

Professional Standards Act 1994 (NSW)

THE INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA (NSW) SCHEME

PREAMBLE

- A. The Institute of Chartered Accountants in Australia (the Institute) is a national occupational association.
- B. The Institute has made an application to the Professional Standards council, appointed under the Professional Standards Act 1994 (NSW) (the Act), for a scheme under the Act.
- C. The scheme is prepared by the Institute for the purposes of limiting occupational liability to the extent to which such liability may be limited under the Act.
- D. The scheme propounded by the Institute is to apply to all participating members referred to in clauses 2.2 and 2.3 of the scheme
- E. The Institute has furnished the Council with a detailed list of risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented
- F. The Scheme is intended to commence on 8 October 2007 and to remain in force for a period of 5 years from its commencement unless it is revoked, extended or ceases in accordance with section 32 of the Act.

THE INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA (NSW) SCHEME

1. OCCUPATIONAL ASSOCIATION

- 1.1 The Institute Scheme ("the Scheme") is a Scheme under the Professional Standards Act 1994 (NSW) ("the Act") of the Institute of Chartered Accountants in Australia ("the Institute"), Level 14, 37 York Street, Sydney NSW 2000.
- 1.2 Definitions of terms used in the Scheme appear in the Scheme, including in Part 4.

2. PERSONS TO WHOM THE SCHEME APPLIES

- 2.1 The Scheme applies to participating members, being those Institute members referred to in clauses 2.2 and 2.3 of the Scheme, and to all persons to whom the Scheme applied at the time of the relevant act or omission on which a cause of action for damages for occupational liability is founded¹. Each such participating member and person is referred to in the Scheme as a "participant".
- 2.2 All members who hold a current Certificate of Public Practice issued by the Institute and affiliate members of the Institute, other than financial services licensees.

¹ Sections 18 and 19 of the Act provide that if the scheme applies to a body corporate or a person, it also applies to each officer of the body corporate and to each partner and employee of the person, provided that if the officer, partner or employee is entitled to be a member of the same occupational association as the body corporate or person, but is not a member, the scheme does not apply to that officer, partner or employee. Section 20 provides that the scheme will also apply to any associated persons who are prescribed by regulations.

- 2.3 All practice entity members of the Institute, other than financial services licensees.
- 2.4 No person to whom the Scheme applies may choose not to be subject to the Scheme, provided that the Institute may, on application by a person, exempt the person from the Scheme if the Institute is satisfied that he or she would suffer financial hardship in obtaining professional indemnity insurance to the levels set out in clause 3.1 below.

3. LIMITATION OF LIABILITY

- 3.1 This scheme only affects the liability of a participant for damages arising from a single cause of action to the extent to which the liability results in damages exceeding:
- (a) \$500,000 where the act or omission giving rise to the cause of action occurred on or before 30 June 2008;
 - (b) \$750,000 where the act or omission giving rise to the cause of action occurred between 1 July 2008 and 30 June 2009;
 - (c) \$1 million where the act or omission giving rise to the cause of action occurred after 1 July 2009.
- 3.2 Where a participant against whom a proceeding is brought relating to occupational liability in connection with Category 1 services is able to satisfy the court of (a), (b) or (c) below, the participant is not liable in damages in relation to that cause of action above the lesser of the Category 1 limitation amount determined under clause 3.4 and the Category 1 monetary ceiling specified in Clause 3.3:
- a) the participant has the benefit of an insurance policy insuring the participant against that occupational liability, and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action (including any amount payable by the person by way of excess under or in relation to the policy) is not less than the amount of the Category 1 monetary ceiling or the Category 1 limitation amount;
- OR
- b) the participant has business assets the net current market value of which is not less than the amount of the Category 1 monetary ceiling or Category 1 limitation amount;
- OR
- c) the participant has business assets and the benefit of an insurance policy insuring the participant against that occupational liability, and the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action (including any amount payable by the participant by way of excess under or in relation to the policy), if combined, is not less than the amount of the Category 1 monetary ceiling or Category 1 limitation amount.
- 3.3 The Category 1 monetary ceiling is \$75 million.

3.4 The Category 1 limitation amount is an amount equal to a reasonable charge for the Category 1 services provided by the participant or which the participant failed to provide and to which the cause of action relates, multiplied by the multiplier specified in clause 3.4.2 below.

3.4.1 In determining the amount of a reasonable charge a court is to have regard to any amount actually charged and to:

- a) the amount that would ordinarily be charged in accordance with a scale of charges prescribed or accepted by the Institute; or
- b) if there is no such scale, the amount that a competent person of the same qualifications and experience as the participant would be likely to charge in the same circumstances.

3.4.2 The multiplier is 10.

3.5 Where a participant against whom a proceeding is brought relating to occupational liability in connection with Category 2 services is able to satisfy the court of (a), (b), or (c) below, the participant is not liable in damages in relation to that cause of action above the monetary ceiling specified in clause 3.6:

(a) the participant has the benefit of an insurance policy insuring the participant against that occupational liability, and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action (including any amount payable by the person by way of excess under or in relation to the policy) is not less than the amount of the Category 2 monetary ceiling;

OR

b) the participant has business assets the net current market value of which is not less than the amount of the Category 2 monetary ceiling;

OR

c) the participant has business assets and the benefit of an insurance policy insuring the participant against that occupational liability, and the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action (including any amount payable by the participant by way of excess under or in relation to the policy), if combined, would total an amount that is not less than the amount of the Category 2 monetary ceiling.

3.6 The Category 2 monetary ceiling is the lesser of:

(a) \$20 million; and

(b) the highest fee (or the highest total of fees) billed by a participant (or if the participant is a member of a practice entity (whether a practice entity member of the Institute or not), by all participants who are members of or a part of the practice entity) in a single financial year for a Category 2 engagement:

- (i) over the 3 full financial years immediately prior to the financial year in which the participant commences to provide the Category 2 services which are the subject of the proceeding against the participant, or

- (ii) if the participant has less than three full financial years' Category 2 services fee history immediately prior to the financial year in which the participant commences to provide the Category 2 services which are the subject of the proceeding against the participant, over the two full financial years or (if the participant has less than 2 years' but one year's or more than one year's such fee history) that full financial year immediately prior to the financial year in which the participant commences to provide the Category 2 services which are the subject of the proceeding,

multiplied by 10

OR

- (c) if the participant has no, or less than one full financial year's, Category 2 services fee history immediately prior to the financial year in which the participant commences to provide the Category 2 services which are the subject of the proceeding against the participant, the applicable amount specified in clause 3.1.

3.7 Where a participant against whom a proceeding is brought relating to occupational liability in connection with Category 3 services is able to satisfy the court of (a), (b), or (c) below, the participant is not liable in damages in relation to that cause of action above the lesser of the Category 3 limitation amount determined under clause 3.9 and the amount of the Category 3 monetary ceiling specified in clause 3.8:

- (a) the participant has the benefit of an insurance policy insuring the participant against that occupational liability, and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action (including any amount payable by the person by way of excess under or in relation to the policy) is not less than the amount of the Category 3 monetary ceiling or the Category 3 limitation amount;

OR

- b) the participant has business assets the net current market value of which is not less than the amount of the Category 3 monetary ceiling or Category 3 limitation amount;

OR

- c) the participant has business assets and the benefit of an insurance policy insuring the participant against that occupational liability, and the net current market value of the assets and the amount payable under the insurance policy in respect of the occupational liability relating to that cause of action (including any amount payable by the participant by way of excess under or in relation to the policy), if combined, would total an amount that is not less than the amount of the Category 3 monetary ceiling or Category 3 limitation amount.

3.8 The Category 3 monetary ceiling is \$20 million.

3.9 The Category 3 limitation amount is an amount equal to a reasonable charge for the Category 3 services provided by the participant or which the participant failed to provide and to which the cause of action relates, multiplied by the multiplier specified in clause 3.9.2 below.

3.9.1 In determining the amount of a reasonable charge a court is to have regard to any amount actually charged and to:

- (a) the amount that would ordinarily be charged in accordance with a scale of charges prescribed or accepted by the Institute; or
- (b) if there is no such scale, the amount that a competent person of the same qualifications and experience as the participant would be likely to charge in the same circumstances.

3.9.2 The multiplier is 10.

3.10 Pursuant to s 24 of the Act, this scheme confers on the Institute a discretionary authority to specify, on application by a participant, a higher maximum amount of liability not exceeding \$75 million than would otherwise apply under the scheme in respect of any specified case or class of case of Category 2 services or Category 3 services, where the fee for the service or services is, or is reasonably expected to be, \$2 million or greater.

The higher maximum amount of liability will apply if the Institute exercises its discretion and approves the higher maximum amount of liability prior to the participant beginning to provide the relevant services.

3.11 In circumstances where the services provided by a participant comprise a combination of Category 1 services and any of:

- (a) Category 2 services;
- (b) Category 3 services;
- (c) Category 2 services and Category 3 services;

the participant's liability under this Scheme for damages in respect of a proceeding in relation to occupational liability in excess of the applicable amount specified in clause 3.1 brought against it will be the highest of:

- (a) the lesser of the Category 1 limitation amount determined under clause 3.4 and the amount of the Category 1 monetary ceiling specified in clause 3.3, in respect of the Category 1 services; and
- (b) the Category 2 monetary ceiling in respect of the Category 2 services, determined in accordance with clause 3.6; and
- (c) the lesser of the Category 3 limitation amount determined under clause 3.9 and the amount of the Category 3 monetary ceiling specified in clause 3.8, in respect of the Category 3 services.

3.12 In circumstances where the services provided by a participant comprise a combination of Category 2 services and Category 3 services, the participant's liability under this Scheme for damages in respect of a proceeding in relation to occupational liability in excess of the applicable amount specified in clause 3.1 brought against it will be (subject to clause 3.10) the higher of:

- (a) the Category 2 monetary ceiling in respect of the Category 2 services, determined in accordance with clause 3.6; and

- (b) the lesser of the Category 3 limitation amount determined under clause 3.9 and the amount of the Category 3 monetary ceiling specified in clause 3.8, in respect of the Category 3 services.

- 3.13 Nothing in this Scheme is intended to increase, or has the effect of increasing, a participant's liability for damages to a person beyond the amount that, other than for the existence of this Scheme, the participant would be liable in law.
- 3.14 This scheme only limits the amount of damages for which a participant is liable if and to the extent that the damages exceed the applicable amount specified in clause 3.1. Where the amount of damages in relation to a cause of action exceeds the applicable amount specified in clause 3.1 but the damages which may be awarded as determined by this scheme are equal to or less than the applicable amount specified in clause 3.1, liability for those damages will instead be limited to the applicable amount specified in clause 3.1.

4. DEFINITIONS

- 4.1 In this Scheme, the following words and phrases have the following meanings:

“Category 1 services” means:

- all services required by Australian law to be provided only by a registered company auditor;
- all other services provided by a registered company auditor in his or her capacity as auditor;
- all services the deliverables from which:
 - (i) will be used in determining the nature, timing and extent of audit procedures in the context of an audit of a financial report; or
 - (ii) will be incorporated into the financial report of an entity; or
 - (iii) are required by law or regulation to be filed with a regulator (excluding returns signed by a registered tax agent);

“Category 2 services” means:

- services to which Chapter 5 or Chapter 5A of the Corporations Act applies;
- services provided pursuant to s.233(2) of the Corporations Act;
- services to which the Bankruptcy Act 1966 applies;
- services arising out of any court appointed liquidation or receivership

“Category 3 services” means any services provided by a participant in the performance of his, her or its occupation, which are not Category 1 or Category 2 services.

“occupational liability” has the same meaning as is ascribed to that term in the Act.