

Director Justice Policy
Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

17 April 2014

Dear Director

CONSULTATION ON THE PROPORTIONATE LIABILITY MODEL PROVISIONS

The Insurance Council of Australia (ICA) refers to your letter dated 24 January 2014 and appreciates the opportunity to comment on the Standing Council on Law and Justice's (SCLJ) model proportionate liability provisions (model provisions) as part of our ongoing participation in the consultation process. In this regard our comments will refer to our earlier submission to the Standing Committee of Attorneys General on 11 October 2011.

The ICA and its members continue to strongly endorse national consistency amongst the Australian jurisdictions on the proportionate liability regime. We support the model provisions which are contained within Option 5 of the SCLJ Proportionate Liability Model Provisions Decision Regulation Impact Statement (October 2013) (RIS) as follows:

***Option 5:** Uniform legislation that more narrowly defines apportionable claim as one where a failure to take reasonable care is an element of the action and prohibits contracting out (the draft model provisions).¹*

We support the conclusion reached by the SCLJ in the RIS that this option will be expected to *provide greater certainty in risk allocation for commercial contracts.*² Further we agree that the uniform arrangements will make it easier for parties to enforce their respective rights and obligations.³ The ICA believes that this option is likely to create a uniform environment where the cost of claims for property damage and economic loss can be reduced and the earlier settlement of claims encouraged.

We will discuss the issues raised by the RIS in relation to the proposed consumer exception below and confirm that our members would support the first option discussed.⁴

Financial Impact of Proportionate Liability Reforms

The ICA and its members believe that the public liability reforms (including those concerning proportionate liability) undertaken across Australia continue to be successful and have assisted in creating the environment for systemic change which has contributed to improvements in the availability and affordability of public liability and professional indemnity insurance for consumers.

The reduction in average premium costs across Australia is evidenced by the Australian Prudential Regulatory Authority (APRA) National Claims and Policies Database (NCPD).

The graphs below compare this reduction in average premium costs for both public liability and professional indemnity costs against the number of risks written. APRA measures the number of risks written instead of policies taken out as there may be a number of different risks, such as public and products liability, in the same policy.

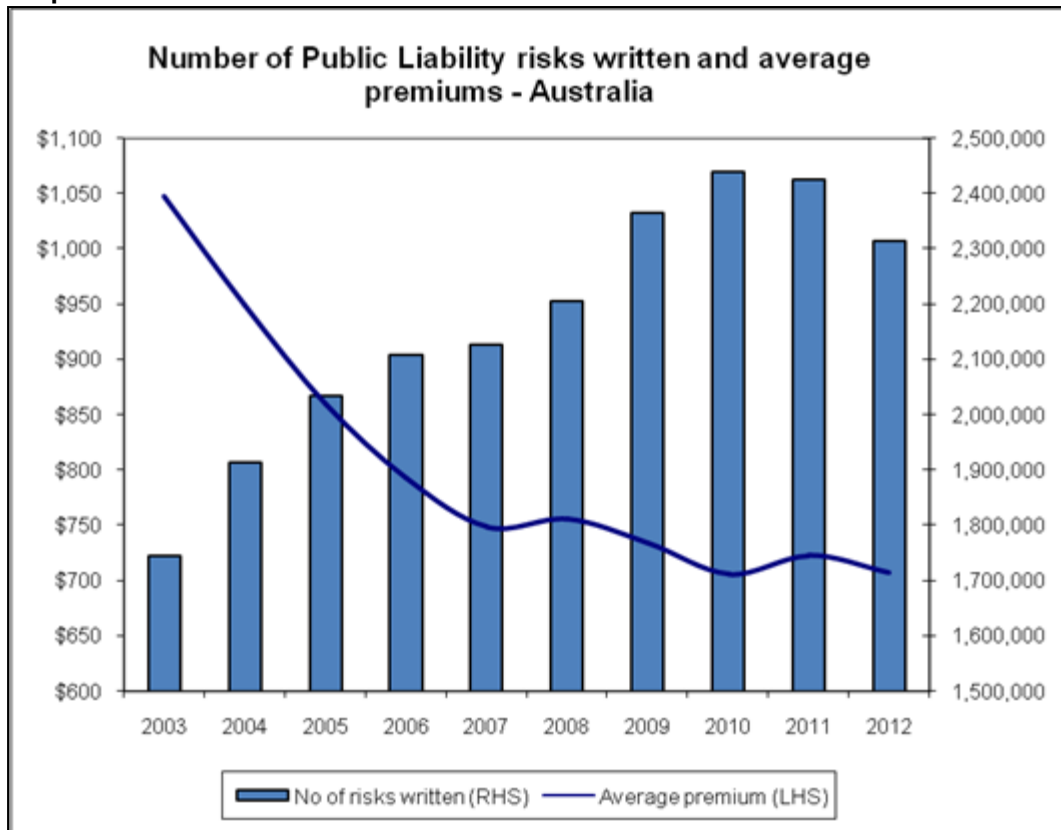
¹ SCLJ Proportionate Liability Model Provisions Decision Regulation Impact Statement (October 2013) (RIS), p10

² RIS, p18

³ *ibid*

⁴ *ibid*

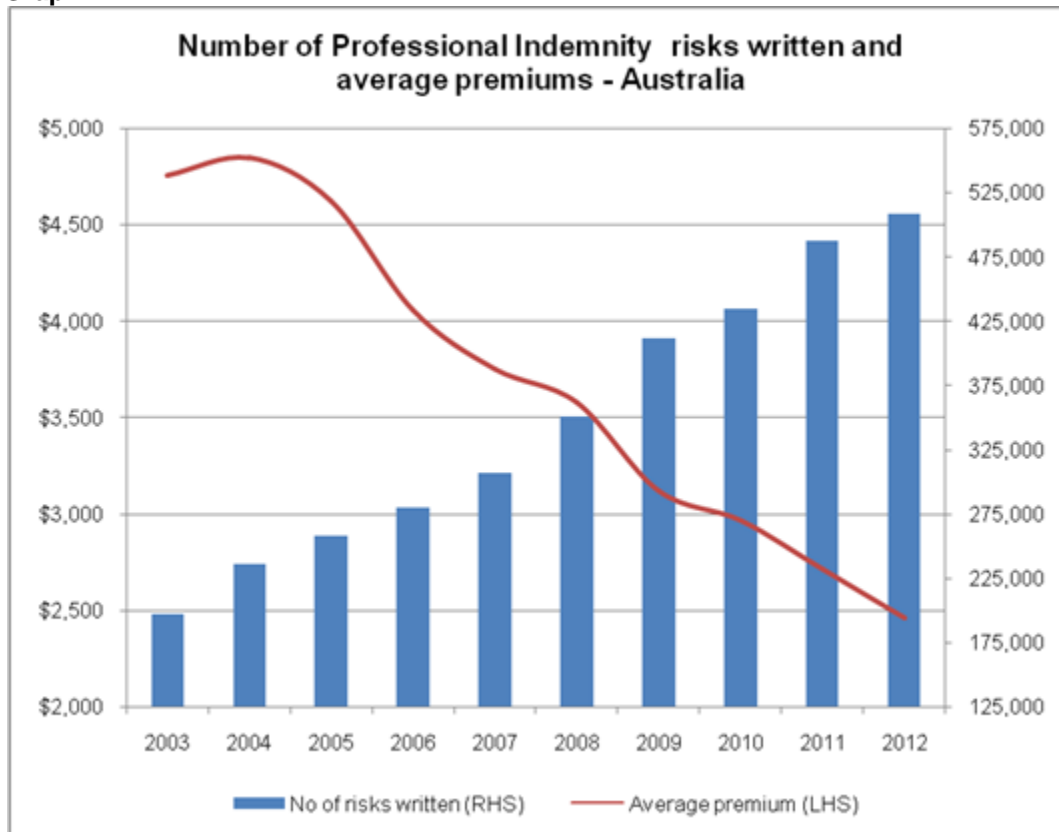
Graph 1



Source: APRA, NCPD, Policy Data Tables June 2012 (issued 26 June 2013)

Graph 1 shows that while the number of public liability risks written in 2012 had increased to 2,313,214, the average premium had fallen to \$708. This represents an increase in the number of risks written of 32.6% since 2003 and represents an average annual growth rate of 3.2%. At the same time the national average public liability premium fell by 2.1% in 2012 virtually offsetting the small premium increase in 2011. Premiums have fallen in seven of the last nine years and were 32.5% less than the average premium in 2003.

Graph 2



Source: APRA, NCPD, Policy Data Tables June 2012 (issued 26 June 2013)

Graph 2 shows that while the number of professional indemnity risk written rose by 4.2% in 2012 to 508,168, the overall increase in the number of professional indemnity risks written over the nine year period from 2003 to 2012 is 157.1%. The level of national average professional indemnity premium shows similar trends to that of public liability and fell by 9.2% to \$2,464 in 2012. Average professional indemnity premiums have also fallen in eight of the last nine years and are 48.2% below the 2003 premium level.

We submit that the above supports the comments of the SCLJ in the RIS that:

However, assuming there is some degree of correlation between the extent to which proportionate liability applies and insurance availability and affordability, generally a contraction of proportionate liability relative to what would otherwise be covered by professional indemnity or public liability insurance may have potential impacts on insurance.⁵

Consumer Exception to Apportionable Claims

The ICA's October 2011 submission raised the issue of the likely impact of the proposed consumer exception to the regime in matters involving consumers who purchase professional services such as accountants, architects and lawyers.

We therefore support the model provisions which are designed to ensure that these claims, involving obligations to render services with due care and skill⁶ remain apportionable under the proposed regime.

⁵ RIS, p 12

⁶ RIS, p 18

The RIS outlines 2 options to achieve this as follows:

Option 1: *Providing that a claim is not an apportionable claim if it is a claim based on a remedy under the Australian Consumer Law (ACL) (unless it is based on a contravention of the prohibition on misleading or deceptive conduct under section 18), and*

Option 2: *Providing that a claim is not an apportionable claim if it is a claim relating to goods or services acquired by an individual as a consumer, with consumer being defined with reference to the first limb of the ACL definition (ie the amount paid for those goods or services did not exceed \$40,000)⁷*

Our members consider that the first option would be more suitable to achieve the aim of preserving the proportionate liability regime in these claims. We submit that the first option provides a clear definition of the type of claims which would be caught by the exemption. In our members' experience misleading and deceptive conduct claims are the most common form of claim under the ACL provisions. This type of claim is also commonly brought together with a negligence claim so the application of proportionate liability is simplified in professional negligence claims.

Contracting Out

The ICA has maintained the position that contracting out of the proportionate liability regime represents a significant weakening of the benefits of the scheme as a whole. In these circumstances the ICA supports Option 5 as it would apply to a more closely prescribed range of claims.⁸

We support the model provisions which ensure that:

contracting out is prohibited for all contracts except an agreement by a concurrent wrongdoer to contribute to indemnify another concurrent wrongdoer.⁹

Conclusion

The ICA and its members are committed to an ongoing productive working relationship with SCLJ and look forward to discussing the implementation of options which improve the greater harmonisation of the proportionate liability regime nationally.

In this regard, we believe that a review of the operation of model provisions be undertaken after their implementation to ensure their efficient operation.

If you have any questions or comments in relation to the above please do not hesitate to contact Justine Hall, Senior Policy Advisor on either (02) 9253 5122 or jhall@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

⁷ RIS, p 21
⁸ RIS, p 18
⁹ RIS, p 22