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Anne Hampson
Civil & International Justice Directorate
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Dear Ms Hampson

Response to the Partial Regulatory Impact Assessment on a Proposed Bill to Reverse House of Lords Judgement in *Johnston v NEI International Combustion Ltd.*

Thank you for inviting AXA Insurance to respond to the above consultation paper. The details of our response are set out below. I also enclose a completed copy of the Respondent Information Form, indicating our wishes in terms of the confidentiality of our response.

1. Executive Summary

AXA Insurance is of the view that:

- 1.1 the Scottish Executive's proposal to introduce legislation "to ensure that the House of Lords judgement in *Johnston v NEI International Combustion Ltd.*....does not have an effect in Scotland" is wholly wrong and should not be progressed.
- 1.2 the Partial Regulatory Impact Assessment (PRIA) consultation document states that the aim of the proposed legislation is to ensure that asymptomatic pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis should "continue to be actionable in Scotland". The rationale for this proposed action is based on an analysis of the medical facts & the legal position that is flawed in many respects.
- 1.3 legislation as proposed in the PRIA consultation document would involve alteration to the fundamental foundations of the law of 'delict' (tort) and set a dangerous precedent for the future. The proposed legislative action would create a wholly new entitlement to compensatory damages for conditions that do not give rise to any symptoms or increased risk of adverse health in the future.

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- 1.4 the proposed legislation is stated to be retrospective in its application and effect. This creates a fundamental question regarding legal framework in Scotland and whether it can be regarded as one founded on stable and equitable principles that business and citizens can rely upon. AXA Insurance would address very closely and seriously the legality of the proposed legislation.
- 1.5 the implications of the proposed legislation would have significant cost implications for all defendants; including employers, former employers, local authorities, the Government and the insurance & re-insurance industries. These costs will inevitably have to be passed on to Scottish society in the form of increased prices and insurance premiums. These increases would only apply in respect of Scottish customers and this will have implications for the competitiveness of Scottish business.

2. The Medical Facts relating to Pleural Plaques

- 2.1 We believe it is important for the Scottish Executive to recognise that all of the medical experts involved in the *Johnston v NEI International Combustion Ltd et al* cases, including the expert giving evidence on behalf of those seeking compensation (Dr Robin M Rudd), were agreed as to the benign nature of pleural plaques and the extreme rarity of them producing physiological effects in anyone diagnosed with the condition.
- 2.2 The PRIA consultation document states (at paragraph 10) that “pleural plaques.....signify an increased risk of developing very serious illness as a result of exposure to asbestos”. This is a misstatement of the facts. All medical experts with recognised experience in asbestos related medical conditions now agree that pleural plaques are always wholly benign. They are also asymptomatic, other than in all but the most unusual & rare case. Much of the commentary on the question of pleural plaques, including that within the Scottish Parliament, has overlooked the fact that the rare cases where symptoms are experienced are still compensable under the terms of the House of Lords judgement. AXA Insurance remains committed to meeting its obligations for such compensation where appropriate.
- 2.3 The established medical evidence is also clear that pleural plaques do not (and cannot) multiply or progress to become any of the other recognised asbestos related conditions. Consequently there is no risk of anyone developing mesothelioma as a consequence of sustaining pleural plaques. The development of pleural plaques is certainly an indicator that a person has been exposed to asbestos, but it is that exposure that gives rise to the risk of developing other asbestos related conditions such as mesothelioma or asbestosis. It is not the pleural plaques that mutate into these conditions. It is not merely those advising on medical issues for employers and insurers who hold this opinion and at no point in the recent litigation were these facts at issue between the parties.
- 2.4 The above points are critical to an understanding of the House of Lords decision in *Johnston v NEI International Combustion Ltd et al*. The Lords decision did not alter the rules of tort law or compensation. Rather, the decision confirmed that asymptomatic pleural plaques do not give rise to an entitlement to compensation under existing law precisely because of the medical facts now known about the condition.

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3. The Legal Position

3.1 The law in Scotland, as elsewhere in the United Kingdom, has always required that a claim for compensation in delict (tort) can only succeed if there is an identifiable harm suffered as a consequence of an act of negligence; and that such identifiable harm is more than *de minimis*; that is to say it is required to reach past a threshold of seriousness.

3.2 The law of delict (tort) is equally clear that the mere risk of a future damage arising from a breach of duty is insufficient to justify compensation (*Gregg v Scott [2002] AC 176*). Similarly, the law is wholly clear that mere anxiety about the risk of sustaining a future damage is not sufficient to warrant an entitlement to compensation (*Hicks v Chief Constable of the South Yorkshire Police [1992] 2 All ER 65*).

3.3 The House of Lords judgement simply re-affirmed these well-established principles of the law of delict and applied those principles to the medical facts concerning pleural plaques. As pleural plaques are:

- Asymptomatic in almost every case
- Do not increase susceptibility to other asbestos related conditions
- Do not progress into other asbestos related conditions

the law of delict (tort) does not, and should not, allow for compensation. As Lord Uist put it in a Scottish case “it is not that pleural plaques cause harm which is *de minimis*, it is that they cause no harm at all” (*Wright v Stoddard International plc [2007] CSOH 173*).

3.4 The House of Lords decision is therefore entirely consistent with the law of delict (tort) and the PRIA consultation document is wrong when it states that “The House of Lords Judgement in *Johnston* reversed over twenty years precedent and practice”. The Lords have applied the existing law to the latest medical facts regarding the etiology and consequences (or the lack of them) of pleural plaques.

3.5 AXA Insurance believes strongly that the proposed legislation to make compensation available to those who have pleural plaques constitutes a fundamental change to the law of negligence that will have significant consequences far beyond the intended effect of entitling those who have asymptomatic pleural plaques to receive compensation.

3.6 Although the PRIA consultation document states “The intention is to encroach into the law of damages no more than necessary” AXA Insurance believes that once the proposed legislative action establishes a right for one group of people to obtain compensation via the law of delict (tort) - when they have sustained no harm and/or simply have an anxiety for the future – there will be serious legal and political difficulties in a denial of the same rights to other groups thereafter. The risks and future uncertainty that such a legal environment will create for society & business will undoubtedly have an adverse impact on the competitiveness of Scottish business.

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4. The Options

Option 1 – Do Nothing

- 4.1 The PRIA consultation document states that doing nothing would mean:
- the House of Lords judgement would be applied in Scotland, meaning that claims for asymptomatic pleural plaques would be dismissed.
 - no benefit to those with pleural plaques
 - benefits to employers, former employers and insurers from reduced costs
 - a permanent loss of compensation to those who go on to develop a more serious condition because a payment for, say, mesothelioma in the future would not recognise the anxiety of the person from the time of diagnosis of the pleural plaques
- 4.2 The analysis within this section of the PRIA consultation fails to recognise that all those people who do develop a symptomatic asbestos related illness are still be able to progress a valid claim for compensation; notwithstanding the House of Lords ruling in *Johnston v NEI International Combustion Ltd et al.* AXA Insurance, and other insurers, remain wholly committed to providing fair and efficient compensation to those diagnosed with symptomatic asbestos related conditions.
- 4.3 The PRIA consultation document fails to identify other key benefits of taking no legislative action. AXA Insurance believes that the proper course of action is for all bodies concerned with the diagnosis and treatment of asbestos related conditions to provide clearer information and education to the public about the issues. Rather than legislating to provide compensation, with all the attendant risks & costs, the opportunity exists to provide more effective and accurate information about the nature of pleural plaques and the absence of any known causative link between them and other asbestos related conditions. AXA Insurance is very willing to participate in action by the Scottish Government, the NHS, healthcare professionals and charities to achieve this outcome. We believe strongly that there is a significant benefit to society as a whole from such action.
- 4.4 Another consequence of taking no legislative action relates to the benefit that would flow from the consequent curtailment of the practice of commercial CT scanning of asymptomatic individuals. These scans are conducted for the sole purpose of promoting a compensation claim. We note that the 12th Report of the Committee on Medical Aspects of Radiation in the Environment (COMARE) raised significant concerns about the merits of scanning asymptomatic individuals, relative to the radiation risks to which those individuals are exposed. COMARE noted the possible risks of speculative scanning of asymptomatic individuals; the dosage of radiation is significant, conditions with no clinical significance or symptoms may be detected leading to consequent unnecessary anxiety. COMARE also found that the information supplied to those undergoing commercial CT scanning was often inconsistent and incomplete.

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- 4.5 AXA Insurance also believes that the Scottish Executive must not overlook the significant benefit to the Scottish economy and business that will flow from taking no action. Leaving the clear and well established principles of law undisturbed by legislative interference will provide much sought after assurance to business that Scotland has a stable, predictable and certain legal environment. This is crucial to enable business to plan for the future without fear of retrospective action and enables the effective risk management and planning so necessary for a growth economy.

Option 2 – Legislate to reverse the House of Lords’ judgement

- 4.6 The legislation proposed in the PRIA consultation document will institute a fundamental change to the basic principles of the law of negligence. Once such as step has been taken the likelihood of restricting the approach only to those with asymptomatic pleural plaques, pleural thickening or asbestosis is very remote in our view. Such a legal change will provide great disturbance to the future impact of the law and generate significant cost implications for employers, former employers, the Government and the insurance industry.
- 4.7 The instability in the predictable nature of the rule of law in Scotland consequent upon the proposed legislative change could well be sufficient to lead insurers to exit the Scottish liability insurance market, or at the very least impose large pricing increases to reflect the future uncertainty in the Scottish market. These consequences would have a clearly detrimental effect on the competitiveness of Scottish businesses.
- 4.8 AXA Insurance regards the proposed legislative action as a potential interference with the rights and property of defendants and their insurers. This, together with the retrospective nature of the action, means we will continue to look very closely at the legality of the proposed legislation.
- 4.9 The PRIA fails to highlight one ‘benefit’ from the option of legislating to overturn the Lord’s judgement; namely the financial benefit to claimant legal firms. Paragraph 24 of the PRIA attempts to quantify the issue of legal costs associated with pleural plaques cases but we believe the analysis is flawed. AXA Insurance has in the past resolved the vast majority of the pleural plaques claims made against it’s policyholders without recourse to formal litigation and without the need to appoint defendant solicitors.
- 4.10 We estimate conservatively that the average amount of claimant legal costs per case that AXA has incurred on Scottish pleural plaques cases is in the region of £7,000 (litigated and non-litigated). The PRIA suggests that there are some 200 pleural plaques ‘actions’ each year (paragraph 7). We believe that to be a significant under-estimate of the volume of claims as it appears to relate solely to those cases that are litigated. However, even on just this figure the benefit of legislation to claimant lawyers would be in excess of £1,000,000 gross income per annum. We would suggest that the true income benefit for claimant solicitors is more than double that figure. The benefit on the estimated 630 claims currently outstanding with the Scottish courts would be in excess of £4,400,000 gross income. These estimates do not take into account the potential volume of cases for asymptomatic pleural thickening.

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- 4.11 By legislating to reinstate compensation for asymptomatic pleural plaques the Scottish Executive will be re-establishing a very lucrative income stream for claimant lawyers – not least of which will be Thompsons solicitors (estimated to be involved in 90% of Scottish cases). That income stream could well be further expanded if, following legislation on pleural plaques, claimant lawyers commence arguments that other asymptomatic conditions are equally worthy of compensation on the back of the action by the Scottish Executive.
- 4.12 We note with interest that Thompsons have provided much of the information contained within the PRIA and indeed were referred to in Scottish Parliament proceedings as having provided a draft copy of proposed legislation to overturn the House of Lords decision to members of the Parliament. We must question the validity of any consultation process that is so clearly being supported by a major beneficiary of the decision to legislate – a decision apparently already taken before the consultation process was even commenced.

AXA Insurance is keen to continue to be involved in the further deliberations of the Scottish Executive on this matter. We imagine that you will intend to seek further dialogue with stakeholders once the Partial Regulatory Impact Assessment consultation is complete. I confirm that we would be very happy to meet with you or others to discuss the matter further. We are members of the Association of British Insurers and are fully supporting their engagement with the Scottish Government on this, and other, issues.

Yours sincerely

David J Williams
Claims Director – AXA Insurance Plc

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