

# **NSW ATTORNEY GENERAL'S DEPARTMENT**

## **National Competition Policy Review of the**

*Professional Standards Act 1994*

### **ISSUES PAPER**

May 2001

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## Foreword

### This Issues Paper

The NSW Attorney General's Department is conducting a review of the *Professional Standards Act 1994*. This Issues Paper has been prepared by the Department for discussion and consultation purposes, and does not represent the view of the NSW Government. It is intended to assist individuals and organisations to prepare submissions in relation to the review. It outlines the scope of the review and the matters about which the Department is seeking comment and information.

The Issues Paper is not intended to limit comment, and any information and comment on issues considered relevant to the Terms of Reference of the review are welcome.

### Why a review?

The NSW Government is required to undertake a review of the *Professional Standards Act* as part of its obligations under the Competition Principles Agreement, which was endorsed by the Council of Australian Governments in April 1995.

In addition, a review of the Act is required by section 55 of the Act. This section requires the Minister to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The Government has decided that the two reviews will be undertaken together, and Terms of Reference have been prepared to incorporate the requirements of the Competition Principles Agreement and section 55 of the Act. The Terms of Reference are set out overleaf.

Further information, questions or comments about the paper can be directed to Kathrina Lo on 9228 7500 or Catherine Morgan on 9228 7581.

### Submissions

Submissions are sought from any person or organisation with an interest in any aspect of the *Professional Standards Act*. The Introduction to the Issues Paper discusses in more detail who may be affected by the review, however, those who may have an interest include members of professional or occupational groups, the insurance industry, other business interests, and consumers generally.

### How do I make a submission?

A submission can be as short as a letter outlining your views on a few aspects of the Issues Paper or a more substantial document canvassing a wide range of issues. Where possible, submissions should contain relevant data and documentation to support the views expressed.

Commercially sensitive information that you do not wish to be made publicly available should be provided under a separate cover clearly marked "**Commercial in Confidence**".

Submissions should be addressed to:

**Mr Laurie Glanfield**  
Director General  
NSW Attorney General's Department  
GPO Box 6  
SYDNEY NSW 2001  
DX 1227 SYDNEY

It would be helpful if you could also provide an electronic copy of your submission, either on a 3.5 inch diskette or by email to [kathrina\\_lo@agd.nsw.gov.au](mailto:kathrina_lo@agd.nsw.gov.au).

**The closing date for submissions is 27 July 2001.**

Information about the New South Wales Attorney General's Department can be found at  
<http://www.lawlink.nsw.gov.au>

## Terms of Reference

### *Review of the Professional Standards Act 1994*

- 1 The review of the *Professional Standards Act 1994* shall be conducted in accordance with the principles for legislation reviews set out in the Competition Principles Agreement. The guiding principle of the review is that legislation should not restrict competition unless it can be demonstrated that:
  - (a) the benefits of the restriction to the community as a whole outweigh the costs; and
  - (b) the objectives of the legislation can only be achieved by restricting competition.
- 2 The review of the *Professional Standards Act 1994* shall also meet the requirements of section 55 of the Act, to determine whether:
  - (a) the policy objectives of the Act remain valid; and
  - (b) the terms of the Act remain appropriate for securing those objectives.
- 3 Without limiting the scope of the review of the *Professional Standards Act 1994*, the review is to:
  - (a) clarify the objectives of the legislation, their continuing appropriateness, and whether the Act remains appropriate for securing those objectives;
  - (b) identify the nature of the restrictive effects on competition;
  - (c) analyse the likely effect of any identified restriction on competition on the economy generally;
  - (d) assess and balance the costs and benefits of the restrictions identified;
  - (e) consider alternative means for achieving the same result, including non-legislative approaches; and
  - (f) consider the functions of the Professional Standards Council.
- 4 When considering the matters in (3), the review should also:
  - (a) identify any issues of market failure which need to be, or are being addressed by the legislation; and
  - (b) consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the *Trade Practices Act 1974* (Cth) and the *NSW Competition Code*.
- 5 The review shall consider and take account of relevant regulatory schemes in other Australian jurisdictions, and any recent reforms or reform proposals, including those relating to competition policy in those jurisdictions.
- 6 The review shall consult with, and take submissions from, consumers, professions peak bodies, representatives of business and the insurance industry, and other interested parties.

# 1 INTRODUCTION

## 1.1 *The Professional Standards Act 1994*

**1.1.1** Consumers use a variety of services provided by a range of occupational groups. There is generally an expectation that services supplied by these groups will be accessible, affordable and of a high standard. When these expectations are not met, there is a further expectation that there will be somewhere for consumers to seek redress.

**1.1.2** Over time, members of occupational groups (eg. solicitors, accountants) were increasingly seen as having financial substance and holding professional indemnity insurance, and there was a rise in the number of actions taken against them and in the level of compensation awarded. As a result, premiums for insurance rose steeply. For many members of occupational groups, insurance became unavailable or unaffordable. This affected consumers who could be awarded unlimited damages but then have no real prospect of recovery.

**1.1.3** The *Professional Standards Act*, in the words of its long title, is:

An Act to provide for the limitation of liability of members of occupational associations in certain circumstances and to facilitate improvement in the standards of service provided by those members.

**1.1.4** The Act limits occupational liability, which is defined in the Act to mean “civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation.”

**1.1.5** The Act established the Professional Standards Council and enables the Council to approve schemes for limiting the occupational liability of persons who are members of an occupational association. Such schemes are legally binding and require members to have sufficient insurance and business assets to pay consumers for damages awarded as a result of a member’s wrongdoing. Additionally, the occupational association must implement a risk management program, including risk management training for members, and it must establish mechanisms for dealing with consumer complaints and for disciplining members. In turn, the Act allows schemes to include a limit (or cap) on the amount of damages that may be awarded against members.

**1.1.6** To date, schemes have been approved for a range of occupational groups (eg. solicitors, accountants). The level of the cap on liability varies from scheme to scheme. Appendix A sets out information in relation to schemes currently in force, including the names of the occupational associations, caps on liability

under the schemes, whether the schemes apply to all members of an occupational association or only to certain classes of members, and whether individuals have been exempted from the schemes.

- 1.1.7 The Professional Standards Act is general in nature in that it may potentially apply to any occupational association. There are also Acts, such as the Legal Profession Act 1987, that regulate particular occupations or professions.

## 1.2 The need for review of the Act

- 1.2.1 There are two reasons why the *Professional Standards Act* needs to be reviewed. First, the NSW Government is required to undertake a review of the Act as part of its obligations under the Competition Principles Agreement, which was endorsed by the Council of Australian Governments in April 1995. The review under National Competition Policy has two aims:

- to remove or improve regulatory restrictions to competition which harbour inefficiencies and unnecessary costs to the economy; and
- to ensure that competitive pressures in the economy are as strong as possible to provide a spur to innovation, lower costs and higher incomes for Australians.

- 1.2.2 Competition Policy reviews are aimed at removing unnecessary, cumbersome and costly impediments to conducting business in New South Wales.

- 1.2.3 Second, section 55 of the Act requires the Act to be reviewed to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

- 1.2.4 The Government has decided that the two reviews will be completed together because of the common issues raised, and Terms of Reference have been prepared to incorporate the requirements of the Competition Principles Agreement and section 55 of the Act.

- 1.2.5 Some of the key issues that are raised by this review include the objectives of the Act, the cap on liability, and the impact of the operation of the Act on competition in the markets for professional services.

- 1.2.6 The review of the Professional Standards Act is being conducted by the NSW Attorney General's Department. This issues paper forms the basis of the consultation process for the review. All submissions received will be carefully considered. The Department may arrange consultation meetings with individuals/organisations to discuss their submissions before finalising its report to the NSW Government.

## 1.3 Who does this review affect?

- 1.3.1 The *Professional Standards Act* potentially affects a wide range of occupational groups. Consequently, this review is likely to be of interest to a wide range of people. Despite the term "professional" in the Act's title, the Act applies to any occupational group, which is defined to include a professional or a trade group.

**1.3.2** The review will be of particular interest to:

- members of schemes approved under the Act;
- members of professions generally;
- members of other occupational groups;
- the insurance industry;
- the business community;
- users of services provided by professional and other occupational groups;
- consumers generally;
- governments; and
- researchers, academics and consultants.

**1.3.3** This list is not exhaustive. The capping of liability for occupational groups potentially affects anyone in New South Wales, and there is continuing debate about whether capping has positive or negative effects. Consequently, anyone with an interest in this issue is encouraged to contribute to the review.



# 2

## CONTEXT OF THE REVIEW AND THE OPERATION OF THE ACT

### 2.1 The context of the review - Competition Policy

**2.1.1** The Council of Australian Governments ratified the National Competition Policy in April 1995. Under the Policy, all State and Territory governments committed themselves to actions aimed at increasing consumer and business choice, improving efficiencies and creating an overall business environment in which to improve Australia's international competitiveness.

**2.1.2** The Competition Principles Agreement requires Governments to review legislation and assess whether any restrictions on competition are in the public interest. There is a presumption that legislative restrictions should be repealed unless a public interest case to the contrary can be made out. Clause 5(1) of the Competition Principles Agreement provides:

The guiding principle is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.

**2.1.3** The review of the *Professional Standards Act* will therefore need to demonstrate that any restrictions on competition imposed by the Act serve the public interest.

**2.1.4** A key feature of legislative reviews under Competition Policy is the quality of outcomes. Reviews are directed at making better rules rather than necessarily fewer rules, and at demonstrating a net public benefit if restrictions are retained. It is also recognised that rules need to be constantly reviewed to ensure they remain relevant and achieve their objectives.

**2.1.5** Even if legislation does not restrict competition, consideration needs to be given to whether its objectives can be achieved by better means. The diagram at Appendix B, based on one produced by the Centre for International Economics, demonstrates the goals of Competition Policy reviews.

## 2.2 The context of the review - Section 55

2.2.1 Section 55(1) of the *Professional Standards Act* provides:

**55. Review of Act**

- 1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- 2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- 3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

2.2.2 The terms of reference prepared for the review are designed to ensure the requirements of both the section 55 review and Competition Policy review are met.

## 2.3 Operation of the *Professional Standards Act*

2.3.1 Under the *Professional Standards Act*, an occupational association may apply to the Professional Standards Council, which is established by the Act, for approval of a scheme to limit liability. The Act does not apply to all types of occupational liability and excludes, for example, liability for damages for personal injury, breach of trust, fraud or dishonesty.

2.3.2 Either an occupational association or the Council may prepare a scheme. Before approving a scheme, the Council must publish a notice in a major newspaper regarding the scheme, consider any comments or submissions received, and conduct a public hearing if this is considered necessary. Once the Council approves a scheme, the scheme is submitted to the Minister who may authorise the publication of the scheme in the *Government Gazette*. A scheme does not come into effect until gazetted and since the Minister authorises gazettal, approval of schemes is effectively required by the Minister. The Supreme Court may disallow a scheme if it does not comply with the Act. Schemes are also subject to disallowance by Parliament.

2.3.3 A scheme may apply to all members of an occupational association or to classes of members. An occupational association may exempt a person from the scheme.

2.3.4 An approved scheme operates to cap the occupational liability of its members. The Act imposes a cap of \$500,000. The cap may vary for different classes of persons within an occupational association or for different kinds of work. Members of a scheme are required to have adequate insurance cover, and occupational associations are required to maintain systems for handling complaints and disciplining members, implement a risk management program, and ensure that members comply with requirements of the scheme.

- 2(a)** Are the types of occupational liability covered by the Act appropriate? Should the Act be extended to cover other types of occupational liability?
- 2(b)** Do the procedures for approving schemes provide for adequate consultation and accountability?
- 2(c)** Is it in the public interest to allow occupational associations to exempt members from schemes?
- 2(d)** Should schemes cover all members of an occupational group, or would such a requirement restrict consumer choice and competition?

## 2.4 The schemes as part of the legislation

**2.4.1** An important issue is whether schemes approved under the *Professional Standards Act* should also be considered part of the legislation for Competition Policy review purposes. The schemes currently in force are the accountants scheme, the solicitors scheme, the investigative and remedial engineers scheme and the professional surveyors scheme.

**2.4.2** The Council of Australian Governments has stated that regulation refers to:

....the broad range of legally enforceable instruments which imposes mandatory requirements upon business and the community as well as to those voluntary codes and advisory instruments ... for which there is a reasonable expectation of widespread compliance.<sup>1</sup>

**2.4.3** Schemes under the Act are significant instruments which have many of the indicia of delegated legislation. For example, they are subject to disallowance by Parliament.

**2.4.4** Arguments for excluding the schemes from review are based on the voluntary nature of the regime — occupational associations are not required to register schemes and their members are not required to join schemes even when they are registered. On the other hand, the effect of the Act and some schemes is an impact on competition, since schemes confer benefits on participants which may affect markets for the provision of services by occupational groups.

**2.4.5** The review will consider the schemes generally. Therefore, comments are sought on the scope of the schemes, as well as in relation to the Act itself and the regulation.

**2.4.6** It is noted that the NSW Attorney General's Department completed a National Competition Policy Review of the *Legal Profession Act* in 1998. The review examined competition issues in relation to all aspects of the Act, including the provision of professional indemnity insurance to solicitors.

### Issues

<sup>1</sup> Council of Australian Governments, *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*, November 1997, p.2

**2(e)** Is the scope and content of existing schemes appropriate?

# 3 THE OBJECTIVES OF THE ACT

## 3.1 Introduction

**3.1.1** An examination of the objectives of the *Professional Standards Act*, and their continuing relevance, is an integral part of a Competition Policy review. Similarly, section 55 of the Act requires the review to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. Chapter 3 of the Issues Paper examines the Act's stated and implied objectives, and the background to the introduction of the Act in order to clarify the objectives.

## 3.2 Legislative statement of objectives

**3.2.1** According to section 3 of the Act, the objectives of the Act are:

- a) to enable the creation of schemes to limit the civil liability of professionals and others;
- b) to facilitate the improvement of occupational standards and others;
- c) to protect the consumers of the services provided by professionals and others; and
- d) to 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.

### Issues

**3(a)** Are the policy objectives of the Act still valid?

**3(b)** Are the terms of the Act appropriate for securing those objectives?

**3(c)** Should the objectives be prioritised and if so, what should the ordering be?

**3(d)** Is there a need for legislative clarification or modification of the objectives?

## 3.3 Background to the legislation

**3.3.1** It is useful to consider the objectives of the Act in the context of the background to the introduction of the Act and in particular, the difficulties the Act was designed to address.

**3.3.2** In numerous common law jurisdictions, developments in the law saw an expansion of the areas in which professionals could be held liable for activities related to the practice of their profession. The most significant developments were in tort law, particularly in the tort of negligence. One example is the development of liability for pure economic loss.

- 3.3.3** Originally, common law prohibited any recovery for economic loss in the absence of reasonably foreseeable harm causing damage to the plaintiff personally.<sup>2</sup> It was considered undesirable to expose defendants to potential liability “in an indeterminate amount for an indeterminate time to an indeterminate class.”<sup>3</sup>
- 3.3.4** In 1963, the House of Lords decided in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>4</sup> that a duty of care to avoid pure economic loss could arise out of negligent advice upon which it was foreseeable that the plaintiff might rely. In Australia, the High Court held in *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”*<sup>5</sup> that owners of a dredge were liable for the economic loss incurred by Caltex, even though Caltex’s property was not directly damaged.<sup>6</sup>
- 3.3.5** These developments had significant implications for members of occupational groups, where economic loss rather than physical damage is a more likely result of professional negligence. According to the case law, professionals could be liable to third parties in tort, and not just to their clients under contract.
- 3.3.6** Expanding fields of liability were accompanied by increasingly large awards of damages. Claims were being brought against professionals partly because they were seen as people of financial substance and likely to be carrying insurance. An increase in the number of claims against professions, resulted in a rise in insurance premiums. In some cases, professionals found they could not obtain insurance at any price.
- 3.3.7** The existence of joint and several liability for torts was also seen as having unfair results for some members of occupational groups. Under joint and several liability, all tortfeasors are jointly liable for losses caused to a plaintiff. If one or more of them cannot pay their contribution, the difference must be made up by the other tortfeasors. This meant an insured member could have to pay an amount exceeding losses caused by his/her own negligence.
- 3.3.8** Occupational groups such as solicitors and accountants are required by professional or legislative rules to work in a partnership business structure under which their liability is unlimited.<sup>7</sup> Historically, these rules were introduced to ensure professionals took personal responsibility for their work and maintained practice standards. However, these rules meant professionals could not use the shield of a limited liability available to corporations to avoid claims for negligence. Consequently, developments in tort law significantly impacted on these occupational groups.

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<sup>2</sup> See, for example, *Cattle v Stockton Waterworks* (1875) LR 10 QB 453

<sup>3</sup> Cardozo CJ in *Ultramares Corporation v Touche* (1931) 174 NE 441 at 444

<sup>4</sup> [1964] AC 465

<sup>5</sup> (1976) 136 CLR 529

<sup>6</sup> See, for example, *Hill v Van Erp* (1997) 188 CLR 159 and *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190

<sup>7</sup> The *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* was recently passed by the NSW Parliament. When the Act commences, solicitors will be able to provide legal services through a corporate structure.

### **3.4 The pressure for reform**

**3.4.1** Members of occupational groups called for legislative intervention on a number of grounds.

**3.4.2** First, they were concerned that a single act of negligence could expose their personal assets to claims. This was seen as unfair because the amount a member could be liable for could be out of proportion to the negligence involved, particularly given the existence of joint and several liability.

**3.4.3** Second, it was said that the situation was unfair to consumers. If a defendant had no insurance, a successful suit by a plaintiff would not necessarily result in the recovery of damages. There was also concern that the rising cost of insurance had resulted in an increase in the number of professionals who were not taking out insurance and who were ensuring all their assets were not in their own name.

**3.4.4** Third, it was claimed unlimited liability adversely affected professional standards. It was argued that the legal risks discouraged competent people from entering the professions, and that this would eventually lead to a decline in standards. It was also argued that such risks encouraged a defensive form of practice, with professionals not prepared to take innovative steps for fear of being sued, and that this was not in the public interest. Further, it was feared professionals might simply not offer some services, leading to a reduction in services available to the public.

**3.4.5** Fourth, it was claimed that large verdicts against members of occupational groups adversely affected the economy generally. There would be a loss of business confidence if, for example, professional firms were forced to cease practice because of claims against them. This in turn would affect the insurance market by making insurance even more difficult to obtain, exacerbating the problem. It was said that other economic effects included a trend towards large firms as only firms with considerable resources could afford insurance premiums, and an increase in the cost of professional services due to the need to cover insurance costs.

**3.4.6** Fifth, it was claimed that growing delays in the court system were partly attributable to claims against professionals, driven by the possibility of receiving significant damages funded by insurance.

**3.4.7** Finally, there was a perceived need to do something to reduce the number of consumer complaints and to deal more effectively with complaints. Accordingly, it was considered necessary to ensure professionals took proper steps to implement risk minimisation practices, and to ensure avenues existed to resolve consumer complaints.

**3.4.8** It is noted that market failures in markets for professional and other occupational services are further explored in Chapter 4.

### **3.5 Proposals for reform**

**3.5.1** A number of suggestions for reform were put forward. These were:

- to allow incorporation, with limited liability, for all professionals;
- to reform tort law by introducing proportionate liability, so a tortfeasor would only be liable for his/her contribution to a loss;
- to limit (cap) liability for professionals;
- to make it compulsory for professionals to take out adequate insurance; and
- composite schemes involving a combination of one or more of the above.

**3.5.2** Any legislative scheme had to ensure on the one hand that plaintiffs with valid claims had the opportunity to obtain compensation for loss suffered as a result of wrongdoing by a professional, and on the other that professionals had the opportunity to ensure any such liability could be met.

**3.5.3** The *Professional Standards Act* attempted to address the concerns raised by introducing a combination of a cap on liability and more widespread insurance cover. The Act was also intended to reduce the need for claims to be made by encouraging service providers to undertake risk management training, and to establish complaints handling and disciplinary processes. Schemes under the Act therefore have some features of statutory occupational licensing regimes.

**3.5.4** Although the Act was not particularly controversial when introduced, it did have critics. For example, it was said that the Act would work against the public interest by enabling professionals to escape full liability for their mistakes or wrongdoing.

#### Issues

**3(e)** Are the problems outlined in section 3.4 significant or severe enough to warrant legislative intervention?

**3(f)** In practice, has the Act adequately addressed the various problems it was introduced to address?

## 3.6 The Professional Standards Council

**3.6.1** One of the objectives of the *Professional Standards Act* is to establish the Professional Standards Council. The Council is an independent body of part-time members appointed by the Attorney General for a period of up to three years. Appointments to the Council are based on an individual's skills, qualifications, experience and ability to contribute to the work of the Council. The Council currently has 11 members drawn from business, government, professional bodies and employee organisations.

**3.6.2** The Terms of Reference requires the review to consider the functions of the Council, which are set out in Division 3 of the Act. The Council summarises its tasks in the following terms:

The Council is responsible for:

- determining applications by occupational associations for professional standards schemes;
- advising the Attorney General about occupational standards;



- monitoring compliance by occupational associations with their risk management strategies, and
- publishing information and conducting forums to assist occupational associations to improve the standards of their members.

**Issues**

**3(g)** Are the functions assigned to the Professional Standards Council under the Act appropriate? Are there other areas where the Council should be acting?

**3(h)** Is the Professional Standards Council working effectively?

**3(i)** Have there been any difficulties with the administration of the Act in practice?

# 4 THE “MARKET” AND REGULATORY OPTIONS

## 4.1 Concept of a “market”

4.1.1 The Australian Competition Tribunal has endorsed a standard definition of a market as:

....the area of close competition between firms or the field of rivalry between them (if there is no competition there is of course a monopolistic market). Within the bounds of a market there is substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be competition, at least in the long run, if given a sufficient incentive.

## 4.2 The “market” for the *Professional Standards Act*

4.2.1 For some pieces of legislation, identification of the market is a relatively straightforward matter because the legislation deals with a single occupation, profession or industry. The *Professional Standards Act* affects markets for services provided by members of occupational groups. Under the Act, “occupational group” includes a professional group and a trade group.

4.2.2 The Act defines an “occupational association” as a body corporate that represents the interests of persons who are members of the same occupational group, the membership of which is limited principally to members of that occupational group. Any occupational group may form an association and register under the *Associations Incorporation Act 1984*. The association could then apply for approval of a scheme under the *Professional Standards Act*.

4.2.3 In these circumstances, it is difficult to identify the “market”, given that the Act does not operate in a single market for occupational services but affects many disparate markets for occupational services. Any anti-competitive effects of the Act need to be considered across a range of markets because services provided by one occupational group cannot be readily substituted for another.

4.2.4 Occupational groups covered by schemes under the Act may compete with each other in some circumstances (eg. solicitors compete with accountants in some areas of work). However, competition is more likely to occur between members of

a particular occupational group, including members who have joined a scheme and members who have not.

**4.2.5** The Act potentially affects a large number of individuals providing occupational services. In its Annual Report for 1999, the Professional Standards Council estimated that over 11,000 individuals are subject to schemes approved under the Act. Services provided by occupational groups covered by these schemes are significant to the economy. There is potential for growth within current schemes and potential for other occupational groups to submit schemes to the Council.

**4.2.6** The “market” may also be viewed in terms of the problem the Act was designed to address. The Act may be seen as a tool to address a failure in the market for members of occupational groups to obtain insurance (or adequate insurance) against liability arising from the practice of their occupation.

#### Issues

**4(a)** What is the “market” affected by the Act? If there is more than one market, how may they be identified and what are their characteristics?

### 4.3 Characteristics of markets for occupational services

**4.3.1** An underlying assumption of Competition Policy is that in general competitive markets will result in the provision of the quantity and quality of products and services that maximise the benefits for society. Competition generally promotes efficient markets and gives incentives for innovation. Intervention may be justified to correct market failures or to take account of equity considerations.

**4.3.2** Different forms of market failure exist. Two that are relevant to markets for occupational services are spill-overs and information asymmetry.

**4.3.3** A spill-over refers to a situation where social costs and benefits of an activity exist but are not reflected in the market transaction. For example, when an engineer erects a faulty building or an accountant conducts a flawed audit, there is far more at stake than just the interests of the direct client.

**4.3.4** Information asymmetry refers to a situation where consumers do not have the same knowledge about products or services as providers of those products or services, resulting in an inequality of bargaining power and consumer choices based on incomplete or inaccurate information. Providers of occupational services generally possess far greater knowledge than their clients, given their specialist training. Spill-over and information asymmetry may be seen as two of the justifications for the *Professional Standard Act*.

**4.3.5** In an imperfect market, some restrictions on competition will have both negative and positive effects. For example, restrictions on entry into an occupation may inhibit competition and drive up prices, but they also exclude unqualified persons who may be a risk to the public. Additionally, controls on conduct may stifle creativity and innovation, but they also minimise the likelihood of malpractice and provide redress for consumer complaints. The cost and benefits of restrictions must therefore be carefully weighed.

**Issues**

- 4(b)** What market failure is the Act attempting to address? Is the Act successful in addressing the failure?
- 4(c)** What effect do schemes under the Act have on the competition in, and the operation of, markets for occupational services?

## **4.4 Regulatory options**

- 4.4.1** New South Wales and Western Australia are the only two states with professional standards legislation. The Western Australian Act is based on the New South Wales Act. Other states do not have legislation which allows the introduction of schemes that would see the capping of liability.
- 4.4.2** The Terms of Reference require the review to consider whether there are alternatives to the *Professional Standards Act*.
- 4.4.3** One option is to keep the Act as it stands. To justify this option under Competition Policy, it must be demonstrated that the benefits of the restrictions on competition to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.
- 4.4.4** An alternative is to repeal the Act. This alternative must be considered if the costs of restrictions on competition to the community outweigh the benefits. It may also be a consideration if the objectives of the Act are no longer relevant.
- 4.4.5** A third alternative is to retain the Act, but with some amendments to reduce the restriction on competition. Such amendments may include increasing the minimum cap, removing some of the exceptions, or making schemes apply to all classes within an occupational association.
- 4.4.6** Other alternatives include the introduction of licensing schemes for occupational groups; reviewing the law of tort; reviewing the law relating to joint and several liability; or allowing members of professional groups to incorporate. It could be argued that where a licensing scheme already exists, as in the case of solicitors, any cap on liability should form part of the licensing scheme, rather than be set under the generic provisions of the Act.
- 4.4.7** Non-legislative alternatives may also exist. For example, self-regulation in the form of an industry code of practice, or an information and education campaign to alert professionals and consumers to the need for insurance.
- 4.4.8** Mandatory industry codes of practice may also be prescribed under the *Fair Trading Act 1987*. These mandatory codes outline minimum standards of legal behaviour in respect of industry or sector-specific practices, and clarify the rights, obligations and expectations of the consumer/trader relationship to create greater certainty. However, such codes have limitations. In *Murphy & 112 Ors v Overton*

*Investments*<sup>8</sup>, the Court of Appeal considered the effect of mandatory codes in relation to the retirement village industry. In a unanimous judgement the Court held that an industry code does not override private duties and obligations created in contract between individual parties within that industry.

#### Issues

- 4(d)** Are there any features of the market(s) for professional services in New South Wales that warrant the existence of professional standards legislation, compared to jurisdictions that do not have similar legislation?
- 4(e)** What has been the experience of jurisdictions that do not have similar legislation, particularly in relation to:
- negligence claims against professionals and other occupational groups?
  - insurance premiums for professional indemnity insurance?
  - professional standards generally? For example, is the implementation of risk management practices less widespread?
  - processes for resolving consumer complaint and disciplining members of occupational groups? For example, do these processes exist in other jurisdictions?
  - competition, consumer choice and the price and quality of services in markets for services provided by occupational groups?
- 4(f)** Would some alternative to the *Professional Standards Act* be preferable? If so, what is the alternative and why is it to be preferred?
- 4(g)** If the Act is retained, are there ways in which it could be improved?

## 4.5 Occupational licensing

**4.5.1** While the Act is voluntary in that it does not impose a requirement to establish a scheme or to belong to a scheme, the Act can be compared to statutes that directly regulate and license a particular profession, for example, the *Legal Profession Act*. The *Legal Profession Act* contains provisions relating to various aspects of the legal profession, including admission as a legal practitioner, practising certificates, business structures for legal practice, insurance requirements, legal professional and advisory bodies, trust accounts, and complaint and disciplinary mechanisms.

**4.5.2** While the objects of the Act do not include the creation of occupational licensing regimes, schemes under the Act have similar features to such licensing regimes. Licensing regimes generally cover all members of an occupational group (eg. solicitors and barristers), or all persons offering a particular type of service (eg. taxation). This ensures the public receives services that are uniform, predictable and comply with minimum standards. Schemes under the Act do not necessarily guarantee uniformity, predictability or minimum standards because schemes may

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<sup>8</sup> [1998] NSWSC 425

only apply to some classes of members within occupational associations and because members can be exempted from schemes.

**4.5.3** Nevertheless, the similarities between occupational licensing regimes and the schemes raises the issue of whether a duplication of regulation exists, that is, whether schemes under the Act duplicate to a degree, occupational licensing regimes. It also raises the issue of whether the main difference between schemes under the Act and occupational licensing regimes, is a statutory cap on liability.

**Issues**

- 4(h)** Do schemes under the Act duplicate to some extent, occupational licensing regimes?
- 4(i)** If the cap on liability is justified from the public interest perspective, should it be incorporated into the occupational licensing regime?
- 4(j)** Should schemes under the Act apply to members of occupational groups that are already subject to licensing schemes established by other legislation?
- 4(k)** Do other arrangements or pieces of legislation duplicate some of the same areas as the Act (eg. industry self-regulation schemes, licensing schemes, consumer protection and trade practices legislation)?

# 5 CAPPING

## 5.1 Introduction

**5.1.1** Chapter 5 of the Issues Paper examines more closely the main issues associated with the capping of liability.

## 5.2 Fairness

**5.2.1** The main criticism of capping is that it is unfair to consumers who use the services of members of occupational associations covered by the *Professional Standards Act*. Consumers badly damaged by a professional's negligence will have no reasonable redress if their loss exceeds the statutory cap. It is noted that many consumers do not have the ability to protect themselves from loss through insurance or risk management. Capping is therefore a departure from the principle that a plaintiff should be fully compensated for his/her loss.

**5.2.2** It is often seen as fundamental to justice that a blameworthy defendant should not escape liability for harm he/she has caused. The UK Department of Trade and Industry and the Canadian Bar Association have criticised capping on the basis that it offers unfair protection to defendants.<sup>9</sup>

**5.2.3** Capping may also be unfair to other defendants in cases of joint and several liability. Defendants who are not members of a scheme are exposed to full liability, but those against whom they may have a right to seek indemnity or contribution may be covered by a scheme and have limited liability. For example, company directors and auditors cannot rely on the Act because it specifically prevents them from covering liability under the *Corporations Law*, and will only have a limited right of recovery against an insurance broker if the broker is covered by a scheme, even if the broker was primarily responsible for the damage caused by wrong advice.

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<sup>9</sup> In its report, *Feasibility Investigation of Joint and Several Liability*, 1996, the UK Department of Trade and Industry stated (pp.47-49) that there was "no principled argument for a capping scheme – it simply benefits defendants at the expense of plaintiffs, when legally those defendants are liable for the wrongs done to those plaintiffs." In its submission to the Canadian Senate Inquiry into Joint and Several Liability, the Canadian Bar Association submitted that a capping scheme "lacks the perception of fairness which should be coherent in good law, as the cap is unlikely to properly reflect the damage or ability to pay." In the same inquiry, the Canadian Institute of Chartered Accountants argued that a capping scheme was "arbitrary and unfair." (See *Joint and Several Liability and Professional Defendants: Report of the Senate Committee on Banking, Trade and Commerce*, Canadian Senate, March 1998)

## 5.3 Deterrent effect

- 5.3.1 It may be argued that capping liability dilutes the deterrent effect on poor behaviour associated with exposure to full liability. Less principled members of professional groups may take shortcuts in their work in the knowledge that there is a cap on liability for any harm they cause.
- 5.3.2 While general tort law is not the primary tool for ensuring appropriate behaviour by members of occupational groups, the threat of large damages claims may modify behaviour to some extent.
- 5.3.3 It has also been argued that the existence of a cap on damages reduces the incentive to negotiate settlement of claims.

## 5.4 Lack of effectiveness

- 5.4.1 The Canadian Bar Association has argued that capping liability on the basis of a dollar amount is unlikely to be effective.<sup>10</sup> For class actions, the cap would apply on a global basis and may not provide sufficient recovery for members of the class, depending on the number of members in the class and the size of the claims.
- 5.4.2 It has been argued that a capped scheme means plaintiffs will at least receive some compensation for loss from an insurance policy. However, the existence of an insurance policy does not mean a successful plaintiff will recover the amount awarded. The insurer may, for example, disclaim liability based on non-disclosure by other members of the firm to which the policy relates.
- 5.4.3 The fact that the *Professional Standards Act* does not apply to all types of liability is also relevant to the issue of effectiveness. Claims are not covered if they relate to matters such as personal injury, breach of trust, fraud, dishonesty or breaches of the *Corporations Law*. It is considered inappropriate to cap liability in these instances. For example, if a solicitor fraudulently misappropriates \$700,000 from a client's trust fund, the amount the client may recover should not be limited to \$500,000. It is also considered inappropriate to cap a professional's liability for breaches of the law as this would send the wrong message. Members of schemes must therefore also consider additional liability that arise elsewhere. The Act may give a false sense of security to members of schemes, and a misleading message to consumers about their rights to sue for damages.

## 5.5 Forum shopping

- 5.5.1 Another criticism of the *Professional Standards Act* is that it encourages "forum shopping" because similar arrangements do not exist in other jurisdictions. A consumer may decide to commence proceedings in a jurisdiction where there is no cap on liability in the hope that he/she will be awarded higher compensation.

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<sup>10</sup> Canadian Bar Association, *Professional Liability*, November 1997, at p. 12



This is particularly true of claims that may be brought under Federal law. For example, tort claims for defective products may be framed as including a claim for misleading conduct under the *Trade Practices Act*. Many transactions between consumers and members of professional groups have a multi-jurisdictional character and differences between jurisdictions can also lead to distortions in the market.

## 5.6 Risk management and complaints handling

**5.6.1** It might be argued that any detriment to the public caused by capping is outweighed by the benefits associated with the complaints handling processes and risk management programs that are required under the Act. The Annual Report of the Professional Standards Council for 1999 details the risk management programs implemented by occupational associations covered by schemes. These risk management programs include codes of practice and ethics, quality management, claims monitoring and review, discipline of members, voluntary mediation services, and continuing education standards.

**5.6.2** It is difficult to know whether these complaints handling processes and risk management programs would have been implemented regardless of the introduction of the Act, due to factors such as pressure from consumers and insurers. Some occupational associations may already have had such systems in place. In other cases, licensing schemes may have required licensees to carry insurance and to be part of occupational complaints handling mechanisms.

### Issues

- 5(a)** In practice, has the cap on liability affected the level of compensation awarded against professionals who are members of approved schemes under the Act?
- 5(b)** In practice, have there been savings in insurance costs as a result of the cap? If so, have these savings been passed on to consumers?
- 5(c)** What are the costs and benefits associated with capping? Do the benefits outweigh the costs?
- 5(d)** Are the arrangements for capping under the Act, together with the requirements for complaints handling processes and risk management training, in the public interest?
- 5(e)** Would complaints handling processes and risk management programs have been implemented by the occupational associations covered by schemes in the absence of the Act?
- 5(f)** Is there evidence of “forum shopping”?

## 5.7 Amount of the statutory cap

**5.7.1** As mentioned before, the *Professional Standards Act* imposes a cap of \$500,000. However, many of the schemes under the Act have higher caps than the

statutory amount (see Appendix A for the amount of the caps under each approved scheme). For solicitors, the amount of the cap is linked to the number of principals in the law firm, while the schemes for surveyors, chartered accountants and some engineers is linked to the fee charged.

**5.7.2** The statutory cap has not been increased since the Act was introduced. This raises the question of whether a \$500,000 cap remains adequate.

**Issues**

**5(g)** Does the cap of \$500,000 set by the Act provide adequate protection for consumers? Should the figure be reviewed?

## **5.8 Disclosure of the cap**

**5.8.1** The Act requires members of schemes to disclose that their liability is capped on all documents given to clients or prospective clients. The Regulation made pursuant to the Act sets out the prescribed form of the disclosure in terms of the wording and print size to be used. The Professional Standards Council has also developed an *Interim Policy Statement on the Disclosure of Limited Liability* to give guidance on how people subject to a professional standards scheme can meet their obligations to disclose that they have limited liability.

**5.8.2** Disclosure may assist consumers to choose between service providers, particularly given that members of occupational associations may be exempt from schemes. However, it is arguable that some consumers may not fully understand the ramifications of choosing a service provider whose liability is capped.

**Issues**

**5(h)** Are the requirements for a member of a scheme to disclose that his/her liability is capped adequate?

# 6 IMPACT ON COMPETITION

## 6.1 Introduction

**6.1.1** The Terms of Reference require the review to identify the nature of the restrictive effects on competition of the *Professional Standards Act*, and to consider whether the effects of the Act contravene the competitive conduct rules in Part IV of the *Trade Practice Act* and the *New South Wales Competition Code*. These instruments include a prohibition on the enforcement of exclusionary provisions, whether or not they are anti-competitive, and arrangements which have the effect of substantially lessening competition; proscription of horizontal price fixing as anti-competitive; and proscription of covenants which have the effect of substantially lessening competition.

**6.1.2** Chapter 6 of the Issues Paper discusses areas where the Act may impact on competition. The areas identified are not intended to be exhaustive or definitive. In looking at areas where the Act may impact on competition, it must be borne in mind that the guiding principle is that legislation should not restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

## 6.2 Restrictions on competition

**6.2.1** According to the National Competition Council, legislation may restrict competition if it:

- governs the entry or exit of firms or individuals into or out of markets;
- controls prices or production levels;
- restricts the quality, level or location of goods and services available;
- restricts advertising and promotional activities;
- restricts price or the type of input used in production process;
- is likely to confer significant costs on business; or
- provides advantages to some firms over others by, for example, shielding some activities from competitive pressures.

**6.2.2** The Council of Australian Government's Committee on Regulatory Reform<sup>11</sup> has suggested that the benchmark for a market for professional services is one which has no restrictions on:

- who can provide goods/services;
- ownership and control of business;
- personal conduct of providers;
- advertising and other information provision; and
- prices/fees charged for goods and services.

## **6.3 Possible areas of concern**

### **6.3.1 *Restrictions on who may provide services***

**6.3.1.1** The *Professional Standards Act* does not make schemes compulsory in the sense that a scheme may not apply to all classes of members within an occupational association and a person may be exempted from a scheme. However, it may be compulsory for members of an occupational group to join a scheme in order to practice. For example, an occupational association may require its members to join a scheme as a prerequisite to membership and right to practice. In the case of one particular occupational group, the cost of insurance without a cap is so high that there is no practical alternative but to join both the occupational association and scheme in order to practice with any form of insurance protection.

**6.3.1.2** Membership of schemes may also become compulsory due to other factors. For example, one particular occupational association considers its scheme to be voluntary, but encourages membership by withholding the right to use the qualification post-nominal unless a member of the association joins the scheme.

**6.3.1.3** Section 34 of the Act allows an occupational association to compel its members to hold insurance against occupational liability. This may apply regardless of whether a member of the occupational association is a member of a scheme. In addition to compulsory insurance, the imposition of fees, qualification levels and training requirements by some schemes may restrict competition by imposing additional compliance costs on practitioners.

**6.3.1.4** If consumers deal with professionals who are members of schemes, they must accept a cap on liability. However, consumers are assured of dealing with service providers who have insurance and risk management training, and consumers also have access to complaints handling mechanisms.

**6.3.1.5** If occupational associations require their members to have insurance, undertake risk management training, participate in complaints handling and disciplinary processes, and adhere to standards, whether or not they are members of a

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<sup>11</sup> Council of Australian Government's Committee on Regulatory reform, *Guidelines for the Review of Regulation of the Professions Under National Competition Policy*, 1999, at p.33.

scheme, the only difference between members and non-members of schemes could be the cap on liability.

#### Issues

**6(a)** Does the Act restrict competition by restricting who can provide services in markets for occupational services? Are the requirements relating to compulsory membership and compulsory insurance cover unnecessary restrictions on competition?

### 6.3.2 *Controls on price*

**6.3.2.1** The *Professional Standards Act* does not directly control prices, but it may impact on prices. If arguments in support of the legislation based on the cost of insurance are correct, it would suggest that the Act should have resulted in lower price structures than would otherwise have been the case.

#### Issues

**6(b)** Does the Act have restrictive effects on competition in markets for occupational services by affecting or distorting prices?

### 6.3.3 *Restrictions on conduct of members*

**6.3.3.1** The *Professional Standards Act* contains a model complaints and discipline code and schemes may adopt the code with modifications approved by the Professional Standards Council. The code contains provisions that include the power to caution or reprimand, impose conditions on practice, and to expel from the occupational association. Modifications to model code could include the power to suspend members from practice and to impose fines.

**6.3.3.2** While a complaints and discipline code may impose restrictions on the conduct of scheme members, it can also result in benefits for consumers, such as assured minimum standards and avenues for having grievances redressed.

**6.3.3.3** The complaints and disciplinary mechanisms supported by the Act also need to be examined to see whether they operate in practice to protect the interests of occupational groups ahead of consumers, and whether they duplicate other areas of the law, such as occupational licensing schemes and consumer protection and trade practices legislation.

**6.3.3.4** It is also noted that schemes apply to occupational groups that are already licensed, such as solicitors and surveyors, or to groups which are covered by professional associations that have their own rules, requirements for insurance, and complaints handling policies. In these circumstances, it might be argued that the only feature that distinguishes the schemes under the Act from other compulsory and voluntary arrangements already applying to members of occupational groups, is the cap on liability.

**Issues**

**6(c)** Does the Act restrict competition in markets for occupational services by restricting the conduct of members of schemes under the Act? Is the system of complaints and disciplinary procedures associated with the Act a restriction on competition?

### **6.3.4     *Advertising and the provision of information***

**6.3.4.1** The *Professional Standards Act* does not place any restrictions on advertising, other than requiring any advertisements to disclose the fact that a member of a scheme has limited liability. It would appear that the public interest is served by requiring such disclosure, because it ensures consumers are aware of the cap and the scheme. However, there is no requirement that the amount of the cap be disclosed. Where all or most members of an occupational group are members of a scheme and therefore subject to a cap, advertising the cap is of little benefit to consumers because there is no choice but to deal with a person whose liability is capped. Finally, the requirement may add to the business costs of scheme members.

**Issues**

**6(d)** Does the Act restrict competition in markets for occupational services by restricting the provision of information?

### **6.3.5     *Significant costs***

**6.3.5.1** The *Professional Standards Act* entails significant costs for those wishing to take advantage of it. Under the Regulation made pursuant to the Act, there is a \$5,000 fee to make an application for approval of a scheme, and a \$2,000 fee for renewal of a scheme. There is an annual fee of \$40 for each person who is a member of a scheme. The minimum annual fee is \$2,500.

**6.3.5.2** Other costs for occupational associations with a scheme include the cost of setting up and maintaining the required body corporate and setting up and administering the scheme, including developing and implementing a risk management program and complaints handling processes, and reporting to the Professional Standards Council. Individual scheme members bear the cost of compulsory insurance, attending risk management training, and any reporting required under the scheme. Occupational associations that do not have a scheme service, and occupational service providers who are not members of a scheme, may not have any of these significant costs.

**Issues**

**6(e)** What guidelines should be used in setting fees?

### 6.3.6 *Discriminating advantages*

- 6.3.6.1** It may be argued that the Act advantages some occupational groups over others. For example, occupational groups that are unable to form or belong to an incorporated association cannot take advantage of the cap on liability. Also, the cap may protect service providers with poor records who would otherwise cease providing services due to the cost of insurance, and the Act may be working against the public interest in this way.
- 6.3.6.2** Schemes may also confer a competitive advantage on members who compete with non-scheme members from the same occupational group, because limited liability may mean lower insurance costs. Also, consumers may choose to deal with scheme members because they are confident about the quality of services provided. However, this advantage should be weighed against the fact that scheme membership also imposes additional costs on participants, such as membership fees and participation in complaints handling processes.

#### Issues

- 6(f)** Do members of approved schemes have a competitive advantage or an unfair advantage over non-members? Does the Act unfairly discriminate against those occupational groups that are unable to organise into an incorporated association? Are service standards and quality for scheme members higher than that for non-members?
- 6(g)** How does the existence of schemes affect the market for occupational services, and occupational groups and service providers who choose not to belong to schemes?
- 6(h)** Is there any evidence that consumers choose to deal with scheme members over non-scheme members? Does the cap on liability for scheme members affect consumer choices?
- 6(i)** Does the Act impose any other restrictions on competition?
- 6(j)** Do the benefits of the restrictions on competition outweigh the costs, and can they be justified in terms of a net benefit to the community as a whole?
- 6(k)** Does the effect of the Act contravene the competitive conduct rules in Part IV of the *Trade Practices Act* and the *New South Wales Competition Code*?

# 7 LEGAL DEVELOPMENTS

## 7.1 Developments in tort law

**7.1.1** Chapter 7 of the Issues Paper discusses whether there have been any developments in the law that affect the review of the *Professional Standards Act*.

**7.1.2** A recent development in tort law is the extension of liability for pure economic loss suffered by third parties. The most recent High Court decision is *Perre v. Apand Pty Ltd*,<sup>12</sup> in which it was held that damages for economic loss can be awarded, even if there is no relationship between the plaintiff who has suffered economic loss and the person who has suffered physical damage caused by the defendant. Previously, the law required the existence of a relationship between the person suffering economic loss and the person suffering physical damage.<sup>13</sup>

**7.1.3** It would appear that liability for pure economic loss falls within the definition of “occupational liability”. This has a number of implications for arrangements under the Act. For example, it increases the number of people who may be able to take action against members of schemes, and may put the current insurance arrangements at risk. It raises questions about the efficacy of the requirement for members of schemes to disclose that they have limited liability, as third parties are potentially affected in addition to the client. It raises questions about the rationale of having schemes based on a multiple of the fee charged, given that no fee is involved for third parties and the fee charged to the client may bear no relationship to the economic damage inflicted on the third party.

### Issues

**7(a)** Does the development in tort law relating to liability for pure economic loss, or any other developments in the law, suggest a need to alter the approach of the *Professional Standards Act*?

<sup>12</sup> [1999] 73 ALJR 1190

<sup>13</sup> See *Caltex Oil (Australia) Pty Ltd v. Dredge “Willemstad”* (1976) 136 CLR 529



## Appendix A

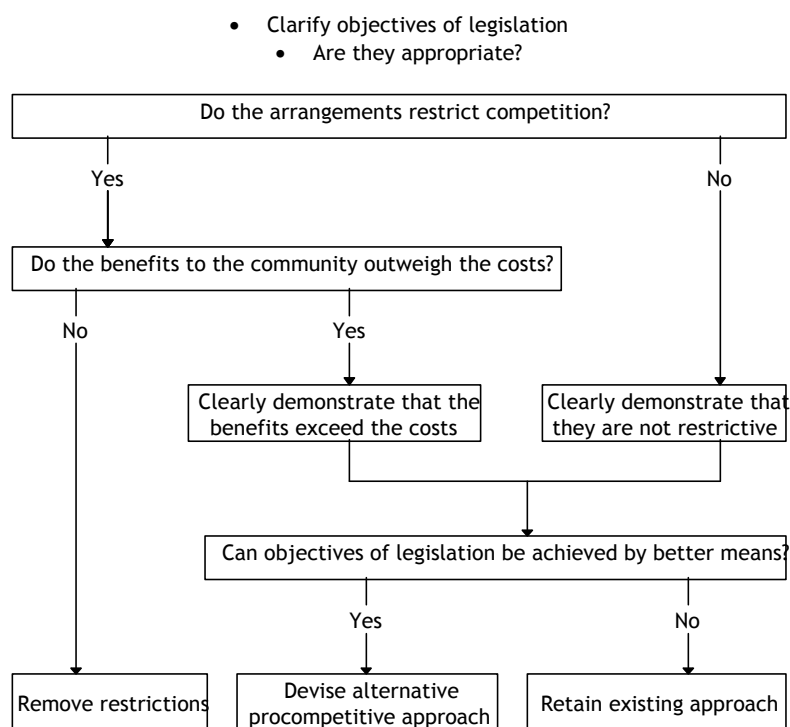
### SCHEMES CURRENTLY IN FORCE UNDER THE PROFESSIONAL STANDARDS ACT

Scheme Name	Cap and Minimum Cover	All Members or Class?	Exemptions Granted?
Accountants Scheme	Cap: \$50m Minimum cover: \$0.5m. For engagements with fees above \$50,000, the applicable amount is 10 times the fee.	Class	No
Solicitors Scheme	Cap: \$50m Minimum cover: \$1.5m. Applicable amount calculated based on firm size at \$0.5m per partner up to \$10m, or a higher amount if pre-selected.	Class	Yes*
Investigative and Remedial Engineers Scheme	Cap: \$3m. A cap of \$1m applies for a specified kind of work. Minimum cover: \$0.5m. Minimum amount applies unless a higher amount pre-selected.	Class	No
Professional Surveyors Scheme	Cap: \$1m Minimum cover: \$0.5m. Applicable amount based on pre-selected figure.	All	No

\* Clause 2.4 of the Solicitors Scheme provides that a person may, on application by the person, be exempted from the Scheme by the Law Society Council.

## Appendix B

### COMPETITION POLICY REVIEW FLOWCHART



## Appendix C

### CONSOLIDATED LISTED OF ISSUES

#### **Chapter 2: Background and operation of the Act**

- 2(a) Are the types of occupational liability covered by the Act appropriate? Should the Act be extended to cover other types of occupational liability?
- 2(b) Do the procedures for approving schemes provide for adequate consultation and accountability?
- 2(c) Is it in the public interest to allow occupational associations to exempt members from schemes?
- 2(d) Should schemes cover all members of an occupational group, or would such a requirement restrict consumer choice and competition?
- 2(e) Is the scope and content of existing schemes appropriate?

#### **Chapter 3: The objectives of the Act**

- 3(a) Are the policy objectives of the Act still valid?
- 3(b) Are the terms of the Act appropriate for securing those objectives?
- 3(c) Should the objectives be prioritised and if so, what should the ordering be?
- 3(d) Is there a need for legislative clarification or modification of the objectives?
- 3(e) Are the problems outlined in section 3.4 significant or severe enough to warrant legislative intervention?
- 3(f) In practice, has the Act adequately addressed the various problems it was introduced to address?
- 3(g) Are the functions assigned to the Professional Standards Council under the Act appropriate? Are there other areas where the Council should be acting?
- 3(h) Is the Professional Standards Council working effectively?
- 3(i) Have there been any difficulties with the administration of the Act in practice?

#### **Chapter 4: The “market” and regulatory options**

- 4(a) What is the “market” affected by the Act? If there is more than one market, how may they be identified and what are their characteristics?
- 4(b) What market failure is the Act attempting to address? Is the Act successful in addressing the failure?
- 4(c) What effect do schemes under the Act have on the competition in, and the operation of, markets for occupational services?
- 4(d) Are there any features of the market(s) for professional services in New South Wales that warrant the existence of professional standards legislation, compared to jurisdictions that do not have similar legislation?
- 4(e) What has been the experience of jurisdictions that do not have similar legislation, particularly in relation to:
  - negligence claims against professionals and other occupational groups?
  - insurance premiums for professional indemnity insurance?
  - professional standards generally? For example, is the implementation of risk management practices less widespread?
  - processes for resolving consumer complaint and disciplining members of occupational groups? For example, do these processes exist in other jurisdictions?
  - competition, consumer choice and the price and quality of services in markets for services provided by occupational groups?

- 4(f) Would some alternative to the *Professional Standards Act* be preferable? If so, what is the alternative and why is it to be preferred?
- 4(g) If the Act is retained, are there ways in which it could be improved?
- 4(h) Do schemes under the Act duplicate to some extent, occupational licensing regimes?
- 4(i) If the cap on liability is justified from the public interest perspective, should it be incorporated into the occupational licensing regime?
- 4(j) Should schemes under the Act apply to members of occupational groups that are already subject to licensing schemes established by other legislation?
- 4(k) Do other arrangements or pieces of legislation duplicate some of the same areas as the Act (eg. industry self-regulation schemes, licensing schemes, consumer protection and trade practices legislation)?

### **Chapter 5: Capping**

- 5(a) In practise, has the cap on liability affected the level of insurance premiums and the level of compensation awarded against professionals who are members of approved schemes under the Act?
- 5(b) In practise, have there been savings in insurance costs as a result of the cap? If so, have these savings been passed on to consumers?
- 5(c) What are the costs and benefits associated with capping? Do the benefits of outweigh the costs?
- 5(d) Are the arrangements for capping under the Act, together with the requirements for complaints handling processes and risk management training, in the public interest?
- 5(e) Would complaints handling processes and risk management programs have been implemented by the occupational associations covered by schemes in the absence of the Act?
- 5(f) Is there evidence of “forum shopping”?
- 5(g) Does the cap of \$500,000 set by the Act provide adequate protection for consumers? Should the figure be reviewed?
- 5(h) Are the requirements for a member of a scheme to disclose that his/her liability is capped adequate?

### **Chapter 6: Impact on competition**

- 6(a) Does the Act restrict competition by restricting who can provide services in markets for occupational services? Are the requirements relating to compulsory membership and compulsory insurance cover unnecessary restrictions on competition?
- 6(b) Does the Act have restrictive effects on competition in markets for occupational services by affecting or distorting prices?
- 6(c) Does the Act restrict competition in markets for occupational services by restricting the conduct of members of schemes under the Act? Is the system of complaints and disciplinary procedures associated with the Act a restriction on competition?
- 6(d) Does the Act restrict competition in markets for occupational services by restricting the provision of information?
- 6(e) What guidelines should be used in setting fees?
- 6(f) Do members of approved schemes have a competitive advantage or an unfair advantage over non-members? Does the Act unfairly discriminate against those occupational groups that are unable to organise into an incorporated association?

- Are service standards and quality for scheme members higher than that for non-members?
- 6(g) How does the existence of schemes affect the market for occupational services, and occupational groups and service providers who choose not to belong to schemes?
  - 6(h) Is there any evidence that consumers choose to deal with scheme members over non-scheme members? Does the cap on liability for scheme members affect consumer choices?
  - 6(i) Does the Act impose any other restrictions on competition?
  - 6(j) Do the benefits of the restrictions on competition outweigh the costs, and can they be justified in terms of a net benefit to the community as a whole?
  - 6(k) Does the effect of the Act contravene the competitive conduct rules in Part IV of the *Trade Practices Act* and the *New South Wales Competition Code*?

#### **Chapter 7: Legal developments**

- 7(a) Does the development in tort law relating to liability for pure economic loss, or any other developments in the law, suggest a need to alter the approach of the *Professional Standards Act*?