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PROFESSIONAL INDEMNITY INSURANCE AND MINIMUM STANDARDS

WHAT EVERY BROKER SHOULD KNOW

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1 INTRODUCTION

1.1 Having adequate insurance is fundamental to every professional services business, whether that be in the health services sector or in the financial lines sector.

1.2 This is usually for any or all of the following reasons:

- (a) the professional cannot obtain a licence to practise their profession, without evidence of adequate professional indemnity insurance
- (b) the professional requires insurance that meets minimum standards prescribed under a capped liability scheme that applies to their profession, and/or
- (c) clients demand that their professional service providers have insurance of a particular standard.

1.3 The 'client demand' part of the equation is usually quite simple. It has been part of the industry for many years. For example, a valuer that is required to have a minimum of \$2 million professional indemnity cover; or an engineer required to have \$10 million cover. However, these requests are becoming increasingly complex and were the subject of the second Prorisk seminar series.¹

1.4 What is still relatively new and ever evolving, are the requirements for insureds to have insurance to meet a fundamental regulatory requirement; or to meet minimum insurance standard demanded by their capped liability scheme.

1.5 The consequences of not meeting either requirement are potentially disastrous for clients. They could lead to a business having to close its doors; or to enormous personal liabilities because the client is not able to obtain the benefit of a relevant capped liability scheme.

1.6 The purpose of this paper is to provide brokers with a working understanding of the more complex legal requirements regarding the regulation of professionals and the operation of capped liability schemes.

1.7 This paper will deal with financial lines, then the health professions sector.

2 FINANCIAL LINES - REGULATORY REQUIREMENTS

2.1 This paper is confined to the main financial lines professions, which are:

- lawyers
- financial planners
- stockbrokers
- engineers and surveyors

¹ The paper Contract Reviews by Brokers - is available on request.

- valuers and
- accountants.

2.2 Lawyers, financial planners, Engineers and surveyors are required to have insurance. An indicative guide of the minimum requirements, which vary from state to state, is as follows:

Profession	Minimum Insurance Requirement	Comments
Lawyer	<p>Must be insured by the Legal Practitioners Liability Committee (unless an exemption applies).</p> <p>Minimum: <u>\$2mil</u> with the LPLC</p>	<p>Part 3.5 <i>Legal Profession Act 2004</i> (Vic)</p> <p>Legal Practitioners' Liability Committee Contract of Professional Indemnity Insurance for Solicitors 2011/2012</p>
Financial Planner	<p>Where total revenue for financial services equals:</p> <ul style="list-style-type: none"> • <u>\$2mil or less</u>: Insurance required is \$2m for one claim and in the aggregate. • <u>Between \$2mil - \$20mil</u>: Insurance cover must at least equal the value of funds which are being invested for clients. Key concept is 'adequate cover'. • <u>Over \$20mil</u>: Insurance required is \$20mil <p>Cover must include indemnity for breaches of Ch 7 of the <i>Corporations Act</i> (including fraud and dishonesty by directors/employees)² AND cannot exclude awards pursuant to the External Dispute Resolution scheme (EDR).</p>	<p>Contained in Regulatory Guide 126 (Dec 2010).</p> <p><u>'Adequate cover' means:</u></p> <p>Limit of indemnity under the policy should cover a reasonable estimate of retail clients' potential losses.</p> <p><u>Consider:</u></p> <ul style="list-style-type: none"> • Worst loss per client • Number of claims that could arise from a single event
Builder - Domestic	<ul style="list-style-type: none"> • Cover required when the contract price is more than \$12,000. • Policy may limit liability to \$200,000 for all claims in respect of any one home including legal costs. • Policy must cover the building work to be carried out under the contract. • Cover must include indemnity loss/damage for non-completion, defective work, breach of warranty, failure to meet standard/quality of work as specified in contract, conduct of builder that contravenes a trade practices provision. loss of deposit/progress payment, costs of alternative accommodation and removal/storage costs. The policy may stipulate that the cover only applies if the builder dies, is insolvent 	<p>Government Gazette number S98 (23 May 2003).</p>

² Except for sole traders.

Profession	Minimum Insurance Requirement	Comments
	<p>or disappears.</p> <ul style="list-style-type: none"> • Non-structural defects - policy extends from the commencement day and ends no earlier than 2 years after the earlier of: <ul style="list-style-type: none"> • The completion date of building work • Termination of contract • All other loss/damage - policy extends from date of commencement and ends not earlier than 6 years after the earlier of: <ul style="list-style-type: none"> • The completion date of building work • Termination of contract • The policy may limit claims for non-completion of work to not more than 20% contract price. 	
Builder - Commercial	<ul style="list-style-type: none"> • Minimum cover required, is the lesser of: <ul style="list-style-type: none"> • Twice the turnover of the insured for commercial building work undertaken during the period of insurance or \$1 million, whichever is the greater; or • \$10 million. • Cover must include payment of the costs and expenses incurred by the insured with the consent of the insurer in defending or settling any claim and, in respect of any one claim, the policy may limit this sum to \$100,000.00 or 20% of the limit of indemnity, whichever is the greater. • Must hold a claims made and notified policy with one automatic reinstatement of the minimum level of cover. • Must cover TPA (now Australian Consumer Law) claims and must not exclude liability for loss and damage arising out of 'building work' as defined in <i>Building Act 1993</i> (Vic). 	<p>Government Gazette No S91 (12 May 2005).</p> <p>Note that demolishers are covered by a different regime.</p>
Surveyor	<ul style="list-style-type: none"> • Minimum cover required for: <ul style="list-style-type: none"> • Costs inclusive policy - \$1.5million for any one claim and in the aggregate • Costs exclusive policy: <ul style="list-style-type: none"> • At least \$1million for any one claim and in the aggregate; and • At least \$500,000 for defence costs for any one claim and in the aggregate. Must hold a claims made and notified policy with at least one automatic reinstatement of the minimum level of cover • Must cover TPA (now Australian Consumer Law) claims and must not exclude liability for loss and 	<p>Government Gazette No S91 (12 May 2005).</p> <p>Same cover required for building inspectors, draftspersons, quantity surveyors and engineers (civil, mechanical, electrical and fire safety).</p>

Profession	Minimum Insurance Requirement	Comments
	damage arising out of 'building work' as defined in <i>Building Act 1993</i> (Vic)	

2.3 The remaining professions are essentially self regulating when it comes to insurance. You are not required to have adequate insurance to have a licence to practice, but this is what you must have if you want to have the benefit of a capped liability scheme. As outlined above, it is also a basic requirement demanded by clients.

3 FINANCIAL LINES BUSINESS - CAPPED LIABILITY SCHEMES

3.1 Capped liability schemes started in NSW in 1994, when NSW enacted the *Professional Standards Act*. Following the collapse of HHH, a suite of tort law reforms enacted the same legislation throughout Australia, which harmonisation of these laws and regulations throughout Australia finally concluding in 2009.

3.2 The concept really is quite simple. Limitation of civil liability should create a stable market for professional indemnity premiums, which will benefit professions and clients alike. A key object is the improvement of professional standards.³

3.3 The gatekeeper for the capped liability scheme is the Professional Standards Council. A profession, via its occupational association⁴ makes a submission including extensive claims data to the Professional Standards Council, setting out an actuarial and market basis for limiting the civil liability of that profession.

3.4 The Professional Standards Council then reviews the proposed scheme and, if approved, sets minimum insurance standards to cover the limited liability. Those schemes are published on the website of the Professional Standards Council.⁵ For brokers, obtaining the minimum insurance standards takes a few more clicks than would be ideal. For

³ The objects of the Act are set out in section 3. They are:

(a) to enable the creation of schemes to limit the civil liability of professionals and others; and

(b) to facilitate the improvement of occupational standards of professionals and others; and

(c) to protect the consumers of the services provided by professionals and others; and

(d) to establish the Professional Standards Council to supervise the preparation and approval of schemes and to assist in the improvement of occupational standards and protection of consumers.

⁴ For example, the Law Institute of Victoria; Australian Property Institute; NSW Bar Association; CPA Australia

⁵ Current schemes are on this link -

http://www.lawlink.nsw.gov.au/lawlink/psc/ll_psc.nsf/pages/psc_schemes#current%20schemes

example, to obtain the minimum insurance standards for valuers in NSW, you have to click through to the API website and then some more.⁶

3.5 Each profession is then required to:

- purchase the insurance required by the minimum insurance standards⁷; and
- make sure the capping of their liability is made known to clients.

3.6 This requires making the capped liability clear on letterhead⁸ and regularly communicating to clients and prospective clients, such as in retainer agreements, the nature and scope of the capped liability scheme.

How does capped liability work in practice?

3.7 Capped liability is obviously only relevant when a professional receives a claim, that could exceed the amount of available insurance.

3.8 That professional is required to plead in its defence, that they have the benefit of a capped liability scheme. At that time the professional needs to prove that they have properly disclosed to clients that they have the benefit of a capped liability scheme.

3.9 This is where brokers and clients will be put under pressure. Sections 31 / 35 of the Professional Standards Act, oblige the client to establish that they have complied with the disclosure requirements of the capped liability scheme. That should be easy enough to do. Professionals should have the benefit of guidance from their professional association as to how to make adequate disclosure, but brokers practicing in this area sit idly by at their peril.

3.10 To properly assist their clients, brokers need to know:

- The minimum insurance standards that apply
- Whether or not the policy they are recommending meets those standards; and
- Tell their clients that they must comply with the disclosure requirements of the scheme, otherwise they risk voiding the benefit of the capped liability scheme.

3.11 This is significant. One of the most important benefits of capped liability, is that it takes the issue of personal liability of a professional off the table. At least that is the practical effect. All professionals should know that in giving advice they owe a personal duty to their clients, whether they give this advice as an employee of a corporation or not.

⁶ APIV minimum insurance standards are -
http://www.api.org.au/assets/media_library/000/000/152/original.pdf?1311550838

⁷ Required by s.29 of the Professional Standards Act

⁸ A guide to disclosure is on the PSC website. Importantly it directs a professionals that have the benefit of a capped liability scheme to disclose this "in all documents given to a client or a prospective client that promote or advertise their occupation. It is an offence not to disclose".

3.12 If liability of the individual and their employer is limited to the cap, then there is no prospect of an individual professional, having a liability for which they are uninsured. That is a significant incentive, to keeping good people in professions and as anecdotally, I could certainly say that a lot of good people have left a profession because they are concerned about their personal liability. So emotionally, capped liability is very important - it lifts the weight off the shoulders of an individual professional.

3.13 So it is very important that brokers understand the minimum insurance requirements and do their best to get them right.

So what does a broker need to do to get it right?

3.14 The minimum insurance standards are available on the Professional Standards Council website for each profession. They are also available on the websites of each professional association. Quite simply, if a broker is organising policies in that profession, they simply have to read the minimum insurance requirements and advise their clients accordingly.

3.15 Obviously your advice could range from:

- the policy does comply with the minimum insurance requirements
- it doesn't comply with the minimum insurance requirements or
- we don't know - seek legal advice.

3.16 It's a matter for each broking firm as to how they deal with these issues. It is a clear point of differentiation in the market. The same applies to underwriters.

3.17 Ideally the Professional Standards Council, insurers and the peak body for each profession (for example CPA; Australian Property Institute) can agree on, and publicise, which policies meet the minimum insurance requirements. Presently we are not there, or if we are, I don't know about it.

Capped liability schemes

3.18 A table summarising the key capped liability schemes is as follows:

The following list shows, by jurisdiction, where there are currently schemes in force [✓] or in the application process [○]. Click on the name of the association for relevant scheme documents.

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Accountants CPA Australia	✓	✓	✓	✓	✓	○	✓	✓
Institute of Chartered Accountants in Australia	✓	✓	✓	✓	✓	○	✓	✓
National Institute of Accountants	-	✓	-	-	-	-	-	-

Barristers	<u>The NSW Bar Association</u>	✓	✓	✓	✓	-	-	✓	✓
	<u>The South Australian Bar Association</u>	-	-	-	-	○	-	-	-
	<u>The Victorian Bar</u>	✓	✓	✓	-	-	-	✓	-
Building consultants	<u>Australian Society of Building Consultants</u>	-	○	-	-	-	-	-	-
Engineers	<u>Engineers Australia</u>	✓	✓	✓	✓	✓	✓	✓	✓
	<u>Investigative and Remedial Engineers (NSW)</u>	-	✓	-	-	-	-	-	-
Computer professionals	<u>Australian Computer Society</u>	✓	✓	✓	✓	-	-	✓	-
Solicitors	<u>Law Institute of Victoria</u>	-	-	-	-	-	-	✓	-
	<u>Law Society of NSW</u>	-	✓	-	-	-	-	-	-
	<u>Queensland Law Society</u>	-	-	-	✓	-	-	-	-
	<u>The Law Society of South Australia</u>	-	-	-	-	○	-	-	-
Surveyors	<u>Professional Surveyors</u>	✓	✓	✓	-	-	-	✓	-
Valuers	<u>Australian Property Institute Valuers Limited</u>	-	✓	-	-	-	-	-	-
	<u>Australian Valuers Institute Co-operative Ltd</u>	-	✓	-	-	-	-	-	-

3.19 Brokers need to be keenly aware as to whether or not the market can currently meet these minimum insurance requirements. In particular, the requirements for excesses will vary from insurance to insured.

3.20 Brokers need to be keenly aware as to what the requirements are, because agreeing to a higher excess than a minimum insurance standards, can void protection under the capped liability scheme.

3.21 It can do so, because if a member has purchased insurance that does not meet the minimum insurance standards, this should be disclosed to the client. Failure to make such disclosure, could result in your client's defence that it is entitled to the benefit of a capped liability scheme, fail.

3.22 Obviously this could lead to a substantial claim against a broker.

4 REGULATORY REQUIREMENTS - HEALTH PROFESSIONALS

4.1 The regulation of health professionals has recently gone through the most significant change since the introduction of mandatory regulation decades ago.

4.2 The Australian Health Practitioners Regulation Authority (AHPRA) was established on 1 July 2010. It is a national scheme that oversees the vast majority of health professions in Australia.⁹ Presently, AHPRA is responsible for regulation of the following professions:

- Medical.
- Dental.
- Nursing.
- Chiropractors.
- Osteopaths.
- Optometrists.
- Physiotherapists.
- Podiatrists.
- Psychologists.

4.3 Chinese medicine practitioners will become nationally regulated from 1 July 2012, along with health professionals with a specialty focus on Aboriginal and Torres Strait Islanders.

4.4 Each of these professions has a national board. Under the national law¹⁰, it is the responsibility of the national board for each profession to specify the required appropriate level of professional indemnity insurance.

4.5 A schedule of the minimum requirements for each of these professions is as follows:

⁹ See www.ahpra.org.au

¹⁰ See www.ahpra.org.au

PROFESSION	MINIMUM INSURANCE REQUIREMENT
Chiropractic	Minimum cover of \$10 million for any single claim and run off cover for 7 years after ceasing practice. ¹¹
Dental	Recto active cover and run off for "all aspects of practice" - cover would appear to be unlimited. ¹²
Medical	Complex - cover to be provided by an approved insurer. No limit is specified. ¹³
Nursing and Midwifery	Run-off cover. No specified limit. ¹⁴
Optometry	Unlimited retroactivity, run-off cover and two automatic reinstatements. Limit not specified. ¹⁵
Osteopathy	\$20 million minimum with one automatic reinstatement, unlimited retroactivity and run off cover with no exclusions regarding individuals scope for practice. ¹⁶
Pharmacy	Minimum \$20,000 for an single claim; run-off cover. ¹⁷
Physiotherapy	Adequate insurance cover organised in consultation with their insurer or insurance broker, given the "risk exposure associated with their practice". ¹⁸
Podiatry	Minimum of \$5 million; run off cover and assessment of whether or not PI Insurance is adequate having regarding to nature of practice. ¹⁹

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<http://www.chiropracticboard.gov.au/documents/default.aspx?record=WD10%2F66&dbid=AP&chksum=JkhaWTVJa%2B%2FUhR0sIkeg6w%3D%3D>

12

<http://www.dentalboard.gov.au/documents/default.aspx?record=WD10%2F84&dbid=AP&chksum=eyOZlh6%2F01m2pkt sPUEJRw%3D%3D>

13

<http://www.medicalboard.gov.au/documents/default.aspx?record=WD10%2F107&dbid=AP&chksum=oD3TxQ2nxbPyCE Fwz4EL8Q%3D%3D>

14

<http://www.nursingmidwiferyboard.gov.au/documents/default.aspx?record=WD10%2F141&dbid=AP&chksum=dCJR7bu TN87jPQtLVjPuDg%3D%3D>

15

<http://www.optometryboard.gov.au/documents/default.aspx?record=WD10%2F160&dbid=AP&chksum=zaqse9t6cBjK5oI UFH2dnw%3D%3D>

16

<http://www.osteopathyboard.gov.au/documents/default.aspx?record=WD10%2F176&dbid=AP&chksum=iJ%2FNlvQHaG sK9zjP2ddt5g%3D%3D>

17

<http://www.pharmacyboard.gov.au/documents/default.aspx?record=WD10%2F266&dbid=AP&chksum=9tYF1NmYIf3dY 9xhxGculg%3D%3D>

18

<http://www.physiotherapyboard.gov.au/documents/default.aspx?record=WD10%2F210&dbid=AP&chksum=vsddtaR2MF Vkrj3vYELCkA%3D%3D>

Psychology	Unlimited retroactive cover; run off and two automatic reinstatements. No minimum insured amount. ²⁰
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4.6 It is worth noting that:

- None of these required standards, mandate defence costs cover for inquiries. However, this is often the biggest exposure for your client and the one in most demand.
- The standards do vary between each profession. You simply have to read the minimum requirements. Hard copies of each of them are attached.
- A professional that does not comply with these requirements, can be prosecuted by the relevant board for unprofessional conduct.

So what is required of a broker?

4.7 Obviously a broker that provides a professional with a policy that does not meet this minimum level has not done a very good job.

4.8 All brokers involved in organising policies for health professionals, should be aware of these minimum requirements. If you provide a policy that does not comply, then obviously you are going to incur the wrath of your clients, as well as some potentially significant damages claims if a health professional is asked to stop practising for a period of time, because they do not have adequate insurance in place.

So can insurers and brokers warrant that the policy complies with the minimum requirements?

4.9 The short answer is they can if they want to, but they had better be sure that the policy does indeed comply. It is rare for a disciplinary board to actually endorse a particular policy. Boards generally do not like doing that. But what they will do is approve applications for clients that have a particular policy.

4.10 However, what insurers and brokers will know, is that health professionals they cover, have provided details of their insurance to their regulatory board and the insurance has been approved as meeting the minimum requirements.

4.11 We might get to a point where boards receive submissions from insurers/brokers and approve particular policies for, say, a one to two year period, but we are not there yet.

4.12 The kind of message can advise their clients about is as follows:

¹⁹

<http://www.podiatryboard.gov.au/documents/default.aspx?record=WD10%2F232&dbid=AP&chksum=znfrn3EWwTF0Q60yvYmgUQ%3D%3D>

²⁰

<http://www.psychologyboard.gov.au/documents/default.aspx?record=WD10%2F252&dbid=AP&chksum=hZRM5O3Si1tH4MWA8XI9%2FLw%3D%3D>

- The minimum insurance requirements specified by the [insert relevant board] are [insert details]. A copy is attached.
- Other clients disclose these insurance details in their application and these applications have been accepted.

5 HEALTH PROFESSIONS - REGULATION OF INSURANCE FOR HEALTH PROFESSIONALS

- 5.1 This section might get a bit technical, but the area of cover for medical malpractice and allied health professions is complex. Brokers that sell these policies have to do a bit of homework.
- 5.2 There is no capped liability scheme for health professionals. Capped liability relates to financial lines. However, there is a 'high cost claim scheme' that was introduced by the Federal Government to ease pressure on increased costs in medical malpractice.
- 5.3 On 1 January 2003, new medical indemnity legislation was implemented in Australia largely as a result of the provisional liquidation of United Medical Protection Limited and the increasing fear of exorbitant costs awards in medical negligence litigation. At the time of UMP's provisional liquidation, there was a real fear that almost 60% of Australia's doctors would find themselves uninsured for IBNR claims.
- 5.4 The primary purpose of the legislation - The *Medical Indemnity Act 2002 (CtH)* - MI Act - and *Medical Indemnity (Prudential Supervision and Product Standards) Act* - PSPS Act - was to increase the availability of medical services in Australia by ensuring that medical practitioners could gain access to a stable and more affordable insurance market.
- 5.5 The idea behind the legislation (which has subsequently undergone some minor amendments) was to effectively subsidise the medical insurance market by providing:
- IBNR indemnity, or partial indemnity, relating to conduct prior to 1 January 2003;
 - Requiring that MDOs fall under the prudential supervision of APRA;
 - Providing greater certainty for insurers by introducing various Commonwealth funded indemnities for high cost claims, exceptional claims and run-off cover claims.
- 5.6 The MI Act, and related legislation, is framed quite broadly as applicable to any health care related vocation. To be considered as a health care related vocation, there must be a requirement for registration in order to practise in any state or territory of Australia. It is safe to say that any of the 13 vocations requiring registration by the Australian Health Practitioner Regulation Authority (AHPRA) will be included as a health care related vocation under the MI Act.

These are:

- Chiropractic
- Dental
- Medical
- Nursing and Midwifery²¹
- Optometry
- Osteopathy
- Pharmacy
- Physiotherapy
- Chinese Medicine Practitioners
- Occupational Therapists
- Medical Radiation Practitioners
- Aboriginal and Torres Strait Islander Health Workers

5.7 The final four health professions listed above, will not come under the AHPRA banner until 1 July 2012. However, registration as a Chinese Medicine practitioner is already regulated in Victoria and would therefore fall under the MI Act.

Allied Health Professionals

MI Act

- 5.8 Under the MI Act, a medical indemnity insurer must be a body corporate authorised under section 12 of the *Insurance Act 1973* (Cth) or a Lloyd's underwriter within the meaning of the *Insurance Act 1973* (Cth). Most insurers, including underwriting agents, practicing in Australia would fulfil this requirement.
- 5.9 There are some benefits to be gained in falling within the mandate of the MI Act. The greatest benefit is access to the high cost claims scheme (the HCCS) which is set out in Part 2 Division 2 of the MI Act.
- 5.10 The HCCS provides insurers with a Commonwealth funded indemnity for claims which result in a liability which is greater than the threshold amount. When the legislation was first introduced, the threshold amount was \$2 million. Since 2005, the threshold amount has usefully been lowered to \$300,000 to reflect the limitations on recovery of damages following tort reforms.

²¹ Please note that midwifery is excluded from almost all sections of the MI Act.

- 5.11 The HCCS entitles the insurer to an indemnity to the value of 50% of the liability in excess of the threshold. For example, if the insurer was required to pay an award of damages of \$500,000, the insurer could seek an indemnity of \$100,000 from the Commonwealth (that is, \$500,000 less the threshold of \$300,000, divided by 2).
- 5.12 The main requirement for eligibility under the HCCS is that the insured must have had sufficient liability cover under their own contract of insurance. If for example the insured has liability cover for \$500,000 dollars, but the award of damages is \$600,000, the break down in liability would be as follows:
- Insurer - \$400,000
 - Commonwealth - \$100,000
 - Insured - \$100,000.
- 5.13 In effect, the HCCS is there to protect the insurer, rather than to give extra protection to the insured.

The exceptional claims indemnity scheme

- 5.14 This scheme only comes into effect where:
- The insured had liability cover for at least \$20 million; and
 - The insurer becomes liable to pay in excess of \$20 million.
- 5.15 In practice, the effect is that the Commonwealth will indemnify the insurer for 50% of claims worth between \$300,000 and \$20 million, and 100% of the claim in excess of \$20 million.

PSPS Act

- 5.16 There are also conditions imposed on insurers in the PSPS Act. Once again, the PSPS Act applies broadly to all health care related vocations.
- 5.17 The first requirement under the PSPS Act is that providers of medical indemnity cover, including all health care professionals, must be provided by a general insurer or a Lloyd's underwriter (as per the MI Act). Secondly, medical indemnity insurance must be provided in a contract of insurance. This effectively removed the old "mutual" structure and required all defence organisations to have what was called by some as an "insurance core".
- 5.18 Section 7A of the PSPS Act also imposes an obligation on an insurer to only charge reasonable premiums. There is no offence or civil penalty for a failure to do so, but it is possible that a breach of the Australian Consumer Law, or the unfair contract terms provisions of the *Australian Securities and Investment Commission Act 2001* (Cth), may arise if premiums are unreasonable.
- 5.19 The two other substantive requirements of the PSPS Act require:

- 5.20 An insurer to provide minimum liability cover of \$5 million (Part 3, Division 1 of the PSPS Act); and
- 5.21 An insurer to make a compulsory offer of retroactive and run-off cover (Part 3, Division 2).
- 5.22 This is why, when you have regard to the minimum standards mandated by the relevant disciplinary boards, that retroactive and run off cover is specified. Somewhat oddly, most Boards do not mandate \$5M minimum civil liability cover, but obviously it is in the interests of Underwriters to offer that cover as it entitles the insurer to the benefit of the High Costs Claims Scheme.
- 5.23 In respect of the above requirements, the PSPS Act provides that they are applicable to medical practitioners and other registered health professionals prescribed by the regulations. However, there are presently no other health care professionals prescribed for the purposes of Part 3 of the PSPS Act. Accordingly, insurers of allied health professionals are not presently required to adhere to the requirements contained in Part 3 of the PSPS Act. However, if they do comply, they can receive the benefit of the High Costs Claim Scheme described above.

Key points

- 5.24 Ownership of medical practices or other health practices, by non qualified businesses is becoming more common. Organising insurance for such organisations, is complicated. The professionals need to be separately insured. But what cover should the business organise?
- 5.25 Notably, the MI Act and PSPS Act do not prevent underwriters from providing vicarious liability cover to private clinics who employ or contract health professionals.
- 5.26 In a global sense, the MI Act and PSPS Act are applicable to insurance arrangements for allied health professionals, specifically those regulated by AHPRA. The general provisions which are applicable to insurers of allied health professionals are:
- The insurer must be a Lloyd's underwriter or an insurer within the meaning of the *Insurance Act 1973* (Cth);
 - The insurance arrangement must be made through a contract of insurance;
 - The insurer must only impose a reasonable premium; and
 - The insurer has access to the High Costs Claims Scheme.
- 5.27 However, the key operative provisions which apply to doctors, do not apply to allied health professionals as they have not been prescribed by the relevant minister. Those operative provisions require an insurer of doctors to meet the following criteria:
- The requirement to provide minimum \$5 million liability cover; and
 - The requirement to provide compulsory offers of run-off and retroactive cover.

5.28 Insurers can however obtain the benefit of the High Costs Claims Scheme in respect of allied health professionals. The scheme gives insurers an indemnity capped at 50% of any amount over \$300,000.²²

5.29 Yes this is complex. The key message for brokers is:

- Be familiar with the regulatory requirements for each health profession
- The law requires health cover to be written on a claims made basis
- Cover has to be provided by a reputable insurer
- The level of cover is relevant to not only compliance with the regulatory standard, but the ability of the insurer to participate in the High Costs Claim Scheme.

6 SUMMARY

6.1 Brokers need to be aware of when their client:

- is required as a condition of their practice, to have adequate insurance
- can obtain the benefit of a capped liability scheme.

6.2 With health professions, brokers need to be aware of the new national regulation scheme, and the fact that insurance requirements can alter from time to time, according to the discretion of the relevant regulatory board. Brokers need to keep up with those changes.

6.3 Brokers need to be aware of the relevant capped liability schemes and whether or not a particular policy complies with the minimum insurance standards. This can be complex, so readily refer a client or professional association for legal advice on the trickier issues.

6.4 Be careful about representing that a policy does or does not comply with minimum regulatory requirements - capped liability schemes. You can represent that a policy does comply with regulatory requirements or minimum insurance standards, but just make sure you get it right and keep up to date - this field is notorious for change.

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DLA Piper
October 2011

²² To be clear, a profession does not need to be prescribed, to claim the benefit of the High Costs Claims Scheme. Many consider this to be an unintentional loophole.