

# PROFESSIONAL STANDARDS AMENDMENT BILL 2009 (WA)

## EXPLANATORY MEMORANDUM

### Overview of Bill

The *Professional Standards Act 1997* (WA) “caps” (limits) the civil liability of members of occupational associations that have had a scheme limiting their liability approved and published in return for measures to improve the standard of services that the members provide to the consumers of those services. The standard of service is improved by requiring the members of the occupational associations to undertake professional development and adopt appropriate risk management strategies. Customers are protected by requiring association members to have appropriate levels of insurance against occupational liability claims.

Professional standards legislation was seen as necessary in response to the insurance premium crisis that hit several years ago. Other legislation intended to halt increasing insurance premiums included the *Civil Liability Act 2002* (WA).

All States and Territories have enacted legislation regarding professional standards and civil liabilities. Additionally, the Commonwealth Parliament has enacted the *Treasury Legislation Amendment (Professional Standards) Act 2004* (Cth) so that plaintiffs can not use Commonwealth legislation such as the *Trade Practices Act 1974* (Cth) to avoid the policy of the professional standards legislation of the States and Territories. Schemes have recently been approved in Western Australia for CPA’s, Chartered Accountants and members of the Institute of Engineers.

To ensure that the legislation operates seamlessly throughout Australia it is occasionally necessary for the Western Australian Parliament to make amendments to the *Professional Standards Act 1997* (WA) so that the same legislation exists in all States and Territories. To reduce the cost of schemes to occupational associations the Professional Standards Council has also proposed the enactment of legislation providing for the mutual recognition of schemes between the participating jurisdictions.

## CLAUSE NOTES

### Part 1 - Preliminary

#### Clause 1 – Short title

Clause 1 provides that the title of the proposed Act is the *Professional Standards Amendment Act 2009* (WA).

#### Clause 2 – Commencement

Clause 2 provides that sections 1 and 2 will come into operation on the day that the Act receives Assent. The balance of the Act (sections 4 to 29, inclusive) will commence on the following day.

### **Clause 3 – *The Criminal Code* amended**

Clause 3 provides that the Act amends *Professional Standards Act 1997* (WA).

## **Part 2 – Amendments relating to defence costs**

### **Clause 4 – Section 4 amended**

Clause 4 of the Bill proposes amendments to be made to section 4 of the Act dealing with terms defined in the Act. Subclause (1) inserts a “(1)” at the beginning of the section and deletes to existing definition of *damages*. New definitions of *costs* and *damages* are inserted. The term *costs* is defined to include fees, charges, disbursements and expenses. The new definition of *damages* is defined to mean damages that are awarded, counterclaims and claims by way of set off as well as related costs and interest payable on those damages and costs.

Subclause (2) inserts a new subsection (2) into section 4. The section clarifies what is meant by *amount payable* when used in the Act. The term is defined to include defence costs payable in respect of a claim if those costs are payable out of the one sum insured under the policy for the members of the occupational association.

### **Clause 5 – Section 34 replaced**

Clause 5 deletes the existing section 34 of the *Professional Standards Act 1997* (WA) and inserts a new section 34. Section 34 provides for the limitation of occupational liability based on the insurance arrangements that have been made. The act provides a number of ways under which member of an occupational association can limit liability. One method is by relating the maximum liability to the monetary ceiling of the insurance carried by the member of the occupational group. The new section 34 makes it clear that a person is not liable in damages above the amount of the monetary ceiling that is provided. The person must be able to satisfy the court that:

- the person has the benefit of an insurance policy insuring the person against the relevant occupational liability; and
- the amount payable in respect of that occupational liability is not less than the amount of the monetary ceiling.

### **Clause 6 – Section 35 amended**

Clause 6 makes three amendments to section 35 of the *Professional Standards Act 1997* (WA). Subclause (a) deletes the words “relates at the time at which the act or omission giving rise to the cause of action occurred; or” and inserts the words “relates, or” in paragraph (a) of section 35. Subclause (b) deletes the words “that occupational liability; and” from paragraph (b)(i) of section 35 and inserts the words

“the occupational liability to which the cause of action relates; and”. The intention of the amendment is to clarify that the liability is related to a cause of action. Subclause (c) deletes the existing paragraph (b)(ii) of the *Professional Standards Act 1997* (WA) and inserts a new paragraph (b)(ii).

Section 35 of the *Professional Standards Act 1997* (WA) provides for the second alternative way in which liability of a member of an occupational association can be limited. The second way is to limit liability by reference to amounts of business assets of the person. The three amendments clarify that a person is not liable in damages in relation to that cause of action above the amount of the monetary ceiling so specified that is related to the amount of the business assets of the person.

#### **Clause 7 – Section 36 amended**

Section 36 of the *Professional Standards Act 1997* (WA) provides for the third alternative way by which a person might limit their liability being a multiple of the fee charged for the original service. Clause 7 makes five amendments to section 36.

The first amendment deletes the words “that occupational liability; and” from paragraph (a)(i) of section 36 of the *Professional Standards Act 1997* (WA) and inserts the words “the occupational liability to which the cause of action relates; and”. The intention of the amendment is to clarify that the liability is related to a cause of action.

The second amendment deletes the present paragraph (a)(ii) of section 36 of the *Professional Standards Act 1997* (WA) and inserts a new paragraph (a)(ii). The new paragraph simplifies and clarifies the paragraph to provide that liability is limited to a multiple of the fees that were charged for the work done.

The third amendment corrects a typographical error to include an additional word “that” into paragraph (aa) of section 36 of the *Professional Standards Act 1997* (WA) so that it reads correctly and is similar to the wording of paragraph (a).

The fourth amendment is similar to the first amendment made to section 36 to clarify the liability is related to a cause of action.

The fifth and final amendment to section 36 of the *Professional Standards Act 1997* (WA) deletes the existing paragraph (b)(ii) and inserts a new paragraph (b)(ii). The amendment clarifies that the amount that may be claimed under the section is calculated using the net current market value of the business assets to calculate the limitation amount.

#### **Clause 8 – Section 40A inserted**

Clause 8 inserts a new section 40A into the *Professional Standards Act 1997* (WA). The proposed new section clarifies that although a defence costs inclusive insurance policy may (as compared with one that is not defence costs inclusive) reduce the amount available to be paid under the policy to a scheme participant’s client in respect of a claim, this does not lower the liability on the scheme participant’s liability to the client. The scheme participant will continue to be liable to the client for any

difference between the amount payable to the client under the policy and the amount of the cap on that liability.

#### **Clause 9 – Section 41 amended**

Clause 9 deletes words from subsection (2) of section 41 and inserts words that make it clear that the claim must relate to a cause of action giving rise to the liability.

### **Part 3 – Amendments relating to mutual recognition**

#### **Clause 10 – Section 4 amended**

Clause 10 amends section 4 of the *Professional Standards Act 1997* (WA) to insert a number of definitions into the Act. The term ***another jurisdiction*** is defined to mean a State or Territory other than Western Australia. The term ***appropriate Council*** means an authority in another jurisdiction that has functions that are similar to those of the Western Australian Professional Standards Council. The term ***corresponding law*** is the law of another jurisdiction that is declared by the regulations to be a corresponding law for the purposes of this Act. An ***interstate scheme*** is a scheme prepared under the corresponding law of another jurisdiction that operates as a scheme of this jurisdiction. The term ***this jurisdiction*** means Western Australia.

Clause 10(b) also amends the definition of ***scheme*** to include a reference to an interstate scheme.

#### **Clause 11 – Section 12 amended**

Clause 11 amends section 12 of the *Professional Standards Act 1997* (WA) in two places. The first deletes the words “by it” from paragraph (1)(a)(i) and the second inserts the words “or law” at the end of subsection (4). The first amendment deletes some superfluous words from the paragraph and the second allows the Professional Standards Council to consider other laws.

#### **Clause 12 – Section 13A inserted**

Clause 12 inserts a new section 13A into the *Professional Standards Act 1997* (WA) to allow the Western Australian Professional Standards Council to co-operate with authorities maintaining similar schemes in other jurisdictions.

#### **Clause 13 – Section 20 amended**

Section 13 inserts a new subsection (4) into section 20 of the *Professional Standards Act 1997* (WA). The new subsection provides that a scheme may indicate an intention to operate as a scheme of Western Australia only, or as a scheme of both Western Australia and another jurisdiction.

#### **Clause 14 – Section 21 amended**

Clause 14 inserts “(1)” at the beginning of section 21 and inserts a new subsection (2) after the newly numbered subclause (1). Section 21 of the *Professional Standards Act 1997* (WA) requires that, before it is approved, a scheme must be publicised by means of a notice in a daily newspaper circulating throughout Western Australia. The proposed new subsection inserts a requirement that a scheme that is to operate as a scheme of some other jurisdiction to be further publicised in accordance with the requirements of the corresponding law of that other jurisdiction.

#### **Clause 15 – Section 23 amended**

Clause 15 inserts “(1)” at the beginning of section 23 and inserts a new subsection (2) after the newly numbered subclause (1). Section 23 sets out the matters the Professional Standards Council must consider before approving a scheme. The proposed new subsection (2) provides that, in the case of a scheme that is intended to operate as a scheme of another jurisdiction, the Council must also consider those matters that the appropriate Council for the other jurisdiction would have to consider and must consider all matters in the context of each of the jurisdictions concerned.

#### **Clause 16 – Section 25 amended**

Clause 16 inserts “(1)” at the beginning of section 25 and inserts a new subsection (2) after the newly numbered subclause (1). Section 25 of the *Professional Standards Act 1997* (WA) provides for the submission of schemes to the Minister, and section 26 provides for their Gazettal. The proposed new subsection (2) provides that a scheme that indicates an intention to operate as a scheme of another jurisdiction is to be submitted by the Council to the Minister administering the corresponding law of the other jurisdiction (so allowing the scheme to be gazetted in that jurisdiction in accordance with that jurisdiction’s version of section 26).

#### **Clause 17 – Section 26 amended**

Clause 17 proposes to amend section 26 of the *Professional Standards Act 1997* (WA) to provide for the gazettal by the Western Australian Minister of an interstate scheme. Subsection (1) is amended to provide for the Gazettal in Western Australia of an interstate scheme that has been submitted to the Minister under that jurisdiction’s version of section 12. A new subsection (3) is also proposed to be inserted so as to extend section 13 to amendments to interstate schemes.

#### **Clause 18 – Section 27 amended**

Clause 18 proposes to amend section 27 of the *Professional Standards Act 1997* (WA) dealing with the timing of the commencement of schemes that have been gazetted. The former subsection (2) is deleted and a new subsection (2) inserted to provide that a scheme’s commencement can be postponed not only by the Supreme Court of Western Australia (under section 28) but also by the Supreme Court of another jurisdiction by an order made under that jurisdiction’s version of section 28.

The clause also proposes to insert a new subsection (3) into section 27 to extend section 27 to amendments to interstate schemes.

### **Clause 19 – Section 28 amended**

Clause 19 proposes to amend section 28 dealing with challenges to the validity of schemes in the Supreme Court. Proposed new subsection (1A) of section 28 provides a definition of scheme for the purposes of the section which includes an amendment to that scheme.

Subclause (2) proposes to insert into section 28(1) of the *Professional Standards Act 1997* (WA) words that will enable a scheme that operates as a scheme of some other jurisdiction to be challenged by persons affected by the scheme as it operates in Western Australia.

Subclause (3) proposes to insert a new subsection (4) that will provide that an interstate scheme may not be declared void under section 28 just because it fails to comply with the requirements of Division 2 (Contents of schemes) of Part 2, but may be declared void if it fails to comply with the equivalent provisions of the corresponding law of the jurisdiction in which it was prepared.

Subclause (4) also inserts a new section 28(5) so as to preserve other rights of challenge and a new section 15 (6) so as to extend section 15 to amendments to interstate schemes.

### **Clause 20 – Section 29 amended**

Clause 20 proposes to amend section 29 of the *Professional Standards Act 1997* (WA) dealing with the review of schemes. The amendment proposes that the existing subsection (3) be deleted and a new subsection (3) be inserted in its place allowing for the review of an interstate scheme under the Act to determine whether it should be terminated in relation to Western Australia.

### **Clause 21 – Section 29A amended**

Clause 21 proposes to amend section 29A of *Professional Standards Act 1997* (WA) dealing with the amendment and vocation of schemes. The amendments will allow for the revocation of interstate schemes. Subclause (1) proposes to delete the words “an amendment to or revocation of” from subsections 29A(1), (2), (3) and (4) and inserting in place the words “an instrument amending or revoking”. The amendments clarify that an amendment or revocation is by way of an instrument.

Subclause (2) proposes to delete the existing subsections 29A(5) and (6) and insert new subsections (5) to (8) inclusive. Proposed new subsection (5) provides that the provisions of sections 20 to 28 of the Act extend, with necessary modifications, to the amendment of a scheme under section 29A.

Proposed new subsection (6) provides that the provisions of sections 20 to 27 (excluding section 25(2)) extend, with necessary modifications, to the revocation of a scheme under section 29A.

Proposed new subsection (7) preserves any right or liability arising out of an application for a scheme before the amendment or revocation.

Proposed new subsection (8) provides that section 29A does not apply to an interstate scheme.

#### **Clause 22 – Sections 30A and 30B inserted**

Clause 22 proposes to insert new sections 30A (Notification of revocation of schemes) and 30B (Termination of operation of interstate schemes in this jurisdiction).

Proposed new section 30A requires the Minister to notify his or her interstate counterparts if he or she revokes a scheme, and to gazette notice of any revocation of an interstate scheme of which he or she receives notice.

Proposed new section 30B provides for the termination of the operation of interstate schemes in relation to Western Australia. The procedures parallel the procedures established by section 29A of the *Professional Standards Act 1997 (WA)* for the amendment and revocation of schemes. That is:

- under subsection (1) the Professional Standards Council may prepare an instrument terminating, in relation to Western Australia, the operation of an interstate scheme;
- under subsection (2) the Minister may direct the Professional Standards Council to prepare an instrument of termination of an interstate scheme;
- under subsection (3) the council must comply with a direction of the Minister to terminate a scheme under subsection (2) but may on its own initiative, prepare an instrument terminating an interstate scheme in relation to this jurisdiction;
- under subsection (4) the provisions of sections 21 to 26 (other than section 25(2)) extend, with necessary modifications, to the termination of the operation of an interstate scheme under an instrument under this section; and
- under subsection (5) the operation of an interstate scheme is terminated in relation to Western Australia, as from a day specified in the instrument, being a day that is later than the day of publication, or if no day is specified, 2 months after publication.

#### **Clause 23 – Sections 44A amended**

Clause 23 proposes to delete the existing subsection (1) of section 44A and insert new subsections (1), (2A) and (2B) in its place. Section 44A of the *Professional Standards Act 1997 (WA)* provides for the duration of schemes. Proposed new subsection (1) provides that a scheme must specify the period it is to remain in force after its commencement but not to exceed 5 years.

Proposed new subsection (2A) provides that a scheme (other than an interstate scheme) remains in force until:

- the period specified in subsection (1) ends; or
- the scheme is revoked; or
- the scheme’s operation ceases because of the operation of another Act; or
- the scheme is declared void, either under an order of the Supreme Court or the Supreme Court of another jurisdiction; or
- the scheme is disallowed under section 42 of the *Interpretation Act 1984* (WA).

Proposed new subsection (2B) provides that an interstate scheme remains in force in Western Australia until:

- the period specified in subsection (1) ends; or
- the schemes operation in relation to this jurisdiction is terminated under section 30B; or
- the scheme ceases to have effect in the jurisdiction in which it was prepared; or
- the scheme is disallowed under section 42 of the *Interpretation Act 1984* (WA).

#### **Part 4 – Amendments for consistency with the national model legislation and for other purposes**

##### **Clause 24– Sections 5 amended**

Clause 24 proposes to amend section 5 dealing with the matters to which the *Professional Standards Act 1997* (WA) does not apply.

Proposed subclause (1) deletes paragraph (b) and inserts “or” after paragraph (a). Paragraph (b) previously provided that the *Professional Standards Act 1997* (WA) did not apply to “any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim”. The proposed deletion of paragraph (b) deals with an anomalous provision limiting the rights of a legal practitioner to benefit from a scheme purely because the claim against the practitioner was acting for a person in a personal injury claim. The insertion of “or” by paragraph (b) is a drafting issue and makes the section consistent with “or” at the end of every paragraph in the section 5(1).

Proposed subclause (2) inserts a new subsection (3) into section 5 of the *Professional Standards Act 1997* (WA). Proposed subsection (3) provides that subsection (1)(a) of section 5 does not operate to exclude from the operation of the Act liability for damages arising out of any negligence of a legal practitioner in acting for a client in a



personal injury claim. The proposed subsection is necessary to clarify that section 5(1)(a) dealing with the exclusion from the operation of the Act of schemes for actions relating to the death of, or personal injury to, a person does not preclude a legal practitioner taking legal action for such death or personal injury.

#### **Clause 25– Sections 17 amended**

Clause 25 amends section 17 of the *Professional Standards Act 1997* (WA) to insert “(1)” before the first subsection and to insert a new subsection (2). Proposed new subsection (2) provides that the annual report of the Professional Standards Council is to include details of any forums conducted by the Council under section 12(1)(h) and any committees established under section 14 during the year to which the report relates.

#### **Clause 26– Sections 31 amended**

Clause 26 amends section 31 of the *Professional Standards Act 1997* (WA) to delete the existing definition of *officer* and insert a new definition that defines an officer to be an officer as defined in the *Corporations Act 2001* (Cth).

#### **Clause 27 – Section 34A inserted**

Clause 27 inserts a new section 34A after section 33 of the *Professional Standards Act 1997* (WA). Proposed subsection (1) provides definitions of *associate* and *officer* for the purposes of section 34A. An *associate* means someone who is associated with the person under the regulations made under section 42(4)(b). An officer is an officer as defined by the *Corporations Act 2001* (Cth) and, in relation other bodies corporate that are not corporations under the *Corporations Act 2001* (Cth), any person who is concerned in or takes part in the management of the body corporate.

Proposed subsection (2) makes it clear that a reference to a limitation that applies under the Act to the principal cause of action also applies to any cause of action with regard to the liability of a partner, officer, employee or associate of the member of an occupational association. The effect is the limit claims to the principal cause of action and to avoid a multiplicity of actions against other related parties.

Proposed subsection (3) provides that a related cause of action is a cause of action in respect of civil liability from which the principal cause of action arose. The subsection ensures that only the principal cause of action can be the subject of an action for liability.

Proposed subsection (4) clarifies that when section 34A refers to a person who is a partner, officer, employee or associate of a member of an occupational association it refers to such a person at the time of the event giving rise to the cause of action.

Proposed subsection (5) provides that when section 34A refers to limitation of a liability it applies to all liabilities relating to the cause of action.

#### **Clause 28 – Section 42 amended**

Clause 28 amends section 42 of the *Professional Standards Act 1997* (WA) to insert after the existing subsection (4)(a) a new paragraph (ba) providing that the term officer has the same meaning as given in section 31.

## **Part 5 –Amendments providing for transitional matters**

### **Clause 29 – Schedule 4 amended**

Clause 29 makes four amendments to Schedule 4 of the *Professional Standards Act 1997* (WA) and also inserts a new Division 2 into Schedule 4.

Subclause (1) provides that clause 29 amends Schedule 4 of the *Professional Standards Act 1997* (WA). Schedule 4 deals with the savings and transitional provisions of the Act.

Subclause (2) inserts a division heading before clause 1 of the Schedule to make it clear that the savings and transitional provisions presently in the Schedule and that are now Division 1 relate to amendments to the *Professional Standards Act 1997* (WA) made by the *Professional Standards Amendment Act 2004* (WA). Subclause (5) inserts a new Division 2 dealing with amendments proposed to be made to the *Professional Standards Act 1997* (WA) by this Bill.

Subclause (3) deletes “Schedule” and inserts “Division” so that the matters in Division 1 of the Schedule relate only to that Division not the entire Schedule. The heading of clause 1 of the Schedule is also altered so that it is consistent with current drafting techniques.

Subclause (4) amends clauses 6(2) and (3) of the Schedule to refer to “subclause” rather than “subsection”. As a result of the amendment the same term “subclause” is used throughout the Schedule.

Subclause (5) inserts a new Division 2 into the Schedule regarding savings and transitional relating to this Bill. Proposed clause 7 defines the terms used in Division 2 and makes it clear that they relate to this Bill. Proposed clause 8 preserves causes of action that arise under section 5 that arose before the commencement of this Bill. Proposed clause 9 preserves the application of causes of action to officers, partners and associates as existed before the commencement day. Proposed clause 10 preserves the application of causes of action to associated defendants as existed before the commencement day.

Proposed clause 11 preserves any expiry date for a scheme that existed before the commencement of the Bill. Proposed clause 12 effectively adopts for the purposes of Division 2 of the Schedule the provisions of clause 6 in Division 1 dealing with the making of regulations of a consequential nature under the *Professional Standards Act 1997* (WA).