



A look ahead - PI insurance and advocacy

January 2024

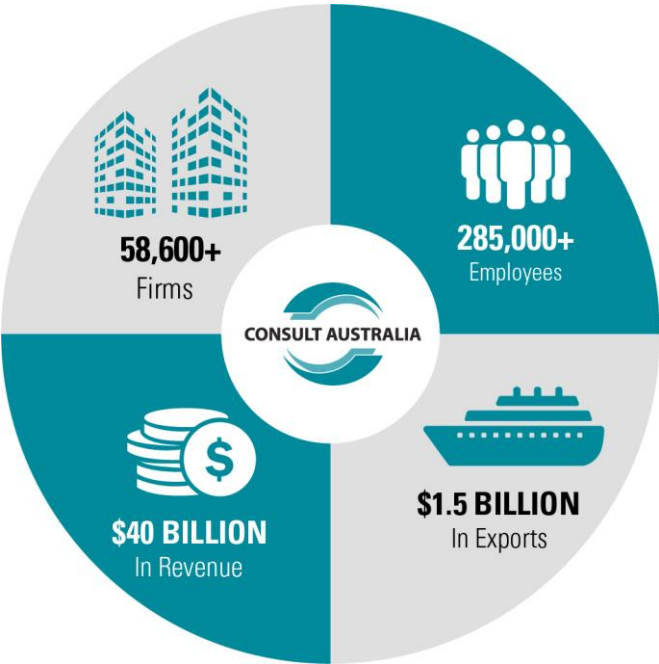


Consult Australia expects that strong action in 2024 will be needed to meet the many challenges faced by members on the already business-critical issue of accessibility and affordability of professional indemnity insurance.

There are pockets of positivity, including our collaboration with the insurance industry and government engagement on contracts. However, there is also the threat of regulatory missteps at state and federal levels that will require a strong and unified voice to avoid.

Consult Australia’s advocacy is only as strong as its support from its members.

ABOUT US



Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia’s top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

SNAPSHOT

State of the PI Market:

- There has been a general improvement to PI insurance lines overall but still concerning gross loss ratios specific to the PI insurance for engineering occupations. While there is some softening in insurance overall, it will not necessarily flow to engineering businesses.

Issues and Opportunities for 2024:

- We expect the NSW Government to continue its push for an Engineering Practice Standard that will include a fit for purpose obligation on engineers.
- Government procurement and regulatory requirements continue to drive businesses towards large and often excessive amounts of coverage.
- Insurance limits and obligations in contracts remain a significant area of concern.
- Consult Australia is working collaboratively with the Insurance Council of Australia, brokers and our peer associations to continue to pressure governments to realise an approach closer to that of a 'model client'.
- Large businesses continue to threaten action under misleading or deceptive conduct provisions of the Australian Consumer Law (ACL) when making claims against consultants.
- With the announced Competition Review, Consult Australia will campaign strongly on these issues including the explicit exclusion in the ACL provided to engineers and architects relevant to the fit for purpose consumer guarantee.

Our Call to Action:

- Members can support Consult Australia's action by amplifying our advocacy, sharing problematic contracts with us, and completing the Capacity & Confidence Survey.
- Government as clients can proactively engage with Consult Australia on procurement and contracting reform, including by revisiting the insurance and liability provisions within their contracts and seriously consider our Model Client Policy.
- Government as regulators should heed the advice and concerns raised by the broader industry about likely impact of proposed regulations and collaborate with industry to re-design regulation to ensure that the public policy intent is met.

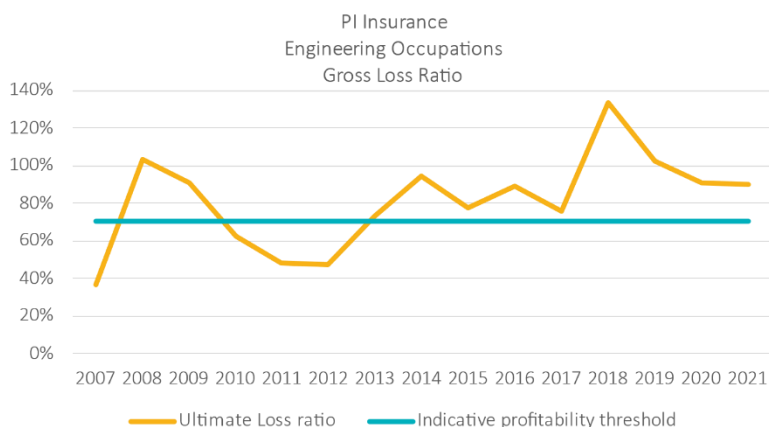
STATE OF THE PI MARKET

The insurance market is generally understood to have a cyclical nature, periodically going through hard and soft cycles. Since around 2017 we have seen a particular 'hardening' of the professional indemnity (PI) insurance market which has resulted in:

- increases in policy excesses and premiums
- cover restrictions as a loss mitigation technique
- capacity challenges as the demand for insurance outweighs supply.

However, Consult Australia holds that the current market is not a typical hard cycle that will resolve itself – especially when it comes to the building and construction industry and particularly in respect of engineering occupations.

This is borne out by figures that show a general improvement to PI insurance lines overall but still concerning gross loss ratios specific to the PI insurance for engineering occupations. Both the May 2023 APRA [NCPD Analysis. Review of claims trends and affordability of public liability and professional indemnity insurance in Australia](#) and the October 2023 [Optima General Insights 2023](#) report note that PI loss ratios have improved with some 'green shoots of recovery' however there remains 'some pressure' on construction professions. The figure below demonstrates this clearly, with the gross loss ratios for PI insurance for engineering occupations still sitting above the indicative profitability threshold. Therefore, while there is some softening in insurance overall, it will not necessarily flow to engineering businesses.



Source: Finity's Marketvue estimates from NCPD data

Jenny Bax, CEO of the Underwriting Agencies Council has advised that:

The Lloyds market is opening up and there is a potential opportunity of Asian markets entering that are looking at Australia with interest, this is very much a 'watch this space'. This interest is likely to disappear where lines do not show sufficient return.

Unfortunately, PI insurance for construction (including engineering occupations) would be such a line as supported by the *Optima General Insights 2023*:

From the insurance supply side, there seem always to be underwriters enthusiastic about the [construction] sector, perhaps because of the volumes available; however, the appropriate underwriting and pricing structures to create more stable, sustainable portfolios seem to be elusive.

ISSUES AND OPPORTUNITIES

Consult Australia remains committed to educating government (both as clients and as regulators) to untangle the issues that impact the PI insurance market and to also provide solutions. We know without tackling these issues and taking opportunities where available, the PI market, especially for the construction sector is unlikely to improve. Below are some of the top-of-mind issues and opportunities needing action.

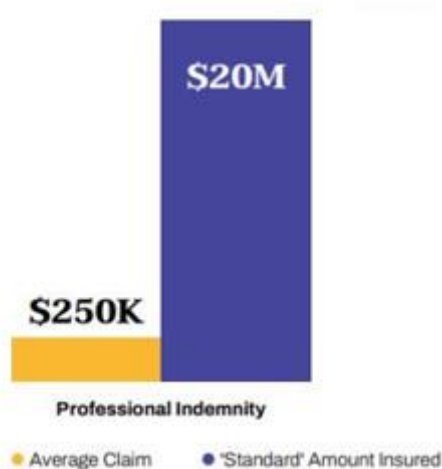
Statutory fit for purpose obligation

In 2024 we expect the NSW Government to continue its push for an Engineering Practice Standard that will include a fit for purpose obligation on engineers. Consult Australia strongly argues against such an obligation (read the detail of our [August 2023 submission here](#)). In late 2023 we called on interested members to share their concerns with the Hon. Anoulack Chanthivong, as Minister for Better Regulation and Fair Trading as well as Minister for Industry and Trade. That call remains open.

Sharing Consult Australia's concerns on this NSW regulatory reform is the Insurance Council of Australia and various brokers specialising in providing cover to engineering businesses throughout Australia. In 2024 we will continue to leverage that support and urge the NSW Government to rethink and re-design this regulation.

Insurance limits and obligations in contracts

It will be no surprise that insurance limits and obligations in contracts remains an area of concern. In late 2023 Business NSW released its [Insurance at the Speed of Business](#) report which included the graph below comparing the average claim value versus the standard amount insured for – showing significant 'overprotection'.



Source: Business NSW Survey Results 2023; NPCD Level 2 Data Sector Specific GCP by Claims average 2019-2022

The commentary accompanying this figure notes, as Consult Australia has also made clear in its advocacy:

Government procurement and regulatory requirement also drive businesses towards large and often excessive amounts of coverage. It is a common stipulation of procurement processes that the applicant business have large (\$10 or \$20 million) in coverage, regardless of the nature of the project being procured.

In addition to often inappropriate insurance limits, Consult Australia has also seen its fair share of contracts including unreasonable obligations relevant to insurance including clauses requiring:

- suppliers to seek the client's approval of the business' insurance policy
- suppliers to provide full copies of insurance policies to clients.

These types of obligations are not only unreasonable but also often unable to be met. For example, insurance policies are commercial in-confidence between the insurer and the insured so cannot be shared.

Misleading and deceptive conduct provisions

Consult Australia is aware that large businesses are threatening action under misleading or deceptive conduct provisions of the Australian Consumer Law (ACL) when making claims against consultants. As part of our advocacy, we have called for this aspect of the ACL to be tightened to ensure that the ACL protects consumers and small businesses, noting that contractual disputes should be dealt with under the contract or according to common law.

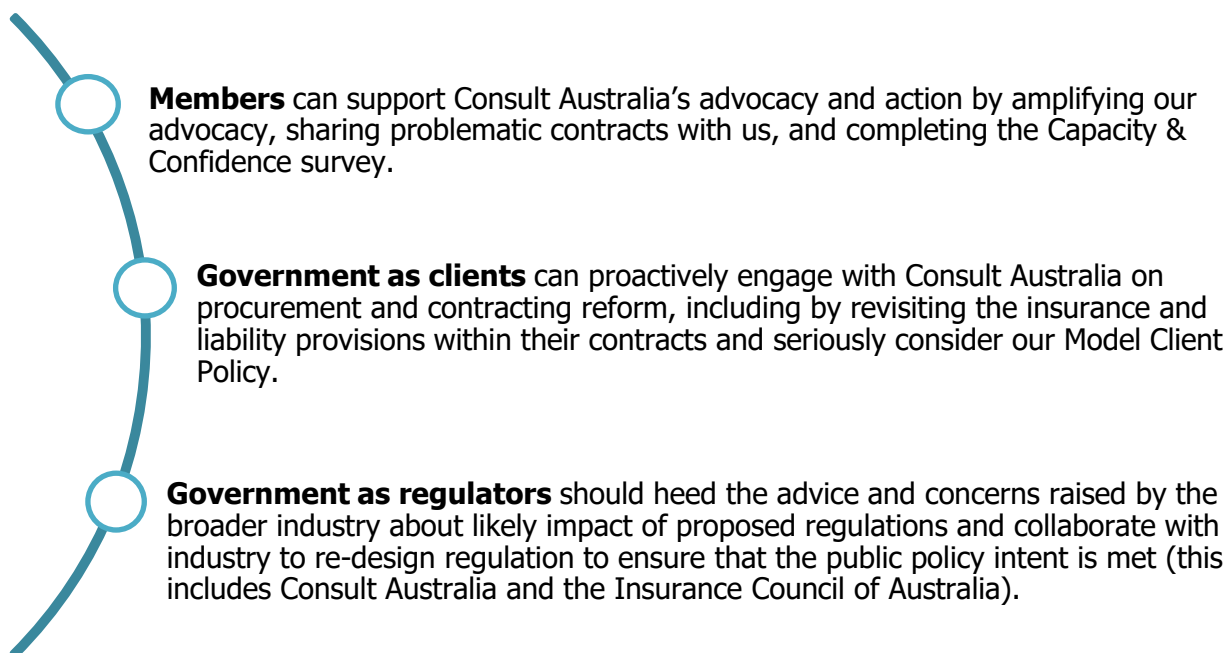
In late 2023 the Federal Treasury announced a [Competition Review](#) and as that ramps up it will be important for Consult Australia to maintain a strong voice on issues such as misleading and deceptive conduct as well as the explicit exclusion in the ACL provided to engineers and architects relevant to the fit for purpose consumer guarantee.

OUR CALL TO ACTION FOR 2024

The above issues will form a core part of Consult Australia's advocacy throughout 2024. Some of our key activities and campaigns will include:

- Engagement of government regulators on regulatory reform, especially in NSW on the proposed fit for purpose obligation and with Federal Treasury on the Competition Review.
- Release of thought leadership reports, including *Unravelling Risk*.
- Contractual discussions with government clients.
- Continued collaboration with the Insurance Council of Australia, including through its Business Advisory Council.
- Conducting and promoting results of our Capacity & Confidence survey which will include questions on PI insurance availability and affordability.

You have a role:



Kristy Eulenstein, Head of Policy and Government Relations



Kristy is your go-to to talk all things insurance. Since joining Consult Australia in July 2019, she has fostered strategic relationships with the insurance industry and led the charge on government engagement to change the status quo.

She develops the strategic policy and advocacy priorities of the association and leads the team of policy and stakeholder engagement professionals in the states and territories.

With over 15 years in the public service Kristy knows how to get government moving.

Our members include:



Consult Australia's members are listed in full on our [website](#).

We acknowledge the Traditional Custodians of the land on which we work and live which includes the lands of the Gadigal, Kuarna, Kulin, Turbal and Wirundjeri people.

We pay our respects to Elders, past and present.

Art Artwork 'Safe Passage' by Kimberley Back under license until March 2025.



PROFESSIONAL DEVELOPMENT

IN - HOUSE EDUCATION

Consult Australia offers a range of in-house Professional Development education that can be tailored specifically to suit your firm's requirements. In-house education encourages greater teamwork and builds awareness and understanding of each other's roles in the organisation by enabling group discussion to be based around real examples that are specific to your business environment and policies. In-house education can also be run at a fraction of the per head cost of sending each participant to an open programme and have the added advantage of being able to be conducted at either your premises or at an off-site location of your choosing at a time that suits you.

An overview of the course available to be run in-house is included below — more information on each can be found at www.consultaustralia.com.au/home/devel-op-your-career/professional-development/education

ROLE OF THE SUPERINTENDENT

The Superintendent's role is a complex one. It requires a sound understanding of the law of contract, substantial engineering skills, and in particular, an understanding of the provisions of the particular project outcomes. This intensive and interactive programme teaches you how to confidently manage the various Superintendent duties, the dual roles of the Superintendent, and how to avoid common legal traps.



CONTRACTS FOR CONSULTANTS

This intensive 2.5-day programme is aimed at those who are regularly confronted with client contracts. The programme provides essential advice and insight on managing and controlling contractual rights and obligations. It is conducted in a small group interactive format and has helped those with both limited and extensive experience to deal more effectively with contracts and their various terms and conditions.

Tools and advice are given on how to develop fair and reasonable contractual relationships with clients.

