

PROFESSIONAL STANDARDS BILL 2004

EXPLANATORY NOTES

General Outline

Objectives of the Legislation

The objective of the Bill is to further facilitate the ongoing affordability of professional indemnity insurance through introduction of a scheme that will promote and encourage improvement in occupational standards.

Reasons for the objectives and how they will be achieved

Over the past two years major problems have emerged with the availability and affordability of professional indemnity insurance. This has resulted in increases in the costs of professional services, and in some instances complete withdrawal of some services. In other instances, the dramatic rise in insurance premiums has resulted in some professionals opting not to insure, leaving consumers no recourse in circumstances where an adverse event for which the professional is civilly responsible occurs.

In June 2002, the Queensland Government introduced the first stage of reforms designed to place maximum downward pressure upon rising insurance premium costs for the public liability insurance sector. This was the *Personal Injuries Proceedings Act 2002*. In March 2003 the Queensland Government introduced the second stage of tort reforms, aimed at placing maximum downward pressure upon rising insurance premium costs generally. The *Civil Liability Act 2003* both clarified basic principles within the substantive law and introduced some fundamental changes to the law of negligence. This included reformulation of the test to be applied in assessing whether a professional had breached a duty of care to a client.

The *Professional Standards Bill 2004* represents the third stage of tort law reform. The Bill proposes that persons engaged in similar or substantially similar occupations will be encouraged to improve the standards of their work through an ability to limit their exposure to liability for their work as a group represented by an association. The Bill provides

for a procedure whereby persons who form associations of which they are members will be able to apply to an independent body for approval of a scheme relating to the work undertaken by the group.

For a scheme to be approved, an occupational association will be required to prove to the independent body, the Professional Standards Council, the scheme will appropriately require all members of the group to subject themselves to duties and obligations that will result in improvement of the standard of service provided by the members of the association. Further, the legislation allows the council to approve limitation of the liability of the members of the association at levels which, having regard to the historical levels of claim against the members and the need for consumer protection, the council consider will facilitate on-going affordability of the services provided by the members. The limitation will also provide for an appropriate level of recourse against the member in conjunction with a guaranteed availability of funds to satisfy the liability through insurance, business assets, or both.

The Bill also incorporates amendments to the *Civil Liability Act 2003* to reformulate the application of proportionate liability in Queensland. The amendments are in accordance with the provisions of the Act as instances where proportionate liability apply traditionally involve professionals whose insurance premiums are assessed upon the increased exposure that results from joint and several liability.

Administrative cost to Government of implementation

There will be an initial administrative cost to government in appointment of the professional standards council, the independent body which is to assess schemes seeking approval under the legislation. However, it is expected that economies of scale will be achieved through a national agreement to use one council for all jurisdictions' legislation. This will include use of one secretariat to administratively assist the council. Finally, it is also possible that the council will become self funding in the future.

Consistency with Fundamental Legislative Principles

The Bill gives rise to a breach of fundamental legislative principle that legislation should not adversely affect the rights of individuals. The Bill provides a method by which a professional may limit their liability to the detriment of someone relying upon their professional work for loss in excess of \$500,000.

The potential adverse affect on individuals must be balanced against the positive effect that a guaranteed level of recovery will exist in circumstances where the limitation amount is reached. With the current failure of the insurance market in some sectors, and professionals deciding to practice uninsured in others, consumers may find they have no monetary recourse whatsoever in circumstances of an adverse event. The proposed system will guarantee availability of funds to a level of which the consumer is advised. The consumer can appropriately consider the risk. Further, the system also guarantees continual improvement in provision of services, thereby reducing the risk of an adverse event occurring.

Consultation

The Queensland Government has been involved in consultation on the implementation of the Bill at both a national and state level. At a national level the Ministerial Forums on Insurance Issues have been investigating the appropriate implementation of professional standards legislation, including taking submissions from the Australian Consumers Association, the Credit Union Services Corporation (Australia) Limited as well as reviewing all submissions made to the Senate Inquiry into professional standards legislation.

At a state level, submissions were obtained from Professions Australia, the Queensland Law Society, the National Law Firms Group, the Australian Bankers' Association, the NSW Professional Standards Council Secretary, the Bar Association of Queensland, the Law Council of Australia, the Property Council of Australia and the Australian Spatial Information Business Association Ltd. In addition, consultation was undertaken with Queensland Treasury, Queensland Transport, the department of State Development and Innovation and the Department of Public Works.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 provides that the legislation may be cited by way of short title.

Clause 2 provides that the Bill is to commence on a date to be proclaimed.

Clause 3 includes a note in the text as being a part of the Bill.

Clause 4 provides the objects of the Bill. The Bill is designed to encourage the improvement of standards in the provision of occupational services. This is achieved through the creation of a procedure whereby an occupational group, through an occupational association, can design a scheme that promotes on-going professional development, high standards of behaviour and conduct, and implementation of risk management strategies in return for the ability to limit liability for their actions within insured limits. This improvement in standards will result in consumer protection through both improved standards and guaranteed recourse in instances of adverse incident.

Clause 5 provides that the Bill is to bind all persons, extending to the State of Queensland and also to the Commonwealth or any other State to the full extent possible. However, the provision does not extend criminal culpability to the State, the Commonwealth, or any other State.

Clause 6 excludes application of the Bill to a number of types of action. Any scheme under the Act can not affect damages payable in personal injury claims, including claims by dependants where a person has died or similar. Further, a scheme can not affect damages payable by anyone as a result of the negligence or fault of a lawyer in a personal injury claim. A scheme can not affect damages payable as a result of a breach of trust, nor can it affect damages payable as a result of fraud or dishonesty. Further, any compensation payable by the State for loss of title to land under the *Land Title Act 1994* is not limited by the Bill.

Clause 7 provides that Schedule 2 to the Bill defines certain words for the purposes of the Bill.

Clause 8 provides that a scheme under the Bill may be prepared either by an occupational association or by the professional standards council.

The council is only able to prepare a scheme if an association applies to the council, and the council is not bound to prepare the application. The clause also provides the council with power to approve schemes under the section.

Clause 9 provides the council must invite public submissions on schemes for which an occupational association has sought approval. Notice must be given of the application in a state-wide newspaper, and the notice must provide detail about the scheme, state where a copy of the scheme may be obtained, and invite comments and submissions within a period of at least 21 days after the notice.

Clause 10 provides that any person may make a submission upon a scheme for which application for approval has been made and notice inviting comments or submissions has been given. The submission must be in writing, and provided to the professional standards council within the time stated in the notice. Further, the clause provides the council may extend the time for submissions.

Clause 11 provides that, in addition to receiving comments by way of written submissions, the professional standards council may take oral comments at a public hearing. There is no obligation upon the council to hold a hearing, and the council may conduct the hearing in the manner it considers appropriate.

Clause 12 details the facts, matters and circumstances which the professional standards council must take in to account when deciding whether or not to approve a scheme. The council must consider all comments, whether written or oral, which are received as part of the formal consultation process. Further, the council must consider the affects of a proposed scheme on persons who have not made submissions through the public consultation process. The council must have particular regard to the risk management strategies and disciplinary procedures provided under the proposed schemes, including implementation requirements. The council is also to have regard to the insurance policies available to the particular members of the occupational association that has applied for approval of the scheme, including premium cost, and the insurance standards for those occupations. The clause also provides that regulations may provide further matters which the council either is to have regard to or must not have regard to.

Clause 13 provides that the council must both formally advise the Minister of the approval of a scheme and provide a copy of the scheme as approved to the Minister.

Clause 14 provides that the Minister must give notice of the approval of a scheme advised to him in the gazette. This must be done by gazette notice. The gazette notice is sub-ordinate legislation, and is therefore required to be tabled in the Legislative Assembly under the *Statutory Instruments Act 1992*. A copy of the scheme as approved is to be attached to the gazette notice when it is tabled. The gazette notice may be disallowed by the Legislative Assembly under that Act, which results in the scheme ceasing to have effect. The scheme also fails to have effect if the gazette notice is not tabled.

Clause 15 commences schemes approved by the council. The scheme commences on the date mentioned in the scheme so long as that date is after the date of the gazettal notice of the council's approval. If no date is mentioned, the scheme will be taken to commence two (2) months after the gazettal notice. A scheme can not commence prior to the gazettal notice. Commencement of a scheme may also be suspended by an order of the Supreme Court.

Clause 16 provides for an application to be made to the Supreme Court after a gazettal notice. The application may only be made by a person who is either affected by the scheme or is reasonably likely to be affected by the scheme. The applicant may seek an order that the effect of the scheme be suspended on the basis the scheme has not been made in accordance with the Act. The application may be made at any time. The Court may make preliminary orders that either remove any effect of the scheme if it has commenced, or stay its commencement if it has not commenced, until the court makes final orders. In making final orders, the Court may permanently suspend operation of the scheme on the basis it contravenes the Act, dismiss the application or extend the temporary suspension of the scheme to allow for rectification of any contravention of the Act. If extending the suspension, the court will provide directions on actions required to rectify the contravention as the Court considers appropriate in the circumstances.

Clause 17 provides the Minister with power to require the professional standards council to review the operation of a scheme. The power may only be exercised by way of written notice signed by the Minister directed to the council. The council must comply with the written notice. The Council also holds the power to review the operation of a scheme, or any proposed change to a scheme, as of its own motion. The purpose of the review is to decide whether the scheme should be amended, revoked, or replaced with a new scheme.

Clause 18 provides that a scheme may be amended or revoked in the same way that application for a new scheme may be made. Accordingly, either the occupational association may draft the amendment or revocation, or the association may apply to the professional standards council to have the council draft the amendment or revocation. Further, the council may prepare an amendment or revocation of a scheme without any application from the relevant occupational association. The rules as to approval of the amendment or revocation are then the same as when seeking original approval of a scheme. As a result, any amendment or revocation will also be notified.

Clause 19 provides that the benefits, duties and obligations under a scheme that has been approved apply to members of the occupational association that applied successfully to have the scheme approved by the professional standards council. The scheme may dictate that the scheme applies to all members of the association, or that the scheme, or identified portions of the scheme, apply to certain groups of members of the association only. The scheme may allow the occupational association to exempt a member from the scheme in its entirety on the specific application of the member. Where the association does exempt a member, the benefits, duties and obligations of the scheme cease to have effect with regard to the member. However, a scheme may not allow officers, partners or employees of the member to seek exemption from the scheme.

Clause 20 extends the application of an approved scheme to the business relationships that may be found within professional service providers. This is achieved by providing that, where a body corporate is a member of an occupational association for which a scheme has been approved, then each officer of the body corporate will be required to comply with the scheme in conducting on behalf of the body corporate any business that falls within the provision of the services regulated by the scheme. Further, where the member has a partner or partners, each partner is required to comply with the scheme in conducting on behalf of the partnership any business that falls within the provision of the services regulated by the scheme. However, where the officer or partner is entitled to be a member of the occupational association, the section provides that the scheme does not extend to the conduct of that officer or partner. As a result, those officers or partners are required to become a member of the occupational association in order to have recourse to the benefits, duties and obligations of the scheme.

Clause 21 extends the application of an approved scheme to employees of a member. Each employee of a member of an occupational association for which a scheme has been approved will be required to comply with the scheme in conducting on behalf of the member any business that falls

within the provision of the services regulated by the scheme. However, if the employee is entitled to be a member of the association, then the employee is unable to have recourse to the scheme. The employee will be required to become a member of the association in order to do so.

Clause 22 provides that a scheme may limit the liability of a member by reference to an insurance policy. This limitation relates to liability incurred as a result of provision of occupational services covered by the scheme. In order to limit the damages payable as a result of that liability, the scheme must provide that the member be required to prove to the court that the member holds an insurance policy that indemnifies the member for the specific liability incurred up to the maximum limit of liability applicable to the member under the scheme. In calculating the amount which is indemnified under the policy, in accordance with the definition of “amount payable” in Schedule 2 any excess which is payable by the member under the policy is to be included in the final total. The maximum limit of liability is the amount set under the scheme at the time of the act or omission from which the liability arises, as confirmed by clause 29.

Clause 23 provides that a scheme may limit the liability of a member by reference to either the value of business assets or a combination of both business assets and an insurance policy. This limitation relates to liability incurred as a result of provision of occupational services covered by the scheme. In order to limit the damages payable as a result of the specific liability incurred by way of reference to business assets, the scheme must provide that the member be required to prove to the court that the member holds assets with a minimum value either equal to or in excess of the maximum limit of liability applicable to the member under the scheme. In order to limit the damages payable as a result of the liability by way of reference to a combination of business assets and insurance, the scheme must provide that the member be required to prove to the court that the member holds both an insurance policy that indemnifies the member for the liability and also assets, the total value of which are equal to or in excess of the maximum limit of liability applicable to the member under the scheme.

In calculating the amount which is indemnified under an insurance policy, in accordance with the definition of “amount payable” in schedule 2 any excess which is payable by the member under the policy is to be included in the final total. The value of the business assets in either instance is assessed as at the date of satisfying the court of the assets held. The meaning of “business assets” is provided in Schedule 2 of the Bill. The maximum limit of liability is the amount set under the scheme at the time

of the act or omission from which the liability arises, as confirmed by clause 29.

Clause 24 provides that a scheme may limit the liability of a member by reference to a multiple of the reasonable charge that may be made for the occupational services provided. The reasonable charge is assessed by reference to both the actual amount charged and the amount that would be charged under any appropriate scale of charges at that time. Where there is no scale of charges, comparison is to be made to the amount that would be charged by a peer of the member of equal qualifications and experience. The amount by which the reasonable charge is multiplied is the multiple set under the scheme at the time of the act or omission from which the liability arises, as confirmed by clause 29. This limitation relates to liability incurred as a result of provision of occupational services covered by the scheme.

For the clause to apply, the scheme must provide that the member be required to prove to the court one of three facts. First, the member can prove the member holds an insurance policy that indemnifies the member for the liability for an amount equal to or in excess of the multiple of charges applicable to the member under the scheme. Second, the member can prove the member holds business assets with a minimum value either equal to or in excess of the multiple of charges applicable to the member under the scheme. Third, the member may prove that the member holds both an insurance policy that indemnifies the member for the liability and assets, the total value of which are equal to or in excess of the multiple of charges applicable to the member under the scheme. In calculating the amount which is indemnified under an insurance policy, in accordance with the definition of ‘amount payable’ in Schedule 2 any excess which is payable by the member under the policy is to be included in the final total. The value of the business assets in either instance is assessed as at the date of satisfying the court of the assets held. the meaning of “balanced assets” as provided in Schedule 2 of the Bill.

Clause 25 provides that a scheme approved by the professional standards council may set either one limit of liability for all members or may provide for different levels of limitation of liability between members of the occupational association. The differences in limitation of liability may be based upon differing types of member, differing groups of members, differing types of occupational services, or differing circumstances in supply of occupational services.

The clause also allows a scheme to provide an occupational association with the power to specify a higher limitation of liability than would

otherwise be the case under the scheme. This power may only be exercised upon the application of a member and may only be exercised in relation to that member's limitation of liability. The application for an increased limitation may be in relation to a specific instance or a general class of cases. The clause does not allow a member to apply for a limitation to be decreased.

Clause 26 provides that a scheme may limit different liabilities to which members of the relevant occupational association are exposed by way of a combination of limitations of liability based upon clauses 22, 23 and 24. In the circumstances where limitations set under either clauses 22 and 24, or clauses 23 and 24, could apply then the scheme must provide that limitation is to be calculated under section 24, but may only equal the lower limit of the two.

Clause 27 deals with the setting of limits of liability by schemes. The clause provides that no scheme may limit liability to an amount of less than \$500,000 for a single cause of action. This minimum does not apply on an event basis, but on a claim basis, as confirmed by clause 30. Further, when deciding whether to approve a limit of liability under a scheme, the professional standards council is required to consider both frequency of claims and the values of claims made against the members of the occupational association concerned. The council must balance this information against the need for consumer protection to ensure appropriate recourse remains available to consumers of services by the members of the association. This requirement is in addition to the matters to be taken into account under clause 12. The clause also provides that any limitation of liability can only apply to causes of action that arise whilst a scheme is in force.

Clause 28 requires occupational associations to decide on the standards of insurance that are to be held by members as part of a scheme. Standards may relate to types of insurance provider, levels of excess payable, exemptions that are acceptable, and levels of insurance cover as confirmed by clause 35. These standards may be amended by an association, but the association must first notify the professional standards council of the proposed change. If the council is concerned with the changes to be made, it may review the scheme. There is no requirement upon the council to review the scheme.

Clause 29 provides statutory force to the limit of liability provided within an approved scheme. However, the limit of liability will not apply if the member attempting to rely upon the limit in relation to a claim by a client if the member has not advised the client of the limitation. The

member may advise the client by either providing a notice in accordance with clause 34 or otherwise advising the client, either orally or in writing, prior to the act or omission from which the cause of action arises. If the claim is brought by a person other than a client, the member is not required to have advised of the limitation of liability.

The clause confirms that the limitation of liability which the member may rely upon is that as at the date of the act or omission. This means that any level of insurance or business assets must satisfy that limit, and any amendment of the limit subsequent to that date is irrelevant. The clause also confirms that the limitation applies for all causes of action founded upon the act or omission. This is the case irrespective of when the claim is made or proceedings are commenced. Further, the limitation will apply even if the cause of action is found to have arisen after the act or omission. It is also not necessary for a scheme to remain in force after the act or omission, only that it be in force on the date in question.

The clause also confirms that a member of an association has no power to decide whether or not to be covered by a scheme approved for the association, whether as a result of an attempt to contract out of the scheme or otherwise. Any exemption must be approved by the association under clause 19 in accordance with the terms of the scheme as approved by the council.

Clause 30 confirms that any limitation set by a scheme relates to each cause of action that arises out of the act or omission. It does not limit the total due for all claims. Where a number of interests are based in the one cause of action, then the total amount payable to each party holding an interest may only be equal to the limitation set by the scheme, and can not be calculated by reference to the limitation amount as applying to each interest. Also, where one person has a number of claims based upon the same act or omission, but against a number of related individuals, the clause provides that the person may only recover a total amount up to the limitation set by the scheme as if the claims were only one cause of action. Related individuals are those that are either officers within the same body corporate, partners of the same partnership or an employee and their employer.

Clause 31 provides that a party to proceedings who is not either a member of the occupational association for which the scheme has been approved, or an officer, partner or employee to which clauses 20 or 21 apply, may not rely upon any limitation of liability set in a scheme in order to limit their own liability.

Clause 32 confirms that any scheme approved by the professional standards council may not have retrospective effect.

Clause 33 provides that the professional standards council is to decide the period which a scheme may be in force. This period must not be more than a period of 5 years from commencement, but may be less. Further, the clause confirms that the period may be reduced during the period decided by the council if the scheme is revoked. In addition, the council may extend the period by a maximum of one (1) year only. This may only be done prior to the period originally decided expires.

Clause 34 requires a member of an occupational association to advise all clients, or prospective clients, of the limitation of their liability by a scheme approved by the professional standards council. This must be done each time the member provides certain documents to the client or prospective client. The documents are those which promote the member's business or occupation, and include correspondence sent during the course of business, but not business cards. The clause provides it is an offence not to provide an appropriate statement on each of those documents. A regulation may provide the form of the statement, but the absence of a regulation does not remove the requirement to provide an appropriate statement.

Clause 35 provides that an occupational association may require members to compulsorily hold insurance. The type and standard of insurance may vary in accordance with the various limitations of liability provided for within the scheme approved for the association, but does not necessarily have to relate to any limitation of liability set. The requirement may merely be a condition of membership, or based upon any other criteria considered appropriate by the association. The clause also confirms that the association may set standards in relation to insurance cover required to be held.

Clause 36 provides an occupational association, or a group of occupational associations, may establish a committee to scrutinise claims made against members for the purposes of advising members on ways to minimise claims based upon occupational liability. The committee may include members of an association and also non-members, for example representatives of insurers, reinsurers or insurance brokers.

Clause 37 requires an occupational association, as part of an application to have a scheme approved, to provide to the professional standards council full written details of the risk management strategies that members will be subject to. The association may make compliance with the strategies a condition of membership of the association, or impose compliance in any way the association considers appropriate. The strategies are to be

considered as additional to any statutorily required procedures or strategies. In an instance where the associations strategies are inconsistent with the statutory requirement, the associations strategy is void to the extent of the inconsistency.

Clause 38 requires the occupational association to provide information to the professional standards council on the risk management strategies of the association, and their implementation and monitoring, both on an annual basis by way of written report and also if requested by the council at any other time. The annual report is to include any findings of any committee formed to scrutinise the claims made against members of the association. The council must include the association's report, in a format considered appropriate by the council, in the council's annual report under clause 64.

Clause 39 enables an occupational association to subject members of the association to audit of the members' compliance with the risk management strategies specified for the member. The compliance audit may be conducted at any time, and may be of specific members, specific classes of member, or of members generally. A copy of the association's audit report must be provided to the professional standards council. The council may require an association to conduct an audit or may conduct an audit itself. If the council does conduct an audit, the association and members must provide all information reasonably requested by the council to conduct the audit. The council must provide a copy of the audit report to the association.

Clause 40 provides that an occupational association may adopt the model complaints and discipline code provided in Schedule 1. The model may be adopted in the form provided in the schedule, or the association may seek to adopt an amended form of the code. Any amendments may relate to the making or deciding of complaints, the decision making process, appeals and outcomes of decisions, such as discipline, and the way in which decisions may be made and by whom. Any amendments, however, are to be approved by the council prior to being adopted. The Code does not have legislative force, in that the legislation does not mandate its adoption. If adopted, the code becomes a contractual agreement between the occupational association and the members of the association.

Clause 41 establishes the professional standards council.

Clause 42 provides that the professional standards council is a separate legal entity, by way of a statutory body corporate, that holds a seal and may be a party to legal proceedings. The entity does not represent the State of Queensland.

Clause 43 outlines the functions of the professional standards council. The council is to advise the Minister upon issues related to the approval, amendment or revocation of schemes, the operation of the Act and the occupational liability of members of occupational associations. It may provide this advice whether the Minister requests the advice or the council considers it appropriate to be provided.

The council is also to advise occupational associations on insurance policies that may be required under Part 2 (Contents of Schemes) and to encourage and assist in the improvement of the occupational standards of members of occupation associations. This includes assisting associations to develop appropriate self-regulation practices in relation to areas such as codes of conduct and continuing occupational development, quality assurance and risk management, and dispute resolution and discipline of members. The council has a monitoring function, thereby ensuring maintenance of occupational standards and compliance with risk management strategies.

The council has a general function relating to ensuring appropriate awareness of occupational standards and the legislation exists, both among associations and the public, as well as the Minister, and to prosecute offences under the Legislation. The council may have further functions placed upon it under other legislation, but the council may not comment upon occupational standards set in other legislation.

Clause 44 further outlines the powers of the professional standards council as a body corporate, in addition to the powers otherwise described in the legislation. These powers are expressed as being equivalent to those of an individual.

Clause 45 provides that the professional standards council is to consist of eleven (11) members, appointed by the Minister in writing. In making an appointment, the Minister must be satisfied any person to be appointed has appropriate experience, skills and qualifications to contribute to the functions and work of the council.

Clause 46 requires the Minister to appoint both a chairperson and a deputy chairperson from the members appointed to the professional standards council. The appointments are to be in writing, and may be made at the same time as appointment of the person as a member of the council. The clause otherwise deals with the term of office of the chair person and deputy chair person.

Clause 47 deals with the term of appointment of members of the professional standards council generally. A member may be appointed for

any period up to three (3) years, with the term being stated in the written notice of appointment. A person may be reappointed as a member at the end of the term. A member may resign their appointment by way of written notice to the Minister.

Clause 48 deals with the conditions of appointment of members of the professional standards council. The member is entitled to be remunerated at the rate decided by the Minister, and may receive any allowances decided by the Minister. The members' conditions are otherwise as stated in the Legislation or as otherwise decided by the Minister.

Clause 49 outlines the circumstances in which a person is to be considered not qualified to either be appointed or continue to hold appointment as a member of the professional standards council. These circumstances are where the person is an insolvent under administration, as defined in Schedule 2 to the Bill, or where the person is incapable of performing their duties as a result of physical or mental incapacity, or where the person is convicted of an offence that has a maximum penalty of imprisonment for one (1) year or more if the offence were committed in Queensland.

Clause 50 provides that the office of a member is to be considered vacant if the incumbent member resigns in accordance with the legislation, or is absent for 3 consecutive council meetings without permission, is no longer qualified to be a member, or is removed from office by signed notice from the Minister.

Clause 51 allows the professional standards council to hold meetings at the times and places the council considers appropriate, but the council must meet at least once a year. Both the Minister and the chairperson are specifically allowed to call a meeting of the council at any time. If the Minister calls the meeting, the Minister holds the right to be heard by the Council.

Clause 52 provides that the chairperson is to preside at all meetings of the professional standards council at which they are present. In the chairperson's absence, the deputy chairperson is to preside, but if the deputy chairperson is also absent, the members present are to elect a member to preside at the meeting.

Clause 53 provides that the decisions of the professional standards council are to be made by a vote of members who are present at the meeting. The council is taken to answer with the majority of votes of members. However, the members present can not vote upon a question unless a quorum exists. Where the number of votes for and against a

question is equal, the member presiding is to cast a second vote to break the deadlock. The presiding member will be the member identified through clause 52.

Clause 54 states that a quorum for a meeting of the professional standards council at which a vote by members is to be made is six (6) members.

Clause 55 allows the professional standards council to conduct meetings of the councils as it considers appropriate, including allowing members to be present at meetings for the purposes of voting through use of technology such as tele-conferencing. Further, the council may make resolutions without holding a meeting of members in circumstances where a majority of the council members appointed provide written agreement with the resolution, and notice of the resolution is given in accordance with procedures previously determined by the council.

Clause 56 requires the professional standards council to keep summaries of the proceedings at council meetings and to record any decisions made by the council, whether at a meeting or not.

Clause 57 requires the seal of the professional standards council to be held and used only as directed by the council. When the seal is used, judicial notice of the imprint of the seal upon a document.

Clause 58 requires judicial notice to be taken of the signature of the chairperson of the professional standards council, and the fact the chairperson holds, or did hold, the position of chairperson.

Clause 59 provides that a document of the professional standards council that does not require being sealed is made by the council if signed by either the chairperson or any person authorised by the council to sign the document. If the document does require being sealed, then the document is made by the council if sealed as authorised by the council and also signed by the chairperson or any person authorised by the council to sign the document.

Clause 60 allows the professional standards council to make a written request to an occupational organisation to provide information or a document the council reasonably requires to undertake its functions. The occupational association must provide the information within the time specified in the request made by the council. The period of notice must be at least seven (7) days. It is an offence for the occupational association to fail to provide the information or document as requested without reasonable excuse.

Clause 61 provides that an occupational association may refer to the council any complaint or evidence relating to the conduct of a member that may be in contravention of the legislation. The individuals of the association involved in reporting the complaint or evidence to the council are indemnified from any civil liability as a result of their actions in referring the matter to the council, so long as their actions are conducted honestly and without negligence.

Clause 62 provides the council may establish a committee to assist it in performance of the council's functions. The committee may consist of members of the council, or non-members that the council consider appropriately qualified. Non-members are to be appointed by way of notice in writing from the council and are not entitled to remuneration, other than reimbursement of reasonable travel expenses and travel allowances. A committee may only be established with the prior approval of the Minister except where the committee consists of members of the council only. The Minister must be provided with the proposed terms of reference or function of a committee prior to giving approval for the committee.

Clause 63 requires the chief executive to provide the professional standards council with reasonable assistance in the performance of the council's functions. This includes nomination of an officer under the control of the chief executive that is appropriately qualified to assist the council in performing its functions.

Clause 64 requires the professional standards council to provide the Minister with an annual report on the council's operations during the past financial year. The report is to be given within 3 months after the end of the financial year. The Minister is required to table the report in the Legislative Assembly within 14 days after receiving the report from the council.

Clause 65 subjects the action of the professional standards council to the general direction and control of the Minister. The Minister may provide specific written directions to the council, including requiring access or delivery of information held by the council. Where written directions are provided by the Minister, the council may publish that written direction in the gazette, and must publish the direction in the next annual report.

Clause 66 makes the provisions of the act part of the substantive law of the State.

Clause 67 voids any agreement to contract out of the provisions. Any agreement between a member and another party that the member either will not comply with, or will only comply partially with, a scheme is invalid and of no force. This includes any agreement to increase or remove

any limitation of liability, or to forego any requirement under a scheme with respect to risk management strategies, quality assurance or any other duty or obligation.

Clause 68 confirms that the legislation does not alter any other insurance arrangements that may be made other than those which are specifically dealt with by a scheme approved under the Legislation.

Clause 69 provides that a prosecution for an offence is to be brought in a summary way under the *Justices Act 1886*. The prosecution must be brought within the later of 1 year after the offence or six months after the complainant becomes aware of the contravention. However, a prosecution may not be commenced after two (2) years after the date of commission of the offence.

Clause 70 indemnifies certain individuals acting under the legislation from civil liability for any act done or omission made honestly and without negligence. The individuals indemnified are the Minister, the chief executive and their officers and employees, the council members, any member of a committee established by the council, and any person provided by the chief executive to assist the council in administration of its functions.

Clause 71 provides the Governor-in-Council with power to make regulations for the purposes of the legislation. This power includes the ability to make regulations that prescribe offences for contravention of regulations, with penalties, to make regulations that prescribe fees payable under the legislation, and to prescribe the content and form of applications to the council for approval of schemes.

Clause 72 requires the Minister to commence a review of the operation of the legislation within two (2) years after its commencement. A report on the review must be tabled in the Legislative Assembly within three (3) months after the review is completed.

Clause 73 states that the part amends the *Civil Liability Act 2003*.

Clause 74 amends section 4 of the *Civil Liability Act 2003* to provide that Chapter 2 Part 2 (Proportionate Liability) of that Act only applies to a breach of duty that occurs on or after the commencement of the amendment of section 4.

Clause 75 amends section 7 of the *Civil Liability Act 2003* to ensure that parties are unable to contract out of the proportionate liability provisions of that Act.

Clause 76 repeals the current Chapter 2 Part 2 (Proportionate Liability) of the *Civil Liability Act 2003* and replaces it with a new part. The new part consists of 14 new clauses. The new clauses retain the basic concept of the allocation of risk by way of proportionate liability, being that where two or more people cause the same damage through their actions, a claimant may only recover from each responsible person that portion of damages as apportioned against the person by a court. The language of the clauses has been grammatically altered to provide for national consistency so far as possible.

The proposed section 28 applies proportionate liability to claims relating to property damage or pure economic loss. The claim may arise at common law, or be based upon a breach of section 38 of the *Fair Trading Act 1989*. A single claim is stated as including the instance where one claim may be brought upon a number of causes of action.

The proposed section precludes the part from applying to claims that arise as a result of a personal injury. This will preclude application of the provisions in not only direct claims by injured people, but also in contribution proceedings between responsible parties and related third party proceedings. Also precluded are transactions by consumers, which are defined in clause 29.

The proposed section does not affect the principles of recovery of loss where another piece of legislation states that joint and several liability applies. Where the part provides protection from liability, the proposed section states the part does not affect or limit protection provided by any other section of the Act or by any other legislation or the common law.

Proposed section 29 provides definitions for the part. In relation to the consumer transaction exclusion, “consumer” is defined to mean those transactions which an individual would be involved in as a normal part of their daily personal life, as opposed to business dealings. It will also include instances where the person obtains professional advice as part of their normal daily life. The definition of “professional” is the same as in section 20 of the Act.

Proposed section 30 provides the definition of “concurrent wrongdoer” for the purposes of a part. To be a concurrent wrongdoer, a person must be one of two or more people whose independent actions have caused another person to suffer the same damage. It will not include a person whose actions are made jointly with others, and it will not include a person where their actions and the actions of others result in separate identifiable damage to another person.

Proposed section 31 implements the concept of recovery of loss by way of proportionate liability. Where a court finds that a person is responsible as a concurrent wrongdoer, then the court must apportion the level of responsibility for any damage or loss between all concurrent wrongdoers. The court may only give judgment against each wrongdoer a party to the proceedings for the apportioned amount.

The proposed section also provides that, where a claim involves both claims based upon actions of concurrent wrongdoers, and claims based upon actions that result in independent damage, then the court must identify the different claims, and apply the apportionment principles to the incident involving the concurrent wrongdoers.

The court may consider the actions of any person who is not a party to the proceedings when apportioning liability and the part will apply whether or not all appropriate parties are joined to a proceeding.

Proposed section 32 places an onus on all parties involved in a claim to identify all concurrent wrongdoers to other parties. A claimant must do this by making the claim against all persons the claimant reasonably believes may be responsible for the loss or damage suffered. If they fail to do so, the court may order the claimant pay any costs thrown away as a result of delay in trial or otherwise required to be paid by a defendant based upon the failure. A concurrent wrongdoer is required to advise a claimant of any other person that is appropriately to be considered a concurrent wrongdoer. This includes providing information that would assist in locating and identifying the other wrongdoer, and it must be given as soon as possible after the claim is made. If the concurrent wrongdoer fails to provide the advice, whilst the court will still provide an apportionment of the damages between wrongdoers, may order that the wrongdoer may be pursued for the entire loss or damage. The wrongdoer would then be required to rely upon subsequent contribution claims against the other wrongdoer to recover any amount not apportioned against them. The court may in the alternative order the wrongdoer to pay any costs thrown away, or may order both. It will also be the case that, where a claimant joins a person to an action based upon information provided by another party under this clause, if the person is found to be not liable the court will have the power to award the costs of the person against both or either of the claimant and the party that provided the advice.

Proposed section 32A confirms that, where a court apportions liability against a concurrent wrongdoer, no further orders may be made against that concurrent wrongdoer which would have the effect of requiring payment

toward any other concurrent wrongdoer's apportionment or future possible apportionment.

Proposed section 32B relates to the instance where a claimant has failed to join all concurrent wrongdoers to an original claim, whether a party is in breach of section 32 or not. The proposed section confirms that the claimant may bring a further action or actions to recover the remaining amount that may be apportioned against any other person. However, the total amount awarded for all claims must not exceed the total loss suffered by the claimant as a result of the acts or omissions of all wrongdoers.

Proposed section 32C also relates to the instance where a claimant has failed to join all concurrent wrongdoers to a claim, whether a party is in breach of section 32 or not. The court holds a discretion to allow, or order, that any remaining person or persons be joined to the proceeding. However, the court is expressly prevented from joining a concurrent wrongdoer who has already been a party in prior proceedings based upon the claim.

Proposed section 32D provides that, where the concurrent wrongdoer is found to have been fraudulent in their conduct, then the concurrent wrongdoer is liable for the entire loss of the defendant severally. The concurrent wrongdoer would then be required to recover any loss apportioned to other parties by way of subsequent action. The concurrent wrongdoer is not able to rely upon the fact that the actions of others also caused the same damage to reduce their liability. The section does not affect the ability of any other concurrent wrongdoer to rely upon the part.

Proposed section 32E provides that, where the concurrent wrongdoer is found to have intentionally caused the loss suffered, then the concurrent wrongdoer is liable for the entire loss of the defendant severally. The concurrent wrongdoer would then be required to recover any loss apportioned to other parties by way of subsequent action. The concurrent wrongdoer is not able to rely upon the fact that the actions of others also caused the same damage to reduce their liability. The section does not affect the ability of any other concurrent wrongdoer to rely upon the part.

Proposed section 32F provides that, where the concurrent wrongdoer is found to have breached section 38 of the *Fair Trading Act 1989*, then the concurrent wrongdoer is liable for the entire loss of the defendant severally. The concurrent wrongdoer would then be required to recover any loss apportioned to other parties by way of subsequent action. The concurrent wrongdoer is not able to rely upon the fact that the actions of others also caused the same damage to reduce their liability. The section does not affect the ability of any other concurrent wrongdoer to rely upon the part.

Proposed section 32G confirms the part does not affect the law in relation to contributory negligence. A court is to deduct an amount that it considers appropriate from the loss suffered by the claimant in circumstances where contributory negligence is proven.

Proposed section 32H confirms the part does not affect any right of recovery by way of contribution a concurrent wrongdoer may have against another person.

Proposed section 32I confirms that nothing in the part affects the laws of vicarious liability, agency or partnership, so that where a concurrent wrongdoer is apportioned an amount of loss, any entity liable under those laws will remain liable for the amount of the judgment against the concurrent wrongdoer. Further, the ability of a court to award exemplary or punitive damages against a single defendant in a proceeding is not affected by the part.

Proposed section 33 enables the Court to provide directions in specific actions upon the application of a party involved, whether proceedings have been commenced or not. The power provided by this section would extend to providing for the type of information required to be provided under proposed section 32.

Clause 77 amends section 61 of the *Civil Liability Act 2003* so that a court is required to assess an injury scale value in accordance with the rules provided by way of regulation. The requirement to consider assessments of ISV's made in past proceedings remains.

Clause 78 amends section 67 of the *Civil Liability Act 2003* to correct a technical error in reference to a chapter of the *Uniform Civil Procedure Rules 1999*.

Clause 79 amends Schedule 2 of the *Civil Liability Act 2003*, by inserting a number of cross-references to definitions contained within clause 76.

Schedule 1—Model Code

Clause 1 provides a definition of “council” for the purposes of the Code.

Clause 2 provides a wide basis upon which complaints about a member may be made to an occupational association that adopts the code.

Clause 3 provides that any person may make a complaint. This includes the ability of an occupational association to make a complaint itself.

Clause 4 provides that a complaint must be in writing and state the particulars upon which the complaint is based. Where a complaint is made to an occupational association, other than those made by the association itself, the association is to advise the professional standards council. *Clause 5* deals with the procedure for advising the council.

Clause 5 provides the procedure for the occupational association when a complaint is received. It requires the association to act upon the complaint, including appropriately advising the professional standards council. The association must consider the complaint, which may include seeking further particulars, conducting investigations, and making attempts to resolve the complaint if appropriate.

Clause 6 provides the occupational association with power in relation to responding to the findings of a consideration of the complaint. It includes the power to reprimand, imposition of conditions of practice, expulsion from membership of the association and dismissal of the complaint. The model code does not allow imposition of awards of compensation.

Clause 7 requires an occupational association to provide a written statement of the decision made upon the complaint to both the complainant and the member against which the complaint is made. This statement must be given within 30 days of the decision.

Clause 8 disallows legal representation as part of any attempt to resolve the dispute, but are otherwise able to have representation where the claim is being investigated.

Schedule 2—Dictionary

Schedule 2 provides definitions for various terms for the purposes of the legislation.