

## **Australian Insurance Law Association**

### **National Conference - Bridge Light Seminar - Professional Indemnity**

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**Kate Sainsbury – Executive Officer, Professional Standards Council**

#### **The National Implementation of Professional Standards Legislation**

I will be speaking about the current state of play in the movement towards the national implementation of professional standards legislation in Australia, and current and prospective legislative amendments.

The views expressed in this paper are my own, and not the views of the Professional Standards Councils, nor the New South Wales Attorney General's Department<sup>1</sup>.

#### **I The current state of play**

##### **Professional Standards Legislation**

New South Wales was the first jurisdiction to enact professional standards legislation in 1994. All jurisdictions have now enacted professional standards legislation<sup>2</sup>. As of 1 October 2006, professional standards legislation is now in force in all jurisdictions.

##### **The constitution of the Councils**

In October 2005, all states and territories and the Commonwealth entered into the *Professional Standards Agreement 2005 (PS Agreement)* whereby all Councils would be constituted by the same members. Pursuant to this agreement, New South Wales and Victoria are entitled to nominate two members, and each other jurisdiction, including the Commonwealth are entitled to nominate one member. All members have been nominated, and Councils have been constituted in all jurisdictions except Queensland and the Australian Capital Territory. It is anticipated that all Councils will be constituted by the end of 2006.

##### **Administrative support to the Councils**

The *PS Agreement* also provides that the New South Wales Attorney General's Department (NSW AGD) will provide Secretariat support to all the Councils, and that

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<sup>1</sup> I would like to thank Dara Read, formally a graduate lawyer in the Professional Standards Councils Secretariat for her assistance in identifying the legislative differences among professional standards legislation. However, any errors in this paper are my own.

<sup>2</sup> *Professional Standards Act 1994* (NSW) (commenced 1 May 1995, amended in 1998, 2000, 2004); *Professional Standards Act 1997* (WA) (commenced 18 April 1998, amended in 2003, 2004); *Professional Standards Act 2003* (Vic) (commenced 8 June 2004); *Professional Standards Act 2004* (Qld) (commenced 1 July 2005); South Australia – *Professional Standards Act 2004* (commenced 1 October 2006); *Professional Standards Act 2004* (NT) (commenced 1 January 2006); *Civil Wrongs (Proportionate Liability and Professional Standards Act) 2004* (ACT) (commenced 9 March 2005); *Professional Standards Act 2005* (Tas) (commenced 1 August 2005); *Treasury Legislation Amendment (Professional Standards) Act 2004* (Cth) (commenced 13 July 2004).

this arrangement will be formalised in a Service Agreement between the NSW AGD. The agreement also states that it is intended that the Councils will be self funding. The Councils are able to generate revenue from application fees and annual fees payable by each member of an occupational association and enjoys the benefit of a scheme.

### Current schemes in operation

In NSW, as of 1 November 2006, there are eight schemes in operation in NSW, representing nine occupational associations. There are currently no schemes in operation in any other jurisdiction. The Institution of Chartered Accountants Australia (ICAA) has applied for a scheme in all jurisdictions as and when Councils are constituted in those jurisdictions.

Current schemes in NSW are:

- Solicitors Professional Standards Scheme propounded by the Law Society of New South Wales. This scheme limits liability by reference to the number of principals in the legal practice.
- The New South Wales Bar Association Scheme propounded by the New South Wales Bar Association. The same limitation of liability applies to all members. This is the only scheme to date to have been prescribed under Commonwealth Legislation.
- Professional Surveyors Scheme propounded by the Professional Surveyors Occupational Association of NSW Inc. This scheme limits liability by reference to the total annual gross fee income for professional services.
- Institute of Consulting Surveyors Scheme propounded by the Institute of Consulting Valuers Co-operative Limited. This scheme limits liability by reference to the type of work performed.
- The National Institute of Accountants Scheme propounded by the National Institute of Accountants and the Accountants Scheme propounded by CPA Australia and the Institution of Chartered Accountants Australia. These schemes limit liability by reference to a multiple of fees.
- Investigative and Remedial Engineers Scheme propounded by the College of Investigative and Remedial Consulting Engineers. Limits liability in a sliding scale and by reference to the type of work involved.
- Engineers Australia (NSW) scheme propounded by Engineers Australia. This scheme limits liability by reference to gross annual fees.

### Current state of legislation: inconsistencies in professional standards legislation.

Legislation in all jurisdictions is based on the New South Wales Act. However, the legislation in each jurisdiction is not identical. Jurisdictions other than New South Wales have included variations to the New South Wales model in their legislation. Amendments to the New South Wales legislation in 2004 occurred after the process of enacting professional standards legislation (PSL) had begun in other jurisdictions, and these amendments have not yet been taken up in all jurisdictions. Some of the differences are also based on policy decisions in particular jurisdictions.

In what follows, I highlight some of the inconsistencies amongst professional standards legislation. I do so in two parts: first, inconsistencies which relate to the

process of approving and implementing professional standards schemes, and second, inconsistencies which relate to the content and application of schemes.

## **A. Process Issues: notifying, consultation, approving, gazetting, commencement, challenging, review, amendment and revocation of schemes**

### **1. Public notification of schemes**

All jurisdictions except Tasmania require the publication of a notice in a daily newspaper circulating throughout the relevant state or territory (NSW s8, ACT s5, SA s9, NT, s8, Tas s9, Qld s9, WA s21, Vic s9). This could arguably be satisfied by an advertisement in a national newspaper circulating throughout each state and territory in Australia. In contrast, in Tasmania, the notice must be published in all daily newspapers published in Tasmania (s9).

Each jurisdiction provides that the Council must publish a notice explaining the nature and significance of the scheme, advising where a copy of the scheme can be obtained or inspected and inviting comments and submissions not less than 21 days after publication of the notice. However, in Victoria (s9(c)), SA (s9(c)) and Tasmania (s9(c)), the specified time cannot be less than 28 days after publication of the notice.

### **2. Consultation and regulatory impact statements**

The Tasmanian Council is required to submit a regulatory impact statement complying with Schedule 2 to the *Subordinate Legislation Act 1992* to the Minister at the same time as the Council submits a scheme to the Minister (13(2)). The Council can recover the cost of preparing a regulatory impact statement from the occupational association seeking to have a scheme approved as a debt due to it from that occupational association (s13(4)).

Consultation is required in Tasmania if a scheme may impinge on or affect the area of responsibility of another Government department, within the meaning of the *State Service Act 2000* (Tas), or a State authority as defined in that Act (s13(4)).

Consultation may also be required in Victoria. Section 13(2) of the Victorian Act provides that:

Section 6(a) of the *Subordinate Legislation Act 1994* applies to a proposed scheme submitted to the Minister as though

- (a) the proposed scheme were a proposed statutory rule; and
- (b) the reference in that section to or any other existing or proposed statutory rule included a reference to any other existing or proposed scheme.

Section 6 *Subordinate Legislation Act 1994* (Vic) provides that the responsible Minister must ensure that where the guidelines require consultation there is consultation with any other Minister whose area of responsibility may be affected and with any sector of the public on which an appreciable economic or social burden may

be imposed. A certificate of consultation in accordance with the guidelines is also required to be given to the Scrutiny Committee as soon as practicable.

It may be that in practice, adequate consultation could be achieved through the public notification process, by sending a copy of the public notification to relevant Ministers and members of the public in Victoria and Tasmania, as well as publicly notifying a scheme in the national press.

#### 4. Issues which the Council must take into account before approving a scheme.

The legislation in each jurisdiction provides that the Council must take into account the following issues before approving a scheme:

- The position of persons who may be affected by limiting the occupational liability of members of the occupational association concerned;
- The nature and level of claims relating to occupational liability made against members of the occupational association concerned;
- The risk management strategies of the occupational association concerned;
- The means by which those strategies are intended to be implemented;
- The cost and availability of insurance against occupational liability for members of the occupational association concerned;
- The standards of insurance determined by the occupational association concerned in relation to insurance policies.

In addition, in all jurisdictions except for NSW and WA, the Council must take into account the provisions contained in the proposed scheme for the making and determination of complaints and the imposition and enforcement of disciplinary measures against members of the occupational association concerned. (NSW s10; ACT Sch4 s7; SA s11; NT s10; Tas s11; Qld s12; WA s23; Vic s11).

#### 4. Ministerial discretion re gazetta

In all jurisdictions except Queensland, the PSL provides that the Minister may authorise the publication of a scheme submitted to the Minister by the Council (NSW s13, ACT s10, SA s14, NT, s13, Tas s14, WA s26, Vic s14). The Minister therefore retains a discretion whether or not to publish the scheme in the gazette, and in this sense, the Council acts as an advisory Council to the Minister.

The situation is different in Queensland. In Queensland, if the Council approves a scheme, it must advise the Minister and give a copy of the scheme, as approved to the Minister (s13). The Minister must notify the Council's approval of the scheme by gazette notice (s14(1)).

#### 5. Commencement of Schemes

PSL in each jurisdiction except Victoria provides that a scheme commences on such day subsequent to publication or notification in the gazette as specified in the scheme, or if a date is not specified, 2 months after the date of publication or notification in the gazette (NSW s14, ACT s11, SA s15, NT s14, Tas s15, Qld s15, WA s27).

In Victoria, the Act (s15) provides that a scheme commences on such day *2 months or more* after the date of its publication as may be specified in the scheme or if no such day is specified, 2 months after the date of its publication. Therefore, in Victoria, there is a minimum of 2 months between the date a scheme is published in the gazette and when the scheme commences.

## 6. Challenging a scheme

Under the ACT (s12(1)), Tas (s16(1)) and Vic (s16(1)) PSL, a person who is reasonably likely to be affected by a scheme may apply to the Supreme Court for an order that the scheme is void for non-compliance with the Act any time before the scheme commences. Hence, in these jurisdictions, a challenge under the Act cannot be made to a scheme after the scheme commences (although it may be possible that the scheme could be challenged under the general law of the state or territory).

In NSW (s15(1)), WA (s28(1)), NT (s15(1)) and Qld (s16(1)), a person who is reasonably likely to be affected by a scheme published in the Gazette can challenge the scheme. It appears that a challenge under the Act in these jurisdictions can be made after the commencement of the scheme. Section 16(2)(a) of the Qld PSL specifically outlines the course of action if a scheme has or has not commenced.

In SA (s16), a scheme can be challenged at any time before the expiration of the 'prescribed period'. The 'prescribed period' has been defined as two months after the date on which the scheme comes into operation<sup>3</sup>.

## 7. Preparation and approval of schemes

In each jurisdiction except Tasmania, the Council may, on the application of an occupational association, prepare a scheme (NSW s7, ACT s4, SA s8, NT s7, Tas s8, Qld s8, WA s20, Vic s8).

## 8. Review of schemes

Each jurisdiction provides that the Minister may direct the Council to review the operation of a scheme and the Council must comply with any such direction but may on its own initiative at any time (whether before or after the scheme ceases to have effect) review the operation of a scheme (NSW s16, ACT s13, SA s17, NT s16, Tas s17, Qld s17, WA s29, Vic s17).

Section 17(4) of the Vic Act also specifically provides that the Council may review the operation of a scheme that relates to the members of an occupational association if the association proposes under section 29 (Insurance to be of a requisite standard) an alteration in the standards applying in relation to an insurance policy or kind of insurance policy that would, in the opinion of the Council, result in less stringent standards.

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<sup>3</sup> Regulation 5, *Professional Standards Regulation 2006* (SA) Commenced 1 October 2006.

Section s17(1) of the Queensland Act specifies that the Minister must give the direction to review by signed notice and s17(5) of the Tasmanian Act provides that the Council may recover the cost of any review of a scheme from the occupational association to whose members the scheme relates as a debt due to it from that occupational association.

#### 9. Amendment and revocation of schemes

In all jurisdictions except Tasmania and Queensland, the Minister may direct the Council to prepare an amendment or revocation of a scheme. The Council must comply with such a direction, but may on its own initiative at any time while the scheme remains in force, prepare an amendment to or revocation of a scheme (NSW s16A, ACT s14, SA s18, NT s17, Tas 18, Qld s18, WA s29A, Vic s18).

In Queensland (s18(3)), the Council may on its own initiative prepare an amendment to or a revocation of a scheme, but there is no reference to the Minister directing the Council to do so.

In Tasmania (s18 (3) - (6)), the Minister may direct an occupational association to prepare an amendment to a scheme if the Minister considers that the scheme no longer meets the objects of the Act. When directed, the association must do so within a reasonable time. If the Minister considers that the occupational association has not prepared an amendment to a scheme within a reasonable time, the Minister may revoke the scheme. If the association submits an amended scheme to the Council which complies with the Act and the Minister's direction, the Council must approve the scheme.

#### **B. Application of schemes – definition of occupational association, persons to whom scheme applies, contracting out, discretionary/mandatory higher caps, definition of occupational liability, insurance standards**

#### 10. Occupational associations – multidisciplinary associations

In NSW (s4), NT (s4) and WA (s4) an occupational association is defined as a body corporate

- (a) which represents the interests of persons who are members of the same occupational group or related occupational groups and
- (b) the membership of which is limited principally to members of that occupational group or those occupational groups (or related occupational group).

This allows multidisciplinary occupational associations to apply for a scheme.

In ACT (s2), SA (s4), Tas (s4), Qld (s7), Vic (s4) the definition of occupational association does not include *related occupational groups*. The Commonwealth legislation also does not include a reference to 'related occupational groups'.

#### 11. Persons to whom a scheme applies

The PSL in each jurisdiction states that a scheme may provide that it applies to all persons within an occupational association or to a specified class or classes of persons within an occupational association (NSW s17, ACT s15, SA s19, NT, s18, Tas s20, Qld s19, WA s30, Vic s19).

The Tasmanian Act also has an additional subsection providing that a scheme may provide that it applies to specified occupational associations within a specified industry (s20(1)(c)). The Tasmanian Act also provides that if a person is exempted from a scheme, the person is exempted from the whole of the scheme (s20(3)).

In all jurisdictions, a scheme will apply to officers and partners of members of occupational association to whom a scheme applies (NSW s18, ACT s16, SA s20, NT s19, Tas s21, Qld s20, WA s31, Vic s20). In all jurisdictions except ACT, a scheme will apply to employees of a person to whom the scheme applies (NSW ss19, SA s21, NT, s20, Tas s22, Qld s21, WA s32, Vic s21). In all jurisdictions except Tasmania, if those persons (officers, partners, employees) are entitled to be a member of the occupational association, but are not, the scheme will not apply to those persons.

In all jurisdictions except ACT and Queensland, if persons are prescribed by the regulations as being associated with persons to whom a scheme applies, the scheme also applies to the prescribed persons (NSW s20, SA s22, NT, s21, Tas s23, WA s33, Vic s22). There are currently no regulations in any jurisdiction

In NSW (s20A), there is an extension of liability of limitation to other persons to whom the scheme applies. There is no equivalent provision in any other jurisdictions.

## 12. Contracting out

In NSW (s50), ACT (s58), WA (s52) and Vic (s54), the PSL provides that the Act applies in relation to a person to whom a scheme in force under this Act applies despite any contract to the contrary, whether the contract was made before, on, or after the date on which the person became a person to whom the scheme applies. Qld (s67) appears to have the same effect.

SA (s54) and NT (s56) Tas (s55 – but subject to exceptions outlined below) allows contracting out of a contract entered into before the commencement of the scheme.

## 13. Discretionary/mandatory higher caps

PSL in all jurisdictions except Tasmania provides that a scheme may confer discretion on an occupational association to allow higher maximum liability upon application by a member either in all cases or in any specified case or class of case (NSW s24(1)(b), ACT s20, SA s26, NT s25, Qld s25, WA s37, Vic s26).

In Tasmania, s27(b) confers a similar discretionary authority in all cases or a specified class of case. Section 27(c) requires that a scheme must provide that an occupational association, on application in a specified case by a person to whom the

scheme applies, is to approve the higher maximum liability specified by that person than would otherwise apply under the scheme.

#### 14. Occupational liability to which the Act does not apply

All jurisdictions except NSW provide that PSL does not apply to liability for damages arising from any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim (ACT s3, SA s5(2), NT, s5, Tas s5, Qld s6, WA s5, Vic s5). In NSW (s5(3)). Legal practitioners in NSW who enjoy the benefit of a scheme have their liability limited for all types of legal work including personal injury.

#### 15. Insurance standards

In all jurisdictions, the Council must consider the standards of insurance determined by the occupational association before approving a scheme (NSW s10(g), ACT 7(g), SA s11(g), NT s10(g), Tas s11(g), Qld s12(g), WA s23(g), Vic s11(g)).

All jurisdictions provide that where a person's liability is limited by insurance, the insurance policy must be a policy, or a policy of a kind which complies with the standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind (NSW s27, SA s29, NT s28, Tas s30, Qld s28, WA s40, Vic s29(1)). (The words 'or a policy of such a kind' do not appear in the ACT provision (s23)).

In Queensland (s28(2)) an association must notify the Council of any proposed change to its insurance standards. In Victoria (s29(2)-(4)), SA (s29(2-4)) and NT (s28(2-4)), associations must submit any proposed changes to its insurance standards to the Council. The Council may approve or refuse to approve a proposal submitted to it. If the Council refuses, the standards remain as previously determined by the association.

In all jurisdictions, occupational associations may impose compliance with insurance standards as a condition of membership, and the association may specify different standards of insurance for different classes of members (NSW s34, ACT s30, SA s36, NT s35, Tas s37, Qld s35, WA s46, Vic s36). In NSW, the PSL states the association may specify different standards of insurance for different classes of members or for different kinds of work or on the basis of any other differing circumstances. In Tasmania, if the association requires its members to hold insurance, the requirement must be stated in the scheme.

Only Tasmania requires the scheme to refer to the requirement to hold insurance. Associations in Queensland, Victoria, NT and SA must notify their Councils of changes to insurance policies. This is not required in other jurisdictions. However, Councils in all jurisdictions have the power to require associations by notice in writing to furnish it with information. Non-compliance is an offence (NSW s44, ACT s50, SA s47, NT, s46, Tas s48, Qld s60, WA s13, Vic s47). Therefore, there may be little difference in practice despite the differences in legislation.

#### **II Plans for the future: legislative reform – costs-inclusive insurance; mutual recognition; regulations**

## **A. Costs-inclusive insurance**

Professional standards legislation provides that a scheme may limit the liability of a member of an occupational association to whom a scheme applies by reference to insurance alone, by reference to business assets alone or by reference to a combination of insurance and business assets.

In November 2005, the NSW Council was advised that the provisions in the legislation which allow limitation of liability by reference to an insurance policy may not allow a costs-inclusive insurance policy to be used for the purposes of limiting the liability of a member of an association.

Under the legislation as then drafted, a person seeking to limit his/her/its occupational liability by reference to a policy of insurance had to prove that the person had the benefit of an insurance policy under which the amount payable (including any amount payable by way of excess under or in relation to the policy) in respect of the occupational liability is not less than the amount of the monetary ceiling.

The advice received was that on one reading of the section, in the case of a costs-inclusive policy, there is no defined amount payable in respect of occupational liability because the policy covers both damages for occupational liability and defence costs.

An amendment was requested to clarify the fact that both costs-inclusive and costs-in-addition insurance policies could be used for the purposes of limiting liability under PSL. The Standing Committee of Attorneys-General gave in-principle support to the amendment in April 2006.

The amendment commenced in Victoria on 11 October 2006<sup>4</sup> and was passed in NSW on 18 October 2006<sup>5</sup> and will commence on the date of Assent. Other jurisdictions are intending to pass a similar amendment.

### The effect of the amendment

The amendment clarifies that a costs-inclusive policy can be used to limit the occupational liability of person to whom the scheme applies. 'Amount payable' has been defined to include the defendant's defence costs, along with an award of damages and costs to the plaintiff. However, the amendment also makes it very clear that even though the 'amount payable' may include defence costs for considering whether or not the insurance policy can be used to limit the liability of a defendant in a case of occupational liability, the defendant will still be liable for the full amount awarded to the plaintiff even if there is no longer sufficient money remaining under a policy of insurance to meet it. A defendant may therefore be personally exposed if they do not have sufficient insurance to cover both the defence costs and any award of damages made against them.

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<sup>4</sup> *Justice Legislation (Further Amendment) Act 2006* Part 15.

<sup>5</sup> *Professional Standards Amendment (Defence Costs) Act 2006*.

For those purchasing costs-inclusive insurance policies, it may therefore be prudent to purchase an amount of insurance which exceeds the limitation of liability amount.

## **B. Mutual recognition**

The Professional Standards Councils have identified the need for schemes approved in one jurisdiction to be recognised as valid in all other jurisdictions, and have sought an amendment to the legislation to allow this. The reasons for seeking this amendment are:

- to avoid the possibility of a constitutional challenge with respect to the extra-territorial operation of professional standards legislation;
- to ensure that only one scheme applies to a practitioner, rather than up to potentially eight schemes if they practice in more than one jurisdiction;
- to decrease financial and administrative burdens on the Councils, occupational associations and practitioners in keeping track of which scheme in which jurisdiction applies to which member;
- to decrease consumer confusion as to which scheme applies to a practitioner, because the professional will only have the benefit of one rather than a multiple of schemes in different jurisdictions.

This issue was considered by the Standing Committee of Attorneys General at its meeting in July 2006. SCAG gave in principle approval for an amendment to professional standards legislation to be developed. As a result in various nuances among professional standards legislation across jurisdictions, it is anticipated that it may be some time before an amendment will be passed all jurisdictions to allow for mutual recognition of schemes across Australia. It may well be, that during the process of drafting an amendment to achieve mutual recognition of schemes, some of the nuances among professional standards legislation discussed above are ironed out, so that the legislation is more uniform across Australia.

## **Regulations**

Regulations relating to the payment of fees and the prescribed form of a disclosure are currently in operation in NSW, WA and SA<sup>6</sup>. These issues are also dealt with in a schedule to the NT and Victorian Acts<sup>7</sup>.

## Fees

South Australia<sup>8</sup> is the first state to implement the new fee structure proposed for the national implementation of professional standards legislation. The regulation provides for an application fee of \$5000 for the approval, amendment or revocation of a scheme, and an annual fee of \$50 for each member of the occupational association subject to a scheme in force under the Act. It is anticipated that the new fee structure will be implemented all other jurisdictions in the near future.

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<sup>6</sup> *Professional Standards Regulation 2004* (NSW), *Professional Standards Regulation 1998* (WA), *Professional Standards Regulation 2006* (SA).

<sup>7</sup> *Professional Standards Act 2003* (Vic), Schedule 4, *Professional Standards Act 2004* (NT) Schedule 4.

### Prescribed form of disclosure

The generic form of prescribed disclosure in the NSW and SA regulations, namely 'Liability limited by a scheme approved under Professional Standards Legislation' is expected to be implemented in the regulations in each jurisdiction in the near future.