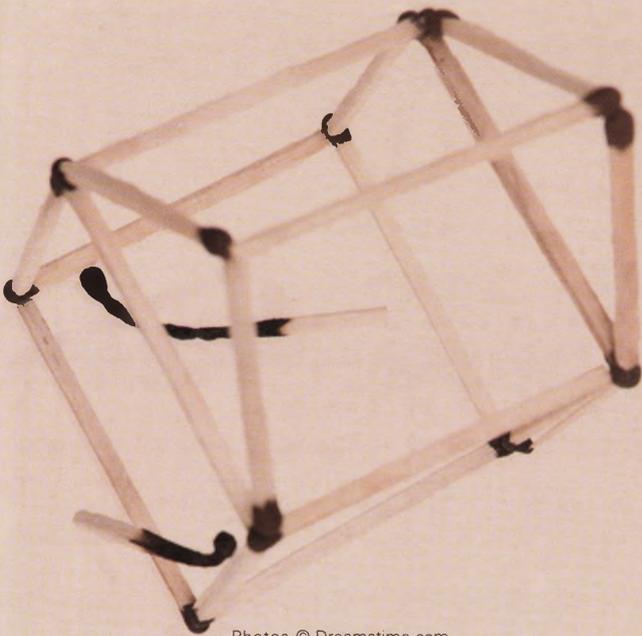


MANAGING RISK through Cover of Excellence® schemes

By Philippa Seagrave



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During the late 1990s, there was concern among professionals about the increasingly litigious nature of the business environment, and the perceived impact this was having on the availability and cost of professional indemnity insurance. This was particularly the case for small law firms and sole practitioners.



With the HIH collapse in the early part of this century serving as an additional catalyst for reform, the legal profession, together with other occupational associations and state governments around Australia, urgently considered what changes could be made to balance professionals' protection with consumers' expectations of quality advice and value for money.

Following national debate, the solution arrived at was the introduction of professional standards legislation in each of the Australian states and territories. As far as possible, the statutes are consistent with the *Professional Standards Act 1994* (NSW). Proportionate liability also formed part of the reform package (but falls outside the scope of this article).

PROFESSIONAL STANDARDS LEGISLATION AND COVER OF EXCELLENCE® SCHEMES

The professional standards legislation may be viewed as a compact between professionals and society that balances the policy considerations involved. Professional standards legislation in each of the states and territories¹ (PSL) allow

occupational associations (such as the state and territory law societies and bar associations) to apply for 'Cover of Excellence' schemes'. Under these schemes, professionals commit to having professional indemnity insurance cover (or specified business assets) at a requisite level and standard; to improving professional standards; and to implementing robust risk management strategies. These strategies must be detailed in a five-year risk-management plan. In return, the scheme limits the civil liability of members of the occupational association. The cap on liability may be a fixed monetary ceiling and/or a multiplier of, for instance, 10 times the reasonable charge for services.

Apart from having access to capped civil liability, professionals benefit from the enhanced reputation associated with an approved *Cover of Excellence*® scheme.

From the community's perspective, the insurance standards required under a scheme mean that consumers are more likely to have access to funds if they have a valid civil claim related to professional services. Society also benefits from professionals being encouraged and assisted to voluntarily improve and maintain their risk management systems. >>

Association members' limited liability status must be disclosed on stationery, in emails, and in other promotional material. Depending on the jurisdiction, at best it is an offence not to disclose, at worst the professional will not have the benefit of the limited liability under the Scheme. There are also important restrictions on the extent to which liability may be limited. Liability may not be capped below \$500,000 for damages arising out of a single cause of action. Neither the PSL nor schemes affect liability for damages arising from personal injury, death, a breach of trust, or fraud or dishonesty and certain transactions relating to real property.

Professional Standards Councils (the Councils) have been established in each jurisdiction under PSL to assess applications for, and to approve and monitor, *Cover of Excellence* schemes. An intergovernmental agreement has been entered into under which all states and territories appoint the same 11 members to each of the 8 Councils.

Schemes are approved and liability limits determined by the Councils following detailed assessment and analysis of each application.

Apart from administering schemes, the Councils may provide advice to ministers regarding the operation of PSL and schemes.

RISK MANAGEMENT AND REPORTING UNDER COVER OF EXCELLENCE® SCHEMES

Associations' risk management plans are not only relevant when seeking approval of *Cover of Excellence*® schemes. After schemes have been approved and are in force, associations must report annually to their state or territory-based Council on the implementation and monitoring of their risk management plan – including the effect of its strategies on mitigating risks, together with any changes made, or proposed to be made to them.

The Councils provide associations with guidance in terms of risk-management plans and strategies. Associations are encouraged to develop their plan consistent with AS/NZS ISO 31000:2009 'Risk Management – Principles and Guidelines'.

When considering associations' risk management plans, from the perspective of applying for a scheme, the Councils focus on potential areas of risk associated with the effective self-regulation of professions. These are drawn from the PSL:

- I. membership entry requirements;
- II. continuing occupational education;
- III. codes of ethics and practice;
- IV. complaints and discipline of association members;
- V. quality assurance and audit including, for example,
 - continuing occupational education;
 - insurance standards;
 - business assets;
 - analysis of the cost and availability of insurance;
 - analysis of nature and level of claims;
 - disclosure of limited liability;
 - use of the *Cover of Excellence*® logo; and
- VI. risk management required by the association of its members.

The Councils also look at the cost and availability of professional indemnity insurance to members of the association, and the relationship between claims, complaints, and the type of continuing education provided to members.

This statutory reporting obligation is intended to ensure that an occupational association makes constant and timely improvement to its practices for the benefit of the consumers of its services. It also allows the Councils to consider whether a cap on civil liability requires adjustment in consequence of any changes in the association's risk profile. In addition, annual reporting on these matters provides the Councils with the opportunity to assess the long-term impact of PSL from the perspective of their stakeholder associations.

Each state/territory-based Council reports on the performance of participating associations in relation to its compliance with risk management reporting and other matters, as described above, in an annual report to parliament.

The Councils have developed a number of policy documents, available on the Professional Standards Councils' website (www.psc.gov.au), as public-domain resources. The policy documents include *A Framework for Compliance under Professional Standards Legislation*, published in September 2009. This provides details of all statutory obligations, including annual risk-management reporting and claims monitoring, together with suggested formats for reporting to the Councils.

Initially spearheaded by the legal profession, *Cover of Excellence*® schemes have now been taken up by associations representing accountants, engineers, IT professionals, surveyors and valuers.

Decisions of the Supreme Courts of NSW and WA have considered limiting damages defences under schemes.² In these cases, the courts have recognised that the schemes operate to limit liability of the defendants (as participating members) to the specified cap.

To encourage scholarship on the improvement of occupational standards, the Councils recently initiated the Star Initiatives Grants Program. This program provides financial assistance to individual members of occupational associations participating in *Cover of Excellence*® schemes for projects that meet the Councils' requirement. More details about the program are available from the Councils' website. ■

Notes: **1** *Professional Standards Act 1994 (NSW)*, *Civil Law (Wrongs) Act 2002 (ACT)*, *Professional Standards Act 2004 (NT)*, *Professional Standards Act 2004 (Qld)*, *Professional Standards Act 2004 (SA)*, *Professional Standards Act 2005 (Tas)*, *Professional Standards Act 2003 (Vic)*, *Professional Standards Act 1997 (WA)*. **2** See, for example, *Aesthetics Architecture Pty Limited v John Camilleri & Ors* [2007] NSWSC 1129, *Allstate Explorations NL v Blake Dawson Waldron (A firm)* [2010] WASC 97, and *Artistic Builders Pty Limited & Anor v Nash & Ors* [2010] NSWSC 1442.

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