

The Show Must Go On

Is a discretionary mutual fund the solution to the insurance crisis facing Australia's amusement, leisure and recreation sector?



Published Wednesday
20th October 2021

CONTENTS

1. EXECUTIVE SUMMARY	10
1.1. Overview	10
1.2. Preliminary Findings	11
1.3. Next Steps	12
1.4. Proposal formulation	12
1.5. Further Consultation	13
2. TERMS OF REFERENCE	14
2.1. Ombudsman review of proposal by AALARA	14
2.2. Consultation Questions	16
3. REVIEW CONTEXT	18
3.1. Background	18
3.2. Role of ASBFEO	18
3.3. Terms	18
3.3.1. Abbreviations	18
4. THE PROBLEM TO BE SOLVED	18
4.1. Insurance market cycle	18
4.2. Market failure/dysfunction	19
4.3. Amusement, Leisure & Recreation sector impacts	21
4.4. Consequence of inaction	22
4.5. Questions for consideration:	22
5. OPTIONS FOR ACTION	23
5.1. Possible solutions to member's public liability	23
5.2. Group Insurance schemes	23
5.2.1. Captive	23
5.2.2. Self-insurance	23
5.2.3. Reinsurance pool	24
5.2.4. Tort reform - 'the New Zealand solution'	24
5.2.5. National Injury Insurance scheme	24
5.2.6. Hybrid models	25
5.3. Questions for consideration:	27
6. WHAT IS A DISCRETIONARY MUTUAL FUND?	28
6.1. History of Mutual Funds	28
6.2. DMF Defined	29
6.3. Strengths of a DMF	31

6.4.	Weaknesses of a DMF	31
6.5.	How does insurance and a DMF differ.....	32
6.6.	International Experience.....	32
6.7.	DMF Better Practice.....	33
6.8.	Public Policy Considerations	33
6.9.	Evidence of market failure or significant dysfunction	34
6.10.	Membership considerations	34
6.11.	Could a DMF work?.....	35
6.12.	For AALARA and the sector?	35
6.13.	For amusement, leisure and recreation services users?	36
6.14.	For site owners and managers?	36
6.15.	Regulatory Requirements	36
6.16.	Australian Prudential Regulation Authority.....	37
6.17.	Australian Securities and Investments Commission	37
6.18.	Australian Financial Services Licence (AFSL)	38
6.19.	Forming a DMF.....	38
6.19.1.	Shared Interest.....	38
6.20.	Design.....	39
6.21.	Risk management.....	40
6.22.	Good Governance	40
6.23.	Timeline.....	41
6.24.	Forming a DMF.....	41
6.25.	Questions for consideration:	42
7.	IS THERE A ROLE FOR GOVERNMENT?	43
7.1.	When is there a role for government intervention?	43
7.2.	Medical defence after HIH collapse	43
7.3.	Terrorism reinsurance pool.....	44
7.4.	Cyclone reinsurance pool.....	45
7.5.	Current proposals for government intervention	46
7.5.1.	Commonwealth intervention.....	46
7.5.2.	Other jurisdictions.....	46
7.5.3.	Market Conditions	47
7.5.4.	Formation Advice/capacity building	47
7.5.5.	Capital Support	48
7.6.	Type of support available.....	48

7.6.1.	Capital options	48
7.6.2.	Governance & Reporting	49
7.7.	Suggested board make up	50
7.7.1.	Reporting.....	50
7.7.2.	Accountabilities.....	50
7.7.3.	Optimising market participation	50
7.8.	Interaction with States and Territories	51
7.8.1.	Legislative recognition	51
7.8.2.	Perceptions around discretion.....	51
7.8.3.	Legislative changes and harmonisation	52
7.8.4.	Safety and operational standards & verification	54
7.9.	Case Study	55
7.9.1.	Dreamworld Aftermath and standards.....	55
7.9.2.	Work Safe Australia Standards	55
7.9.3.	AALARA Standards	56
7.9.4.	Showmen's Guild Safety Management System Standards	56
7.10.	Consumer awareness.....	56
7.11.	Local Government.....	57
7.11.1.	Land management	57
7.12.	Questions for consideration:	58
8.	INDUSTRY LEADERSHIP	59
8.1.	Sectors to be included.....	59
8.1.1.	AALARA Membership.....	59
8.1.2.	Showmens Guild Members.....	60
8.1.3.	Social and economic benefit of membership	60
8.1.4.	Outdoor Activity and Caravan Industry Sectors.....	60
8.2.	Risk, Claims Data and Actuarial Analysis.....	61
8.2.1.	Data Collections & Assessment.....	61
8.3.	DMF member entry requirements.....	61
8.4.	Formal Proposal Development	62
8.5.	Questions for consideration:	62
9.	'FIT FOR PURPOSE' SOLUTION	63
9.1.	Key Success Features of a suitable DMF	63
9.1.1.	Member-led and shared purpose	63
9.1.2.	Design, Governance & Capacity	63

9.1.3.	Scale	64
9.1.4.	Participation.....	64
9.1.5.	Risk management & mitigation.....	64
9.1.6.	Stickability	65
10.	Contestability	66
10.1.	Manager	66
10.2.	Legal and actuarial services	66
10.3.	Claims Handling.....	66
10.4.	Feasibility and Durability.....	67
10.4.1.	Protection against demutualisation.....	67
10.5.	Durability.....	68
10.6.	Public Confidence.....	68
10.7.	Interaction with Market.....	69
10.8.	Required Government Action	69
10.9.	Questions for consideration:	70
11.	PATH FORWARD	71
12.	APPENDIX A - Australian case studies	72
12.1.	Capricorn Mutual	72
12.1.1.	History and Membership	72
12.1.2.	Corporate Management and Operations.....	72
12.1.3.	Risk Management	73
12.2.	Civic Risk Mutual	73
12.2.1.	History and Membership	73
12.2.2.	Corporate Management and Operations.....	73
12.2.3.	Risk Management	74
13.	UK Mutual case studies.....	75
13.1.	Activities Industry Mutual (AIM).....	75
13.1.1.	History and membership.....	75
13.1.2.	Corporate Management and operations	75
13.1.3.	Risk Management	75
13.2.	The Caravan and Motorhome Club.....	76
13.2.1.	History and membership.....	76
13.2.2.	Corporate Management and operations	76
13.2.3.	Risk Management	76
13.3.	The Retail Mutual.....	76

13.3.1.	History and membership.....	76
13.3.2.	Corporate Management and operations	77
13.3.3.	Risk Management	77
13.4.	Demutualisations	78
14.	UK Demutualisation case studies	80
14.1.	Norwich Union (1997 – Insurance company)	80
14.1.1.	History as a mutual	80
14.1.2.	Demutualisation.....	80
14.1.3.	Outcomes	80
14.2.	Bradford & Bingley Building Society (2000)	80
14.2.1.	History as a mutual	80
14.2.2.	Demutualisation.....	81
14.2.3.	Outcomes	81
15.	Australian Demutualisation case studies	82
15.1.	National Roads and Motorists’ Association (NRMA) (2000)	82
15.1.1.	History as a mutual	82
15.1.2.	Demutualisation.....	82
15.1.3.	Outcomes	82
15.2.	AMP.....	83
15.2.1.	History as a mutual	83
15.2.2.	Demutualisation.....	83
15.2.3.	Outcomes	83
16.	APPENDIX B	84
16.1.	Legislation requiring harmonisation	84

1. EXECUTIVE SUMMARY

1.1. Overview

- 1.1.1** Following the then Australian Small Business and Family Enterprise Ombudsman's (ASBFEO) 2020 Inquiry into the insurance market for small businesses, this Office has been approached by a number of business sectors unable to secure insurance coverage. The Ombudsman continues to investigate other options to ensure insurance coverage is accessible for all small businesses.
- 1.1.2** Due to this Office's ongoing engagement with and past examination of small business insurance issues, and to further the Office's ongoing advocacy for small business, the Ombudsman announced a self-initiated review of the Australian Amusement, Leisure, and Recreation Association's (AALARA) proposal to establish a Discretionary Mutual Fund (DMF) as a potential solution to the critical and immediate need for insurance in the sector represented by AALARA. The Ombudsman intended to provide advice to government on the merits of AALARA's proposal, the possible supports government could consider offering to businesses operating in the sector, and related public policy considerations.
- 1.1.3** The review aimed to allow this Office to provide further advice to Government and the sector on the need to support businesses in securing critical insurance products and investigate whether the DMF model proposed by AALARA would resolve the insurance issues in the sector.
- 1.1.4** Discretionary Mutual Funds (DMFs) operate to provide risk cover on a discretionary basis to a group of individuals or organisations. While discretionary protection is similar to traditional insurance protection, there is a critical difference.
- 1.1.5** Under traditional insurance coverage, a policy holder has a contractual right to have their claim paid upon meeting the policy's terms and conditions. Under the cover of a DMF, the DMF's members, who are also its owners, are entitled to submit a claim for indemnity to the DMF's board (or an entity managing claims on the board's behalf), who may or may not approve the claim, at its discretion. That is, DMF members do not have the same legal claim to indemnity against an event that holders of traditional insurance products do.¹
- 1.1.6** Any claim a DMF decides to pay is paid from a common fund made of pooled member contributions that represent something akin to premiums under traditional insurance coverage.
- 1.1.7** There is an appreciation that the commercial insurance sector suffers from hardening and softening in market cycles, and it is widely accepted that the sector represented by AALARA is one of the most impacted by a hardening of the global market. The inability of specific businesses to access insurance, often despite the efforts of experienced brokers advocating on their behalf, has been publicised along with the impacts of being forced to cease operations. DMFs are often proposed as solutions when markets harden, such as is happening now.
- 1.1.8** AALARA's submission to this Office's Insurance Inquiry in 2020 included advice that many businesses in its sector were unable to source affordable insurance. AALARA advised that many of its members had ceased to trade, had inactive and stranded assets, and were looking for work outside the industry. Very few insurance companies were at the time willing to insure the industry and premiums were rising dramatically, sometimes by up to 150%. AALARA advised that it had conducted a survey in March 2020, gathering responses

¹ G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, p 17

from 40 AALARA members, and found that the 40 Members collectively owned 297 pieces of plant and had made a total of 3 claims. Only 40.5% of Members had been offered renewal terms.

- 1.1.9** The issues in obtaining insurance in Australia, particularly for small business and family enterprises, have far reaching consequences for business viability, competition, business entry and exits and consumer outcomes. The amusement and leisure industry is likely to be one of the most impacted by the additional cost pressures and an inability to access cover in relation to their insurance coverage and will face large-scale closures. There has recently been significant coverage of the issues faced by the sector, with many regional media outlets pointing to what they see as the demise of the amusement aspects of regional shows.

1.2. Preliminary Findings

- 1.2.1** The preliminary findings of this review are that:

- a DMF suits the industry represented by AALARA.
- a DMF may be a suitable way to address the current insurance crisis facing the industry.
- the suitability and durability of a DMF solution for the sector will depend heavily on:
 - support for legislative reform from states and territories, willingness to accept the solution by councils and land/showground managers,
 - the final makeup of the membership,
 - the cost of premiums and reinsurance, the management of the DMF and any management costs; and
 - the size of any claims in the first few years of operation.

- 1.2.2** This finding of suitability is based on there being sufficiently significant issues in sourcing appropriate insurance that a non-insurance solution is warranted; the likelihood that the public will be negatively impacted should insurance remain unavailable; as well as the detriment to the commercial businesses in the sector and many rural communities; and the size of the sector being sufficient to support a DFM.

- 1.2.3** It is important to note that in recent weeks, a new facility offered by Coversure has entered the market. While a market-based solution is always preferable and the Coversure facility should be encouraged to expand operations, it is unlikely the Coversure solution will be acceptable to the entire industry covered by AALARA. The maximum amount of available public liability insurance through the Coversure facility is \$10 million, where most showgrounds, councils, and state governments require coverage of \$20 million. During initial consultations, the Office was advised that consumer safety and support groups had not turned their minds to a reduction in coverage. Additional consultation with these groups will be necessary to gauge consumer sentiment.

- 1.2.4** Further, the Coversure product is a vanilla-labelled/line slip AVIVA policy, a well-regarded UK-based Direct Offshore Foreign Insurer (DOFI). This means that the offering is not regulated by the Australian Prudential Regulation Authority (APRA), which may cause concern for some potential customers about the provider's ongoing support for Australian risks.

- 1.2.5** We are aware that the Coversure product is offering coverage at approximately double the premium rates that were previously available to the sector, while not providing the full \$20 million coverage required by states and territories. There will also be some categories of activity excluded, for example category four and five rides. This issue of affordability may pose further challenges for the sector should this facility be entirely relied upon, and with

the significant exclusions, given the gaps between the cover offered and legislative and landowner requirements.

- 1.2.6** There are also questions about what percentage of the industry this facility will be able to service, as well as around the costs of securing insurance through the facility. Several entities have indicated that their insurance costs would double, or in some cases quintuple, should they source insurance through the Coversure product.
- 1.2.7** The Coversure product and any other market-based solutions should be welcomed and encouraged. To date, promoters have not been successful in securing secondary cover for claims (taking it to \$20million) or reinsurance. The emergence of this facility does not, however, overtake the need for a durable and affordable insurance solution for the sector. In consultations, Coversure indicated that to date, they had not been successful in securing secondary cover for the additional \$10 million, or reinsurance for its offering.
- 1.2.8** A range of possible solutions have been considered in preparation of this report, including group insurance schemes, captives, self-insurance, a reinsurance pool, tort reform (ie 'the New Zealand solution'), the implementation of the proposed national injury insurance scheme, and hybrid models. Further detail on these options is below.

1.3. Next Steps

- 1.3.1** This interim report is designed to allow the amusement, leisure and recreation sector, the insurance sector, and other interested parties, provide feedback on the preliminary findings. Consultations will be held with a range of interested parties, and those wishing to provide feedback should contact the Ombudsman at inquiries@asbfeo.gov.au. Submissions should also be provided to inquiries@asbfeo.gov.au by close of business, 3 November 2021. Interested parties are encouraged to respond to as many consultation questions as they have expertise in, but are not required to respond to all questions. Interested parties are further invited to provide any additional information or advice they feel would be useful for consideration.
- 1.3.2** During the consultation period, work will continue on the development of actuarial modelling to provide a more robust proposal that could support operationalising a DMF for the sector. The consultation period will also allow for a period of consultation with colleagues in state and territory governments, as well as local government organisations, about the appetite for a DMF and required legislative change.

1.4. Proposal formulation

- 1.4.1** The Australian Amusement, Leisure and Recreation Association (AALARA) has engaged heavily with this Office through our work on insurance affordability and availability, and across government following the publication of our report, to highlight the inability of businesses within their sector to secure insurance, and gain support for the establishment of a Discretionary Mutual Fund (DMF) for the sector. AALARA has entered into a partnership with Aon to establish an industry-owned and operated discretionary mutual fund to provide accessible and affordable insurance for the benefit of their members.
- 1.4.2** As identified in the ASBFEO Insurance Inquiry report, and by AALARA in their ongoing advocacy, the lack of insurance coverage will lead to the closure of businesses in the amusement and leisure sector, significant job losses (particularly in regional areas), stranded assets, and loss of economic activity generated by metro and regional shows, and amusement parks.
- 1.4.3** AALARA has also engaged with the Insurance Council of Australia (ICA) in an attempt to find an insurer willing to support the sector. Following their engagement, the ICA wrote to

AALARA to advise that it was unlikely they would be able to secure insurance on the private market in Australia.

- 1.4.4** AALARA sought assistance from Government to develop and establish a DMF in partnership with Aon, providing Government with advice that they expected the need for approximately \$5 million capital funding from the Government to support the establishment of the DMF.
- 1.4.5** On commencing this review, the Ombudsman was advised that AALARA had prepared a proposal to establish a DMF, and that the review was to be of that proposal. Following the launch of the review, it was determined that a formal proposal with costings, actuarial analysis, and formation documents was not in place.
- 1.4.6** As such, the review has been focusing on the development of a conceptual proposal, as well as on the policy framework that may guide any government involvement in a DMF for the sector. Finally, this review has considered a number of potential barriers to the formation of a DMF for the sector, and how these might be overcome.

1.5. Further Consultation

- 1.5.1** The Ombudsman continues to liaise with APRA, the Australian Securities Investment Commission (ASIC), the Treasury, state and territory governments, the ICA, the mutual sector, and other interested parties in the amusement, leisure, and recreation sector. This consultation will continue over the coming weeks, prior to the release of a final report.

2. TERMS OF REFERENCE

2.1. Ombudsman review of proposal by AALARA

- 2.1.1** The Ombudsman's terms of reference required the Ombudsman to review the proposal by AALARA to establish a DMF for the amusement, leisure, and recreation industry. This work required significant engagement with industry through AALARA and related industry stakeholders. The review was to investigate whether the DMF model that AALARA and Aon proposed would resolve the insurance issues in the sector and may form the basis of further advocacy work by the Ombudsman in the insurance space.
- 2.1.2** As part of the Inquiry, the Ombudsman has sought external expert advice as required, including specialist legal and actuarial advice. The Ombudsman has also sought advice from specialists in mutual insurance, drawing from the mutual insurance sector.
- 2.1.3** The Ombudsman's report was to consider the framework for establishment of the DMF, the establishment phase (i.e. the first three years) and the DMF's ongoing operations.
- 2.1.4** In undertaking the review, and with the advice of external experts as required, the Ombudsman was required to:
1. Examine whether the cover provided by a DMF, and evidenced by a Certificate of Protection, will meet the requirements of members of the amusement, leisure and recreation sector to have public liability insurance as imposed by:
 - a. Governments;
 - b. Licensing and regulatory authorities; and
 - c. Contractual arrangements such as loan agreements, leases, and operating licences.
 2. Consider any specific form of cover that the DMF would need to provide or any specific contractual obligations that would need to be included in the DMF's policies in order to satisfy the above requirements.
 3. Examine the minimum levels of cover and any requirements that members would be obliged to obtain from the DMF in order to meet legal obligations.
 4. Consider whether a DMF comprising of members of the amusement, leisure and recreation sector is likely to be financially viable on an ongoing basis, including identifying:
 - a. The start-up and ongoing costs of the DMF;
 - b. Industry interest and likely levels of participation in the DMF, including whether larger industry participants will join (and impacts if they do not);
 - c. What level of initial capital contribution to the premium pool will be required to ensure that it is self-sustaining (ie can meet claims for a 1 in 200-year event, 1 in 100-year event, and 1 in 50-year event):
 - i. If the initial capital contribution is obtained via a loan, the expected time it will take the DMF to repay the loan;
 - d. The prior claims history of the industry, drawing on industry survey data and actuarial assessment;

- e. How the DMF will operate in practice, including what level of claims will be funded through the DMF and what may be covered through re-insurance purchased by the DMF;
 - f. What form and amount of additional insurance the DMF will likely be required to meet claims that will not be covered out of the premium pool;
 - g. Whether the required additional insurance is available in the current market;
 - h. What the premiums for the additional insurance are likely to be and whether premiums are affordable and commercially reasonable for members of the DMF (including how premium payments will be split between members);
 - i. How the funds of the DMF should be managed to ensure ongoing viability of the DMF.
5. Outline appropriate legal and governance structures for the DMF, including considering measures the industry may be able to take in order to reduce the risk associated with the industry, and therefore insurance costs. This may include eligibility criteria for DMF members and ongoing eligibility verification.

2.2. Consultation Questions

2.2.1 We welcome broad input, but do not expect that all respondents will answer every question.

1. Is there a need for action by government? Is there a proven incapacity for the industry to self-support a solution?
2. If the government does not act to support the sector, what alternatives could the sector pursue?
3. Are there any other groups or entities likely to be affected if the government does not take action?
4. Are there any other options for action that should be considered by the sector or the government?
5. What other aspects of DMF better practice should be considered?
6. Are the public policy considerations listed accurate? Should additional considerations be included?
7. Is there sufficient evidence that a DMF, if appropriately formed and governed, could work for the various stakeholder groups?
8. Are there other regulatory considerations that should be addressed?
9. Are the design, risk management, and governance suggestions appropriate?
10. Does the timeline appear reasonable?
11. Are there alternative examples of government intervention that should be considered?
12. Are there other aspects that should be considered in terms of market conditions or capacity building for the DMF board and membership?
13. What alternative models of financial support could be offered?
14. Are the governance and reporting proposals appropriate? Is the suggested board make-up likely to provide the best results for the DMF?
15. Are there other issues that need to be considered in relation to interaction with states and territories?
 - a. Are the perceptions around discretion presented accurate? Are there other perceptions that should be considered?
 - b. Are there specific legislative barriers that should be considered?
16. Are the current safety standards/regulatory environment/Quality Assurance verification purposes fit for purpose? If not, how would you suggest these be amended?
17. What needs to be undertaken to ensure consumer awareness around the DMF? Are there alternative methods for consumers to manage their own risk?
18. Are there other sectors that should be included in membership of this DMF?
19. Are the proposed DMF member entry requirements adequate? What additional requirements could be considered?
20. What else should be considered in the process of the final proposal development?
21. Are the key success features identified accurate? Are there other features that should be considered?
22. What other offerings to the DMF membership might increase 'stickability'?
23. How important is contestability of service offerings? Are there other ways to ensure contestability?

24. What are additional best practice claims handling procedures?
25. Should the DMF include a constitutional protection against demutualisation?
Should government introduce a protection against demutualisation for the broader sector?
26. Is public confidence in the DMF likely to be an issue? What else could be done to encourage public confidence in the proposed DMF?
27. Are there appropriate mechanisms to reengage with private sector/industry market solutions over the life of the insurance market cycle? If not, what proposal settings would enable the sector to take advantage of a softening market?

3. REVIEW CONTEXT

3.1. Background

- 3.1.2** The amusement, leisure, and recreation industry has been experiencing difficulty in accessing affordable public liability insurance for some time. This difficulty was highlighted in the AALARA submission to the then Ombudsman's 2020 Insurance Inquiry.

"We've been hearing from an increasing number of Members recently about a growing trend of insurance companies denying public liability insurance completely or pricing public liability insurance policies out of reach."²

- 3.1.3** In the time since AALARA's submission, the organisation has been working with insurance brokers, the Insurance Council of Australia (ICA), the Department of the Treasury, various Ministers of the Australian Government, and State Officials to develop a solution to their members' inability to access public liability insurance.
- 3.1.4** Despite these efforts, AALARA received a letter from the ICA on 30 April 2021 which confirmed a likely ongoing inability of its members to access public liability insurance coverage. This points to an intractable failure within the Australian public liability insurance market for AALARA's membership, and the industry more broadly.
- 3.1.5** In response to the inability of their members to secure public liability insurance, AALARA has sought to develop a proposal to establish a discretionary mutual fund (DMF) for their sector. As part of their proposal, AALARA has approached the Australian Government to seek a capital contribution, provided as either a loan or grant, to assist with establishing an adequate claims capital pool and support obtaining reinsurance.

3.2. Role of ASBFEO

- 3.2.1** The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) is an independent advocate for small business owners. Established in 2016 under the *Australian Small Business and Family Enterprise Ombudsman Act 2015*, the office assists and advocates for small business and family enterprises. The Ombudsman has legislative powers to conduct inquiries and research, work with other arms of government, contribute to inquiries and promote good business practice.
- 3.2.2** The Ombudsman's advocacy is centred on a number of issues small business raise with the office, including the availability and affordability of insurance for the sector.

3.3. Terms

- 3.3.1.** Abbreviations

4. THE PROBLEM TO BE SOLVED

4.1. Insurance market cycle

- 4.1.1** The lack of available or affordable insurance is not the fault of the amusement, leisure, and recreation industry. Rather, it reflects a hardening of the broader insurance market, both in Australia and internationally. A hard insurance market is considered one phase of the general insurance market's cycle and is characterised by prices rising, increasing excesses and/or expanded exclusions or high prices relative to recent periods. The alternative to a hard or hardening market is a soft or softening market. A soft market is characterised by

² K Ahrens, AALARA. *Submission to ASBFEO Insurance Inquiry*, August 2020

falling prices or prices that are low relative to recent periods, reductions in excesses and/or a narrowing in exclusions. These cycles are driven by the profitability and losses of insurance companies, the need to keep an eye on shareholder returns, and the risk appetite of Lloyd's of London syndicates.

4.1.2 The last significant hardening of the Australian insurance market, in the early 2000's was brought on by the September 11 terrorist attacks and the collapse of Australian insurance behemoth HIH Insurance. In its consultation paper titled the *Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance* (the ICA Report), released earlier this year, the ICA confirmed that currently, the Australian general insurance market for SMEs is “in the ‘hard’ part of the cycle.”³ The ICA Report notes a number of sectors that have been hit by issues of affordability and availability as a result of a hard insurance market, the severity of which has increased over the last two or three years. These sectors are:

- Public liability for tourism, leisure and some other business sectors;
- Professional indemnity for several professions including financial advisers and building industry professionals;
- Directors and officers and management liability insurance (for SMEs and also for larger companies), compounded by the growth of successful class actions in recent years;
- Property insurance for natural perils (cyclone, flood and bushfire) in some locations and for building construction; and
- Business interruption insurance.⁴

4.1.3 Businesses from all these sectors and their representatives, and those in other sectors facing these particular or strikingly similar issues, approached this Office in response to our 2020 Insurance Inquiry arguing that they were facing what they perceived to be market failure.

4.2. Market failure/dysfunction

4.2.1 There is some debate about what constitutes ‘market failure’ for the purposes of insurance for small businesses. The ICA report points to four key and interlinked topics of discussion around insurance, being affordability, availability, market failure, and government intervention. The ICA Report goes on to argue that market failure can be inappropriately referenced in discussions of small business issues and conflated with the affordability and availability of critical insurance products. While the circumstances might not be viewed by the insurance industry as market failure, they certainly do reflect market dysfunction in the eyes of small businesses unable to access affordable insurance that supports their ability to operate. Government intervention is commonly pointed to as a source of solutions.

4.2.2 For small businesses, it is not possible to separate affordability from availability. In many instances, insurers will point to the existence of a policy and claim that its existence means that insurance is available. In many instances, the policy is priced such that it may as well not exist, because small business operators have no capacity to pay for the cover they need to continue operating. The Ombudsman's Office, through its Information Line, 2020

3 J Trowbridge, *Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance; Consultation Paper*, May 2020, p 8.

4 J Trowbridge, *Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance; Consultation Paper*, May 2020 Page 6

Insurance Inquiry and this review has heard from hundreds of small businesses across multiple sectors who have been unable to find an affordable insurance policy. In order to satisfy the terms if not the spirit of contractual arrangements, many of these small businesses purchase insurance with excess provisions they know they would be unable to satisfy in the event of a claim. We are now hearing that many are unable to cobble together policies despite being prepared to take such personal risks.

- 4.2.3** The ICA report suggests that a 30% - 50% increase in premiums was a 'medium' category and therefore an acceptable increase for small businesses to bear. The Ombudsman's submission to that report argued that for many small businesses an increase of 30% was not sustainable considering the thin margins in many sectors and earlier year on year premium price increases. The Ombudsman's thoughts notwithstanding even the ICA report points to increases of 100% as being severe and increases of over 200% as being extreme.
- 4.2.4** During our consultation with the Showmens Guild of Australasia (the Showmens Guild) and AALARA, both pointed to increases in premiums of over 200% prior to the sole remaining international underwriter pulling out of the sector entirely. The insurance market has been failing for some time in this sector.
- 4.2.5** If insurance is seen to be unaffordable by operators, is the market simply 'at work', is there a lack of full information or a failure to fully utilise information that is available, is it a considered response to risk and claims history, or are insurers exploiting their position in a hardening market? Traditionally the affordability issue arises because operators and insurers cannot meet on price but in the case of the amusement, leisure and recreation sector there has been a complete withdrawal of any form of coverage, even that with unaffordable premiums.
- 4.2.6** The outcome of this market behaviour in a hard part of the cycle is that insurers withdraw from market segments they regard as unattractive, either limiting the market to a smaller number of insurers or sometimes, as is the case in this sector, all insurers withdraw. Of course, the nature of insurance business is that insurers, in common with most other financial services, can enter or re-enter market segments as the cycle 'softens' according to their business strategy and plans from time to time, and can withdraw in the same way. This is reflective of hard and soft market cycles.
- 4.2.7** Public liability insurance coverage is a legal requirement for the operation of rides at showgrounds and fixed installations alike, both through contractual obligations, and through obligations imposed on councils and other landowners by state and territory governments. As such, the lack of availability of insurance is a critical issue for both ride operators and the consumers who should have access to adequate compensation in the event of personal injury or death.
- 4.2.8** Many operators had been advised that come September 2021, there will be no insurance coverage available for them in Australia. The introduction of the Coversure facility as discussed in Preliminary Findings will support some businesses in the sector, but not all. There is also no guarantee of durability of the Coversure solution. A DMF may represent a more durable solution but will only be fit for purpose if relevant statutory requirements and asset owners/managers recognise the utility and functionality of this form of risk cover. A DMF will only be effective if governments, particularly State, Territory and municipal, and private asset holders, accept it as a suitable substitute if requisite insurance obligations cannot be satisfied.

4.3. Amusement, Leisure & Recreation sector impacts

- 4.3.1** The AALARA membership are clearly facing an incredibly hard insurance market, but the inability to access public liability insurance is not unique to this cohort. In 2019 this Office was approached by building certifiers who indicated that their industry was unable to access insurance that was a requirement of their licensing arrangements, following the Grenfell Tower disaster in London. A solution to this problem is being developed in NSW, and is discussed below. Children's service providers are similarly struggling to access the insurance required for their licenses. The Showmen's Guild have also advised that their members and industry, beyond those members shared with AALARA, are facing the same issues.
- 4.3.2** The Showmens Guild represent over a thousand small businesses, some of whom are also AALARA members, and all of whom contribute to provision of Australia's rural, regional, and metro shows, big and small, with rides and attractions. Many of the Guild's members represent fifth generation showmen and women, who have dedicated their lives to travelling around the country's shows, and carrying on family traditions and businesses.⁵ Traveling showmen and women also spend approximately \$82 million in regional and rural communities each year.⁶
- 4.3.3** While the broader Australian public are likely only to encounter these businesses as infrequently as their visits to local agricultural show, for Guild members, their businesses represents a way of life.
- 4.3.4** Owing to the unique set of skills possessed by showmen and women, any demise of their industry is likely to produce long-term unemployed individuals. The Reserve Bank of Australia notes that scarring associated with long-term unemployment can often carry on past re-entry of the workforce.⁷ Avoiding the collapse of the industry will mean avoiding the possibility that showmen and women are forced to confront this issue. Further, unlike other sectors that have faced substantial disruption or complete closure in recent history, there are no international operators to fill the looming void. The loss of Australia's amusement and recreation sector is not one that can be readily replaced.
- 4.3.5** The longevity of these businesses is matched by that of Australia's agricultural shows, whose history stretches back up to 200 years. For the agricultural shows themselves, rides and attractions are an important drawcard and revenue stream that supports their cultural and educational aspects. The small businesses showmen and women operate help to capture the attention of, and draw in, people that otherwise may not be interested purely in a show's agricultural offerings, creating critical exposure.
- 4.3.6** For the general public, rides and amusements increase the attraction of Australia's 580+ agricultural shows. Approximately 5.9 million Australians visit agricultural shows annually, contributing to the industry's annual economic value of \$965 million.⁸ The affinity they generate for agricultural shows amongst the population helps to foster community identity; ensure the survival of historic agricultural traditions and sports, showcases primary industry skills and exemplar production; breakdown regional-metropolitan divides;

5 The Show Mens Guild of Australasia [website], n.d.

6 The Hon D Littleproud - Minister for Agriculture, Drought and Emergency Management, *\$4.3 Million support agricultural showmen and women*, Mirage News [website], 21 May 2021

7 N Cassidy, I Chan, A Gao & G Penrose, *Long-term Unemployment in Australia*, Reserve Bank of Australia, December 2020, p 47

8 Queensland Chamber of Agricultural Societies Inc, *An Economic & Social Impact Study of Australian Agricultural Shows*, 2012, p 1

and grow the public's (particularly children's) understanding of Australia's agricultural sector and the vital role it plays in our economy, and in feeding and clothing the nation.

- 4.3.7** In discussing the economic and social contributions of the amusement and recreation sector, it is important to recognise that in interacting with the industry, Australians as consumers have the right to peace of mind that their health and safety is being appropriately protected, and that in the event of an accident, they will have access to adequate compensation. In the event of accident or injury, Australia's state and local governments, as well as the showground operators on which shows are held, and local councils, require adequate insurance to protect those consumers and for landowners and managers themselves.

4.4. Consequence of inaction

- 4.4.1** AALARA's previous representations emphasise that without public liability cover, many businesses in the amusement, leisure, and recreation sector will be unable to operate, and agricultural shows may struggle to remain operational. Conversely, some operators may choose to operate without insurance, leaving consumers and landowners potentially unprotected.
- 4.4.2** This Office is aware that many Guild members have already seen withdrawal of insurance, and are unable to access public liability insurance, meaning they are sidelined from working during the current show season, and left in possession of expensive assets, some worth over \$1 million, that are effectively worthless. It is not possible to realise the value of these assets when the prospective purchaser would be similarly unable to source insurance.
- 4.4.3** The sum total of these factors is a market failure or catastrophic dysfunction of public liability insurance for the industry which represent a unique set of circumstances worthy of consideration of a public policy response.
- 4.4.4** Without an appropriate public policy response, Australians must prepare to see fewer and fewer rides at their shows, until rides cease to be offered entirely, due to a lack of public liability insurance. The Royal Adelaide Show was cancelled again this year due to COVID lockdowns and other amusement industry events are being afflicted by the declining number of available rides. The industry has previously suggested that by the time of the Sydney Royal Easter Show (scheduled for 8 to 19 April 2022) there will be no amusement rides with appropriate insurance coverage.
- 4.4.5** More broadly the experience of the Showmen's Guild has been replicated across the entire AALARA membership and beyond into related areas of active recreation, entertainment and activity centres and even the experience-based visitor/leisure economy.

The case of a considered public policy response is compelling and pressing.

4.5. Questions for consideration:

1. Is there a need for action by government? Is there a proven incapacity for the industry to self-support a solution?
2. If the government does not act to support the sector, what alternatives could the sector pursue?
3. Are there any other groups or entities likely to be affected if the government does not take action?

5. OPTIONS FOR ACTION

5.1. Possible solutions to member's public liability

- 5.1.1 AALARA has considered a number of possible solutions to its member's public liability insurance crisis informed by its experience during a crisis a generation earlier and in examination of its alternatives with its insurance advisers, AALARA considers a Discretionary Mutual Fund for the sector to be its best path forward.
- 5.1.2 There are a number of alternative options to the establishment of a DMF where there is a hard market and insurance becomes inaccessible. These have been successful in other sectors and in other circumstances, however all are specific to the situations they face and may not be as appropriate as the DMF currently proposed.

5.2. Group Insurance schemes

- 5.2.1 Group Insurance Schemes are an option for specific membership groups to pool their resources and work together to purchase insurance. This is a viable option for many businesses or organisations who are able to negotiate as a larger group and provide an attractive offer to an insurer through their pooled resources. In a market where insurance is unaffordable this can help to reduce premiums. It also allows for a more tailored coverage to all of the members involved and showcases the groups shared risk mitigation strategies and history.

- 5.2.2 This Office understands that this option has already been explored by the industry and they have been unable to secure the requisite insurance. The fact they have not been able to secure insurance through a group insurance scheme highlights the issue of market failure, strengthening the proposal for a DMF as a viable alternative.

5.2.1. Captive

- 5.2.1.1 An alternative to the purchasing of insurance or reinsurance by a DMF is the establishment of a captive. Captives are 'insurance' entities that are wholly owned subsidiaries of their parent companies are often established in offshore jurisdictions. Offshore jurisdictions can be attractive as they avoid Australian legislative requirements such as those under the *Insurance Act 1973* (Cth) and associated prudential and taxation regulation. A captive provides insurance cover directly to its parent company and generally obtains reinsurance in the market to cover liabilities. While insurance captives generally pose little risk to the general public, in cases where they provide cover for public liability, such as the current proposal is intended to do, there can be risk if the captive does not hold enough capital to cover its parent company's losses.⁹

- 5.2.1.2 Due to the unchallenged market failure in AALARA's area of insurance need, it would be much more difficult to ensure that a captive could exist in this sector, let alone be successful. The lack of appetite for captives means that if there were to be government intervention and support for one it would present too high a risk of failure. As such, this model is not recommended.

5.2.2. Self-insurance

- 5.2.2.1 Self-insurance involves setting aside money to pay for potential losses instead of relying on insurers to indemnify parties.¹⁰ This is a good option for claims that are likely to be minimal and for businesses and sectors with excess capital. The model poses significant risks in the

⁹ G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, p 49

¹⁰ Investopedia, *Self-Insurance Explained: Benefits, Risks and Real-Life Examples* [website], n.d.

event of a high-value claim or multi-claim event. Given the potential for high value claims for any significant catastrophic occurrence and the lack of capital in the sector, this model is not recommended.

5.2.3. Reinsurance pool

5.2.3.1 The creation of the Australian Reinsurance Pool Corporation (ARPC) in 2003 established a precedent for a public/private collaboration where government provides reinsurance in order to make a particular market more attractive to insurers. The government has also committed to a reinsurance pool for cyclones and related flood damage in Northern Australia, which will be administered by the ARPC from 1 July 2022.

5.2.3.2 In both cases where government intervention has focused on reinsurance pools, the nature of the risk is large scale, catastrophic and infrequent. Further, both cases require long-term ongoing commitments by the government. As such, this option is not appropriate for the amusement, recreation and leisure sector, who are seeking short term government intervention for more frequent lower-value claims during an establishment phase.

5.2.4. Tort reform - 'the New Zealand solution'

5.2.4.1 One frequently canvassed way to increase the availability of public liability insurance is through the imposition of statutory caps on claims amounts. Imposing such caps would alter the risk environment by providing greater certainty to insurers, potentially lowering the amount payable and helping to make insurance more affordable. The model has been successfully implemented in New Zealand and this Office highlighted the merits of the proposal in our 2020 Insurance Inquiry.

5.2.4.2 While this model would have a significant impact on the sector, it would require substantial tort law reform, which would not only be difficult and time consuming, but may have the unintended consequence of eroding consumer confidence in the sector if not implemented simultaneously with the Productivity Commission-proposed National Injury Insurance Scheme (NIIS). As such, with an NIIS in place, the government could continue to consider the statutory caps on public liability, however this solution is not sufficiently timely or targeted directly at the amusement and leisure industry. As such, the proposed DMF is preferred and the imposition of statutory caps should be reviewed as a long-term option to improve the insurance landscape in Australia.

5.2.4.3 The jointly administered Commonwealth/States and Territories Professional Standards Council model represents a form of liability capping, but is currently restrained to professional services industries.

5.2.5. National Injury Insurance scheme

5.2.5.1 The 2011 Productivity Commission (PC) Report into Disability Care and Support recommended 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 PC model would remove the right to sue for lifetime care costs for catastrophic injuries and would help reduce risk and provide insurance companies with greater certainty, making insurance more affordable.

5.2.5.2 The PC proposal to establish an NIIS was recommended 10 years ago and there has as yet been no action. Further, while it would assist the amusement, leisure and recreation industry, establishment of an NIIS is not sufficiently targeted or timely to meet the current needs of the sector. As such, the proposed DMF option is the preferred immediate solution and examination of an NIIS model should be examined as a potential long-term improvement to the insurance landscape in Australia.

5.2.6. Hybrid models

5.2.6.1 Without Government seed funding or significant initial capital injection from members, a DMF is unlikely to have sufficient funds to pay claims in its early years of operation. A DMF will often purchase a form of reinsurance to cover and manage risk over and beyond the limit manageable by the mutual fund itself. When a new mutual is launched it is common that 90% of the risk is covered by reinsurance and this percentage is decreased as the fund's reserves grow. This is referred to as a 'hybrid model'.

5.2.6.2 Even a fully funded DMF benefits from working with insurers as reinsurers to make sure the mutual is protected from catastrophic losses. This effectively shares some of the risk and supports the mutual in meeting the needs of members.

5.2.6.3 There are three types of reinsurance for mutuals.¹¹

- **Risk Excess of Loss:** Usually for an established mutual that needs to reduce the impact of any one loss above a certain level. Risk Excess of Loss insures a mutual's exposure on any one individual risk event excess of a predetermined amount known as an excess. The risk excess reinsurer only pays when the loss exceeds the pre-agreed amount. For this, reinsurers charge a percentage rate of the total premium.
- **Quota Share:** Ideal for sectors with a higher degree of volatility but which will be profitable over a period of time. The mutual pays a pre-agreed percentage of premiums to the reinsurer who agrees to pay the same percentage of the claims. This method reduces the exposure for the mutual, potentially protecting the mutual from financial ruin in the event of large losses, particularly early on.
- **Catastrophe:** Provides protection for losses related to a specific catastrophic event. Catastrophe reinsurance always has a finite recovery amount and the emphasis is on the mutual and its advisors to ensure that sufficient coverage is purchased for any accumulations of risk after the impact of any quota share or risk excess reinsurance.

5.2.6.4 Reinsurance can be arranged through a broker; however concerns were raised in our consultations that there is probably insufficient time to establish this should the proposed DMF need to be operating prior to the end of 2021.

5.2.6.5 Further, our consultation with Regis UK suggested that mutuals should aim to incorporate some form of insurance as an addition to the discretionary cover provided by the mutual. The advice provided by Ashurst was consistent with this suggestion. This is possible when the mutual operates with a membership base that has consistent and expected losses. By taking expected losses out of the market and covering these losses through the mutual, insurers are more likely to re-enter the market. As such, a mutual is able to work with insurers, creating a hybrid model. The mutual model should aim to transfer unexpected or catastrophic losses away from the mutual to the insurer, allowing for effective forward planning and consistency for the members.

5.2.6.6 Hybrid models are also considered to be a potential solution to the *Certificate of currency* issue. Given their discretionary nature, a DMF, unlike a traditional insurer, is unable to provide a certificate of currency to a member. These certificates are generally essential for purposes of finance, licensing and council-related matters. This issue can be managed through the use of a group reinsurance policy.

¹¹ Self Insurance market.com, *Reinsuring Mutual Insurance Companies*, [website], n.d.

- 5.2.6.7** As mentioned previously, an alternative to the purchasing of insurance or reinsurance by a DMF is the establishment of a captive. Captives are 'insurance' entities that are wholly owned subsidiaries of their parent companies in offshore jurisdictions. This more complex arrangement may be outside the scope of the DMF currently under consideration.

5.3. Questions for consideration:

4. Are there any other options for action that should be considered by the sector or the government?
5. What other aspects of DMF better practice should be considered?

6. WHAT IS A DISCRETIONARY MUTUAL FUND?

6.1. History of Mutual Funds

- 6.1.1** Mutual funds have a history dating back several centuries. They first appeared in England and the United States through the late 17th and early 18th centuries to cover losses that result from fire. Since then, mutuals have been established all over the world, including throughout Latin America and India. Often they have been employed by specific occupation groups (e.g. farmers, fishermen or teachers) in the absence of suitable protection or savings solutions from the general insurance sector.¹²
- 6.1.2** Such was the growth of the sector worldwide that the International Cooperative and Mutual Insurance Federation (ICMIF) was established in 1922, as a specialised arm of the International Co-operative Alliance. ICMIF allowed mutuals to share information and has since built capacity to broker reinsurance and assist development of new mutual insurers in emerging markets.¹³
- 6.1.3** This is largely the case with existing mutuals in Australia today. Generally, although not always, mutuals were established in response to failures in the commercial insurance market. Failure includes instances where a group of entities (individual or businesses) is being charged prohibitively high premiums or believes that retained premiums income could be better invested to the advantage of the insured or its members, or cannot find insurance individually. Often, despite some failures, the entities can show low loss ratios and good claims history.
- 6.1.4** The late 20th century saw a wave of demutualisations across the developed world as a result of financial sector liberalisation in developed economies including in the United States, Australia, the UK and Canada.¹⁴
- 6.1.5** DMFs providing public liability insurance are not common and exist primarily in the UK and Australia. One of Australia's more successful DMFs, Civic Risk Mutual, first began offering only public liability coverage to its members. With proper risk management and business management, a DMF for the leisure and amusement sector could provide a workable alternative to failure in the general insurance market.
- 6.1.6** Discretionary Mutual Funds (DMFs) operate to provide risk cover on a discretionary basis to a group of individuals or organisations. While discretionary protection is similar to traditional insurance protection, there is a critical difference.
- 6.1.7** While insurance is not explicitly defined in Australia, under traditional insurance coverage, a policy holder has a contractual right to have their claim paid upon meeting the policy's terms and conditions. Under the cover of a DMF, the DMF's members, who are also its owners, are entitled to submit a claim for indemnity to the DMF's board (or an entity managing claims on the board's behalf), who may or may not approve the claim, at its discretion. That is, DMF members do not have the same legal claim to indemnity against an event that holders of traditional insurance products do.¹⁵
- 6.1.7** Any claim a DMF decides to pay is paid from a common fund made of pooled member contributions that represent something akin to premiums under traditional insurance coverage. It is important to recognise that the discretion to deny claims is rarely exercised, with discretion usually exercised in favour of the member, in the form of some claims being

12 Swiss Re, *Sigma 4, Mutual insurance in the 21st century: back to the future?*, 2016 p 2

13 International Cooperative and Mutual Insurance Federation, *History of ICMF*, [website], n.d.

14 Swiss Re, *Sigma 4, Mutual insurance in the 21st century: back to the future?*, 2016, p 2

15 G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, p 17

accepted that may fall outside policy guidance or protection guidelines to enable an early resolution and to avoid the need for claimants to pursue the member directly via formal legal action.¹⁶

- 6.1.8** Most Australian DMFs do not provide public liability protection, and provision of public liability insurance through DMFs is unusual internationally too. This means that a common discretion exercised in favour of the members may not be automatic in the event a DMF providing public liability cover to the leisure and amusement sector is established.
- 6.1.9** “By combining ownership and policyholder roles, and removing the profit motive of shareholders, a mutual structure can align incentives between the customer and insurer and so reduce the potential for adverse selection or moral hazard.”¹⁷ A moral ‘hazard occurs’ when an insurance customer has an incentive to increase its risk exposure as a result of not bearing the full cost of that risk. Combining the ownership and policyholder roles means that mutually protected entities feel a greater ownership of risk and are therefore more likely to protect against it.

6.2. DMF Defined

- 6.2.1** A mutual entity typically comprises a group of individuals with common risk profiles or goals that pool financial resources to meet agreed financial risk obligations of each member. In pure mutual structures, members own and operate the mutual entity. Mutuals operate most effectively where there is a regular pattern of relatively small losses as opposed to infrequent catastrophic losses, and as such, responsible risk management by individual members is crucial. This loss profile assists underwriting and reduces pressures on the mutual if there is a significant loss in a single year.
- 6.2.2** While risk management by individual members is crucial to the long-term viability of a mutual, the shared characteristics of the membership base means that the mutual can play a role in the implementation of membership wide, tailored risk mitigation practices. Generally, a mutual can also avoid certain government taxes and charges, the costs associated with prudential regulation (discussed in a later chapter) and minimise overheads associated with traditional insurance such as marketing and obligations to return profit to shareholders.
- 6.2.3** The most common legal structure for a DMF, and the one being considered here, is an incorporated discretionary mutual (IDM). IDMs are mutual entities established as a constituted body corporate or a company limited by guarantee, under the *Corporations Act 2001*. Capricorn Mutual, discussed later in this document, is an example of an existing, Australian IDM.
- 6.2.4** Generally, in an IDM, each member of the mutual has one vote, regardless of the level of premiums paid into the mutual.¹⁸ This is the case unless a mutual decides to issue mutual capital instruments (MCIs) as outlined under 2019 amendments to the *Corporations Act 2001*.¹⁹ MCIs are a mutual-specific capital raising instrument that give their purchasers voting rights as well as a rate of return. Importantly, these rights can be restricted through the issuing mutual’s constitution. The restriction of these rights has been devised so as to give mutuals the ability to protect themselves from non-member investors who might seek to use MCIs as a method to gain control of a mutual and use this control to gain profit, beyond the agreed rate of return, with little consideration for mutual members. In late

16 G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, p 17

17 Swiss Re, *Sigma 4, Mutual insurance in the 21st century: back to the future?*, 2016, p 3

18 G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, p 18

19 *Corporations Act 2001* (Cth) s 167AB-AJ.

2020, in response to the passing of the MCIs enabling legislation, Australian Unity became Australia's first mutual to issue MCIs.²⁰ In doing so, Australian Unity amended its constitution to "ensure Australian Unity remains a mutual and is protected from undue influence." These amendments include:

- MCI Members will have no right to vote on winding up the organisation;
- MCI Members will not be able to propose or vote on any demutualisation proposals;
- MCI Members would have no access to profits, above the original purchase price and interest owed, in the unlikely event that the organisation was wound up; and
- If a future board ever seeks to dilute any of the three measures outlined above, appropriately substantial levels of member information, quorum levels and voting thresholds would have to be met.²¹

6.2.5 Other forms of DMFs not discussed here include unincorporated discretionary trusts, statutory discretionary mutual trusts, local government mutual funds, informal non-discretionary mutual funds and mutual aid schemes offering insurance.

6.2.6 It is also important to distinguish between mutual entities that provide discretionary cover (DMFs) which are not regulated by the Australian Prudential Regulation Authority, and authorised insurers which may also possess mutual characteristics. Some authorised insurance companies operate as a mutual (authorised mutuals), on a not-for-profit basis, returning benefits to members in the form of lower premiums as opposed to returning profits to shareholders. These authorised mutuals provide contractual insurance cover and are subject to prudential regulation. Well-known examples of authorised mutuals include Australian Unity and Hospitals Contribution Fund (HCF).

6.2.7 For an IDM, the DMF's management will actuarially estimate the likely losses for which members will be indemnified and charge a contribution accordingly. Contributions may differ or be the same among members, depending on each members' risk profile. In return for their contributions, members obtain a right to have their claim considered by the mutual's board or an externally engaged management firm who may make a recommendation to the board. After hearing the claim, or taking the advice from its management firm, the board will exercise their discretion in deciding whether the claim should be paid.²²

6.2.8 The DMF provides its members with protection or policy guidelines, which indicate the terms on which the DMF is likely to exercise its discretion. These guidelines may relate to the DMF's own insurance or reinsurance policy wording. In other cases, the mutual may exercise its discretion beyond the terms of its policy or its protection guidelines. This is the discretionary nature of a DMF that is entirely unavailable to holders of traditional insurance policies.

6.2.9 DMFs will often purchase insurance or reinsurance to cover and manage risk over and beyond the risk retained in the mutual. Historically, providing insurance or reinsurance cover to a mutual has been an attractive business for those insurers not willing to enter a

20 International Cooperative and Mutual Insurance Federation, *Australian Unity becomes Australia's first mutual to issue Mutual Capital Instruments*, [website], 3 December 2020

21 Australian Unity, *Safeguarding our mutual: Mutual capital instruments explained*, [website], n.d.

22 G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, p 18

particular segment of the market that typically experiences a high number of low cost claims.²³

6.3. Strengths of a DMF

- 6.3.1** A DMF is particularly effective in thin or hard markets, where the sector seeking to address a lack of insurance availability or affordability is easily defined, cohesive, and has sufficient capital to set up the DMF and manage claims in the first few years. DMFs benefit considerably by being able to determine conditions of membership or entry to the fund, thereby easily enforcing safety or operating standards, and training opportunities across the membership. This allows the board to exclude industry members with higher risk profiles and reduce the likelihood of claims. The process of considering and approving membership also encourages a 'self-policing' of industry standards by members who are committed to the ongoing success of the DMF.
- 6.3.2** Through consultations, we were also able to see that DMF boards are able to more closely manage claims made against their members, with at least one DMF claiming to have successfully defended a number of claims that they felt other insurers may have paid. According to the Mutual Managers of this DMF, this action led to a perception amongst stakeholders that spurious claims were less likely to be successful and were therefore less likely to be attempted, further strengthening the DMF.
- 6.3.3** Proponents of DMFs point to the fact that because a DMF is owned by and operated for the membership, and there is therefore no need to turn a profit and provide returns to shareholders, the member contributions are likely to be less than the premiums charged by for-profit insurers. This may be true where the market covered was previously profitable to the insurers in question. Where a market is profitable, however, it is unlikely that for-profit insurers would exit the market en masse, and as such a DMF formed in response to unavailability or unaffordability of insurance in the existing market may be unable to deliver on this implied promise.

6.4. Weaknesses of a DMF

- 6.4.1** The ability to define and restrict the membership of a DMF is in many ways their greatest strength, because a DMF is only as strong as its weakest (or riskiest) members. If members are to be admitted due to a sense of 'industry loyalty' but are unable or unwilling to comply with the required standards, the entire fund and sector will be exposed to unnecessary risk.
- 6.4.2** A DMF can also be at risk of management capture where the sector does not have sufficient appropriately qualified representatives to manage the mutual, with the support of a mutual manager for the first few years of operation if necessary. It is critical that the mutual manager does not come to completely control the operations of the mutual. Concerns have been raised through consultations about mutual managers encouraging a reliance on the management company rather than developing the mutual towards eventual self-sufficiency. It is therefore critical that appropriate contestability of management and other services is ensured.
- 6.4.3** While ensuring appropriately qualified representatives exist to manage the mutual, it is equally important to put in place appropriate succession planning mechanisms. DMFs can be at significant risk where they rely too heavily on the services of a small number of

²³ G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, p 24

member-directors or proponents and are unprepared when these individuals retire or are unable to effectively discharge their duties.

- 6.4.4** Finally, DMFs are occasionally at risk of ‘demutualisation’, particularly when member engagement with the mutual is low, or where the market failures the DMF was created to address are less severe and members consider that they may be better served by broader market providers. Demutualisation becomes attractive to members where they see the opportunity to benefit financially from the division of resources that have been built up over years or possibly generations. The durability of a DMF will be threatened unless the leadership can demonstrate benefits of membership over and above, in this instance, insurance coverage.

6.5. How does insurance and a DMF differ

- 6.5.1** A DMF is an arrangement to provide indemnity or protection to participants (as an alternative to insurance) that operates largely outside the insurance regulatory system under Australian law.
- 6.5.2** Traditional insurance contracts and the carrying on of insurance business in Australia is regulated under the *Insurance Act 1973* and the *Insurance Contracts Act 1984*. The discretionary nature of the products provided by DMFs means that they are not subject to the provisions of the *Insurance Act 1973* and the *Insurance Contracts Act 1984*. DMFs are subject to significantly less regulation than traditional insurance although they do not operate unregulated.
- 6.5.3** A DMF can provide financial protection to members that is very similar to insurance, however it is not generally recognised in legislation, regulation and contracting as an equivalent alternative. This is true in Federal, State, Local Government and non-government contracting.
- 6.5.4** A DMF can operate outside of the legal framework governing insurance because they do not provide a legal contract of indemnity. Instead, the protection framework rules state that the governing body of the DMF may choose to use its discretion to indemnify a participant. In normal circumstances this does not have much practical significance, because claims are made in a very similar way to insurance claims. There does not appear to be significant case law examining situations where a DMF has declined indemnity on discretionary grounds when a member had a reasonable expectation of cover.

6.6. International Experience

- 6.6.1** The DMF structure is popular internationally, and is used to provide protection across a range of risks including medical indemnity, motor vehicle, home and contents, property, and professional indemnity.²⁴ Coverage for public liability under the DMF structure is not common, and while the reasons for this are not clear, there has been an increase the development of these types of DMFs in recent years, particularly in the UK. The reasons for this development have been stated as industry responses to hard markets, a desire to better manage industry risk, and an intention to reduce the insurance costs to industry participants by removing the requirement to return profits to shareholders.
- 6.6.2** An example of a mutual covering public liability risks is the UK-based Activities Industry Mutual, which has been operating for over ten years, and is managed by Regis Mutual Management.

24 International Cooperative and Mutual Insurance Federation (ICMIF), *members*, [website] n.d.

6.7. DMF Better Practice

6.7.1 There has been an evolution in Australia of what is considered ‘good practice’ in operating a DMF.

6.7.2 While this good practice is not documented and publicly available, those operating in and adjacent to the DMF sector speak about it and appear to have mostly a shared understanding of how it applies to their operations. While not everybody will agree with each of the items, it may be wise for the sector or the Business Council of Co-operatives and Mutuals to consider the development of a documented ‘best practice guide’.

6.7.3 Best practice generally includes:

1. Ensuring an appropriate structure, which (as discussed below) could include either a Trust or a Company limited by Guarantee. Advisers to this project prefer the Company structure due to the greater suitability for providing good governance over a longer period, and the ability to raise Mutual Capital Instruments.
2. Operating with full funding, or having sufficient funds to meet the highest realistic amount of claims cost that is retained before external reinsurance is triggered. A DMF will usually provide coverage for periods of up to 12 months at any time. The full funding standard will be met where the contributions collected from members is greater than the sum of:
 - commission and any other distribution costs;
 - administrative costs, the largest of which is usually management fees;
 - any reinsurance premium to provide both ‘per risk’ and ‘aggregate’ cover; and
 - the total maximum cost of retained claims before the aggregate cover cuts in.

6.7.4 Where it appears that full funding is unlikely to be achieved, increasing contribution requirements or making a call on members will be necessary.

3. Establishing a sound governance process that involves an appropriate balance of member, management, and independent expertise. As discussed above, there is significant risk to a DMF where it is ‘captured’ by the manager. Where this occurs, the interest and involvement of members and their association risks waning, and decisions made can be in the interests of the manager rather than that of the members.

6.7.5 A DMF is a complex, highly technical and specialised operation, and industry leaders, however capable, cannot be expected to be knowledgeable about the details and should not be put in a position where they may make unsound decisions. Despite not being regulated by APRA (but of course needing to comply with ASIC’s AFSL requirements), it is sensible for the Directors of a DMF to strive for, and ultimately deliver the governance, skills, risk management, and independent review expectations of APRA-regulated entities.

4. A DMF usually does not have a substantial capital base, as opposed to APRA-authorised insurers, for which such a base is a prudential requirement. They are also unable to source significant capital from shareholders to deal with unexpected situations. Appropriate reinsurance is therefore arguably the most important element of security for a DMF, particularly in its early years.

6.8. Public Policy Considerations

6.8.1 A fundamental threshold question for government is where appetite sits on the spectrum of:

- Supporting DMFs and encouraging further development of the sector through direct support or enabling regulation;
- Recognising or allowing DMFs with minimal interference or regulation; or
- Discouraging or even banning DMFs.

- 6.8.2** The HIH Royal commission recommended that DMFs be regulated by APRA. Such regulation would require immense capital reserves and may challenge the viability of a number of DMFs currently operating successfully in Australia. The sector, and the members of the DMFs potentially affected, are likely to strongly oppose such a development.
- 6.8.3** The Potts review effectively remained ‘on the fence’ regarding APRA regulation. While it considered the need for stronger regulation of the sector, Mr Potts ultimately determined that the sector was unlikely to pose a systemic risk and that regulation by APRA was unnecessary. This position may of course need to be revisited in the event there are a significant number of DMFs developed in response to ongoing hard insurance markets. If regulation was to be considered, it may not be appropriate to impose the full suite of regulation currently imposed on APRA-authorized insurers on the sector. It may be possible to develop an appropriately-sized guidance and best-practice framework within which DMFs could operate with desired features potentially a condition of any government support.
- 6.8.4** Once the threshold question of government appetite for a DMF is established, it is necessary for government to consider a range of issues prior to determining whether or not to support the establishment of the DMF proposed by AALARA. Resolving these questions need to provide a framework government can work within to assess possible future requests to support DMFs for particular industry groups. Key considerations could be as follows.

6.9. Evidence of market failure or significant dysfunction

- 6.9.1** Market failure or significant dysfunction can be interpreted broadly, but it must be clear that a hard market alone is insufficient to support such a determination, unless insurance is so expensive that ‘good’ operators find it inaccessible or are exiting the market.
- 6.9.2** Instead, consideration could be given to whether there is commercially available insurance that provides sufficient coverage for the industry to comply with their legislative obligations.
- 6.9.3** Where there is insufficient coverage available, government may first consider whether it would be appropriate to reduce the legislatively required amounts of coverage required. This review may need to be undertaken in conjunction with States and Territories, and may require the agreement of States and Territories to enact.

6.10. Membership considerations

- 6.10.1** As discussed above, DMFs are most successful when they have a clearly defined membership base. Where a group requesting support for formation of a DMF does not have a clearly defined and unified membership base, government support alone is unlikely to ensure success of the endeavour.
- 6.10.2** Consideration should be given to the potential membership base, and whether, where government support is provided for the establishment of the structure, it would be appropriate to require that business not be denied support from the DMF on the basis that they are not a member of a proponent industry association. Of course, businesses could

be denied support where they are unable to, or refuse to comply with reasonable safety and operational standards that are a precursor to membership.

- 6.10.3** Government should also give consideration to the economic and social benefit the businesses likely to make up the DMF membership provide to the broader community. Difficult decisions may be necessary where businesses provide significant economic, but little or negligible social benefit, for example, or vice versa.
- 6.10.4** Finally, consideration should be given to the ability of the sector in question to provide for itself in efforts to establish a DMF. It may be prudent to establish a framework within which support is provided, ensuring that highly profitable businesses with high levels of available capital are not deemed eligible for taxpayer support. Instead, support may be better targeted towards business sectors that consist of operators with lower profit margins, less retained capital, and a reduced capacity to raise or service debt to support formation of a DMF from outside the membership.

6.11. Could a DMF work?

- 6.11.1** The DMF model is a proven model for delivery of an insurance-type solution in sectors with clearly defined membership bases, motivated groups of individuals or businesses looking to address affordability, availability, or other issues related to insurance, and having or being able to access sufficient capital to establish and see the fund through the formative years is an essential pre-condition.
- 6.11.2** As such, and provided any sector met those criteria, the DMF and its members complied with any legislative or regulatory requirements, and any legislative or regulatory barriers to accepting membership of a DMF in lieu of insurance were addressed, there is no prima facie reason why a DMF should not be used to address hard insurance markets.

6.12. For AALARA and the sector?

- 6.12.1** With due consideration of best practice for operation and criteria required prior to the provision of government support, a DMF structure could be an appropriate way to address the current issues of availability of insurance for the amusement, leisure, and recreation sector.
- 6.12.2** A critical component of this success will be whether or not the sector can unify behind one proposal as opposed to splitting resources across many. It will also be necessary to undertake further actuarial modelling to determine whether the sector is, or was recently, profitable for insurers or has a genuine prospect of not being loss-making in the near or mid-term. If not, a DMF may not deliver the anticipated reduction in premium costs, and may indeed require an increase in premiums to remain viable.
- 6.12.3** There is also a question about whether or not membership of a DMF will satisfy the legislative and regulatory requirements imposed by State and Local Government entities on amusement, leisure, and recreation service providers to hold valid 'insurance coverage' to a certain value.
- 6.12.4** While membership of a DMF entitles members to have claims considered by the board, it does not provide an entitlement to payment of those claims, and is therefore not considered insurance for the purpose of these pieces of legislation. This issue is discussed in greater detail below but will be a critical threshold issue to the successful operation of a DMF for this industry.
- 6.12.5** Addressing the requirement to hold insurance prior to operation would require legislative and regulatory change across states and territories, including at local government level,

and would therefore require the agreement of those governments and regulators. A degree of harmonisation would be helpful given the mobile and cross border activity of a number of AALARA members.

6.13. For amusement, leisure and recreation services users?

6.13.1 Whether or not service users would accept DMF membership of operators as sufficient protection for themselves in case of an accident is somewhat dependent on whether they consider insurance coverage for potential injuries at all.

6.13.2 It is, of course, likely that patrons assume there is some form of insurance coverage, particularly where they are required to sign waivers of liability. What is less clear is whether patrons actively engage in considerations of whether the insurance coverage is likely to be sufficient to adequately compensate them in the event of an accident that causes harm or loss.

6.13.3 Even where a service user did contemplate the level of coverage they may deem 'comfortable' for them to accept the risk of engaging in the activity, a discussion of the discretionary nature of DMF coverage is complicated, and unlikely to be fully engaged in by patrons wishing to enjoy a ride at the local country show or about to embark on a laser-tag adventure at a birthday party. Further, amusement, leisure and recreation service operators are likely to be disinclined to provide detailed and prominently displayed warnings about the possibility of a claim on a DMF being declined by the board prior to patrons' using their services.

6.13.4 Ultimately, some consideration needs to be given to the need to protect vulnerable consumers in the event of an accident and a refusal or inability by the DMF to pay out on any claim. As discussed further below, it may be possible for the DMF members to partner with an insurer such as Flip which allows individuals to purchase cover or for it to be included as an addition to the ride/experience costs, up to an agreed limit for certain incidents for defined time periods. An arrangement such as this may have the added benefit of reducing the overall risk to the DMF and therefore any premiums paid by members.

6.14. For site owners and managers?

6.14.1 As mentioned briefly above, and discussed in more detail below, the key threshold issue for site owners and managers will be whether membership of the DMF can be accepted in lieu of formal insurance cover, and whether this acceptance will satisfy their obligations under the various pieces of legislation, regulation, and contract they operate within.

6.14.2 Site owners and managers may be reluctant to reduce the coverage they currently require operators to hold out of concern that should there be an accident on their site, they may be held vicariously liable for any injuries and eventual remediation payments. Of course, this concern would need to be balanced by site owners and managers against the need/desire to have their sites used and revenue generated.

6.15. Regulatory Requirements

6.15.1 Traditional insurance contracts and the carrying on of insurance business in Australia is regulated under the Insurance Act 1973 and the Insurance Contracts Act 1984.

6.15.2 The discretionary nature of the products provided by DMFs means that they are not subject to the provisions of the Insurance Act 1973 and the Insurance Contracts Act 1984. DMFs are subject to significantly less regulation than traditional insurance although they do not operate unregulated.

6.16. Australian Prudential Regulation Authority

- 6.16.1** The Australia Prudential Regulation Authority (APRA) is the independent statutory authority tasked with prudentially regulating Australia's banking, insurance and superannuation industries.
- 6.16.2** Prudential regulation is concerned with maintaining the stability and soundness of the nation's financial system. The primary concern in prudential regulation is ensuring that financial institutions are resilient enough to be able to meet their financial commitments to depositors, policyholders and fund members under reasonable circumstances.²⁵
- 6.16.3** To achieve this, APRA sets out minimum capital, governance and risk management requirements for businesses in Australia's financial services industries.
- 6.16.4** APRA, for the most part, does not regulate DMFs. The idea was canvassed by Mr Gary Potts, then of the Treasury, in his Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers (the Potts Review) although Mr Potts also noted that "it seems inconceivable that DMFs could pose any sort of systemic risk" given their small market share.²⁶ In response to the Potts Review and a subsequent discussion paper by the Treasury, the Australian Parliament passed the Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007 (DMF and DOFI Bill) on 13 September 2007. The DMF and DOFI Bill allowed "APRA to collect information from DMFs on the role they play in the Australian risk management market and to determine to what extent these entities pose a prudential risk."²⁷
- 6.16.5** After consultation with the DMF industry, APRA revoked its relevant reporting standards and ceased collecting data on the industry in 2016.²⁸
- 6.16.6** Interestingly, despite not being subject to APRA regulation, both Civic Risk Mutual and Capricorn Mutual employ APRA prudential benchmarks in managing their capital holdings. This ensures that the risk to members is minimised because their risk is prudentially managed. They do so also to the benefit of members, without other associated costs of prudential regulation, meaning a cheaper product.

6.17. Australian Securities and Investments Commission

- 6.17.1** The Australian Securities and Investment Commission (ASIC) regulates the national corporate, financial services, consumer credit and authorised financial markets.²⁹ ASIC's regulation of financial services markets, done under the Australian Securities and Investments Commission Act 2001 and the Corporations Act 2001, involves the licencing and monitoring of "financial services businesses to ensure that they operate efficiently, honestly and fairly." These business typically deal in areas such as superannuation, managed funds, shares and company securities, derivatives and insurance.³⁰ The licence required to conduct a financial services business is called an Australian Financial Services Licence (AFSL).

²⁵ Australian Prudential Regulatory Authority (APRA), *About APRA*, [website], APRA, n.d.

²⁶ G Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, 2004, pp 7 & 37.

²⁷ The Parliament of the Commonwealth of Australia, *Financial Sector Legislation Amendment Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007 (2007)* Revised explanatory memorandum, p 9

²⁸ Australian Prudential Regulatory Authority (APRA), *About APRA*, [website], APRA, n.d.

²⁹ Australian Securities and Investments Commission (ASIC), *Our Role*, [website], ASIC, n.d.

³⁰ Australian Securities and Investments Commission (ASIC), *Who We Regulate*, [website], ASIC, n.d.

6.18. Australian Financial Services Licence (AFSL)

6.18.1 As a DMF is a financial service, an AFSL is required to legally manage a DMF in Australia. This means that in cases where a DMF employs an external mutual management company, who itself holds an AFSL such as Regis Mutual Management, upon agreement, the DMF may be able to use the mutual management company's AFSL.

6.18.2 While ASIC tailors each AFSL to the specifics of its holding entity, there are a number of general obligations AFSL holders have, and for which ASIC produce general regulatory guidance material.³¹ These obligations relate to:

- Conduct and disclosure;
- The provision of your financial services;
- The competence, knowledge and skills of your responsible managers;
- The training and competence of your financial advisers and authorised representatives;
- Ensuring your financial advisers and authorised representatives comply with the financial services laws;
- Compliance, managing conflicts of interest and risk management;
- The adequacy of your financial, technological and human resources; and
- Dispute resolution and compensation arrangement (if clients include retail clients).³²

6.18.3 In addition to reporting requirements for AFSL holders, ASIC has significant information-gathering and investigative powers. Where the employment of these monitoring tools reveals license breaches or other contraventions of the relevant acts, ASIC has the legislative power to take a range of enforcement action.³³

6.19. Forming a DMF

6.19.1. Shared Interest

6.19.1.1 A clearly defined membership base is the cornerstone of an effective DMF.

6.19.1.2 Splitting DMF arrangements between industry subsets present a challenge of trading off between the benefits of a strong and diverse revenue base for the fund, and ensuring harmony among members. It is important for the members of a DMF to have shared interests (i.e. goals for the DMF), regulatory environments, and risk environments. However, a large membership base for the DMF will provide for revenue streams that allow for expanding reserves and provide for healthy cash flow.

6.19.1.3 While looking at determining the membership base for the proposed DMF, we are aware that there are differing views and interests canvassed between the AALARA and the Showmen's Guild industry associations. We understand that these differences may be sufficient for separate insurance arrangements to be desirable as separating these may provide for two more unified operations. However, separating the two groups will have implications for the function and viability of a DMF due to reduced membership numbers and therefore scale in each.

31 Australian Securities and Investments Commission (ASIC), *AFS Licensee Obligations*, [website], ASIC, n.d.

32 Australian Securities and Investments Commission (ASIC), *AFS Licensee Obligations*, [website], ASIC, n.d.

33 Australian Securities and Investments Commission (ASIC), *ASIC's approach to enforcement Information Sheet 151*, ASIC, 16 September 2013

6.19.1.4 We understand that while there had been a separate DMF contemplated for part of the sector, this has now been resolved.

6.20. Design

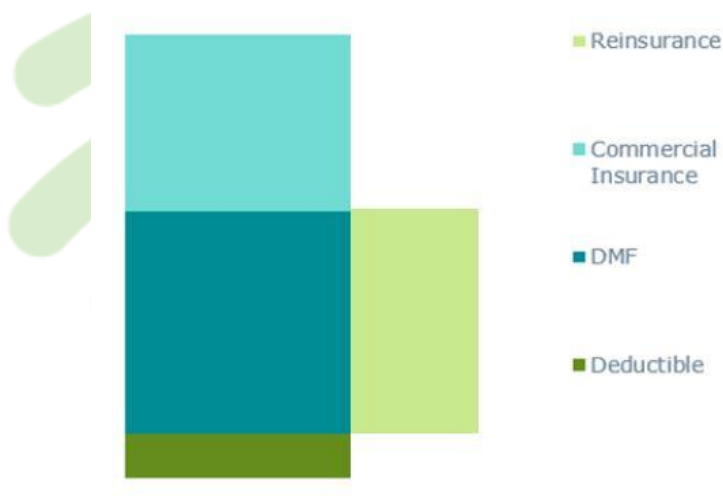
6.20.1 The DMF will require significant setup costs and funds for the first few years of its operation.

6.20.2 This initial capital investment is vital to ensure the longevity and effectiveness of the mutual. The DMF will initially be vulnerable to large claims in the event of a catastrophic event, and as such, will need either suitable reinsurance or the ability to rely on its members to provide capital in the event there are claims that are above the reserves of the fund. It will be vital to ensure that members are aware of the risk of a potential call on the membership to supplement reserves before they join the DMF.

6.20.3 A strategy to prevent these large claims against the DMF would be around strict conditions of membership and risk mitigation that will reduce the risk of significant claim events and the likelihood cost of payouts from the fund. This highlights a key benefit of DMFs, which is that they allow for a mutual approach to risk and in turn risk mitigation. DMF members will often mitigate risks effectively in cases where there is a potential liability claim. This means they can defend spurious claims successfully and not pay out, a key feature of success for international DMFs through our consultations.

6.20.4 The structure of the DMF will also be important for managing risks around the capital required for the operation.

6.20.5 Ashurst has provided four potential models for the DMF structure, with their preferred model providing a hybrid structure, similar to that adopted by the Activities Industry mutual in the United Kingdom.



6.20.6 Under this structure, the DMF is triggered once a threshold deductible retained by the member is exceeded. The appropriate level of deductible will need to be considered and determined proportionately to a member's capacity to pay, and risk exposure, but is important as it encourages good risk management and good claims practices, by ensuring there is a 'pain threshold' before the funds in the DMF become available.

6.20.7 The DMF then covers any cost above the deductible, supported by 'reinsurance' to protect the DMF against loss. The reinsurance needs to be drafted to allow for the fact that the DMF extends indemnity on a discretionary basis, and the reinsurer will need comfort around the exercise of that discretion. The need for reinsurance will be greater in the early

years when the DMF is building capital, but it should be noted that reinsurance may not always be available to the level required, or at an acceptable cost.

- 6.20.8** The DMF could then purchase an ‘excess layer’ of commercial insurance above the DMF, allowing the DMF to act as a ‘deductible in-fill’. This addition would provide a right to indemnity, removing the risk of discretion for members and, critically, third parties reliant on the cover available to the member. The insurance layer could kick in at lower levels when insurance is available and commercially attractive to reduce the retained risk in the DMF. While commercial insurance may not always be available, the DMF rules should be drafted in such a way that commercial insurance can be added as another layer of protection on the DMF when it is available.

6.21. Risk management

- 6.21.1** For the proposed DMF, it is important to maintain a method of mitigating risk to prevent avoidable claims against the fund. A key component of a risk management is defining the acceptable level of risk for businesses that seek cover through the DMF and establishing the ongoing review of acceptable risk.
- 6.21.2** Various stakeholders across the industry have highlighted the importance of using standards (explored further later) as a way of developing a risk management strategy and defining the acceptable level of risk. Some industry groups have even gone as far as using the industry standard to develop their own version of standards that would assist their industry in mitigating risk. Ensuring appropriate and robust risk mitigation across the membership is an important strategy for the proposed DMF to manage risk.
- 6.21.3** Risk management needs to be in the foundation of a DMF. By understanding members risks, helping them identify and mitigate them and then successfully defending spurious claims the DMF is able cover in a tailored and appropriate manner.
- 6.21.4** Risk management is bolstered by effectively training board members. This gives them the specialised insights that are needed in order steer the DMF in a direction that can effectively cover its member's needs.
- 6.21.5** Risks are also mitigated by creating positive relationships with insurers and reinsurers. This helps to balance risks and by articulating the risk management and mitigation strategies, gives confidence to insurers.

6.22. Good Governance

- 6.22.1** The DMF should aim to develop its membership, directors, and work towards self-sufficiency. Members should have opportunities to learn from each other, and share information to expand on any mandated risk mitigation practices provided for by the DMF. Further, board members should continually engage in training and seek expert advice to allow them to better exercise their duties.
- 6.22.2** It has been clear throughout our consultations that it is imperative to the success of a DMF that a strong culture is embedded within the organisation. The best way to ensure this is through the commitment and activities of the directors, and in particular the member-directors.
- 6.22.3** Every consultation held for this review has highlighted the importance of a committed and capable board, and indicated that directors are the ‘glue’ that holds a DMF together. The majority of directors will be required to be members of the fund, and should have industry experience along with a strong interest in the success of the DMF and ideally other skills they can ring, including legal, financial, or corporate management skills. Their experience

and knowledge should be backed up by comprehensive training to supplement their understanding of legal and actuarial principles necessary to the running of an insurance vehicle.

- 6.22.4** The mixture of directors, with members of the DMF, external experts and a government representative (if taxpayer support is provided) will be important in developing the capabilities of the DMF. Members of the DMF can offer valuable insights into how the industry operates, where key risks lie and what actions should be taken to mitigate the risks. The independent board members will provide necessary experience in managing a mutual, offer advice on how to ensure the ethos of the DMF is shared with members, and have valuable financial, legal, and management skills.
- 6.22.5** If taxpayer support is conditional on a government representative, this person should bring a strong overview of the ongoing public interest supported by the DMF, and commensurate accountability to the board.
- 6.22.6** Finally, the fund manager should work with the board to ensure day to day operations are smooth and effective. The open and competitive process should ensure the fund manager is capable and able to guide and support the board members.

6.23. Timeline

- 6.23.1** Setup of a DMF will take a period of time between three and six months, and with insurance for many in the industry already expired, and more expiring from September 2021, timeframes present a significant challenge.
- 6.23.2** There is a significant effort required to establish the governance structure of the DMF, capital arrangements, actuarial assessments, and other legal agreements between stakeholders and the DMF.
- 6.23.3** Further, the first few months of operation present a risk to the DMF where claims against the fund may challenge long-term operation. Large claims may be enough to clear the fund, therefore it is critical to ensure there is a mechanism available to assist the DMF early on in its establishment.
- 6.23.4** An option to prevent early collapse of the DMF in the event of a large or multiple claims could be that the government stand as a temporary underwriter to support the DMF through the first few months, and until commercial reinsurance is available. This would ensure that the DMF can survive long enough to accumulate premium surpluses to address the insurance market failure or significant dysfunction.

6.24. Forming a DMF

- 6.24.1** It is important that any arrangement around the proposed DMF have clear timelines.
- 6.24.2** While a DMF can be set up in 3 months if really pushed, discussions with mutual managers suggest that this is unlikely to be possible in this situation. Instead a 6-month timeline is preferable and given the complexity of the AALARA proposal, 6 months will be necessary. This longer timeline allows enough time for detailed legal and actuarial advice to be obtained.
- 6.24.3** Further steps involve, but are not limited to, creating governing documents, establish a steering committee, determining membership details, model structures, creating Product Disclosure Statements, and organising Licensing arrangements. Fortunately, actuarial and legal work has been considered through this review and may be able to be used to expedite this process if needed.

- 6.24.4** Because the sector is likely to be deemed to be experiencing market failure, there may be an opportunity for an equivalent of a 'restricted license holder' which includes enablement support in the banking sector, which may be able to insure the sector with the backing of the government. This would entail a group of experts or suitably qualified industry associations (who would be stood up on declaration of a market failure) to work with the proposed members to ensure there are effective risk mitigation and management practices in place.
- 6.24.5** This may support and give confidence to the government acting as an underwriter for these businesses while the DMF is established.
- 6.24.6** Alternatively, the government could establish a short-term reinsurance pool for the sector in order to incentivise insurers to return to the sector. This option carries greater long-term risk but allows insurance companies to step in to insure the sector while the DMF is created.

6.25. Questions for consideration:

6. Is there sufficient evidence that a DMF, if appropriately formed and governed, could work for the various stakeholder groups?
7. Is there sufficient evidence that a DMF, if appropriately formed and governed, could work for the various stakeholder groups?
8. Are there other regulatory considerations that should be addressed?
9. Are the design, risk management, and governance suggestions appropriate?
10. Does the timeline appear reasonable?
11. Are there alternative examples of government intervention that should be considered?
12. Are there other aspects that should be considered in terms of market conditions or capacity building for the DMF board and membership?

7. IS THERE A ROLE FOR GOVERNMENT?

7.1. When is there a role for government intervention?

7.1.1 It is widely agreed by the industry that government intervention in a market such as the insurance market should only and always be a last resort in the event of an inability to source a product or service on the open market. Australia has three precedents in the insurance sector:

1. Medical defence after HIH collapse
2. Terrorism reinsurance pool
3. Cyclone reinsurance pool.

7.2. Medical defence after HIH collapse

7.2.1 The collapse of the HIH group of companies in 2001 had far-reaching consequences for the Australian population including the immediate cessation of cash benefit payments to policy-holders, cancellation of surgery for car accident victims in Queensland and the closure of community legal centres after their professional indemnity insurance was adversely affected.³⁴

7.2.2 HIH was a major reinsurer of United Medical Protection Limited /Australasian Medical Insurance Limited (UMP/AMIL), then Australia's largest medical defence organisation (MDO), which itself had experienced a dramatic increase in the frequency and value of claims since the mid-1990s. HIH's failure, coupled with the events of 11 September 2001 in the United States and the resultant downturn in global financial markets, did irrecoverable damage to UMP/AMIL and it was placed into provisional liquidation in May 2002.³⁵

7.2.2 The particular issues in the medical indemnity sector were premium under-pricing and inadequate provisioning for future risk. In theory, the premium set for insurance should be sufficient to meet any future claims that arise; in medical indemnity, this "long tail" may continue for decades and when the inflation rate averaged 2.5% but claims increased on average by 10%, future claims risks became under-funded.

7.2.3 In response to UMP/AMIL's collapse, and recognising that having an uninsured medical sector presented unacceptable risk to both the provision of essential services, and consumers, the Government established a number of schemes to subsidise premiums for medical practitioners and provide financial assistance to medical indemnity providers and to practitioners for high-cost claims.

7.2.4 In a speech to the Australian Medical Association in May 2003, then Senator the Hon Helen Coonan stated that the Government's decision to intervene in medical indemnity was not taken lightly.³⁶ The issue requiring most immediate attention was the imminent failure of UMP/AMIL. If UMP/AMIL was allowed to fail, more than 60% of Australia's doctors would have no protection against past adverse events, current or future claims.

³⁴ The Treasury, *The HIH Claims Support Scheme Chapter 3*, the Treasury, 19 June 2015

³⁵ Toh, W Satchwell, L and Cohen J. 2009 *Medical Indemnity – Who's got the perfect cure?* Paper presented to the Institute of Actuaries of Australia, 12th Accident Compensation Seminar, Melbourne, 22-24 November pages 11-12

³⁶ The Treasury, *A Suitable Case for Treatment - The Restructure of Medical Indemnity - Speech to the 2003 Australian Medical Association National Conference, Sydney*, The Treasury, 2003

- 7.2.5** The Government's policy responses were staged to meet the evolving conditions. Initially, a guarantee was provided which allowed UMP/AMIL to continue operating in provisional liquidation. Further, the Commonwealth stepped in to effectively provide a line of credit by assuming UMP/AMIL's unfunded future claims liabilities with member doctors to pay for the facility over time.
- 7.2.6** However, the Government was concerned about the likelihood that further intervention in the market would be required, in part due to the non-regulated nature of the then Medical Defence Organisation model. To address this, the Government required that from 1 July, 2003 all providers of medical indemnity needed to be prudentially regulated and offering legally enforceable contracts of insurance.
- 7.2.7** The Indemnity Insurance Fund was established in 2011 to consolidate the seven existing government assistance schemes which had been established between 2003 and 2010. In February 2014, the National Commission of Audit recommended that the Commonwealth scale back its subsidies for medical indemnity insurance and reported that there was evidence that the insurance market was normalising.³⁷ A report prepared for the Department of Health in April 2018 concluded that at a high level, the range of reforms implemented since 2002 (including the Commonwealth interventions) have improved the stability and profitability of the medical indemnity insurance sector.^{38,39}

7.3. Terrorism reinsurance pool

- 7.3.1** Prior to the events of September 11, 2001 in the United States, terrorism insurance was incorporated into standard insurance policies. After that date, insurers moved to limit their liability in relation to terrorist events. Australian insurers could not find affordable reinsurance cover for terrorism risk. With a large proportion of assets uninsured for terrorism risk, financiers and investors faced uncertainty which could have resulted in adverse economic outcomes, delayed investment and increased global financial insecurity. There was a widely held view that there was market failure.⁴⁰
- 7.3.2** The Australian government was of the opinion that it was necessary for the proper functioning of the national economy to maintain cover against terrorism risk, in early 2002 pressure was building for government intervention from the insurance, property and banking industries.
- 7.3.3** Media reports at the time were suggesting that large enterprises were finding it not only impossible to get terrorism insurance, but that this in turn was jeopardising loan contracts and throwing major projects into doubt.⁴¹ The ABA showed strong support for the Terrorism Insurance Bill 2003, highlighting the impact a lack of insurance was having on loan security. Appearing before the Senate Economics Legislation Committee on 1 May 2003, the ABA stated that in the case where an asset held as security is destroyed by an act of terrorism and there is no insurance coverage for that risk, then the value of the security could potentially reduce to nil.
- 7.3.4** The parliament subsequently passed the Terrorism Insurance Act 2003 which created the Australian Reinsurance Pool Corporation (ARPC). The structure of the scheme relies on a public/private partnership. Such a step also had the benefit of ensuring that the public

37 Australian National Audit Office, Auditor-General Report No. 20 of 2016-17, 19 October 2016, paragraph 4

38 MP Consulting, *First Principles Review of the Medical Indemnity Insurance*, 2018, p 5

39 MP Consulting, *First Principles Review of the Medical Indemnity Insurance*, 2018, p 5

40 Organisation for Economic Cooperation and Development (OECD), *Australian Terrorism Risk Insurance*, OECD, May 2016

41 Australian Financial Review (AFR), *Plea to PM to provide Terrorism Cover*. AFR, 18 April 2002

were secure in being able to be adequately compensated in the event of a terrorist event. The Insurance Council of Australia (ICA) highlighted that the effect of the Government's reinsurance pool would provide cover to businesses that is currently unavailable, and by spreading the cost over the entire insuring community it will make terrorism cover more affordable and widely available. Under the structure, the ARPC acts as a reinsurer with private insurers holding insurance contracts directly with consumers and businesses.

- 7.3.5** In effect, any terrorism exclusion clauses in certain insurance contracts are inoperative if a terrorism incident is declared by the Minister. Therefore, primary insurers must cover against terrorism risk and can either reinsure through the ARPC or use an alternate reinsurance mechanism. Since 2003 there has been one declared terrorist incident in Australia – the siege at the Lindt Café, Sydney in December 2014.⁴²
- 7.3.6** In 2006 the ARPC was expanded to provide terrorism risk insurance for public authorities. The Commonwealth has capped its ultimate liability at AUD\$10 billion. If the costs of an event are likely to exceed that guarantee cap, the Minister will declare a 'reduction percentage' and each insured will receive a reduced amount.
- 7.3.7** The ARPC's scheme funding capacity was AUD\$13.7 billion at 30 June 2020.⁴³ ARPC has begun the gradual transfer of risk back to the global reinsurance market in line with increases in insurance capacity, thus reducing reliance on the Commonwealth guarantee. However, the most recent review of the Terrorism Insurance Act and the ARPC, released on 12 December 2018, recommends that the Act remain in force and the scheme remain in place as in their absence, *'there would likely be a market failure in the terrorism insurance market with wider economic implications'*.⁴⁴

7.4. Cyclone reinsurance pool

- 7.4.1** Homeowners and businesses in Northern Australia have faced crippling insurance costs, and in some cases, cannot get insurance at all. Several past reviews and inquiries have addressed the availability and affordability of insurance cover for natural disasters, including bush fires have called for Government intervention. While these inquiries recognise that no one policy solution will address the insurance challenges faced due to natural disasters in Australia the cyclone reinsurance pool is an important step.
- 7.4.2** To address the issue of insurance in northern Australia the Government has so far enacted a number of policy measures. These include the North Queensland Strata Titles inspection scheme and in a 2017 ACCC inquiry into the affordability and availability of insurance in northern Australia. The inquiry found that in 2018–19, the average premium for combined home and contents insurance across northern Australia was approximately \$2,500, almost double that for the rest of Australia (\$1,400).⁴⁵
- 7.4.3** The issue of availability continues to be exacerbated and in undertaking a similar inquiry the Australian Small Business and Family Enterprise Ombudsman found a lack of available insurance cover for natural disasters. Following the Black Summer bushfires media continue to report on business 'inability to obtain insurance at a viable rate, one business

⁴² Australian National Audit Office, *Management of the Terrorism Reinsurance Scheme*, ANAO, June 2019

⁴³ Transparency Portal, *ARPC Annual Report: How ARPC's Terrorism Insurance Scheme operates, 2019-2020*

⁴⁴ The Treasury, *Terrorism Insurance Act Review: 2018*, The Treasury, 12 December 2018

⁴⁵ Australian Competition and Consumer Commission (ACCC), *Northern Australia Insurance Inquiry – Final Report*, ACCC, 2020, p 25

worth \$3.5 million was provided an insurance quote of \$6.5 million and many others refused cover all together.⁴⁶

- 7.4.4** On 4 May 2021 the Government announced its intention to establish a reinsurance pool covering the risk of property damage caused by cyclones and cyclone-related floods in Northern Australia. The pool seeks to improve the accessibility and affordability of insurance for households and small businesses in cyclone-prone areas, predominantly in northern Australia.⁴⁷ 'Reinsurance' is purchased by insurers to manage their own exposure to large losses from insurance claims made from a cyclone or cyclone-related floods, and the Government's intention is that a reinsurance pool will attract more insurers into the market and deliver reduced premiums to consumers.
- 7.4.5** Given their expertise in providing government-backed reinsurance, the ARPC has been tasked with setting up and administering the pool, which is expected to operate from 1 July 2022.
- 7.4.6** The Federal Government has not previously supported the establishment of a DMF to address insurance market failure. It did step in to support the existing mutual fund for medical indemnity insurance but required the fund submit to prudential regulation (ie become an 'authorised mutual') which is a departure from the traditional DMF model.

7.5. Current proposals for government intervention

7.5.1. Commonwealth intervention

- 7.5.1.1** It is important to determine the scope for government intervention and then define the rules that the DMF will abide by to ensure there is an effective use of public funds. This will help establish the DMF with the values and ethos that are important to its longevity, while also providing assurance to the government that their contribution will be put to good use.
- 7.5.1.2** Where public funds and support are provided there need to be clear conditions for the support.
- 7.5.1.3** These should include government representation on the board of the DMF for the life of the financial support, an equitable financial structure to allow for repayment of the loan if applicable, and guarantee of competitive, regularly contested, and independent contracts for the fund management, legal and actuarial services provided to the DMF.

7.5.2. Other jurisdictions

- 7.5.2.1** Given the difficulty many sectors are facing dealing with dysfunctional markets, and the fact that many jurisdictions require insurance coverage for licensing of professionals, we are aware that jurisdictions within Australia other than the Commonwealth are currently fielding requests from certain sectors for either assistance in accessing insurance, or for acceptance of DMF membership in lieu of insurance. To date, these jurisdictions have not indicated support for the DMF model.

⁴⁶ C Fellner, 'I didn't think it was possible': Why bush holidays could become a thing of the past, The Sydney Morning Herald, 2021

⁴⁷ The Treasury, *Reinsurance pool for cyclones and related flood damage, Consultation paper*, The Treasury, May 2021, p 2

7.5.3. Market Conditions

7.5.3.1 Determining market failure is imperative prior to any government intervention.

7.5.3.2 Any statement of market failure needs to come from an independent and authoritative source. In the case of AALARA's membership, the ICA has written to AALARA indicating that their sector is unlikely to obtain insurance in the foreseeable future. The ICAs consultation paper, 'Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance' report also points to the issues of accessibility and affordability for this sector. The issue of access and affordability in the sector means that even if insurance is technically offered, the cost of the insurance, sometimes significant multiples of the annual turnover of a company, renders it unavailable, pointing to market failure.

7.5.3.3 The recent introduction of the Coversure facility will assist some, but by no means all of the current industry participants to address their insurance issues. As discussed above, it is clear that the Coversure facility will leave many businesses unable to access insurance, and therefore grappling with a failure or dysfunction of the market.

7.5.3.4 For clarity and consistency on market failure or significant dysfunction, this Office's 2020 Insurance Inquiry Report states:

"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."

7.5.3.5 Therefore, market failure or significant dysfunction must be formally confirmed by a trusted, authority independent from either the sector affected by apparent market failure or significant dysfunction, or the insurance industry. We propose that the Federal Government could declare the existence of market failure or significant dysfunction in a sector before intervention is provided. The Federal Government should determine annually whether there is market failure in sectors deemed to be suffering from it, and be responsible for declaring cessation of market failure or significant dysfunction.

7.5.3.6 Once a market failure or significant dysfunction is determined by the relevant body, the Federal Government could assemble a team of specialists in DMF development and management including legal advisers, actuaries, and a possible mutual fund manager, to provide advice to the business sector on the set up of a DMF.

7.5.4. Formation Advice/capacity building

7.5.4.1 If the federal government is to provide financial support for the formation of a DMF, the government may also consider whether they could further support the arrangement through template documents and pathfinders. These artefacts could then be provided in an open source format to other groups looking to form a DMF in the future, with or without federal government financial support. Such additional support would help the DMF establish its constitution and organise their fund appropriately, and provide certainty to the government representative on the board. This support would also help to accelerate formation, alleviate management fees and remove much of the reliance typically placed on the mutual manager. This would also help to support a competitive, open market for newly established DMFs to operate within.

7.5.4.2 Given the likelihood of a continuation of the current hard insurance market, and the significant number of industries that have contacted this Office looking for support in their difficulties to access insurance, there may be an increase in approaches to government for support to establish DMFs. It therefore may be appropriate to consider the establishment of an expert taskforce within the Treasury, and drawing on expert external advice, to

provide best practice assessment and analysis of proposals, and support for any future formation.

- 7.5.4.3** Consideration should also be given to ensuring the newly established DMF operates within a supportive ecosystem. The mutual sector in Australia is close-knit and houses a range of leaders with significant expertise. One of the 'Seven Co-operative Principles' that co-operative and mutual businesses refer to in their operations is 'co-operation amongst co-operatives'⁴⁸, and our extensive consultations with the sector included a great number of offers of support for a DMF in formation stages. As such, close engagement with the sector, through individual established DMFs or through the industry body, the Business Council of Co-operatives and Mutuals, should be considered.

7.5.5. Capital Support

- 7.5.5.1** The established membership base will need to work effectively with the government in order to ensure an effective DMF is established.
- 7.5.5.2** For clarity, the support should rely on the membership sustaining the policy intent to derive public good, that is to ensure consumers and patrons of amusement and leisure providers are appropriately compensated in the event of an accident or death. The membership should also focus on ensuring that the collective membership remains intact as far as possible and ideally enhanced over time. If these are not maintained, government should retain the ability to cease support and wind down the DMF, recouping their investment.
- 7.5.5.3** With clear parameters established for government intervention, the conditions and type of support that the government can provide should be considered. This should be established to best meet fair and equitable requirements for public funds, ensuring any economic commitment is fair, made on a sound and defensible policy basis and any advice is impartial.
- 7.5.5.4** Options for support that the government provides include funding made available for external activity, funding to seek specialist advice and funding to set up the mutual.

7.6. Type of support available

7.6.1. Capital options

- 7.6.1.1** **Loan to be paid back:** The first option is an interest free loan to be repaid over 10 years. This will require clauses in the DMF constitution to repay the loan. The constitution should also have the option, if agreed to by the board, to repay the loan faster when there are additional reserves.
- 7.6.1.2** Therefore, if the DMF model proves to be successful, the profits that are traditionally returned to members can be used to repay the loan, providing the government with faster repayment and allowing the DMF to move more quickly to independence. This is one way to help foster more 'buy-in' by the members who will see the loan repayment as a priority goal in order to start receiving the benefits members of a mutual traditionally expect to receive.
- 7.6.1.3** Alternatively, the loan can be set at a fixed repayment rate per annum, with any excess funds in the reserve managed by the board. Traditionally, these reserves would be

⁴⁸ International Cooperative Alliance (ICA), *Cooperative Identity*, ICA, [website], n.d.

returned to members. Again, this is an option to improve 'buy-in' from members who will see benefits from the funds as soon as possible.

- 7.6.1.4** Both options are viable to help build member commitment while also providing government with certainty that their investment is repaid.
- 7.6.1.5 Matched grant:** Another option for providing financial support is funding through a matched grant. This will be an equivalent level of public investment to an interest free loan but will also require the members to contribute capital. This approach would support DMF proponents optimizing self-sufficiency as a policy expectation when seeking government assistance.
- 7.6.1.6** Member's contribution helps ensure they are also taking on responsibility for the success of the DMF as they have contributed capital as opposed to being given money. Government involvement on the board and other conditions imposed due to the provision of public funds would then be tied to a time limit instead of a loan. For example, the funding may require the board to include a member of government for a specified period (for example five years), at which time a review would be undertaken to determine the viability of the DMF and any further government requirements.

7.6.2. Governance & Reporting

- 7.6.2.1** The Board makeup should be carefully considered. It may be appropriate to ensure that government representation exists where government has a financial interest in the fund, and that other members are able to provide appropriately robust advice. Specifically:
 - 7.6.2.1 Constitution:** A DMF is required to have a 'one member one vote' rule, regardless of the contribution of the member to the fund. This ensures that all members have an equal vote for board members, and where appropriate, decisions taken by the fund. Aspects of 'better practice' from the DMF and broader mutual sector that should be considered when developing the constitution include a need to ensure members are truly heard in decision making to avoid 'management capture', and ensuring that each of the 'subgroups' within membership are able to be represented on the board (ie avoiding block voting that could 'stack' the board in favour of one membership group). It may also be important in this instance for the Constitution to be written to allow for the raising of Mutual Capital Instruments in the future.
 - 7.6.2.2 Government representative on the board:** This role should be tied to the period of repayment, and the DMF's Constitution should dictate that while there is an outstanding value on the loan, the government should have a representative on the board. This will make the proposal more publicly defensible, and increase accountability while there are public funds tied to the DMF. The board member should be an independent government appointee with relevant expertise and able to ensure a public policy lens is prominent in the Board's deliberations. The appointee should also have a thorough understanding of the insurance sector, and also understands the nature and operations of DMFs.
 - 7.6.2.3 Fund members on the board:** Given the nature of a DMF, the majority of the board must be made up of members of the fund. The board members who are members of the fund should be deeply experienced in their industry. They will need to have a thorough understanding of the spirit of a DMF being focused on 'by the members, for the members' in order for the enterprise to be successful. Further, the member board members should receive specific training in order for them to be better know how to manage the fund, manage risk, and promote membership risk mitigation and cohesion.

7.6.2.4 Other board members: The other board members will need robust skillsets in the law, insurance, and actuarial services, and will require a deep understanding of DMFs. Ideally, they will have experience with mutual funds and understand the ethos that drives the mutual to be successful. This is not the same as someone who has broad experience at a for-profit insurer as the intent of the DMF is for longevity, to guard against demutualisation, and to make a modest profit to deliver self-sustainability in the short to medium term. As such, it may be sensible for the DMF to draw independent board members from the mutual insurance sector.

7.7. Suggested board make up

7.7.1 The board should consist of nine members. One member should be a government representative, five should be members of the mutual and three should be independent experts. At the time that is appropriate, the government representative can vacate their position to be filled by an additional independent and appropriately qualified candidate.

7.7.2 It may be worth considering whether it is necessary to apportion board representation from the various groups that make up the DMF membership. Given the potential membership makeup includes a number of easily defined groups (ie the various Showmens Guild members, outdoor recreation providers, and other AALARA members), there is a potential for the larger membership groups to effectively control the organisation by voting in blocs for directors that represent their industry. This would have the effect of lessening the democratic nature of the organisation, and should be avoided if possible.

7.7.1. Reporting

7.7.1.1 The board should report to the membership and any other bodies required by law as appropriate. While the government has a financial interest in the fund, bi-annual reporting should also be provided to the relevant Minister, through the government representative on the board, to ensure the taxpayer investment in the fund is being appropriately managed. The Minister should also receive copies of audited financial statements in line with the required reporting by the DMF to the membership.

7.7.2. Accountabilities

7.7.2.1 Given the support requested by the sector from government, should this support be provided, the board of the DMF will need to consider additional responsibilities above managing the fund in the best interests of members, extending to a responsibility to be accountable to the government and taxpayers for at least the first five years of operation, or until the initial amount is paid back to government should the loan option be preferred.

7.7.2.2 This accountability will be achieved partially through the inclusion of a government representative on the board, but should be considered by directors in their course of business. It may also be appropriate for this accountability requirement to be canvassed in the DMF's constitution or other governing documents.

7.7.3. Optimising market participation

7.7.3.1 The DMF will need to work within the existing insurance market, seeking commercial insurance from the market where possible and appropriate, as well as through ensuring they operate as a good corporate citizen in line with public and stakeholder expectations of the broader sector. This can be achieved by closely integrating with other sector operators to ensure situational awareness, and ensuring that Directors of the DMF undertake the appropriate training required of directors of such organisations.

7.8. Interaction with States and Territories

7.8.1. Legislative recognition

- 7.8.1.1** It is critical to the success of the DMF and the ongoing viability of the sector that the solution established is accepted by states, territories, local councils and other interested stakeholders as either a form of insurance, or in lieu of insurance where insurance is not otherwise available. Without this acceptance, and as discussed at length above, the DMF will not provide sufficient cover to members to allow them to operate.

7.8.2. Perceptions around discretion

- 7.8.2.1** The main beneficiary of the DMF beyond the fund membership, will be the consumer who will continue to be able to enjoy showrides, sideshow alleys, and other amusements at shows and bespoke leisure centers, have comfort that high levels of safety are maintained, and in the event of an accident, have claims paid.
- 7.8.2.2** One key challenge to providing this experience is perceptions around the discretionary nature of a DMF.
- 7.8.2.3** Property owners and councils will not only need to accept DMF membership in lieu of insurance, but they will need to have confidence in the discretion exercised by the board. Mitigations to perceptions of higher risk are most appropriate to come from the board members, with key experts and a government representative there to provide strong confidence in the reliability of the fund.
- 7.8.2.3** By their nature, DMFs provide discretionary cover. Under insurance cover, a policy holder has a legal right to indemnity from the insurer for claims within their cover, and cover is determined by policy terms and therefore is generally certain. Under a DMF, members have a right to have a claim considered by the directors or trustee, but no right to indemnity. A DMF must have an unfettered discretion on accepting claims. Further, members of a DMF do not have the benefit of the Insurance Contracts Act 1984 (Cth) which provides a range of protections.
- 7.8.2.4** Further, as indicated through the consultation process, the technical term ‘discretionary’ can lead to the belief that there is a lower requirement to pay claims. Organisations consulted with disagreed with this perception, pointing instead to a view that the discretionary nature and board determination powers of a DMF enable the fund to operate in the grey areas of claims in a way that more often than not allows claims to be paid out, even when there is no strict requirement to do so, if it would not damage the overall standing of the fund.
- 7.8.2.5** Insurers largely operate in black and white terms, with an eye on shareholder returns. If an insured party falls slightly out of the explicit and complicated terms of the agreement, it is common for the claim to be denied, and in most instances where a dispute arises, AFCA will uphold the decisions because of the wording of the contract. In contrast, organisations consulted with suggested that if the intent of the DMF is to ensure coverage for an event or accident, which then occurs, where a member took appropriate and effective risk mitigation strategies, a board of a DMF is likely to pay out the claim. Further, the collaborative approach to risk and extensive risk mitigation requirements means that the DMF is more likely to be able to defend spurious claims.
- 7.8.2.6** Clear and effective communication about the true benefits of the discretionary nature of a DMF is vital if the government and public support of the proposal is to be earned. It should be made clear that the end consumer may secure a better result in instances of accidents,

through extra safety measures imposed by the DMF for membership, and effective claims management.

- 7.8.2.7** The entities proposed to be covered by the DMF are likely to be required by third parties to comply with public liability, and also possibly products liability, insurance obligations as a result of contract they enter into to provide services. If membership of a DMF is to be accepted by counterparties in lieu of insurance, contracts will need to be amended to accept the arrangement.
- 7.8.2.8** This will require counterparties being comfortable with the discretionary nature of the cover, and being confident that any obligations they have are satisfied or can be satisfied by allowing DMF cover in lieu of insurance. Consideration will need to be given to contractual liability caps linked to insurance recoveries, noting that a DMF could thwart the intent by denying cover in its discretion.
- 7.8.2.9** It is noted that the proposal to form a DMF in NSW to provide cover for building certifiers is reliant on the NSW Government accepting membership of a DMF in lieu of insurance, and as such there is a precedent for this acceptance. It is noted that the NSW Government has been willing to consider this option only because they require the business sector to hold insurance, and are willing to consider it while no commercial insurance is available.
- 7.8.2.10** Similarly in the situation of AALARA members, the counterparties to contracts require members to hold insurance, and insurance is currently unavailable in the commercial market. Should this situation change, however, it will have implications for the ongoing viability of the DMF. For example, should commercial insurance become available again in the future, it is likely that DMF membership will not be accepted. For that reason, the possibility of a change in the insurance market, and how it is intended that the DMF will respond, should be built into the DMF rules. It would be possible to manage a return of the commercial insurance market in this space by retaining less risk in the DMF and purchasing more commercially available insurance through the DMF for members.
- 7.8.2.11** While the Commonwealth cannot require Non-Commonwealth Government counterparties to contract to accept DMF membership in lieu of insurance, it can lead by example, and seek support for the acceptance of a DMF from State, Territory, and local governments. Each of the State, Territory, and local governments will likely face criticism should a potential solution for the insurance crisis for the sector be found, which they are not willing to support in their jurisdictions. It is likely that the government acceptance of a DMF will lead to private sector acceptance of the arrangement.

7.8.3. Legislative changes and harmonisation

- 7.8.3.1** Each state, territory, and council has in force legislation that requires providers of certain services in the amusement and leisure sector to hold certain types of insurance in order to be able to operate in their jurisdiction. In most of these instances, the requirement to hold insurance is to provide protection to the end user of the service (the consumer). In some instances, it is also required to guard against any liability the relevant authority would be subject to in the event of an accident occurring on land they are responsible for. Cover levels differ, but all pieces of legislation reviewed by Ashurst in their report to the review, clearly require insurance to be provided.
- 7.8.3.2** Ashurst's advice on harmonising or otherwise satisfying legislative requirements across the states and territories points to the fact that Commonwealth legislation can 'override' State legislation, provided the relevant legislation relates to a Commonwealth power under the constitution. In this instance the relevant sections could be s51(xiv) with respect to insurance (other than State insurance) or under s51(xx) with respect to corporations. A

direct or indirect consistency between the Commonwealth and State law under s109 of the Constitution would be required. However, the Commonwealth cannot legislate to impair a State's capacity to function as a government.

- 7.8.3.3** Deeming legislation might require providing DMF members or licensees with a statutory right to have a DMF considered equivalent to public liability insurance. This would create the relevant inconsistency needed to make any State legislative definition of 'public liability insurance' invalid if it excluded reliance on a DMF.
- 7.8.3.4** Finally, while the Commonwealth might seek, subject to constitutional limits, to legislate to affect the meaning of 'insurance' under State statutes by way of changes to the Insurance Contracts Act 1984 or otherwise under legislation, this may have a detrimental affect on the proposed and other DMFs as it would impact regulatory requirements.
- 7.8.3.5** Further details about types of legislation that could require amendment are available at appendix B.
- 7.8.3.6** For a DMF in this industry to be successful, each of these pieces of legislation would require amendment to, in certain circumstances, allow for membership of a DMF in lieu of insurance under certain circumstances.
- 7.8.3.7** Ideally, a process of legislative harmonisation would be undertaken to ensure standardised application across the states and territories. It is important to note that this amendment of legislation is a matter for the states and territories but is a threshold issue for the successful operation of a DMF in this sector. If the states and territories are unable or unwilling to amend their legislation to accept DMF membership in lieu of insurance, the DMF members will be in breach of their regulatory obligations by operating without insurance, and landholders will be in breach of their obligations by allowing DMF members to operate without insurance.
- 7.8.3.8** It is not intended that the change to allow DMF membership in lieu of insurance be made permanent, as this may cause concerns for jurisdictions that would prefer an insurance product be in place.
- 7.8.3.9** Instead, a declaration of insurance market failure for a particular sector could trigger a legislative provision that allows for acceptance of membership of the DMF in lieu of insurance for a period, say five years, to allow the sector to establish or ramp up the activities of a DMF to provide cover for that sector. A minimum period would be necessary to allow the DMF sufficient time to develop its operations to an extent that it can maintain the confidence of governments in its capacity to provide adequate cover for members and consumers.
- 7.8.3.10** On the approach to the nominated time period elapsing, the relevant authority could make a further declaration of market failure, or should the sector have a strong preference to maintain cover through a DMF, the sector could make the case to relevant state and territory governments that membership of the DMF should be considered sufficient for insurance purposes for a further defined time period, or in perpetuity. An adequate lead time would enable an orderly transition.
- 7.8.3.11** Ideally, this legislative change would be harmonised across jurisdictions to provide certainty to small businesses that travel between regional and metro shows. Legislative harmonisation, however, is neither a quick or easy process. In examining other harmonisation efforts around the Commonwealth, there is often a time span of years to have effective legislation.

7.8.3.12 For example, the harmonisation of the recognition of co-operatives (also known as the Co-operatives National Law) offers a good example of the length of time around harmonisation. The new regulatory model was initially proposed in a Regulatory Impact Statement (RIS) in 2014 by the Ministerial Council on Consumer Affairs (established by the Council of Australian Governments or COAG). NSW was the first jurisdiction to implement the legislation on 3 March 2014 and Queensland was the final jurisdiction to implement on 1 December 2020.⁴⁹ So, whilst the regulatory model was successfully implemented, the duration from RIS to effective regulatory environment ultimately took over 6 years. In this instance, states and territories would need to move significantly more quickly to allow service providers to continue operating in their jurisdictions, and jurisdiction-specific legislative reform is likely to be the most expedient first step.

7.8.3.13 In any legislative change as contemplated above, consideration needs to be provided to outcomes for the ultimate beneficiary of any insurance policy, the consumer. Implementing change that would allow for DMF membership in lieu of insurance may result in consumer harm in the event that a large or multiple claims are made on the DMF, and the DMF then either exercised discretion not to pay the claim, or the DMF failed due to lack of funds. The structure of the DMF is critical to providing as much protection as possible, and consumers should be made aware of the discretionary nature of claims payments prior to accessing the services provided by DMF members.

7.8.4. Safety and operational standards & verification

7.8.4.1 Standards are needed to assure safety of products, to ensure that products and materials are tailored-made and fit for their purpose, promote the interoperability of products and services and promote common understanding of a product. A standard consists of a technical specification or other precise criteria designed to be used as a rule or guideline that can be considered as a summary of best practice.

7.8.4.2 There are Australian and international Standards, as well as standards developed by certain regulators, and industry standards developed by professional industry associations for the purpose of maintaining a standard in performance for the particular activities within the industries.

7.8.4.3 There are internationally accepted standards for amusement devices including; ASTM F 24, EN 13814 & ISO 17842/17929. Australia also has local standards for amusement devices under Australia AS 3533.

7.8.4.4 The Australian standards related to the amusement industry and amendments include:

- ASNZS 3002:2008: Electrical installations for shows and carnivals
- AS 3533.1-2009: Design and construction
- AS 3533.1-2009/Amdt 1-2011: Design and construction
- AS 3533.2-2009: Operation and maintenance
- AS 3533.2-2009/Amdt 1-2011: Operation and maintenance
- AS 3533.3-2003: In-service inspection
- AS 3533.4.1-2005: Land-borne inflatable devices

⁴⁹ Fair Trading NSW, *Co-operatives national law*, [website], n.d.

- AS 3533.4.1-2005/Amdt 1-2007: Land-borne inflatable devices
- AS 3533.4.3-2007: Roller coasters
- AS 3533.4.4-2011: Concession go-karts
- AS 3533.4.5(Int)-2012: Waterborne inflatables

7.8.4.5 Ride failure can be mitigated through complying with Australian standards for inspection, maintenance, and testing of amusement rides. The risk of injury or harm from ride operation or attraction use can be further mitigated by competent set-up, proper management and appropriate supervision, and applying the necessary operational standards.

7.9. Case Study

7.9.1 An amusement ride known as The Octopus broke, causing the corresponding sweep arm to buckle at the Fred's Pass Show in May 2019. The ride took two revolutions before coming to a stop, whereby the gondola attached to the arm of the ride, carrying two adult patrons crashed to the ground. A structural condition report, which included a welding inspection report, was commissioned as part of the NT WorkSafe investigation. An audit of the records for both amusement devices indicate 'Non-Destructive Testing' may not have been conducted at the frequency required under the Australian Standards for that class of device. Magnetic particle testing showed welds and rod ends for all 8 sweep support rods were defective. This suggested to NT Work Safe that ultrasonic testing and magnetic particle testing may not have been conducted on the welded connections and repair welds.

7.9.1. Dreamworld Aftermath and standards

7.9.1.1 The Thunder River Rapid Ride failure at Dreamworld in 2016 had occurred just prior to the planned risk assessment of the ride. The coroner's report detailed the risk information pertaining to the ride was not stored in a central location and therefore accessing this information was difficult to complete the audit. However, the report commented on records provided by Ardent Leisure during the investigation that suggested further modifications for the Thunder River Rapid Ride such as implementing a single button shutdown and sourcing further wood for the conveyer. Unfortunately, these records were not supplemented with further details around the context or reasoning for these modifications nor the decision to not proceed⁵⁰ Following the Dreamworld incident, the Office of Industrial Relations (OIR) Queensland has increased the number of yearly risk assessments pertaining to Theme Parks or amusement devices⁵¹

7.9.2. Work Safe Australia Standards

7.9.2.1 Safe Work Australia has provided packages of guidance material to support the WHS Act 2011 and the WHS Regulations 2011. For guidance to comply with the WHS Act, stakeholders may refer to the 'Managing risks of plant in the workplace – Code of Practice 2013' to determine whether or not the obligations under the Act are being complied with. For amusement devices the Code references 'Australian Standard AS3533.1 – 2009: Amusement Rides and Devices for design, manufacture and use'.

⁵⁰ CORONERS COURT OF QUEENSLAND, *Inquest into the deaths of Kate Goodchild, Luke Dorsett, Cindy Low & Roozbeh Araghi at Dreamworld October 2016*, Queensland Courts, February 2020, pp 37 & 82.

⁵¹ CORONERS COURT OF QUEENSLAND, *Inquest into the deaths of Kate Goodchild, Luke Dorsett, Cindy Low & Roozbeh Araghi at Dreamworld October 2016*, Queensland Courts, February 2020, p 242

7.9.2.2 A detailed inspection of an amusement device must be carried out at least once every 12 months by a competent person under Work Health and Safety laws. The annual inspections of these devices are legally required to be recorded in a logbook and it is advised these records are kept in a central location.⁵²

7.9.3. AALARA Standards

7.9.3.1 When the insurance market last hardened in the amusement, leisure, and recreation sector, the then board of AALARA developed a series of standards by which members were expected to abide. This set of safety standards should be reviewed and updated to ensure they are at the very least compliant with current safety standards and, if possible, provide a baseline of acceptable standards that exceed the current required minimums. These standards incorporate relevant international requirements given no major rides or attractions are designed and manufactured in Australia. Meeting this standard and being regularly assessed against them should then form part of the requirements of membership of any DMF.

7.9.4. Showmen's Guild Safety Management System Standards

7.9.4.1 The AALARA membership covers several activities also provided by the members from the Showmen's Guild. Consequently, many of the activities bound by the Showmen's Guild safety standards for their members overlap with many activities undertaken by the AALARA membership.

7.9.4.2 The Showman's guild ensures their members establish a Safety Management System in order to achieve a high standard of safety performance for their devices. The guidance provided to their members for health and safety covers not only maintenance standards for amusement devices but guidance on best practice for training, first aid, risk management and record keeping.

7.10. Consumer awareness

7.10.1 Consumers of any product or service provided publicly, or by a private business, are entitled to a reasonable expectation that the provider of the product or service will exercise due care and skill in providing that product or service. Also that in the unlikely event that things go wrong, or an injury occurs, the provider will have the ability (through insurance or otherwise) to compensate the consumer to some extent for loss or injury arising from that issue. Were they to consider the question of insurance, it would be a reasonable expectation of consumers engaging in an amusement, leisure, or recreation activity that the provider of the activity would have sufficient insurance available to cover any injuries arising from a machine fault or failure, misfeasance causing harm, or negligence by the provider.

7.10.2 In the event of membership of a DMF being accepted by regulators in lieu of insurance where insurance is not available or unable to be secured to the requisite level, there is a strong argument that consumers should also be made aware of this. This would allow consumers to make their own best judgements as to whether to accept the risk or participating in an activity. This disclosure to consumers would, of course, need to be balanced against the potential risk to the business in both deterring customers and administrative burden.

⁵² Safe Work Australia (SFA), *Amusement devices information sheet for annual inspections and records*, SFA [website], 20 March 2020

- 7.10.3** Many businesses in the adventure, leisure, and recreation sector already require patrons to sign liability waivers which purport to transfer the risk to the patron prior to engagement in the activity. It would not, therefore, seem additionally burdensome to ask those businesses to provide a written disclosure to patrons advising them of the discretionary nature of the protection they assume is in place. Equally, while amusement ride operators do not usually require each patron to sign a liability waiver prior to riding, they do often display 'terms and conditions' either on the ticket, or at the ticket booth prior to tickets being purchased. This information could be amended reasonably easily to provide advice to consumers about the discretionary nature of the DMF protection.
- 7.10.4** Further, as COVID-19 has made 'checking in' a ubiquitous and accepted part of life, the industry or the DMF could seek to develop QR Codes or similar that require consumers to acknowledge the different protection being afforded by the DMF membership prior to participating in the activity. While this would not diminish the liability of the business owner in the event of a preventable accident, it would go some way to ensuring consumers were appropriately apprised of risks prior participating.
- 7.10.5** It may also be possible for consumers to 'self-insure' to an extent, prior to participating in a ride or other amusement activity. A recent market entrant, Flip Insurance, backed by HCF (a large health insurance mutual) provides ad-hoc personal injury insurance with agreed caps on payouts depending on the severity of the injury. The proposed DMF could partner with an organisation such as Flip and encourage patrons to secure their own personal insurance prior to participating in a ride or other activity, or alternatively source additional cover for patrons. This model shifts at least part of the burden of insurance onto the consumer, thereby supplementing any claim made on the DMF. It should be noted that this model may also limit the size of the claim able to be made by the consumer.

7.11. Local Government

7.11.1. Land management

- 7.11.1.1** As discussed above, local government land management regulations will need to be reviewed and amended where necessary to accept membership of a DMF in lieu of insurance coverage in order to allow operators to continue providing services on local government land. Ideally this acceptance process would be conducted in concert with any other legislative changes required at state and territory level, particularly given local government's prominent role in the management of crown land.
- 7.11.1.2** Delegated committees of management would also need to be engaged in this DMF acceptance process. The advantages of harmonising this change across jurisdictions has been previously canvassed.

7.12. Questions for consideration:

13. What alternative models of financial support could be offered?
14. Are the governance and reporting proposals appropriate? Is the suggested board make-up likely to provide the best results for the DMF?
15. Are there other issues that need to be considered in relation to interaction with states and territories?
 - a. Are the perceptions around discretion presented accurate? Are there other perceptions that should be considered?
 - b. Are there specific legislative barriers that should be considered?
16. Are the current safety standards/regulatory environment/Quality Assurance verification purposes fit for purpose? If not, how would you suggest these be amended?
17. What needs to be undertaken to ensure consumer awareness around the DMF? Are there alternative methods for consumers to manage their own risk?

8. INDUSTRY LEADERSHIP

8.1. Sectors to be included

8.1.1 A DMF tends to be more successful when it has clearly defined members.

8.1.2 For example, the National Federation of Retail Newsagents (NFRN) Mutual Limited in the UK were able to leverage off their clearly defined, retail newsagents' organisation membership to have a strong initial membership base, a mutual mindset and beneficial risk-management practices. The membership demonstrated a significant economic and social benefit to the UK, however required a DMF approach due to issues with affordability.

8.1.3 The proposed DMF should leverage industry associations' membership, creating a base that has social and economic benefits to Australia.

8.1.1. AALARA Membership

8.1.1.1 AALARA has a diverse membership, including show ride and amusement operators, most of whom are also represented by the various Showmen's Guilds (discussed below), larger amusement parks, trampolining centres, and go-kart racing providers among others. The industry AALARA represents has an estimated revenue of \$1.3 billion and employs approximately 7,000 people.⁵³

8.1.1.2 Their membership can be approximately broken down to the numbers of individual businesses below:

• Transportable Rides & Attractions	162
• Manufacturers & Industry Suppliers	80
• Theme Parks & Outdoor Attractions	42
• Indoor Play Centres	38
• Engineers	37
• Go Karting	12
• Trampoline Centres/Parks	10
• Events & Festivals	8
• Aquatic	6
• Laser Tag	2
• Student	2
• Maze	2

8.1.1.3 The membership is a combination of transportable attractions and fixed installations with a variety of risk profiles and risk management practices. A large proportion of the AALARA membership would be considered family businesses with many spanning multiple generations.

8.1.1.4 The intention of the AALARA board is to open membership of the DMF to a range of businesses facing difficulty in accessing insurance on what they consider to be reasonable commercial terms. This includes the caravan industry and the outdoor adventure industry,

⁵³ A Allday, IBIS WORLD. *Amusement Parks and Centres Operation in Australia*, 2020 Page 7.

should businesses in those industries be interested in joining, and meet membership criteria around risk mitigation strategies.

8.1.2. Showmens Guild Members

8.1.2.1 In this scenario, the Showmens Guild membership provides an opportunity for a clearly defined DMF membership group which could fit well within the AALARA proposal for a DMF. These are the enterprising business people with multi-generational knowledge, expertise, skillsets, and invested passion for the agricultural show. They are passionate about entertaining the nation in all the regions they can reach. In addition, AALARAs membership base have similar expertise and can embrace the mutual mindset to help a DMF succeed.

8.1.2.2 Importantly, given the proponents are seeking government support, no business should be denied access to the mutual simply because they are not a member of an industry association. This kind of 'third line forcing' is contrary to the spirit of DMFs and public policy expectations. Of course, businesses who are not members of industry associations will still need to adhere to the strict entry requirements and risk mitigation behaviors required of members, and the ethos of the mutual.

8.1.3. Social and economic benefit of membership

8.1.3.1 When considering whether its involvement is required, the Government should consider the economic and social benefit of the businesses likely to make up the DMF membership. There are clear ways to establish a potential membership base for a DMF. The membership base proposed by AALARA, if accepted as the members of the DMF, have clear value not only to the economy, but to communities and the Australian way of life.

8.1.3.2 The regional show is vital to the economic and cultural value of rural communities. Shows, amusement parks, and amusement center operations bring \$1.3 billion in revenue to the Australian economy per annum.⁵⁴ However, the dollar figure does not do justice to the huge importance of shows, fetes and amusement parks to the communities they operate in.

8.1.3.3 As an industry in its 200th year of operation in Australia, agricultural shows are a bedrock of regional and rural Australian culture. Many people and businesses rely on the regional show as a means to engage with their community and build business relationships. It is not simply a date on the calendar or an event to attend, but a linchpin of the year for businesses and individuals alike, providing an opportunity for community and business growth and development. Further, agricultural shows offer children and young people valuable opportunities. The shows help children and young people develop leadership skills and feel connected to their community, an important part of their growth and development, identity and education.⁵⁵

8.1.4. Outdoor Activity and Caravan Industry Sectors

8.1.4.1 During this review ASBFEO consulted with the Outdoor Council of Australia (OCA), the national peak body which represents outdoor adventure activity businesses. The OCA noted with interest the discussions around the provision of a DMF for the broader AALARA sector but ultimately considered the risk profile and operations of their membership group

⁵⁴ A Allday, *Amusement Parks and Centres Operation in Australia*, IBIS World, 2020, p 7

⁵⁵ Queensland Chamber of Agricultural Societies Inc, *An Economic & Social Impact Study of Australian Agricultural Shows, 2012*, pp 35-37.

to be so removed from the amusement sector as to make creating a cohesive membership base including OCA members difficult.

- 8.1.4.2** The Caravan Industry Association of Australia (CIAA) was also involved in initial discussions around the AALARA proposal but seems to be more aligned with the adventure activity sector than the amusement sector. It is also interesting to note that within the caravan industry public liability insurance is currently still available although premiums are increasing. Some aspects of caravan park life, such as ‘bouncing pillows’ and pool slides are being highlighted as exclusions under most insurance policies.

8.2. Risk, Claims Data and Actuarial Analysis

- 8.2.1** As discussed earlier in the report, past claims data has been difficult to source from the sector, leading to significant challenges for the actuaries contracted to perform analysis.
- 8.2.2** What has been achieved in the way of actuarial analysis suggests that the sector was broadly unprofitable for the insurance sector for several years prior to the exit of the market, with loss ratios running at an average of 160% for some time. This suggestion of unaffordability is further evidenced by the Coversure offering, which is widely reported by industry to require premiums double that of previous years, and for half the amount of coverage.
- 8.2.3** This suggests that while a DMF may be a solution for businesses seeking insurance and unable to secure any in the market, it will not, at least initially, offer the types of cost savings hoped for by the proponents. The intention of a DMF will always be to astutely manage claims, and in doing so build a pool that would allow for the reduction in premiums over time. While this may be possible, it should not be relied upon by the potential membership as an assured outcome of establishing the DMF, and adds to the case for Government support with establishment capital.
- 8.2.4** It should also be noted that prior to the period of time in which insurance was completely unavailable for the sector, the sector was making representations about the unaffordability of the insurance then offered. This suggests that should the DMF be established, there will remain some members of the industry who find membership unaffordable.

8.2.1. Data Collections & Assessment

- 8.2.1.1** Data collections and assessment are ongoing, with a view to finalising claims forecasting an actuarial analysis of the premium pool required in the coming weeks. Once those are available to this Office, they will form part of our final report and advice to Government.

8.3. DMF member entry requirements

- 8.3.1** The DMF will need to set strict entry requirements as discussed briefly under the previous sections entitled ‘risk mitigation’ and ‘good governance’. This is because a DMF is only as robust as it’s weakest member, and members without good risk management strategies and business practices present an increased risk that the rest of the membership will be required to support.
- 8.3.2** In this instance, member entry requirements in addition to the membership contribution could include, but should not be limited to:
- Agreement to abide by, and be audited against industry-developed safety standards that are no less rigorous than the Australian and International Standards discussed above, and updated regularly as best practice develops;
 - Provision of a complete record of past claims that accurately reflects a ‘good’ claims history against industry norms;

- Agreement to undertake training as required by the DMF board;
- Agreement to submit to 'spot audits' of equipment should the board require it;
- Commitment to bring all potential claims to the DMF within a specified time frame, including providing an undertaking not to attempt to 'self-manage' claims;
- Accepting an excess and accompanying low level claims management protocols; and
- Consideration may be required as to refusing coverage for certain machines or activities deemed by the board to be a higher than acceptable risk.

8.4. Formal Proposal Development

8.4.1 The final proposal for the AALARA DMF is still in development.

8.4.2 Given the range of groups likely to form part of the membership, it may be appropriate or desirable for the development to include workshops or co-design sessions, particularly for parts of the proposal that point to membership requirements (including industry standards and any training to be mandated), governance practices, and claims handling processes.

8.4.3 Ensuring that there is a co-designed process with appropriate participation of potential and future members will be critical to ensuring the acceptance of these requirements by the DMF membership. Such a process will also drive feelings of ownership amongst the membership, leading to greater 'stickability' of members as well as a greater focus on 'protection' of the fund from the membership.

8.4.4 Finally, the co-design process would ensure a greater awareness of the DMF amongst potential members, driving membership awareness and interest throughout the industry.

8.5. Questions for consideration:

18. Are there other sectors that should be included in membership of this DMF?
19. Are the proposed DMF member entry requirements adequate? What additional requirements could be considered?
20. What else should be considered in the process of the final proposal development?
21. Are the key success features identified accurate? Are there other features that should be considered?

9. 'FIT FOR PURPOSE' SOLUTION

9.1. Key Success Features of a suitable DMF

9.1.1. Member-led and shared purpose

9.1.1.1 Membership works best when it consists of individuals who feel as though they are all a part of the same "club". Perceptions of cross subsidisation can lead to disputes amongst membership, diluting the mutual ethos and creating difficulties for the board and management. This is particularly problematic in the formative years of a mutual. This risk has been identified and highlighted in the advice received from Ashurst on 23 July 2021.

9.1.1.2 Ashurst have noted the benefit of having members with differing risk profiles, as this will lead to a diversified risk pool. To counteract the possibility of discontent between members if some feel they are subsidising others, Ashurst has recommended:

- requiring all members to adopt and implement good risk management and audit compliance;
- rewarding members with low claims by having risk rated premiums;
- rewarding members with low claims with lower deductibles and/or an aggregate on their total deductible payments in any year;
- requiring co-insurance for 'bad risks', i.e. a member pays a portion of the claim above the deductible; and
- putting an aggregate limit on a member's right to coverage in any one year, noting that this may leave third parties uncompensated in significant events and expose members to additional personal claims exposure unless 'gap' insurance can be accessed.

9.1.1.3 The key to industry support is to have members who have a strongly vested interest in the success of the mutual. Traditionally this is sought through initial capital investment and shared purpose or challenge.

9.1.1.4 While capital investment (i.e. 'skin in the game') is one option for the proposed DMF there are other levers to promote a sense of ownership of the fund. These levers include the loan repayment conditions as members will be liable to repay the loans and then be invested in it. Further, given the current market failure, the membership will be committed to the mutual as they perceive it to be their only option for business and sector survival. The DMF should then build on these ties with incentives and benefits to help further drive a sense of personal ownership.

9.1.2. Design, Governance & Capacity

9.1.2.1 As discussed previously, DMFs are complex vehicles that can be challenging for people without previous corporate experience, or insurance including technical knowledge, to run effectively. The design of the DMF must therefore require that directors are appropriately skilled and have the capacity to undertake their duties effectively.

9.1.2.2 The sections of this report titled 'Good Governance' and 'Governance and Reporting' deal with specific suggestions for the makeup of the Board of the DMF, and the need to ensure sufficient capacity amongst the board membership to effectively run the fund. This is especially critical where the end aim of the DMF is to become self-managed over a period of time, and cease relying on the expertise of mutual managers.

9.1.2.3 Examining successful DMFs, it is clear that along with expectations that directors will have the necessary skills to effectively manage the fund and any claims that are presented to it, the most successful DMF directors are passionate custodians of the culture of the entity, and the principles of mutuality. Members of the mutual sector cite numerous examples of attempts by independent board members of mutuals and co-operatives or external parties, to demutualise large and successful member-owned firms with a view to profiting from the intergenerational build-up of reserves. In each of these examples, the success or failure of the demutualisation attempts were largely attributed to the determination of board members to retain the mutual, or a willingness to accept the demutualisation. The DMF should therefore be designed, as much as is possible, to guard against attempts at demutualisation.

9.1.3. Scale

9.1.3.1 The scale of the DMF is important to its potential success. In theory, a larger membership base is preferable to allow a greater group over which to spread risk. However, it is critical to ensure that the membership is not expanded at the expense of keeping the risk the DMF is exposed to, to an acceptable level. As such, understanding and analysing the risk profiles and claims history of potential members is critical to the success of the undertaking. It is important that the DMF has a diversified risk pool, however it could lead to discontent amongst members if some members feel they are subsidising others. To counter this perception, the DMF could implement those good governance/best practice processes previously highlighted, including:

- requiring all members to adopt and implement good risk management and audit compliance;
- reward members with low claims by having risk rated premiums;
- reward members with low claims with lower deductibles and/or an aggregate on their total deductible payments in any year;
- co-insurance for 'bad risks', i.e. a member pays a portion of the claim above the deductible; and
- put an aggregate limit on a member's right to coverage in any one year, noting that this may leave third parties uncompensated in the event of a multi-party or large claim.

9.1.4. Participation

9.1.4.1 To further bolster industry support and membership commitment, the DMF board and management should be required to engage regularly with their members, to drive cultural cohesiveness. There is an opportunity for the board to share success stories from members, data around risk and how to prevent it, and a regular focus on sourcing and addressing member feedback.

9.1.4.2 Members need to be as involved as much as possible in shaping the direction, risk mitigation and culture of the DMF. This will help to differentiate the DMF from general insurers and will help to promote the non-financial benefits of the scheme including 'value add' training and technical services, particularly where the market may soften and members may be inclined to look at alternative insurance opportunities.

9.1.5. Risk management & mitigation

9.1.5.1 Similar to the ethos of contestable contractual arrangements, a process is needed to ensure that safety requirements and maintenance operator standards are reliable. While this is already part of best practice in the industry, it is imperative that the safety

requirements are clearly documented and reviewed by appropriately qualified specialists to ensure that they are suitable.

- 9.1.5.2** Compatibility with and confirmation of the suitability of standards by the appropriate workplace safety and/or competent authority in each jurisdiction is recommended.
- 9.1.5.3** Once standard procedures and requirements for safety and maintenance are documented and vetted it should become a condition of membership that all members follow these procedures. Regular engagement with members will be one way to monitor uniform implementation. Additionally, it may be worth considering implementation of an audit process to ensure member compliance.
- 9.1.5.4** Operators will need to undergo an accreditation process in line with safety and maintenance requirements. The likely membership base already well and truly meets these requirements as they are based on international standards, however accreditation will be necessary to ensure the effectiveness of the DMF and bolster support for the safety provisions of members, and security of the fund. The accreditation process will also assist in building ownership and a community ethos as all members will have similar practices.
- 9.1.5.5** Certification and auditing professionals should consider their own liability protection and might benefit from participation in a PSC scheme.

9.1.6. Stickability

- 9.1.6.1** The question of stickability has been canvassed elsewhere in this report as a key component of the durability of a DMF. The stickability or propensity of members to remain engaged with the DMF is unlikely to be an issue where there is a lack of alternative insurance cover that meets the needs of the sector.
- 9.1.6.2** Where the insurance market softens and alternatives are available, potentially through loss-leading offerings from large insurers intent on regaining market share may impact on DMF participation. The DMF needs to ensure members will remain loyal to it, despite perhaps being unable to provide the cheapest coverage.
- 9.1.6.3** Despite a DMF not having a profit motive, and therefore not needing to provision to make a return to shareholders, they will typically hold smaller reserves to ensure premiums are as low as possible, and will therefore have to appropriately adjust premiums each year leading to them being unable to compete with the insurance market on price alone.
- 9.1.6.4** As such, the offerings from the DMF to members need to be compelling, and viewed as providing real value above and beyond the amount spent on premiums. These additional offerings should be developed over time, and only when the DMF is in a position to consider diversifying their offering, but could take the form of:
 - industry training, including training around best practice operations, marketing, business support and business development;
 - recognition amongst consumers and land owners as 'best practice' organisations, such as with a 'tick of approval';
 - business support, possibly through the DMF contracting reliable and expert bookkeeping, engineering or legal services in bulk for their membership at reduced prices;
 - group buying of parts and products required for servicing of rides, along with other inputs; and
 - marketplaces or brokerage services for members looking to sell businesses or equipment, or for potential members looking to purchase businesses.

- 9.1.6.5** While these services would need to be carefully managed and should not detract from the fund's core purpose, the DMF membership could look to emulate or partner with existing, successful mutuals or co-operatives to provide these services to, and drive real value for members.

10. Contestability

10.1. Manager

- 10.1.1** There are a small number of experienced mutual managers in Australia, including Aon, JLT, and Regis Mutual Management. Mutual managers are critical to the set up and success of the DMF, particularly where the businesses that will be members do not have significant experience in forming or running an insurance business. Given the vulnerable nature of many of these businesses, the mutual manager must be trusted to support the sector-specific knowledge of the directors to drive the best outcomes for the DMF.
- 10.1.2** Throughout our consultations with existing DMFs in Australia and internationally, a strong theme developed around the perceived conflict of interest of brokers acting as the mutual manager emerged also.
- 10.1.3** Existing DMFs were at pains to point out that a broker trying to write business into a fund they are managing may cause a conflict with ensuring the best interests of the fund are held as a priority. Consideration should be given to addressing and ensuring ongoing management of any perceptions of conflict of interest in the mutual manager.
- 10.1.4** To ensure that proponents of potential future DMFs are genuinely acting in the best interests of the potential members, it is strongly recommended that the fund manager be subject to a periodic open competitive process. Even where they have assisted in the development of the proposal for the DMF, and particularly if government is providing support in the establishment of the DMF, this contestability dimension is important in maintaining confidence in the fund's operation.
- 10.1.5** The initial contract for fund manager, should be contested through an open tender process, where the process can be modelled on current government (non-panel) procurement practices. The length of the initial contract should be short and renewals should be conducted at one to two year periods until the loan is repaid, or at a five-year review.
- 10.1.6** Once the loan is repaid or if determined at the five-year review, it may be appropriate for the DMF to consider entering into longer term contracts with service providers. The initial, shorter contracts will allow Government greater comfort that the management is delivering value for public capital investment.

10.2. Legal and actuarial services

- 10.2.1** Similar to the fund manager, any legal services or actuarial advice sought by the fund in the period of loan repayment or government involvement, and ideally in perpetuity, should be subject to a periodic competitive process. This process should be separate to the process to appoint a mutual manager, to ensure proper engagement of the range of service providers by the mutual manager.

10.3. Claims Handling

- 10.3.1** Claims handling needs to be carefully managed by the mutual manager in conjunction with the board, in accordance with the policies and procedures established for the DMF.

- 10.3.2** Our consultations with regulators have uncovered an amount of concern that the discretionary nature of a DMF will lead to valid claims being denied. Our consultations with the domestic and international mutual industry, however, point to a culture where claims are rarely denied, and in fact are often paid despite their not meeting the requisite criteria and there therefore being no obligation on the DMF to do so.
- 10.3.3** While this intention of boards of established DMFs to ‘do the right thing’ by their members and consumers is laudable, it must be supported by:
- strong financial reserves to allow for sufficient coverage of future, valid claims;
 - clear internal policy parameters and soundly developed and replicable rationale, so as to support consistency and avoid accusations of ‘favouritism’ by directors;
 - a clear statement that the application of discretion does not set a precedent for future claims; and
 - a broad agreement from the membership that the exercise of the discretion is considered reasonable in the circumstances. A member vote may be required to ensure this agreement to the clear policy parameters.
- 10.3.4** A strong theme of our international consultations has also been the need for the DMF, particularly when newly established, to deny and be willing to defend claims it considers to be spurious.
- 10.3.5** This practice has been highlighted as a point of difference between a well-managed DMF and commercial insurers, who are known to pay small claims rather than engaging in potentially costly proceedings to defend them. Our international consultations strongly reinforced the benefits of fighting spurious claims to ensure the DMF developed a reputation of successfully defending claims, thereby reducing any perception they were a ‘soft touch’.
- 10.3.6** Those we consulted with suggested that such action leads to ‘no win, no fee’ legal representatives being less likely to advise clients to undertake action where the claim is unlikely to be successful, thereby protecting the DMF from such claims into the future.

10.4. Feasibility and Durability

10.4.1. Protection against demutualisation

- 10.4.1.1** If a mutual fund is successful, there is often a temptation to demutualise and publicly list the company to access the capital held in the fund. Such temptation has been the crux of many demutualisations in the global history of the mutual sector. If government support is provided, it must be clearly stated in the governing documents that the fund is not able to be demutualised in such a way as to deliver profit or short-term reserve returns for members and board members.
- 10.4.1.2** Some existing examples of this include clauses that do not allow members to profit from a demutualisation unless they have been a member for a certain time period. Given the five-year review and potential 10-year loan repayment model if government support is provided, both five and ten years are viable options for these clauses in the initial set up of the DMF.
- 10.4.1.3** Alternatively, the governing documents can stipulate that in the event of a demutualisation, all profits must be donated to a charity or another DMF in a similar industry. Indeed in parts of Europe, the legislation governing the establishment and regulation of mutuals and their cousin-companies, co-operatives, requires that in the event of a demutualisation all funds realised must go to another mutual or co-operative operating in the same industry and with similar purpose.

10.4.1.4 In the case of the proposed DMF there is also scope to stipulate that profit made from a demutualisation must be used to repay the government loan or, once that obligation is satisfied, paid into a pool similar to the method used to support medical indemnity insurance following the HIH collapse. This fund would serve to help the industry if the market hardens in a way that leads to market failure or significant dysfunction, as has occurred previously and is currently occurring, by supporting access to ongoing affordable cover.

10.5. Durability

10.5.1 Once the fund has been established, it should be durable enough to continue to provide industry with affordable and accessible insurance into the future regardless of market conditions. This is challenging where a softening insurance market may lead to more competitive insurance premiums which may lure members away from the DMF, unless the additional offerings of the fund are attractive enough to encourage member 'stickiness'.

10.5.2 The DMF may be well positioned to provide services to take advantage of their membership's shared interests and therefore maintain their membership through softening insurance markets. This could include bulk discount deals on products commonly used in the industry or advisory services to navigate the shared regulatory environment. The DMF's services may be a useful mechanism to provide members with value regardless of the insurance market.

10.5.3 By retaining members and increasing capital, the DMF may in time have enough resources to convert into an authorised mutual or other insurance model for the long-term benefit of the members, although conversion to an authorised mutual is not a path traditionally taken by DMFs in Australia. At any time at which the DMF was able to transition to an alternative structure, all government money should be fully repaid and the government would no longer have a direct stake in the operation of the fund.

10.5.4 However, while a demutualisation should be avoided, if possible, if the DMF is unable to retain the level of membership to make authorisation viable, the DMF should be constructed with contingency plans to continue to assist the industry in accessing insurance in the event of a demutualisation. These contingency plans would avoid dissolving the DMF through payouts to the then members, but instead look at other models of providing insurance whilst retaining the fund for future market dysfunction and/or failures. This may include an insurance subsidy program that looks to decrease the cost of existing available insurance premiums (as in the wake of the HIH collapse) or other measures to support the industry accessing insurance.

10.5.5 Developing durability of the DMF is critical to ensuring that in the event the insurance market continues its cyclical process of hardening and softening, there will be a fund that could form the basis of a future DMF to address similar market failures.

10.6. Public Confidence

10.6.1 The DMF must enjoy public confidence, at least amongst those who use the services of businesses that rely on membership, in order to be successful.

10.6.2 The need to make consumers aware of the use of a DMF in lieu of insurance has been canvassed under the 'consumer awareness' section of this report, and it is worth considering the need for the DMF, through its members, to undertake a targeted consumer education campaign. While it is highly likely that the majority of consumers will perceive the risks in undertaking the activities the DMF members provide, and the risk of injury

while doing so as very low, there will be a percentage of consumers who wish to be fully apprised of, and be given the opportunity to mitigate those risks.

- 10.6.3** For those consumers, disclosure will be key, and the DMF should consider providing a range of documents to their members that explain the nature of the DMF, why it has been developed (ie the nature of the hard insurance market), and provide information about the claims process in the event of an incident necessitating a claim. This information would ideally be developed in conjunction with an organisation like the Consumer Law Centres to ensure it is accessible to consumers. DMF members should also be provided the support necessary to enable them to accurately and confidently respond to queries from consumers should any arise. This could be achieved through mandatory training provided by the DMF to its members.
- 10.6.4** Following a few years of operation, the DMF should also be able to provide members with information that consumers may find useful, such as the number of claims received from members (ideally with claim numbers less than industry standard due to membership obligations and effective management of the businesses in membership), and the typical results of these claims.

10.7. Interaction with Market

- 10.7.1** A successful DMF will need to interact with the broader insurance market throughout its operations and recognising the market is dynamic.
- 10.7.2** The section of this report dealing with design provides a suggestion for the eventual design of the DMF, which includes, in ideal circumstances, the fund securing reinsurance for part of its operation above a deductible, as well as commercial insurance for claims over and above a certain amount. This design will necessitate the DMF directors building strong and durable relationships across the commercial insurance sector, so that they are not reliant on mutual managers to source these products in the event directors decide to change manager or self-manage the fund.
- 10.7.3** Best practice examples both domestically and overseas maintain strong relationships with international insurance providers, including Lloyds, to ensure they can place their reinsurance and commercial insurance with the best value providers. It may also be beneficial for the DMF to engage with the existing mutual sector to establish which international reinsurers have the greatest knowledge of, and provide the most support for, the Australia mutual sector.
- 10.7.4** Where Government considered it appropriate to support access to 'gap' insurance for the DMF, private sector insurers may also seek support, which would need to be considered alongside those insurers' profit motive. While it is uncontested that this is a failed/dysfunctional market, further dialogue with the insurance industry will help to canvas ways in which a DMF might interact most fully with the private sector.

10.8. Required Government Action

- 10.8.1** Should the federal government decide to support the DMF proposed by AALARA, and following a review of the final proposal developed by Aon in partnership with AALARA, government will need to undertake the following actions:
1. Decide on and formalise the policy parameters under which a proposal to form a DMF could be supported by the government. Such consideration should include, at a minimum, the parameters outlined in this report, along with any additional parameters determined through consultation on this report.

2. Work with the state and territory governments to address the threshold issues of legislative recognition/acceptance and preferably harmonisation required to allow membership of a DMF in lieu of insurance. Without the co-operation of state and territory legislatures, the Federal Government alone cannot ensure the success of a DMF.
3. Finalise the type of support to be provided, whether it is a grant, a low interest loan, or another form of support including 'gap' insurance and/or reinsurance enablement.
4. Determine and appoint a government representative for the DMF board.
5. Enter into the necessary agreements with AALARA and/or the board of the DMF.
6. Assemble and make available a nominated policy-lead and technical and regulatory expertise to expedite DMF formation and the development of guidance material.

10.9. Questions for consideration:

22. What other offerings to the DMF membership might increase 'stickability'?
23. How important is contestability of service offerings? Are there other ways to ensure contestability?
24. What are additional best practice claims handling procedures?
25. Should the DMF include a constitutional protection against demutualisation? Should government introduce a protection against demutualisation for the broader sector?
26. Is public confidence in the DMF likely to be an issue? What else could be done to encourage public confidence in the proposed DMF?
27. Are there appropriate mechanisms to reengage with private sector/industry market solutions over the life of the insurance market cycle? If not, what proposal settings would enable the sector to take advantage of a softening market?

11. PATH FORWARD

- 11.1** There are some fundamental questions for the AALARA membership, their advisers, federal, state and territory, and local governments, along with the community to grapple with prior to the proposal to form a DMF being confirmed as a suitable response to the sector's insurance crisis, and one that the government should support.
- 11.2** The sector will also need to urgently finalise their proposal and provide that to government for review.
- 11.3** In terms of this report and the work being undertaken by this Office, feedback on the questions raised in this report is being sought from interested parties by no later than close of business, Wednesday 3 November 2021.
- 11.4** Once that feedback is received, it will be analysed and a further, final report to government providing specific advice on policy parameters, DMF design, membership requirements, and any other relevant matters, will be finalised.

12. APPENDIX A - Australian case studies

12.1. Capricorn Mutual

12.1.1. History and Membership

12.1.1.2 Unlike other discretionary mutual funds discussed in this review, Capricorn Mutual Limited (Capricorn Mutual) was not established in response to insurance market failure in a particular sector. While there was a general hardening of insurance markets at the time of its inception (as a result of the September 11 terrorist attacks), Capricorn Mutual was instead fashioned as an additional product for Capricorn Society Cooperative's suite of member offerings.

12.1.1.3 Capricorn Society Cooperative (Capricorn Society) began in 1970 as a buying group for a small number of Western Australian service station owners to level the playing field with the big multinational oil companies.⁵⁶ From there, Capricorn Group (Capricorn Society and all related entities) has grown its membership to over 22,000, including in international markets, and broadened its product offerings for members, including through the establishment of Capricorn Mutual in 2003. Capricorn Mutual's membership significantly overlap with that of Capricorn Society. Their risk protection services have grown since then to allow members to "access mutual protection as well as a wide range of insurance products brokered through other providers."

12.1.2. Corporate Management and Operations

12.1.2.1 Capricorn Mutual's current board enjoys a wealth of experience. Each of the 3 directors from the mutual membership bring strong commitment to the collective principles of a mutual, founded in governance experience on Capricorn Society's board. This is complemented by external community and business governance experience. Capricorn Mutual invests regularly in board training and member directors must complete a directorship course in order to receive director fees. The member directors are supported by an independent director with extensive experience in banking and insurance, including as Chief Executive of an international mutual.⁵⁷

12.1.2.2 The board is supported in its role by and oversees the activities of Capricorn Mutual Management (CMM), to whom operational management of Capricorn Mutual is outsourced.⁵⁸ CMM itself is a wholly owned subsidiary of Capricorn Society, the board of which also enjoys strong member representation complemented by formal qualifications, external governance and banking and insurance experience. This includes a number of independent directors.

12.1.2.3 Capricorn Risk Services (CRS), also a wholly owned subsidiary of Capricorn Society, and is exclusively authorised to deal on behalf of Capricorn Mutual and Capricorn Insurance Services, with CRS "authorised to offer advice, and deal in, mutual risk products".⁵⁹

12.1.2.4 While the corporate structure of the Capricorn Group's entities appears complex, it in fact works to reinforce the principles associated with member ownership and strong corporate governance. This in turn protects the aggregate and interests of the mutual members. The strength of the Capricorn Group's belief in their operations is evident in their ongoing preparedness to offer CMM's services beyond Capricorn Mutual.

⁵⁶ Capricorn Mutual, *Our Story*, Capricorn Mutual [website], n.d.

⁵⁷ Capricorn Mutual, *Consolidated Annual Report for the year ended 30 June 2020*, Capricorn Mutual 2020

⁵⁸ Capricorn Mutual, *Corporate Governance Statement*, Capricorn Mutual [website], n.d.

⁵⁹ Capricorn Risk Services, *Financial Services Guide*, Capricorn Risk Services [website], 2020

12.1.3. Risk Management

- 12.1.3.1** Capricorn Mutual's membership do not represent the 'difficult risk' that is often associated with the establishment of a mutual fund in response to challenging general insurance market conditions. Capricorn Mutual believes that general insurers would happily take their members as customers.
- 12.1.3.2** Much of Capricorn Mutual's risk management involves ensuring their members' risk is correctly understood and protected against. Where CRS do not understand or cannot manage the full complexities of a certain risk, Capricorn Insurance Services (CIS), another wholly owned subsidiary of Capricorn Society and an authorised general insurance broker, is used to find adequate protection in the general insurance market.
- 12.1.3.3** One of Capricorn Mutual's strongest assets in the member culture it enjoys, which is founded in the history and pre-existing sense of ownership the members have of Capricorn Society and its related entities, including Capricorn Mutual. This sense of ownership is a large part of creating member buy-in for risk management.

12.2. Civic Risk Mutual

12.2.1. History and Membership

- 12.2.1.1** After a major provider left the market, many New South Wales councils found it near, if not impossible to find insurance. They undertook to pool their insurance premiums and to provide public liability cover via a self-insured fund and bulk purchased insurance. This was to be the foundation of what is today called Civic Risk Mutual (Civic Risk).⁶⁰
- 12.2.1.1** This is a strikingly similar situation to that which businesses in the amusement and leisure industry currently find themselves in.
- 12.2.1.1** The 6 foundation councils were from the Western Sydney region and their original mutual has since merged with other similar geographically based operations – today Civic Risk has 24 members (of NSW's 100 councils).
- 12.2.1.1** In response to further general insurance market failures to provide adequate or affordable cover, Civic Risk has expanded their product line to include crime, cyber, property and just about everything except workers compensation.
- 12.2.1.1** Unlike similar broker-run schemes in Australia's other states, Civic Risk is member run, managed and owned.

12.2.2. Corporate Management and Operations

- 12.2.2.1** Civic Risk began with all its functions under the management of an insurance brokerage firm. Civic Risk has since split its internal operations employing a team to manage the Mutual and engaging specialist service providers, under separate service contracts. The key services Civic Risk outsources are actuarial, brokerage and claims management. Separating operations in this manner reduces, in the view of the board, any conflict of interest that might arise having a single, external entity managing all of Civic Risk's internal functions.

The external specialists Civic Risk employs are overseen by a governance board and market tested on a 3-5 year basis.

⁶⁰ Civic Risk Mutual, *About Us*, Civic Risk Mutual, [website], n.d.

12.2.2.2 Civic Risk's governance board is elected from its members' assembly, in which every member council is represented. Upon election to the board, individuals who have not previously held a Civic Risk board position must undergo an induction and training process.

12.2.3. Risk Management

12.2.3.1 Civic Risk offer their members a range of cover beyond public liability, including industrial special risk, motor vehicle, crime, employment practices, corporate travel and casual hire among others. Civic Risk run a comprehensive risk management program in order to effectively mitigate these various risks. This involves constant education programs for their members and triennial audits to demonstrate continual improvement. These programs are supplemented by risk grants and best practice procedures developed by the members.

12.2.3.2 Civic Risk also require prospective members undertake an external audit of their risk, governance and financial stability before joining. This ensures that Civic Risk fully understands the risk profile of a new member and can help them in their risk journey.

12.2.3.3 To protect its members' funds under management, Civic Risk also purchases reinsurance. The purchasing of reinsurance negates issues associated with members acquiring services that require a certification of insurance.

13. UK Mutual case studies

13.1. Activities Industry Mutual (AIM)

13.1.1. History and membership

13.1.1.1 AIM was set up in 2005 response to an unsubstantiated perception that their industry is unsafe, causing difficulties in obtaining public liability insurance. AIM was established in order to have a more cost-effective way of insuring their industry.⁶¹ AIM currently has over 750 members, accounting for 60-70% of the market share in their industry.⁶² Their membership is varied and includes businesses who operate water sports, maintain bike-riding, indoor climbing walls and many more. This is the most proximate example for AALARA's proposed DMF.

13.1.1.2 AIM covers Public Liability (including excess cover if necessary), Directors' and Officers', Business Travel, Personal Accident and more.⁶³ The cover is tailored to member's needs, who have a reasonable level of control over what they are covered for. AIM also has a panel of preferred brokers to help arrange further insurance as well as a relationship with QBE UK Ltd.⁶⁴

13.1.2. Corporate Management and operations

13.1.2.1 AIM was established by Regis Mutual Management Ltd, who still manage the fund. They have a requirement for a maximum of 9 and a minimum of 3 board members. AIM currently have 5 board members who are all in the industry who know the risks and are well placed to make determinations. This includes Andrew Gardiner who is the Chairman and one of AIM's founders.⁶⁵

13.1.2.1 In 2019 they had a £514,482 profit, which allowed them to issue refunds to their members.⁶⁶ AIM were also able to operate to a profit in 2020 during COVID and lockdowns, highlighting the strong position they have in the market.

13.1.3. Risk Management

13.1.3.1 AIM takes a rigorous approach to risk management. This has led to them winning 9 out of 10 disputes about claims leveled against their members.⁶⁷ In order to obtain a membership, new members must meet minimum risk requirements. AIM and its board use their specialised knowledge of the industries they cover to promote and assist in strong risk mitigation practices.

61 Activities Industry Mutual (AIM), *About Us*, AIM, [website], n.d.

62 Information gathered through consultation with Regis UK

63 Activities Industry Mutual (AIM), *Our Products*, AIM, [website], n.d.

64 Activities Industry Mutual (AIM), *Important Information*, AIM, [website], 2020

65 Activities Industry Mutual (AIM), *Our Board*, AIM, [website], n.d.

66 Activities Industry Mutual (AIM), *Annual Report and Financial Statements for the year ended 31 July 2020*, AIM, 2020

67 Information gathered through consultation with Regis UK

13.2. The Caravan and Motorhome Club

13.2.1. History and membership

13.2.1.1 The UK Caravan and Motorhome Club (the Club) was founded in 1907 and has operated as a club for its members ever since. This includes over 100 Club sites as well as more than 1,300 certified sites and conduct of touring pitch nights and club meets.⁶⁸

13.2.2. Corporate Management and operations

13.2.2.1 The mutual side of the business is managed by Regis Mutual Management Ltd. The Club also has a policy with Accredited Insurance (Europe) Limited, underwritten by DAS Legal Expenses Insurance Company Limited where members can make claims if they are not satisfied by the board's exercise of discretion.⁶⁹

13.2.2.1 The cover provided through the Caravan Cover scheme is not a legal requirement or a contract of insurance and claims are handled by the club. The Club's board members have full discretion over whether to agree to pay a claim and what the amount to be paid will be. The Club also states that the board may "agree to pay claims outside the terms and conditions of the cover if they feel the circumstances justify it."⁷⁰

13.2.2.1 Members are able to choose the amount they cover their caravan, equipment and contents for, helping to determine potential payouts. They also offer no claims discounts, which reach 35 percent after 4 years. The club offers coverage for a range of concerns, ranging from vehicle breakdowns and roadside assistance to personal and holiday cover.⁷¹

13.2.3. Risk Management

13.2.3.1 Given the nature of the insurance provided, risk management is delivered through providing secure events and locations for their members to meet. Their members are households from different parts of the UK, which makes broad based risk management procedures and advice for their members more general.

13.2.3.2 As such, the Club's arrangement with Accredited Insurance and DAS are both helpful to continue to operate the Club's insurance effectively, with no claims discounts a good way to build a culture of risk mitigation.

13.3. The Retail Mutual

13.3.1. History and membership

13.3.1.1 The fund was set up in 1999, originally just for newsagents who were members of the National Federation of Retail Newsagents (NFRN). The original name was NFRN Mutual Limited, but the fund evolved to include more retail outlets including high street shops, pubs and hair salons.

13.3.1.2 There are currently about 4000 members, including a member who joined in 1999 and is still with them. Some 94 percent of members renew with the Mutual, which far exceeds that of traditional insurance companies.⁷²

⁶⁸ Caravan and Motorhome Club, *About Us*, [website] n.d.

⁶⁹ Caravan and Motorhome Club, *Caravan Cover Standard and Super* [website], 2021, p 1

⁷⁰ Caravan and Motorhome Club, *Do I Need Caravan Cover*, [website], n.d.

⁷¹ Caravan and Motorhome Club, *Caravan Cover Benefits*, [website], n.d.

⁷² The Retail Mutual, *About Us*, [website], n.d.

13.3.2. Corporate Management and operations

13.3.2.1 The fund is run by Regis mutual Management Ltd. The NFRN Mutual Limited has a 16.33 percent shareholding in Regis Mutual Management Ltd.⁷³ The board does have the ultimate decision on claims; however, the ethos is that all claims will be settled in line with the cover and sometimes exceeding the cover.⁷⁴ Further, the board has ultimate discretionary decision over the entrance of a new member. The fund covers liability, property, personal accident as well as some others.⁷⁵

13.3.2.2 The fund operated at a deficit in both 2018 and 2017 but was confident in their business model and expansion goals. Further, the fund keeps only a small amount of money in reserves, because they have no need for extra reserves, only reserves for a catastrophe that would require the mutual to be wound down.⁷⁶

13.3.3. Risk Management

13.3.3.1 The Retail mutual works with their membership base to share data about risk. This enables them to share where vulnerabilities are, what trends may be and what solutions have been found. Further, they use their relationships with security companies to help provide members with security options that have been proven to be effective. The risk management is driven into their mutual ethos, they share and help each other to help reduce the amount that is taken from their capital pool.

73 The Retail Mutual, *Annual Report and Financial Statements*, 2018, Page 14.

74 Information gathered through consultation with NFRN

75 The Retail Mutual, *Retail Insurance*, [website], n.d.

76 The Retail Mutual, *Retail Insurance*, [website], n.d.

13.4. Demutualisations

- 13.4.1** Demutualisation is the process through which a private, member-owned mutual legally changes its structure in order to become a publicly-traded company. Generally speaking, the demutualisation of a DMF is the result of a decision by the Board and a vote by members.
- 13.4.2** The mutual is typically transferred into a company entity, publicly listed with members receiving shares in the company or windfall gains on listing. The purpose and appeal of demutualisation is to gain control of the underlying capital assets of the mutual which have usually been built up over generations of members.
- 13.4.3** Several methods exist for demutualisation, but in all cases, existing members are replaced as owners of the funds by shareholder investors. When a demutualisation occurs, former members may still utilise the products and services as they did previously, but the prices, conditions and other terms may change as the listed company takes its place in the open market.
- 13.4.4** The reasons for demutualisation vary. In 1999 the RBA noted that the drivers for demutualisation may lie in the need to access external capital for expansion; compete more effectively with public companies; improve the perception of accountability; and for regulatory purposes.⁷⁷ The need to demutualise to access external capital has been diminished with the introduction of Mutual Capital Instruments in 2019. The experience of many demutualisations is that following conversion, the board and executive management were rewarded through increased remuneration and share options. In some instances, the rationale for demutualisation of needing additional capital fell away in their subsequent amalgamation into larger consolidated entities.
- 13.4.5** There was an uptick in demutualisations in the 1980s and 90s in both the UK and Australia, which represented a large segment of the financial services industry. For example, when AMP demutualised in 1998, 10 percent of Australian adults received shares.⁷⁸
- 13.4.6** In the UK, demutualising to access profits and reserves was rife, after the Building and Societies Act (1998) was legislated, allowing investors to join mutuals with the intention of gaining voting rights to take the mutual public for short term gains.⁷⁹ The trend of demutualisations was initially very profitable for members; in 1997 the demutualisation of “five building societies and one insurance company (being Norwich Union) led to windfall gains of about £35 billion.”⁸⁰
- 13.4.7** The legacy of demutualised organisations vary. Some former mutuals have high market share in their industry today, such as Aviva (formerly Norwich Union), whereas others have not fared as well such as Bradford & Bingley who suffered huge losses before being nationalised and sold after the 2008 Global Financial Crisis.
- 13.4.8** In 2006, the UK’s All-Party Parliamentary Group for Building Societies & Financial Mutuals completed a short inquiry “Windfalls or Shortfalls? The true cost of Demutualisation”

⁷⁷ Reserve Bank of Australia (RBA), *Demutualisation in Australia*, RBA, 1999 p 2

⁷⁸ Reserve Bank of Australia (RBA), *Demutualisation in Australia* RBA, 1999, p 6

⁷⁹ Coop News, *Big bang demutualisation building societies failed*, [website] n.d.

⁸⁰ Coop News, *Big bang demutualisation building societies failed*, [website] n.d.

which sought to understand if the decision to demutualise was successful.⁸¹ The report states that based on the evidence they heard, mutuals performed better than their Publicly Listed Company (plc) rivals. It also found that while the directors of the demutualised companies had substantially increased remuneration, there was no corresponding improvement in performance.

- 13.4.9** In response, many mutuals across the EU and UK have clauses in their Rules that members cannot profit from demutualisation, or that members must be a member for a certain period of time before they can profit from a demutualisation. Some argue that the continued protection of legacy assets can only be assured through legislation.⁸² A new DMF could consider a form of constitution that prohibits the distribution of legacy assets.
- 13.4.10** A less common but equally effective form of demutualisation and a more recent development in the market, is the sale of the mutual business to an existing external entity. This is more common in the USA where the process is formalised and known as sponsored demutualisation. Mutuals could be well served by ensuring they have contingency plans to withstand hostile interest from global funds.

⁸¹The All-Party Parliamentary Group for Building Societies & Financial Mutuals, *Windfalls or Shortfalls? The true cost of Demutualisation*, [website], 2013

⁸²Mutuo, *The private equity threat to cooperatives and mutuals*, [website], 29 April 2021

14. UK Demutualisation case studies

14.1. Norwich Union (1997 – Insurance company)

14.1.1. History as a mutual

14.1.1.1 Founded in 1797, Norwich Union was originally established as a fire insurance company, operating under Norwich Union Society for Insuring of Buildings, Goods, and Merchandise & Effects from Loss by Fire. At the time of demutualisation, the members received a share of the company's profits.⁸³

14.1.1.1 Norwich Union Life Insurance Society was founded in 1808 and the Fire Society began to expand into Europe 1824. Norwich continued to grow through acquisitions, including Scottish Union in 1959. The mutual continued to expand and was a well-recognised brand by the 1990s.

14.1.2. Demutualisation

14.1.2.1 Norwich Union was demutualised in 1997 in a year that saw several demutualisations in the UK and large windfalls for members. Almost three million members received a windfall worth hundreds of pounds in the demutualisation. The move saw Norwich become an FTSE 100 company and £2.4 billion was raised in the share offer; at the time the largest sum ever raised in a British private sector flotation.⁸⁴

14.1.3. Outcomes

14.1.3.1 Norwich Union merged with insurance company CGU in 2000, forming CGNU. In 2002 the name of this merged company was changed to Aviva, however, the Norwich Union brand was retained in the UK, drawing from the prestige and brand recognition of the mutual. Aviva eventually phased out the name Norwich Union on 1 June 2009.

14.1.3.2 Unlike the building societies explored below, Norwich Union, through Aviva, continues to operate successfully. This is partly due to being an insurance company and not a bank, but also stems from a company that has successfully used the mutual's reputation and credibility as a launch pad to grow and increase diversity in the market.

14.1.3.3 Today, Aviva offers car, home, life and health insurance in the UK. In 2020, it had an adjusted operating profit of £2,492 million and have over 18 million customers across their core markets.⁸⁵

14.2. Bradford & Bingley Building Society (2000)

14.2.1. History as a mutual

14.2.1.1 Bradford & Bingley formed in 1964 from a merger between the Bradford Equitable Building Society and the Bingley Building society. At the time, and leading into the 1980s and 1990s, building societies were popular in the UK and a key source of mortgage loans.

14.2.1.1 The Bradford & Bingley Building Society continued to operate as a mutual, acquiring many other mutuals which bolstered their growth. By 1988 it had 1.85 million members and was a prominent mutual in the UK. The brand was well known by the mid-90s, however it

⁸³ Aviva plc, *Timeline*, [website], n.d.

⁸⁴ Aviva plc, *Timeline*, [website], n.d.

⁸⁵ Aviva plc, *Annual Report and Accounts 2020, 2020*, p 1.

struggled to remain competitive, particularly in regards to prices, while using the mutual model.⁸⁶

14.2.2. Demutualisation

14.2.2.1 In 2000, members voted to demutualise the Building Society by listing it on the stock exchange. This saw members receive 250 shares worth 248 pence each, or approximately £620 per member.⁸⁷ Bradford & Bingley was one of the last large demutualisations that occurred in this era, following the likes of Abbey National, Halifax and Northern Rock.

14.2.2.2 The demutualisation saw big increases in remuneration for directors on the board. Members received cash windfalls and investors could access a well-run and recognised business, which helped drive down consumer costs.⁸⁸

14.2.3. Outcomes

14.2.3.1 Bradford & Bingley, in moving away from the mutual model, used wholesale funding and access to capital to compete in the open market. This is part of the reason that by 2008, as the Global Financial Crisis (GFC) tore through the financial sector, Bradford & Bingley was also in turmoil. The bank was nationalised in 2008, before being bought by the Santander Group through another failed demutualised bank Abbey National. The Bradford & Bingley and Northern Rock (Asset Management) plc were integrated under a single holding company.

14.2.3.2 Including Bradford & Bingley, Northern Rock, Abbey National and Alliance & Leicester, which were all taken over by the Santander Group and Woolwich, and later taken over by Barclays, highlight the risk of demutualisation.

14.2.3.3 Other examples of demutualisation in the UK include:

- Abbey National (1989)
- Alliance & Leicester (1997)
- Northern Rock (1999)
- Halifax (1999)

Australian examples include:

- Capita (1990)
- National Mutual (September 1995)
- Colonial (1996)
- AMP (1998)

⁸⁶ P Inman, *How turning into banks lead to ruins*, The Guardian, [website], 29 September 2008

⁸⁷ The All-Party Parliamentary Group for Building Societies & Financial Mutuals, *Windfalls or Shortfalls? The true cost of Demutualisation*, [website], 2006

⁸⁸ P Inman, *How turning into banks lead to ruins*, The Guardian, [website], 29 September 2008

15. Australian Demutualisation case studies

15.1. National Roads and Motorists' Association (NRMA) (2000)

15.1.1. History as a mutual

15.1.1.1 The NRMA is a well-known Australian organisation which offers emergency roadside assistance to drivers, retail outlets for car servicing, travel guides and other services in NSW and the ACT.

15.1.1.1 The NRMA was founded in 1920 as the Australian National Roads Association. By 1925 the NRMA had more than 7,000 members and NRMA Insurance was formed to offer household and motoring insurance. By 1939 the NRMA had grown to more than 66,000 members and provided a huge road service operation. With the growth in vehicles in Australia through the 1950's membership grew to 1 million in the 1970s and then doubled again before 1990.

15.1.1.1 The financial success of NRMA Insurance led to a surplus of funds which could not easily be distributed to members. As a mutual, only rebates could be offered to members and these had the effect of artificially deflating the price of insurance products. Demutualisation, through the issuance of shares in a listed company, was a preferred method to allow funds to be distributed to members (without affecting product pricing).

15.1.2. Demutualisation

15.1.2.1 Demutualisation of the entire company, (both the membership/road service and the insurance/financial services) was first proposed in 1994 and initially received member support. However, a successful Federal court challenge put an end to the proposal.⁸⁹

15.1.2.2 NRMA demutualised into two separate companies in August 2000. The insurance business was transferred to NRMA Insurance Limited which is now known as Insurance Australia Group Limited (IAG). NRMA remained a significant shareholder in IAG Limited and members received discounted insurance premiums for a number of years.

15.1.3. Outcomes

15.1.3.1 IAG Limited is a diversified insurance group operating throughout Australia, New Zealand and Asia with a market capitalisation of \$12.28B.⁹⁰ IAG Limited is the umbrella entity trading as various insurance brands including NRMA Insurance, SGIO, SGIC, CGU, Swann Insurance and WFI in Australia.

15.1.3.2 For NRMA members who acquired shares at the time of demutualisation in August 2000, the deemed cost base (no money was paid) was \$1.78/share and the share value is currently \$4.98.⁹¹

15.1.3.3 NRMA (road and member services) remains a mutual company and has diversified into travel and holiday operations, including acquiring the Travelodge Hotel Group chain.

⁸⁹ *Fraser v NRMA Holdings Ltd*, (1995), 127 ALR 543

⁹⁰ Australian Securities Exchange (ASX), IAG, ASX, 7 July 2021

⁹¹ IAG, *Share Price Information*, [website], 6 July 2021

15.2. AMP

15.2.1. History as a mutual

15.2.1.1 The Australian Mutual Provident Society was formed in 1849 under the Friendly Society's Act and was the first mutual life assurance office to be established in Australia.⁹² In its first year, there were 42 policyholders. Prior to demutualisation the policy-holders were a strong voice for the mutual and in some cases instrumental in reversing the decisions arrived at by the Board of Directors.⁹³

15.2.2. Demutualisation

15.2.2.1 AMP was demutualised in 1998 and became publicly listed on the ASX. At the time it was the busiest day in ASX history in terms of total value traded: in excess of \$6.5b in one day.⁹⁴ In 1998, roughly 10% of the adult population in Australia held shares in AMP.⁹⁵

15.2.2.2 Approximately 88 per cent of policyholders elected to retain their share allocation. Although, there were some members who elected to take immediate advantage of the demutualisation by receiving cash in lieu of their shares.⁹⁶

15.2.3. Outcomes

15.2.3.1 Following the demutualisation of AMP, the company expanded its operations to include banking, superannuation and financial advice services. AMP acquired National Provident Institution in a \$3.6 billion deal. Shortly after this deal, AMP acquired GIO through a hostile takeover.⁹⁷ In 2011 AMP and AXA Asia Pacific merged.⁹⁸

15.2.3.2 In 2020, AMP decided to sell their life insurance business in an attempt to simplify AMP's group structure. The board considered this to be the best interest for shareholders however it should be noted many shareholders criticised the deal and AMP was forced to strongly defend the valuation of the \$3.3 billion sale.⁹⁹

92 M Anderson, *Some glimpses of the early history of the A.M.P Society*, Business archives and history, 1961, p 2

93 M Anderson, *The archives of the AMP society*, Australian Society of Archivists, 1960, p 3

94 Australian Securities Exchange, *Annual report 2002-2003*, 2003

95 Reserve Bank of Australia (RBA), *Bulletin January 1999 - Demutualisation in Australia*, RBA, January 1999

96 Reserve Bank of Australia (RBA), *Bulletin January 1999 - Demutualisation in Australia*, RBA, January 1999

97 GIO Insurance, *About Us*, [website] n.d.

98 AMP, *Our History* [website] n.d.

99 S Paul, P Duran, *Australia's AMP tries to sooth angry investors after insurance sale*, Reuters, 31 October 2018

16. APPENDIX B

16.1. Legislation requiring harmonisation

Jurisdiction	Details
Commonwealth	<p>Great Barrier Reef Marine Park Amendment Regulations 2001 (No. 2) (Cth) (Repealed) 66B(1) The Authority may suspend a permission for a bareboat operation being conducted in the Whitsunday Planning Area if the operation does not comply with the following requirements: ...</p> <p>(b) its vessels must have protection and public liability indemnity insurance for at least \$5 000 000;</p>
Australian Capital Territory	<p>Motor Sport (Public Safety) Act 2006 (ACT) 10(2) A licence is subject to the conditions—</p> <p>(a) prescribed by regulation; and</p> <p>(b) put on the licence under this section. Examples of conditions that may be put on a licence</p> <p>1 safety standards for the public, competitors or people at or near a motor vehicle racing place</p> <p>2 public liability insurance</p> <p>Boxing Control Regulation 2016 (ACT) (Repealed)</p> <p>4(1) A person is exempt from the application of all provisions of the Act in relation to the person's involvement in World Fight Australia, subject to the following conditions: ...</p> <p>(c) for a promoter of World Fight Australia—as soon as possible, and before World Fight Australia begins, the person gives the Director, Active Canberra in the Chief Minister, Treasury and Economic Development Directorate— ...</p> <p>(ii) evidence to show public liability insurance, professional indemnity insurance and workers compensation insurance covering World Fight Australia, including cover for all contestants, officials, doctors engaged by the promoter and people at the Australian Institute of Sport arena for the purpose of watching World Fight Australia; and</p>
New South Wales	<p>Paintball Act 2018 (NSW)</p> <p>39(1) The holder of a paintball venue permit must maintain a policy of public liability insurance in an approved form that provides cover for public liability incurred in connection with the operation of the paintball venue, being a policy that provides for</p>

cover for an amount of not less than \$10,000,000 or such other amount as may be prescribed by the regulations.

Local Government (General) Regulation 2005 (NSW)

72 The council must not grant an application for an approval to install or operate an amusement device unless it is satisfied-- (e) that there is in force a contract of insurance or indemnity for the device that complies with clause 74.

74 It is a condition of an approval to install or operate an amusement device that there must be in force a contract of insurance or indemnity that indemnifies to an unlimited extent (or up to an amount of not less than \$10,000,000 in respect of each accident) each person who would be liable for damages for death or personal injury arising out of the operation or use of the device and any total or partial failure or collapse of the device against that liability.

Crown Land Management Regulation 2018 (NSW)

43(1) For the purposes of clause 19 of Schedule 3 to the Act-- (a) the activity specified in Column 1 of the Table to this subclause is prescribed as an approved activity, and (b) the requirements specified in Column 2 of the Table opposite the activity are prescribed in relation to the carrying out of the activity for it to be an approved activity.

Tourism and farm tourism

The holder of the lease must ensure the activity is covered by public liability insurance which covers the duration of activity of at least \$10 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover.

Sport and leisure events

The holder of the lease must ensure that the events are covered by appropriate public liability insurance that covers the duration of events on the land of at least \$10 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover.

Recreational shooting

The holder of the lease must ensure that appropriate public liability insurance is in place which covers the duration of the activity of at least \$20 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover.

Film making

The holder of the lease must ensure that appropriate public liability insurance is in place which covers the duration of the activity of at least \$10 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover.

Motorsport rally

The holder of the lease must ensure that appropriate public liability insurance is in place which covers the duration of the activity of at least \$20 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover.

Music Festival Act 2019 (NSW)

3 music festival organiser, for a music festival, means the person or other entity noted on the public liability insurance policy provided to—...

Weapons Prohibition Regulation 2017 (NSW)

40(1) An application for the Commissioner's approval of a club may be made by the secretary of the club (or other relevant office holder if there is no secretary) by lodging with the Commissioner an application in the approved form, together with—

40(3) The Commissioner must not grant an approval unless— ...

(c) the Commissioner is satisfied that— ...

(iv) the club will maintain adequate public liability and member insurance.

Firearms Regulation 2017 (NSW)

97(1) An application for the Commissioner's approval of a club may be made by the secretary of the club (or other relevant office holder if there is no secretary) by lodging with the Commissioner an application in the approved form, together with—

97(3) The Commissioner must not grant an approval unless— ...

(c) the Commissioner is satisfied that— ...

(iv) the club will maintain adequate public liability and member insurance.

Richmond Valley Local Environmental Plan 2012 (NSW)

Special events on public land (other than land in Zones E2 or E3 ...

(3) Event organiser must have adequate public liability insurance for the event.

Charitable Fundraising Regulation 2021 (NSW)

24 An authority holder must ensure a child participant is covered by an appropriate insurance policy, including a public liability insurance policy.

Weapons Prohibition Regulation 2009 (NSW) (Repealed)

33B(1) An application for the Commissioner's approval of a club may be made by the secretary of the club (or other relevant office holder if there is no secretary) by lodging with the Commissioner an application in the approved form, together with: ...

33B(3) The Commissioner must not grant an approval unless: ...

(iv) the club will maintain adequate public liability and member insurance.

Newcastle City Centre Local Environmental Plan 2008 (NSW) (Repealed)

(4) The person carrying out the filming must obtain a policy of insurance that adequately covers the public liability of the person in respect of the filming for an amount of not less than \$10,000,000. ...

(6) A filming management plan must be prepared and lodged with the consent authority for the location at least 5 days before the commencement of filming at the location. The plan must contain the following information and be accompanied by the following documents (without limiting the information or documents that may be submitted): ...

(l) a copy of the public liability insurance policy that covers the filming at the location,

Bathurst Showground By-Law 1988 (NSW) (Repealed)

9(1) The trustees may set aside any portion of the land for any purpose for which the land may be used, and from time to time may grant to any person, body of persons, club, association or corporation the use of the land so set apart on such conditions as the trustees may think fit. ...

9(3) The conditions referred to in subclause (1) shall include a condition that any person, body of persons, club, association or corporation granted use of the land set apart shall effect public liability insurance coverage with an insurer, for an amount and on conditions approved by the trustees. ...

24 The trustees shall effect public liability insurance coverage with an insurer, for an amount and on conditions approved by the Director of Crown Lands.

Firearms Regulation 2006 (NSW) (Repealed)

91(1) An application for the Commissioner's approval of a club may be made by the secretary of the club (or other relevant office holder if there is no secretary) by lodging with the Commissioner an application in the approved form, together with: ...

91(3) The Commissioner must not grant an approval unless: ...
(iv) the club will maintain adequate public liability and member insurance, and

Hunters Hill Local Environmental Plan (Gladesville Village Centre) 2010 (NSW) (Repealed)

(4) The person carrying out the filming must obtain a policy of insurance that adequately covers the public liability of the person in respect of the filming for an amount of not less than \$10,000,000. ...

(6) A filming management plan must be prepared and lodged with the consent authority for the location at least 5 days before the commencement of filming at the location. The plan must contain the following information and be accompanied by the following documents (without limiting the information or documents that may be submitted): ...

(l) a copy of the public liability insurance policy that covers the filming at the location,

Hunters Hill Local Environmental Plan (Hunters Hill Village) 2009 (NSW) (Repealed)

(4) The person carrying out the filming must obtain a policy of insurance that adequately covers the public liability of the person in respect of the filming for an amount of not less than \$10,000,000. ...

(6) A filming management plan must be prepared and lodged with the consent authority for the location at least 5 days before the commencement of filming at the location. The plan must contain the following information and be accompanied by the following documents (without limiting the information or documents that may be submitted): ...

(l) a copy of the public liability insurance policy that covers the filming at the location,

**Penrith City Centre Local Environmental Plan 2008 (NSW)
(Repealed)**

Schedule 2 – Clause 18 The applicant or operator is to have and keep current a policy of insurance that covers the public liability of the person for an amount of not less than \$10,000,000. The policy is to indemnify Penrith City Council against liability for any civil action arising out of the use of the area as an outdoor eating area between the front property boundary of the shop and the kerb line of the street for the full frontage of the shop premises. A copy of the policy is to be provided to the Council before commencing any development to which this clause applies.

Northern Territory**Firearms Act 1997 (NT)**

9(9) An application for a paintball operator licence must: ...

(c) be accompanied by evidence that the applicant has public liability insurance for the amount prescribed by regulation.

Queensland**Townsville Breakwater Entertainment Centre Act 1991**

13.01 The Owner shall provide and maintain at all times during the period of construction, furnishing and equipping of the Entertainment Centre, adequate public liability and indemnity and property damage insurance (including, without limitation, boiler and machinery insurance) protecting the Owner and the Operator against loss or damage arising in connection with the construction, furnishing and equipping and preparation for the opening of the Entertainment Centre. Such public liability and indemnity insurance shall specifically include the coverages and limits specified in Clause 13.03.

13.03.1 Public liability insurance having a minimum per occurrence limit of twenty-five million dollars (\$25 000,000.00) against all claims which may be brought anywhere in the world for bodily injury, death or damage to property of third parties which insurance shall amongst other risks include coverage against liability arising out of the ownership or operation of motor vehicles as well as coverage in the same amount against all claims brought anywhere in the world arising out of alleged

South Australia**Local Government (General) Regulations 2013 (SA)****Mobile food vendors**

25A(1) In accordance with section 224(2) of the Act, the following requirements relating to conditions of a permit for the purposes of a mobile food vending business are prescribed: a council must ensure that the permit is subject to—(i) a condition

requiring the permit holder to have insurance of a kind specified by the council (such as public liability insurance);

Explosives (Fireworks) Regulations 2016

14 It is a condition of a pyrotechnician's licence that the holder of the licence must ensure that, for each fireworks display conducted under the authority of the licence, a policy of public liability insurance is maintained in respect of death, personal injury and property damage arising out of the display in an amount of— (a) if the display involves the use of aerial fireworks, at least \$5 million; or (b) in any other case, at least \$1 million.

Motor Vehicles Regulations 1996 (SA) (Repealed)

9A(1) Subject to the conditions set out in subregulation (4), a prescribed motor vehicle may be driven on a golf course without registration or insurance.

9A(2) Subject to the conditions set out in subregulation (4), a prescribed motor vehicle may be driven on a road that does not form part of a golf course without registration or insurance in order to travel by the shortest available route from one part of a golf course to another part of the golf course. ...

9A(4) The conditions referred to in subregulations (1) and (2) are as follows: ...

(b) a policy of public liability insurance indemnifying the owner and any authorised driver of the vehicle in an amount of at least ten million dollars in relation to death or bodily injury caused by, or arising out of, the use of the vehicle must be in force.

Explosives (Fireworks) Regulations 2001 (SA) (Repealed)

14 It is a condition of a pyrotechnician's licence that the holder of the licence must ensure that, for each fireworks display conducted under the authority of the licence, a policy of public liability insurance is maintained in respect of death, personal injury and property damage arising out of the display in an amount of—

(a) if the display involves the use of aerial fireworks, at least \$5 million; or

(b) in any other case, at least \$1 million.

Road Safety (Traffic Management) Regulations 2019 (VIC)

29(1) A person who intends to hold a race or series of races on a road may apply to the Chief Commissioner of Police for permission to conduct the race or series of races.

Victoria

29(2) A person who makes an application under subregulation (1) must also submit the following to the Chief Commissioner of Police by a day specified by the Chief Commissioner—

(a) a certificate of currency for public liability insurance in relation to the race or series of races being held by the applicant

Professional Boxing and Combat Sports Regulations 2018 (VIC)
Form 2 ...

8. Please provide details (including the name of the insurer and the amount of cover) of public liability insurance that will be in place for the promotion:

9. Does the venue listed above also have public liability insurance that will cover the event? YES/NO

Professional Boxing and Combat Sports Regulations 2008 (VIC) (Repealed)
Form 2 ...

7. Please provide details of insurance that you intend to provide for professional contestants and officials, and public liability insurance (e.g. name of insurer, amount of cover)

— Promotion participant insurance:

— Public liability insurance:

Professional Boxing and Martial Arts Regulations 1997 (VIC) (Repealed)
Form 2 ...

13. Insurance Public Liability Have you taken out adequate public liability insurance for the purposes of the promotion?

City of Adelaide

Park Lands Events – Conditions of Hire – 2021-2022

Insurance and Indemnity

The Applicant shall have and maintain for the period of hire, a policy of insurance against risks to the public in relation to the event, and such policy to be of a minimum amount of \$20 million in respect to any one claim, and list the City of Adelaide as an interested party. ...

Fireworks

Fireworks are only permitted to be provided and operated by pyrotechnicians licensed by SafeWork SA and who hold Public Liability Insurance for a minimum of \$20million. ...

Amusement Structures

A copy of the organisation's Public Liability Insurance 'Certificate of Currency', minimum \$20million and a copy of the annual inspection report issued by a competent person (as defined in Regulation 241 – Annual inspection of amusement device or passenger ropeway) must also be obtained and forwarded to the Business Centre Representative. It is advised that your Company's Public Liability Insurance may not cover the amusement rides at your event in the Park Lands. ...

Animal Nurseries, Petting Zoos & Animals for riding

Event Management requires a copy of the operator's Public Liability Insurance, to the value of \$20 million for each and every claim and must be extended to name and indemnify COA.

Permit Conditions for Media Production Permit

17. As required by Council, your organisation must take out a Public Risk Policy indemnifying the City of Adelaide against any claims for damage to persons or property resulting from the activity, including the setting up and dismantling of all equipment.

Health/Fitness Groups & Personal Trainers Permits, Application & Operating Guidelines (2 October 2018)

Permit applicants must have the following essential elements, where applicable; ...

Evidence of current Public Liability insurance policy to a minimum of \$20 million;

Health/Fitness Groups & Personal Trainers Permits, Application & Operating Guidelines

Eligibility ...

Permit applicants must have the following essential elements, where applicable; ...

Evidence of current Public Liability insurance policy to a minimum of \$20 million; Conditions for Use ...

Each accredited operator issued a permit by City of Adelaide: ...

shall take out and maintain in their name, for the duration of the term of the permit, a Public Liability insurance and Professional Indemnity Insurance. The insurer must be Australian Prudential Regulation Authority (APRA) approved.

Mobile Food Vending Permits – Application Information, Location Rules, and Operating Guidelines (5 March 2018) Insurance

City of Brisbane

Mobile food vending permit holders must take out and keep current a public and product liability insurance policy noting specifically City of Adelaide as an interested party ... The policy must insure for at least TWENTY MILLION DOLLARS (\$20,000,000) and must cover injury, loss or damage to persons or property arising out of the activity carried out under this permit or the granting of this permit by the Council.

Permit Conditions for On Street Activities

17) The Permit Holder must effect and maintain at all times during the term of this permit a public liability insurance policy in the amount of twenty million dollars (\$20,000,000.00) per claim or such other amount as the City of Adelaide may reasonably require from time to time...

Arts & Cultural Grants Program – 2021-22 Program Guidelines Payment ...

Prior to payment, all successful applicants will be required to: ...

Provide a copy of their public liability insurance Certificate of Currency for a minimum of \$20 million

Footpath Dining Local Law 2011

9 Subject matter for permit conditions

(1) Without limiting Council's power to impose conditions under this local law, the conditions of a footpath dining permit may do any or all of the following—

(a) require the permit holder to take out and maintain public liability insurance to a minimum value as stated in Council's Footpath Dining Permit Guide, naming Brisbane City Council as an interested party;

Entertainment permit

Supporting documents ...

Supporting documents that may be required include Certificate of Currency for Public Liability Insurance at a minimum of \$20 million indemnifying Council for all claims for personal injury and damage to property arising out of the event. You must also ensure that all sub-contractors have appropriate Public Liability Insurance (e.g. electricians, ride operators, stage/marquee/grandstand erectors etc.)

Busker / street performer permit

Eligibility Requirements

City of Darwin

You will need to take out public liability insurance to a minimum value of \$10 million and name your local council as an interested party.

Events at Brisbane parks and bridges

Public liability insurance

As part of your event application you need to have public liability insurance, which must:

- include the name and date of your event
- name the bridge or park
- have \$20 million coverage per incident
- note the State of Queensland, represented by the Department of Housing and Public Works, as an interested party.

Related event approvals

Fireworks ...

You will need to notify the local fire station about the fireworks at least seven days before the event and ensure sub-contractors involved in the firework display have appropriate Public Liability Insurance.

Street Food Guidelines

Before a permit can be issued the following must be supplied:

A Certificate of Currency from the business insurer showing:

- o \$20 million public liability insurance; and
- o City of Darwin as an interested party.

Provider for Subsidised Program Application – Run a Healthy Darwin Activity

Eligibility ...

Hold current public liability insurance for an amount not less than \$20,000,000 (NB. If no current insurance, please contact staff to discuss auspice options).

Community Centre Application Form

Terms and Conditions ...

14. The Hirer shall, during the term of hire and at the discretion of Council, keep in force a policy of public liability insurance for an amount not less than \$20,000,000 in the name of the Hirer and the City of Darwin. Exemptions may apply at the discretion of City of Darwin.

City of Hobart

Public Spaces By-Law 2018

Applications

85. Any application for a permit pursuant to this by-law is to be:

...

(iv) evidence of current public liability insurance or other relevant insurance; and

Community Gardens Guidelines (December 2020)

The City of Hobart Community Gardens Criteria To be supported by the City of Hobart applicants must demonstrate that they meet the following criteria in an application to establish a community garden on City-owned land. ...

The group must be covered by public liability insurance.

Application to conduct commercial filming and photography in a public space

For your application to be considered please include a copy of your public liability insurance (in the name of the individual or company making this application) with your application.

Application to occupy a public space (outdoor dining)

For your application to be considered please include a copy of your public liability insurance (in the name of the individual or company making this application) with your application.

Venue booking application

To hold an event at one of these locations you will need to have Public Liability insurance (\$20m or above).

City of Melbourne

Melbourne Event Planning Guide (August 2019)

3.4 Public Liability Insurance

Event organisers must make sure they have a public liability insurance policy underwritten by an insurance broker/company authorised to conduct insurance business in Australia. A Certificate of Currency must be provided showing that the proposed event is fully covered for a minimum of \$20 million. Event organisers are encouraged to obtain copies of current certificates of currency from sub-contractors providing event services (e.g. performers, marquee hire, fireworks).

Event Permit Terms and Conditions

Public liability insurance policy for at least twenty million dollars (\$20,000,000), with an insurer approved by the Council. A

City of Perth

certificate of currency must be provided with the permit application.

Community Meeting and Multi-Purpose Room Policy

Insurance and Bonds

The hirer must be the holder of a current public liability insurance policy underwritten by an insurer authorised to conduct insurance business in Australia. A copy of a 'certificate of currency' must be provided with all community venue applications.

Event Permit Application – General Terms and Conditions

7(a). Public Liability Insurance

The applicant acknowledges and agrees to have and maintain public liability insurance for the Event as a condition of approval.

Outdoor Dining Permit – Online Application Form

To complete this form you will need ...

Public Liability Insurance for \$20 million

City of Sydney

Event Guidelines

Section 5 – Terms and conditions for use of public domain

Event activity – standard approval conditions ...

3. The event organiser must effect and maintain at its own cost public liability insurance for a minimum amount of \$10,000,000 per occurrence. This insurance must be held with an insurer approved by APRA or holding an investment grade rating from S&P, Moody's or Fitch. A current certificate of currency must be provided to Council prior to the event or on request.

Martin Place Event Guidelines (April 2020)

1.1. Event Application Process

All event organisers need to complete and submit an Event Application form with accompanying public liability insurance covering the applicant and event as a pre-requisite for any provisional booking and assessment to be made for Martin Place.

Pitt Street Mall Event Guidelines (April 2020)

2.1. Event Application Process

All event organisers need to complete and submit an Event Application form with accompanying public liability insurance covering the applicant and event as a pre-requisite for any

provisional booking and assessment to be made for Martin Place.

Temporary Event Application Form

Part 8: Event Insurance

You will be required to obtain public liability insurance for a minimum cover of \$10 million.