



New South Wales

# Professional Standards Amendment (Defence Costs) Bill 2006

## Explanatory note

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

## Overview of Bill

The *Professional Standards Act 1994* (*the Principal Act*) provides, among other things, for the setting up of schemes that limit the liability of members of associations of practitioners of particular trades or professions if the practitioner has the benefit of an occupational liability insurance policy that provides at least a minimum level of cover set by the scheme.

The object of this Bill is to amend the Principal Act to enable the insurance policy to provide cover that is inclusive of defence costs. Accordingly, payments may be made under the policy to or on behalf of the practitioner in defending the claim without affecting the limitation on liability provided by the scheme.

## 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 assent.

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

**Clause 4** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

## **Schedule 1 Amendments**

**Schedule 1 [1]** inserts a definition of *costs* into the Principal Act. The term is relevant to the concepts of damages and defence costs used in the Principal Act (as proposed to be amended by this Bill).

**Schedule 1 [2]** substitutes the definition of *damages* in the Principal Act to clarify the meaning of that term in the Principal Act and, in particular, to include in that meaning interest on costs ordered to be paid in connection with an award of damages.

**Schedule 1 [3]** inserts proposed section 4 (1A) into the Principal Act to ensure that references in the Act to an occupational liability insurance policy extend to a policy that provides cover that is inclusive of defence costs. (Such references appear in sections 21, 22 and 23 of the Principal Act.)

**Schedule 1 [4]–[8]** amend sections 21–23 of the Principal Act as a consequence of the insertion of proposed section 4 (1A) (see **Schedule 1 [3]**) and to omit certain words that are redundant in light of section 28 (2) of the Principal Act. (See also the proposed amendment to section 28 (2) by **Schedule 1 [10]**).

**Schedule 1 [9]** inserts proposed section 26A into the Principal Act. Section 26A makes it clear that although a defence costs inclusive insurance policy may (as compared with one that is not defence costs inclusive) reduce the amount available to be paid under the policy to a scheme participant's client in respect of a claim, this does not lower the cap on the scheme participant's liability to the client. The scheme participant will continue to be liable to the client for any difference between the amount payable to the client under the policy and the amount of the cap.

**Schedule 1 [10]** amends section 28 (2) of the Principal Act to ensure that it has the same effect as words that are omitted from sections 21–23 as a consequence of the amendment of those sections by **Schedule 1 [4]–[8]**.

**Schedule 1 [11]** enables savings and transitional regulations to be made consequent on the enactment of the proposed amendments.

**Schedule 1 [12]** inserts provisions into the Principal Act that, in certain circumstances, validate schemes approved before the commencement of the proposed amendments and related matters.

First print



New South Wales

# Professional Standards Amendment (Defence Costs) Bill 2006

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New South Wales

# Professional Standards Amendment (Defence Costs) Bill 2006

No. , 2006

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## A Bill for

An Act to amend the *Professional Standards Act 1994* with respect to schemes that limit the occupational liability of members of occupational associations.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Professional Standards Amendment (Defence Costs) Act 2006</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on assent.	6
<b>3 Amendment of Professional Standards Act 1994 No 81</b>	7
The <i>Professional Standards Act 1994</i> is amended as set out in Schedule 1.	8 9
<b>4 Repeal of Act</b>	10
(1) This Act is repealed on the day following the day on which this Act commences.	11 12
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	13 14

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<b>Schedule 1</b>	<b>Amendments</b>	1
	(Section 3)	2
<b>[1]</b>	<b>Section 4 Definitions</b>	3
	Insert in alphabetical order in section 4 (1):	4
	<i>costs</i> includes fees, charges, disbursements and expenses.	5
<b>[2]</b>	<b>Section 4 (1), definition of “damages”</b>	6
	Omit the definition. Insert instead:	7
	<i>damages</i> means:	8
	(a) damages awarded in respect of a claim or counter-claim or claim by way of set-off, and	9 10
	(b) costs in or in relation to the proceedings ordered to be paid in connection with such an award (other than costs incurred in enforcing a judgment or incurred on an appeal made by a defendant), and	11 12 13 14
	(c) any interest payable on the amount of those damages or costs.	15 16
<b>[3]</b>	<b>Section 4 (1A)</b>	17
	Insert after section 4 (1):	18
	(1A) A reference in this Act to the amount payable under an insurance policy in respect of an occupational liability includes a reference to:	19 20 21
	(a) defence costs payable in respect of a claim, or notification that may lead to a claim (other than reimbursement of the defendant for time spent in relation to the claim), but only if those costs are payable out of the one sum insured under the policy in respect of the occupational liability, and	22 23 24 25 26
	(b) the amount payable under or in relation to the policy by way of excess.	27 28

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<b>[4] Section 21</b>	1
Omit the section. Insert instead:	2
<b>21 Limitation of liability by insurance arrangements</b>	3
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 that:	4
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(a) the person has the benefit of an insurance policy insuring the person against the occupational liability to which the cause of action relates, and	7
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(b) the amount payable under the policy in respect of that occupational liability 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,	10
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the person is not liable in damages in relation to that cause of action above the amount of that monetary ceiling.	15
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<b>[5] Section 22 Limitation of liability by reference to amount of business assets</b>	17
	18
Omit “at the time at which the act or omission giving rise to the cause of action occurred” from section 22 (a).	19
	20
<b>[6] Section 22 (b) (ii)</b>	21
Omit the subparagraph. Insert instead:	22
(ii) the net current market value of the business assets and the amount payable under the policy in respect of that occupational liability, 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,	23
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<b>[7] Section 23 Limitation of liability by multiple of charges</b>	1
Omit section 23 (1) (a) (ii). Insert instead:	2
(ii) under which the amount payable in respect of that occupational liability is not less than an amount ( <i>the limitation amount</i> ), 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, or	3 4 5 6 7 8 9 10 11
<b>[8] Section 23 (1) (c) (ii)</b>	12
Omit the subparagraph. Insert instead:	13
(ii) the net current market value of the assets and the amount payable under the policy in respect of that occupational liability, if combined, would total an amount that is not less than the limitation amount,	14 15 16 17
<b>[9] Section 26A</b>	18
Insert after section 26:	19
<b>26A Liability in damages not reduced to below relevant limit</b>	20
The liability in damages of a person to whom a scheme applies is not reduced below the relevant limitation imposed by a scheme in force under this Act because the amount available to be paid to the claimant under the insurance policy required for the purposes of this Act in respect of that liability is less than the relevant limitation.	21 22 23 24 25 26
<b>Note.</b> Section 4 (1A) permits a defence costs inclusive policy for the purposes of this Act, which may reduce the amount available to be paid to a client in respect of occupational liability covered by the policy. Section 26A makes it clear that this does not reduce the cap on the liability of the scheme participant to the client, and accordingly the scheme participant will continue to be liable to the client for the amount of any difference between the amount payable to the client under the policy and the amount of the cap.	27 28 29 30 31 32 33 34
<b>[10] Section 28 Limit of occupational liability by schemes</b>	35
Omit “at the time of the relevant act or omission” from section 28 (2).	36
Insert instead “at the time at which the act or omission giving rise to the cause of action concerned occurred”.	37 38

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<b>[11] Schedule 4 Savings, transitional and other provisions</b>	1
Insert at the end of clause 1 (1):	2
<i>Professional Standards Amendment (Defence Costs) Act 2006</i>	3
<b>[12] Schedule 4, Part 5</b>	4
Insert after Part 4:	5
<b>Part 5 Professional Standards Amendment (Defence Costs) Act 2006</b>	6 7
<b>16 Definition</b>	8
In this Part, <i>amending Act</i> means the <i>Professional Standards Amendment (Defence Costs) Act 2006</i> .	9 10
<b>17 Validation of schemes etc</b>	11
(1) A scheme approved under this Act before the commencement of the amending Act is taken to be, and always to have been, a valid scheme if it would have been valid had the amendments made by the amending Act been in force when the scheme was approved.	12 13 14 15
(2) Anything done or omitted to be done in respect of such a scheme is taken to be, and always to have been, validly done or omitted. In particular, an insurance policy required by this Act before a limitation on liability in damages of a person to whom such a scheme applies is reduced is taken to comply, and always to have complied, with this Act if it would have complied had the amendments made by the amending Act been in force when the policy was issued.	16 17 18 19 20 21 22 23
(3) This clause extends to proceedings pending in a court on the commencement of this clause.	24 25