Queensland Law Society

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Office of the President

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

[redacted]

Dear Committee Secretary

Inquiry into Small Business Insurance

The Queensland Law Society (**QLS**) welcomes the opportunity to contribute to the inquiry into small business insurance and appreciates the additional time allowed for this submission.

QLS is the peak professional body for Queensland's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This submission has been prepared with input from the QLS Accident Compensation Committee, Not for Profit Committee and the Competition and Consumer Law Committee.

A. Access to insurance coverage which meets contemporary business needs and B. Affordability and availability of insurance products

Difficulties in obtaining and affording insurance

Small businesses and not for profit organisations face challenges in accessing affordable and adequate insurance coverage across a wide range of industries. Rising premiums, higher excesses, exclusions, and limited insurer appetite for certain sectors or locations create substantial barriers for many operators seeking to adequately protect their assets and manage risk. These challenges increasingly affect small businesses across both metropolitan and regional areas, including areas where insurance premiums are higher due to underlying risk profiles such as flood risk.

Owners of small businesses in at-risk areas who cannot access affordable insurance risk losing not only their businesses but their homes in circumstances where they have used their homes

to secure small business loans. Farmers and primary producers are also significantly impacted by the difficulty in obtaining insurance for stock, crops and fences which are often damaged by floods, cyclones and fires.

We have received comments from our members particularly relating to north Queensland, where premiums can be significantly higher, as illustrated by home and content insurance costing 60% more than the national average.[1] Reduced competition, limited insurer willingness to operate in the region, and higher perceived risk contribute to increased costs for businesses, particularly those exposed to natural hazards.

Small legal practices

We are not specifically aware of difficulties for law firms in obtaining general insurance products though we anticipate that small firms operating in areas prone to natural disasters would be experiencing the same difficulties as other businesses. We are aware that some practitioners have difficulties obtaining professional indemnity insurance for non-legal work they carry out, such as project management of body corporate management (noting of course that legal work is covered by mandatory professional indemnity insurance).

In terms of cyber insurance, QLS Member Practices have access to QLS Cyber Essentials Insurance but are encouraged to consider their need for top up cover.[2]

Insurance crisis in not-for-profit sector for children and family services

In June 2021 a number of children and families services peak bodies wrote to the NSW Treasurer and Attorney-General regarding the collapse of the insurance market for organisations seeking physical and sexual abuse coverage for children's services.[3]

As a result of that letter, an interjurisdictional working group (**IJWG**) on NGO physical and sexual abuse insurance was established.

There is still no permanent solution to the problems identified by the June 2021 letter and the work done by the IJWG in several Australian jurisdictions. There is no permanent government or market intervention solution yet in place in Queensland, Tasmania, South Australia and the Northern Territory.

The absence of the availability of consistent and suitable insurance for this massive area of organisational risk (given there are no time limitations for the bringing of child sexual abuse claims in any jurisdiction in Australia any more), means many providers - a large number of whom are not for profit organisations - are unable to obtain clear cover for their legacy liabilities, as well as present and future risk in this space.

[1] Premium price: The impact of climate change on insurance costs - The Australia Institute
[2] https://www.qls.com.au/qls-membership/services-and-benefits/business-services/qls-cyber-essentials-insurance
[3] https://www.acwa.asn.au/wp-content/uploads/2021/08/Joint-Letter-to-Minister-CC-Treasurer-and-Attorney-re-Insurance.pdf

The currently inconsistent national landscape is summarised below:

QLD	NSW	VIC ("Community service organisations" tab)	TAS
No permanent scheme in place. 2024/25 budget revealed funding to support development of a long-term indemnity scheme, but no update has been shared for a permanent scheme.	The Special Liability Insurance Scheme came online on 1 January 2025.	Long-term scheme in place via Victoria Managed Insurance Authority.	No Permanent scheme in place. A short-term scheme is in place.

ACT (pp. 10, 95)	SA	WA	NT
Long-term scheme in place via Australian Capital Territory Insurance Authority.	A temporary scheme was in place until September 2022. It is unknown if or for how long this will be extended.	Indemnity cover for OOHC and youth homelessness accommodation services only.	It has been indicated that no permanent scheme will be developed.

C. Adequacy of current regulatory framework in addressing modern insurance challenges and

D. D. any related matters

We anticipate the Parliamentary Joint Committee may receive submissions regarding the civil liability settings in Australian jurisdictions and how the extent of liability and availability of damages influences the quantum of judgments or settlements and therefore insurance costs.

From a Queensland point of view, QLS submits that the civil liability settings, and the procedures in place for the conduct of personal injury claims in Queensland, are largely appropriate and any efforts to curb rising insurance costs in Queensland should be achieved through mitigation of risks by insureds and appropriate management of claims rather than restricting damages available to injured persons. QLS makes no comment on the civil liability settings and the procedures for the conduct of personal injury claims in other Australian jurisdictions which do differ from the Queensland settings and procedures. Queensland's settings and procedures work well in balancing the availability of affordable insurance, efficient management of claims and adequately compensating injured members of the public.

QLS acknowledges that the Commonwealth government as well as the state governments, can play a role in enacting policy settings that allow claims to be managed more efficiently, for example policies that contribute to the availability of sufficient numbers of medical specialists to both treat injured people and provide expert medico-legal evidence.

State governments can also contribute to curbing insurance costs, for example by enacting policies that address issues like claim farming, the recovery of standard costs by claimants and pre-proceeding claim management processes. Initiatives of this nature have had positive impacts on Insurance costs in Queensland. QLS has been a proponent of laws that:

- Prohibit claim farming in Queensland, which now apply across motor accident, workers' compensation and other personal injuries matters. These laws have been effective in deterring claim farming in Queensland. QLS supports calls for nationally consistent laws against claim farming.
- Regulate the entitlement of successful claimants to recover their standard legal costs in both the motor vehicle and public liability claim jurisdictions.;
- Mandate pre-proceeding claims management processes that include, amongst other things:
    - early notification of claims and potential claims
    - disclosure of all information relevant to claims
    - attendance at compulsory settlement conferences
    - certification that a claim is ready for trial before convening a compulsory settlement conference
    - exchange of written final offers if settlement conferences are unsuccessful, with the offers having cost implications in future judgements
    - provision of cost analysis to claimants prior to convening compulsory settlement conferences.

Turning to components of the civil liability ecosystem that may be identified as increasing insurer costs, QLS comments as follows.

Liability

Dangerous recreational activities

QLS considers that the provisions governing dangerous recreational activities in Queensland – Chapter 2, Division 4 of the *Civil Liability Act 2003* (Qld) - and courts' interpretation of those provisions have been appropriate.

Nervous shock claims

QLS understand some sections of the community perceive it is too easy for persons who have not been physically injured in an accident to claim damages for psychological injury, for example witnesses to an accident or its aftermath or family members of injured persons.

While recognising that these third-party nervous shock claims have an impact on insurers' costs and therefore on premium, QLS considers that substantially restricting such claims by imposing arbitrary requirements or excluding them altogether would not be justified.

The evolution of the law of negligence in relation to nervous shock claims has always involved tension between incremental development of legal principle and consideration of public policy regarding how far the scope of liability should extend. The Queensland *Civil Liability Act 2003* addresses duty of care and causation without prescribing the exact class of persons who can make a third-party nervous shock claim.

QLS considers this established approach has served the Queensland community well, remains appropriate and that the social utility in a third party being able to claim damages for nervous shock resulting in diagnosed mental disorders, where breach of duty and causation are proven, should not be discarded purely because of its impact on insurance premiums. Rather, it is worthwhile the legal profession engaging in meaningful discussion about the limits of the law of nervous shock while the courts remain empowered to decide matters on a case-by-case basis. The fact that the common law still applies restrictions on third party nervous shock claims is

illustrated by the recent Supreme Court of Queensland decision of *Lundbergs v Fu & Anor* [2025] QSC 135.

As with the general discussion below regarding psychological injuries, improvements can be found by policy initiatives to significantly improve access to mental health support for claimants with psychological conditions to ensure early intervention and the availability of specialists to provide expert assessment to minimise unnecessary delays in progress of personal injury claims.

Damages

Psychological injuries

While recognising that primary and, particularly, secondary psychological injury claims have substantially increased in recent times, QLS would not support reform proposals that would see access to damages for diagnosed psychological injuries in Queensland further significantly restricted. As stated above, the current policy settings working in conjunction with common law principles continue to effectively manage psychological injury claims.

Some of the relevant Queensland policies that have had effective positive influences include that, under the *Civil Liability Regulation 2014,* adverse psychological reactions to physical injuries that are not themselves mental disorders are treated as a feature of the physical injury for the purpose of calculating an injury scale value (**ISV**) upon which general damages are calculated. We consider this appropriate.

Where there is a diagnosed mental disorder along with a physical injury, the court must determine which is the dominant injury and adjust the ISV for the dominant injury to take into account additional injuries. The psychiatric injury rating scale (**PIRS**) rating accepted by the court informs how a mental disorder is allocated, or contributes to, an ISV. Given these effective policy settings we do not think that there is any significant need to adjust how general damages for combined physical/psychological claims are calculated in Queensland.

We consider that there are other levers that can reduce the impact of psychological injuries on insurance schemes, such as the already identified improved access to treatment through government policies that promote increased access to mental health professionals to achieve early intervention. This would mitigate against development/exacerbation of psychological injures. Increased access to psychiatrists for independent medical examinations/expert reports would also assist in reducing the time it takes to resolve a claim, which would reduce the costs of claims and reduce the adverse impact that drawn out claims can have on the psychological health of the claimant.

Gratuitous and paid care

When considering the availability of damages for care, the rationale for awarding such damages must be borne in mind, including that the need for care has been created by the tortious actions of the defendant and should therefore be compensated. This is central to the relevant Queensland policy setting addressing care and it has served the Queensland community well.

For gratuitous care in Queensland, this rationale is reflected in s 59 of the *Civil Liability Act 2003*, which provides that, in order to recover damages, gratuitous services must be necessary, arise solely out of the injury in relation to which damages are awarded and not have been care that was already provided to the injured person before the breach of duty happened. Further, the services must have been provided, or are to be provided, for at least six hours per week for at least six months and must be offset for any benefit the service provider obtains through providing the service and take into account any period for which the injured person has not or will not require the services because of care provided in a hospital or other institution. Interest is not paid on past gratuitous care. Damages awarded for future gratuitous services are

discounted on the 5% tables rather than the 3% tables as would have been the case at common law.

When this suite of provisions are taken as whole, QLS considers that these legislative settings, whilst restricting the availability of damages for gratuitous care, do provide an appropriate balance between the needs of injured persons and the need to keep insurance affordable.

Any suggestion that gratuitous care should be paid at a lower rate or that commercial rates should not be paid unless the injured person has engaged commercial care up to the date of judgment cannot be justified. This is highlighted by recognising that an injured person who has not used commercial care may not continue to have access to friends or family who are providing gratuitous care. Further, to restrict, as some sectors of the community may advocate, the recovery of care damages at commercial rates to those who have already been able to afford commercial rates is anathema to the objective of damages claims. The lack of having engaged paid care after an injury will in many cases relate to lack of means, often as a result of the compensable injury, rather than a lack of need for paid care or easy availability of gratuitous care. Commercial rates, discounted appropriately on the 5% tables and for vicissitudes and contingencies, are therefore justified and do not represent overcompensation for future care needs.

Sullivan v Gordon Damages

Sullivan v Gordon damages, which compensate for an injured person no longer being able to provide gratuitous care for others were reintroduced in Queensland in 2010 but are subject to significant restrictions (see ss 59A to 59D *Civil Liability Act 2003*). These include that the injured person died or that they meet an injury threshold imposed by the requirement that general damages must exceed a prescribed amount (currently $58,090, which calculates to an injury scale value of 23 or more) and that the recipient of the care resided at the injured person's usual residence. There are several other requirements, including a threshold on the amount of care the injured person would reasonably have been expected to provide.

Arguably, the current Queensland policy provisions result in claimants who could reasonably be considered deserving missing out on any damages. For example, an injured grandmother who previously cared for a seriously ill or disabled grandchild but did not live in the same household is not eligible for *Sullivan v Gordon* damages despite the immense impact on the needs of her family.

QLS opposes any argument that *Sullivan v Gordon* damages should be further restricted in states where they are currently available.

Assessment of damages: non-economic loss damages, minimum injury thresholds, caps and injury scales

The assessment of general damages in Queensland using the injury scale value system and calculation provisions in the *Civil Liability Regulation 2014* (and similar provisions in the workers' compensation scheme) have significantly restricted the general damages recovered for "less significant claims" making many of them commercially unviable to pursue beyond the pre-proceeding process. The use of the ISV system does achieve consistency in the assessment of general damages but at a significantly reduced amount for lower range injuries. Damages awarded for ISVs in public liability matters are calculated on a sliding scale from $1,780 for an ISV of 1 to $436,100 for an ISV of 100. QLS considers that the modest sums payable in relation to low ISVs already restrict injured claimants' entitlements and that there is no need to introduce any further thresholds, noting that it is possible for an ISV of 0 to be assessed where an injury is purely temporary.

It is noted that the introduction of thresholds that must be satisfied before an entitlement to damages can be exercised results in unintended consequences and a misdirection of resources, often with significant increases in costs incurred.

Crossover between schemes

It is not uncommon for claims to engage both public liability and statutory insurance schemes (i.e. workers' compensation and compulsory third party). In the case of matters where a worker is injured by a third party, for example a labour hire employee injured at at the premises of a host employer, both the employer and third party can be liable, with both named as defendants and contributions negotiated in a settlement or determined by the court or with one defendant joining the other as a contributor. The total amount of damages to be paid includes the statutory refund to the workers' compensation insurer for compensation paid during the statutory phase.

The Queensland workers' compensation scheme is the most financially viable workers compensation scheme in Australia. This is a product of the positive impact of the Queensland policy settings and regulatory framework. No policy changes or regulatory framework changes should be enacted that risk this financial stability. This includes any suggestion that the way in which liability and damages are apportioned between workers' compensation insurers and public liability insurers should be altered to favour public liability insurers. Curtailing the ability of workers' compensation insurers to recover refunds or contributions to damages from public liability insurers would not properly reflect each defendant's liability and would have a significant impact on the viability of compulsory statutory schemes that play an essential and important societal role in rehabilitating workers and in paying damages where it is just to do so.

Concerns arsing in other jurisdictions that public liability defendants and their insurers are not made aware of claims early enough, may be ameliorated significantly by the adoption of the Queensland pre-proceeding framework which has the benefits set out above including the requirement that early notice be given to public liability defendants under our pre-proceedings legislation. The *Personal Injuries Proceedings Act 2002* (Qld) (**PIPA**) eliminates concerns about late notice being provided to public liability insurers. We suggest that moderating the impost of public liability/workers' compensation claims by improving procedural requirements in other jurisdictions is a fairer, more balanced and more effective approach than making wholesale changes to the way in which contribution is managed or to the ability of statutory insurers to recover damages from host employers, which would put effective and efficient statutory compensation schemes at risk.

Procedural reforms

As stated, QLS considers that the pre-litigation procedures in place in Queensland, i.e. PIPA and similar provisions in relation to motor accidents and common law claims for workers' compensation are largely effective and can provide a model to other states for streamlining pre-litigations procedures.

In terms of the payment of legal costs, QLS considers that the provisions within the *Legal Profession Act 2007* (Qld), including the '50/50 rule' in speculative personal injuries matters (s 347), are generally appropriate and effective.

As stated above, in terms of regulation of the recovery of standard costs from defendants, the concept of upper and lower offer limits, as used in Queensland has proven effective, though the limits should not be annually indexed.[4] Indexation has been counterproductive because the limits have increased faster than the awards of total damages to which they are linked.

[4] See section 40, 56 and 75A PIPA.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [redacted]

Yours faithfully

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Peter Jolly
President