Australian Insurance Law Association
Bridge Light Seminar

Professional Indemnity

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Who (or what) is Aprofessional@

1. Insurance practice conventionally recognises Aprofessional indemnity@ as a specific category of insurance risk. The category description implies, or at least suggests, that Aprofessionals@ or Aprofessional@ conduct covered by the indemnity product have definable characteristics. But that is true in only the most general sense. The complex reality is that the appropriate answer to the question Awho (or what) is professional@ is fundamentally influenced by the reason the question is being asked.

2. At its most general level the word Aprofessional@, when used in the context of insurance indemnity, is little more than an adjectival shorthand expression used, without pretense at precision, to describe a broad risk category. That category does not include liability risks arising from either the ownership, control or supply of property and products but does include ***almost*** anything that could reasonably be regarded as a risk arising from the conduct of an occupational activity or enterprise. This kind of broad category description can be seen in the groupings used in APRA=s National Claims and Policies Database, which includes within its Aprofessional indemnity@ statistics
   2.1 Directors and officers liability insurance
   2.2 Employment practices insurance
   2.3 Superannuation trustee=s liability insurance
   2.4 Medical indemnity insurance and
   2.5 Aprofessional@ errors and omissions insurance.

3. APRA=s Aerrors and omissions@ insurance subcategory repeats the adjectival use of Aprofessional@ but without any attempt at definitional clarification. In fact at least 3 of the NCPD subcategories - superannuation trustees, medical and Aerrors and omissions@ - could really be merged into their own composite category. There, despite a continued

use of the nominal description as Aprofessional indemnity@ insurance they can be thought of as really an indemnity product available for various kinds of Aadvice / service related@ liability and ***almost***[1] equivalent to a form of Aproduct liability@ insurance for businesses of that kind. In its July 2005 *Fifth Monitoring Report: Public Liability and Professional Indemnity Insurance*, for example, the ACCC defined Aprofessional indemnity@ insurance as relating to the liability of Aarchitects, accountants, lawyers **and others**@. The question is whether any, and if so what, kinds of restrictions apply to limit the A**and others**@ category.

4. It is not surprising that such a useful product would have a wide market appeal, which attracts its application in areas arguably beyond its original conception - that conception being alluded to by the continued conventional use of Aprofessional@ as the appropriate description of the product category. The fact that the market, to some extent, presents and perceives Aprofessional indemnity@ insurance in this expansive way can be readily illustrated. On its website AON Australia explains that

> Professional Indemnity Insurance indemnifies an organisation in respect of liability caused by a breach of professional duty. Where an organisation provides or holds itself out as having a special skill upon which others rely, a duty of care arises. Is it not only limited to Aobvious@ professional activities, such as engineers and architects, but extends to any person who provide special skill or advice and can include activities such as training, project management and advisory or consultancy services.

5. Consistent with that general explanation AON offers Aprofessional indemnity= insurance for a wide range of Aprofessions and occupations@ - from architects, accountants

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[1] The significance of the qualification A***almost***@ emerges from the discussion of cases such as *GIO General Ltd v Newcastle City Council* (1996) 38 NSWLR 558 and *Government Insurance Office of New South Wales v Council of the City of Penrith* [1999] NSWCA 42 and there contrast with the decision in *Suncorp Metway Insurance Limited v Landridge Pty Ltd* (2005) 12 VR 290; [2005] VSCA 223. All three cases are discussed later in this paper.

engineers and medical practitioners to management, mineral and information technology consultants as well as life insurance and real estate agents. The general language seeks to emphasise the notion of Aspecial skill@ as central to the concept of Aprofessional indemnity@ but the illustrative examples convey a generosity of meaning. This relative generosity in the scope of indemnity offered by insurers can also be seen in the approach taken in the Professional Standards Legislation.

6. Despite the use of AProfessional@ in the title, the principal mechanism for the operation of Professional Standards legislation is the ability of Aan occupational association@ to prepare a scheme for approval by the Professional Standards Council: see s 7 of the NSW Act. The concept of an Aoccupational association@ is defined as any body corporate which represents the interests of persons who are members of the same occupational group (or related occupational groups) and whose membership is limited principally to members of those groups: see section 4 of the Act.

7. An approved Aprofessional standards@ scheme may limit the maximum liability of members of the Aoccupational association@. The limit has statutory effect in relation to Aoccupational liability@ to the extent provided for in a scheme for any individual claim : see s 28 of the NSW Act. The concept of Aoccupational liability@ is defined in section 4 of the Professional Standards Act as meaning any form of Acivil liability A arising A directly or indirectly from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation@ - but does not include liability for personal injury, breach of trust, fraud or dishonesty: see s 5 of the Act.

8. The legislative provisions potentially permit a diversity of Aoccupations@ to be accommodated with the general Aprofessional standards@ scheme. Similarly it is now a common, if not virtually universal, practice for policies to define the insured risk by reference to conduct occurring in the course of the Aprofessional@ business, but to define that business merely by its description in the policy schedule, supplemented at times by

information contained in the proposal.[2] One can speculate whether this trend in the wording of Aprofessional indemnity@ insurance policies has come about to accommodate the appeal of the market or a resigned acceptance of the vain pursuit of definitional certainty.

9. The Aoccupational liability@ to which professional standards legislation applies is similarly wide - any form of Acivil liability arising directly or indirectly from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation@. This expansive formula corresponds with changes in policy wordings. Typically the standard wordings of most professional indemnity policies offered in the Australian market provide an inclusive description of the insured risk as Acivil liability@ having an appropriate connection with the insured=s ordinary business activities. And if that trend has not yet become universal, it is likely to be encouraged by the increased practical significance of professional standards legislation and schemes.

10. The combined effect of these developments is the practical consequence that - subject to the impact of particular policy wordings - the extent of Aprofessional indemnity@ cover depends less on the Aprofessional@ characterisation of the insured=s business activity than on the nature of the connection between that activity and the conduct that occasioned the liability.

- the scope of Asimple@ professional indemnity cover - Acourse of practice / professional business@

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[2] For a discussion of the problems that arise where the policy schedule omits the intended business description see *Toomey v Scolaro=s Concrete Constructions Pty Ltd* (2002) 12 ANZ Ins Cas 61-519; [2002] VSC 48 and *Manren Ltd v Royal & Sun Alliance Insurance Australia Ltd* (2003) 12 ANZ Ins Cas 61-568; [2003] VSCA 59.

11. The point can be illustrated by the decision in *Baltzan v Fidelity Insurance Co of Canada* (1932) 32 W.W.R. 140. In that case the insured doctor held a policy that indemnified him for liability Ain the practice of his profession@. It was held to apply to liability for an injury to a patient caused by an X-ray table being improperly locked - even though the action of locking the table did not involve any professional expertise. The insured in that case was a doctor - and thus within any view of the meaning of Aprofessional@. But the same result would follow in any case where the policy defined the insured Aprofessional business@ by reference to the business description in the policy schedule. As Nettle JA said in *Suncorp Metway Insurance Limited v Landridge Pty Ltd* (2005) 12 VR 290

> [28] ... Given that the general principles of contractual construction apply as much to policies of insurance as to any other contract, the conception of Aprofessionalism@ within a given policy of insurance must always depend upon the business to which the policy relates and thus upon the Aprofession@ which is in view.

As will be observed, Nettle JA=s approach would treat Aprofession@ and Abusiness@ as synonymous terms - at least in relation to the description of the insured=s business.

12. Much the same point arose, though in a rather more complex factual setting, in *Pioneer Road Services Pty Ltd v QBE Insurance Ltd* (2002 12 ANZ Ins cas 61-250. In that case the insured was a road construction company and had contracted with a local government Council to build a road in conformity with the Council=s specifications. Pioneer held a professional indemnity policy expressed to provide Aclaims made@ indemnity in respect of Aany civil liability... incurred in the conduct of the Professional Business Practice@. The term Aprofessional business practice@ was defined to mean Athe business conducted by the insured, as specified in the schedule@. Each policy was specifically endorsed so that it was Alimited to cover design and consulting/advisory services only@.

13. In the controversy over indemnity the insurer contended that the professional indemnity policy only applied to design and consulting services that were separate from the performance of actual construction contracts. Pioneer, on the other hand, contended that the Aprofessional indemnity@ policy responded to any liability that arose in connection

with design and advisory services - even if they formed part of the incidental obligations imposed under a road construction contract.

14. Wood CJ at CL held that Pioneer=s incidental responsibilities under the construction contract, in relation to the preparation of a traffic management plan, provision of adequate signage and appropriate maintenance of the road surface during construction - the matters upon which its own liability to the injured person had been based - would not relevantly be characterised as part of its Adesign@ or Aconsulting@ responsibilities for the purpose of the professional indemnity policy. Having regard to the detailed performance requirements in the construction contract Pioneer=s relevant responsibilities did not fall within the subject matter of the policy because Pioneer Ahad little room to move ... in the sense of exercising any independent judgment outside the parameters laid down@ in the construction contract. In addition, however, Wood CJ at CL also held that, as a matter of construction, the policy indemnity was never intended to apply to design and consulting activities that were merely ancillary to the performance of obligations imposed under a construction contract.

15. In relation to the concept of Aprofessional business@, however, Wood CJ at CL accepted the submissions that the description Aprofessional business practice@ had been used in the policy to define the ambit of the insured business and that did not confine the scope of the indemnity Ato a breach of professional duty strictly so regarded@. - see [2002] NSWSC 137 at [68].

- cover for Aprofessional duty@ in the course of the Apractice / professional business@

16. Some policies attempt to narrow the potential scope of the indemnity by a cumulative requirement that the liability must arise not only Ain the course of@ or Ain connection with@ the insured Aprofessional business@ but must also arise from a breach of professional duty. The modern case most frequently cited to support the efficacy of this approach is *FAI General Insurance Co Ltd v Gold Coast City Council* [1995] 2 Qd R

341. In that case the insured council had both a general liability policy and a professional indemnity policy. The general liability policy excluded Aprofessional advice or service... or any error or omission connected therewith@. The professional indemnity policy extended only to Aany claim... for breach of professional duty in the conduct of the practice@. But it defined the insured=s Apractice@ as that of a Amunicipal authority@. This effectively embraced the kind of Aself serving@ definition to which I have referred previously. Consequently, any restriction on the scope of the indemnity applied by reference to the characterisation of the relevant duty - rather than the overall nature of the insured=s practice or business.

17. The conduct that gave rise to the Council=s liability was misstatement by a council officer about the location of a water main. The Queensland Court of Appeal noted that the council officer appeared to have been merely Aan inquiry officer@. The judgment suggests that this finding negated the officer having any Aprofessional@ task in relation to the selection or interpretation of the basic information. Nor was there any evidence that the Council officer held any relevant professional qualification. The Court of Appeal rejected the claim for policy indemnity and said

> The definition of risk and the measure of the obligation to indemnify in a professional indemnity policy in terms of breach of professional duty in the conduct of the practice of Municipal Authority requires that effect be given to the word Aprofessional@. It is not every breach of duty in the course of the conduct of the Apractice@ or Abusiness@ of AMunicipal Authority@ which will be a breach of professional duty. The meaning of Aprofessional@ will, of course, vary with context. AProfessional@, however, connotesApertaining or appropriate to a profession@, Aengaged in one of the learned professions@.
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> The point is illustrated by the decision of the British Columbia Court of Appeal in *Chemetics International Ltd v. Commercial Union Assurance Co. of Canada* (1984) 11 D.L.R. (4th) 754. In that case the policy excluded liability in respect of the rendering of Aprofessional services@. The relevant failure was to give proper operating instructions in a manual. The manual was prepared by a qualified engineer. That was, however, held to be irrelevant to determining whether the particular instruction in issue was characterised as a professional service. It was held not to be. The provision of operating instructions was not the provision of professional services; the service was not one which could usually be expected to be provided only by a professional engineer. It was simply part of a service provided by a vendor to a purchaser of the particular plant.

18. The later decision of the New South Wales Court of Appeal in *GIO General Ltd v Newcastle City Council* (1996) 38 NSWLR 558 provides an informative contrast to the Gold Coast City Council decision. In *GIO General* the policy provided, amongst other things, a Aclaims made@ indemnity to the Council in respect of Aany negligent act, error or omission... in the conduct of the insured=s business@. This principal indemnity, despite its policy heading AProfessional Liability@, did not in fact require characterisation of either the Council=s business, or any particular breach of duty, as Aprofessional@ in order to attract the policy indemnity. However, the composite policy wording was partly Aoccurrence@ based and partly Aclaims made@. A subsequent endorsement clarified the intention to confine the Aprofessional indemnity@ cover to claims made during the period of insurance by expressly purporting to exclude any other claims made arising from Aprofessional advice or service by the insured or any error or omission connected therewith@.

19. In *GIO General* the Council=s liability arose from a deficient building inspection carried out to ensure compliance with relevant construction approval. Since the claim had not been made during the period of insurance the liability was excluded (subject, of course, to the effect of ICA section 40) if the council=s deficient inspection could be regarded as an error or omission Aconnected@ with professional advice or service. The Court of Appeal held that the characterisation depended on the intrinsic nature of the Council=s inspection and approval activity, rather than the reason why it occurred. Consequently, the fact that the Council was performing a statutory function, and perhaps even discharging a statutory obligation, did not preclude the compliance inspection from being characterised as Aprofessional@. In reaching that conclusion the context of the policy was important. In particular, the connotations of the word Aprofessional@ were regarded as relevantly informed by the nature of the insured=s Abusiness@. This is made clear in the often cited passage at 38 NSWLR 568.

> The term Aprofessional@ in the context of professional indemnity insurance today is very broad. ... The term involves, in the context of a policy written for a local government authority, no more than advice and services of a skilful character according to an established discipline: see *Commissioners of Inland Revenue v Maxse* [1919] 1 KB 647 at 657; *Carr v Inland Revenue Commissioners* [1944] 2 All ER 163 at 166-167. On the

> evidence before the Court as to the nature of the respondent's activities, I entertain no doubt that they would fall within this definition as now understood in this context. The examination and analysis of building proposals with a view to granting consent is properly characterised as the provision of a service of a skilful character according to a discipline. In fact the evidence suggested (although this is not crucial or determinative) that some (1996) 38 NSWLR 558 at 569 or all of the functions were performed by professionally qualified persons. Therefore the Club's claim which arose out of such activities fell within the endorsement to the policy, and thus within cl (c).

20. This same distinction - between overall function and the particular activity giving rise to the liability - was emphasised again in *Government Insurance Office of New South Wales v Council of the City of Penrith* (1999) 102 LGERA 102; [1999] NSWCA 42. In that case the Council=s liability arose from the unjustified lodgement of a caveat. The caveat claimed, pursuant to a particular provision of the Local Government Act 1919, an interest in an alleged drainage reserve. The insurance policy conferred an indemnity in relation to claims Afor breach of professional duty... in the conduct of any business dependent wholly or mainly on personal qualifications conducted... on the half of the Council in a professional capacity@. This clause clearly sought to draw a distinction between, on the one hand, the basic nature of the Council=s business and, on the other, Aprofessional@ liability. Perhaps not surprisingly, therefore, the claim was rejected. It was rejected on two bases. The first was that the actual cause of the Council=s liability was the lodging of the caveat. This was a formal act done by the Council and could not in any sense, the court found, be regarded as a Aprofessional@ activity. Even if the Council=s conduct in lodging the caveat had been influenced by erroneous records or even a deficient Aprofessional@ judgment by Council officers (a manner that was not established by the evidence) it did not give rise to liability which attracted the policy indemnity. This was partly because, to the extent that the Council=s conduct was based upon erroneous information contained in the Council records, the provision of that information, even by a person having some form of professional qualification, did not constitute a relevant professional service. It was also partly because, to the extent that the information was compiled by someone with the relevant professional qualifications, the plaintiff had failed to establish that any relevant Aprofessional@ obligation was owed to it in connection with the compilation of the information.

21. One can see in these cases two different criteria being used to determine the particular contextual connotations of the word Aprofessional@. The first of these criteria is the policy definition of the insured=s business. Since the fundamental policy objective is to provide a measure of liability indemnity for conduct in the ordinary course of the business, the more generalised the nature of the business the more likely it is that the Court will take an expansive view of the use of the word Aprofessional@ and regard it as providing only a minor qualification on the scope of the indemnity. The second of these criteria is the precise characterisation of the particular act that gives rise to the liability. Unless that precise activity actually involves the exercise of appropriate skill or judgment courts favouring this approach have been reluctant to characterise the conduct as relevantly Aprofessional@ for the purposes of the policy indemnity.

22. Two relatively recent case demonstrate the way in which the choice of criterion can lead to significantly different results. In *Toomey v Scolaro=s Concrete Constructions Pty Ltd* (2002) 12 ANZ Ins Cas 61-519; [2002] VSC 48 the insured conducted a disparate business which included property development, and property management. It had a broad form of liability policy which provided public liability indemnity for occurrences Ain connection with the insured business@ - subject to a specific exclusion for Aclaims arising out of any breach of duty owed in a professional capacity@. The insured=s liability arose out of an accident attributable to a low balustrade at a property where the insured had a nominal role as Aproject manager@ but where its actual function, the judge held, was minimal. The insured=s employee was aware of the inadequate balustrade but did nothing to rectify or replace it. The Court held that this did not involve a breach of duty Aowed in a professional capacity@, notwithstanding the insured=s nominal title as project manager. In a passage which graphically illustrates the importance of context, Eames J said

> [70] As I earlier noted, the role of Project Manager, although one of fairly recent origin, may well require the application of skills over a range of disciplines. Although not a traditional profession, it is one which, in my view, could very well be regarded as being professional for the purpose of a professional indemnity policy, and had there been such a policy in existence may well have provided coverage to [the insured] for the actions or inaction of James. The categories of "professions" should not be regarded as being closed,

> and confined to traditional learned professions. Whether at any moment the actual conduct giving rise to liability would be covered by such a policy would be a matter to be considered on a case by case basis, having regard to the wording and nature of the policy which was under consideration.

23. This passage shows a rather remarkable flexibility in the characterisation of the same conduct. It hypothesises that different results may follow according to whether or not the Aprofessional@ criterion is being considered in the context of a public liability policy (where presumably it is relevant because of a policy exclusion) or in a professional indemnity policy (where it operates as an adjectival description in the principal insuring clause). It is interesting to note that in the subsequent appeal: *Manren Ltd v Royal & Sun Alliance Insurance Australia Ltd* (2003) 12 ANZ Ins Cas 61-568; [2003] VSCA 59 Callaway JA expressed some doubts about the correctness of the trial judge=s conclusion that the insured Aproject manager=s@ breach of duty should not be characterised as a breach of duty in a professional capacity.

24. Callaway JA=s doubts in *Manren* were given practical significance in the later Victorian Court of Appeal decision in *Suncorp Metway Insurance Limited v Landridge Pty Ltd* (2005) 12 VR 290; [2005] VSCA 223. That decision more definitely favours an expansive interpretation of the concept of Aprofessional@ duty - and strongly contrasts, in its result, with some of the earlier decisions. In *Landridge* the insured was a real estate agent who had been retained to act as the property manager for leased residential premises. The tenant complained to the agent=s receptionist about a trip hazard on the garage floor at the property. The message was not conveyed to the responsible person. The hazard remained unremedied and the tenant was ultimately injured. When the tenant sued the agent the professional indemnity insurer denied liability - contending that the insured=s liability arose from neither a breach of professional duty nor a breach of any Aprofessional@ duty owed to the tenant. The argument arose because the policy provided an indemnity against Alegal liability... for breach of a professional duty... in the conduct of the business@. The business was identified in the policy schedule as that of a real estate agent. The proposal contained the additional description that the business and professional activities of the insured included sales, residential property management and finance applications.

25. In rejecting the insurer=s contention that there was no relevant breach of professional duty Buchanan JA said

> [11] The construction of the policy is an exercise to be carried out in the context of the circumstances in which it was formed, so as to give effect to the intention of the parties: .*Kay Pty Ltd v G.M. Acceptance Corporation* [1963] VR 458 at 463 per Sholl J. The activities which could give rise to liability requiring protection were those of an estate agent selling houses, managing the letting of houses and arranging finance. In order to make commercial sense of the policy, in my view it is necessary to regard those core activities of the agent=s business as carrying on a profession, while at the same time recognizing that not everything done by an estate agent is to be described as carrying on a profession. **If the word Aprofessional@ in the insuring clause is limited to the conduct of a learned profession**: *FAI General Insurance Co Ltd v Gold Coast City Council* (1995) 2 Qld.R. 341 at 344 per McPherson JA, Davies JA and Moynihan J**; the cover afforded by the policy will be restricted to probably no more than some incidental aspects of the business of an estate agent**. Put another way, unless the agent was to be regarded as under a professional duty to monitor the condition of leased premises and ensure that they were kept in good repair, it is difficult to see that any professional duties were owed by the agent in respect of property management, a major component of the agent=s business: cf *Toomey v Scolaro=s Concrete Constructions Pty Ltd* (2002) 12 ANZ Insurance Cases 61B519 at 76,076 per Eames J.

> [15] Counsel for the insurer placed considerable emphasis upon the low level of expertise possessed by the receptionist and the property manager and the simplicity of the tasks which they failed to carry out. He compared their failure to pass on the tenant=s complaints and to detect and appreciate the need to repair the hole in the garage floor with a council clerk=s description of the position of a trench in relation to a property boundary, which was held not to be a breach of a professional duty: *FAI General Insurance Co Ltd v Gold Coast City Council*, above; and a clerk=s statement that a town council had no interest in a particular piece of land, which was held not to be concerned with the provision of a professional service: *GIO of New South Wales v Council of the City of Penrith (1999) 102 LGERA 102*.
> [16] In my view the analogy which counsel sought to draw was false. Local councils carry out a large number of activities, a number of which, such as engineering, property valuation and surveying, are orthodox professional activities. Other activities of councils, such as garbage collection and record-keeping, have no professional content. **The question whether a breach of duty answers the description of a breach of a professional duty depends upon characterisation of the overall activity in the context of which the breach occurs, and is not answered by concentrating on the specific task which has not been performed or badly performed so as to give rise to liability**. The relatively simple tasks of the council clerks the subject matter of the cases relied

> upon by the insurer were not part of the councils= professional activities. The breaches by the agent=s employees in the present case, on the other hand, occurred in the course of carrying out the activity of property management, which in my opinion is to be regarded as a professional activity for the purposes of the policy of insurance. Similarly, the failure of a solicitor=s clerk to deliver an appearance to the Prothonotary=s office, while a failure to perform a task requiring little or no skill, in my view is properly described as a breach of the solicitor=s professional duty.

26. In the same case Nettle JA put the same point shortly and succinctly:

> [27] ... many of the authorities in this area of the law are concerned with tests for distinguishing between the sorts of acts or omissions which constitute the provision of services to which a policy extends and those which do not. More often than not, however, the problem is not so much in recognising the distinction as in precisely defining the criterion of distinction. Hence the concentration in the authorities on the words Aprofession@ and Aprofessional@ and the various attempts made in some of them to define those terms. But as Buchanan JA demonstrates, the criterion of professionalism in one context is virtually bound to be different to that in another, and hence there is little utility in attempts at transposition.

Conclusion

27. The insurance industry has long recognised the uncertainty inherent in the use of the word Aprofessional@. It is intended as a word of limitation, but the scope of the limitation is very dependent on the context in which it used. The cases identify at least two important contextual considerations. They are, first, the actual nature of the business intended to be insured - and its policy description. The second is the particular policy description of the liability to which indemnity attaches. At a broad level of generality it is correct to say that the concept of Aprofessional indemnity@ is directed at activities that involve a relevant element of special skill - in the sense that expression is used in *GIO General Ltd v Newcastle City Council* (1996) 38 NSWLR 558. However, the decision of the Victoria Court of Appeal in *Suncorp Metway Insurance Limited v Landridge Pty Ltd* (2005) 12 VR 290; [2005] VSCA 223 shows that, if the insured business itself involves merely management and supervisory functions, the limitation intended by the use of the word Aprofessional@ may have minimal content. This is likely to be particularly the case

if the insurance market is developing to make this kind of indemnity insurance available for Aoccupational liability@ generally.

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Note: *Liability limited by a scheme approved under Professional Standards Legislation*.