

appropriate would be determined having regard to the nature of the profession in terms of work performed, role undertaken and extent of professional indemnity insurance."

The stated object of the Occupational Liability Bill is to provide a general means whereby the civil liability (arising in contract, tort (negligence) or otherwise) of professionals and of others may be limited. The Bill shall not apply to or in respect of liability for damages arising from:

- (a) the death or personal injury to a person;
- (b) a breach of fiduciary duty;
- (c) fraud or dishonesty.

The Bill establishes two schemes. They are to be available as alternatives. Neither scheme is compulsory. If a person who is able to do so does not take advantage of either scheme, the person's civil liability will be determined in accordance with the principles ordinarily applicable.

The first scheme limits liability to a specified amount if insurance against civil liability is held to that amount or

if business assets are retained to that amount. "Business assets" are defined to mean "the property of the person which is able to be taken in proceedings for enforcement of a judgement of a court, other than property which is not used in the performance of the person's occupation". In other words, it appears that personal property would be exempt - so long as the insurance was in place or business assets available to a specified amount. Different amounts are likely to be specified for different occupations.

The second scheme limits liability to a multiple of the cost of providing the service from which the liability has accrued.

The Bill also constitutes the Occupational Liability Council, which is to assist professionals and others to improve their occupational standards and is to make recommendations as to the classes of persons who should be brought within the proposed Act.

The introduction of this Bill may have been one of Mr Dowd's most significant final acts as Attorney General. It remains to be seen whether the Bill will be passed.

For further comment, see also the article below by Sedgewicks.

Mandatory Professional Indemnity Insurance - Is this the Emerging Prototype?

Compulsory professional indemnity insurance in Australia may be a step closer as a result of the Occupational Liability Bill 1990 (NSW).

The Bill was introduced into the New South Wales Parliament in late 1990 and is due to be re-introduced in the Autumn Session. The effect of the proposed legislation will be to impose de facto compulsory professional indemnity insurance upon various occupational groups, these being groups of professional and business people who would avail themselves of this type of insurance. The major benefit for those involved will be limited civil liability in respect of their business activities.

When introducing the Bill, the NSW Attorney-General stated that a major concern in the current climate of increased litigation was the inability of some successful claimants to recover against professionals who have insufficient professional indemnity insurance, or no insurance at all.

The legislation is expected to overcome that difficulty by introducing a system imposing minimum levels of professional indemnity insurance and asset requirements for various occupational groups. Limited liability would be available for occupational groups in respect of financial or economic loss, including property damage. Limitation of liability will not be available under the legislation in respect of death or personal injury, breach of trust or fiduciary duty, fraud or dishonesty.

It is expected the legislation will also impose risk management and self regulation requirements on occupational groups in order to better manage practices which

presently lead to negligent errors and mistakes.

The proposed system providing limited liability would not be mandatory, but would be available to any occupational group complying with appropriate requirements. Occupational groups which choose not to comply will continue to be exposed to unlimited liability as presently occurs. This will provide occupational groups with a real disincentive not to comply. Disclosure of limited liability, where applicable, will be mandatory.

One likely effect of the proposal for limited liability will be the need for higher limits of professional indemnity insurance.

Professional indemnity insurance buyers who do intend to comply will still be able to canvass the market to obtain the most suitable terms and prices. However, the insurance requirements which are likely to be a prerequisite in order to obtain limited liability will, in many circumstances, probably impose a higher limit than that which certain occupational groups would currently effect so that most successful claims made against those groups could be satisfied.

Other States are closely observing this current legislative exercise with a view to adopting similar law reform. If initial experiences in New South Wales are perceived to be positive, it is not unreasonable to expect that de facto mandatory professional indemnity insurance requirements will apply in other parts of Australia.

Our Financial Institutions and Professional Indemnity Division is closely monitoring the progress of this matter and will be happy to assist with any queries.

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