

Professional Standards Legislation

Introduction

Professional Standards Legislation has been progressively implemented across Australia since 1994. The Legislation enables the creation of schemes to limit the civil liability of professionals and members of occupational associations and groups. This article provides background to the current professional standards regulatory regime and considers some key questions, including:

- What is the history of the Professional Standards Legislation?
- Who is covered by the Professional Standards Legislation?
- What is a Professional Standards Scheme?
- How is a Professional Standards Scheme created?
- How does the Professional Standards Legislation limit professional liability?
- What are the Professional Standards Councils and what are their statutory functions?

What is the history of the Professional Standards Legislation?

Since 1994 Professional Standards Legislation has been progressively introduced to the Commonwealth, States and Territories on a nationally consistent basis. Australia's journey toward uniform professional standards legislation began in 1989 with a discussion paper titled "*Limitation of Professional Liability for Financial Loss*" issued by the NSW Attorney General's Department. The discussion paper ultimately led to the *Professional Standards Act 1994* (NSW) and was motivated in large part by concern for growing professional indemnity insurance costs. In 1997, Western Australia enacted equivalent legislation. The remaining States and Territories implemented nationally consistent professional standards legislation following the 2001-02 insurance crisis.¹

The Professional Standards Legislation in each State and Territory features the following uniform statement of legislative objects:

- To enable the creation of schemes to limit the civil liability of professionals and others
- To facilitate the improvement of occupational standards of professionals and others
- To protect the consumers of the services provided by professionals and others
- The creation of Professional Standards Councils ('the Councils') to supervise the preparation and application of schemes and to assist in the improvement of occupational standards and protection of consumers.²

¹ Law Council of Australia, 'LCA Brief' (September 2003) 1.

² *Professional Standards Act 1994* (NSW) s 3; *Professional Standards Act 1997* (WA) s 3; *Civil Law (Wrongs) Act 2002* (ACT) sch 4.1; *Professional Standards Act 2003* (Vic) s 3; *Professional Standards Act 2004* (NT) s 3; *Professional Standards Act 2004* (Qld) s 4; *Professional Standards Act 2004* (SA) s 3; *Professional Standards Act 2005* (Tas) s 3.

Who is covered by the Professional Standards Legislation?

The Professional Standards Legislation applies to persons who are members of an occupational association. An occupational association is a body corporate that represents the interests of people who are members of the same profession or occupation, such as the Law Society of NSW. Professional associations are usually non-profit organisations that aim to further a profession, the interests of individuals engaged in that profession as well as the public interest.³ Professions have traditionally been largely self-regulating with professional associations operating independently of, and parallel to, government regulation.

Occupational associations can prepare and submit a Professional Standards Scheme to a Professional Standards Council for approval. Members of an occupational association that have an approved Professional Standards Scheme can join the Scheme and will obtain the benefit of having their civil liability limited.

What is a Professional Standards Scheme?

A Professional Standards Scheme is a legal instrument devised by an occupational association that captures the commitments made by professionals to the Professional Standards Councils on behalf of Australian consumers.⁴ In basic terms, the Scheme that applies to an occupational association is a binding statement that members will be held to defined professional standards to deliver enhanced protection for consumers. In return for this binding statement the professionals who take part in the scheme receive a cap on their civil liability for damages if a court upholds a claim against them.

A Scheme is considered desirable for an association because it sends a strong message to members, clients, the professional community and the Australian public about an association's commitment to high professional standards. A Scheme leads to improved professional standards and practices, by requiring effective risk management strategies and continuing development programs. Schemes also lead to increased consumer protection because every professional that takes part in their association's Scheme must carry insurance or assets to meet any damages awarded at the formal liability limit. Consumers can therefore have confidence that if they need to take legal action that a professional will be able to pay compensation to a defined amount.

³ Roger Burritt, James Guthrie and Elaine Evans, 'Professional Associations – Past Contributions, Present Tensions and Future Opportunities' in Roger Burritt, James Guthrie and Elaine Evans, *Relevance and Professional Associations in 2026* (Chartered Accountants, 2016) 9, 9.

⁴ Professional Standards Councils, *What are Professional Standards Schemes?* <www.psc.gov.au/video-library/what-are-professional-standards-Schemes> (accessed on 27 July 2017).

How is a Professional Standards Scheme created?

The process for creating a Professional Standards Scheme is defined in the Professional Standards Legislation. The application process is intensive and generally takes associations 12 months to complete but will depend on the nature of the association. In broad terms, and in the ordinary course, the process is as follows:

- An occupational association will prepare a Scheme
- Once the Scheme is prepared, the association may apply to the Professional Standards Council to have it approved
- Before approval is given, the relevant Council must publish a public notice explaining the nature and significance of the Scheme, and invite comments or submissions to be tendered within 21 days
- Before approval, the Council must consider all valid submissions and comments, the position of any person affected by limiting occupational liability, the risk management strategies of the occupational association concerned, and the cost and availability of insurance against occupational liability for members of the association; and
- If the Council approves the Scheme it will be submitted to the Minister who may then authorise publication of the Scheme in the Government Gazette.

Once approved and published in the Gazette, the Scheme may commence. At any time during the operation of the Scheme the Minister may direct the Council to review its operation, amend or revoke the Scheme.

How does the Professional Standards Legislation limit professional liability?

Limiting professional liability is a key object of the Professional Standards Legislation. The limitation is provided by the provisions of the Legislation and the relevant Scheme. This means that acts or omissions by members of one occupational association may be the subject of limited liability while liability for members of another occupational association may not be limited. The Legislation also makes clear that the limit on damages provided by a Scheme with respect to an act or omission is that limit in force at the time that the act or omission founding the legal action occurred. Under the Legislation, the limit on damages that may be awarded is a limit per claim, rather than a cumulative limit for all claims arising out of a single event.

Membership of an occupational association that has a Scheme is not necessarily enough to ensure that the liability of the professional is limited. For example, not holding required insurance cover may result in the professional being excluded from the benefit of the Scheme's liability limitation.⁵

⁵ *Thomson v Golden Destiny Investments Pty Ltd* [2015] NSWSC 1176, [630]-[634].

Most Schemes also allow the occupational association discretion to increase the monetary cap for certain cases. The level of limitation will depend upon certain factors, such as the number of Partners or Directors of each entity and the amount of fees incurred. The Professional Standards Councils website provides details of all approved Schemes, including liability caps and how they are determined for each occupational association. For example, the current Professional Standards Scheme that applies to solicitors has two monetary ceilings:

- \$1.5 million for members of law practices consisting of up to and including 20 practitioners and fees of less than \$10 million; and
- \$10 million for law practices with more than 20 practitioners with income greater than 10 million.

Finally, regardless of the terms of the applicable Scheme, the Legislation in all jurisdictions expressly provides that it does not apply to limit liability for damage arising out of:

- The death or injury of a person
- A breach of trust; or
- Fraud or dishonesty.

In all jurisdictions except New South Wales and Western Australia, the Legislation does not apply to anything done or omitted to be done by a lawyer while acting for a client in a personal injury claim. In South Australia, the Legislation also does not apply to intentional torts. The Legislation also prohibits a member of an occupational association contracting out of a Scheme.

What impact has the legislation had on consumer protection?

Improving occupational standards and protection of consumers is a key function of the Professional Standards Councils. The Councils' role in guiding development of codes of ethics and practice, as well as advising on quality management and complaint resolution is one way in which consumer protection may be enhanced. By insisting on strict consumer protection and quality standards the Councils can significantly increase the quality of professional services rendered and improve consumer protection.

Professionals benefit from the caps on liability discussed above. It may be argued that these caps reduce the extent to which consumers can access adequate redress in the event of damage caused by a professional's act or omission and thus consumer protection is diminished. However, as was argued before the Western Australian Parliament in 1997, uncapped liability resulted in prohibitively expensive insurance premiums with the consequence that an 'alarming number' of professional practitioners 'reduce their insurance cover or go uninsured.'⁶ This meant that consumers who successfully sued a professional practitioner had 'no certainty of recovery as the capacity of the [professional] to meet a valid claim varies depending on the level of indemnity insurance and that [professional's] personal assets.'

⁶ Western Australia, *Professional Standards Bill (WA) Second Reading Speech*, Legislative Assembly, 18 March 1997 (Mr Antony Kevin Royston Prince).

The Professional Standards Legislation therefore provides that occupational associations may compel their members to hold insurance against occupational liability. Because of caps on liability, insurance policies are less likely to be prohibitively expensive. The association may make membership conditional on holding such insurance and may stipulate the standards to which the insurance policy must comply.⁷ In this way, consumers may receive a smaller damages award than would be the case without caps on liability but the probability that they will fully recover that awarded sum is substantially increased. This quid pro quo is one of the key tenants of the Professional Standards Legislation.

What are the Professional Standards Councils and what are their statutory functions?

In each Australian State and Territory, the Professional Standards Legislation provides for the establishment of Professional Standards Councils.⁸ Each Council has 11 members who are appointed for terms of up to three years and may be reappointed at the end of their term. The States, Territories, and the Commonwealth have agreed that each jurisdiction will appoint each other jurisdiction's members to their own Council. This means that while there are eight Councils across Australia, each one has identical membership, with members appointed as follows:

- Two members from each of NSW and Victoria; and
- One member from each of the remaining States, the ACT, the Northern Territory, and the Commonwealth.

The functions of the Councils are set out in the Professional Standards Legislation. In general terms, those functions include:

- Advising the Attorney General on the operation of the Professional Standards Legislation and the creation or amendment of a Scheme
- Advising occupational associations concerning policies of insurance with respect to the limitation of professional liability
- Encouraging and assisting in the improvement of occupational standards of members of occupational associations

⁷ *Professional Standards Act 1994* (NSW) s 34; *Professional Standards Act 1997* (WA) s 46; *Professional Standards Act 2003* (Vic) s 36; *Professional Standards Act 2004* (Qld) s 35; *Professional Standards Act 2004* (SA)

⁸ *Professional Standards Act 1994* (NSW) s 39; *Professional Standards Act 1997* (WA) s 8; *Professional Standards Act 2003* (Vic) s 42; *Professional Standards Act 2004* (Qld) ss 41, 42; *Professional Standards Act 2004* (SA) s 42; *Professional Standards Act 2005* (Tas) s 43; *Civil Law (Wrongs) Act 2002* (ACT) sch 4 pt 4.36; *Professional Standards Act 2004* (NT) s 41.

- Encouraging and assisting in the development of self-regulation of occupational associations, including the giving of advice and assistance concerning:
 - Codes of ethics;
 - Codes of practice;
 - Quality management;
 - Risk management;
 - Resolution of complaints by clients;
 - Voluntary mediation services;
 - Membership requirements;
 - Discipline of members; and
 - Continuing occupational education.
- Monitoring the occupational standards of persons to whom this Act applies
- Monitoring compliance by an occupational association with its risk management strategies
- Publishing advice and information concerning the above matters
- Conducting forums on issues of interest to members of occupational groups; and
- Commencing legal action in its own name to prosecute offences under the Professional Standards Legislation or associated regulations.

Summary

In summary, the Professional Standards Legislation seeks to:

- Enable the creation of Schemes to limit the civil liability of professionals and others
- Facilitate the improvement of occupational standards of professionals and others
- Protect the consumers of the services provided by professionals and others; and
- Constitute the Professional Standards Council to supervise the preparation and application of Schemes, and to assist in the improvement of occupational standards and protection of consumers.

The Council consists of 11 members and its key functions are to:

- Review proposed Schemes and consider their approval
- Advise occupational associations on policies of insurance with respect to the limitation of professional liability
- Encourage improvement of occupational standards
- Encourage and assist in the development of self-regulation of occupational associations
- Publish advice and information concerning the above matters
- Conduct forums on issues of interest to members of occupational groups; and
- Commence legal action in its own name to prosecute offences under the Professional Standards Legislation or associated regulations.

The Legislation provides for the existence of Schemes to limit liability for damage of members of occupational associations. The provisions of the applicable Scheme are fundamental to determining the scope of the limitation on liability that may apply. However, in all jurisdictions the Legislation does not apply to limit liability for damage arising out of:

- The death or injury of a person
- A breach of trust; or
- Fraud or dishonesty.

The power of occupational associations to compel their members to hold adequate occupational liability insurance helps to protect consumers by ensuring that if they successfully sue a member of an occupational association they have better prospects of recovering the entire judgment sum.

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This subject overview has been written with the support of the following partners:

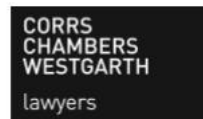


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