

Professional Standards Act 1994 No 81

[1994-81]



New South Wales

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Professional Standards Act 1994 No 81



New South Wales

An Act to provide for the limitation of liability of members of occupational associations in certain circumstances and to facilitate improvement in the standards of services provided by those members.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Professional Standards Act 1994*.

2 Commencement

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

3 Objects of this Act

The objects of this Act are as follows:

- (a) to enable the creation of schemes to limit the civil liability of professionals and others,
- (b) to facilitate the improvement of occupational standards of professionals and others,
- (c) to protect the consumers of the services provided by professionals and others,
- (d) to constitute the Professional Standards Council to supervise the preparation and application of schemes and to assist in the improvement of occupational standards and protection of consumers.

4 Definitions

(1) In this Act:

another jurisdiction means any State or Territory, other than this jurisdiction.

appropriate Council, in relation to another jurisdiction, means the authority that, under the corresponding law of that jurisdiction, has functions that are substantially the same as the Council's functions under this Act.

business assets means the property of a person that is used in the performance of

the person's occupation and that is able to be taken in proceedings to enforce a judgment of a court.

corresponding law means a law of another jurisdiction that corresponds to this Act, and includes a law of another jurisdiction that is declared by the regulations to be a corresponding law of that jurisdiction for the purposes of this Act.

costs includes fees, charges, disbursements and expenses.

Council means the Professional Standards Council constituted by this Act.

court includes an arbitrator.

damages means:

- (a) damages awarded in respect of a claim or counter-claim or claim by way of set-off, and
- (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
- (c) any interest payable on the amount of those damages or costs.

exercise of a function includes, where the function is a duty, the performance of the duty.

function includes a power, authority and duty.

interstate scheme means a scheme:

- (a) that has been prepared under the corresponding law of another jurisdiction, and
- (b) that operates, or indicates an intention to operate, as a scheme of this jurisdiction.

judgment includes:

- (a) a judgment given by consent, and
- (b) an award of an arbitrator.

occupational association means a body corporate:

- (a) which represents the interests of persons who are members of the same occupational group or related occupational groups, and
- (b) the membership of which is limited principally to members of that occupational group or those occupational groups.

occupational group includes a professional group and a trade group.

occupational liability means civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation.

scheme means a scheme for limiting the occupational liability of members of an occupational association, and includes an interstate scheme.

this jurisdiction means New South Wales.

Note—

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

(1A) A reference in this Act to the amount payable under an insurance policy in respect of an occupational liability includes a reference to:

(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

(b) the amount payable under or in relation to the policy by way of excess.

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

5 Occupational liability to which Act does not apply

(1) This Act does not apply to liability for damages arising from any of the following:

(a) the death of or personal injury to a person,

(b) (Repealed)

(c) a breach of trust,

(d) fraud or dishonesty.

(2) This Act does not apply to liability which may be the subject of proceedings under Part 13 or 14 of the [Real Property Act 1900](#).

(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 an Australian legal practitioner in acting for a client in a personal injury claim.

6 Act binds the Crown

This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Part 2 Limitation of liability

Division 1 Making, amendment and revocation of schemes

7 Preparation and approval of schemes

- (1) An occupational association may prepare a scheme.
- (2) The Council may, on the application of an occupational association, prepare a scheme.
- (3) The Council may, on the application of an occupational association, approve a scheme prepared under this section.
- (4) A scheme prepared under this section may indicate an intention to operate as a scheme of this jurisdiction only, or of both this jurisdiction and another jurisdiction.

8 Public notification of schemes

- (1) Before approving a scheme, the Council must publish a notice in a daily newspaper circulating throughout New South Wales:
 - (a) explaining the nature and significance of the scheme, and
 - (b) advising where a copy of the scheme may be obtained or inspected, and
 - (c) inviting comments and submissions within a specified time, but not less than 21 days after publication of the notice.
- (2) If the scheme indicates an intention to operate as a scheme of both this jurisdiction and another jurisdiction, the Council must also publish a similar notice in the other jurisdiction in accordance with the requirements of the corresponding law of that jurisdiction that relate to the approval of a scheme prepared in that jurisdiction.

9 Making of comments and submissions concerning schemes

- (1) Any person may make a comment or submission to the Council concerning a scheme of which notice has been published under section 8.
- (2) A comment or submission must be made within the period specified for that purpose in the notice or within such further time as the Council may allow.

10 Consideration of comments, submissions and other matters

- (1) Before approving a scheme, the Council must consider the following:
 - (a) all comments and submissions made to it in accordance with section 9,
 - (b) the position of persons who may be affected by limiting the occupational liability of members of the occupational association concerned,

- (c) the nature and level of claims relating to occupational liability made against members of the occupational association concerned,
 - (d) the risk management strategies of the occupational association concerned,
 - (e) the means by which those strategies are intended to be implemented,
 - (f) the cost and availability of insurance against occupational liability for members of the occupational association concerned,
 - (g) the standards (referred to in section 27) determined by the occupational association concerned in relation to insurance policies.
- (2) If the scheme indicates an intention to operate as a scheme of both this jurisdiction and another jurisdiction:
- (a) the Council must also consider any matter that the appropriate Council for the other jurisdiction would have to consider under the provisions of the corresponding law of that jurisdiction that relate to the approval of a scheme prepared in that jurisdiction, and
 - (b) the matters to be considered by the Council, whether under subsection (1) or paragraph (a), are to be considered in the context of each of the jurisdictions concerned.

11 Public hearings

- (1) The Council may conduct a public hearing concerning a scheme if the Council thinks it appropriate.
- (2) A public hearing may be conducted in such manner as the Council determines.

12 Submission of approved schemes for Gazettal

- (1) The Council may submit a scheme approved by it to the Minister.
- (2) If the scheme indicates an intention to operate as a scheme of both this jurisdiction and another jurisdiction, the Council may also submit the scheme to the Minister administering the corresponding law of the other jurisdiction.

13 Gazettal, tabling and disallowance of schemes

- (1) The Minister may authorise the publication in the Gazette of a scheme submitted to the Minister by the Council or, in the case of an interstate scheme, by the appropriate Council for the jurisdiction in which the scheme was prepared.
- (2) Sections 40 and 41 of the *Interpretation Act 1987* apply to a scheme published in the Gazette under this section in the same way as they apply to a statutory rule.

- (3) In this section, a reference to an interstate scheme includes a reference to an instrument amending an interstate scheme.

Note—

Subsection (3) applies subsections (1) and (2) to instruments that amend an interstate scheme. Those subsections already apply, by virtue of section 16A (5), to instruments that amend a scheme that is not an interstate scheme.

14 Commencement of schemes

- (1) A scheme published in the Gazette with the authorisation of the Minister commences:
- (a) on such day subsequent to the date of its publication as may be specified in the scheme, or
 - (b) if no such day is specified—2 months after the date of its publication.
- (2) This section is subject to any order made by the Supreme Court under section 15 and any order made by the Supreme Court of another jurisdiction under the corresponding law of that jurisdiction.
- (3) In this section, a reference to a scheme includes, in the case of an interstate scheme, a reference to an instrument amending that scheme.

15 Challenges to schemes

- (1) A person who is or is reasonably likely to be affected by a scheme published as referred to in section 13 (including a person who is or is reasonably likely to be affected by a scheme that operates as a scheme of another jurisdiction) may apply to the Supreme Court for an order that the scheme is void for want of compliance with this Act.
- (2) The Court may, on the making of the application or at any time before the scheme commences, order that the commencement of the scheme is stayed until further order of the Court.
- (3) The Court, in relation to an application, may:
- (a) make an order that a scheme is void for want of compliance with this Act, or
 - (b) decline to make such an order, or
 - (c) give directions as to the things that are required to be done in order that a scheme, the commencement of which is stayed under this section, may commence, or
 - (d) make any other order it thinks fit.
- (4) The Court may not make an order that an interstate scheme is void for want of compliance with this Act on the ground that the scheme fails to comply with Division

2, but may do so on the ground that the scheme fails to comply with the provisions of the corresponding law of the jurisdiction in which it was prepared that relate to the contents of schemes prepared in that jurisdiction.

- (5) This section does not prevent a scheme from being challenged or called into question otherwise than under this section.
- (6) In this section, a reference to a scheme includes, in the case of an interstate scheme, a reference to an instrument amending that scheme.

16 Review of schemes

- (1) The Minister may direct the Council to review the operation of a scheme.
- (2) The Council must comply with any such direction but may on its own initiative at any time (whether before or after the scheme ceases to have effect) review the operation of a scheme.
- (3) A review may, but need not, be conducted in order to decide:
 - (a) in the case of a scheme prepared under this Act, whether the scheme should be amended or revoked or whether a new scheme should be made, or
 - (b) in the case of an interstate scheme, whether the operation of the scheme should be terminated in relation to this jurisdiction.

16A Amendment and revocation of schemes approved by Council

- (1) An occupational association may prepare an instrument amending or revoking a scheme that relates to its members.
- (2) The Council may, on the application of an occupational association, prepare or approve an instrument amending or revoking a scheme that relates to the members of the association.
- (3) The Minister may direct the Council to prepare an instrument amending or revoking a scheme.
- (4) The Council must comply with any such direction but may on its own initiative, at any time while the scheme remains in force, prepare an instrument amending or revoking a scheme.
- (5) The provisions of sections 7-15 extend, with any necessary modifications, to the amendment of a scheme by an instrument under this section.
- (6) The provisions of sections 7-14 (other than section 12 (2)) extend, with any necessary modifications, to the revocation of a scheme by an instrument under this section.
- (7) This section does not apply to an interstate scheme.

Note—

An instrument that amends a scheme operating in another jurisdiction may be submitted to the Minister administering the corresponding law of that jurisdiction under section 12 with a view to its being published under that law. An instrument made under the corresponding law of another jurisdiction that amends an interstate scheme may be submitted to the Minister administering this Act with a view to its being published under section 13.

16B Notification of revocation of schemes

- (1) On publication in the Gazette of an instrument revoking a scheme (other than an interstate scheme) that operates as a scheme of another jurisdiction, the Minister must cause notice of that fact to be given to the Minister administering the corresponding law of that jurisdiction.
- (2) On receipt of notice that an interstate scheme has been revoked under the corresponding law of the jurisdiction in which it was prepared, the Minister must cause a statement to that effect to be published in the Gazette.

Note—

Under section 32 (1B), an interstate scheme will cease to have effect in this jurisdiction when it ceases to have effect in the other jurisdiction.

16C Termination of operation of interstate schemes in this jurisdiction

- (1) The Council may, on the application of an occupational association, prepare an instrument terminating, in relation to this jurisdiction, the operation of an interstate scheme that relates to members of the association.
- (2) The Minister may direct the Council to prepare an instrument terminating the operation of an interstate scheme in relation to this jurisdiction.
- (3) The Council must comply with any such direction, but may on its own initiative, at any time while an interstate scheme remains in force, prepare an instrument terminating the operation of the scheme in relation to this jurisdiction.
- (4) The provisions of sections 8–13 (other than section 12 (2)) extend, with any necessary modifications, to the termination of the operation of an interstate scheme under an instrument under this section.
- (5) The operation of an interstate scheme in respect of which an instrument under this section is published under section 13 (as applied by subsection (4)) is terminated, in relation to this jurisdiction, as from:
 - (a) such day subsequent to the date of its publication as may be specified in the instrument, or
 - (b) if no such day is specified—2 months after the date of its publication.

Division 2 Contents of schemes

17 Persons to whom scheme applies

- (1) A scheme may provide that it applies to all persons within an occupational association or to a specified class or classes of persons within an occupational association.
- (2) A scheme may provide that the occupational association concerned may, on application by a person, exempt the person from the scheme.
- (3) A scheme ceases to apply to a person exempted from the scheme as referred to in subsection (2) on and from the date on which the exemption is granted or on and from a later date specified in the exemption.
- (4) Subsection (2) does not apply to a person to whom a scheme applies by virtue of section 18, 19 or 20.

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:

officer:

- (a) in relation to a body corporate that is a corporation within the meaning of the [Corporations Act 2001](#) of the Commonwealth, has the same meaning as in that Act, and
- (b) in relation to a body corporate that is not a corporation within the meaning of that Act, means any person (by whatever name called) who is concerned in or takes part in the management of the body corporate.

19 Employees of persons to whom a scheme applies

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

20 Other persons to whom a scheme applies

If persons are prescribed by the regulations for the purposes of section 29 (4) as being associated with persons to whom a scheme applies, the scheme also applies to the prescribed persons.

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

- (1) A limitation that applies under this Act to the occupational liability of a person as a member of an occupational association in respect of a cause of action (the **principal cause of action**) also applies, in respect of the principal cause of action and any related cause of action, to the liability of any other person to whom the scheme concerned applies as a partner, officer, employee or associate of the member (whether or not the other person's liability is an occupational liability).

Note—

Sections 18–20 provide for a scheme to apply to a partner, officer, employee or associate of a member of an occupational association to whom the scheme applies.

- (2) A **related cause of action** is a cause of action in respect of civil liability of the other person arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by that person that caused or contributed to the loss or damage with which the principal cause of action is concerned and that resulted from the same or substantially the same event as that from which the principal cause of action arose.
- (3) A reference in this section to a person who is a partner, officer, employee or associate of a member of an occupational association is a reference to a person who was such a partner, officer, employee or associate at the time of the event that gave rise to the principal cause of action.
- (4) A reference in this section to a limitation on liability that applies to a person as a member of an occupational association includes a reference to a limitation on liability that would apply to the person if a cause of action relating to the liability were brought against the person.
- (5) In this section:

associate of a person means someone who is associated with the person pursuant to the regulations under section 29 (4) (b).

officer:

- (a) in relation to a body corporate that is a corporation within the meaning of the [Corporations Act 2001](#) of the Commonwealth, has the same meaning as in that Act, and
- (b) in relation to a body corporate that is not a corporation within the meaning of that Act, means any person (by whatever name called) who is concerned in or takes

part in the management of the body corporate.

21 Limitation of liability by insurance arrangements

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:

- (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
- (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,

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

22 Limitation of liability by reference to amount of business assets

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 business assets the net current market value of which 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, or
- (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 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,

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 that occupational liability is not less than an amount (***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, or
- (b) that person has business assets the net current market value of which is not less than the limitation amount, or
- (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 policy in respect of that occupational liability, 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.

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
 - (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.

- (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.

25 Combination of provisions under sections 21, 22 and 23

If, in a scheme, provisions of the kind referred to in section 23 and provisions of the kind referred to in section 21 or 22 (or both) apply to a person at the same time in respect of the same kind of work, the scheme must provide that the damages which may be awarded against the person are to be determined in accordance with section 23 but must not exceed the amount of the monetary ceiling specified in relation to the class of person and the kind of work in the provisions of the kind referred to in section 21 or 22.

26 Liability that cannot be limited by a scheme

- (1) A scheme can only affect the liability for damages arising from a single cause of action to the extent to which the liability results in damages exceeding such amount (but not less than \$500,000) as is determined for the purposes of the scheme by the Council and specified in the scheme.
- (2) In making a determination, the Council must have regard to:
 - (a) the number and amounts of claims made against persons within the occupational association concerned, and
 - (b) the need to adequately protect consumers.
- (3) A Council determination:
 - (a) takes effect when an amendment providing for its specification in the scheme takes effect, and
 - (b) applies only to a cause of action that arises after the determination takes effect.

26A Liability in damages not reduced to below relevant limit

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.

Note—

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 Insurance to be of requisite standard

For the purposes of a scheme, an insurance policy must be a policy, or a policy of a kind, which complies with standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind.

Division 3 Effect of schemes

28 Limit of occupational liability by schemes

- (1) To the extent provided by this Act and the provisions of the scheme, a scheme limits the occupational liability, in respect of a cause of action founded on an act or omission occurring during the period when the scheme is in force, of any person to whom the scheme applied at the time when the act or omission occurred.
- (2) The applicable limitation of liability is the limitation specified by the scheme as in force at the time at which the act or omission giving rise to the cause of action concerned occurred.
- (3) A limitation of liability that, in accordance with this section, applies in respect of an act or omission continues to apply to every cause of action founded on it, irrespective of when the cause arises or proceedings are instituted in respect of it, and even if the scheme has been amended or has, in accordance with section 32, ceased to be in force.
- (4) A person to whom a scheme applies cannot choose not to be subject to the scheme, except in accordance with provisions included in the scheme under section 17 (2).

29 Limitation of amount of damages

- (1) **Limitation imposed on single claims** A limitation imposed by a scheme in force under this Act of an amount of damages is a limitation of the amount of damages that may be awarded for a single claim and is not a limitation of the amount of damages that may be awarded for all claims arising out of a single event.
- (2) **No splitting of plaintiffs** Claims by a number of persons who have a joint interest in a cause of action are to be treated as a single claim for the purposes of this Act despite the fact that they may also have several interests.
- (3) **No splitting of defendants** Two or more claims by the same person arising out of a single event against persons to whom a scheme in force under this Act applies and who are associated are to be treated as a single claim for the purposes of this Act.
- (4) **Associated defendants** Persons are associated if they are:
 - (a) partners, employees of the same employer or in the relationship of employer and employee, or

- (a1) officers of the same body corporate or in the relationship of body corporate and officer of the body corporate (with **officer** having the same meaning as in section 18), or
- (b) persons who are prescribed by the regulations for the purposes of this subsection.

30 Effect of scheme on other parties to proceedings

A scheme does not limit the liability of a person who is a party to proceedings if the scheme does not apply to the person.

31 Proceedings to which a scheme applies

A scheme in force under this Act applies to proceedings relating to an act or omission that occurred after the commencement of the scheme.

32 Duration of scheme

- (1) A scheme must specify the period (not exceeding 5 years) for which it is to remain in force after its commencement.
- (1A) Subject to subsection (2), a scheme (other than an interstate scheme) remains in force until:
 - (a) the period specified under subsection (1) ends, or
 - (b) the scheme is revoked, or
 - (c) the scheme's operation ceases because of the operation of another Act, or
 - (d) the scheme is declared void, either by an order made by the Supreme Court under section 15 or by an order made by the Supreme Court of another jurisdiction under the corresponding law of that jurisdiction, or
 - (e) the scheme is disallowed under section 41 of the *Interpretation Act 1987*.
- (1B) Subject to subsection (2), an interstate scheme remains in force in this jurisdiction until:
 - (a) the period specified under subsection (1) ends, or
 - (b) the scheme's operation in relation to this jurisdiction is terminated under section 16C, or
 - (c) the scheme ceases to have effect in the jurisdiction in which it was prepared, or
 - (d) the scheme is disallowed under section 41 of the *Interpretation Act 1987*.
- (2) The Minister may, by notice published in the Gazette, extend the period for which a scheme is in force. The notice must be published on or before the day when the

original period ends.

- (3) Only one extension may be effected under subsection (2) in respect of any particular scheme, and the maximum period of such an extension is 12 months.

33 Notification of limitation of liability

- (1) If a person's occupational liability is limited in accordance with this Part, all documents given by the person to a client or prospective client that promote or advertise the person or person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation and similar documents, must carry a statement to that effect.
- (2) A person who contravenes this section is guilty of an offence.
Maximum penalty: 50 penalty units.
- (3) The regulations may prescribe a form of statement for the purposes of this section.
- (4) A person does not commit an offence against this section if the statement carried on the person's documents is in the prescribed form.
- (5) In this section, a reference to a document does not include a reference to a business card.

Part 3 Compulsory insurance

34 Occupational association may compel its members to insure

- (1) An occupational association may require its members to hold insurance against occupational liability.
- (2) Such a requirement may be imposed as a condition of membership or otherwise.
- (3) The occupational association may set the standards with which the insurance must comply (for example, as to the amount of the insurance).
- (4) The occupational association may specify different standards of insurance for different classes of members or for different kinds of work or on the basis of any other differing circumstances that it considers relevant.

35 Monitoring claims

- (1) An occupational association may establish a committee for monitoring and analysing claims made against its members for occupational liability or two or more occupational associations may establish a common committee for that purpose.
- (2) It is not necessary for all the committee members to be members of the occupational association or associations concerned. (For example, members may include

representatives of insurers.)

- (3) An occupational association may, through such a committee or otherwise, issue practice advice to its members with a view to minimising claims for occupational liability.

Part 4 Risk management

36 Risk management strategies

- (1) If an occupational association seeks the approval of the Council under section 7 to a scheme, it must furnish the Council with:
 - (a) a detailed list of the risk management strategies intended to be implemented in respect of its members, and
 - (b) the means by which those strategies are intended to be implemented.
- (2) The means of implementation may be imposed as a condition of membership or otherwise.
- (3) The strategies are to apply in addition to other statutory requirements and must not be inconsistent with them.

37 Reporting

- (1) An occupational association must provide information to the Council concerning its risk management strategies if requested to do so by the Council.
- (2) An occupational association must provide an annual report to the Council as to the implementation and monitoring of its risk management strategies, the effect of those strategies and any changes made or proposed to be made to them.
- (3) The occupational association's annual report is to be incorporated into the Council's annual report in such form as the Council determines.

Part 5 Complaints and disciplinary matters

38 Occupational Associations (Complaints and Discipline) Code

- (1) A scheme may adopt the provisions of the Model Code set out in Schedule 1 with such additions, omissions or other modifications (if any) as may be approved by the Council.
- (2) The modifications may include provisions relating to the making and determination of complaints and the imposition and enforcement of disciplinary measures against members of an occupational association, including (but not limited to) the following:
 - (a) the establishment of committees for the purpose of implementing the Model Code

or any of its provisions,

- (b) the procedure at meetings of any such committee,
- (c) whether any such committee may administer an oath,
- (d) the application or exclusion of the rules of and practice as to evidence,
- (e) the grounds on which a complaint may be made,
- (f) the verification of complaints by statutory declaration,
- (g) the suspension of members from membership or from practice,
- (h) the imposition of fines,
- (i) the making of appeals,
- (j) the exchanging of information with other occupational associations (within or outside New South Wales).

Part 6 The Professional Standards Council

Division 1 Constitution of the Council

39 Constitution of the Council

There is constituted by this Act a body corporate with the corporate name of the Professional Standards Council.

Division 2 Membership and procedure of the Council

40 Membership of the Council

The Council is to consist of 11 persons appointed by the Minister who have such experience, skills and qualifications as the Minister considers appropriate to enable them to make a contribution to the work of the Council.

41 Provisions relating to members of the Council

Schedule 2 has effect with respect to the members of the Council.

42 Provisions relating to procedure of the Council

Schedule 3 has effect with respect to the procedure of the Council.

Division 3 Functions of the Council

43 Functions of Council

(1) The Council has the following functions:

- (a) to give advice to the Minister concerning:
 - (i) the publication in the Gazette of a scheme, or of an amendment to a scheme, submitted to the Minister, or of notice of the revocation of such a scheme,
 - (ii) the operation of this Act,
 - (iii) any other matter relating to the occupational liability of members of occupational associations,
- (b) to give advice to occupational associations concerning policies of insurance for the purposes of Part 2,
- (c) to encourage and assist in the improvement of occupational standards of members of occupational associations,
- (d) to encourage and assist in the development of self-regulation of occupational associations, including the giving of advice and assistance concerning the following:
 - (i) codes of ethics,
 - (ii) codes of practice,
 - (iii) quality management,
 - (iv) risk management,
 - (v) resolution of complaints by clients,
 - (vi) voluntary mediation services,
 - (vii) membership requirements,
 - (viii) discipline of members,
 - (ix) continuing occupational education,
- (e) to monitor the occupational standards of persons to whom this Act applies,
- (f) to monitor the compliance by an occupational association with its risk management strategies,
- (g) to publish advice and information concerning the matters referred to in this section,
- (h) to conduct forums on issues of interest to members of occupational groups,
- (i) to collect, analyse and provide the Minister with information on issues and policies concerning the standards of occupational groups,

- (j) to institute proceedings in its own name for the prosecution of an offence against this Act or the regulations that comes to its notice or for injunctive or other relief in respect of such offences.
- (2) The Council is not empowered to give advice concerning occupational standards contained in any other Act or statutory instrument.
- (3) Any advice given to the Minister by the Council may be given either at the request of the Minister or without any such request.
- (4) The Council has such other functions as are conferred or imposed on it by or under this or any other Act or law.
- (5) The Council is taken to have locus standi for the purpose of pursuing any injunctive or other relief in accordance with subsection (1) (j), and is not to be required to give any undertaking as to damages in connection with the grant of any interlocutory relief.

43A Co-operation with authorities in other jurisdictions

For the purpose of dealing with a scheme that operates, or indicates an intention to operate, as a scheme of both this jurisdiction and another jurisdiction, the Council:

- (a) may, in the exercise of its functions under this Act, act in conjunction with the appropriate Council for the other jurisdiction, and
- (b) may act in conjunction with the appropriate Council for the other jurisdiction in the exercise of that Council's functions under the corresponding law of that jurisdiction.

43B Delegation of functions

The Council may delegate to any person whose services are used by the Council under section 46 any of the functions of the Council other than the function under section 43 (1) (j) or this power of delegation.

Division 4 Miscellaneous

44 Requirement to provide information

- (1) The Council may, by notice in writing, require an occupational association whose members are subject to a scheme in force under this Act or which seeks the approval of the Council under section 7 to a scheme, or an amendment to or revocation of a scheme, to furnish information to it which it may reasonably require in order to exercise its functions.
- (2) An occupational association which does not comply with a notice under this section is guilty of an offence.

Maximum penalty: 5 penalty units.

44A Referral of complaints

- (1) An occupational association may refer to the Council any complaint or other evidence received by it that a member or former member of the association has committed an offence against section 33 or an offence against the regulations.
- (2) Nothing that is done in good faith under this section by or on behalf of an association subjects the association, any member of the association's executive body or any person acting under the direction of the association or its executive body to any action, liability, claim or demand.

45 Committees of Council

- (1) The Council may establish committees to assist it in the exercise of its functions.
- (2) It does not matter that any or all of the members of a committee are not members of the Council.
- (3) The procedure for calling committee meetings and for the conduct of business at those meetings is to be as determined by the Council or (subject to any determination of the Council) by the committee.

46 Staff of the Council

The Council may, with the approval of the Minister, arrange for the use of the services of any staff, including a person designated as chief executive officer, or facilities of a Public Service agency or a public or local authority.

47 Annual report

- (1) As soon as practicable after 30 June, but before 1 October, in each year, the Council must prepare and forward to the Minister a report on the Council's work and activities for the period of 12 months ending on 30 June in that year.
- (2) The Minister is required to lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after receiving the report.
- (2A) If a House of Parliament is not sitting when the Minister seeks to lay the report before it, the Minister is to cause a copy of the report to be presented to the Clerk of that House of Parliament.
- (2B) A report presented under subsection (2A):
 - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
 - (b) may be printed by authority of the Clerk of the House, and
 - (c) if so printed, is taken to be a document published by or under the authority of the

House, and

(d) is to be recorded:

- (i) in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and
- (ii) in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly,

on the first sitting day of the House after receipt of the copy of the report by the Clerk.

- (3) The report is to include details of any forums conducted by the Council under section 43 (1) (h), and of any committees established by the Council under section 45, during the period to which the report relates.

Part 7 Miscellaneous

48 Characterisation of this Act

The provisions of this Act are to be regarded as part of the substantive law of the State.

49 Application of this Act

- (1) To the extent to which Parts 3, 4 and 5 are inconsistent with another Act, the other Act prevails. Otherwise, this Act has effect despite any other law to the contrary.
- (2) This Act does not affect the operation of section 5 of the *Corporations (New South Wales) Act 1990*.

50 No contracting out of this Act

This Act applies in relation to a person to whom a scheme in force under this Act applies despite any contract to the contrary, whether the contract was made before, on or after the date on which the person became a person to whom the scheme applies.

50A Disclosure of information

A person must not disclose any information obtained in connection with the administration or execution of this Act unless that disclosure is made:

- (a) with the consent of the person from whom the information was obtained, or
- (b) in connection with the administration or execution of this Act, or
- (c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or
- (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or

(e) with other lawful excuse.

Maximum penalty: 20 penalty units.

51 No limitation on other insurance

Nothing in this Act limits the insurance arrangements a person may make apart from those made for the purposes of this Act.

52 Proceedings for offences

Proceedings for an offence against this Act or the regulations are to be dealt with summarily before the Local Court.

53 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Without limiting the generality of subsection (1), the regulations may make provision concerning the following:
 - (a) the fees for applications for the Council's approval, under Division 1 of Part 2, of a scheme, or an amendment to or revocation of a scheme,
 - (b) the annual fee to be paid to the Council by an occupational association whose members are subject to a scheme in force under this Act.
- (3) A regulation may create an offence punishable by a penalty not exceeding 50 penalty units.

54 Rules of court

- (1) Rules of court may be made with respect to any matter arising under Part 2.
- (2) A rule of court may specify:
 - (a) matters relating to section 15, and
 - (b) the means by which the net current market value of assets may be determined for the purposes of section 22 or 23.
- (3) This section does not limit the rule-making powers of any court.

55 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

56 Savings, transitional and other provisions

Schedule 4 has effect.

Schedule 1 Complaints and disciplinary matters

(Section 38)

Model code

1 Citation

This Code may be cited as the *Occupational Associations (Complaints and Discipline) Code*.

2 Definitions

In this Code:

Council means the Professional Standards Council constituted by the *Professional Standards Act 1994*.

3 What actions may be the subject of a complaint?

A complaint may be made that a member of the occupational association has acted (or has failed to act) in such a way as to justify the taking of disciplinary action against the member under this Code. A complaint may be made and dealt with even though the person about whom it is made has ceased to be a member.

4 Who may make a complaint?

Any person may make a complaint (including the occupational association and the Council).

5 How is a complaint made?

A complaint may be made to the occupational association. The complaint must be in writing and contain the particulars of the allegations on which it is founded. the occupational association must notify the Council of each complaint made to it (other than a complaint made by the Council).

6 What happens after a complaint is made?

The occupational association must consider a complaint as soon as practicable after the complaint is made to it or notified to it by the Council. The association may then do any

one or more of the following:

- (a) it may require the complainant to provide further particulars of the complaint,
- (b) it may carry out an investigation into the complaint,
- (c) it may attempt to resolve the complaint by conciliation,
- (d) it may decline to entertain the complaint (because, for example, the complaint is frivolous, vexatious, misconceived or lacking in substance),
- (e) it may conduct a hearing into the complaint.

7 What action may be taken after a hearing into a complaint?

After an occupational association has conducted a hearing into a complaint against a person, it may, if it finds the complaint substantiated, do any one or more of the following:

- (a) caution or reprimand the person,
- (b) impose conditions as to the carrying out of the person's occupation,
- (c) require the person to complete specified courses of training or instruction,
- (d) require the person to report as to the carrying out of the person's occupation at the times, in the manner and to the persons specified by the association,
- (e) order the person to obtain advice as to the carrying out of the person's occupation, from such persons as are specified by the association,
- (f) expel the person from membership of the association.

If the association does not find the complaint substantiated, it must dismiss the complaint. The association is not entitled to make an award of compensation.

8 Notices of decisions

Within 30 days after a decision is made by an occupational association concerning a complaint, the complainant and the person against whom the complaint is made must be given a written statement of the decision. The statement must include the reasons for the decision.

9 What rights of representation do parties to a complaint have?

The complainant and the person about whom the complaint is made are not entitled to legal representation during attempts to resolve the complaint by conciliation but are entitled to legal representation during a hearing into the complaint.

10 How may the functions of the occupational association under this Code be exercised?

A function of an occupational association under this Code may, in accordance with a resolution of the association, be exercised by the executive body of the association or by a person or persons appointed for the purpose.

11 Protection from liability

No matter or thing done or omitted by the occupational association or a person acting in accordance with a resolution of the association subjects a member of the executive body of the association or the person so acting personally to any liability if the matter or thing was done or omitted in good faith for the purpose of implementing this Code.

Schedule 2 Provisions relating to members of the Council

(Section 41)

1 Chairperson and Deputy Chairperson of the Council

- (1) Two of the members of the Council are (in and by their respective instruments of appointment or in and by other instruments executed by the Minister) to be appointed as Chairperson and Deputy Chairperson of the Council, respectively.
- (2) The Minister may remove a member from the office of Chairperson or Deputy Chairperson of the Council at any time.
- (3) A person holding office as Chairperson or Deputy Chairperson of the Council vacates that office if the person:
 - (a) is removed from that office by the Minister, or
 - (b) resigns that office by instrument in writing addressed to the Minister, or
 - (c) ceases to be a member.

2 Deputies of members

- (1) The Minister may, from time to time, appoint a person to be the deputy of a member, and the Minister may revoke any such appointment.
- (2) In the absence of a member, the member's deputy:
 - (a) is, if available, to act in the place of the member, and
 - (b) while so acting, has all the functions of the member and is taken to be a member.
- (3) The deputy of a member who is Chairperson or Deputy Chairperson of the Council does not (because of this clause) have the member's functions as Chairperson or Deputy Chairperson.

- (4) A person while acting in the place of a member is entitled to be paid such allowances as the Minister may from time to time determine in respect of the person.

3 Term of office

Subject to this Schedule, a member holds office for such period (not exceeding 3 years) as may be specified in the member's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

4 Allowances

A member is entitled to be paid such allowances as the Minister may from time to time determine in respect of the member.

5 Vacancy in office of member

- (1) The office of a member becomes vacant if the member:
- (a) dies, or
 - (b) completes a term of office and is not re-appointed, or
 - (c) resigns the office by instrument in writing addressed to the Minister, or
 - (d) is removed from office by the Minister under this clause or by the Governor under Part 6 of the *Government Sector Employment Act 2013*, or
 - (e) is absent from 4 consecutive meetings of the Council of which reasonable notice has been given to the member, except on leave granted by the Council or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Council for having been absent from those meetings, or
 - (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
 - (g) becomes a mentally incapacitated person, or
 - (h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.
- (2) The Minister may remove a member from office for incompetence or misbehaviour.
- (3) Notice of meetings of the Council may be given to members:
- (a) personally or by post, or
 - (b) by email to an email address specified by the member for being given notice of that kind, or

(c) by any other method authorised by the regulations for giving notice of that kind.

6 Filling of vacancy in office of member

If the office of a member becomes vacant, a person may, subject to this Act, be appointed to fill the vacancy.

7 Effect of certain other Acts

(1) The provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to a member.

(2) A provision made by or under any Act:

(a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or

(b) prohibiting the person from engaging in employment outside the duties of that office,

does not operate to disqualify the person from holding that office and also the office of a member or from accepting and retaining any remuneration payable to the person under this Act as such a member.

(3) The office of a member is not, for the purposes of any Act, an office or place of profit under the Crown.

8 Personal liability of members

No matter or thing done or omitted by the Council, a member or any person acting under the direction of the Council or a member subjects the member or person personally to any liability if the matter or thing was done or omitted in good faith for the purpose of executing this or any other Act.

Schedule 3 Provisions relating to procedure of the Council

(Section 42)

1 General procedure

The procedure for the calling of meetings of the Council and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Council.

2 Quorum

The quorum for a meeting of the Council is a majority of its members for the time being.

3 Presiding member

- (1) The Chairperson of the Council or, in the absence of the Chairperson, the Deputy Chairperson of the Council or, in the absence of both, another member elected to chair the meeting by the members present is to preside at a meeting of the Council.
- (2) The person presiding at any meeting of the Council has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

4 Voting

A decision supported by a majority of the votes cast at a meeting of the Council at which a quorum is present is the decision of the Council.

5 First meeting

The Chairperson of the Council is to call the first meeting of the Council in such manner as the Chairperson thinks fit.

Schedule 4 Savings, transitional and other provisions

(Section 56)

Part 1 Miscellaneous

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

Professional Standards Amendment Act 1998

Professional Standards Amendment Act 1999

Professional Standards Amendment Act 2004

Professional Standards Amendment (Defence Costs) Act 2006

Professional Standards Amendment (Mutual Recognition) Act 2007

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Professional Standards Amendment Act 1998

2 Definition

In this Part, **the amending Act** means the *Professional Standards Amendment Act 1998*.

3 Review of schemes

The provisions of section 16, as inserted by the amending Act, extend to apply in respect of schemes in force at the commencement of the section, as so inserted.

4 Limitation of damages in respect of subsisting causes of action

- (1) Sections 21, 22 and 23, as in force immediately before the day on which amendments made to them by the amending Act took effect, continue to apply in respect of any cause of action that arose before that day as if those amendments had not been made, except as provided by subclause (2).
- (2) The amendments made to sections 21, 22 and 23 by Schedule 1 [3] to the amending Act apply in relation to a cause of action arising before, as well as after, those amendments took effect.
- (3) Sections 28 and 32, as in force immediately before their repeal by the amending Act, continue to apply in respect of a cause of action arising from anything done or omitted before their repeal.

5 Determination of extent of limitation of damages

The amendments made by the amending Act to section 26 do not apply in respect of a determination made under that section before those amendments took effect.

6 Fees payable on applications for approval of amendment to or revocation of scheme

For avoidance of doubt, section 53, as in force immediately before the amendment made to that section by the amending Act, is taken always to have empowered the prescription by regulation of any fee that might be prescribed under that section as in force after the amendment took effect.

Part 3 Professional Standards Amendment Act 1999

7 Definition of existing schemes

In this Part, **existing scheme** means a scheme purporting to have been established in compliance with this Act and in existence immediately before the commencement of this clause.

8 Validation of existing schemes for limited period

- (1) The provisions of an existing scheme are, to the extent to which they fail to provide for the scheme to apply to all persons within an occupational association or to a specified class or classes of persons within an occupational association, taken to have complied with this Act:
 - (a) at the time at which the provisions were first included in the scheme, and
 - (b) at all times until:
 - (i) the expiration of 12 months after the commencement of this clause, or
 - (ii) the amendment of the provisions in accordance with this Act after the commencement of this clause, or
 - (iii) the operation of the scheme ceases,whichever occurs first.
- (2) This clause does not apply to the provisions of an existing scheme to which clause 9 applies.

9 Validation of exemption provisions in existing schemes and exemptions

- (1) This clause applies to the provisions of an existing scheme that provide (in effect) that an occupational association may, on application, exempt a person from the scheme.
- (2) The provisions of an existing scheme to which this clause applies are taken to have complied with this Act:
 - (a) at the time at which the provisions were first included in the scheme, and
 - (b) at all times until the commencement of section 17 (2).
- (3) The provisions of an existing scheme to which this clause applies are taken to have been made under section 17 (2).
- (4) An exemption granted before the commencement of this clause under the provisions of an existing scheme to which this clause applies is taken to have been validly granted on the date on which it was granted and is taken to be valid at all times on and from that date.

10 Part does not apply to new provisions of existing schemes

This Part does not apply to a provision of an existing scheme included in the scheme after the commencement of this clause.

11 Part does not affect previous court or tribunal decisions

This Part does not affect any decision or order of a court or tribunal made before the commencement of this clause.

Part 4 Professional Standards Amendment Act 2004

12 Definition

In this Part:

amending Act means the *Professional Standards Amendment Act 2004*.

13 Operation of amendments

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.

14 Personal injury claims

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.

15 Application of schemes to officers, partners, employees and associates

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.

Part 5 Professional Standards Amendment (Defence Costs) Act 2006

16 Definition

In this Part, **amending Act** means the *Professional Standards Amendment (Defence Costs) Act 2006*.

17 Validation of schemes etc

- (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.
- (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.

- (3) This clause extends to proceedings pending in a court on the commencement of this clause.

Part 6 Professional Standards Amendment (Mutual Recognition) Act 2007

18 Expiry date of existing schemes

The period for which the Council has, before the commencement of Schedule 1 [16] to the *Professional Standards Amendment (Mutual Recognition) Act 2007*, determined that a scheme is to remain in force for the purposes of section 32 (1), as then in force, is taken to be specified in the scheme.