

2.2.1 Guidance

Association insurance standards

For Schemes being prepared under Professional Standards
Legislation

June 2021





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Disclaimer

This guidance is applicable only to an occupational association preparing a Scheme for approval under Professional Standards Legislation. It does not constitute legal or other professional advice and should not be relied on as such. An occupational associations should seek its own legal/professional advice to find out how the Professional Standards Legislation and other relevant laws and regulations may apply to it. For access to legislation in force in NSW, go to the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au.

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Pilot



1. Guidance statement

A key aim of this guidance is to assist your association in completing Submodule 2.2 *Association insurance standards*. Where a Scheme limits liability by insurance arrangements, it is a mandatory requirement for the Professional Standards Councils to consider the insurance standards determined by the association before approving a Professional Standards Scheme.

The guidance has been developed to assist associations to develop effective insurance standards which will improve the level of participation in and quality of professional indemnity insurance for members so as to facilitate greater protection for consumers of members' professional services.

2. Purpose

Insurance standards are generally a critical component of any Scheme application, with the role of this guidance to assist associations to provide and establish insurance standards for their members.

Associations must generally produce, as part of any Scheme application, a set of professional indemnity insurance standards which prescribe a minimum standard of insurance required to be held by professional members. Such standards must be approved by the governing body of the association.

The Councils are required to consider the association's insurance standards as an integral part of its approval process for any proposed Scheme. In Victoria, South Australia, the Northern Territory and Tasmania, the legislation provides that the Council may review a Scheme where a proposed change to an association's insurance standards results (in the Council's view) in less-stringent standards. Additionally, in Tasmania, an association may not alter its insurance standards except by amendment of its Scheme. These are important considerations where a Scheme is intended to apply in these jurisdictions.

Guidance

Where the association submits a proposed Scheme intended to have force in all states and territories – in effect, a national Scheme - that Scheme must comply with the highest standards required by the Professional Standards Legislation of any jurisdiction in which it is intended to operate

3. Importance of professional indemnity insurance standards

For Schemes that limit liability by reference to insurance arrangements, the limitation of liability provided for in any Professional Standards Scheme will only operate where the member of the occupational association has the benefit, in relation to a claim for occupational liability, of a professional indemnity insurance policy:

- (a) under which the amount payable, in respect of that occupational liability, is not less than the amount of the applicable monetary ceiling specified in the Scheme¹;

¹ NSW s.21; Vic s.23; Tas s.24; SA s.23; WA s. 34; NT s.22; Qld s. 22; ACT sch 4 s.17.



- (b) which is a policy, or a policy of a kind, that complies with the Insurance standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind².

Because professional indemnity insurance is written on a claims made basis, the relevant time at which such insurance must be held is the time at which the relevant claim giving rise to the member's occupational liability is first made against the member (or, where the member becomes aware of facts which might give rise to such claim and notifies its insurer of those facts during the same period of insurance, the time of such notification³).

The objectives of the Professional Standards Legislation will be met where an association's insurance standards require that its members hold insurance which:

- (a) satisfies that statutory requirement that the amount of indemnity available is not less than the limitation of liability provided by the Scheme
- (b) provides a high degree of confidence that such policies will, in fact, respond to claims so as to provide meaningful compensation to consumers which suffer loss as a result of the wrongful conduct of members
- (c) remains available and affordable to members.

The Councils will make an assessment, before approving a Scheme, as to whether the association's insurance standards meet these objectives.⁴ The Councils have developed policies for making that assessment.

Pursuant to those policies, the Councils will take into account the matters set out in this Guidance in determining whether to approve a Scheme which incorporates the Insurance standards. The Councils retain a discretion to approve a Scheme even if all of the criteria in this Guidance are not satisfied.

4. Limitation of liability based on compliant insurance policy

Any Scheme proposed by an association may provide for a limitation of liability by reference to insurance arrangements and, if it does so, should contain a provision which provides that the limitation of liability provided for by the Scheme applies where the member is able to satisfy the Court that it has the benefit of a professional indemnity insurance policy, under which the amount payable in respect of the relevant occupational liability is not less than the applicable monetary ceiling in relation to the class of person and the kind of work to which the cause of action relates. In such cases, the relevant insurance policy must comply with the association's insurance standards.

For the purpose of such provision, the association's insurance standards should be defined as the insurance standards presented to, and considered by, the Councils in connection with the Councils' approval of the Scheme (subject to any amendment to such insurance standards as are subsequently presented to the Councils and approved (in jurisdictions where this is required) or endorsed (in other jurisdictions) by the Councils in writing).

5. General considerations

In considering an association's insurance standards, the Councils will have regard to:

- (a) the protection of consumers of professional services
- (b) the position of persons who may be affected by limiting the occupational liability of

² NSW s27; Vic s.29(1); Tas s.30(1); SA s.29(1); WA s.40; NT s.28(1); Qld s.28(1); ACT sch 4 s4.23.

³ By operation of section 41 of the *Insurance Contracts Act 1984* (Cth).

⁴ NSW s.10; Vic s.11; Tas s.11; SA s.11; WA s. 23; NT s.10; Qld s. 12; ACT sch 4 s.4.7.



members of the occupational associations

- (c) whether the standards of the association address the essential components of the professional indemnity insurance, including:
 - (i) the parties to the insurance contract
 - (ii) the nature and extent of cover provided
 - (iii) other commercial considerations.
- (d) the practical availability and affordability of required cover to association members.

Section 6 below contains a series of guidelines regarding:

- a) the scope of cover and features which the association's Insurance standards must, should or should preferably stipulate be included in members' professional indemnity policies (**stipulations**)
- b) guidance as to how such stipulations may be framed or refined by the association's Insurance standards for application to the circumstances of the Scheme. Guidances appear in coloured text boxes.

The stipulations are categorised as:

Must

These stipulations are generally considered by the Councils to be a minimum standard. A Scheme which does not meet this minimum standard will need to satisfy the Councils that special circumstances exist to justify the departure.

Should

These stipulations are strongly encouraged.

Should preferably

These stipulations would be beneficial and will be favourably regarded by the Councils in their overall assessment of the Insurance standards.

May

These stipulations may be accepted by the Councils as a satisfactory alternative to a stipulation categorised as should or must.

The guidance in section 6 is designed to assist the association to tailor its Insurance standards to the needs of the particular market within which the occupational activities are conducted. They are not mandatory but will be favourably regarded by the Councils in their overall assessment of the Insurance standards.

The guidance includes suggestions which an insured professional member **should be encouraged to** do in order to maximise their coverage under the policy. The Councils will look favourably on the inclusion of such provisions in their overall assessment of the Insurance standards.

6. Requirements

a) Stipulations and guidances

To assist the Councils in considering the association's proposed insurance standards and whether to approve the Scheme, the association should submit the information identified below, as part of the Scheme application process:



| OVERVIEW | | | |
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| Evidence / information required | | Association's response | |
| <ul style="list-style-type: none"> provide an overview of the scope and levels of professional indemnity insurance available to association members provide broker analysis and advice as to what additional insurance coverages are available to association members. Note: The scope of cover required by an association's Insurance standards should provide the most comprehensive level of cover reasonably and generally available and affordable to association members. | | | |
| STIPULATIONS AND GUIDANCE | | | |
| Standard | Description | Guidance | Association standard (conforms or varies (include reasons)) |
| The Insurer | 6.1 The insurer must be APRA authorised | Professional indemnity insurance is a type of general insurance. Providers of general insurance in Australia are regulated by the prudential regulator, The Australian Prudential Regulatory Authority (APRA): see https://www.apra.gov.au . | |
| | 6.2 Despite stipulation 6.1 above, the policy may be placed with an Unauthorised Foreign Insurer (UFI) provided that the occupational association has been provided with a letter signed by a qualified insurance broker certifying that: <ul style="list-style-type: none"> (a) at least one policyholder is a high-valued insured; (b) an atypical risk is being insured against; (c) the risk being insured against cannot reasonably be placed in Australia; or | The <i>Insurance Act 1973</i> (Cth) provides for an exemption that recognises that there are some circumstances where insurance risk cannot be appropriately placed with an APRA approved general insurer, and thus needs to be insured with a UFI. An UFI is a foreign domiciled insurer that is not authorised by APRA to carry on insurance business in Australia. ⁵ The term 'high value insured' is defined in Regulation 4B of the Insurance Regulations 2002. Atypical risks are exclusively defined in the Regulation 4C of the Insurance Regulations 2002. The exemption for risks that cannot reasonably be placed in Australia recognises that there will be a range of circumstances where a | |

⁵ Insurance Regulations 2002 at reg 4.



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| | (d) the policy is required by the law of a foreign jurisdiction within the meaning of Part 2 of the Insurance Regulations 2002. | business or consumer has a unique risk that cannot be placed with an authorised insurer or with an UFI under the high-value insured or atypical risk exemptions. This may include where an authorised insurer does not offer the necessary terms and conditions to cover a particular risk, or where the capacity of the Australian market in a particular line has been exhausted, or where there are benefits that accrue to an insured through a longstanding on-going relationship with an insurer. | |
| | 6.3 The insurer must be financially stable and able to meet the claim(s) in full. | The association's Insurance standards should specify the means by which the financial status of the insurer will be measured. For example, the insurer has a good credit rating from a reputable international rating agency or other assets, resources or systems to enable the payment of claims. | |
| Who is covered? | 6.4 The professional member must be either: (a) an insured or (b) a third-party beneficiary. | An insured is a person who or which is a contracting party to the policy of insurance. A third-party beneficiary is a person who or which is not a contracting party to the policy but is entitled to be indemnified under the policy. A third-party beneficiary may be identified by name (for example named in a list of persons insured by the policy) or by membership of a class of persons insured by the policy (for example directors, officers or employees of the contracting insured). | |
| | 6.5 The policy must cover non-professional past, present and future persons employed by professional members or by corporate entities which employ professional members where such persons, | If a Scheme applies to a person (including a corporate entity) to whom the Scheme applies, then the Scheme also applies to each employee of the person/entity. Provided that if, such employee is entitled to be a member of the same occupational association, but is not a member, the Scheme | |



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| | by reason of their role in connection with the provision of professional services by a member, are or might be entitled to the benefit of the Scheme. | does not apply to that employee. ⁶ | |
| | 6.6 The policy must cover past, present, and future officers of a corporate member (if any), or corporate entities which employ professional members of a Scheme, where such officers are or might be entitled to the benefit of the Scheme. | If a Scheme applies to a body corporate, the Scheme also applies to each officer of the body corporate. Provided that if, such officer is entitled to be a member of the same occupational association, but is not a member, the Scheme does not apply to that officer. ⁷ | |
| | 6.7 The policy must cover any past, present and future partners of a professional member where such partner is or might be entitled to the benefit of the Scheme. | If a Scheme applies to a person, the Scheme also applies to each partner of that person. Provided that if, such partner is entitled to be a member of the same occupational association, but is not a member, the Scheme does not apply to that partner. ⁸ | |
| | 6.8 The policy should preferably cover the insured for vicarious liability that may arise from services delivered by any contractors of a professional member, where such contractor is engaged by the member to carry out the occupational activities to which the Scheme applies or is otherwise involved in the performance of such occupational activities (whether in a | | |

⁶ NSW s19; Vic s.20; Tas s.21; SA s.20; WA s.31; NT s.19; Qld s.20; ACT sch 4 s4.16.

⁷ NSW s18; Vic s.21; Tas s.22; SA s.21; WA s.32; NT s.20; Qld s.21; ACT sch 4 s4.16.

⁸ NSW s18; Vic s.21; Tas s.22; SA s.21; WA s.32; NT s.20; Qld s.21; ACT sch 4 s4.16.



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| | <p>professional capacity or not).</p> <p>6.9 Where the policy does not cover contractors referred to in stipulation 6.8, the member should take reasonable steps to satisfy itself that the contractor has its own professional indemnity policy which provides cover in respect of the contractor's performance of the occupational activities which policy would be compliant with the association's Insurance standards.</p> | | |
| Claims made | <p>6.10 The policy must be a 'claims made' or 'claims made and notified' policy.</p> | <p>This means that the policy must be a "claims made" rather than an "occurrence" based policy. The "claims made" policy is triggered in the policy period during which the demand or claim is made against the insured member. The policy in place at the time of the act or omission giving rise to the professional's occupational liability occurred is not triggered by reason only of the happening of that act or omission.</p> | |
| | <p>6.11 The policy should have a continuous cover extension.</p> | <p>A continuous cover extension provides that, where an insured has been continuously insured for in successive period of insurance with the same insurer(s), the insurer will cover a claim made during the policy period notwithstanding that the insured became aware of facts or circumstances which might give rise to a claim in a prior period (during which the insured was insured under a policy issued by the insurer) but failed to notify the insurer of that fact or circumstance in such prior period of insurance.</p> | |



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| | | <p>Note: Members should be encouraged to maintain insurance with the same insurer for consecutive periods of insurance rather than frequently changing insurers.</p> <p>Where a member is covered by a claims made policy which contains a continuous cover clause, the risk of the insured being disentitled to the benefit of the policy, by reason of an inadvertent failure to notify a fact or circumstance which might give rise to a claim as soon as practicable after becoming aware of such fact or circumstance, is significantly reduced.</p> <p>Note: Members should be encouraged to notify the insurer of any facts or circumstances which might give rise to a claim as soon as practicable after becoming aware of such facts or circumstances.</p> <p>Section 40(3) of the <i>Insurance Contracts Act 1984</i> (Cth) provides that, where the insured becomes aware of facts which might give rise to a claim, during a particular policy period, and notifies the insurer of those facts as soon as practicable after becoming aware of them, then the insurer may not refuse to pay the claim by reason only of the fact that no claim was made during the policy period. Associations should assist their members to develop risk management procedures to ensure that such facts or circumstances are notified promptly.</p> | |
| <p>Scope of insuring clause</p> | <p>6.12 The policy must either:</p> <p>(a) provide cover in respect of occupational liability arising from professional activities</p> | <p>There are two main variations of insuring clauses in professional indemnity policies. Civil liability policies provide cover for 'civil liability' incurred from the professional activities of the insured business. 'Act,</p> | |



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| | <p>carried out by the member which fall within the scope of the occupational activities to which the Scheme applies.</p> <p>(b) provide cover in respect of occupational liability arising out of an alleged act, error, or omission in the conduct of the professional activities by the member which fall within the scope of the occupational activities to which the Scheme applies.</p> | <p>error or omission' policies qualify or restrict that cover by requiring the insured persons of entities to show that such liability arose from an identifiable act, error, or omission. While a 'civil liability' wording is preferable, an 'act, error or omission' wording is acceptable.</p> <p>Professional indemnity insurance policies will generally include a definition of the insured's 'business' or 'professional services'. This should be broadly drafted to ensure that it includes all occupational activities, falling within the scope of the Scheme, which are carried out by the professional member.</p> <p>Professional indemnity insurance policies may also contain exclusions which may exclude cover in respect of particular professional activities carried out by the member. Such exclusions would not be appropriate if they had the effect of excluding occupational activities carried out by the member to which the Scheme applies.</p> | |
| <p>Limit of liability</p> | <p>6.13 The limit of liability under the policy in respect of any one claim must be equal to or greater than the highest monetary ceiling specified in the Scheme applicable to the member by reference to the class of persons to which the member belongs and the kind of work undertaken by the member (or any discretionary monetary ceiling approved by the</p> | <p>The limit of liability should preferably be expressed in Australian dollars. Where the limit of liability is not expressed in Australian dollars, the member will be exposed to a compliance risk as a result of future exchange rate fluctuations. Members should be encouraged to take appropriate action to manage that compliance risk. For example, by ensuring that the limit of indemnity is set with a margin above the applicable monetary ceiling to allow for any exchange rate fluctuations.</p> | |



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| | association in respect of that member). | | |
| | <p>6.14 The policy should either:</p> <p>(a) provide at least one automatic reinstatement of the limit of liability; or</p> <p>(b) have an aggregate limit of liability of at least twice the any one claim limit of liability.</p> | <p>An automatic reinstatement operates so that, in the event that a prior claim (or multiple prior claims) erodes or partly erodes the limit of liability available to the member and a subsequent claim is made against the member, the member may elect to reinstate the limit of liability in respect of that subsequent claim. An aggregate limit is a limit of indemnity which applies in respect of all covered claims in any one period of insurance.</p> | |
| | 6.15 The limit of liability under the policy should be defence costs in-addition | | |
| | <p>6.16 Notwithstanding 6.15 above, the limit of liability under the policy should preferably be cost inclusive provided that the limit of liability under the policy is sufficient to meet both:</p> <p>(a) the highest monetary ceiling specified in the Scheme applicable to the member by reference to the class of persons to which the member belongs and the kind of work undertaken by the member; and</p> <p>(b) all legal costs which could be reasonably anticipated to be incurred in connection with a claim for occupational liability.</p> | <p>It is easier for members to ascertain the amount of money available to pay claims if the policy is costs exclusive as in those policies, defence costs do not erode the limit of indemnity available to pay damages or compensation to third parties.</p> <p>Care must be taken with costs inclusive policies to ensure that there is enough indemnity remaining in the policy to meet the highest applicable monetary ceiling.</p> <p>Note: The association's Insurance standards should specify a metric, appropriate to the nature of the occupational liability and the applicable monetary ceiling, as to a minimum sum and/or percentage of the applicable monetary ceiling by which the limit of indemnity should exceed the monetary ceiling so as provide an appropriate degree of confidence that stipulation 6.16(b) would be satisfied.</p> | |



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| Excess or deductible | 6.17 The deductible or excess under the policy should be set at a level which, having regard to the financial position of the professional member at the time the policy is entered into, can reasonably be expected to be able to paid by the member at least twice in any 12 month period. | An excess or deductible is the amount or proportion of any (or all) losses arising under an insurance policy which the insured professional is required to pay prior to the insurer being required to indemnify the professional. If the loss is less than the amount of the excess or deductible, then the insured professional must meet the cost of it. Note: The association's Insurance standards should specify a metric, appropriate to the nature of the occupational liability and the applicable monetary ceiling(s), as to a maximum level of excess expressed as a monetary sum and/or a percentage of the lowest monetary ceiling specified in the Scheme applicable to the member by reference to the class of persons to which the member belongs and the kind of work undertaken by the member. The association's Insurance standards may provide a provision whereby the association may, at its discretion, approve a higher excess subject to a mechanism by which the association is able to satisfy itself of the member's ability to pay such excess at least twice in any 12 month period. | |
| | 6.18 The policy should contain an aggregation clause which provides that, for the purposes of calculating the number of excesses payable: (a) all causally connected or interrelated acts, errors or omissions shall jointly constitute a single act, error, or | | |



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| | <p>omission under this Policy; and</p> <p>(b) where a single act, error, or omission gives rise to more than one claim, all such Claim(s) shall jointly constitute one Claim.</p> | | |
| | <p>6.19 The policy should not contain an excess provision which is expressed to apply on a per claimant basis.</p> | <p>Some professional indemnity policies provide that a separate excess will apply to any claim brought by a distinct claimant. This type of excess provision creates a significant risk that a single act, error or omission may give rise to a number of related claims by distinct claimants which would result in the insured member being required to pay multiple excesses. This type of clause has the capacity to undermine the consumer protection objectives of the Professional Standards Legislation as advanced by stipulation 6.17.</p> | |
| <p>Retroactive date</p> | <p>6.20 Where the policy contains a retroactive date, that date must be no later than the latter of:</p> <p>(a) the date on which the contracting insured first commenced carrying out the occupational activities</p> <p>(b) the date on which the contracting insured first took out insurance in respect of its occupational liability</p> <p>(c) the date on which the contracting insured took out a new insurance policy as a result of a merger or acquisition of a business, where past liabilities are covered</p> | <p>The association's Insurance standards may include a provision by which the association may approve a policy which does not comply with stipulation 6.19 where the association has been provided with a letter from a qualified insurance broker certifying that the professional member is not reasonably able to obtain a policy which contains an earlier retroactive date.</p> <p>Note: A professional member will not reasonably be able to obtain a policy which contains an earlier retroactive date where the cost of such policy would be prohibitive having regard to the nature of the contracting insured's business including its size, turnover and number of employees.</p> | |



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| | under a separate policy. | | |
| Consumer protection legislation | 6.21 The policy should preferably contain an extension or clarification clause specifying that the cover provided by the policy includes cover for any unintentional breach of the misleading and deceptive conduct provisions of consumer protection legislation applicable to the occupational activities to which the Scheme applies. | Depending on the scope of the occupational activities to which the Scheme applies, relevant consumer protection legislation may include Part V of the <i>Trade Practices Act 1974</i> (Cth); the Australian Consumer Law (being Schedule 2 of the <i>Competition and Consumer Act 2010</i> (Cth)); Division 2 Part 2 of the <i>Australian Securities and Investment Commission Act 2001</i> (Cth); Part 7 of the <i>Corporations Act 2001</i> (Cth) or any similar or related legislation of a State or Territory of Australia. | |
| Run off cover | 6.22 The policy should preferably provide automatic run-off cover for a period of at least 7 years in the event that the named insured ceases to carry on the insured professional business at any time during the currency of the policy. | | |
| | 6.23 Where a policy of the type referred to in stipulation 6.22 is not reasonably available, the member must arrange and maintain run-off cover for a period 7 years following cessation of the business. | <p>Even after ceasing a business, a third party can make bring a cause of action for occupational liability against the member for up to 6 years after the alleged loss or damage was suffered.</p> <p>Run-off cover is available in a variety of forms. For example, it may be provided as a distinct run-off policy with a term of 7 years or with a term of one year and renewed annually for 7 years.</p> <p>Run-off cover may also be obtained by way of endorsement or extension to another policy. For example, the professional member may form a new corporate entity which may arrange an insurance policy to cover its own prospective exposures</p> | |



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| | | and may contain an extension or endorsement to cover the member's prior business in respect of the occupational activities provided by that former entity. Some policies provide standard automatic or optional extensions to cover a principal's previous business. | |
| Maintaining continuity of cover | 6.24 The professional member should maintain continuous PI insurance cover for the duration of the Scheme. | This means that if the policy obtained by the member expires or is cancelled, the member is obliged to renew the policy or take out another one in similar terms. The members must always have PI cover in place so ensure that there are no gaps in cover. If there has been a change in the wording and/or the insurer from year to year, the member must satisfy itself that there are no material gaps in cover. | |
| Premium | 6.25 The premium payable in respect of the policy should be at a level which is affordable to the professional member so as to enable the member to maintain continuous PI insurance cover for the duration of the Scheme. | | |
| Exclusions | 6.26 The policy must not contain any exclusion, or combination of exclusions, which would have the effect that any mandatory requirement of the association's Insurance standards is wholly or substantially negated. | | |
| | 6.27 The policy should not contain any exclusion or combination of exclusions which would have the effect | The association's Insurance standards should specify any exclusions, commonly occurring in policies issued to persons in respect of the occupational liabilities or | |



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| | that any mandatory requirement of the association's Insurance standards is or may be negated in a material proportion of claims likely to be made against the member. | activities to which the Scheme applies, which the association considers must not or should not be included in members' policies because they would be likely to have the effect referred to clause 6.26 or 6.27 above. | |
| Excess-layer insurance | 6.28 Members should preferably seek to obtain a single policy which complies with these Insurance standards. | | |
| | 6.29 Members may take out an insurance program consisting of two or more policies (being primary and excess-layer policies) which, taken together, comply with these Insurance standards provided that all policies comply individually with these standards otherwise than as to the limit of indemnity and excess. | | |
| | 6.30 In this case, of an insurance program consisting of two or more policies (being primary and excess-layer policies), any excess policy(s) should preferably follow the form of the primary insurance. | An excess-layer policy is a policy which provides cover for amounts which exceed the limit of liability provided another underlying policy. For example, a professional may have one policy which provides cover up to a limit of indemnity of \$2,000,000 and a second policy which provides for an additional limit of indemnity of '\$8,000,000 in excess of \$2,000,000'. The first policy is referred to as a 'primary' policy. The second policy is referred to as an 'excess-layer' policy. The total amount of insurance held by that professional is \$10,000,000. ⁹ | |

⁹ The reference to 'excess-layer' insurance should not be confused with the concept of a policy 'excess' (as referred to at Clause 6.17 above). They are distinct concepts.



b) Statutory and compulsory Schemes

Statutory policies

If there are compulsory State or Commonwealth government insurance requirements, this should be made clear in the standards. The standards should be tailored by reference to any statutory scheme. The Councils can take some comfort about the identity and stability of the insurer in a government scheme.

Where the applicable monetary ceiling, or at least one of the potentially applicable monetary ceilings, exceeds the limit of indemnity under the government scheme, then the standards should deal with the interaction between the State or Commonwealth scheme and excess insurance (sometimes referred to as 'top up' insurance). Also refer clauses 6.28 to 6.30 above in relation to excess insurance.

Compulsory Schemes

Where the association administers its own endorsed occupational liability insurance scheme, the Councils will need a high degree of satisfaction that the association's insurance standards are not anti-competitive or do not otherwise constitute a conflict of interest for members. In this regard, the Councils will consider whether the members can effectively obtain their own professional indemnity policies which comply with the association's Insurance standards.

c) Powers and discretions of the association

The association's professional indemnity insurance standards should contain provisions which give the association the necessary powers and discretions to administer the standards including those referred to in this section.

Exemptions

The association's insurance standards may provide the association with a discretion to grant an exemption, to a specific professional member or group of professional members, from the requirements of the insurance standards.

The insurance standards should specify the process by which a member may apply for such exception, the factors which the association must or may consider in exercising the discretion and should provide the association with the right to request information necessary to considering such application.

Approvals

Individual provisions

The association's insurance standards may provide the association with a discretion to approve a policy provision even though that provision does not or may not strictly comply with a mandatory policy requirement set out in the insurance standards where, in the reasonable assessment of the association:

- (a) the provision is not inconsistent with the objectives of the insurance standards
- (b) in the absence of such approval, the standards would operate unfairly and/or cause undue hardship to a member.

Where a policy provision has been approved by the association, the policy shall not be non-compliant by reason only of the fact that it contains that provision.



Notwithstanding the above clauses for 'individual provisions', the association may not grant an approval of a provision, where the grant of such approval would have the effect that the policy does not comply with the following stipulations:

- (a) 6.1 or 6.2
- (b) 6.4 to 6.7
- (c) 6.10
- (d) 6.13.

Policies

The association's insurance standards may provide the association with a discretion to approve a policy even though that policy may not strictly comply with one or more mandatory policy requirements set out in the insurance standards where, in the reasonable assessment of the association:

- (a) the policy viewed as a whole and in the context of the whole of the circumstances, is not inconsistent with the objectives of the insurance standards
- (b) in the absence of such approval, the standards would operate unfairly and/or cause undue hardship to a member.

Any approval of a policy by the association shall be recorded in writing in the records of the association and shall constitute binding evidence that the policy complies with the association's insurance standards.

Notwithstanding the above clauses for 'policies', the association may not grant an approval of a policy which does not comply with the following stipulations:

- (a) 6.1 or 6.2
- (b) 6.4 to 6.7
- (c) 6.10
- (d) 6.13.

Declarations of non-compliance

The association's insurance standards may provide the association with a discretion to declare that a policy does not comply with the insurance standards even though that policy complies with all mandatory policy requirements set out in the insurance standards where, in the reasonable assessment of the association:

- (a) the policy considered as a whole and in all of the circumstances is inconsistent with the objectives of the insurance standards
- (b) such declaration would not operate unfairly and/or cause undue hardship to a member.



Guidance

It is recognised that no set of insurance standards could possibly cover every situation in which a policy might be rendered inappropriate for a member or group of members, having regard to the objectives of the Professional Standards Scheme framework, this guidance and/or the association's policy standards. This power combined with the association's monitoring powers provides an effective mechanism by which the policies which are not consistent with the above objectives can be declared non-compliant.

d) Administration, review, and amendment of standards

As the administrator of the Scheme, the association is responsible for the oversight of the operation of the insurance standards.

The association's administrative responsibilities require the association to take proactive steps to:

- (a) Educate stakeholders including members, insurance brokers and insurers about the nature and content of the association's insurance standards
- (b) Encourage the availability and take-up of coverage which complies with the insurance standards including by providing feedback in relation to any non-compliance
- (c) Collect information and data about the degree of compliance with the Scheme so as to provide a reasonable degree of assurance that the insurance standards are being widely complied with
- (d) Review the continuing appropriateness of the insurance standards on a regular basis
- (e) Work with members, brokers and insurers to address any non-compliance and to improve the overall quality and scope of insurance held by members
- (f) Report to the Councils in respect of:
 - (i) the degree of compliance with the insurance standards
 - (ii) the degree to which the overall the quality and scope of insurance held by members had improved over time.
- (g) Seek amendment of the insurance standards where the association's review suggests that such amendment would assist in achieving the objectives of the Professional Standards Legislation as set out in this

Guidance

For Schemes that operate in multiple jurisdictions, insurance standards may be an integral part of the Scheme and may only be changed by preparing an instrument amending the Scheme, for approval by the Councils.



Guidance.

The association should develop a framework by which the association will undertake these responsibilities including imposing obligations on members to provide necessary data, information, and co-operation necessary for the associations to do so.

This framework should be integrated with the association's other Scheme administration obligations and supported by the general member obligations in respect of the Scheme.

e) Amendment to the insurance standards

The Councils consider that the form and content of the association's insurance standards constitute a fundamental part of the Councils' determination to approve the Scheme and to submit the Scheme to the Minister(s) for gazettal.

Where an association proposes to amend its insurance standards, the association must submit any proposed amendments to the Councils for approval prior to making such amendments. In the case of a Tasmanian Scheme, or a multijurisdictional Scheme which operates in Tasmania, such approval process must proceed by way of an application to amend the Scheme.

The Professional Standards Legislation in the Northern Territory, South Australia, Tasmania, Victoria expressly provide that changes to an association's insurance standards must be approved by the Councils.¹⁰ The Queensland legislation requires the association to notify the Council of the proposed change.¹¹ The Tasmanian legislation requires that any such change must proceed by way of an application to amend the Scheme. While there is no express requirement contained in the relevant legislation in the Australian Capital Territory, New South Wales, or Western Australia,¹² it is the policy preference of the Councils in these jurisdictions that they be given the opportunity to consider and provide feedback on such proposed amendments to insurance standards.

Further, it is the policy of Councils that, in the case of any multijurisdictional Scheme which applies in Tasmania, such change must proceed by way of an application to amend the Scheme.

In the event that an association makes changes to its insurance standards without prior approval by the Councils, in the jurisdictions where approval is a statutory requirement, the Councils may, on their own initiative, prepare an instrument amending or revoking the Scheme.

¹⁰ Vic s.29(2); Tas s.30(2); SA s.29(2); NT s.28(2).

¹¹ Qld s.28(2).

¹² NSW s27; WA s.40; ACT sch 4 s4.23.