



Association of British Insurers

TACKLING THE COMPENSATION CULTURE: THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

Improving the System for All

September 2011



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Introduction

Our current compensation system is failing. It is too slow, too expensive, and fails too many genuine claimants who have a right to access fair, proper and timely compensation.

Compensators such as insurers, retailers, local authorities and manufacturers are committed to paying genuine claimants the compensation that they are entitled to. They do so despite the current system – not because of it.

The current system encourages many people to believe that there is a compensation culture that they can exploit with exaggerated and fraudulent claims. The price for this is paid by millions of honest customers, in higher insurance premiums, rising prices and increased costs to local authorities and the NHS.

The solution to this failure is set out in Lord Justice Jackson's comprehensive report on reforms to the compensation system. It follows a similar path to reforms in countries such as Ireland that have successfully tackled the compensation culture and have seen insurance premiums fall.

The Jackson recommendations safeguard access to justice for genuine claimants, ensuring that those who are entitled to compensation receive it quickly and at a proportionate cost.

Compensators welcome those parts of the Legal Aid, Sentencing and Punishment of Offenders Bill that implement Lord Justice Jackson's recommendations, but there is more to be done.

The Jackson recommendations should be implemented in full in the Legal Aid, Sentencing and Punishment of Offenders Bill and associated regulations to create a positive outcome for claimants and for all UK consumers and taxpayers.

The Problem

The number of bodily injury claims received by insurers increased by 72% from 2002 to 2010.

‘The Whiplash “condition” is ideal for those with an interest in milking the law abiding motorist.’

Jack Straw MP

The current compensation system in the UK fails to deliver justice at proportionate costs – impacting upon claimants, businesses and taxpayers alike. There are various elements of the current system that cause problems:

- Aggressive marketing tactics by Claims Management Companies (‘CMCs’) result in members of the public receiving spam text messages and cold calls encouraging them to claim compensation even where there has been no accident. This adds to the ‘have a go’ compensation culture.
- Nearly 1200 whiplash claims are made every day in the UK. This is far higher than the rest of Europe but people in the UK do not have weaker necks than those on the Continent. Part of the reason for the discrepancy is that some European countries have rules in place which help ensure only genuine whiplash claims are made. Currently in the UK insurers pay out nearly £2 billion a year on whiplash which is difficult to diagnose and almost impossible to disprove.
- In principle, claimants are liable for the defendant’s costs if their litigation is unsuccessful. However, After the Event (‘ATE’) insurance is often taken out to cover a claimant’s exposure. The cost of ATE premiums are determined by claimants but borne by unsuccessful defendants. The ATE premium is often waived if a claim is unsuccessful. Claimants have little incentive in ensuring that costs are reasonable as they are unlikely to foot the bill.
- Referral fees (payments made to intermediaries for claimants’ cases) have increased the costs in the system without adding any value. Claimants’ details are sold on to the highest bidder and can reach up to £1000 for a single case. The cost of referral fees are passed onto compensators and ultimately consumers. Referral fees are not the cause of the problem but are a symptom; they have arisen because of the disproportionate costs available to claimant lawyers.

- In 2010 the Road Traffic Accident Portal system was launched to facilitate better communication between parties in personal injury car accident claims to settle claims before they reach Court. The Portal ensures that claimants get the compensation they are entitled to efficiently and at low cost. Claimant lawyers who bring claims through the Portal are entitled to claim fixed costs. In Germany fixed costs are €300 compared to £1200 in the UK, it is a system that works efficiently to deliver justice and proper compensation to claimants without adding unnecessary costs. Compensators support the extension of the Portal to all low-value personal injury claims with a lower fixed costs regime.
- Employers liability claims in the current system are one of the key drivers of overly bureaucratic approaches to managing health and safety. Responsible employers seek to prevent injury and ill health and recognise their responsibility to make amends rapidly where significant harm does occur. However, their focus on managing risk is distracted by a proliferation of small claims that, in the current system, are simply not cost-effective to defend. These claims are encouraged by CMCs and Trade Unions, fuelled by referral fees.
- Fraudulent claims also continue to increase. 'Crash for Cash' scams and phantom passenger claims take advantage of the disproportionate costs needed to fight cases even where there are indications of fraud. Detected fraudulent insurance claims rose 9% in 2010 compared to 2009 and totalled £919 million. There was also an estimated £930 million of undetected fraud in the same year.

Fraudulent motor accident claims

Phantom passengers – a car containing no passengers will be involved in a minor accident. The driver of that car makes a personal injury claim involving whiplash along with three "passengers" who were not in the vehicle at the time.

Crash for Cash – a car will brake sharply, usually in an unexpected position such as a roundabout or slip road, and often with brake lights non operational. This induces the innocent motorist to drive into the back of their car. The fraudster will then make a claim for personal injury usually involving a claim for whiplash. Staged accidents may also involve a claim for phantom passengers.

The costs of our failing system

Consumers and taxpayers currently pay for the broken civil litigation system in the UK.

“Motor Premiums fell by 16% in Ireland in the two years after civil reforms were implemented.”

“By 2010 one insurer’s average claimant costs represented 142% of the sums received by injured victims.”

Ministry of Justice Response to consultation on Reforming Civil Litigation Funding and Costs in England and Wales

Consumers

- **The costs of the system are passed on to consumers** in many ways, from higher insurance premiums to increasing gas and electricity bills and more expensive weekly supermarket shops.
- The ABI surveyed over 50,000 low-value motor accident claims in 2009 and 2010, and found that for every pound paid in compensation, 87p was paid in legal costs. One insurer has provided data to the Ministry of Justice showing that by 2010, average claimant costs represented **142%** of the sums received by the injured victims. This affects us all as consumers.
- **UK consumers are paying £2.7m a day to the claimant lawyers through their motor insurance premiums.** Higher insurance premiums, particularly for young drivers, affect their ability to purchase cars which hits car manufacturers and affects their ability to produce vehicles competitively in the UK.
- Reducing claimants’ legal costs is critical to delivering a fairer and more efficient compensation system: **motor premiums fell by 16% in Ireland in the two years after reforms were implemented** which included speeding up compensation payments and reducing claimants’ costs.
- Businesses are affected too. For example, one large supermarket chain has reported that it needs to keep five stores open for a year just to pay the costs of personal injury claims.

Taxpayers

- It creates a heavy cost burden on local authorities, the NHS and government departments. UK businesses, local authorities and consumers are all affected.
- In the financial year 2010/2011 alone, the NHS paid out over £257 million in lawyers’ fees as a result of claims. **Between 2004 and 2011 there has been a 5% increase in NHS legal costs, but a 130% increase in claimant legal costs.**
- Higher insurance premiums, the need for larger legal budgets for local authorities and the spectre of more and more claims being brought affects schools, sports clubs, charities and other voluntary groups from delivering services within their local communities. **The system as it stands creates a compensation culture which harms society at large** by rewarding exaggerated and fraudulent claims – many driven by unscrupulous CMC – at the expense of honest customers who have to pay higher prices to cover the cost.

'If there is a system of fees in which a lawyer can still make a profit from a relatively small claim having paid hundreds of pounds for the privilege...then we have to address the fixed costs as well as the referral fees.'

Sir Alan Beith MP
Chair of the Justice Committee
28 June 2011, Legal Aid,
Punishment of Offenders and
Sentencing Bill Second Reading

The Solution

Lord Justice Jackson identified the ways in which costs can be reduced and justice delivered in a comprehensive, objective and evidence-based report.

We urge the Government to implement his recommendations **in full**. We welcome the Government's approach to Jackson's reforms in the Legal Aid, Sentencing and Punishment of Offenders Bill and the steps it takes to curb the compensation culture.

The Jackson recommendations must, however, be implemented carefully to ensure no unintended consequences and even higher costs for consumers and taxpayers.

Lord Justice Jackson makes it clear in his report that **his recommendations are a package** designed to reduce costs and ensure access to fair compensation.

The Legal Aid, Sentencing and Punishment of Offenders Bill goes a long way to meeting Jackson's objectives but we urge the government to **tackle disproportionate costs** in particular by banning the receipt and payment of referral fees across the board as recommended by Jackson.

Referral fees are driven by the high costs available for claims. The current fixed costs in low-value car accident claims (not including success fees) are £1200 – with referral fees often £800 claimant lawyers are still able to make a net income of £400. If they are able to run claims at £400 for a profit the current fixed costs need to be substantially reduced.

Lord Justice Jackson's recommendations are backed by the insurance, local authority and business organisations represented in this publication because we recognise that **as a package they deliver a reduction in excessive costs and provide access to fair compensation for those with genuine claims**.

An argument that Jackson's recommendations and the provisions of the Legal Aid, Sentencing and Punishment of Offenders Bill would inhibit lawyers taking on some cases is merely an argument in favour of continuing the status quo of a system characterised by perverse incentives, inefficiency and waste.

International Perspective

Other countries have far more efficient costs regimes in their compensation system. A number of Common Law jurisdictions have enacted reforms to reduce civil costs with many of the same principles as Lord Justice Jackson's recommendations. Most notably Canada, Hong Kong and Australia in recent years.

Fixed costs regimes in European countries have also been able to keep costs proportionate and deliver access to justice at a lower cost than the UK. Other European countries with fixed costs regimes have historically charged from between €300 and €1250 for a €5000 claim whilst in the UK an RTA claim of £5000 can cost up to £2350 in legal fees – even with the introduction of a fixed costs regime for these types of claims.



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Access to Justice – Myth and Reality

Compensators are in favour of ensuring those on low incomes have the opportunity to pursue genuine claims in the same way as everyone else. There are various myths surrounding the impact of the proposed reforms on access to justice which need to be dispelled.

Myth	Reality
Compensators don't want to pay out claims. Their support for the Legal Aid, Sentencing and Punishment of Offenders Bill is evidence that claimants will be squeezed out.	Compensators have always paid genuine claimants the compensation they are entitled to and will continue to do so. The Bill will speed up the time in which genuine claimants get their compensation.
There's no such thing as a compensation culture. Its existence is a myth created by compensators.	A compensation culture does exist in this country and only parts of the legal system that benefit from it are still in denial. It is a common experience for people to receive 'claim now' texts for accidents and to see advertisements inciting people to litigate.
Success fees are essential to ensuring access to justice. Lawyers will not take on cases without their success fees guaranteed to be paid by the defendant.	Claimant lawyers are not obliged to take on cases currently; they already choose the cases they take under our existing civil justice system. Success fees provide a perverse bonus to claimant lawyers to continue to increase costs and not reach settlement at an early date. The Bill puts claimants at the heart of ensuring costs are reasonable.
A lawyer is necessary for all claims. If people do not use a lawyer compensators will take advantage of them.	The ABI commissioned independent research into outcomes for those represented by lawyers and those who were not. Claimants dealing directly with an insurer receive on average £289 more than claimants with legal representation. In addition, the time taken to settle claims for claimants dealing directly with an insurer is on average 95 days less.
Referral fees pay for the legitimate marketing tools of Claims Management Companies who increase awareness in people's right to sue.	Increased public awareness of legitimate rights to most consumers is nuisance texts and phone calls and aggressive marketing tactics. The public are aware of where to go when they have a claim – referral fees add no value.

What do consumers think?

The ABI undertook a survey of over 2,500 consumers¹ to understand their views on compensation culture:

- 51% said they had been approached by a CMC so far this year. However, only 3% said that this had been helpful in making their claim
- 83% of those surveyed believed that CMCs serve no useful purpose and 49% believe they encourage false claims and add to the compensation culture
- Only 1% of consumers thought that having their personal details sold on for a referral fee would help them make a claim
- 92% of those surveyed said they would be concerned or annoyed if their details were sold for a referral fee in this way

These results show consumers have real concerns as to how their details are sold on as commodities. The survey also shows that consumers do not see nuisance CMCs as being a worthwhile option in the event of a claim.

¹Fieldwork for the survey was conducted online by YouGov between 31st May and 2nd June 2011. The survey results are based on responses from 2,613 GB adults aged between 18 and 70.

Typical fixed costs in an uncontested whiplash claim:

Fixed fee to claimant's solicitor paid by defendant



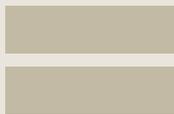
Minus



Typical fee paid by claimant's solicitor to the CMC for the referral fee



Equals



The net fee received by the claimant's solicitor under the current arrangements



Removing the referral fee element would enable the fixed costs to be significantly reduced – the claimant's solicitor would receive the same as before, but up to £800 would be saved per case, reducing costs for compensators and ultimately consumers and taxpayers. It would also bring the costs of claims in line with costs in Germany.

What is a referral fee?

A referral fee is a fee paid to an intermediary - generally a CMC - for a client referral. A client referral occurs when the client's contact details are passed on to a solicitor. Referral fees are frequently as much as £800 but can be up to £1000 for low value claims. Recipients include CMCs, lawyers, trade unions and insurers.

Why should the UK ban referrals fees?

• Added costs

The "merry-go-round of fees" results in fees paid by claimant lawyers to CMCs and trade unions to take on claims. Claimant lawyers consider these fees to be an overhead (a marketing cost). Claimant lawyers' guideline hourly rates and fixed costs are artificially high as they take into account the referral fees paid throughout the claims system.

• Compensation culture

CMCs' aggressive marketing and desire to generate more and more claims encourages some claimants to either exaggerate or completely make up a claim adding to the "have a go" culture. Some Trade Unions also benefit from referral fees and actively encourage claims for minor injuries which are difficult and uneconomic to defend.

• No added value

Throughout the claims system the consumer is referred to companies purely because CMCs, lawyers, garages and car hire firms have agreed to pay the highest referral fee.

Referral Fees – How they work in a Public Liability claim

Supermarket Ltd self-insures for low value personal injury claims. It pays for this through its own sales revenue.

You are shopping in Supermarket Ltd when you slip on the floor. Your ankle hurts which makes it awkward for you to walk home from the store with your shopping bags.

You take a taxi home from the store. You see an advert in the back of the taxi paid for by CMC Ltd which says "Injured in an accident that wasn't your fault? You may have a claim for compensation. Call CMC Ltd's freephone number today".

You call CMC Ltd and they tell you that you have a claim.

CMC Ltd sells your information onto Mr Claimant Lawyer for £800. This payment is called a Referral Fee.

You are contacted by Mr Claimant Lawyer because he is willing to pay the highest referral fee to CMC Ltd.

Mr Claimant Lawyer represents you in a claim against Supermarket Ltd.

Supermarket Ltd agrees to settle the claim and pay you compensation of £2000. Supermarket Ltd also pays Mr Claimant Lawyer's legal fees of £2000. **Mr Claimant Lawyer's fees are calculated according to Guideline Hourly Rates which are fixed at a high enough level to enable Mr Claimant Lawyer to make a profit even after paying CMC Ltd's £800 referral fee.**

CMC Ltd has merely sold on your claim to a solicitor that you could have found and instructed on your own. Consumers have made it clear that they know who to go to in the event of a claim. Claims Management Companies increase costs which are ultimately passed on to consumers in increased premiums and prices.

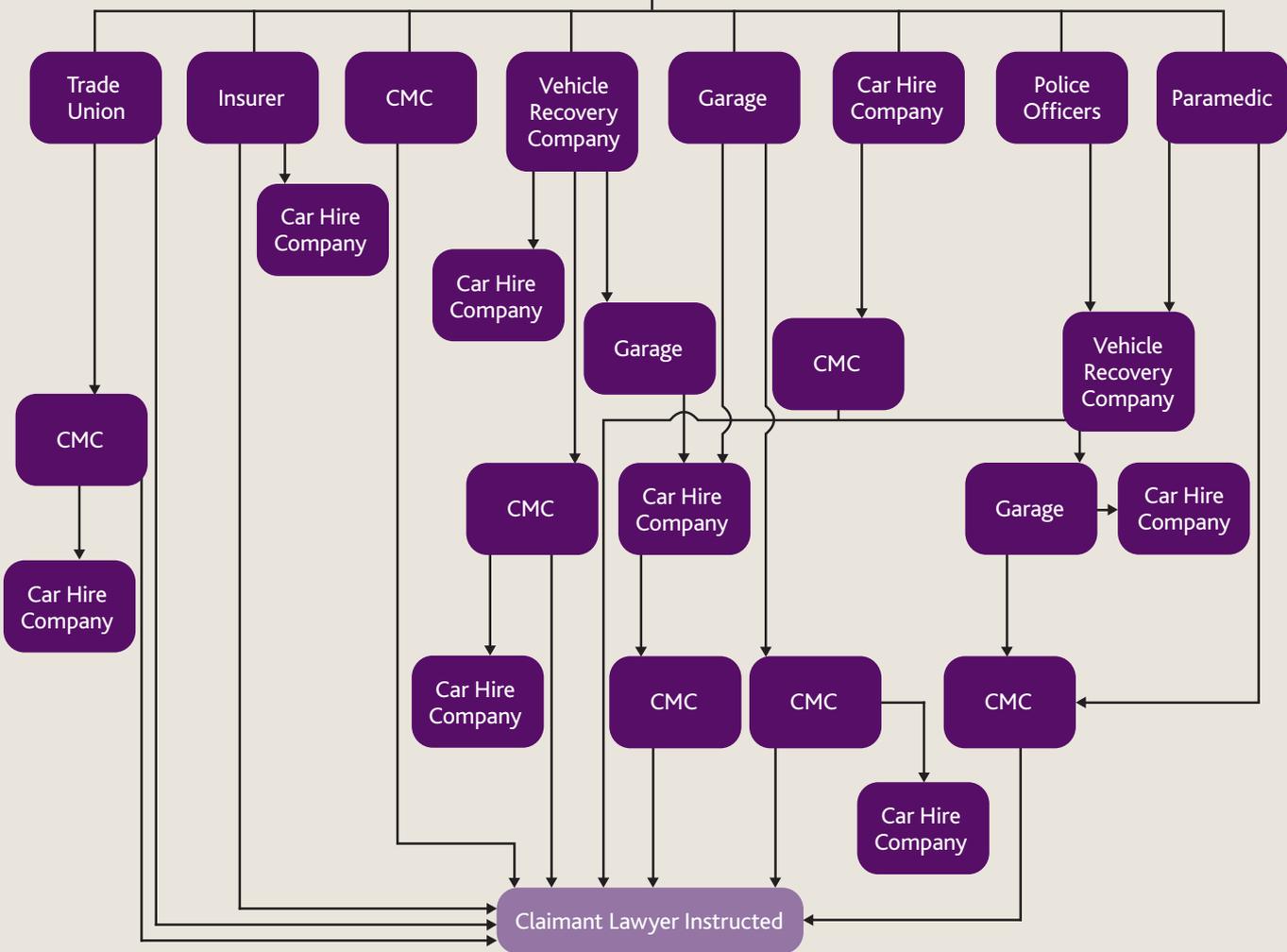
These costs affect Supermarket Ltd's profits and are passed back onto the consumer through increased food and fuel prices affecting all consumers.

CMC Ltd has received £800 of the costs of this claim for passing on your accident details.

Referral Fees – How they work in a Car Accident claim

You buy a motor insurance policy and pay your annual premium

You have an accident that was not your fault. There is now a so-called 'Golden Hour' for someone to be the first to collect and sell on your details so they can receive payment of a referral fee. Many of the competing organisations are:



Your lawyer's fees are calculated according to the fixed cost regime for car accident claims which are fixed at a high enough level to enable the lawyer to make a profit even after paying a referral fee - the costs of which often include the costs of fees throughout the system.

The other driver's insurer settles the claim and pays your lawyer's fees which adds to the costs for insurers and therefore increases premiums for ALL consumers.

Key:
 → The selling of your details, for which a Referral Fee is paid.

The Legal Aid, Sentencing and Punishment of Offenders Bill

The Claims Management Regulator's Annual Report 2010/2011 details that CMC revenue has increased by 57% in one year despite the number of authorised CMCs only increasing by 3%.

Compensators are solely concerned with the provisions of the Bill that relate to reforms to civil justice; sections 41 to 44. These sections of the Bill will deliver the following benefits:

Section 41 - Success fees

- This section of the Bill abolishes the recoverability of lawyer's success fees.
- Success fees provide a perverse bonus to claimant lawyers who continue to increase costs and do not reach settlement at an early date.
- Success fees are used by claimant lawyers to pay for the costs of unsuccessful claims. They place a disproportionate cost burden on one losing defendant because of the decisions of claimant lawyers to take on unmeritorious claims.
- The argument that claimant lawyers will not take on cases with low chances of success if success fees are abolished is fundamentally flawed. Claimant lawyers are not obliged to take on cases currently; they already choose the cases they take under our existing civil justice system.

Section 42 - Damages-based agreements

- This section provides an additional funding arrangement for claimants by allowing lawyers to charge a proportion of their fees commensurate to the level of damages awarded to their client.
- Damages-based agreements mean that the claimant is much more engaged in the level of fees incurred. This will ensure that costs are kept to a reasonable level throughout the lifetime of a claim.

Sections 43 & 44 - Recoverability of ATE insurance premiums and third party funders' costs

- This section removes the recoverability of After-The-Event insurance premiums and third party funders' costs from defendants. ATE policies in some instances are useful and help claimants cover costs they would otherwise be unable to cover but the cost of the premium should not fall to the defendant.
- ATE insurance policies, sometimes taken out very close to trial at very high cost are disproportionate. Lord Justice Jackson, in his final report, considered that the average premium in a case against the NHS was over £10,000. This is clearly disproportionate and unreasonable.
- ATE premiums are agreed to by the claimant but fall to be paid by an unsuccessful defendant and are linked to costs incurred and not the value of the claim. Removing this recoverability will engage a claimant in the costs of his claim and ensure they remain reasonable.

Time for change

- The current civil justice system is in need of reform to halt the compensation culture which affects us all as consumers in higher prices and inflated insurance premiums, and as taxpayers through income tax, council tax, and National Insurance contributions.
- The Legal Aid, Sentencing and Punishment of Offenders Bill offers a better deal for genuine claimants by providing the compensation they are entitled to quicker and at lower costs. The quicker that personal injury claimants receive compensation, the quicker they can start to benefit from assistance with rehabilitation.
- The civil litigation costs provisions in the Legal Aid, Sentencing and Punishment of Offenders Bill go a long way to addressing these issues but more must be done.
- We urge the Government to implement Jackson's recommendations in full including a ban on referral fees which increase costs, encourage bad behaviour and provide no added value for consumers.
- The Government must also take action to reduce fixed costs which are currently disproportionately high and implement reforms on whiplash to ensure that genuine claimants receive the compensation they are entitled to quickly and at lower costs.
- These reforms will reduce the cost of litigation for insurers, government departments, local authorities, businesses and individuals.

Conclusion

The compensation culture in the UK is not unstoppable or irreversible.

Lord Justice Jackson has identified the changes necessary to safeguard access to justice for all. His recommendations should be introduced in full.

Compensators welcome the steps taken in the Legal Aid, Sentencing and Punishment of Offenders Bill.

Insurers, self insured corporates, manufacturers and public sector organisations all agree that positive changes can - and must - be made for the benefit of claimants, consumers and taxpayers alike.

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The ABI is the voice of insurance, representing the general insurance, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has over 300 members, accounting for some 90% of premiums in the UK.



Ford is the market leading motor manufacturer in the UK. Ford of Britain employs around 11,500 people at eight locations in the development, manufacture and supply of the Ford vehicle range. This figure climbs to just over 15,000 employees if you include Ford Credit and the Ford-owned Ford Retail dealer network.



Asda is one of Britain's leading retailers. It employs over 175,000 colleagues at 424 locations. It has also recently purchased 147 Netto stores. Asda serves over 18 million shoppers a week and its home shopping business serves 98 per cent of UK homes.



Centre for Justice is a modern adjudication service for the insurance sector - a quick, cost effective and reliable alternative to the courts and arbitration. In dealing with disputed claims or issues with other insurers, the service puts insurers in control of cost and risk. www.centreforjustice.org.



Alarm represents 1,700 risk practitioners across public service organisations including the NHS and local authorities. The association develops and supports best practice in public risk management, represents the interests of public risk practitioners and promotes excellence in the use of risk management.



EEF is the representative voice of manufacturing, engineering and technology-based businesses. As well as representing the views of manufacturers, EEF is a leading provider of business services, including HR, employment law, health, safety and environment.



Lloyd's Market Association (the LMA) provides professional, technical support to the Lloyd's underwriting community and represents their interests. All managing agents at Lloyd's are members, together managing a gross premium income of around £23 billion.



Airmic is a members' association supporting those responsible for risk management and insurance within their own companies. With over 1000 individual members from over 450 companies, Airmic provides research, training, networking, lobbying and market information for the benefit of members.



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BAA is a leading airport company involved in almost every aspect of the day-to-day running of six UK airports. We help millions of people each year to reach destinations around the globe. BAA is also a world leader in security and one of the largest commercial landlords in the UK.



Whitbread PLC is the UK's largest hotel and restaurant group. Its well-loved brands include Premier Inn and Costa. Whitbread PLC employs over 40,000 people globally and serves over 10 million customers every month in over 2,000 outlets across the UK.



The British Safety Council's vision is that no one should die, be injured or made ill by their work. We work to provide our 8,000 corporate members in 50 countries with the knowledge and skills necessary to effectively control the risk of workplace injury and ill health and environmental harm.



SMMT is the voice of the UK motor industry, supporting and promoting the interests of the UK automotive sector, at home and abroad, to government, stakeholders and the media.



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