



New South Wales

Professional Standards Amendment Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Professional Standards Act 1994* as follows:

- (a) The definition of **occupational association** is amended to include associations that comprise members of more than one occupational group.
- (b) Existing provisions that extend an occupational liability limitation scheme to partners, employees and associates of members of an occupational association are broadened so as to extend a scheme to officers (including directors) of a corporation that is a member of an occupational association. The operation of those provisions is also clarified so that they will apply to limit a liability of partners, officers, employees and associates that arises in connection with the liability of the member of the occupational association.
- (c) The coverage of the Act is extended to liability arising from the negligence of legal practitioners in acting for clients in personal injury claims (which is currently specifically excluded from the operation of the Act).

- (d) Provisions dealing with the relevance to the cap on liability of the amount payable under a policy of insurance are amended to make it clear that the amount payable under a policy of insurance includes any excess payable under the policy.
- (e) An occupational liability limitation scheme will be permitted to specify a multiple, monetary ceiling or minimum cap for the purposes of the scheme by way of a formula that is to be applied to calculate the multiple, ceiling or cap.
- (f) Currently, an occupational liability limitation scheme can provide that the cap on liability provided for by the scheme is to be calculated as a multiple of the fee charged. An amendment will provide that if the multiple results in an amount that is less than the minimum cap provided for by the scheme, liability for damages will be limited to that minimum cap. A further amendment will allow a member of the scheme to rely on business assets alone (as an alternative to business assets together with an insurance policy) to establish ability to satisfy a claim.
- (g) The ability of an occupational liability limitation scheme to set different caps on liability for different situations will be enhanced by removing the existing limited grounds on which a scheme can differentiate between cases for this purpose, and by permitting the occupational association to assign a higher cap to a person covered by the scheme on the application of the person.
- (h) The ability of an occupational liability limitation scheme to set different insurance standards for members will be enhanced by widening the grounds on which an association can differentiate for this purpose.
- (i) The requirement for Ministerial approval for the conducting of forums and the establishment of committees by the Professional Standards Council will be removed.
- (j) Consequential savings and transitional provisions are enacted.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Professional Standards Act 1994* set out in Schedule 1.

Schedule 1 contains the amendments referred to in the Overview.

Schedule 1 Amendments

Schedule 1 [1] and [2] make the amendment referred to in paragraph (a) of the Overview.

Schedule 1 [6] and [7] make the amendments referred to in paragraph (b) of the Overview.

Schedule 1 [4] and [5] make the amendment referred to in paragraph (c) of the Overview.

Schedule 1 [9] and [10] make the amendments referred to in paragraphs (d) and (f) of the Overview.

Schedule 1 [11] makes the amendments referred to in paragraphs (e) and (g) of the Overview.

Schedule 1 [15] makes the amendment referred to in paragraph (h) of the Overview.

Schedule 1 [16]–[18] make the amendments referred to in paragraph (i) of the Overview.

Schedule 1 [19] and [20] make consequential savings and transitional amendments.

Schedule 1 [3], [8] and [12]–[14] make consequential amendments.

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New South Wales

Professional Standards Amendment Bill 2004

No. , 2004

A Bill for

An Act to amend the *Professional Standards Act 1994* to make further provision for the operation of schemes under that Act for limiting the occupational liability of members of occupational associations; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Professional Standards Amendment Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Professional Standards Act 1994 No 81

The *Professional Standards Act 1994* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 4 Definitions

Insert “or related occupational groups” after “group” in paragraph (a) of the definition of *occupational association*.

[2] Section 4, definition of “occupational association”

Insert “or those occupational groups” after “group” in paragraph (b) of the definition.

[3] Section 4 (2)

Insert at the end of section 4:

- (2) Notes included in this Act do not form part of this Act.

[4] Section 5 Occupational liability to which Act does not apply

Omit section 5 (1) (b).

[5] Section 5 (3)

Insert after section 5 (2):

- (3) Subsection (1) (a) does not operate to exclude from the operation of this Act liability for damages arising out of any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim.

[6] Section 18

Omit the section. Insert instead:

18 Officers or partners of persons to whom scheme applies

- (1) If a scheme applies to a body corporate, the scheme also applies to each officer of the body corporate.
- (2) If a scheme applies to a person, the scheme also applies to each partner of the person.
- (3) However, if an officer of a body corporate or a partner of a person is entitled to be a member of the same occupational association as the body corporate or person, but is not a member, the scheme does not apply to that officer or partner.

- (4) In this section: 1
officer: 2
- (a) in relation to a body corporate that is a corporation within 3
the meaning of the *Corporations Act 2001* of the 4
Commonwealth, has the same meaning as in that Act, and 5
 - (b) in relation to a body corporate that is not a corporation 6
within the meaning of that Act, means any person (by 7
whatever name called) who is concerned in or takes part in 8
the management of the body corporate. 9

[7] **Section 20A** 10

Insert after section 20: 11

**20A Extension of liability limitation to other persons to whom scheme 12
applies** 13

- (1) A limitation that applies under this Act to the occupational 14
liability of a person as a member of an occupational association 15
in respect of a cause of action (the *principal cause of action*) also 16
applies, in respect of the principal cause of action and any related 17
cause of action, to the liability of any other person to whom the 18
scheme concerned applies as a partner, officer, employee or 19
associate of the member (whether or not the other person's 20
liability is an occupational liability). 21
- Note.** Sections 18–20 provide for a scheme to apply to a partner, officer, 22
employee or associate of a member of an occupational association to 23
whom the scheme applies. 24
- (2) A *related cause of action* is a cause of action in respect of civil 25
liability of the other person arising (in tort, contract or otherwise) 26
directly or vicariously from anything done or omitted by that 27
person that caused or contributed to the loss or damage with 28
which the principal cause of action is concerned and that resulted 29
from the same or substantially the same event as that from which 30
the principal cause of action arose. 31
- (3) A reference in this section to a person who is a partner, officer, 32
employee or associate of a member of an occupational 33
association is a reference to a person who was such a partner, 34
officer, employee or associate at the time of the event that gave 35
rise to the principal cause of action. 36
- (4) A reference in this section to a limitation on liability that applies 37
to a person as a member of an occupational association includes 38
a reference to a limitation on liability that would apply to the 39
person if a cause of action relating to the liability were brought 40
against the person. 41

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- (5) In this section: 1
associate of a person means someone who is associated with the 2
person pursuant to the regulations under section 29 (4) (b). 3
officer: 4
(a) in relation to a body corporate that is a corporation within 5
the meaning of the *Corporations Act 2001* of the 6
Commonwealth, has the same meaning as in that Act, and 7
(b) in relation to a body corporate that is not a corporation 8
within the meaning of that Act, means any person (by 9
whatever name called) who is concerned in or takes part in 10
the management of the body corporate. 11
- [8] **Section 21 Limitation of liability by insurance arrangements** 12
Omit “cause of action” where firstly occurring. Insert instead “proceeding”. 13
- [9] **Section 21 (b)** 14
Omit the paragraph. Insert instead: 15
(b) under which the amount payable in respect of the 16
occupational liability relating to the cause of action 17
(including any amount payable by way of excess under or 18
in relation to the policy) is not less than the amount of the 19
monetary ceiling specified in the scheme in relation to the 20
class of person and the kind of work to which the cause of 21
action relates at the time at which the act or omission 22
giving rise to the cause of action occurred, 23
- [10] **Sections 22 and 23** 24
Omit the sections. Insert instead: 25
22 Limitation of liability by reference to amount of business assets 26
A scheme may provide that if a person to whom the scheme 27
applies and against whom a proceeding relating to occupational 28
liability is brought is able to satisfy the court: 29
(a) that the person has business assets the net current market 30
value of which is not less than the amount of the monetary 31
ceiling specified in the scheme in relation to the class of 32
person and the kind of work to which the cause of action 33
relates at the time at which the act or omission giving rise 34
to the cause of action occurred, or 35

- (b) that:
 - (i) the person has business assets and the benefit of an insurance policy that insures the person against that occupational liability, and
 - (ii) the net current market value of the business assets and the amount payable under the insurance policy in respect of the occupational liability relating to the cause of action (including any amount payable by way of excess under or in relation to the policy), if combined, would total an amount that is not less than the amount of the monetary ceiling specified in the scheme in relation to the class of person and the kind of work to which the cause of action relates at the time at which the act or omission giving rise to the cause of action occurred,

the person is not liable in damages in relation to that cause of action above the amount of the monetary ceiling so specified.

23 Limitation of liability by multiple of charges

- (1) A scheme may provide that if a person to whom the scheme applies and against whom a proceeding relating to occupational liability is brought is able to satisfy the court:
 - (a) that the person has the benefit of an insurance policy:
 - (i) insuring the person against that occupational liability, and
 - (ii) under which the amount payable in respect of the occupational liability relating to the cause of action (including any amount payable by way of excess under or in relation to the policy) is not less than an amount (in this section called the **limitation amount**), being a reasonable charge for the services provided by the person or which the person failed to provide and to which the cause of action relates, multiplied by the multiple specified in the scheme in relation to the class of person and the kind of work to which the cause of action relates at the time at which the act or omission giving rise to the cause of action occurred, or
 - (b) that person has business assets the net current market value of which is not less than the limitation amount, or

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- (c) that:
- (i) the person has business assets and the benefit of an insurance policy insuring the person against that occupational liability, and
 - (ii) the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to the cause of action (including any amount payable by way of excess under or in relation to the policy), if combined, would total an amount that is not less than the limitation amount,

the person is not liable in damages in relation to that cause of action above the limitation amount or, if the scheme specifies a minimum cap determined by the Council for the purposes of the scheme that is higher than the limitation amount, above the amount of the minimum cap so specified.

- (2) In determining the amount of a reasonable charge for the purposes of such a provision, a court is to have regard to any amount actually charged and to:
 - (a) the amount that would ordinarily be charged in accordance with a scale of charges accepted by the occupational association of which the person is a member, or
 - (b) if there is no such scale, the amount that a competent person of the same qualifications and experience as the person would be likely to charge in the same circumstances.
- (3) This section does not limit an amount of damages to which a person is liable if the amount is less than the amount specified for the purpose in the scheme in relation to the class of person and the kind of work concerned.

[11] Section 24

Omit the section. Insert instead:

24 Specification of limits of liability and multiples

- (1) A scheme may:
 - (a) specify the same maximum amount of liability in relation to all cases to which the scheme applies or different maximum amounts of liability for different cases or classes of case or for the same case or class of case for different purposes, and

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- (b) confer a discretionary authority on an occupational association, on application by a person to whom the scheme applies, to specify in relation to the person a higher maximum amount of liability than would otherwise apply under the scheme in relation to the person either in all cases or in any specified case or class of case. 1
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- (2) A scheme may specify a multiple, monetary ceiling or minimum cap by way of a formula that is to be applied to calculate the multiple, ceiling or cap. 7
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- [12] Section 25 Combination of provisions under sections 21, 22 and 23** 10
Omit “occupation”. Insert instead “kind of work”. 11
- [13] Section 25** 12
Omit “person in”. Insert instead “class of person and the kind of work in”. 13
- [14] Section 29 Limitation of amount of damages** 14
Insert after section 29 (4) (a): 15
(a1) officers of the same body corporate or in the relationship 16
of body corporate and officer of the body corporate (with 17
officer having the same meaning as in section 18), or 18
- [15] Section 34 Occupational association may compel its members to insure** 19
Insert “or for different kinds of work or on the basis of any other differing 20
circumstances that it considers relevant” after “members” in section 34 (4). 21
- [16] Section 43 Functions of Council** 22
Omit “, approved by the Minister,” from section 43 (1) (h). 23
- [17] Section 45 Committees of Council** 24
Omit “, with the approval of the Minister,” from section 45 (1). 25
- [18] Section 47 Annual report** 26
Insert after section 47 (2): 27
(3) The report is to include details of any forums conducted by the 28
Council under section 43 (1) (h), and of any committees 29
established by the Council under section 45, during the period to 30
which the report relates. 31

[19] Schedule 4 Savings, transitional and other provisions	1
Insert at the end of clause 1 (1):	2
<i>Professional Standards Amendment Act 2004</i>	3
[20] Schedule 4, Part 4	4
Insert after Part 3:	5
Part 4 Professional Standards Amendment Act 2004	6
	7
12 Definition	8
In this Part:	9
<i>amending Act</i> means the <i>Professional Standards Amendment Act 2004</i> .	10
	11
13 Operation of amendments	12
Except as provided by this Part, an amendment made by the amending Act extends to a cause of action arising before the commencement of the amendment but not so as to affect any decision of a court, or any compromise or settlement made before the commencement of the amendment.	13
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14 Personal injury claims	18
The amendments made by the amending Act to section 5 do not apply to a cause of action that arose before the commencement of the amendments.	19
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15 Application of schemes to officers, partners, employees and associates	22
The amendments made by the amending Act that substitute section 18 and insert section 20A do not apply to a cause of action that arose before the commencement of the amendments.	23
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