

# PROFESSIONAL STANDARDS ACT 1994 No. 81

NEW SOUTH WALES



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**PROFESSIONAL STANDARDS ACT 1994 No. 81**

NEW SOUTH WALES



**Act No. 81, 1994**

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.  
[Assented to 12 December 1994]

**The Legislature of New South Wales enacts:****PART 1—PRELIMINARY****Short title**

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

**Commencement**

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

**Objects of this Act**

3. 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.

**Definitions**

4. In 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;

“**Council**” means the Professional Standards Council constituted by this Act;

“**court**” includes an arbitrator;

“**damages**” means damages awarded in respect of a claim or counter-claim or by way of set-off, and includes:

- (a) interest payable in respect of an amount awarded as damages;
- and

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- (b) legal costs and expenses ordered to be paid in connection with an award of damages (other than legal costs and expenses incurred in enforcing a judgment or incurred on an appeal made by a defendant);

**“exercise”** of a function includes, where the function is a duty, the performance of the duty;

**“function”** includes a power, authority and duty;

**“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; and  
 (b) the membership of which is limited principally to members of that occupational group;

**“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.

**Does this Act apply to all types of occupational liability?**

5. (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) any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim;  
 (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 14 of the Real Property Act 1900.

**Act binds the Crown**

6. 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****Preparation and approval of schemes**

7. (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.

**Public notification of schemes**

8. 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.

**Making of comments and submissions concerning schemes**

9. (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.

**Consideration of comments, submissions and other matters**

10. 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.

**Public hearings**

11. (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.

**Submission of schemes to Minister**

12. The Council may submit a scheme approved by it to the Minister.

**Gazettal, tabling and disallowance of schemes**

13. (1) The Minister may authorise the publication in the Gazette of a scheme submitted to the Minister by the Council.

(2) Part 6 of the Interpretation Act 1987 (sections 39, 42 and 43 excepted) applies to a scheme which is published in the Gazette with the authorisation of the Minister in the same way as it applies to a statutory rule.

**Commencement of schemes**

14. A scheme published in the Gazette with the authorisation of the Minister commences 2 months after the date of its publication, subject to section 15.

**Challenges to schemes**

15. (1) A person who is or is reasonably likely to be affected by a scheme published as referred to in section 13 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.

### **Amendment and revocation of schemes**

16. The other provisions of this Division apply to the amendment of a scheme and the revocation of a scheme in the same way as they apply to a scheme.

## **Division 2—Contents of schemes**

### **Persons to whom a scheme applies**

17. 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.

### **Partners of persons to whom a scheme applies**

18. (1) If a scheme applies to a person, the scheme also applies to each partner of the person.

(2) However, if a partner 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 partner.

### **Employees of persons to whom a scheme applies**

19. (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.

### **Other persons to whom a scheme applies**

20. 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.



**Limitation of liability by insurance arrangements**

21. A scheme may provide that if a person to whom the scheme applies and against whom a cause of action relating to occupational liability is brought is able to satisfy the court that the person has an insurance policy:

- (a) insuring the person against that occupational liability; and
- (b) under which the amount payable in respect of the occupational liability relating to that cause of action is not less than the amount of the monetary ceiling specified in the scheme in relation to the person at the time at which the cause of action arose,

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

**Limitation of liability by reference to amount of business assets**

22. A scheme may provide that if a person to whom the scheme applies and against whom a cause of action 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 person at the time at which the cause of action arose; or

(b) that:

- (i) the person has business assets and an insurance policy insuring the person against that occupational liability; and
- (ii) the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action, 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 person at the time at which the cause of action arose,

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

**Limitation of liability by multiple of charges**

23. (1) A scheme may provide that if a person to whom the scheme applies and against whom a cause of action relating to occupational liability is brought is able to satisfy the court:

- (a) that the person has an insurance policy:
- (i) insuring the person against that occupational liability; and
  - (ii) under which the amount payable in respect of the occupational liability relating to that cause of action is not less than an amount (in this section called the “**limitation amount**”), being a reasonable charge for the services provided by the person or which the person failed to provide and to which the cause of action relates, multiplied by the multiple specified in the scheme in relation to the person at the time at which the cause of action arose; or
- (b) that:
- (i) the person has business assets and an insurance policy insuring the person against that occupational liability; and
  - (ii) the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action, 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.

(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 person.

### **Specification of different limits of liability for different persons and different work**

24. A scheme may specify different maximum amounts of liability for different classes of persons within an occupational association or different kinds of work, or both.

**Combination of provisions under sections 21, 22 and 23**

25. 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 occupation, 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 person in the provisions of the kind referred to in section 21 or 22.

**Liability that cannot be limited by a scheme**

26. (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.

(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 applies only to a cause of action that arises after the determination is made.

**Insurance to be of requisite standard**

27. 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****Limit of occupational liability by schemes**

28. (1) A scheme, on and from its commencement in accordance with this Act and for the period for which it is in force, limits in accordance with its provisions the occupational liability of the persons to whom it applies.

(2) A person to whom a scheme applies cannot choose not to be subject to the scheme.



**Limitation of amount of damages**

**29. (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
- (b) persons who are prescribed by the regulations for the purposes of this subsection.

**Effect of scheme on other parties to proceedings**

**30.** 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.

**Proceedings to which a scheme applies**

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

**Time limit on limitation of liability**

**32. (1)** The application of a scheme to the members of an occupational association ceases at the end of such period, not exceeding 5 years after the commencement of the scheme, as is determined by the Council unless:

- (a) the application ceases earlier in accordance with an Act of Parliament; or
- (b) the application ceases later in accordance with an extension under this section.

(2) The Minister may extend the period of application of a scheme, by up to 6 months, if notice of the extension is published in the Gazette before the period ends.

(3) A right or liability arising during the application of a scheme to members of an occupational association is not affected by the scheme's ceasing to apply.

### **Notification of limitation of liability**

33. (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, business cards 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.

## **PART 3—COMPULSORY INSURANCE**

### **Occupational association may compel its members to insure**

34. (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.

### **Monitoring claims**

35. (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**

### **Risk management strategies**

**36.** (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.

### **Reporting**

**37.** (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**

### **Occupational Associations (Complaints and Discipline) Code**

**38.** (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**

#### **Constitution of the Council**

39. 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**

#### **Membership of the Council**

40. 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.

#### **Provisions relating to members of the Council**

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

#### **Provisions relating to procedure of the Council**

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

**Division 3—Functions of the Council****Functions of the Council**

**43. (1)** The Council has the following functions:

- (a) to give advice to the Minister concerning:
  - (i) the publication in the Gazette of a scheme submitted by it to the Minister;
  - (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, approved by the Minister, 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.

(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.

#### **Division 4—Miscellaneous**

##### **Requirement to supply information**

44. (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 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.

##### **Committees of the Council**

45. (1) The Council may, with the approval of the Minister, 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.

##### **Staff of the Council**

46. The Council may, with the approval of the Minister, arrange for the use of the services of any staff or facilities of a government department, an administrative office or a public or local authority.

##### **Annual report**

47. (1) As soon as practicable after 1 January, but before 31 March, in each year, the Council must prepare and forward to the Minister a report on its work and activities for the previous 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.

## **PART 7—MISCELLANEOUS**

### **Characterisation of this Act**

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

### **Application of this Act**

49. (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.

### **No contracting out of this Act**

50. 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.

### **No limitation on other insurance**

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

### **Proceedings for offences**

52. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

### **Regulations**

53. (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 approval of the Council under section 7;
- (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.

#### **Rules of court**

54. (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.

#### **Review of Act**

55. (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.

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**SCHEDULE 1—COMPLAINTS AND DISCIPLINARY MATTERS**

(Sec. 38)

**MODEL CODE****Citation**

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

**Definitions**

2. In this Code:

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

**What actions may be the subject of a complaint?**

3. 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.

**Who may make a complaint?**

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

**How is a complaint made?**

5. 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).

**What happens after a complaint is made?**

6. 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.



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SCHEDULE 1—COMPLAINTS AND DISCIPLINARY MATTERS—*continued*

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

7. 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.

**Notices of decisions**

8. 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.

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

9. 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.

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

10. 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.

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SCHEDULE 1—COMPLAINTS AND DISCIPLINARY MATTERS—*continued*

**Protection from liability**

11. No matter or thing done or omitted by the occupational association or a person acting in accordance with a resolution of the association subjects the person 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**

(Sec. 41)

**Chairperson and Deputy Chairperson of the Council**

1. (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.

**Deputies of members**

2. (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.

**Term of office**

3. 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.

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SCHEDULE 2—PROVISIONS RELATING TO MEMBERS OF THE COUNCIL—  
*continued*

**Allowances**

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

**Vacancy in office of member**

5. (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 8 of the Public Sector Management Act 1988; or
- (e) is absent from 4 consecutive meetings of the Council of which reasonable notice has been given to the member personally or in the ordinary course of post, 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 which is punishable by penal servitude or imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence which, 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.

**Filling of vacancy in office of member**

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

**Effect of certain other Acts**

7. (1) Part 2 of the Public Sector Management Act 1988 does not apply to the appointment of a member.



*Professional Standards Act 1994 No. 81*

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SCHEDULE 2—PROVISIONS RELATING TO MEMBERS OF THE COUNCIL—  
*continued*

(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.

**Personal liability of members**

8. 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**

(Sec. 42)

**General procedure**

1. 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.

**Quorum**

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

**Presiding member**

3. (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.

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SCHEDULE 3—PROVISIONS RELATING TO PROCEDURE OF THE  
COUNCIL—*continued*

**Voting**

4. 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.

**First meeting**

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

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*[Minister's second reading speech made in—  
Legislative Council on 14 September 1994  
Legislative Assembly on 22 September 1994]*





FIRST PRINT

## PROFESSIONAL STANDARDS BILL 1994

NEW SOUTH WALES



### EXPLANATORY NOTE

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The object of this Bill is to provide a general means whereby the civil liability of professionals and others may be limited and, at the same time, to put in place provisions which are designed to facilitate improvement in the standards of services provided by professionals and others in order to protect the users of those services.

The Bill enables the members of an occupational association to be covered by a scheme to limit their civil liability. A scheme may limit liability in either of two main ways (or by a combination of them). The first way limits liability to a specified amount if insurance against civil liability is held to that amount or if business assets are retained to that amount. The second way limits liability to a multiple of the cost of providing the service from which the liability has accrued.

The Bill constitutes the Professional Standards Council. One of its functions is to approve schemes for limiting liability which it has prepared or schemes submitted to it for approval by a professional association. Another function of the Council is to assist professionals and others to improve their occupational standards.

A scheme approved by the Council is to be submitted to the Minister and it cannot commence until the Minister authorises its publication in the Gazette. Part 6 of the Interpretation Act 1987 concerning the tabling and disallowance of statutory rules is applied (with appropriate modifications) to schemes to ensure that they are subject to Parliamentary scrutiny. Provision is also made for persons affected by schemes to challenge their validity in the Supreme Court.

To balance the limitation of liability with appropriate measures for the protection of consumers, the Bill contains provisions enabling the introduction of compulsory insurance, the monitoring of claims in order to establish a claims history, the implementation of risk management strategies, annual reporting and measures for dealing with complaints and disciplining persons against whom complaints are substantiated.

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**PART 1—PRELIMINARY**

**Clause 1** specifies the short title of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a proclaimed day or days.

**Clause 3** specifies the objects of the proposed Act.

**Clause 4** contains definitions for the purposes of the proposed Act. "Occupational association" is defined so as to include a body such as a professional society or association.

**Clause 5** provides that the proposed Act does not limit liability arising from:

- the death of or personal injury to a person
- any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim
- a breach of trust
- fraud or dishonesty.

**Clause 6** provides that the proposed Act binds the Crown.

**PART 2—LIMITATION OF LIABILITY**

**Division 1—Making, amendment and revocation of schemes**

**Clause 7** provides that the Council may approve a scheme for limiting the occupational liability of members of an occupational association prepared either by the Council or by a professional association.

**Clause 8** requires the Council to publish a public notice in a daily newspaper concerning a proposed scheme before it can approve the scheme.

**Clause 9** enables any person to make a comment or submission about a proposed scheme following publication of the notice.

**Clause 10** lists the matters the Council must take into account before approving a scheme, including all comments and submissions made by the public.

**Clause 11** enables the Council to conduct public hearings concerning a scheme.

**Clause 12** provides for the Council to submit schemes it has approved to the Minister.

**Clause 13** enables the Minister to authorise the publication in the Gazette of a scheme submitted by the Council. The provisions of Part 6 of the Interpretation Act 1987 concerning the tabling and disallowance of statutory rules will apply to a gazetted scheme.

**Clause 14** provides that a scheme will commence 2 months after it is gazetted unless it is challenged in the Supreme Court.

**Clause 15** enables a person affected or reasonably likely to be affected by a scheme to challenge its validity in the Supreme Court on the ground that it does not comply with the proposed Act.



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**Clause 16** makes the provisions of this Division applicable to the amendment and revocation of schemes as well as to their creation.

**Division 2—Contents of schemes**

**Clause 17** provides that a scheme can apply to all persons within an occupational association or to a specified class or classes within that association.

**Clause 18** specifies the circumstances in which the application of a scheme extends to the partners of a person to whom the scheme applies.

**Clause 19** specifies the circumstances in which the application of a scheme extends to the employees of a person to whom the scheme applies.

**Clause 20** extends the application of a scheme to persons who are declared by regulation to be associated with persons to whom a scheme applies.

**Clause 21** provides that a scheme may limit the civil liability of a person to whom it applies to the maximum amount specified in the scheme for that person if he or she has insurance covering that amount.

**Clause 22** provides that a scheme may limit the civil liability of a person to whom it applies to the maximum amount specified in the scheme for that person if he or she has business assets, or a combination of business assets and insurance, covering that amount. "Business assets" is defined in clause 4 to mean property of the 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.

**Clause 23** provides that a scheme may limit the civil liability of a person to whom it applies if that person has insurance, or a combination of insurance and business assets, covering the amount which is the multiple specified in the scheme of the reasonable charge for the services the person provided or failed to provide and from which the liability arises. A "reasonable charge" is defined to mean:

- the ordinary scale charge; or
- if there is no scale, the amount that a competent person of the same qualifications and experience would be likely to charge in the same circumstances.

The clause will not operate so as to limit an amount of damages which is less than an amount specified for the purpose in the scheme.

**Clause 24** enables different maximum amounts of liability to be specified in a scheme for different classes of persons within an occupational association or for different kinds of work.

**Clause 25** enables the inclusion in a scheme under clause 23 of provisions of the kind contemplated in clause 21 or 22 provided that civil liability is calculated in accordance with clause 23 and does not exceed the maximum amounts specified in the scheme in accordance with clause 21 or 22.

**Clause 26** provides that a scheme cannot affect the first  $\frac{1}{2}$  million of a person's liability in respect of a claim or such greater amount as may be determined by the Council for the particular scheme.

**Clause 27** requires an insurance policy to be of a kind which complies with standards determined by the occupational association concerned.



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### **Division 3—Effect of schemes**

**Clause 28** provides that a scheme limits the civil liability of a person to whom it applies from the date of its commencement but only for the period for which it remains in force. A person to whom a scheme applies cannot choose not to be subject to the scheme.

**Clause 29** provides that the limitation of liability is a limitation of the amount of damages which may be awarded for a single claim and is not a limitation of the amount of damages which may be awarded for all claims arising out of a single event. However, claims by persons who have a joint interest and claims by the same person arising out of a single event against associated persons (such as partners, co-employees and persons in an employer/employee relationship) are to be treated as a single claim.

**Clause 30** provides that defendants to an action who are not persons to whom a scheme applies do not have their liability limited by the scheme.

**Clause 31** provides that a scheme in force under the proposed Act will apply only to liability that arises after the scheme's commencement.

**Clause 32** provides that the application of a scheme is to cease after a period determined by the Council of not more than 5 years in most cases so that schemes are kept under regular review.

**Clause 33** requires a person whose civil liability is limited under Part 2 of the proposed Act to notify that fact on all documents given by the person to a client or prospective client that promote or advertise the person or the person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation, business cards and similar documents. Contravention of the clause is made a summary offence punishable by a maximum penalty of 50 penalty units. Under section 56 of the Interpretation Act 1987, one penalty unit is currently equivalent to \$100.

### **PART 3—COMPULSORY INSURANCE**

**Clause 34** enables an occupational association to compel its members to hold insurance against occupational liability.

**Clause 35** enables an occupational association to establish committees to monitor and analyse claims against its members.

### **PART 4—RISK MANAGEMENT**

**Clause 36** requires an occupational association that wishes its members to be brought under the proposed Act to develop risk management strategies.

**Clause 37** requires an occupational association to report annually (and more frequently if requested by the Council) as to the implementation and monitoring of its risk management strategies.

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**PART 5—COMPLAINTS AND DISCIPLINARY MATTERS**

**Clause 38** enables the adoption by an occupational association of a code set out in Schedule 1 to the proposed Act. The code contains provisions concerning the making and resolution of complaints against members of occupational associations and the taking of disciplinary measures against members.

**PART 6—THE PROFESSIONAL STANDARDS COUNCIL**

**Division 1—Constitution of the Council**

**Clause 39** constitutes a body corporate to be known as the Professional Standards Council.

**Division 2—Membership and procedure of the Council**

**Clause 40** enables the Minister to appoint the Council's members. Membership is to comprise 11 persons, having appropriate experience, skills and qualifications.

**Clause 41** is a formal provision which gives effect to Schedule 2. That Schedule contains detailed provisions relating to the appointment, term of office, tenure of office and remuneration of members.

**Clause 42** is a formal provision which gives effect to Schedule 3. That Schedule contains detailed provisions relating to the procedures and determinations of the Council.

**Division 3—Functions of the Council**

**Clause 43** specifies the functions of the Council. The Council is:

- to advise the Minister concerning the publication in the Gazette of a scheme it has submitted and the operation of the proposed Act
- to assist, in a variety of ways, in the improvement of occupational standards
- to collect information concerning, and to monitor the occupational standards of, persons to whom the proposed Act applies.

**Division 4—Miscellaneous**

**Clause 44** enables the Council to require an occupational association to supply it with information it needs in order to exercise its functions.

**Clause 45** enables the Council to establish committees to assist it in the exercise of its functions.

**Clause 46** enables the Council to make use of the services of the staff of government departments or public authorities.

**Clause 47** requires the Council to prepare an annual report and provides for the tabling of the report in Parliament.

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**PART 7—MISCELLANEOUS**

**Clause 48** will characterise the provisions of the proposed Act as part of the substantive law of the State, so that when the law of the State is applied in another jurisdiction as the law governing the proceedings, the limitation on liability effected by the proposed Act will also be applied.

**Clause 49** provides that Parts 3, 4 and 5 of the proposed Act are to take effect subject to the provisions of other Acts but that, otherwise, the proposed Act is to have effect despite any other law to the contrary. The clause also makes clear that the proposed Act is not intended to affect the operation of the Corporations Law. This has the consequence that liability for which provision is made under the Corporations Law will not be limited by the proposed Act.

**Clause 50** prevents persons to whom a scheme applies from contracting out of the provisions of the proposed Act.

**Clause 51** provides that the proposed Act does not limit the insurance arrangements a person may make apart from those made for the purposes of the proposed Act.

**Clause 52** provides for the summary prosecution before a Local Court of offences against the proposed Act or the regulations.

**Clause 53** enables the Governor-in-Council to make regulations for the purposes of the proposed Act.

**Clause 54** enables rules of court to be made concerning matters arising under Part 2 of the proposed Act.

**Clause 55** requires the proposed Act to be reviewed within 5 years.

**SCHEDULES**

**Schedule 1** contains the Occupational Associations (Complaints and Discipline) Code.

**Schedule 2** contains provisions relating to the members of the Council.

**Schedule 3** contains provisions relating to the procedure of the Council.

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FIRST PRINT

**PROFESSIONAL STANDARDS BILL 1994**

NEW SOUTH WALES



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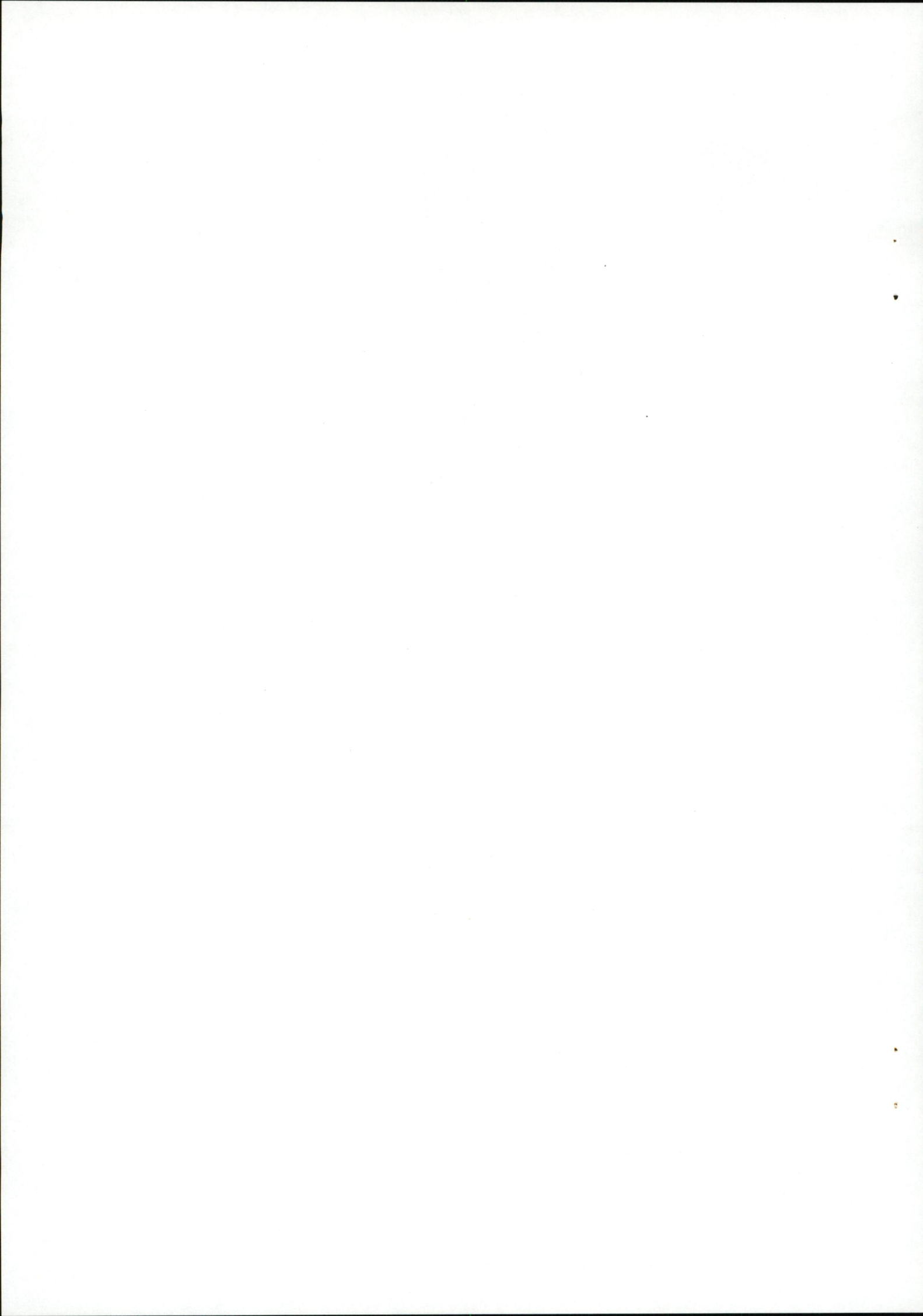
SCHEDULE 1—COMPLAINTS AND DISCIPLINARY MATTERS

SCHEDULE 2—PROVISIONS RELATING TO MEMBERS OF THE COUNCIL

SCHEDULE 3—PROVISIONS RELATING TO PROCEDURE OF THE COUNCIL

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**PROFESSIONAL STANDARDS BILL 1994**

NEW SOUTH WALES



No. , 1994

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**A BILL FOR**

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.

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The Legislature of New South Wales enacts:

**PART 1—PRELIMINARY**

**Short title**

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

**5 Commencement**

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

**Objects of this Act**

3. The objects of this Act are as follows:

- 10 (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;
- 15 (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.

**20 Definitions**

4. In 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;

25 “**Council**” means the Professional Standards Council constituted by this Act;

“**court**” includes an arbitrator;

“**damages**” means damages awarded in respect of a claim or counter-claim or by way of set-off, and includes:

- 30 (a) interest payable in respect of an amount awarded as damages; and



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- (b) legal costs and expenses ordered to be paid in connection with an award of damages (other than legal costs and expenses incurred in enforcing a judgment or incurred on an appeal made by a defendant);

**“exercise”** of a function includes, where the function is a duty, the performance of the duty; 5

**“function”** includes a power, authority and duty;

**“judgment”** includes:

(a) a judgment given by consent; and

(b) an award of an arbitrator; 10

**“occupational association”** means a body corporate:

(a) which represents the interests of persons who are members of the same occupational group; and

(b) the membership of which is limited principally to members of that occupational group; 15

**“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; 20

**“scheme”** means a scheme for limiting the occupational liability of members of an occupational association.

**Does this Act apply to all types of occupational liability?**

5. (1) This Act does not apply to liability for damages arising from any of the following: 25

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

(b) any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim;

(c) a breach of trust; 30

(d) fraud or dishonesty.

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

**Act binds the Crown**

6. 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. 35

**PART 2—LIMITATION OF LIABILITY****Division 1—Making, amendment and revocation of schemes****Preparation and approval of schemes**

7. (1) An occupational association may prepare a scheme.
- 5 (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.

**Public notification of schemes**

- 10 8. 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
  - 15 (c) inviting comments and submissions within a specified time, but not less than 21 days after publication of the notice.

**Making of comments and submissions concerning schemes**

9. (1) Any person may make a comment or submission to the Council concerning a scheme of which notice has been published under section 8.
- 20 (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.

**Consideration of comments, submissions and other matters**

- 25 10. 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;
  - 30 (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;

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- (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. 5

**Public hearings**

- 11. (1) The Council may conduct a public hearing concerning a scheme if the Council thinks it appropriate. 10
- (2) A public hearing may be conducted in such manner as the Council determines.

**Submission of schemes to Minister**

- 12. The Council may submit a scheme approved by it to the Minister.

**Gazettal, tabling and disallowance of schemes 15**

- 13. (1) The Minister may authorise the publication in the Gazette of a scheme submitted to the Minister by the Council.
- (2) Part 6 of the Interpretation Act 1987 (sections 39, 42 and 43 excepted) applies to a scheme which is published in the Gazette with the authorisation of the Minister in the same way as it applies to a statutory rule. 20

**Commencement of schemes**

- 14. A scheme published in the Gazette with the authorisation of the Minister commences 2 months after the date of its publication, subject to section 15. 25

**Challenges to schemes**

- 15. (1) A person who is or is reasonably likely to be affected by a scheme published as referred to in section 13 may apply to the Supreme Court for an order that the scheme is void for want of compliance with this Act. 30
- (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.



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- (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
  - 5 (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.

**Amendment and revocation of schemes**

- 10 **16.** The other provisions of this Division apply to the amendment of a scheme and the revocation of a scheme in the same way as they apply to a scheme.

**Division 2—Contents of schemes****Persons to whom a scheme applies**

- 15 **17.** 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.

**Partners of persons to whom a scheme applies**

- 20 **18. (1)** If a scheme applies to a person, the scheme also applies to each partner of the person.
- (2)** However, if a partner 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 partner.

**Employees of persons to whom a scheme applies**

- 25 **19. (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.

**30 Other persons to whom a scheme applies**

- 20.** 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.

**Limitation of liability by insurance arrangements**

21. A scheme may provide that if a person to whom the scheme applies and against whom a cause of action relating to occupational liability is brought is able to satisfy the court that the person has an insurance policy: 5

- (a) insuring the person against that occupational liability; and
- (b) under which the amount payable in respect of the occupational liability relating to that cause of action is not less than the amount of the monetary ceiling specified in the scheme in relation to the person at the time at which the cause of action arose, 10

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

**Limitation of liability by reference to amount of business assets**

22. A scheme may provide that if a person to whom the scheme applies and against whom a cause of action relating to occupational liability is brought is able to satisfy the court: 15

- (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 person at the time at which the cause of action arose; or 20

(b) that:

- (i) the person has business assets and an insurance policy insuring the person against that occupational liability; and
- (ii) the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action, 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 person at the time at which the cause of action arose, 25 30

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

**Limitation of liability by multiple of charges**

23. (1) A scheme may provide that if a person to whom the scheme applies and against whom a cause of action relating to occupational liability is brought is able to satisfy the court: 35



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(a) that the person has an insurance policy:

- (i) insuring the person against that occupational liability; and
- (ii) under which the amount payable in respect of the occupational liability relating to that cause of action is not less than an amount (in this section called the "**limitation amount**"), being a reasonable charge for the services provided by the person or which the person failed to provide and to which the cause of action relates, multiplied by the multiple specified in the scheme in relation to the person at the time at which the cause of action arose; or

(b) that:

- (i) the person has business assets and an insurance policy insuring the person against that occupational liability; and
- (ii) the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action, 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.

(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 person.

**Specification of different limits of liability for different persons and different work**

24. A scheme may specify different maximum amounts of liability for different classes of persons within an occupational association or different kinds of work, or both.



**Combination of provisions under sections 21, 22 and 23**

25. 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 occupation, 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 person in the provisions of the kind referred to in section 21 or 22.

5

**Liability that cannot be limited by a scheme**

26. (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.

10

(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.

15

(3) A Council determination applies only to a cause of action that arises after the determination is made.

**Insurance to be of requisite standard**

20

27. 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**

25

**Limit of occupational liability by schemes**

28. (1) A scheme, on and from its commencement in accordance with this Act and for the period for which it is in force, limits in accordance with its provisions the occupational liability of the persons to whom it applies.

30

(2) A person to whom a scheme applies cannot choose not to be subject to the scheme.

**Limitation of amount of damages**

29. (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  
(b) persons who are prescribed by the regulations for the purposes of this subsection.

**Effect of scheme on other parties to proceedings**

30. 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.

**Proceedings to which a scheme applies**

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

**Time limit on limitation of liability**

32. (1) The application of a scheme to the members of an occupational association ceases at the end of such period, not exceeding 5 years after the commencement of the scheme, as is determined by the Council unless:

- (a) the application ceases earlier in accordance with an Act of Parliament; or
- (b) the application ceases later in accordance with an extension under this section.



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(2) The Minister may extend the period of application of a scheme, by up to 6 months, if notice of the extension is published in the Gazette before the period ends.

(3) A right or liability arising during the application of a scheme to members of an occupational association is not affected by the scheme's ceasing to apply. 5

**Notification of limitation of liability**

33. (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, business cards and similar documents, must carry a statement to that effect. 10

(2) A person who contravenes this section is guilty of an offence.

Maximum penalty: 50 penalty units. 15

(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.

**PART 3—COMPULSORY INSURANCE** 20**Occupational association may compel its members to insure**

34. (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. 25

(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.

**Monitoring claims** 30

35. (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.



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(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.)

5 (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****Risk management strategies**

10 **36. (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.

15 (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.

**Reporting**

20 **37. (1)** An occupational association must provide information to the Council concerning its risk management strategies if requested to do so by the Council.

25 (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****30 Occupational Associations (Complaints and Discipline) Code**

**38. (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.

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(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; 5
- (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; 10
- (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; 15
- (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****Constitution of the Council** 20

39. 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****Membership of the Council**

40. 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. 25

**Provisions relating to members of the Council**

41. Schedule 2 has effect with respect to the members of the Council. 30

**Provisions relating to procedure of the Council**

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

**Division 3—Functions of the Council****Functions of the Council**

43. (1) The Council has the following functions:
- 5 (a) to give advice to the Minister concerning:
    - (i) the publication in the Gazette of a scheme submitted by it to the Minister;
    - (ii) the operation of this Act;
    - (iii) any other matter relating to the occupational liability of members of occupational associations;
  - 10 (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;
  - 15 (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;
    - 20 (iv) risk management;
    - (v) resolution of complaints by clients;
    - (vi) voluntary mediation services;
    - (vii) membership requirements;
    - (viii) discipline of members;
    - 25 (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;
  - 30 (g) to publish advice and information concerning the matters referred to in this section;
  - (h) to conduct forums, approved by the Minister, on issues of interest to members of occupational groups;
  - 35 (i) to collect, analyse and provide the Minister with information on issues and policies concerning the standards of occupational groups.



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(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. 5

**Division 4—Miscellaneous****Requirement to supply information**

44. (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 to furnish information to it which it may reasonably require in order to exercise its functions. 10

(2) An occupational association which does not comply with a notice under this section is guilty of an offence. 15

Maximum penalty: 5 penalty units.

**Committees of the Council**

45. (1) The Council may, with the approval of the Minister, 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. 20

(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.

**Staff of the Council** 25

46. The Council may, with the approval of the Minister, arrange for the use of the services of any staff or facilities of a government department, an administrative office or a public or local authority.

**Annual report**

47. (1) As soon as practicable after 1 January, but before 31 March, in each year, the Council must prepare and forward to the Minister a report on its work and activities for the previous year. 30

(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.

## **PART 7—MISCELLANEOUS**

### **5 Characterisation of this Act**

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

#### **Application of this Act**

10 49. (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.

#### **No contracting out of this Act**

15 50. 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.

#### **No limitation on other insurance**

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

#### **Proceedings for offences**

25 52. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

#### **Regulations**

30 53. (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.

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(2) Without limiting the generality of subsection (1), the regulations may make provision concerning the following:

(a) the fees for applications for the approval of the Council under section 7;

(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. 5

(3) A regulation may create an offence punishable by a penalty not exceeding 50 penalty units.

**Rules of court** 10

54. (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. 15

(3) This section does not limit the rule-making powers of any court.

**Review of Act**

55. (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. 20

(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. 25

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*Professional Standards 1994***SCHEDULE 1—COMPLAINTS AND DISCIPLINARY MATTERS**

(Sec. 38)

**MODEL CODE****Citation**

- 5       1. This Code may be cited as the Occupational Associations (Complaints and Discipline) Code.

**Definitions**

2. In this Code:  
10       “**Council**” means the Professional Standards Council constituted by the Professional Standards Act 1994.

**What actions may be the subject of a complaint?**

- 15       3. 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.

**Who may make a complaint?**

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

**How is a complaint made?**

- 20       5. 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).

**What happens after a complaint is made?**

- 25       6. 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;
  - 30       (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.

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SCHEDULE 1—COMPLAINTS AND DISCIPLINARY MATTERS—*continued*

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

7. 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: 5

- (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; 10
- (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. 15

**Notices of decisions**

8. 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. 20

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

9. 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.

**How may the functions of the occupational association under this Code be exercised? 25**

10. 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.

*Professional Standards 1994*SCHEDULE 1—COMPLAINTS AND DISCIPLINARY MATTERS—*continued***Protection from liability**

- 5 11. No matter or thing done or omitted by the occupational association or a person acting in accordance with a resolution of the association subjects the person 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

(Sec. 41)

10 **Chairperson and Deputy Chairperson of the Council**

1. (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.

15 (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:

- 20 (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.

**Deputies of members**

2. (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.

25 (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.

30 (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.

**Term of office**

35 3. 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.



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 SCHEDULE 2—PROVISIONS RELATING TO MEMBERS OF THE COUNCIL—  
*continued*
**Allowances**

4. 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**

5. (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 10
- (d) is removed from office by the Minister under this clause or by the Governor under Part 8 of the Public Sector Management Act 1988; or
- (e) is absent from 4 consecutive meetings of the Council of which reasonable notice has been given to the member personally or in the ordinary course of post, 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 15
- (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 20
- (g) becomes a mentally incapacitated person; or
- (h) is convicted in New South Wales of an offence which is punishable by penal servitude or imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence which, if committed in New South Wales, would be an offence so punishable. 25

(2) The Minister may remove a member from office for incompetence or misbehaviour.

**Filling of vacancy in office of member**

6. If the office of a member becomes vacant, a person may, subject to this Act, be appointed to fill the vacancy. 30

**Effect of certain other Acts**

7. (1) Part 2 of the Public Sector Management Act 1988 does not apply to the appointment of a member.

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**SCHEDULE 2—PROVISIONS RELATING TO MEMBERS OF THE COUNCIL—**  
*continued*

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

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- (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,

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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.

**Personal liability of members**

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8. 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**

20

(Sec. 42)

**General procedure**

1. 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.

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**Quorum**

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

**Presiding member**

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3. (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.

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SCHEDULE 3—PROVISIONS RELATING TO PROCEDURE OF THE  
COUNCIL—*continued*

**Voting**

4. 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.

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**First meeting**

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

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