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New South Wales

# Professional Standards Amendment Bill 1998

## Explanatory note

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

### Overview of Bill

The *Professional Standards Act 1994* provides among other things for schemes to be set up by associations representing persons practising particular trades or professions. A scheme limits the liability of members of an association, provided certain guarantees (for example in the form of insurance) are provided by the members to ensure that the liability is met. The Act creates the Professional Standards Council ("the Council") to oversee the operation of the Act.

The objects of this Bill are:

- (a) to vary the manner in which a limitation of liability under a scheme established under the Act is calculated, and
  - (b) to make explicit provision for the review of such schemes and for the Council to prepare amendments to and revocations of such schemes, and
  - (c) to make further provision in relation to the prosecution of offences under the Act, and
  - (d) to make other, minor amendments.
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## 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 giving effect to the amendments to the *Professional Standards Act 1994* set out in Schedule 1.

## Schedule 1 Amendments

**Schedule 1 [1]** repeals and replaces section 14 of the Act (which provides that a scheme under the Act commences 2 months after its publication) to make it possible for a scheme to commence on any specified date after its publication.

**Schedule 1 [2]** repeals section 16 of the Act and replaces it with new sections 16 and 16A. The new sections provide expressly for reviews by the Council of schemes and for the Council's preparation of amendments to schemes and revocations of schemes. The Council is obliged to do these things at the direction of the Minister but may also do them on its own initiative. (The current section 16 does not expressly provide for review of schemes, and amendments and revocations must at present be initiated by the relevant association.) Amendments made by **Schedule 1 [11]**, **[13]** and **[15]** are consequential.

**Schedule 1 [3]** amends sections 21, 22 and 23 of the Act so as to include among the persons protected by schemes those persons who come within the umbrella of an insurance policy, even if they do not "have" a policy (as the present wording is).

**Schedule 1 [4]** amends sections 21, 22 and 23 of the Act so as to specify the time of an act or omission that gives rise to a cause of action as the critical time by reference to which a court will assess a defendant's insurance cover, or asset backing, in order to determine whether the defendant is entitled, in terms of a scheme, to limited liability in the cause of action and the extent of that limitation. (Currently the determination is made by reference to the defendant's state of affairs as at the time when the cause of action arose.)

**Schedule 1 [5]** makes a minor amendment to section 26 of the Act, to provide that the minimum limitation on liability under a scheme should be specified in the scheme. **Schedule 1 [6]** makes a consequential amendment to the same section.

**Schedule 1 [7]** repeals and replaces section 28 of the Act as a consequence of the amendments made to sections 21, 22 and 23 by Schedule 1 [4]. The object is to make it clear that a defunct or varied scheme continues to have exclusive operation in respect of liabilities arising from acts or omissions that occurred when the scheme applied to liabilities so arising.

**Schedule 1 [8]** repeals and replaces section 32 of the Act to acknowledge that the application of a scheme may be limited by its revocation, and to enable the Minister to extend a scheme by up to 12 months (instead of 6 months as at present).

**Schedule 1 [9] and [10]** amend section 33 of the Act to remove business cards from the class of documents on which a person must include a warning of any limitation of liability applying to the person under a scheme.

**Schedule 1 [11] and [12]** amend section 43 of the Act so as to include in the Council's functions the institution of proceedings in respect of offences against the Act.

**Schedule 1 [14]** inserts a new section 44A into the Act to make it clear that an occupational association may refer to the Council any information that it has about an offence by one of its members against section 33 of the Act (that is, a failure to include a warning on business documents of any limitation of liability applying to the member under a scheme) or against the regulations, and protects an association from liability for having done so.

**Schedule 1 [16] and [18]** enact savings and transitional provisions relating to the amendments made by the proposed Act and enable the making of any necessary regulations of a similar nature.

**Schedule 1 [17]** amends clause 11 (Protection from liability) of the *Occupational Associations (Complaints and Discipline) Code* (or *Model Code*) in Schedule 1 to the Act by way of statute law revision.

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New South Wales

# Professional Standards Amendment Bill 1998

No. , 1998

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## **A Bill for**

An Act to amend the *Professional Standards Act 1994* with respect to claims, the review of schemes and other matters.

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Professional Standards Amendment Act 1998*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation. 5

**3 Amendment of Professional Standards Act 1994 No 81**

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

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## Schedule 1 Amendments

(Section 3)

### [1] Section 14

Omit the section. Insert instead:

#### 14 Commencement of schemes

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- (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. 10
- (2) This section is subject to any order of the Supreme Court under section 15 (2).

### [2] Sections 16 and 16A

Omit section 16. Insert instead:

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#### 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. 20
- (3) A review may, but need not, be conducted in order to decide whether a scheme should be amended or revoked or whether a new scheme should be made. 25

#### 16A Amendment and revocation of schemes

- (1) An occupational association may prepare an amendment to or revocation of a scheme that relates to its members.

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Schedule 1 Amendments

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- (2) The Council may, on the application of an occupational association, prepare or approve an amendment to or revocation of a scheme that relates to the members of the association.
- (3) The Minister may direct the Council to prepare an amendment to or revocation of a scheme. 5
- (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 amendment to or revocation of a scheme. 10
- (5) The provisions of sections 7–15 apply, with any necessary modifications, to the amendment or revocation of a scheme as well as to the making of a scheme.
- [3] Sections 21, 22 (b) (i) and 23 (1)**
- Insert “the benefit of” before “an insurance policy” wherever occurring. 15
- [4] Sections 21 (b), 22 and 23 (1) (a) (ii)**
- Omit “the cause of action arose” wherever occurring.  
Insert instead “the act or omission giving rise to the cause of action occurred”. 20
- [5] Section 26 Liability that cannot be limited by a scheme**
- Insert “and specified in the scheme” after “Council” in section 26 (1).
- [6] Section 26 (3)**
- Omit the subsection. Insert instead: 25
- (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. 30



**[7] Section 28**

Omit the section. Insert instead:

**28 Limit of occupational liability by schemes**

- (1) To the extent provided by this Act and the terms 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 applies during that period. 5
- (2) The applicable limitation of liability is the limitation specified by the scheme as in force at the time of the relevant act or omission. 10
- (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. 15
- (4) A person to whom a scheme applies cannot choose not to be subject to the scheme. 20

**[8] Section 32**

Omit the section. Insert instead:

**32 Duration of scheme**

- (1) A scheme remains in force for such period (not exceeding 5 years) from its commencement as is determined by the Council and specified in the scheme unless, before the end of the period so determined:
  - (a) it is revoked, or
  - (b) its operation is extended by notice under this section, or 30
  - (c) its operation ceases because of the operation of another Act.

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- (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. 5
- [9] Section 33 Notification of limitation of liability**
- Section 33 (1)**  
Omit “, business cards”. 10
- [10] Section 33 (5)**  
Insert after section 33 (4):
- (5) In this section, a reference to a document does not include a reference to a business card.
- [11] Section 43 Functions of Council** 15
- Omit section 43 (1) (i). Insert instead:
- (i) the publication in the Gazette of a scheme, or of an amendment to a scheme, submitted by it to the Minister, or of notice of the revocation of such a scheme, 20
- (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. 25

**[12] Section 43 (5)**

Insert after section 43 (4):

- (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. 5

**[13] Section 44 Requirement to provide information**

**Section 44 (1)**

Omit "under section 7 to a scheme". 10

Insert instead "under section 7 to a scheme, or an amendment to or revocation of a scheme,".

**[14] Section 44A**

Insert after section 44:

**44A Referral of complaints** 15

- (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. 20

- (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. 25

**[15] Section 53 Regulations**

Omit section 53 (2) (a). Insert instead:

- (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, 30

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Schedule 1 Amendments

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**[16] Section 56**

Insert after section 55:

**56 Savings, transitional and other provisions**

Schedule 4 has effect.

**[17] Schedule 1 Complaints and disciplinary matters** 5

Omit "the person" from clause 11 of Schedule 1.

Insert instead "a member of the executive body of the association or the person so acting".

**[18] Schedule 4**

Insert after Schedule 3: 10

**Schedule 4 Savings, transitional and other provisions**

(Section 56)

**Part 1 Miscellaneous**

**1 Regulations** 15

- (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*

- (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. 20

- (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: 25

- (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

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- (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** 5

**2 Definition**

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

**3 Review of schemes** 10

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** 15

- (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). 20

- (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. 25

- (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** 30

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.

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Schedule of the amendments referred to in the Legislative Council's Message of  
7 April 1998.

No 1 Page 2, clause 3, line 8. Insert after "(a)":

and by inserting instead the following paragraph:

- (a) must be made, and must take effect, no later than 3 months after the date of assent of the Gas Supply Amendment Act 1997, and
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