

Your ref:  
Our ref:  
Contact: Mr B Marden (Sydney)  
Telephone: 02 9228 7176  
Email: [bernie\\_marden@agd.nsw.gov.au](mailto:bernie_marden@agd.nsw.gov.au)

## NATIONAL OFFICE

The Secretary  
Trade Practices Act Review  
Department of the Treasury  
Langton Crescent  
PARKES ACT 2600

### SUBMISSION TO THE REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974

The Professional Standards Council is concerned about the impact of the Trade Practices Act on the operation of schemes approved by the Council. Consumer interests would be served by the Trade Practices Act recognising schemes.

The Council is constituted under the Professional Standards Act 1994 (NSW) and the Professional Standards Act 1997 (WA). This world leading legislation was introduced into those states with bipartisan support, and in WA as a product of a joint parliamentary committee. The objects of the legislation 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 of professionals 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 the protection of consumers.

The impetus for the development of this legislation was a review of professional liability in 1988. An Issues Paper prepared by the NSW Attorney General's Department was released in September the following year. Its wide circulation brought extensive comment on the issues, and a Discussion Paper was subsequently produced and then released in April 1990. That Paper, titled 'Professional Liability, Insurance and Risk Management' outlined a proposal to introduce limited liability tied to significantly increased consumer protection. The response to the Discussion Paper was extraordinary. The proposal received wide support from professional associations. Consumer organisations and other bodies supported the proposal in recognition of the need for the community to address the liability and insurance problem, and the benefits offered to consumers.

In many areas of the law, standards of reasonableness determine whether a service provider is found to be a wrongdoer, and assumptions about the availability of insurance are of practical influence. There has been a trend to make professional people the insurers of the financial wellbeing of persons and



GENERAL ENQUIRIES **1300 555 772**  
[psc\\_excellence@agd.nsw.gov.au](mailto:psc_excellence@agd.nsw.gov.au)  
[www.lawlink.nsw.gov.au/psc](http://www.lawlink.nsw.gov.au/psc)

**NATIONAL OFFICE**  
Level 15 Goodsell Building  
8- 12 Chifley Square SYDNEY NSW 2000

WA OFFICE: DEPARTMENT OF JUSTICE  
16TH FLR 141 ST GEORGE'S TCE PERTH WA 6000  
TEL 08 9264 1076 FAX 08 9264 1077

GPO Box 6 SYDNEY 2001  
Phone 02 9228 8060 Fax 02 9228 8066

corporations who, in a free market, take risks to pursue profits. Professional people are paid to give conscientious and skilful advice. However, if the practical operation of the law provides that they warrant or insure the financial wellbeing of their clients, then naturally they will charge accordingly.

Professionals who are subject to a high level of financial risk may adopt practices which are characterised by an excessive degree of caution, with detrimental consequences for the client. Such defensive practices do not enhance outcomes for consumers. Increasing claims and increasing insurance premiums have resulted in an alarming number of professional practitioners choosing to reduce their insurance or to go uninsured. The problem is exacerbated in recent times as the Australian insurance market shrinks and professionals are forced to purchase insurance from overseas because it is unavailable in Australia. That insurance is thus outside the regulatory structures administered by the Australian Prudential Regulatory Authority and without the protection offered by that regulatory regime. The prospect of clients recovering rightful damages is diminished by the capacity of the professional to meet a valid claim, depending on the level of indemnity insurance and the professional's personal assets. Professionals, clients, nor the community benefit from the long term consequences of such a situation.

Limiting professional liability is widely recognised and accepted as being appropriate. It is also recognised that it is essential that regard is had for the public interest and the interest of clients. Professional standards legislation provides a means to limit that liability and, at the same time, to protect consumers of such services. The de facto cap on damages determined by the capacity of defendants to pay is replaced with a statutory cap tied to a number of safeguards to protect the interests of clients.

Limited liability of itself is not sufficient to address the liability and insurance problems confronting the professional services market. It must be accompanied by a supporting focus on improving professional standards through the effective use of risk management strategies, including effective codes of ethics and complaints and discipline systems, quality assurance and risk management programs, continuing education, and so on. The professional standards legislation focuses on risk management. It is a system predicated on self-regulation. A primary function of the Professional Standards Council is to encourage and assist the development of self-regulation. It is self-regulation that is underpinned by legislation.

The Cover of Excellence™ schemes approved under the professional standards legislation - the mechanism by which professional associations function under the Professional Standards Act - present to the insurance market an attractive pool of insurable professionals. They are attractive to insurers because they are actively managing their risk through structured risk management strategies and there is greater certainty about the level of their risk exposure. Schemes have been approved in NSW for engineers, accountants, surveyors, lawyers and valuers.

The capacity of professional standards legislation would be improved with the introduction of a national system of legislation. However, more particularly there is a need to arrest statutory liability that is sometimes used as an alternative to common law liability. For example, 'misleading and deceptive conduct', as provided in federal trade practices legislation, might sometimes be used to undermine the proper operation of professional standards legislation

and thus diminish the capacity of professional standards legislation to appropriately and effectively manage risk and professional indemnity insurance costs, and to protect consumers. It can be expected that such an adverse outcome for consumers was not envisaged for the trade practices legislation.

Professional indemnity and other insurance are a significant business cost. Those that properly insure better serve and protect consumers. Those that are covered by Cover of Excellence™ schemes under the Professional Standards Act are further enabled to contribute to the public benefit.

Compulsory insurance is a feature of all schemes approved by the Professional Standards Council. The schemes cap liability of professionals and other occupational groups when the person is subject to the scheme and has insurance of not less than the amount of the applicable cap as specified in the scheme.

The Council determines those caps having regard for the nature and amount of past claims and for the need to protect consumers. The schemes provided a proper basis for determining levels of insurance that are adequate for ensuring that consumers are protected. Participants ought able to be confident as to the extent of their liability and thus that they have adequately insured.

However, claims for “misleading and deceptive conduct” under the Trade Practices Act are increasingly made as an alternative to a claim of negligence. Common law claims are within the jurisdiction of the Professional Standards Act, but the prospect of an alternative “misleading and deceptive conduct” claim is perceived by insureds as a threat and for which they are forced to purchase additional insurance cover above the level that would otherwise be required under an approved scheme. That adds to their operating costs. That diminishes their capacity to compete.

Thus, the operation of the Trade Practices Act potentially devalues schemes under the Professional Standards Act, and so impacts on the capacity of professional standards legislation to achieve its public policy objectives of improving professional standards, reducing risk and protecting consumers.

An imperative of the trade practice legislation is to provide a public benefit. Both the public benefit and competition would be better served where the trade practice legislation recognises schemes approved under the Professional Standards Act.

It could be argued that not all conduct that misleads and deceives should fall within the protective ambit of schemes under the Professional Standards Act. It is instructive that damages for fraud or dishonesty are not capped under the Professional Standards Act. Therefore, it may be that the Trade Practices Act should apply caps applicable under schemes where damages arise because of conduct that amounts to negligent conduct that consequently misleads and deceives, rather than conduct that was intended to mislead and deceive. Such an approach would take advantage of the work done by the Council in setting liability limits and its attention to consumer protection.

It is apparent to the Council that the perceived threat of the Trade Practices Act to schemes is having an adverse impact on the capacity of the Professional Standards Act to achieve its objectives. It is unreasonable that the Trade Practices Act behaves as a disincentive for professions and other occupations to

become involved in consumer protection initiatives such as schemes under the Professional Standards Act when they are undermined by the Trade Practices Act. The opportunity for forum shopping provided by the trade practices provisions and which, apparently, is increasingly exploited by litigants, is contrary to the intended good purposes of the Trade Practices Act. It drives a wedge between federal and state consumer protection devices such as the Trade Practices Act and the Professional Standards Act . Instead, they should be complementary and harmonious in their operation for the public benefit.

I recommend that the Review consider how the Trade Practices Act should be amended to enable damages to be limited to levels that are consistent with those set by the Council for participants in schemes approved under the Professional Standards Act.

*Warwick Wilkinson*

Warwick Wilkinson AM  
Chairman  
10 July 2002