

Policy Statement on Professional Indemnity Insurance

For Professional Standards Schemes under
Professional Standards Legislation



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What is this policy about?

An occupational association, any of whose members subject to a scheme in force under Professional Standards Legislation, is required to have the benefit of an insurance policy to cover their limitation amount/cap. Occupational associations set insurance standards of members. When approving and monitoring Professional Standards Schemes¹, the Council will consider the insurance standards specified by an occupational association according to this policy statement.

This is a statement of the Council's observations and policy and is not a substitute for obtaining separate legal advice.

The Purpose of this Policy Statement on Professional Indemnity Insurance

1. The Professional Standards Council (the Councils) is concerned to ensure the integrity and operation of each State's or Territory's Professional Standards Legislation (the Act) are not compromised by insurance arrangements, implemented by members of occupational associations in accordance with standards set by their occupational association, having the potential to not deliver the intended protection and benefit to either that member or the ultimate consumer.
2. This policy statement specifies the policy the Councils will adopt in considering standards determined by occupational associations in relation to insurance policies to be taken out by their members when considering whether or not to approve a scheme.
3. However, the Councils will consider each scheme, and any standards determined by the occupational association in relation to insurance policies to be taken out by its members, on its own merits. In particular, the Councils retain the discretion to approve schemes premised upon standards of insurance that do not conform with this policy, especially where the occupational association has satisfied the Councils (with supporting evidence as appropriate) that the non-conformity in all the circumstances of the matter, is appropriate and reasonable.

In considering whether the non-conformity with this policy is appropriate and reasonable the Councils may consider the full range of relevant matters including the cost and availability of insurance on the terms under the proposed standards compared with standards that might otherwise be in strict conformity with this policy.

4. This policy statement is relevant to occupational associations applying for a scheme, which limits liability by reference to insurance arrangements alone, or in combination with business assets.

¹ In February 2014 the name "Professional Standards Schemes" replaced previous reference to *Cover of Excellence*® schemes. Nonetheless schemes approved by the Council prior to February 2014 are described as *Cover of Excellence*® schemes until such time as they expire. This reference to "Professional Standards Schemes" includes such *Cover of Excellence*® schemes.



Approval of schemes under Professional Standards Legislation

5. When considering an application for approval of a scheme under the Act, the Councils must consider a number of matters including:

5.1. The cost and availability of insurance against occupational liability for members of the occupational association concerned

5.2. The standards determined by the occupational association concerned in relation to insurance policies.

NSW	Vic	Tas	SA	WA	NT	Qld	ACT
s10	s11	s11	s11	s23	s10	s12	s4.7(1)

6. The Act makes provision concerning insurance policies by which the members of an occupational association may be insured against occupational liability covered by a scheme approved under the Act.

The Act provides that for the purposes of a scheme, an insurance policy must be a policy, or a policy of a kind, that complies with standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind.

NSW	Vic	Tas	SA	WA	NT	Qld	ACT
s10(g)	s11(g)	s11(g)	s11(g)	s23(g)	s10(g)	s12(h)	s4.7(1)(g)

7. Importantly, the Act substantially also provides that:

Limitation of liability by insurance arrangements

A scheme may provide that if a person to whom the scheme applies and against whom a proceeding relating to occupational liability is brought, is able to satisfy the court that:

- a) The person has the benefit of an insurance policy insuring the person against the occupational liability to which the cause of action relates, and
- b) The amount payable under the policy in respect of that occupational liability is not less than the amount of the monetary ceiling specified in the scheme in relation to the class of person and the kind of work to which the cause of action relates.



The person is not liable in damages in relation to that cause of action above the amount of that monetary ceiling.

NSW	Vic	Tas	SA	WA	NT	Qld	ACT
s21	s23	s24	s23	s34	s22	s22	s4.17

8. It is not for the Councils but for the occupational association to set for its members the standards which insurance policies must meet for the purposes of a scheme. The Councils' obligation is to consider those standards as part of its consideration in whether or not to exercise its discretion to approve a scheme.

9. Three categories of matters will be of particular importance to the Councils:

9.1. **The first** is the ability of the insurer to financially respond to and meet a claim under the policy of insurance. This is of particular concern in the case of insurers providing cover in relation to mandatory minimum caps set by the scheme itself, but may be of less significance with respect to the discretionary higher caps, and commensurate levels of insurance cover, which an occupational association may approve at its discretion in the terms of its scheme. The Councils are concerned that the insurance standards determined by the occupational association provide reasonable assurance, by the insurer being subject to a recognised prudential regulatory regime, that the insurer should be able to respond to and meet such claims in full.

In this context:

- (a) In the case of occupations whose insurance is required by the Commonwealth or State statutes, and where the identity of the insurer is required to be and is approved by a Commonwealth or State instrumentality, the Councils are likely to be satisfied with the selection of such an insurer
- (b) Similarly, if the occupational association fixes a standard by reference to whether the insurer is authorised, licensed or approved under Commonwealth or State legislation, the Councils are likely to be satisfied with the selection of such an insurer.

9.2. **The second** is the terms on which the cover is to be granted. The occupational association ought to set standards which provide reasonable assurance that insurance will in fact be available to cover occupational liability at capped levels if and when a claim is made.

In this context, and without being prescriptive, the Councils will have regard as to whether, and if so how, the standards determined by the occupational association address at least the following issues:

- (a) Insuring Clause – reasonably broad form (including cover for misleading and deceptive conduct under the Trade Practices Act, State based Fair Trading Acts, Corporations Act and ASIC Act) preferred.



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- (b) Extensions and exclusions – extensions to cover all reasonable occupational activities and services that might give rise to occupational liability, with minimal exclusions, preferred.
 - (c) Reinstatements – at least one automatic reinstatement is preferred.
 - (d) Deductibles or Excess – it is preferred for deductibles or excess to be set at reasonable levels having regard to the relevant cap under the scheme, the apparent capacity of the member to meet the deductible or excess from other available assets, and the underlying principle of reasonable assurance of effective recourse to the consumer for occupational liability claims up to the amount of the relevant cap under the scheme.
 - (e) Retro active date – it is preferred that the retro active date not be unreasonably limited.
 - (f) Run-off cover – reasonable run-off cover for at least traditional statutory limitation periods preferred.

9.3. **The third** is the question whether the standards require the policy of insurance to be defence costs-inclusive of, or defence costs in addition to, the limit of cover.

Defence costs in addition to the stated level of cover is preferred, consistent with the underlying principle of reasonable assurance of effective recourse to the consumer for occupational liability claims up to the amount of the relevant cap under the scheme. If the standards permit the policy of insurance to be defence costs inclusive, then the Council may have regard to this fact in its consideration of the limitation of liability cap under the scheme.

10. If the Council considers it desirable to obtain independent expert advice on the occupational association's standards of insurance, the Council may request the occupational association to:

- (a) Provide an opinion, addressed to the Council, from a reputable insurance consultant, concerning those standards in the context of this policy statement; and/or
- (b) Fund the costs to be incurred by the Council in obtaining its own independent expert advice concerning those standards in the context of this policy statement and otherwise.