

2004

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

**CIVIL LAW (WRONGS) (PROPORTIONATE LIABILITY AND
PROFESSIONAL STANDARDS) AMENDMENT BILL 2004**

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
Mr Jon Stanhope MLA

Outline

The Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Bill 2004 will amend the *Civil Law (Wrongs) Act 2002* to implement proportionate liability and professional standards in the Australian Capital Territory.

The Bill represents a further measure to deal with the problems experienced by the insurance industry since 2001. A combination of international, domestic and structural factors came together to produce a severe increase in premiums for liability classes of insurance in Australia. For some risks, liability insurance became unavailable. The factors which led to the crisis included the failure of the HIH insurance group in early 2001 and the increased scrutiny of underwriting performance and capital adequacy, including upgrades to the prudential standards set by the Australian Prudential Regulatory Authority, which regulates the insurance industry.

To counteract the effect of the insurance crisis on the professional indemnity insurance market, the Standing Committee of Attorneys-General (SCAG) in August 2003 set out a nationally consistent basis for proportionate liability legislation and professional standards legislation and committed to legislative implementation. The SCAG proposal is the culmination of a long process of national policy consultation aimed at dealing with the recent problems affecting the insurance industry in Australia and overseas.

Proportionate liability legislation for purely economic loss or property damage and professional standards legislation are complementary approaches addressing the problem of escalating professional indemnity insurance premium prices.

The Bill will replace the use of the concept of joint and several liability as a means of compensating claimants with the concept of proportionate liability as a means for compensating claimants in legal claim for economic loss or property damage.

Proportionate liability means that in an action for damages for purely economic loss or damage to property (excluding personal injury claims), where more than one person has caused the loss or damage, each defendant in the action is liable only to the extent of his or her responsibility for the loss or damage caused.

The Bill will also introduce professional standards for industry associations, such as compulsory professional indemnity insurance, continuing education, codes of conduct, disciplinary procedures, and risk management strategies, in return for financial limits on liability for damages in relation to an action under the law of negligence, contract or misleading conduct for economic loss.

Clause Notes

Clause 1 – Name of Act – states the title of the Act, which is the *Civil Law (Wrongs) Proportionate Liability and Professional Standards) Amendment Act 2004*.

Clause 2 – Commencement – commencement for the Act will be by written notice and in two stages. Section 4 (New chapter 7A) will synchronise the commencement of this provision with the passage of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 through the Commonwealth Parliament. Sections 5, 6, and 7 (fees and regulations), section 8 (New schedule 4) and section 9 (New schedule 5) will synchronise with the passage of the Treasury Legislation Amendment (Professional Standards) Bill 2003 through the Commonwealth Parliament.

Clause 3 – Act amended - The provisions of the Act will be amendments to the *Civil Law (Wrongs) Act 2002*.

Clause 4 – New Chapter 7A

107A – Definitions for ch 7A – the definition of ‘defendant’ encompasses a situation where legal action is taken against multiple parties in a particular case.

107B – Application of ch 7A – apportionable claims – this section defines the concept of an ‘apportionable claim’, which is the type of claim to which ‘proportionate liability’ will apply.

Proportionate liability *will* apply to a legal action for damages relating to economic loss or damage to property. Such an action might arise from tort law or contract law or breach of a statute (such as the misleading and deceptive conduct provision in Part 2 of the *Fair Trading Act 1992*).

Proportionate liability will *not* apply to a claim arising out of personal injury, a ‘consumer claim’ and any claim prescribed under the regulations. Any such regulations may be applied retrospectively to cover claims arising before the regulations were notified.

Proportionate liability will *not* apply to a claim under the *Discrimination Act 1991*, a claim under the *Workers Compensation Act 1951*, or a claim to which Part 10 (compulsory vehicle insurance) of the *Road Transport (General) Act 1999* applies.

There can only be a single claim relating to the same loss or damage, even if the claim for the loss or damage is based on more than one legal cause of action.

107C – Meaning of consumer claim for Pt 7A - A consumer claim is a claim by a natural person (*not* a corporation) which relates to goods or services purchased for the claimant’s personal, domestic or household use, including a claim relating to the provision of personal financial advice such as superannuation advice.

A claim is not a consumer claim if the claimant wants to use goods or services for a business purpose. These purposes are defined in the *Fair Trading Act 1992*, in

relation to re-supplying goods/services; transforming goods/services in relation to a process of manufacture; or repairing other goods or fixtures on land.

107D – Concurrent wrongdoers - A concurrent wrongdoer is any person whose actions, together with the actions of others, caused damage to the person initiating the claim. For the purpose of apportioning responsibility, it does not matter if the person is insolvent or has died, or is being wound up or has ceased to exist (if the person is a corporation).

107E – Certain wrongdoers not to have benefit of apportionment - Proportionate liability will not apply to defendants who intended to cause, or fraudulently caused, economic loss or property damage. Their claims will be decided on the basis of ‘joint and several liability’, meaning that they may be held liable for the entire amount of the damage.

107F – Proportionate liability for apportionable claims - Proportionate liability means that a defendant will only be liable for the proportion of damage for which he or she is responsible. A defendant cannot be held responsible for more than that proportion.

In apportioning responsibility, the Court must take into account the degree to which the claimant is responsible for the damage, and may also take into account the degree to which any other person, not a party to the proceeding, is responsible.

107G – Defendant to tell claimant about concurrent wrongdoers - A defendant is under an obligation to tell the claimant about any other person who may be a concurrent wrongdoer. The defendant must provide information regarding the identity of the other person and the circumstances that may make the other person a concurrent wrongdoer. Failure to provide this information by the defendant may result in the defendant having to pay the claimant’s legal costs.

107H – Contribution not recoverable from defendant - Once a defendant is found to have been responsible for a certain proportion of the damage suffered by the claimant, the amount of compensation which the defendant must pay cannot be further increased. Holding one defendant responsible for a proportion of the damage will not prevent another defendant being held responsible for his or her proportion of the damage (which occurs under the doctrine of joint liability in tort law).

This section is not intended, however, to affect a prior contractual arrangement whereby one potential defendant agrees to accept legal risk on behalf of another potential defendant.

107I – Subsequent proceeding by claimant - If a claimant is not fully recompensed in an action against particular defendants, the claimant may initiate an action against another defendant for compensation to the extent of that other defendant’s responsibility. A claimant may not, however, recover compensation which amounts to more than the original damage actually suffered by the claimant.

107J – Joining non-party concurrent wrongdoer - The court may allow any number of persons to be defendants in a particular court action. However, a person

cannot be included as a defendant if that person was a defendant in a previous action concerning the same claim.

107K – Ch 7A does not affect certain other liability - This chapter does not affect the law relating to vicarious liability (i.e. where an employer is held responsible for the actions of an employee), the law which holds a person responsible for the actions of his or her agent, the law which holds a person responsible for the actions of a business partner, or where legislation creates several liability (rather than proportionate liability) in relation to a claim.

Clause 5 – New section 222A

222A – Determination of fees - This provision is intended to set quantities for fees which may be prescribed under the Act, for example in relation to the preparation of schemes by the Professional Standards Council.

Clause 6 – Regulation-making power Section 223 - This section will renumber section 223 to make allowance for section 223 (3).

Clause 7 – New section 223(2) - This provision will allow for offences to be created for contravention of a regulation up to a limit of 20 penalty units (currently \$2,000).

Clause 8 – New schedule 4 - this schedule contains the provisions implementing professional standards in the Australian Capital Territory.

1 – Objects of sch 4 - This section specifies the objects of the professional standards provisions in schedule 4. The primary goals of the provisions present a ‘trade-off’ between setting a financial limit on the liability of professionals to be sued for damages on the one hand, and facilitating the improvement of standards of service by professionals to consumers on the other.

2 – Definitions for sch 4 - This section sets out the definitions for the purpose of the schedule. Some key definitions are as follows:

“occupational association” – a corporation representing the interests of a particular profession (eg: a law society, or an association of accountants)

“occupational liability” – legal responsibility, whether based on judge-made law relating to torts and contracts, or under statute, or legal responsibility as an employer, relating to the business activities of a professional.

“scheme” – an arrangement under which the legal responsibility of professionals, which relates to their ability to be sued for damages, is set at a certain financial limit.

3 – Application of sch 4 - The legal responsibility of professionals is not limited if a legal claim is based on a personal injury to a person, a breach of trust, fraud or dishonesty. The intention of the provisions is to distinguish between an ‘honest mistake’ and a ‘dishonest mistake’. The provisions do not apply to an action against a lawyer for negligence in acting in a personal injury matter, or a proceeding under the *Land Titles Act 1925* for wrongdoing in a real estate transaction.

4 – Preparation and recommendation of schemes by council - The Professional Standards Council may prepare a scheme to limit the liability of an occupational association or recommend to the Minister a scheme which has previously been prepared by the association.

5 – Public notification of schemes - Before recommending a scheme for approval, the council must publish a notice in an ACT daily newspaper explaining the nature of the scheme and inviting comments and submissions regarding the scheme.

6 – Making of comments and submissions about schemes - Anyone may make comments or submissions to the council regarding a scheme, within the allocated time period.

7 – Consideration of comments, submission etc - This section lists matters the council must consider before recommending a scheme for approval. They include all submissions made to it by the public, the effect on people from the limitation on occupational liability, insurance claims information regarding a professional group, risk management strategies by the professional group, availability of insurance, the proposed level of compulsory insurance, and complaints and disciplinary procedures.

8 – Public hearings - The council may conduct a public hearing about a scheme, and may decide the manner of any such hearing.

9 – Submission of schemes to Minister - When the council has recommended a scheme to the Minister, it may submit it for consideration by the Minister (the Attorney General).

10 – Approval of schemes by Minister - The Attorney General has the final say in whether or not to approve a particular scheme which has been submitted by the council. Approval will be by way of a regulation which needs to be presented to the Legislative Assembly.

11 – Commencement of schemes - A scheme approved by the Attorney General will commence either when the regulation is made or on a day specified in the regulation.

12 – Challenges to scheme - A scheme may be challenged in the Supreme Court for non-compliance with the schedule. The Court may make an order that the scheme is noncompliant with the schedule, give directions about things that must be done to commence the scheme or make any other order.

13 – Review of schemes - The Attorney General may direct the council to review the operation of a scheme to decide whether a scheme should be amended or revoked. The council may, on its own initiative, review the operation of a scheme at any time.

14 – Amendment and revocation of schemes - The council must prepare an amendment or revocation of a scheme on the direction of the Attorney General, or at any other time. A new regulation would need to be passed for this purpose.

15 – People to whom scheme applies - A scheme may apply to everyone within a professional association, or a particular class of people within that association. An association may exempt a person from the scheme.

16 – Other people to whom scheme applies - The scheme will also apply to a business partner of a scheme member; an employee of a scheme member; an officer where the member is a corporation; or any other person prescribed in the regulations.

17 – Limitation of liability by insurance arrangements - A scheme may limit financial damages from a legal action at a certain level, as long as the defendant is able to prove to the court that he or she possesses an insurance policy which will insure the defendant for amounts up to that level.

18 – Limitation of liability by reference to amount of business assets - A scheme may limit financial damages from a legal action at a certain level, as long as a defendant is able to prove to the court that he or she has business assets up to the value of that financial level.

19 – Limitation of liability by multiple of charges - A scheme may limit financial damages from a legal action at a certain level (based on a ‘reasonable charge’ formula), as long as a defendant is able to prove to the court that he or she possesses an insurance policy which will insure the defendant for amounts up to that level. Alternatively, the defendant may prove to the court that he or she possesses business assets or a combination of assets and insurance up to that particular level.

A ‘reasonable charge’ formula is based on the reasonable charge for services provided by a defendant to the claimant, where the failure to provide this service adequately is the basis of the claim. The scheme may specify that liability will be limited at a level which is, for example, two times or three times the reasonable charge for that service.

20 – Statement of different limits of liability – This provision provides for different liability caps for different types of work to be included in a professional standards scheme. It also provides that a professional association should be able to approve requests from member organizations (or individuals) to adopt a higher liability cap, either on a one-off basis or for a class of contracts.

21 – Combination of provisions under cl 17, cl 18 and cl 19 - In the case where a scheme limits liability with reference to a certain fixed financial limit, and also with reference to a financial limit based on a ‘reasonable charge’ formula, the lower of the two limits will be applicable.

22 – Amount below which liability may not be limited - A financial limit in a professional standards scheme, as it relates to a single claim, cannot be set below \$500,000. In setting the financial limit for a particular scheme, the council must have regard to the number and amounts of claims made against people within the professional association and the need to adequately protect consumers.

23 – Insurance to be of required standard - In a scheme, the financial limit under an insurance policy must be set by the professional association whose members must take out such insurance.

24 – Limit of occupational liability by schemes - The scheme will limit the occupational liability of a person in relation to a particular claim based on an act if the scheme applied to the person when the act happened. A limitation of liability will apply to every type of legal action which relates to a single act (eg: an action for negligence, an action for breach of contract etc). The limitation of liability will arise even if court proceedings occur after the wrongful act, or all aspects of the legal liability do not occur at the time the wrongful act is committed. The limitation of liability will apply even if the scheme has since been amended or revoked.

25 – Limitation of amount of damages - The financial limit on liability applies to each claim by a single person, and is not a limitation of the amount of damages that may be awarded for claims by multiple people relating to a single wrongful act.

However, where two or more people have a joint interest in a particular legal action relating to a single wrongful act, then they are to be treated as a single claim.

Two or more claims by the same person arising out of the same wrongful act against people who are associated (eg: an employer and his/her employee) are to be treated as a single claim.

26 – Effect of scheme on other parties to proceedings - If a scheme does not apply to a person, that person cannot benefit from limited liability.

27 – Proceedings to which a scheme applies - A scheme will apply to acts or omissions that happened during the period in which the scheme was in force.

28 – Duration of scheme - A scheme will remain in force for up to five years unless it is revoked, or its operation ceases because of the operation of another Act. The operation of a scheme can be extended by the Attorney General, for up to 12 months (but it can only be extended once).

29 – Notification of limitation of liability - Professionals will be under an obligation, in their promotional documentation, to notify their clients that their occupational liability is limited. A particular phrase may be set out in the regulations for use by professionals for this purpose. A penalty of up to \$5,000 will apply for failing to carry this out.

Professionals will be under an obligation to provide a client with a copy of the scheme which limits their liability, upon request. A penalty of up to \$5,000 will apply for failing to carry this out.

30 – Occupational association may require its members to insure - A professional association may require its members to hold insurance against occupational liability. This requirement may be imposed as a condition of membership of the association. The professional association may set the amount of the insurance. Different amounts of insurance may be set for different classes of members.

31 – Monitoring claims by occupational associations - A professional association may establish a committee to monitor claims made against members for occupational

liability. An insurer representative may be a committee member. The committee may issue practice advice to its members to minimize claims for occupational liability. The committee can ask an insurer to give it any information or documentation which will assist it in carrying out its function.

32 – Risk management strategies by occupational associations - As part of the preparation for a scheme to limit liability, a professional association must give the council information regarding the risk management strategies it intends to implement for its members and information about how it intends to implement the strategies. The method of implementation may be imposed as a condition of membership of the professional association.

33 – Reporting by occupational associations - A professional association must provide information to the council regarding risk management strategies on request.

A professional association must provide an annual report to the council about implementation of its risk management strategies and any proposed changes to the strategies.

34 – Compliance audits - A compliance audit of the compliance of members with a professional association's risk management strategies may be conducted at any time by the council or the association.

If a compliance audit is conducted by the council, the professional association must provide all relevant information to the council, and the council must give a copy of a report of the audit to the association.

35 – Complaints and discipline code - A scheme may adopt the provisions of the model complaints and discipline code in Schedule 5 with any changes recommended by the council. The changes may provide for the making and deciding of complaints and the imposition of disciplinary measures against members of a professional association. Specific measures may relate to the establishing of a committee to implement the code, the grounds on which a complaint may be made, the imposition of fines and the making of appeals.

36 – The council - The Professional Standards Council is established as a corporation with its own seal.

37 – Functions of council - This section sets out that the functions of the council include advising the Attorney General regarding: the approval, amendment and revocation of schemes, the operation of the professional standards provisions, professional indemnity insurance, improvement of standards of service by professionals, development of self-regulation by the professions, and monitoring of risk management strategies of professionals.

38 – Membership of council - The council is to consist of 11 appropriately qualified people appointed by the Attorney General. It is envisaged that the appointments will be synchronized with those made under other State and Territory legislation to enable the creation of a 'national council'.

39 – Chairperson and deputy chairperson of council - A chairperson and deputy chairperson of the council, who must be a member of the council, will be appointed by the Attorney General, and may be removed from the council at any time.

40 – Deputies of members - The Attorney General may appoint a person to be the deputy of a member, enabling the deputy to act with all the functions of the member in the absence of that member.

41 – Term of office of members - A member can be appointed for up to three years.

42 – Allowances of members - Allowances for members are to be decided by the Attorney General.

43 – Vacancy in office of member - A vacancy occurs in circumstances including when a member dies, completes a term of office, or is removed from office.

The Attorney General may remove a member from office for incompetence or misbehaviour or mental or physical incapacity.

44 – Filling of vacancy in office of member - A person may be appointed to fill a vacancy on the council.

45 – Personal liability of members etc - A council member is not personally liable for anything done honestly, in the exercise of a council function. Any such liability attaches instead to the council itself.

46 – General procedure for council - General procedure for calling meetings is to be decided by the council.

47 – Quorum at council meetings - A quorum for a meeting is a majority of council members.

48 – Presiding member at council meetings - The presiding member for a meeting will be either the chair, the deputy chair, or another member elected by the meeting. The presiding member has a second or casting vote where votes are equal.

49 – Voting at council meetings - A decision supported by a majority of the votes cast at a meeting of the council where there is a quorum of members is the decision of the council.

50 – Requirement to provide information - A professional association seeking to have its scheme considered by the council must provide the council with all the necessary information. Failure to do so carries a penalty of \$5,000.

51 – Referral of complaints - A professional association may refer a complaint of breach of the ‘obligation to notify’ (section 29), or an offence against the regulations, to the Professional Standards Council.

The association is obliged to give information to the council about any evidence of a breach of section 29 by one of its members. Failure to do so, if dishonest, may result in civil liability to a member of an association's executive body.

52 – Committees of council - The council may establish committees to assist it in the exercise of its functions. Committee members do not have to be council members.

53 – Use of government staff or facilities - The Attorney General may arrange for the council to use government staff or facilities.

54 – Engagement of consultants by council - The council may engage consultants with suitable qualifications and experience.

55 – Accountability of the council to Minister - The Attorney General may issue general or specific directions to the council regarding the performance of its functions.

56 – Annual report of council - The council must prepare a report on its work and activities for each financial year.

57 – Characterisation of sch 4 - This section clarifies that the schedule is part of the substantive rather than procedural law of the Australian Capital Territory which is significant for its application under 'conflict of laws' principles, where the laws may be applied by the court system of a different jurisdiction.

58 – No contracting out of sch 4 - The professional standards provisions will apply to professionals regardless of any contract which might provide otherwise, whether the contract was made before, on or after the day when the provisions became applicable to that professional.

59 – No limitation on other insurance - The schedule does not limit further insurance arrangements a professional might take above and beyond its provisions.

60 – Review of sch 4 - The Attorney General must review this schedule at the end of its fifth year of operation, in terms of whether its policy objectives are valid and have been achieved.

Clause 9 – New schedule 5

Schedule 5 Occupational associations – model code - Schedule 5 sets out the model *Occupational Associations (Complaints and Discipline) Code*, which provides for the actions which may be the subject of a complaint; who may make a complaint, how is a complaint made; what happens after a complaint is made; what action may be taken after a hearing into a complaint; notices of decisions; the rights of representation for parties to complaints; how occupational association's functions under code may be exercised; and protection from liability.