Professional Standards Scheme – Briefing paper for lawyers
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1. Background

1.1 Brief outline of the Professional Standards Scheme

(a) Chartered Accountants Australia and New Zealand Professional Standards Scheme (**Scheme**) has been prescribed under the NSW Professional Standards Act with mutual recognition for each State and Territory of Australia as well as the *Competition and Consumer Act 2010* of the Commonwealth (each an **Act** and together, the **Acts**).

(b) The Scheme is intended to remain in force for 5 years from its commencement. The Scheme commenced on 8 October 2019.

(c) The Acts provide that prescribed schemes limit the "occupational liability" of the participating members of an "occupational association".

(i) Section 28 of the NSW Act provides in part:

> *"(1) To the extent provided by this Act and the provisions of the scheme, a scheme limits the occupational liability, in respect of a cause of action founded on an act or omission occurring during the period when the scheme is in force, of any person to whom the scheme applied at the time when the act or omission occurred."*

(ii) The various State Interpretation Acts provide that a "person" includes an individual, a corporation and a body corporate.

(iii) It follows from the use of the word "person" in the relevant Acts that the liability limitation provisions in the Acts would not apply to:

A. a partnership (as opposed to its individual members);

B. a trust (as opposed to the trustee); or

C. an unincorporated association.

(d) The Acts provide that if the Scheme applies to a person, it also applies to each:

(i) employee of the person;

(ii) partner of the person,

provided that if an employee or partner is entitled to be a member of the same occupational association, but is not a member, then the Scheme does not apply to that employee or partner.

(e) The Acts also provide that if a Scheme participant is a body corporate, the Scheme also applies to each officer of the body corporate, provided that if an officer is entitled to be a member of the same occupational association, but is not a member, then the Scheme does not apply to that officer.

(f) The participating members of the CA ANZ Scheme who are covered by the Scheme are:

(i) all CA ANZ members who:

- hold a current Australian Certificate of Public Practice;
- are affiliate member;
- or are incorporated Practice Entity Members

(g) A person to whom the Scheme applies cannot choose not to be subject to the Scheme, unless they have been exempted by CA ANZ. *Section* 2.2 of each CA ANZ Scheme provides that "CA ANZ may, on application by a person, exempt the person from the Scheme if CA ANZ is satisfied that he or she would suffer financial hardship in obtaining professional indemnity insurance to the levels set out in [the Scheme]."

(h) The Acts define "occupational liability" as:

> "*Civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation*."

(i) The Acts do not apply to any liability for damages arising from:

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

(ii) a breach of trust; or

(iii) fraud or dishonesty.

(j) The Scheme only applies to limit liability where the acts or omission of the participant giving rise to the cause of action, occurred during the period when the Scheme is in force. It is irrelevant if the proceedings which form the basis of the claim are instituted after the period of the Scheme.

(k) If a CA ANZ member provides services in another State or Territory, that member is also a participating member of the Scheme of that State or Territory. There is no requirement in the Schemes that to be covered by the Scheme, a member must be located in that State or Territory. The jurisdictional trigger is where the service was provided, not where the practitioner is located.

(l) The 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 $2 million. In other words, if a claim for less than $2 million is brought against a participant, then that liability is not limited by the Scheme. Only if the claim exceeded $2 million, would the Scheme operate.

1.2 Liability caps

(a) The Scheme provides a participating member with a defence which removes the member's exposure to a judgment beyond the caps specified in the Scheme.

(b) Damages are only capped however, if the defendant Scheme participant satisfies the Court that he/she/it holds Professional Indemnity Insurance cover and/or business assets to the applicable monetary ceiling specified in the Scheme.

(c) There are 3 categories of occupational liability services in the Scheme:

(i) Category 1 – audit services;

(ii) Category 2 – insolvency services; and

(iii) Category 3 – any services provided by a Scheme participant in the performance of his, her or its occupation, which are not in Categories 1 or 2.

(d) Category 1 liability cap – audit services:

(i) $2 million, where the claim arises from a service in respect of which the fee is less than $100,000;

(ii) $5 million where the claim arises from a service in respect of which the fee is $100,000 or more, but less than $300,000;

(iii) $10 million where the claim arises from a service in respect of which the fee is $300,000 or more, but less than $500,000;

(iv) $20 million where the claim arises from a service in respect of which the fee is $500,000 or more, but less than $1,000,000;

(v) $50 million where the claim arises from a service in respect of which the fee is $1,000,000 or more but less than $2,500,000; and

(vi) $75 million where the claim arises from a service in respect of which the fee is $2,500,000 or more.

(e) Category 2 liability cap – insolvency services:

(i) $2 million, where the relevant fee is less than $100,000;

(ii) $5 million, where the relevant fee is $100,000 or more, but less than $300,000;

(iii) $10 million, where the relevant fee is $300,000 or more, but less than $500,000;

(iv) $20 million where the relevant fee is $500,000 or more.

The relevant fee is the highest fee billed by a Participant (or by all Participants who are members of a practice entity) in a single financial year for a Category 2 engagement/appointment over the 3 financial years prior to the year in which the Participant commenced to provide the services the subject of the claim. If the Participant only has 2 years' fee history, then the relevant fee is the highest such fee billed in either of those years. If the Participant only has 1 year's fee history, then the relevant fee is the

highest such fee billed in that year. If the Participant has less than 1 full financial year's fee history, then the relevant fee is $2 million.

(f) Category 3 liability cap – other services:

(i) $2 million, where the claim arises from a service in respect of which the fee is less than $100,000;

(ii) $5 million where the claim arises from a service in respect of which the fee is $100,000 or more, but less than $300,000;

(iii) $10 million where the claim arises from a service in respect of which the fee is $300,000 or more, but less than $500,000;

(iv) $20 million where the claim arises from a service in respect of which the fee is $500,000 or more.

(g) CA ANZ has observed that some lawyers defending claims against CA ANZ members have not been pleading the limitation of liability defence under the relevant Act.

(h) It is thought that the failure to plead the limitation of liability defence may be due to:

(i) a reluctance by insurers to incur the additional legal fees required to plead and establish the defence; and/or

(ii) a lack of understanding as to how the Scheme works.

(i) The purpose of this paper is accordingly to:

(i) briefly explain for insurance companies and defence lawyers, how the Scheme works; and

(ii) raise some issues for consideration by insurance companies and defence lawyers.

2. Issues for defence lawyers – Pleading limitation of liability defence

(a) Damages will not be limited unless the limitation of liability defence is pleaded. If that is the result of an oversight or mistake, the client may have a negligence action against the lawyer for not pleading the defence, the damages likely being the difference between what the damages would have been if the defence had been pleaded (the limitation amount under the Scheme, which would have been paid out by the member's insurance company) and the damages actually ordered by the court.

(b) As a result of the High Court's 2009 decision in *Aon Risk Management v Australian National University*, in which it expressly overruled *State of Queensland v J L Holdings*, late applications to amend are now much more likely to be refused:

(i) Prior to *Aon Risk Management v Australian National University*, the leading case on the amendment of pleadings was *State of Queensland v J L Holdings Pty Limited* (1997), which was previously authority for the proposition that "justice" was the paramount consideration in determining an application for leave to amend pleadings. Although Court case management principles (such as efficiency and avoiding delay) were a relevant consideration, the High Court previously held that they could not "prevail over the injustice of shutting the applicants out from raising

an arguable defence, thus precluding the determination of an issue between the parties."

As a consequence of that decision, the accepted position until recently was that an application to amend would in most cases be granted, so long as:

A. the proposed amendment raised an arguable issue; and

B. any prejudice suffered by the other party or parties could be adequately compensated by an order for costs.

(ii) The High Court in *Aon* expressly overruled *Queensland v J L Holdings*, and held that the various Court Rules must be applied having regard to the objectives of the timely disposal of proceedings at an affordable cost, where these objectives are stated. In this context, the "just resolution" of proceedings remains the paramount consideration, but this phrase is to be understood as encompassing the minimisation of expense and delay.

In particular, the High Court stated:

> *"Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of the proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs…The modern view is that even an order for indemnity costs may not always undo the prejudice a party suffers by late amendment."*

(iii) On the specific facts of the case before it, the High Court commented:

> *"... the history of these proceedings reveals an unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation or adjournment of the dates set down for trial, and raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable Rules of Court, leave should be granted.*
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> *In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in*

which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to ANU's statement of claim should not have been allowed."

(iv) Pleading the defence may also be useful in limiting the resources allocated by the plaintiff to the case. It is interesting in that regard to note the following passage in the 2007 NSW Supreme Court judgment in *Aesthetic Architecture v John Camilleri*, an interlocutory application for an order allowing the defendant accountant to amend his defence to assert a limitation of liability defence under the NSW Act. The Plaintiff vigorously opposed the amendment application, arguing that "had he been aware of the limitation of liability defence, the plaintiff's solicitors would have conducted the proceedings on a significantly different basis. In particular the expenditure incurred would have been limited, the budget would have been substantially scaled back, and he would have refrained from briefing senior counsel and would have limited the role of junior counsel in the preparation of the matter." The Court permitted the amendment to allow the late invocation of the limitation defence in that case. However, given that the case was determined before *Aon,* it is conceivable that the amendment would be refused if the matter were to be determined now.