

**Background Paper No. 4**  
**Professional Indemnity Insurance**  
**(for the Legal and Medical Profession)**

**Prepared by the Insurance Council of Australia**

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# Professional Indemnity Insurance for the Legal Profession

## Introduction

This paper provides an overview of the different professional indemnity insurance (“PII”) schemes for solicitors currently operating in each State and Territory<sup>1</sup> of Australia.

Professional indemnity insurance protects consumers of legal services from loss arising from the negligence of a legal practitioner in the course of practice, and indemnifies the legal practitioner against damages arising from a claim for such loss.

The overview focuses on the following issues:

- Is the scheme compulsory for legal practitioners?
- What is the governing legislation?
- Which authority oversees the scheme?
- Which organisation underwrites the scheme?
- What are the legislative provisions relating to the pricing of premiums or the viability of the scheme?

This paper will focus on PII schemes for solicitors. In States/Territories with a fused profession, schemes may apply to both barristers and solicitors. However, many states have different schemes that apply to barristers due to some differences in liability laws and the structure of practice. It is also important to note that some solicitors are able to seek an exemption from holding PII, depending on their type of employment. This may include legal practitioners working in government or corporate sectors.<sup>2</sup>

This paper will not examine funds such as solicitors fidelity or guarantee funds that protect clients from loss due to a fraud or theft committed by a solicitor.

## New South Wales

In New South Wales, solicitors are regulated by the Law Society of NSW.<sup>3</sup> To practice in NSW, solicitors must have a minimum PII cover of \$1.5 million per claim.<sup>4</sup> Additional ‘Top Up’ insurance is optional.

The *Legal Profession Act 1987* (NSW) governs the PII requirements for solicitors in NSW.<sup>5</sup>

Under the *Legal Profession Act 1987* (NSW), the Law Society of NSW has the function of managing the PII requirements for NSW solicitors.<sup>6</sup> LawCover was established by the Law Society as a non-

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<sup>1</sup> The legal profession in Australia is a matter for the State and Territory jurisdictions and is thus primarily covered by State/Territory legislation although it may be affected by federal legislation.

<sup>2</sup> Refer to the appropriate State/Territory legislation for specific exemptions.

<sup>3</sup> *Legal Profession Act 1987* (NSW), sets out the statutory functions and powers of the Law Society, see for example ss 54, 57B

<sup>4</sup> See [www.lawcover.com.au](http://www.lawcover.com.au) and *LawCover Professional Indemnity Policy 2000/2001*, clause 5.

<sup>5</sup> See in particular, ss 39–47A

profit company and wholly owned subsidiary of the Law Society to discharge functions relating to PII.<sup>7</sup> LawCover oversees PII insurance for solicitors and manages the statutory Solicitors Mutual Indemnity Fund.<sup>8</sup>

In NSW the scheme is compulsory for legal practitioners. The Law Society Council must not issue a practising certificate to a solicitor not covered by an approved PII policy.<sup>9</sup> A PII policy is an approved insurance policy if, among other things, the insurer and the terms of the policy have been approved by the Attorney General by order in writing given to the Law Society.<sup>10</sup>

In addition to PII, all solicitors may be required, as part of their application for a practising certificate, to pay a fee that includes a contribution to the Solicitors Mutual Indemnity Fund.<sup>11</sup> This Fund was set up as a statutory mutual fund in 1987 as an alternative to accessing insurance through the commercial insurance market.<sup>12</sup> It sits alongside the PII scheme and can only be used for the purposes set out by legislation.<sup>13</sup> Essentially, this Fund exists to support or 'back up' the main PII scheme or may be used in lieu of it.

The NSW Attorney General retains power to conduct an investigation of the Fund at any time<sup>14</sup> and to approve and facilitate new arrangements for the scheme<sup>15</sup>.

The *Legal Profession Act 1987* (NSW) empowers the Law Society to negotiate with insurers to provide PII for solicitors.<sup>16</sup> Since 1 July 2001, the 'insurer' within the terms of the legislation, is American Re-Insurance Company, which underwrites the policy issued and managed by LawCover.<sup>17</sup> Optional 'Top Up' PII is also available from LawCover and is underwritten by Gerling Australia Insurance Company Pty Ltd and QBE Insurance (Australia) Ltd.<sup>18</sup>

From 1998 to 2000, the sole insurer of the LawCover PII scheme was HIH Insurance. After the appointment of provisional liquidators to HIH in March 2001, LawCover determined to use the unallocated funds in the Solicitors' Mutual Indemnity Fund as a 'rescue package' to meet the indemnity liabilities of solicitors in NSW.<sup>19</sup> Amendments were made to the *Legal Profession Act 1987* (NSW) to facilitate this determination, including a provision allowing for special levies to be imposed on solicitors to ensure that all HIH liabilities under LawCover could be met in full.<sup>20</sup>

In NSW PII is provided by a combination of the Solicitors Mutual Indemnity Fund and the private sector. There are no legislative provisions relating to the pricing of premiums.<sup>21</sup>

The legislation does not specifically make provision for the viability of the PII scheme. However, with the default of the underwriter, HIH, of the LawCover PII scheme in March 2001, viability was ensured

<sup>6</sup> s 41 *Legal Profession Act 1987* (NSW)

<sup>7</sup> A discussion of the activities of LawCover and its policy are available at [www.lawcover.com.au](http://www.lawcover.com.au)

<sup>8</sup> s 40 *Legal Profession Act 1987* (NSW); LawCover Press Release 19 September 2001

<sup>9</sup> s 31, 41(1) *Legal Profession Act 1987* (NSW).

<sup>10</sup> s 41 *Legal Profession Act 1987* (NSW).

<sup>11</sup> s 29, 31, 41(1) *Legal Profession Act 1987* (NSW)

<sup>12</sup> 22 39 – 47AB *Legal Profession Act 1987* (NSW); LawCover press release 19 September 2001, [www.lawcover.com.au](http://www.lawcover.com.au)

<sup>13</sup> s 44 *Legal Profession Act 1987* (NSW)

<sup>14</sup> s 47AA, 47AB *Legal Profession Act 1987* (NSW)

<sup>15</sup> See for example, s 47B(1) *Legal Profession Act 1987* (NSW). New arrangements were approved and facilitated by amendments to the *Legal Profession Act 1987* (NSW) after a provisional liquidator was appointed to HIH and other HIH group members on 15 March 2001.

<sup>16</sup> s 41(4) *Legal Profession Act 1987* (NSW).

<sup>17</sup> Schedule, *LawCover Professional Indemnity Policy 2001/2002*, available at [www.lawcover.com.au](http://www.lawcover.com.au)

<sup>18</sup> *LawCover Professional Indemnity Policy 2001/2002*, available at [www.lawcover.com.au](http://www.lawcover.com.au)

<sup>19</sup> Full details of the arrangements made are discussed in updates and press releases issued by the Law Society from 16 March to 19 September 2001, available at [www.lawcover.com.au](http://www.lawcover.com.au)

<sup>20</sup> ss 44A, 44B, 46A, sch 2A *Legal Profession Act 1987* (NSW)

<sup>21</sup> LawCover introduced a new pricing system on 1 July 2001, after consultation with members, based on firm size, claim experience and the member's own choice of excess: *LawCover Professional Indemnity, Premiums now made to measure* at [www.lawcover.com.au](http://www.lawcover.com.au)

by the existence and use of the Solicitors' Mutual Indemnity Fund. Legislative amendment was required to allow the Fund to be used for this purpose. The Fund itself is governed by several provisions in the Act, including several provisions to protect its viability: power to impose additional levies on solicitors to meet the liabilities of the Fund<sup>22</sup>, power to punish solicitors who do not pay levies<sup>23</sup> and power for the Attorney General to investigate the Fund to ensure its viability<sup>24</sup>.

## Australian Capital Territory

In the Australian Capital Territory, solicitors are regulated by the Law Society of the ACT.<sup>25</sup> To practise in ACT, solicitors must have a minimum PII cover of \$1.5 million per claim. Additional 'Top Up' insurance is optional.

In the ACT the scheme is compulsory for legal practitioners. The Law Society makes it a condition of issuing a practising certificate that a solicitor must hold an approved PII policy.<sup>26</sup>

The *Legal Practitioners Act 1970* (ACT) governs the PII requirements for solicitors in the ACT.<sup>27</sup>

Under the *Legal Practitioners Act 1970* (ACT), the Law Society of the ACT has the function of managing the PII requirements for ACT solicitors.<sup>28</sup> The Act gives the Law Society broad powers to negotiate with an insurer, approve an insurer, approve the terms of a PII policy offered by an insurer, impose conditions and vary or revoke its approval at any time.<sup>29</sup>

Pursuant to its powers under the *Legal Practitioners Act 1970* (ACT), the Law Society provides a choice of two PII schemes to ACT solicitors.<sup>30</sup> One scheme is compiled by Willis Australia ("the Willis scheme"), who negotiate with insurance companies each year to provide a competitive policy for solicitors. Currently, the Willis scheme is underwritten by QBE Insurance (Australia) Ltd (60%) and Gerling Australia Insurance Company Pty Ltd (40%).

ACT solicitors also have the choice of insuring with the NSW LawCover scheme, currently underwritten by American Re-Insurance Company.<sup>31</sup> Due to the appointment of provisional liquidators to the underwriter of the LawCover PII scheme, HIH, in March 2001, ACT solicitors covered by this scheme became dependent on the 'rescue package' developed by LawCover.<sup>32</sup> The inability of LawCover to finalise its policy offer before 1 July 2001 for the 2001/2002 year meant that all solicitors in the ACT took PII under the Willis scheme this financial year.

The Law Society of the ACT has also approved the Victorian PII scheme for firms that have offices in Canberra but are based in Victoria.

In the ACT, PII is required by legislation but is provided by the private sector according to market determinants. There are no legislative provisions relating to the pricing of premiums or to the viability of the scheme.

<sup>22</sup> ss 46, 46A *Legal Profession Act 1987* (NSW)

<sup>23</sup> s 47 *Legal Profession Act 1987* (NSW)

<sup>24</sup> ss 47AA, 47AB *Legal Profession Act 1987* (NSW)

<sup>25</sup> s 4 *Legal Practitioners Act 1970* (ACT)

<sup>26</sup> The Law Society has power to impose conditions on the issue of a practising certificate including that the holder have a specified type of insurance: s 33 *Legal Practitioners Act 1970* (ACT).

<sup>27</sup> See in particular, ss 75-80

<sup>28</sup> s 76 *Legal Practitioners Act 1970* (ACT)

<sup>29</sup> ss 76, 77, 83 *Legal Practitioners Act 1970* (ACT)

<sup>30</sup> The choice of dual schemes was introduced approximately 4 years ago: information obtained from discussions with the Law Society of the ACT.

<sup>31</sup> Schedule, *LawCover Professional Indemnity Policy 2001/2002*, available at [www.lawcover.com.au](http://www.lawcover.com.au)

<sup>32</sup> See [www.lawcover.com.au](http://www.lawcover.com.au)

## Queensland

In Queensland, solicitors are regulated by the Queensland Law Society.<sup>33</sup> To practise in Qld, solicitors must have a minimum PII cover of \$1.1 million per claim. Additional ‘Top Up’ insurance is optional.

In Queensland the scheme is compulsory for legal practitioners. The Law Society makes it a condition of issuing a practising certificate that a solicitor must hold an approved PII policy.<sup>34</sup>

The *Queensland Law Society Act 1952* (QLD) governs the PII requirements for solicitors in Queensland.<sup>35</sup>

Under the *Queensland Law Society Act 1952* (QLD), the Queensland Law Society has the function of managing the PII requirements for Queensland solicitors.<sup>36</sup> The Act gives the Law Society broad powers to make ‘Indemnity Rules’ to set out the requirements for indemnity insurance and the conditions on which it must be obtained, including the power to establish, maintain and manage on behalf of the society any scheme of PII.<sup>37</sup>

Pursuant to its broad powers under the *Queensland Law Society Act 1952* (QLD), the Law Society requires all solicitors to take out PII with a scheme managed and underwritten by The St Paul/APPIIL.<sup>38</sup>

In Queensland there are no legislative provisions relating to the pricing of premiums or to the viability of the scheme. The Law Society has the power to make rules regarding these issues under the *Queensland Law Society Act 1952* (QLD). However, currently the pricing of policies is determined by the underwriter of the PII scheme.

## Northern Territory

In the Northern Territory, solicitors are regulated by the Law Society of the Northern Territory.<sup>39</sup> To practise in the Northern Territory, solicitors must have a minimum PII cover of \$750,000 per claim. Additional ‘Top Up’ insurance is optional.

In the Northern Territory the scheme is compulsory for legal practitioners. The Law Society makes it a condition of issuing a practising certificate that a solicitor must be insured for professional indemnity.<sup>40</sup>

The *Legal Practitioners’ Act 1974* (NT) governs the PII requirements for solicitors in the Northern Territory.<sup>41</sup>

Under the *Legal Practitioners’ Act 1974* (NT), the Law Society of the Northern Territory has the function of managing the PII requirements for Northern Territory solicitors.<sup>42</sup> The Act gives the Law

<sup>33</sup> ss 4, 5 *Queensland Law Society Act 1952* (QLD)

<sup>34</sup> The Law Society has power to make rules for indemnity against loss arising from claims in respect of every description of civil liability incurred by a legal practitioner: ss 5A(1)(ha), 5A(1)(hc), 5A(5)-(8), 5H *Queensland Law Society Act 1952* (QLD). Details of the indemnity insurance are contained in the *Indemnity Rules*, made by the Society under these provisions.

<sup>35</sup> See in particular, ss 5A(1)(ha), 5A(1)(hc), 5A(5)-(8), 5H and the *Indemnity Rules* (held by the QLD Law Society).

<sup>36</sup> ss 5A, 5H *Queensland Law Society Act 1952* (QLD)

<sup>37</sup> s 5A(6)(h)-(l) *Queensland Law Society Act 1952* (QLD)

<sup>38</sup> This information was obtained from discussions with the Queensland Law Society.

<sup>39</sup> S 7 *Legal Practitioners’ Act 1974* (NT)

<sup>40</sup> Refer to *Professional Indemnity Insurance Renewal Information Paper* at [www.lawsocnt.asn.au](http://www.lawsocnt.asn.au). See also Legal practitioners (Professional Indemnity) Regulations 1980

<sup>41</sup> See in particular, ss 35A-35B *Legal Practitioners’ Act 1974* (NT). See also Legal practitioners (Professional Indemnity) Regulations 1980

Society broad powers to make arrangements with insurers and administer that insurance for solicitors.

Pursuant to its powers under the *Legal Practitioners' Act 1974* (NT), the Law Society has appointed Marsh Ltd to be the approved professional Indemnity insurance broker for NT solicitors. The insurer/underwriter for the PII scheme for the period 1 October 2001 to 30 September 2002 is Gerling Australia Insurance Company Pty Ltd.<sup>43</sup>

In the Northern Territory there are no legislative provisions relating to the pricing of premiums or to the viability of the scheme. The Law Society has the power to make rules regarding these issues under the *Legal Practitioners' Act 1974* (NT). However, currently the pricing of policies is determined by the insurer/underwriter of the PII scheme.

## Tasmania

In Tasmania, the Law Society of Tasmania regulates solicitors.<sup>44</sup> To practise in Tasmania, solicitors must have a minimum PII cover of \$1.1 million per claim. Additional 'Top Up' insurance is optional.

In Tasmania the scheme is compulsory for legal practitioners. The Law Society makes it a condition of issuing a practising certificate that a solicitor must hold approved PII.<sup>45</sup>

The *Legal Profession Act 1993* (Tas) governs the PII requirements for solicitors in Tasmania.<sup>46</sup>

Under the *Legal Profession Act 1993* (Tas), the Law Society of Tasmania has the function of managing the PII requirements for Tasmanian solicitors.<sup>47</sup> The Act gives the Law Society broad powers to make 'Indemnity Rules' to allow provision of PII for solicitors, including the negotiation and making of agreements or arrangements with insurers.<sup>48</sup>

Pursuant to its powers under the *Legal Profession Act 1993* (Tas), the Law Society has appointed Willis Australia to be the approved professional Indemnity insurance broker for Tasmanian solicitors. The underwriters for the current PII scheme in Tasmania are QBE Insurance (Australia) Ltd and Gerling Australia Insurance Company Pty Ltd.<sup>49</sup>

Under the *Legal Profession Act 1993* (Tas) there are no legislative provisions relating to the pricing of premiums or to the viability of the scheme. However, the Act gives the Law Society the power to make rules regarding these issues under the Indemnity Rules. Currently the underwriter of the PII scheme determines the pricing of policies.

<sup>42</sup> ss 35A-35B *Legal Practitioners' Act 1974* (NT)

<sup>43</sup> Refer to *Professional Indemnity Insurance Renewal Information Paper* at [www.lawsocnt.asn.au](http://www.lawsocnt.asn.au)

<sup>44</sup> ss 4-15 *Legal Profession Act 1993* (Tas); *Law Society Act 1962* (Tas)

<sup>45</sup> ss 51, 55C, 124 *Legal Profession Act 1993* (Tas). See also the Indemnity Rules made pursuant to the Act.

<sup>46</sup> See in particular, ss 124–126 *Legal Profession Act 1993* (Tas)

<sup>47</sup> ss 124-126 *Legal Profession Act 1993* (Tas)

<sup>48</sup> s 124 *Legal Profession Act 1993* (Tas)

<sup>49</sup> Information obtained from the Law Society of Tasmania.

## South Australia

In South Australia, the Law Society of South Australia regulates solicitors.<sup>50</sup> To practise in South Australia, solicitors must have a minimum PII cover of \$750,000 per claim. Additional ‘Top Up’ insurance is optional.

In South Australia the scheme is compulsory for legal practitioners. The *Legal Practitioners Act 1981* (SA) states that the Supreme Court of South Australia cannot issue a practising certificate unless the legal practitioner applying for the certificate holds an approved PII policy.<sup>51</sup> Although the Act appoints the Supreme Court to be the admitting authority, the Law Society of South Australia issues the practising certificates according to the conditions set by legislation.<sup>52</sup>

The *Legal Practitioners Act 1981* (SA) governs the PII requirements for solicitors in South Australia.<sup>53</sup>

Under the *Legal Practitioners Act 1981* (SA), the Law Society of South Australia has the function of administering the PII scheme for South Australian solicitors.<sup>54</sup> The Act gives the Law Society power to establish, with the approval of the Attorney-General, a PII scheme for legal practitioners, including the power to negotiate with insurers, impose levies and charges on members and other incidental powers.<sup>55</sup> The Law Society has established LawClaims as a subsidiary organisation, to undertake these obligations on its behalf.

Pursuant to its powers under the *Legal Practitioners Act 1981* (SA), LawClaims has appointed Willis Australia to be the approved professional indemnity insurance broker for South Australian solicitors. The underwriters for the current PII scheme in SA are QBE Insurance (Australia) Ltd and Lloyds of London.<sup>56</sup>

Under the *Legal Practitioners Act 1981* (SA) the Law Society has several powers relating to premiums and viability, including the power to impose premiums, levies, fees or other charges on solicitors in relation to the PII scheme.<sup>57</sup> The Law Society exercises this power to set premiums for PII, balancing the need for viability with the best interests of its members. This is done in consultation with the broker and underwriters of the scheme.

## Victoria

In Victoria, the Legal Practice Board regulates solicitors.<sup>58</sup> To practise in Victoria, solicitors must have a minimum PII cover of \$1.5 million per claim. Additional ‘Top Up’ insurance is optional.

In Victoria the scheme is compulsory for legal practitioners. The *Legal Practice Act 1996* (Vic) requires solicitors in Victoria to maintain PII in order to practise in that state.<sup>59</sup>

The *Legal Practice Act 1996* (Vic) governs the PII requirements for solicitors in Victoria.<sup>60</sup>

<sup>50</sup> ss 7-14 *Legal Practitioners Act 1981* (SA)

<sup>51</sup> s 19 *Legal Practitioners Act 1981* (SA)

<sup>52</sup> See [www.lssa.asn.au](http://www.lssa.asn.au)

<sup>53</sup> See in particular, ss 14, 16, 19, 52 *Legal Practitioners Act 1981* (SA)

<sup>54</sup> ss 14, 52 *Legal Practitioners Act 1981* (SA)

<sup>55</sup> s 52 *Legal Practitioners Act 1981* (SA).

<sup>56</sup> Information obtained from LawClaims, South Australia.

<sup>57</sup> s 52(2)(d) *Legal Practitioners Act 1981* (SA)

<sup>58</sup> ss 347-371 *Legal Practice Act 1996* (Vic)

<sup>59</sup> ss 224-226 *Legal Practice Act 1996* (Vic)

<sup>60</sup> See in particular, ss 224-229A *Legal Practice Act 1996* (Vic)



Under the *Legal Practice Act 1996* (Vic), the Legal Practitioners' Liability Committee is established to provide PII for Victorian solicitors.<sup>61</sup> It is empowered to enter into contracts of PII, gather information as required and administer the PII scheme.

The Legal Practitioners' Liability Committee operates the Liability Fund, established under the *Legal Practice Act 1996* (Vic), which is a self-funded and self-managed scheme.<sup>62</sup> There is no external underwriter for the Liability Fund.<sup>63</sup> Optional 'Top Up' insurance is not provided by the Committee but is provided by external insurers.

The *Legal Practice Act 1996* (Vic) provides that in determining premiums and excesses for contracts of PII, the Legal Practitioners' Liability Committee must take into account several factors. These factors include differences in risk relating to practitioners and types of matters, size of firms, past claims records and the solvency of the Liability Fund.<sup>64</sup> If the Committee determines that the amount of credit in the Liability Fund is insufficient to meet the liabilities of the Fund, it has power to order special levies to be imposed on solicitors.<sup>65</sup>

## Western Australia

The Legal Practice Board of Western Australia regulates legal practitioners in WA and the Law Society<sup>66</sup> administers arrangements for PI. To practise in WA, solicitors must have a minimum PII cover of \$1.5 million per claim. Additional 'Top Up' insurance is optional.

In Western Australia the scheme is compulsory for legal practitioners. In order to obtain a practising certificate in Western Australia all legal practitioners are required to hold PII.<sup>67</sup>

The Legal Practitioners (Professional Indemnity Insurance) Regulations 1995 (WA), enacted under the *Legal Practitioners Act 1893* (WA) govern the PII requirements for solicitors in WA.

Under the Legal Practitioners (Professional Indemnity Insurance) Regulations 1995 (WA) the Law Society of Western Australia has the power to make arrangements with insurers to provide PII for WA solicitors.<sup>68</sup> To discharge these obligations, the Law Society of Western Australia established Law Mutual (WA) in 1995 as a division of the Society. Law Mutual (WA) assists legal practitioners by obtaining competitively priced insurance coverage, administering the compulsory PII scheme, providing risk management education and claims settlement services.<sup>69</sup>

Two insurers, St Paul Insurance Australia and Allianz Australia, currently underwrite the scheme.

The Legal Practitioners (Professional Indemnity Insurance) Regulations 1995 (WA) contain provisions regarding premiums and viability of the scheme. The Regulations require premiums to be set and paid to the Law Society Council.<sup>70</sup> In addition, the Regulations empower the Law Society Council to impose levies on firms if it is of the opinion that the assets available for the PII scheme are insufficient to meet the liabilities of the scheme.<sup>71</sup>

<sup>61</sup> ss 234, 236 *Legal Practice Act 1996* (Vic)

<sup>62</sup> ss 230-233A *Legal Practice Act 1996* (Vic)

<sup>63</sup> Information obtained by telephone form the Legal Practitioners' Liability Committee.

<sup>64</sup> s 228 *Legal Practice Act 1996* (Vic)

<sup>65</sup> s 233A *Legal Practice Act 1996* (Vic)

<sup>66</sup> The Law Society of Western Australia is established as an incorporated association.

<sup>67</sup> ss 5, 6 Legal Practitioners (Professional Indemnity Insurance) Regulations 1995 (WA)

<sup>68</sup> s 4 Legal Practitioners (Professional Indemnity Insurance) Regulations 1995 (WA)

<sup>69</sup> See [www.lawsocietywa.asn.au](http://www.lawsocietywa.asn.au)

<sup>70</sup> s 7 Legal Practitioners (Professional Indemnity Insurance) Regulations 1995 (WA)

<sup>71</sup> s 8 Legal Practitioners (Professional Indemnity Insurance) Regulations 1995 (WA)

# Professional Indemnity Insurance for the Medical Profession

## Overview

Historically the medical profession has been able to obtain liability cover in Australia since the late 1800's. Such cover has provided medical practitioners with levels of professional indemnity (PI) to limit their potential exposure to common law damages arising in connection with the exercise of their profession.

Up until recently, PI for medical practitioners in Australia has not been compulsory. Rather practitioners have relied on provision of liability cover for the most part from medical defence organisations and in some cases from insurance companies.

There have been few insurers as opposed to Medical Defence Organisations entering the market to provide this cover. GIO Limited offered cover for a short period in the late 1980's and early 1990s. St Paul Insurance Australia is a recent entry (2000) and there are some underwriting agencies such as Macquarie Underwriting Pty Ltd and a recent entrant that provide contracts of insurance through a London underwriter.

All Australian Medical Defence Organisations<sup>72</sup> that are mutuals offer membership rather than a policy issued by these not-for-profit organisations. They offer discretionary and not contractual cover. This discretionary cover takes the organisations outside the requirement of APRA because they do not offer an insurance contract.

## New South Wales

In NSW, professional indemnity insurance for medical practitioners<sup>73</sup> will, for the first time, be compulsory under the *Health Care Liability Act 2001* (HCL Act).<sup>74</sup>

The HCL Act commenced on 5 July 2001, except for Part 3 dealing with professional indemnity insurance, which is yet to commence.

Professional indemnity insurance is defined in the Act as insurance against civil liability arising out of the provision of health care, and includes an agreement or arrangement for discretionary indemnity in respect of that liability (section 4, HCL Act).

The HCL Act also includes provisions setting limits on damages that may be recovered for injury or death caused by a health care provider (Part 2), and protects medical practitioners, registered nurses and certain health practitioners from civil liability when voluntarily providing health care to injured persons in an emergency (Part 4).

<sup>72</sup> MDOs will often take out insurance through a captive insurer or through other reinsurance arrangements

<sup>73</sup> 'Medical practitioner' is defined separately from 'health practitioner' in the HCL Act: section 4(1) notes that 'Medical practitioner' is defined under the *Interpretation Act 1987* (NSW) as a medical practitioner registered under the *Medical Practice Act 1992* (NSW). Section 4(3) of the HCL Act also provides that a reference to a medical practitioner includes the medical practitioner's practice company.

<sup>74</sup> For background detail, see the Second Reading Speech to the Health Care Liability Bill 2001, the Hon CJ Knowles MP, Minister for Health, *NSW Parliamentary Debates* (Legislative Assembly), 19 June 2001. See also NSW Parliamentary Library, *Medical Negligence and Professional Indemnity Insurance*, Background Paper 2/2001 by Rachel Callinan.

The objects of the HCL Act are:

- to facilitate access to fair and sustainable compensation for persons who sustain severe injuries from the provision of health care;
- to keep the costs of medical indemnity premiums sustainable, in particular by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injury, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities;
- to promote the reasonable distribution across the medical indemnity industry of the costs of compensation for persons who sustain severe injuries from the provision of health care;
- to facilitate the effective contribution by medical indemnity providers to risk management and quality improvement activities in the health care sector; and
- to enable the medical profession and the community to be better informed as to the costs of compensation for, and developing trends in, personal injury claims arising from the provision of health care (section 3, HCL Act).

Part 3 of the HCL Act (yet to commence) sets out the provisions for professional indemnity insurance for medical practitioners.

Section 19 of the HCL Act specifically provides that a person will not be able to practise as a medical practitioner unless the person is covered by approved medical insurance. Accordingly, the NSW Medical Board must not register a person as a medical practitioner unless it is satisfied that the person has such PI insurance, and it may cancel the registration of a person as a medical practitioner if the person is not covered by PI insurance. Further, practising as a medical practitioner without being covered by approved PI insurance is for the purposes of the *Medical Practice Act 1992*, unsatisfactory professional conduct.

PI insurance is approved if the kind and extent of the insurance (including any particular terms or conditions) have been approved by the Minister by order published in the Gazette (section 20, HCL Act).

The HCL Act regulates insurers<sup>75</sup> who are to provide approved PI insurance for medical practitioners as follows.

- An insurer must comply with certain data collection, reporting and risk management requirements (section 21).
- The Minister may impose additional requirements on an insurer by order published in the Gazette, and by such order may require an insurer to do certain things such as: provide insurance for all categories of specialty medical practice; provide insurance in accordance with specified rate relativities between different categories of medical practitioner; and comply with specified standards, including standards for risk management and claims handling (section 22).
- The Minister may by order published in the Gazette prohibit an insurer from providing PI approved insurance if satisfied that the insurer has failed to comply with any of the

<sup>75</sup> The HCL Act does not define insurer. However, 'professional indemnity insurance' is defined in the Act as insurance against civil liability arising out of the provision of health care, and includes an agreement or arrangement for discretionary indemnity in respect of that liability (section 4, HCL Act).

requirements under section 21, or under an insurance regulation order under section 22 (section 24).

- An authorised officer under the Act has certain powers of entry, inspection and investigation in relation to insurers to determine compliance with the Act, and in connection with the administration of the Act (section 29).

## Who Provides Cover

There are three main ways in which professional liability cover can be obtained and is set out in the table below.

Insured	Provider
Public hospitals and other public health care institutions	<p>Will usually be vicariously liable for doctors they employ. The cover is likely to be provided under a treasury fund from the State. Visiting medical officers are covered in all States for their public hospital work except NSW and there are some exceptions for the Obstetricians.</p> <p>As most interns, residents, registrars can get discretionary cover for matters not covered by the government indemnity for free (or almost for free) they take up the offer. It provides them with the advisory services and a useful sounding board when employer advice on particular concerns about cover is unclear</p>
Individual private doctors	Cover provided by Medical Defence Organisations and Insurers, usually the former.
Doctors employed by Private Health Providers	<p>They will usually be covered by an insurer under the hospital/institution policy. Occasionally there may be an agreement that the doctor will not be covered by that policy and he/she will have to purchase it separately or the institution may pay for the MDO fees.</p> <p>Most private hospital operators usually require an employed doctor to take out the discretionary cover available from an MDO. Discretionary cover will provide access for members to put forward matters for consideration which falls outside the normal cover.</p>

## Comparison of Medical Defence Organisations and Insurance

There are a number of differences between Insurers and Medical Defence Organisations. A comparison is provided in the table below.

Medical Defence Organisations	Insurance
Mutual not-for-profit organisations	Have shareholders who expect a profit
Discretionary cover	Commercial insurance products
Subscription fee paid for membership	Premium paid for the policy
Claims made cover (some exceptions)	Claims made cover
Indemnity may be granted for unlimited cover on each matter.	Indemnity is usually limited to a predetermined sum agreed in the policy and may be subject to an aggregate amount.
Medical advisory services are provided in part by other doctors employed or contracted to the organisation. Substantial in-house provision of legal advice is available in some of the organisations.	Limited advisory services are provided, and these tend to be legal advice rather than a mixture of legal and medical advice.
Will provide advice and consider assistance with legal representation for matters outside the traditional coverage, for example an MDO may choose to represent a doctor where allegations of sexual assault are made but not yet proven. They don't pay any damages but may fund part of the legal representation	Insurers are clear about what they will and don't include in cover and if sexual assault is not covered in the policy no assistance will be provided
MDOs are not subject to any regulation by APRA, or any legislation that affects <i>insurance</i> , although they may have to conform to any regulation/legislation that talks about <i>indemnity</i> if it does not specifically require the organisation to be a corporation.	The <i>Insurance Act 1973</i> (Cth), APRA standards, and the <i>Corporations Act 2001</i> (Cth) apply.
NSW will now be bound by the <i>Health Liability Act 2001</i> and this removes the distinction between insurer and MDO in terms of the application of this Act to the provision of insurance.	
Some regulation is provided for within the power of the Minister in power for the time being. However, the prudential regulation is yet to be determined both as to type and extent	
MDOs provide a lobbying role for their members at a number of political levels.	Insurance companies, do not as a rule, lobby for policy holders.
There is no requirement to provide IBNRs in the balance sheet.	IBNRs must be assessed.



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