

A photograph of a person walking down a wide, curved stone staircase. The person is wearing dark clothing and holding a brown umbrella. The staircase is made of light-colored stone blocks and has a checkered pattern on the lower steps. The background shows a building with a stone facade.

By Anne Durack

PROFESSIONAL STANDARDS LEGISLATION in AUSTRALIA

Professional standards legislation has progressively been introduced in all states of Australia over the last few years.¹ The legislation sets a framework whereby occupational associations² are able to limit the occupational civil liability (professional liability) of their members to an agreed cap, depending on the level of insurance cover or business assets available to meet any judgment by entering into a professional standards scheme.

The objects of the schemes are not only to limit the liability of members but also to facilitate the improvement of occupational standards and to protect consumers from unsatisfied judgments for claims for professional negligence. It is also anticipated that, in future, insurance premiums can be kept at a realistic level for professionals and avoid a situation in which they have no insurance and no assets.

Participating associations are required to meet a range of criteria including codes of conduct, ethics, complaints and disciplinary processes, and demonstrate a capacity to impose

risk management strategies on their members. Consumers are protected, as any judgment will be paid either by the professional or will be covered by adequate insurance. Consumers will also have the benefit of improved standards by the relevant professionals and access to complaints procedures should these standards not be met.

STRUCTURE OF SCHEMES

Every state has legislation that establishes a professional standards council (PSC), an independent statutory body empowered to supervise the preparation and approval of

schemes and to assist in the improvement of occupational standards and protection of consumers.

Each state has a PSC made up of nominees from most states of Australia. Its functions are set out in each state's Act.³ Councils not only approve schemes, but are required to give advice and monitor occupational associations in relation to policies of insurance and assist in the development of self-regulation, including giving advice regarding codes of ethics, practice, quality management, risk management, resolution of complaints, voluntary mediation services and continuing education. They also have powers to prosecute offences under the relevant professional standards legislation.

WHO CAN APPLY AND WHO IS COVERED

Only occupational associations can apply for a scheme and, if approved, the members of that association are then covered by the scheme. Individuals cannot apply. The rationale for this is that associations have the ability to impose standards on their members.

To be covered under a scheme that applies to a particular profession or occupation, an entity and all its employees who are entitled to be a member of the association need to be a member of the occupational association.⁴ If a successful claim is made against a member of an entity who is not covered because s/he is not a member of the association, s/he may be liable for the full amount of the claim, which will be uncapped. S/he could also be entitled to bring a contribution claim against all other members to contribute to the balance of the claim which exceeds the monetary cap. The effect would be to undermine the effectiveness of the limitation of the liability. Retired members of entities may need to continue to be members of the relevant occupational association in order to derive the benefit of the scheme.

There are provisions within schemes allowing them to provide for some members of the association to opt out of the scheme. Incorporated legal practices (ILPs) will be covered where they can be a member of the association. It should be noted that, at present, ILPs in Queensland are not part of the Queensland scheme, as the Professional Standards Act in that state prevents them from joining the relevant occupational association.

For a scheme to be approved, the association must lodge a detailed application setting out the proposed scheme, including but not limited to:

- details of a five-year risk management plan;
- how the risk management strategies are to be implemented;
- details of the cost and availability of insurance;
- details as to the nature and level of claims made for occupational liability against members of the association for at least 10 years;
- details of the association's code of conduct and complaint process for members.

Before approval by the PSC, the scheme is to be advertised and any submissions reviewed. The relevant minister will publish the finalised scheme in that state's *Gazette*. The scheme will specify a start date and the length of time it will apply. At the end of that period, it can be renewed on application. The PSC also has the power to revoke a scheme.

WHAT IS NOT COVERED

In no state does the relevant legislation apply to liability arising from personal injury or death to person, breach of trust, fraud or dishonesty or liability under various state laws relating to the protection of land title.⁵ In all states, except WA and NSW, legal practitioners acting for persons in personal injury claims are excluded. Law firms that practise solely in the personal injury area may apply to be exempted from the scheme. However, those firms will have to ensure they do only that type of work.

The scheme only affects liability for damages arising from a single claim to the extent to which liability results in damages exceeding the capped amount. Given the extensive litigation on the definition of a single claim in insurance policies, it is anticipated this will be the subject of litigation in the future. The act or omission must have occurred after the date the scheme was approved. The scheme has no retroactive effect. Claimants with a joint interest in a cause of action are treated as a single claim for the purposes of the Act. In those circumstances, a court may need to decide how the capped amount is to be apportioned between the relevant claimants.

The definition of damages is the same in all states and includes damages, interests and claimants costs. It does not include defence costs.

DISCLOSURE REQUIREMENTS

It is a requirement for a participating member of the association who is covered under the scheme to disclose their limited liability status on all documents given to clients or prospective clients, including websites. Business cards, social media and advertisements in the print media are accepted. While regulations made under the individual Acts may prescribe the relevant wording, the recommended minimum is 'Liability limited by a scheme approved by the Professional Standards Legislation' and it is to be equal to or greater in size than Times New Roman 8 point. In NT, Queensland, Tasmania and Victoria any member who has not disclosed or cannot establish that they told the client of the limitation of liability cannot rely on the limit of liability in any defence. Such non-compliance might also affect the member's insurance cover, as it could represent a breach of a term of the policy. In other states, the penalty for non-disclosure is a fine, but could also constitute a breach of a condition of the member's insurance policy.

Displaying an optional Professional Standards Council (PSC) Cover of Excellence logo indicates that a participating member is part of an association with a scheme approved by the PSC. Using the logo does not replace the requirement to disclose to clients, nor does it disclose the restrictions of limited liability. It indicates that the participating member is part of a scheme that strives for excellence and quality service. To be used correctly, the logo must conform with prescribed placement, colour and size.

AMOUNT OF LIMITATION OF LIABILITY

The limit of liability under a scheme must exceed \$500,000, but the maximum cap can vary from state to state and >>

different members can have different maximum levels. How this is determined can vary: some schemes have higher maximum levels depending on numbers of partners or directors of each entity; some will have different levels depending on the amount of fees incurred; and some will be a fixed amount but participating members can apply to increase it. The presently approved schemes that apply to solicitors allow for two caps: one for \$1.5 million for firms up to 20 practitioners with fees of less than \$10 million, and one for \$10 million for firms with more than 20 practitioners or for firms with incomes of more than \$10 million, regardless of size. Details of all schemes approved, including the liability cap and how it is determined for each association, can be found on the PSC website and the website relating to the particular occupational association. If acting for a person with a claim against a professional who is covered under a scheme, it is recommended that these details be checked. Further enquiries may need to be made to the relevant association to ensure that the proposed defendant is in fact a member and has complied with the association's requirements under the terms of the scheme.

All Acts prohibit the contracting out of a scheme by a member of an occupational association.⁶ Most schemes allow the association discretion to increase the monetary cap up to a maximum for a specified case or class of case for a member. In order for such a provision to be approved, the occupational association will be required to be satisfied that the member has sufficient insurance cover or business assets to cover such a liability.

OBLIGATIONS OF OCCUPATIONAL ASSOCIATIONS

An occupational association with a scheme is required to educate its members as to the disclosure requirements and report any non-compliance to the PSC; monitor correct use of the cover of excellence logo; pay an annual fee to the PSC; report annually on the risk management activities based on the five- year plan submitted in the application; and report annually on the number, amount and nature of professional liability claims against its members in any year. Associations are also required to notify the PSC on the cost and availability of professional indemnity insurance each year. While in some occupations the association arranges professional indemnity insurance for all its members, in others individual members arrange their own insurance. In those situations, the association is required to obtain this information from its members on an annual basis.

The occupational association will also be required to keep records to ensure that it can establish who is covered at any time under a scheme; and ensure that its members comply with continuing education, insurance, and risk management requirements.

PROFESSIONAL INDEMNITY INSURANCE

The scheme is not an insurance policy. It only caps liability but, in most cases, members can have the benefit of the scheme only if they can satisfy a court that there is a valid insurance policy available to respond to the claim. Rarely will a scheme be approved on the basis that members have

sufficient business assets to cover any liability up to the maximum cap. All schemes to date have been approved on the basis that participating members have relevant insurance cover and the occupational association is required to set standards as to the minimum insurance cover required and the terms and conditions of any policy.

Before approving a scheme under the Act, the association must provide details of any claims for professional negligence against members of the association for of the previous 10 years, which includes amounts paid by way of damages and costs, and the nature of the claims. In addition, the association must have provided details of the cost and availability of insurance and to report on this on an annual basis. The Council will also have obtained its own actuarial advice as to whether the proposed cap is realistic in the circumstances.

Most professional indemnity insurance policies are costs-inclusive – that is, the defendant's costs are included in the maximum cover per claim and are, in most cases, spent before the claimant has established a claim for damages. The scheme operates to cap damages, interest and claimants' costs only. Costs incurred by the defendant are not included in the damages cap. This therefore limits the potential for there to be a shortfall in the amount of cover available under a professional indemnity insurance policy, depending on the combined amount awarded to the claimant for damages, interest and costs and the defence costs incurred.

Most professional indemnity insurance policies have an excess payable when damages are awarded. It is the responsibility of the occupational association to ensure that such excesses are not so large that members do not have the business assets to pay it. The Council is unlikely to approve a scheme where the association allows large excesses that cannot be afforded by members.

A scheme will limit the occupational liability of a member for damages arising from a single cause of action to the relevant monetary cap. Most professional indemnity insurance policies have a broad aggregation provision, which means that a series of related acts or omissions or a series of related matters are treated as one claim under the policy. The result is that the policy limit applies to one loss but could include a number of different causes of actions and be based on a number of different acts or omissions. Situations may therefore arise where the participating member will not be able to satisfy the court that the insurance policy applies, will not be able to rely on the cap, and might therefore potentially be exposed to a personal liability.

Professional indemnity policies are claims-made policies – that is, the relevant policy that applies is the policy in force in the year the claim was made (which is often not the same as the year in which the act or omission occurred). Claims made against members after the relevant scheme has commenced but which relate to an act or omission before the scheme applied may mean that the member will not be able to obtain the benefit of the cap.

HOW IS THE SCHEME DEALT WITH IN LITIGATION

If legal proceedings claiming damages that could exceed the

cap under the relevant scheme are brought against a member of an occupational association for damages arising from a single cause of action, the defendant will plead in its defence that its liability is limited to a particular amount under the Professional Standards Scheme. Similarly, if contribution is sought from other defendants, the defendant will plead limited liability. The defendant will then have to show to the court that it has a professional indemnity policy that complies with the approved scheme that will respond to the claim; that the amount payable under the insurance policy is not less than the amount of the relevant monetary ceiling specified in the scheme; and that the cause of action is not excluded under the Act. A plaintiff will then have to consider if it wants to put in issue whether the member has complied with the scheme.

The only defendant in the litigation that can take advantage of the limitation of liability is the member of the relevant occupational association and not other parties to the litigation.

If the court is satisfied that the defendant is covered under the scheme, it will limit damages awarded to the relevant monetary cap specified in the relevant scheme. Issues may arise as to what the cap is. If it depends on the number of partners at a relevant time, or the amount of fees, the defendant will have the onus of proving these facts.

The scheme will have no impact on claims that fall within the cap.

The definition of damages includes damages, interest and costs. Issues may arise if the amount of damages is close to the limit and the amount of interest and the claimant's costs have not been determined when judgment is given. Heenan J in *Allstate Exploration NL v Blake Dawson Waldron*⁷ noted this. In that claim, the plaintiff's claim if successful was \$7 million for damages exclusive of interest and costs. The limit of the defendant's liability under the NSW *Professional Standards Act* was \$10 million. Heenan J said that judgment would have to be for a liquidated amount of less than \$10 million, or it would incorporate a declaration that if the aggregate was likely to exceed that cap, judgment would be for \$10 million and no more. In that case, the plaintiff was not successful.

Likewise, in *Artistic Builders Pty Ltd v Nash*,⁸ the NSW Supreme Court was asked to make orders for the payment of the claimant's costs. Judgment had already been entered against a firm of solicitors for the full amount of the cap. No order for costs was made against the firm, as their liability had already been capped.

CONCLUSION

There are at present 18 schemes operating in Australia including, but not limited to, various associations representing accountants, valuers, engineers and solicitors in Queensland, South Australia, New South Wales and Victoria and barristers in those states. In December 2013, schemes for the Law Society of Western Australia and WA Bar Association were advertised and are likely to become operative later in 2014. Associations have adopted policies and procedures to ensure compliance with requirements. To date, there has been little litigation on the relevant legislation, but issues as

to what constitutes a single cause of action and the exclusion for breach of trust and dishonesty are likely to give rise to litigation in the future.

The intention of the Act was to improve and maintain standards of professional excellence, to assist consumers in the knowledge that a large claim can be satisfied by payment. Time will tell what effect it will have and whether the schemes will keep escalating insurance costs at bay. ■

Notes: **1** *Professional Standards Act 2004* (NSW); *Civil Wrongs Act 2002* (ACT); *Professional Standards Act 2004* (NT); *Professional Standards Act 2004* (QLD); *Professional Standards Act 2004* (SA); *Professional Standards Act 2005* (TAS); *Professional Standards Act 2003* (VIC); *Professional Standards Act 1997* (WA).

2 An occupational association is a body corporate representing the interests of people who work in the same profession or occupation.

3 NSW s43; ACT Sch 4 s4.37; NT s45; Qld s43; SA s46; TAS s47; VIC s46; WA s12. **4** WA s21; NSW s19; NT s20; QLD s21; SA s21; VIC s21. **5** WA s5; NSW s5; NT s5; QLD s6; SA s5; Vic s5; Tas s5; ACT s4.3. **6** WA s52; VIC s54; TAS s55; SA s54; QLD s67; NT s56; NSW s50. **7** [2010] WASC 97. **8** [2011] NSWSC 350.

Anne Durack is a barrister at Francis Burt Chambers, Perth.
PHONE (08) 9220 0469 **EMAIL** adurack@francisburt.com.au.

**OCCUPATIONAL THERAPY AND
ACCESS CONSULTANCY SERVICES**



**Provision of medico legal reports on
the home modification and domestic
housing design requirements of people
with complex/catastrophic injuries**

**Reports can be completed to
suit specific timeframes**

Enquiries to be directed to:

Elizabeth Ainsworth

PO Box 504,
Coorparoo Qld 4151, Australia

Phone 0408 781 554

Email info@homedesignforliving.com

www.homedesignforliving.com

