



Mr Alf Capito
Chair
NSW Professional Services Industry Taskforce

Via email to: professional.iap@business.nsw.gov.au.

30 July 2012

Dear Mr Capito

NSW DRAFT PROFESSIONAL SERVICES INDUSTRY ACTION PLAN

The Insurance Council of Australia¹ (Insurance Council) welcomes the opportunity to provide a short submission on the New South Wales (NSW) Professional Services Industry Action Plan (the Plan). We also appreciate the consultative approach adopted in the development of the draft Plan through the industry forums participated in by the Insurance Council on 15 and 28 February 2012.

The Insurance Council is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. March 2012 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$36.6 billion per annum and has total assets of \$115.9 billion. The industry employs approx 60,000 people and on average pays out about \$111 million in claims each working day.

Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. We therefore have a strong interest in development of a NSW Plan which will encourage growth in this sector and therefore support the draft Plan's identification of export opportunities for the insurance industry in emerging markets and the potential to develop NSW as a regional training and education centre for Asia.

The Plan is an important initiative to identify constraints and opportunities for NSW businesses. This submission will highlight specific Tax and Professional Liability insurance issues as well as the need for specific legislative reform which the Insurance Council is currently discussing with the NSW Department of Attorney General and Justice, for your consideration.

Regulatory Barriers - Tax

Consistent with the views which the Insurance Council put at the Industry Forum on 15 February, Insurance Council supports recommendation 13 for the removal of tax and regulatory barriers, specifically that the:

¹ Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

NSW Government develop and present options on restructuring the Emergency and Fire Services Levy (on a revenue-neutral basis) to replace the insurance levy component with an alternative funding source.

The Insurance Council notes that the NSW government is examining the abolition of statutory contributions from insurers to fund NSW emergency services (aka fire and emergency services levies). The release of a Discussion Paper on the Funding of NSW Emergency Services represents a step towards abolition of insurer statutory contributions and follows on from similar such recommendations in the NSW IPART review of State Taxation and the Commonwealth's Henry Tax Review. The Insurance Council looks to the Discussion Paper as the basis under which the NSW Government follows the example set by the Victorian Government in abolishing statutory contributions by 1 July 2013.

Furthermore, the Insurance Council notes that State stamp duties also represent a drag on the insurance industry. According to the NSW Budget papers, the NSW Government is expected to raise some \$823 million in insurance stamp duties in 2012/13, the equivalent of just under 1.5% of all State revenues. The Insurance Council contends that, given the modest revenues involved, the NSW Government is positioned to follow the lead of the Australian Capital Territory Government in phasing out stamp duties on insurance over the short to medium term.

Other Regulatory Barriers – Directors and Officers liability policies

In relation to the competitiveness and long-term attractiveness of NSW as a place for business, we wish to highlight the potential negative impact of a recent New Zealand High Court case, *Bridgecorp*.² *Bridgecorp* was based on section 9 of the Law Reform Act 1936 (NZ). NSW has an equivalent provision in section 6 of the NSW Law Reform (Miscellaneous Provisions) Act 1946.

The case has created significant uncertainty for insurers and the NSW business community with potentially serious consequences for professionals, businesses and company directors with a liability claim against them. *Bridgecorp* established that on the happening of an event giving rise to a claim for damages or compensation against an insured (whether or not liability is accepted or proven), a charge is created which attaches to all insurance moneys available in a Directors and Officers (D&O) liability policy. In *Bridgecorp*, the insurer could not therefore in accordance with the terms of a policy, advance to directors and officers money for the defence of legal proceedings brought against them.

A number of potential negative consequences follow the decision including:

- uncertainty of NSW application and potential significant personal exposure of directors could result in an ongoing shortage of experienced directors in NSW;
- loss of entrepreneurial activity;
- inability to pay defence costs impacting on business viability (particularly small businesses); and
- a conflict of State and Federal Laws with section 6 effectively freezing policy payments while the insured has a valid claim for their defence costs to be met.

The Insurance Council is in discussions with the NSW Department of Attorney General and Justice on the need to repeal the NSW provision. We understand a legislative amendment to

² *Steigrad & Ors v BFSL 2007 Ltd & Ors* (15 September 2011)

prevent the charge applying to any defence costs component is currently being considered to address the most pressing problem created by the *Bridgecorp*.

Ideally, the Insurance Council would like to see an amending Law Reform (Miscellaneous Provisions) Act 1946 Bill introduced to the next session of Parliament. We would appreciate the Taskforce's support in emphasising the need for early legislative amendment to restore the necessary certainty for the NSW business community.

Professional indemnity insurance (PII)

The Insurance Council would also like to take the opportunity to comment on the references to the cost of PII as a barrier to competitiveness and industry efficiency, with specific reference to the legal profession. In particular, in Chapter 5 – Outcomes from consultations, the following claims are made.

At 5.1.3

The cost of professional indemnity created a barrier to both domestic and international competitiveness.

At 5.2.2

Consultations identified a number of areas for improvement including:

- *Reduce the cost of professional indemnity insurance to improve business viability, particularly of SMEs;*

The International Legal Services Advisory Council noted that compliance costs from inefficient, multi jurisdictional legal profession regulation hamper competitiveness, with the costs of professional indemnity insurance, admission requirements and responding to multiple regulators all playing a role.

The following comments are made in the Recommendations:

At Recommendation 9

This issue has been raised in consultations that identified the need for a business structure of Limited Liability Partnership in particular, but noted the need for consistency across Australia. This structure has a number of advantages in relation to professional indemnity insurance, risk and liability management, and operating across international borders (in many of our major trading partners this is the preferred form of business structure).

At Recommendation 10

A range of issues were raised in consultations for improvement, some of which are currently subject to review by COAG or NSW agencies. These include:

- *Viability of legal firms due to high cost of professional indemnity insurance, particularly for SMEs.*

Whilst we recognise that the cost of PII was raised by NSW professional services business and organisations in the consultation process, it is necessary for the Professional Services

Industry Action Plan Taskforce to establish whether such claims are accurate. There is no evidence provided in the draft plan to support these claims. Furthermore, it is unclear whether the alleged high cost of PII is an Australia-wide or NSW specific issue.

We wish to correct the record in relation to the cost of PII. PII premiums are not simply 'high' or 'low' but reflect the exposure faced by the relevant profession and therefore the risk to be borne by the insurer. This is a function of numerous factors including the nature of the legal system and a propensity to litigate. The Australian PII market is highly competitive and in real terms the cost of PII for most occupations is at its lowest for at least a decade.

The draft Industry Action Plan claims PII costs are particularly a barrier to the competitiveness and viability of legal firms. The market for primary PII for law firms is largely controlled by the profession itself, with each law society running their own compulsory scheme. PII premiums paid by legal firms are very much driven by historical claim experience and there is very little cross-subsidisation with other occupations. The cost of PII for a legal firm is a reflection of the profession's exposure. It follows that if the industry is able to reduce its exposure, the cost of PII will come down as well. In addition, it is unlikely that adoption of a new business structure (such as an LLP), in itself, will yield any PII benefit.

In order to improve domestic and international competitiveness and business viability, we submit that the Industry Action Plan should instead focus on raising professional standards across the professional services industry.

If you would like any further information on the issues raised in this submission, please contact the Insurance Council's General Manager Regulation, Mr Anning, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO