



The meaning of “Professional” in Policies of Insurance

More and more, these days, the meaning of “professional” in terms of a person holding himself out as a professional or conducting and working within a profession is not governed by the views of society or social historians but rather, for the purposes of insurance, is governed by the types of activities for which insurers are prepared to provide cover.

It is well accepted that the traditional “professions” were those of medicine, the clergy and the law. It is also clear that the Courts well recognise that the meaning of “profession” is a fluid concept and one which has extended beyond the traditional professions. For example, when the High Court was considering the meaning of the word profession in 1924¹, the Court, recognised that the meaning of “profession” was a vague and “elastic” term² Isaacs J observed that:

“The word “profession” is not one which is rigid or static in its signification; it is undoubtedly progressive with the general progress of the community...”³.

and Rich J commented:

“In Australia, at any rate, we have travelled beyond the well-known three learned professions,it is submitted.”⁴

Nevertheless, notwithstanding the recognition that the term was fluid and had expanded beyond its traditional boundaries, the High Court were not prepared to extend the scope of “profession” to include the activities of a horse trainer.

Today it is submitted, that community standards have shifted significantly further still. If we were to accept the description of the activities of a horse trainer, which were submitted in argument in *Bradfield*, that the trainer had “*acquired considerable knowledge, skill and experience extending over many years in connection with the training, handling and treatment of race horses for the purpose of competing for prizes and money.... And formulates a plan for training each horse in accordance with the views, directions and requirements of the owner*”⁵. We would readily accept that a horse trainer is a professional. This view is supported by the meaning of the word “*professional*” as used by Kirby P (as he then was) that “*professional*” (in respect to a Council) requires “*no more than advice and services of a skilful character according to an established discipline*”⁶. It is even more clear at least in terms of professional indemnity insurance, that a horse trainer would undoubtedly be regarded as a professional.

Tests such as those referred to in *Jackson and Powell on Professional Liability*⁷ are used to seek to identify a professional namely:

1. That the work is skilled and specialised and is mental rather than manual.
2. The work is governed by moral principles of a fiduciary nature which go beyond the general duty of honesty and include concerns as to the duty of confidentiality and owing a wider duty to the community.
3. They tend to belong to professional organisations which impose a degree of self-regulation.
4. There is an element of status which attaches to such professions.

¹ *Bradfield v The Federal Commissioner of Taxation* [1923-1924] 34 CLR 1.

² *Ibid*, page 7 per Rich J.

³ *Ibid*, page 7 per Isaacs J.

⁴ *Ibid*, per Rich page 7

⁵ *Ibid*, page 3 per Higgins J

⁶ *GIO General Limited v Newcastle City Council* (1996) 38 NSWLR 558 at 568

⁷ *Jackson & Powell on Professional Liability* (6 edn) Powell J and Stewart R Sweet & Maxwell, London 2006, at paragraph 1-005.



While the above criteria are no doubt useful and indeed essential if one was to look at the meaning of a professional within society it is clear from a review of reported cases dealing with the meaning of profession/professional that a far wider interpretation is given by courts to those words in the context of professional negligence insurance.

With the proliferation of “professional indemnity” policies of insurance and the provision of such cover necessitating the inclusion of exclusion clauses, to extend professional activities, from other forms of liability cover it is of importance for participants in this area, including, insurers, both underwriters and claims officers, lawyers and “professionals” to understand what those terms mean when they are used in such policies.

By reviewing the leading Australian cases in this area and several cases from 2007 it is hoped to provide greater insight into the way courts will interpret these terms when used in policies. Hopefully that, by undertaking such a review, some guiding principles can be extracted suitable for general application.

Before turning to the Australian cases in detail it is useful to review the decision of *Chemetics International v Commercial Union Assurance Co Canada* (1984) 11 DLR(4th) 754 a decision of the British Columbia Court of Appeal which is almost universally referred to, in the Australian cases, when consideration is given to the term “professional” in a policy of insurance.

In *Chemetics* the insured was covered under a liability policy which contained an exclusion clause in the following terms:

“This policy shall not cover the liability for damage to or destruction of, or loss of use of property caused directly or indirectly by.... error or omissions in the rendering of professional services”.

Chemetics provided engineering services for the design and supply of equipment and material for a Pulp mill. In the provision of these services the contract provided, by Clause 1.3, that *Chemetics* would provide:

“The onsite services of a competent supervisory operating engineer at such time as the Plant is substantially completed, for the training of the owner/operators in the operation for the Plant and for supervising the performance test run for the acceptance of the Plant by the owner....”

Loss was suffered by the customer following a failure by *Chemetics* to warn of the risk of overfilling the tower which could cause damage and rupture the towers conical roof.

Under the contract *Chemetics* was required to provide an operating manual. It was accepted that both the operating manual and the instructions given by *Chemetics* were inadequate. While the court held that *Chemetics* had failed to give proper instructions importantly this was held not to be a failure to render professional services within the meaning of the exclusion clause. Notwithstanding the contract required a professional engineer, to provide training this was not determinative, the court held:

“... the insurer has not shown that the training of operators called for by clause 1.3 was the provision of professional services. In the words of the contract, it was the provision of services of a competent supervisory operating engineer. That requirement could have been satisfied by providing a person experienced in the operation of plants and knowledgeable as to the operating characteristics of this particular plant. That person would more appropriately be described as a technician. No doubt he would have to be a professional as distinguished from an amateur. But that is not the meaning of ‘professional’ as used in the exclusion. In that context, it is intended to refer to the kind of services, such as design of the plant, which could normally be expected to be provided only by a professional engineer”.

Chemetics is generally regarded as demonstrating that the provision of information, such as operating instructions, is not the provision of professional services and is not a service usually expected to be



provided by a professional. It was simply part of a service provided by a vendor to a purchaser of plant⁸.

It is important to note that the use of the word “professional” in *Chemetics* was in an exclusion clause in a liability policy. The court expressed the view that the word “professional” did not apply to the provision of instructions on the use of the plant but interpreted the clause, in the context of the exclusion, to apply to matters such as design.

FAI General Insurance Co Ltd v Gold Coast City Council [1995] 2 QD R 341

This case concerned determination of which of two policies, held by the Council, would respond to a claim. The Council held a general liability “broad form” policy which contained an exclusion for liability which arose from:

“The rendering of or failure to render professional advice or service by the (Council) or any error or omission connected therewith...”

The other policy was a professional indemnity policy which provided cover to the Council “against any claim or claims for compensation... for breach of professional duty in the conduct of the practice as defined and referred to in the schedule by reason of any negligence whether by way of act, error or omission”. The insured’s profession was stated in the schedule to be “municipal authority”.

The trial judge had held that the claim was covered under both policies and the purpose of the appeal was to determine under which policy the claim should be paid. Under the liability policy there was a \$100,000 excess and under the professional indemnity policy there was a \$25,000 excess.

The facts were relatively straightforward in that the Council had been sued for negligent misstatement on the basis of advice given by a Council officer that a trench was located on land at a depth of 4 metres and was some 4 metres from the boundary of the land on which it was proposed to erect a warehouse.

In this case there was no evidence that the Council officer, giving the advice, had any professional qualifications.

The court approached the case on the basis of deciding whether the claim came within the terms of the professional indemnity policy. In considering this question the court noted:

“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 ‘professional’. It is not every breach of duty in the course of the conduct of the ‘practice’ or ‘business’ of ‘municipal authority’ which will be a breach of professional duty. The meaning of ‘professional’ will, of course, vary with context. ‘Professional’, however, connotes ‘pertaining or appropriate to a profession’, ‘engaged in one of the learned professions’.

The court then considered *Chemetics* noting the effect of that decision was that a professional service did not include the provision of operating instructions which were simply held to be a service provided by a vendor to a purchaser. The court continued:

“In the present case the Respondent’s [Council] servant did no more than convey factual information which was incorrect and upon which it may be accepted that a professional judgment was exercised by those responsible for the design of the plaintiff’s building. That, however, did not impart any ‘professional’ component of the Respondent’s duty to provide correct information in the circumstances.”

As a consequence of the Court determining that the Council had not provided a professional service the liability policy applied and the insured was required to pay a greater excess.

⁸ *FAI General Insurance Co Ltd v Gold Coast City Council* [1995] 2 QD R 341



The case can be regarded as one relating to the consideration of extent of cover under a professional indemnity policy

GIO General Limited v Newcastle City Council (1996) 38 NSWLR 558

The NSW Court of Appeal was required to consider appeals from two judgments in the Supreme Court both dealing with the consequences of the collapse of the Newcastle Worker's Club following the Newcastle earthquake on 28 December 1989. Both cases involved the same policy and the same parties.

The policy was issued by the GIO. It provided public liability, products liability and professional liability insurance.

By further endorsement a professional indemnity exclusion was included in the policy to effectively exclude professional negligence claims from the public liability or products liability cover and provided that:

"the rendering of or failure to render professional advice or service by the insured or any error or omission connected therewith..."

was covered under the professional liability cover under the policy.

The negligent act which was said to give rise to the claim against the Council was a failure by the Council, in issuing a certificate of structural soundness, to note that a critical chord member had been omitted from one of the roof trusses in the auditorium of the Workers Club during construction.

Both O'Keefe CJ Comm D and Bainton J, when considering the failure of the Council, considered the activity was not the rendering of professional advice or service but the carrying out of a statutory duty. On that basis both judges held that the claims did not come within the professional liability cover and the professional indemnity exclusion did not apply.

Kirby P delivered the principal judgment and Powell JA agreed. Sheller JA agreed with Kirby, on this issue, but gave a short separate judgment on the meaning of "occurrence". Given the significance that the comments of Kirby P have come to assume it is worth setting out this portion of his judgment in full:

*"Both of the primary judges concluded that the relevant activities of the respondent consisted of the carrying out of statutory duties **rather than** the provision of professional service or advice. These two characterisations were considered to be mutually exclusive.*

*With respect, I cannot agree with the primary judges upon this view. The mere fact that the liability of the respondent is grounded in statute, rather than any common law duty, is not determinative of whether the relevant activities are properly to be characterised as 'professional'. The relevant activities conducted by the respondent must be examined to see whether, in their nature, they are properly characterised as 'professional'. The source of the respondent's duties to perform the activities, although a relevant circumstance, is not definitive. For the same reason, it does not necessarily matter whether the officers of the respondent who were alleged to have given faulty advice and service were professionally qualified engineers: see also **FAI General Insurance Co v Gold Coast City Council**..... The question is, is the type of service which was provided properly characterised as 'professional service'.*

The term 'professional' in the context of professional indemnity insurance today is very broad. This is evidenced by the very large range of policies which are written for such insurance ... 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 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 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).

The effect of this decision was to hold that the exclusion to the public liability section of the policy applied whereby a failure to render professional advice, or service could only be covered under the professional liability section of the policy. However as the policy required a claim to be made against the Council during the policy period, for that cover to be enlivened, and as no claim was made, the policy did not respond. It should be noted that, on appeal, the High Court held that pursuant to section 40(3) of the Insurance Contracts Act the notice given by the insured, during the policy period, was sufficient and therefore the claim was covered. The High Court only granted special leave to appeal in respect to the application of section 40. Leave was not given in respect of the nature of professional advice or service: see *Newcastle City Council v GIO General Limited* (1997) 191 CLR 85.

Government Insurance Office of NSW v Council of the City of Penrith [1999] NSW CA 42

This is another Council case involving a similar issue to the decision in *Gold Coast City Council*. The court consisted of Mason P, Powell and Beazley JJA. The majority judgment was delivered by Powell JA with whom Mason P agreed adding some remarks of his own in respect to professional duty. Beazley JA dissented.

The matter for determination was whether or not the claim against the Council came within the insuring clause of a professional indemnity policy. The insuring clause indemnified the council:

"against any claim..... for breach of professional duty.... by reason of any negligent act, error or omission.... committed or alleged to have been committed on the part of any person employed by the (Council) or any person elected to the Council....in the conduct of any business dependent wholly or mainly on personal qualifications conducted by or on behalf of the (Council) in a professional capacity....".

The claim by the Council against GIO arose upon the settlement of a claim between the Council and Mitora Pty Ltd ("**Mitora**").

Mitora had purchased land subject to Council approval of a development application. Mitora, through its solicitors, had written to Council enquiring as to whether the Council would object to any claim for possessory title to a lane adjacent to the land acquired by Mitora.

The solicitors for Mitora asked Council whether the lane had been reserved as a public laneway and whether the land had been rated for the past 30 years. The Council responded by letter noting the land had not been valued or rated for the relevant period and was not considered to be a public laneway.

In subsequent correspondence the Council confirmed that the laneway was not required for any engineering or town planning purposes and that the Council would not object to Mitora making an application for possessory title to the laneway. However, notwithstanding the prior correspondence, when Mitora lodged its development application the Council advised that the land was owned by others and the Council needed the owner's consent to the development application. The Council lodged a caveat against the primary application for possessory title made by Mitora. Proceedings were commenced and ultimately the Council withdrew the caveat. Mitora then made a claim for damages for wrongful lodgement of the caveat. Those proceedings in turn were settled by payment, by the Council, to Mitora. It was in respect of that payment that the Council sought indemnity under its professional liability policy from GIO.

The Council argued that its actions in lodging the caveat and providing information to Mitora were undertaken by the council, in its professional capacity. However the majority held that not only were those steps not those of an employee or person elected to the council, as required by the insuring clause, but that they were not professional services. Powell JA held that:



“The provision of information as to what may, or may not, be ascertained from Council’s records is not, without more, the provision of a professional service; nor is it made so by reason of the fact that the person providing the information may have some form of professional qualification.”

In adopting this position Powell JA relied on both *Gold Coast City Council* and *Newcastle City Council*.

Of relevance, Powell JA also referred to *Chemetics* noting in that case that *“it was held that the failure to give proper instructions was not an error or omission in the rendering of professional services within the meaning of the policy, and the fact that the employee who drew up the manual happened to have professional qualifications was irrelevant”*.

In concluding this issue Powell JA noted:

“In the present case, what Mitora sought from the Council was, not advice, of a professional nature, as to the title to some old system land – it is clear that prior to April 1981 advice as to title had already been sought from, and given by, its solicitors – but, in the first instance, information as to what was contained in the Council’s records, and, later, information as to the Council’s future intentions in relation to the land. Neither request, when complied with, in my view, involved the Council in providing any professional service to Mitora, and, even if the information were given negligently, that, in my view, gave rise to no breach of professional duty on the part of any employee of, or person elected to, the Council towards Mitora”.

Given the views expressed by Beazley JA, in more recent judgments, it is worth noting the comments made in this case.

Beazley JA expressed disagreement with the approach adopted by the Queensland Court of Appeal in *Gold Coast City Council*. After referring to the comments of the joint judgment that the Council employee, in *Gold Coast City Council*, did no more than convey factual information, which was incorrect, and which did not impart any “professional” component and was therefore outside the professional indemnity coverage. Beazley JA commented that in her opinion such an approach was far too narrow and *“does not accord with modern day notions and commercial practice in relation to professional indemnity policies”*. In support of this broader view Beazley JA referred to the comments of Kirby P in *Newcastle City Council*.

Beazley JA came to the view that the actions of the Council, in providing the advice, was undertaken in the course of the Council exercising its statutory function as the local authority for the area. As to the two matters of advice given by the Council, as to whether firstly the Council required the land in relation to drainage and/or town planning purposes, this was part of the Council’s statutory function. As to the second matter, as to whether Council would take action in relation to Mitora’s primary application, with respect to the land including the laneway, the Town Clerk was engaging in an activity which was an integral part of the administration of the Council. On that basis Beazley JA disputed the conclusion, reached by the majority, that the Council was *“merely expressing its intentions as a putative land owner”*. For these reasons Beazley JA held that the advice came within the Professional Liability cover.

Toomey v Scolaro’s Concrete Constructions Pty Ltd (in liq) 5 (2002) 12 ANZ Ins Cas 61-519

This case has been included in the review of relevant cases as a consequence of the reliance placed upon it, in other judgments, to support the view that the word professional may well, and indeed invariably will, be subject to a different interpretation, depending on whether those words appear in an insuring clause or an exclusion clause.

The facts of the case, put very briefly, concern building work which was undertaken by Hudson Conway Ltd and related to a decision by a building foreman as to whether or not a balustrade, on steps, ought have been replaced because it did not comply with the relevant Building Code. Ultimately the balustrade was not replaced and it was held that a person, who suffered significant injury, did so because of the non-complying balustrade. Because of various other matters in relation to the insuring clause indemnity was not available under the policy but nevertheless the trial judge went on to consider exclusion clause 6 which relevantly provided:



“Professional duty – 6 claims arising out of any breach of duty owed in a professional capacity by any of the Persons Insured...”

The exclusion applied to the public liability cover.

In determining whether the duty was owed in a “professional capacity” the trial judge considered whether it was necessary to look at the role of the company, as project manager, or the specific activities of the foreman. Eames J commented:

“In my view, determination of this question will involve both the narrow and broader focus, but primarily the specific actions which gave rise to the liability will require keenest attention. Actions of an entirely unprofessional kind by an employee, which take place in a professional organisation, might nonetheless be held to have arisen in a professional capacity, and likewise, in an organisation which would be regarded as engaged in industrial and not professional pursuits, the activities of an employee at any given moment might well be characterised as constituting a professional service sufficient to demonstrate that liability of the employer arose by breach of duty in a professional capacity”.

In considering this question Eames J referred to *Newcastle City Council* and the judgment of Kirby P where the focus was on the activities of the Council employee which were said to be negligent and to have caused the liability. Eames J then referred to *Gold Coast City Council* noting the court focused on the individual’s activity and held that the Council employee was merely conveying factual information, not making a professional judgement. Similarly in *City of Penrith* the focus was placed on the particular activity which was held to be the mere conveying of information and not something done in a professional capacity. As with *Chemetics City of Penrith* did not depend, for its outcome, on the professional qualification of the person providing the service. Eames J noted that:

“Each of those decisions demonstrates that the question must be resolved by an examination of the totality of the circumstances, but with a focus on the actual conduct, by action or omission, of the negligent individual performing the services”.

In responding to a submission that “professional” must have the same meaning, irrespective of whether it appears in an exclusion clause of a policy or as the basis of liability in a professional indemnity policy, Eames J commented:

“... we must not lose sight of the fact that the context in which the word ‘professional’ appears in the two policies is likely to be different. Furthermore, when the term appears in an exclusion clause, the overlaying principle of contra proferentem applies – with particular force (although the same principle also has application where the inclusive terms of a professional indemnity policy are under consideration). In other words, where the insurer is seeking to give a restrictive meaning to the words of its own policy so as to deny coverage under a professional indemnity policy, an attempt to confine liability to the practice of the learned professions might be resisted in favour of a more broad approach”.

His Honour went on to conclude that in considering the application of the exclusion clause ‘*contra proferentem*’ he was not persuaded that the liability “*arose from conduct which constituted a breach of duty owed in a professional capacity*”.

Suncorp Metway Insurance Ltd v Landridge Pty Ltd (t/as LJ Jooker Hampton Park) [2005] 12 VR 290

In this case the Court of Appeal of Victoria was required to consider the application of a professional indemnity policy to the activities carried out by a real estate agent.

Briefly the facts were that a tenant had reported to the managing agent, of the property, (the insured) defects in the garage floor which needed repairing. The agent failed to repair the floor or to advise the landlord of the danger notwithstanding the complaint. Subsequently the tenant injured herself tripping in a shallow hole in the concrete floor of the garage and recovered damages from the agent.

The insuring clause under the professional indemnity policy provided indemnity:



“For breach of a professional duty by reason of any act, error or omission committed or alleged to have been committed by the Insured in the conduct of the Business”.

The ‘Business’ was stated in the schedule to be that of a real estate agent.

The issue for determination was whether the agent’s legal liability to the tenant was *“for breach of professional duty by reason of any act, error or omission committed ... in the conduct of the Business”.*

Evidence given at trial, by the sole director of the insured, was that he left the day to day running of the property management business to his staff, the property manager had been educated to year 10 and had completed a traineeship in the course of her employment which did include education in property management. The director agreed that the amount of knowledge and skill required to act as a property manager was *“embarrassingly enough, on behalf of the industry, not much”.*

The negligence, the failure to pass on the tenant’s complaints or arrange to carry out the repairs was held, by the trial judge, to form part of the agent’s breach of its professional duties.

The arguments put by the insurer on appeal were that:

- (a) the omissions of the agent, founding its liability to the tenant, were not breaches of professional duty within the meaning of the insuring clause; and
- (b) the only professional duty of the agent was that owed to the landlord and accordingly the policy did not respond to indemnify the agent against liability owed to the tenant.

Counsel for the insured relied on the dicta of Kirby P in *Newcastle City Council* that ‘professional’ involves *“advice and services of a skilful character according to an established discipline”.* It is easy to accept that the failure to pass on information, as to repairs to be carried out to the garage floor, was simply factual information, not of itself, requiring any skill according to an established discipline. Nevertheless the Court of Appeal looked at the purpose of the policy namely professional indemnity insurance for the conduct of the business of a real estate agent and noted that very little of the activities of a real estate agent would arise in a professional capacity.

It was therefore necessary to look to the commercial intention of the parties in entering into the policy. In this regard Buchanan JA noted:

“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 recognising that not everything done by the estate agent is to be described as carrying on a profession....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”.

Further, on this theme, Buchanan JA noted that there was very little work an estate agent undertook which could properly be described as “advice or services of a skilful character according to an established discipline”. The judge noted that unless the core activities of the agent are regarded as carrying on a profession the policy will afford no significant protection.

In seeking to distinguish *Gold Coast City Council*, *Newcastle Council* and *Penrith City Council* Buchanan JA noted that in regard to Councils they undertake a myriad of activities some of which are professional services others which are not. Therefore, he reasoned, there is a valid point to seeking to determine which services are of a professional nature, covered under a professional indemnity policy, and those that are not and may be covered by a public liability policy. In making this determination *“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”.. In seeking to draw this distinction Buchanan JA noted that the matters referred to in the Council cases did not fall within the Councils’ professional activities whereas the omission by the real estate agent “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”.

On this aspect of the argument Nettle JA concurred saying:

“As Buchanan JA also explains, 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 ‘profession’ and ‘professional’ and the various attempts made in some of them to define those terms. 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”.

The other important aspect of this case concerned the question as to whom the duty of care, in a professional capacity, was owed.

The insurer argued that the duty to the tenant was an ordinary common law duty of care not a professional duty. It was only the landlord to whom the agent owed a professional duty. Again, in answering this argument Buchanan JA referred to the business purpose of the policy and noted:

“The insurer’s argument would limit the policy to one providing indemnity against claims by those whose contractual relationship with the agent create and define the agent’s professional duty. In my view, such a limitation is neither expressly nor implicitly present in the insuring clause of the policy. I think it is sufficient that the claim for compensation against which the insurer promised indemnity was for acts or omissions which constituted breaches of a professional duty”.

The standard of care required of the agent was to exercise, with respect to the tenant, the competence and skill that was usual among estate agents practicing the “profession” of managing properties. The scope of the duty was defined by the professional task upon which the agent was engaged albeit at the request of the landlord.

Nettle JA was of a similar view:

“... the duty which the insured was alleged to have breached was one owed to someone other than the insured’s client.... But it was nevertheless a professional duty within the meaning of the policy, for it demanded the exercise of the very same degree of skill and care as the insured owed to its client under its retainer”.

GIO General Limited v Job t/as Jobs Engineering [2007] WASCA 63

In this case the Western Australian Court of Appeal was required to consider the application of a professional indemnity exclusion clause in a public liability policy.

The facts were briefly that the business of Jobs Engineering comprised the design, manufacture and supply of machinery and equipment including wood processing machines. Jobs Engineering supplied a machine to V&D Ridolfo Pty Limited (“Ridolfo”) which subsequently on sold the machine to Mr Fitzpatrick. Mr Fitzpatrick was injured when his left foot was trapped in the machine which resulted in the amputation of his leg. The allegation made by Mr Fitzpatrick against both Jobs Engineering and Ridolfo was that they did not inform Mr Fitzpatrick about the need for a barrier or safety switch on the cabin.

Jobs Engineering made a claim on the insurer, under a Product Liability Policy, in respect to the claim by Mr Fitzpatrick.

GIO denied indemnity on the basis that it was not liable for claims:



“arising

(a) out of a breach of duty owed in a professional capacity...”

The insurer argued that the liability arose from the insured’s breach of duty in a “professional capacity”.

Pullin JA after referring to *Gold Coast City Council* and *Chemetics* noted:

“For a manufacturer to tell someone is to inform them or advise them but, in my opinion, it is not possible to contend that this amounts to the giving of advice in a professional “capacity””

The insurer referred to *Newcastle City Council* noting that for advice to be ‘Professional’ it only needed to be provided “according to a discipline” and the meaning of “Professional” in the context of professional indemnity insurance is very broad. But Pullin JA noted that it was held in *Newcastle City Council* that the Council was engaged in the rendering of “professional advice or service” in examining building proposals. His Honour then referred to *City of Penrith* and the finding that “the mere provision of information by a Town Clerk as to what was in the Council’s records, and what the Council’s future intentions were in respect to the parcel of land, was not a professional service”. Finally he concluded that in his opinion there was “no merit in the argument that the alleged omission to give advice about the need for a barrier or switch was a breach of a duty in a professional capacity. Such an alleged omission was merely the omission to provide information”.

Buss JA, with whom Steytler P agreed, commenced his consideration of this issue by noting that an insurance policy is a commercial contract and should be given a business like interpretation.

In referring to *Newcastle City Council* he noted that:

“In the Court of Appeal of New South Wales, Kirby P (with whom Sheller & Powell JJA agreed) held that the relevant activities of the respondent must be examined to determine whether, in their nature, they are properly characterised as “professional””.

After referring to comments from *Landridge* Buss JA referred to *Toomey* noting:

“The term “professional” in the indemnity clause of a professional indemnity policy does not necessarily bear an identical meaning in an exclusion clause of a public liability products or liability policy... The context in which the term “professional” is used in an insurance policy may be significant in determining its meaning”.

Buss JA then referred to *Chemetics* and *The City of Penrith* and the purpose of the policy noting that it was to provide cover for public and products liability and commented:

“If any and all negligent acts and omissions of Jobs Engineering, of the kind I have just mentioned, were to be characterised as breaches of duty owed by it in a professional capacity, in the exclusion 10(a), the cover under the indemnity clause of the products liability insurance would be severely circumscribed. The indemnity clause would not respond unless Jobs Engineering’s legal liability to pay was not attributable to its negligence or other breach of duty owed by it in a professional capacity, but arose on some other legal basis. The parties cannot have intended such an uncommercial and unreasonable result, and it is not a construction which the language of the policy unequivocally requires”.

Buss JA Held that the relevant exclusion was limited:

“In the context of the products liability cover, to claims arising out of breaches of duty owed by Jobs Engineering to persons who have retained it to perform work or services in the course of its business. The exclusion does not extend to breaches of duty owed to third parties who may suffer foreseeable loss or damage as a result of negligent acts or omissions by Jobs Engineering in designing, manufacturing or supplying machinery and equipment, including the negligent failure to give advice of the kind which it should have given to V&D Ridolfo. My construction of exclusion 10(a) is consistent with the evident object of the products liability



cover, namely, to provide indemnity, of real and not negligible value, in respect of claims for personal injury and property damage caused by defective goods and property designed and manufactured by Jobs Engineering, and put into circulation within Australia.”

Hall –v- Adventure Training Systems Pty Limited & Anor [2007] NSW SC 817

Harrison AsJ of the Supreme Court of NSW was required to consider the extent of an exclusion clause relating to the provision of professional advice or services.

Mr Hall was a Petty Officer in the Royal Australian Navy and was required to perform duties at the “*Endeavour High Ropes Course*” in Western Australia. As part of arrangements between the Navy and Adventure Training Systems (ATS) ATS was retained to carry out work and provide services including inspection and/or maintenance services in relation to the course. It was alleged that in providing those services ATS failed to check beneath the swagged ends of the metal ropes, forming part of the course, and in particular the rope attached to a support pole. As a result of the swagged end of the support pole rope being affected by corrosion the plaintiff suffered serious injuries when he fell to the ground when the rope broke at the point of corrosion.

ATS took no active part in the proceedings and pursuant to leave granted by Hoeben J QBE was joined as a defendant, pursuant to Section 6 of the *Law Reform (Miscellaneous) Provisions Act* (1946), to the proceedings.

QBE had denied indemnity to ATS because the claim was caused by or arose out of:

“The rendering of or failure to render professional advice or service by the Insured or any error or omission connected therewith”.

There was also an exclusion for liability caused by or arising out of advice, design, formula or specification given for a fee.

The plaintiff argued that *Chemetics* set out the relevant principles and in particular the comment that professional service was “*intended to refer to the kind of services, such as design of the plant, which could normally be expected to be provided only by a professional engineer*”..

QBE sought to rely on the decision of Kirby P in *Newcastle City Council* which, it argued, was authority for the general proposition that “*professional*” means no more than advice and services of a skilful character according to an established discipline.

Harrison AsJ responded to those submissions in the following terms:

“The broad view of Kirby P should not be adopted in this case. Firstly, Kirby P did not define “professional” for the purposes of construing the application of an exclusion clause but rather the policy generally. Here the word “professional” appears in the exclusion clause where it is to be read strictly, and contra proferentem against the insurer where ambiguity exists. Upon a strict view, the definition of “professional advice and service” cannot be as broad as Kirby P suggested in the context of GIO. Secondly, Kirby P’s statement at 568 was specifically made in the context of a policy written for a local Government Authority. GIO is not of assistance.

The view of the definition of “professional” in Chemetics is preferable. An insurer cannot use the words “professional advice or service” to exclude liability for every type of advice and service. The word “professional” strictly limits the application of the exclusion clause.

Whether or not assessment, certification and replacement is the provision of routine maintenance, or a professional service rendered by Adventure Training is a question of fact, and one that is not delineated by any clear and certain line. On balance, I find that such a request from the maintenance supervisor to carry out work is in the nature of routine maintenance, and not Adventure Training providing professional advice or service. As a result, the liability is not excluded by the operation of the exclusion clause”.



Vero Insurance Limited v Power Technologies Pty Ltd [2007] NSW CA 226

In this case Mr Barlow brought proceedings against his employers, various transport companies, and Delta Electricity for damages, for negligence, in causing him to contract mesothelioma. Mr Barlow was required to load trucks with fly ash and during this work inhaled asbestos dust and fibre which was released when maintenance and repair work was carried out on the boiler tubes.

Delta Electricity successfully brought contribution proceedings against Power and Power in turn brought a claim against its insurer claiming it was entitled to indemnity.

The policy issued by Vero provided cover for bodily injury but excluded:

“Claims arising out of a breach of the duty owed in a professional capacity by the Insured”.

Accordingly, one of the issues on appeal was whether the claim arose out of a breach of duty owed in a professional capacity so as to fall within the exception clause in the policy.

In contribution proceedings, taken by the parties, the Trial Judge held that Power’s liability arose because it had failed to communicate to the Electricity Commission, at the time of entering into the Contract, the dangers of asbestos and the necessity to adopt stringent precautions against workers inhaling the asbestos fibres when the fibres were disturbed. It was also found that Power owed professional duties to Elcom *“to ensure that the boilers were skilfully designed”* and that Power *“when discharging its professional duties to Elcom, owed a further duty to Elcom to warn against the dangers of asbestos”*. His Honour found:

“The duty to warn was a common law duty owed to Mr Barlow against the foreseeable possibility that Elcom would itself be negligent, not a professional duty owed to Elcom”.

The judgment of the Court of Appeal was delivered by Beazley JA with whom Campbell JA and Harrison J agreed. Beazley JA referred to *Chemetics* and the finding that the provision of operating instructions or a warning would not be the provision of professional services. She then referred to *Fitzpatrick* noting the comment of Buss JA that:

“The context in which the term “professional” is used in an insurance policy may be significant in determining its meaning”

Beazley JA also relied on *Toomey* noting that the term *“professional”* in a professional indemnity policy did not necessarily bear an identical meaning in an exclusion clause of *“public or products liability”* and noted to similar effect the comments of Nettle JA in *Landridge* that:

“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”.

Beazley JA then considered the commercial purpose of the policy and, in adopting the approach of Buss JA in *Fitzpatrick*, sought to give commercial purpose to the policy taken out by the insured. To do so required the exclusion clause to be read so that it did not *“inappropriately circumscribe”* the intended cover of the policy.

Beazley JA formed the view that, in order to give commerciality to the policy, she held that the exclusion clause was to be read as only excluding claims where the loss was caused by a breach of duty owed in a professional capacity and the insured only owed a professional duty to whom it contracted not to Mr Barlow. The insured owed a ‘normal’ duty of care to Mr Barlow not a ‘professional’ one. Beazley JA concluded:

*“The policy was a public liability policy. It excluded claims arising out of a breach of duty owed in a **professional** capacity by the respondent. The respondent did not owe a **professional** duty to Mr Barlow. Rather, it owed him a duty of care as a third party in respect of whom it was reasonably foreseeable might suffer damages as a result of its negligence in designing and supplying plant and equipment to Delta and its predecessors and in the manner in which it carried out maintenance on that plant and equipment.*



Accordingly, I am of the opinion that the exclusion does not operate in this case so as to disentitle the respondent to indemnity under the policy”.

Application

Of the nine cases (including *Chemetics*) considered above, four have considered the interpretation of “professional” in the context of policy coverage and five have considered it in the context of an exclusion clause. In the policy coverage cases *Newcastle City Council* and *Gold Coast City Council* have both been included as, it is submitted, they turn on a consideration of coverage provided by the policies.

From a consideration of the above cases an attempt will be made to draw out relevant principles which can be applied, whether by general application or as guidance, in seeking to determine the likely views a court may take when faced with interpreting either a professional indemnity policy or a clause seeking to exclude liability arising in a professional capacity.

It is clear that by virtue of one of the general principles applying to interpretation of contracts of insurance, being the *contra proferentem* rule, whereby the drafter of the wording will have the words construed against them, it must be accepted that the outcome is likely to vary as to whether the question of coverage or exclusion is being considered. For the question of coverage the court will strive to apply a broad application whereas in the application of an exclusion clause the court will seek to confine its application.

Thus, a necessary distinction is the different approaches courts will take to the application of coverage or exclusion.

Is there an accepted meaning of “Professional”

Before applying the cases on the coverage/exclusion basis it is worth pausing to consider whether there is a general over reaching test which can be applied to determine whether an activity will be regarded as professional. Following the decision of Kirby P in *Newcastle City Council* there did seem to arise the opportunity to regard “professional”, in an insurance context, as meaning “*advice or service of a skilful character according to an established discipline*”.

As was seen in the High Court decision in *Bradfield* (the horse trainer case), the courts, at that time, were not prepared to regard someone as a professional simply on the basis that they had acquiring considerable knowledge, skill and experience extending over many years. As observed above it would seem that the occupation of a horse trainer would sit within the descriptive definition provided by Kirby P.

The horse trainer case does raise a significant issue. In that case the question for consideration was whether someone, according to general community standards was a professional. However, the issue presently under consideration arises in the insurance context and whether, for the purpose of coverage or exclusion, are certain activities or duties owed in a professional capacity. It is submitted that with the development of policies of insurance and in particular civil liability and broad form types of cover the distinction between whether someone is a professional or simply carrying on a business is becoming blurred and will become more blurred with the continued broadening of the classes of activity which are covered by “professional indemnity policies”. This position is highlighted in *Landridge* where notwithstanding very few of the activities, being undertaken by the real estate agent, could be regarded as the activities of a professional cover was available under a professional indemnity policy.

Returning to the “definition” provided by Kirby P it must be remembered that his description was predicated by a restriction that the term “professional” applied “*in the context of the policy written for a local government authority*”.

In considering this decision Eames J, in *Toomey*, was prepared to consider that such a test was applicable to a private company or group and not simply to a municipal authority. However, by the time of the Victorian Court of Appeal decision in *Landridge*, considering a professional indemnity policy for a real estate agent, Buchanan JA, dealing with a submission that the test outlined by



Kirby P had to be applied equally to a real estate agent, to determine if the activities are professional, responded noting the analogy was false. In the same case, Nettle JA in support of Buchanan JA added:

“... 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.”

In *Fitzpatrick*, both Pullin and Buss JJA, in referring to *Newcastle City Council*, noted that the consideration of “*professional*” by Kirby P was “*in the context of a policy written for a local government authority*”. The most clear restriction on the applicability of the “*definition*” provided by Kirby P was recently given in *Hall* where it was said that the “*broad view*” of Kirby P should not be adopted because his “*definition*” firstly related to a policy of insurance and not an exclusion clause and secondly that it was provided in the context of a local government authority.

An important question to consider is whether it is necessary that the person providing the advice or service needs to have professional qualifications and fit within one of the categories of professionals such as an engineer, architect or project manager. Clearly on the basis of the Kirby P dicta this is not necessary provided the expertise are of a “*skilful nature in accordance with an established discipline*”. However it is fair to say that on a coverage question this requirement will be reduced further but on an exclusion the question of professional qualifications will assume greater significance. As was seen in *Chemetics* notwithstanding the contract required an engineer to perform the work the Court held that it could have been provided by an unqualified, but experienced, person and thus was not within the exclusion.

From the cases it does appear that while the dicta of Kirby P is a useful starting point it will be subject to review, whether it is being considered in the context of coverage or exclusion, and even on questions of coverage it is likely to be dependent on the “*professional*” involved.

Professional Indemnity Policy

As we have seen the courts have interpreted the meaning of “*professional*” in terms of the business activity which is sought to be covered.

We have seen in the Council cases, namely, *Gold Coast City Council*, *Newcastle Council* and *The City of Penrith* that the court has considered the particular activity being undertaken to determine whether that activity was professional.

In *Gold Coast City Council* it was held that the provision of information as to the location of a trench line did not involve any “*professional*” component. Similarly in the *City of Penrith* it was held that information as to what was contained in the Council records and information as to the Council's future intention in relation to a piece of land did not involve the provision of any professional service, but simply the mere provision of information.

Of course in *Newcastle City Council* it was held that the review of plans submitted to council for the purpose of a building approval was a professional activity and the claim came within the professional liability cover of the policy.

A different approach was taken by the Victorian Court of Appeal in *Landridge* which concerned the professional indemnity cover given to a real estate agent.

As noted in *Landridge* the court observed there was very little work done by the real estate agent which could fall within the description of the provision of advice or services of a skilful character. Buchanan JA commented:

“Unless the core activities of the agent's business, arranging the selling of property and managing property leases, are regarded as carrying on a profession, the policy will afford no significant protection.”



In the course of that case it was argued on behalf of the insurer that the failure of the real estate agent's staff to pass on complaints by the tenant, as to the hole in the garage floor, and to realise the need to have the repair undertaken was akin to the failings of the council officers in *Gold Coast City Council* and *Penrith City Council* cases. Buchanan JA considered that analogy faulty noting that local Councils carry out a large number of activities, some of which are clearly of a professional nature while others are not. He then commented:

"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 the liability."

The approach of the Court in *Landridge* highlights a propensity of the Court, given the varied businesses which are covered by professional liability policies, to treat the business activity as professional. This position is further aggravated if little of the activities of the business of the insured could be described as professional.

To Whom is the Duty Owed

In *Landridge* it was submitted on behalf of the insurer that the duty which was owed by the agent to the tenant was an ordinary common law duty of care and thus was not covered by the professional liability policy. It was said that the only duty owed in a professional capacity was the duty owed by the agent to his client, the landlord. Both Buchanan and Nettle JJA dismissed this argument. Buchanan JA after noting that there was no such express or implicit limitation present in the insuring clause of the policy commented:

"The content of the duty of care owed by the agent to the tenant was supplied by the professional task upon which the agent was engaged at the request of the landlord."

It should be noted, as discussed below, in respect to *Fitzpatrick* and *Vero* in the context of exclusion clauses, that the obligation of the professional duty has been restricted to the contracting parties.

Contra Proferentem

As has been discussed above the court's have relied on, implicitly or impliedly, the contra proferentem principle in expanding the scope of cover provided by a professional indemnity policy.

Business Purpose

Again, as discussed above, the courts have either explicitly or impliedly considered the business purpose of the policy to determine the scope of cover provided by the policy.

Courts have considered the overall characteristics of the activity being undertaken to determine whether a relevant breach is covered by a professional indemnity policy. In this regard, the decision of Buchanan JA in *Landridge* is of particular significance.

Exclusion Clauses

The courts, when interpreting exclusion clauses, more so than the scope of coverage questions have relied on the principle of contra proferentem.

Contra Proferentem

The case, as has been seen, most cited in respect to the application of this principle is *Toomey*. In particular the following passage is often referred to:

"... when the term ["professional"] appears in an exclusion clause, the overlaying principle of contra proferentem applies – with particular force (although the same principle also has



application where the inclusive terms of a professional indemnity policy are under consideration).”

In *Hall* Harrison AsJ noted:

*“Here the word ‘professional’ appears in the exclusion clause where it is to be read strictly, and **contra proferentem** against the insurer where ambiguity exists.”*

In *Fitzpatrick*, Buss JA referred to the decision of *Toomey* noting that the use of ‘professional’ in an indemnity clause will not necessarily bear an identical meaning to its use in an exclusion clause.

What was the activity being undertaken?

The courts, in considering exclusion clauses have been much stricter in looking at the activity being undertaken to determine whether or not that activity is of a professional nature. Commencing with the decision in *Chemetics* the court restricted the professional services exclusion, relating to services, to matters such as “*design*” and not the provision of instructions on operating a plant. Similarly in *Fitzpatrick*, Pullin JA concluded that the failure of the manufacturer to advise, as to the need for a barrier and switch, was not “*the giving of advice in a professional ‘capacity’*”.

Finally in *Hall* it was held that the maintenance being undertaken by Adventure Training Systems was “*in the nature of routine maintenance, and not ... providing professional advice or service*”.

To whom is the duty owed?

We have seen above that courts in considering a professional indemnity policy are prepared to hold that the professional duty was held to be owed to persons other than the party contracting with the insured. This is particularly clear from the case of *Landridge* where it was held that the duty, owed to the tenant by the agent, was a professional duty.

When this question has arisen in relation to exclusion clauses, the courts have adopted a more restrictive approach limiting the obligation of the professional duty to the parties with whom the insured has contracted.

In *Fitzpatrick* Buss JA noted that the exclusion clause was limited in relation to the products liability cover “*to claims arising out of breaches of duty owed by Jobs Engineering to persons who have retained it to perform work or services in the course of its business. The exclusion does not extend to breaches of duty owed to third parties who may suffer foreseeable loss or damage as a result of negligent acts or omissions by Jobs Engineering in designing, manufacturing or supplying machinery and equipment, including the negligent failure to give advice of the kind which it should have given to V & D Ridolfo*”.

For this construction Buss JA relied on the evident object of the products liability cover to provide indemnity and real value in respect of claims for personal injury and property damage caused by defective goods and property designed and manufactured by Jobs Engineering.

This approach was also adopted by Beazley JA in *Vero* when, after referring to the dicta of Buss JA, Beazley JA noted that to adopt a different construction, in the case before her, would have significantly undermined the commercial purpose of the policy. The policy was a public liability policy and Beazley JA noted that the insured did not owe a professional duty to the plaintiff. “*Rather, it owed him a duty of care as a third party in respect of whom it was reasonably foreseeable might suffer damage as a result of its negligence in designing and supplying plant and equipment to Delta and its predecessors and in the manner in which it carried out maintenance on that plant and equipment*”.

Conclusion

The following principles, it is submitted, can be extracted from the above cases.

In respect to both policies of insurance and exclusion clauses the courts will rely on:



- (a) Contra proferentem.
- (b) The business purpose and commerciality of the policy.

In respect to policies of insurance:

- (a) The dicta of Kirby P is a good starting point although the above principles of contra proferentem and commerciality may serve to override it.
- (b) Where policies are issued to organisations, such as Councils, which undertake both professional activities and non-professional activities, the courts are more likely to consider the particular activity being undertaken to determine whether or not that is within the professional indemnity cover.
- (c) Where the business activity undertaken, such as a real estate agent, does not involve activities which are generally recognised as professional activities then in reliance on the contra proferentem and commerciality tests there will be a much greater likelihood that the court will regard all activities associated with such a business as within the insuring clause.
- (d) It will not be necessary that the insured has professional qualifications although in line with the Kirby P dicta it will usually be necessary to be able to point to the *“advice or service”* being *“of a skilful character according to an established discipline”*.

When it comes to the court considering exclusion clauses, again the principles of:

- (a) contra proferentem; and
- (b) commerciality

will play a significant role in determining the extent to which such an exclusion clause will be interpreted. The courts will be driven to give a real and commercial effect to the type of cover being provided and this in turn may be reflected in:

- (c) The court more strictly looking for a professional service, as opposed to simply, for example, the supply of information, which will be the subject to the exclusion. Thus where design is an element of a contractual arrangement then it will be this element which will be regarded as being the object of the exclusion clause not simply supplying information of a factual nature.
- (d) The courts will also seek to restrict the operation of exclusion clauses by determining that the professional duty, required by the exclusion clause, will be restricted to the party with whom the insured has contracted and who, by contract, is owed the professional duty. Thus while third parties, not subject to such contractual arrangements, will be regarded as being owed a duty of care by the insured it will not be a professional duty.
- (e) There will also tend to be a greater emphasis on the, or the need for, qualifications of the person who provided the service or advice. If it can be established the person providing the advice or service did not need or have qualifications then it is more likely those activities will not be excluded by a professional duty exclusion clause.

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