DRAFT SECOND READING SPEECH

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Professional Standards Amendment Bill 2016

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Madam Speaker, this Bill repeals subsection 27(c) of the *Professional Standards Act 2005* and inserts mutual recognition provisions into that Act. As a result, members of professional associations in Tasmania will at last be on a level playing field with colleagues working interstate.

Professional standards legislation was introduced in all states and territories over a decade ago to address problems of the rising cost and declining availability of professional indemnity insurance following the collapse of the insurer HIH in 2001 and the failure of some insurers more generally to appropriately price some classes of insurance.

The rationale behind the introduction of professional standards legislation was that, by limiting the liability of professionals that belong to a professional association, the maximum level of insurance required is reduced, leading to lower professional indemnity premiums.

In return for allowing a limit on liability for economic loss and property damage for members of a professional association, the association is required to demonstrate that it is implementing risk management strategies which improve the professional standards of its members thereby protecting consumers.

The caps on liability set by a professional association are required to be reasonable and will vary depending on the professional association and size of the firm in question.

Tasmania's *Professional Standards Act 2005* has to date differed in one major respect from the professional standards legislation in mainland jurisdictions.

Section 27(c) of the Tasmanian Act requires that the professional association is to agree to increase the cap on liability for a scheme member on application by that member in a particular case.

All jurisdictions, including Tasmania, have a different provision (section 27(b) of the Tasmanian Act) that gives the professional association that developed a scheme discretion whether or not to approve a higher limit of liability on application by a scheme member in a particular case.

Since commencement of the Act a number of professional associations have lobbied for the removal of subsection 27(c) on the grounds that it has made the Tasmanian Act unworkable.

Only one professional standards scheme has ever been registered in Tasmania and that one has since lapsed. In contrast, there are approximately 20 mutually recognised schemes operating in other states and territories covering accountants, lawyers, surveyors, valuers and the Australian computer society.

Because of this anomaly, the Government requested that the Departments of Treasury and Finance and Justice review the public interest case for retaining or removing the subsection.

As part of the review, a consultation paper was released in December 2014 and targeted feedback was sought from a wide range of stakeholders. Thirteen written submissions from stakeholders were received, all of which supported the repeal of the subsection.

The submissions showed that professional associations have concerns that, by allowing two parties to negotiate their own liability cap, a scheme approved under the Act would not achieve the overarching objective of limiting the civil liability of professionals and protecting consumers through improved and monitored professional standards and lower insurance premiums.

There was also concern that, because of section 27(c), mutual recognition of schemes in other jurisdictions was not possible, thereby requiring individual applications for schemes in Tasmania at an additional cost.

To date in mainland jurisdictions the provision that gives the professional association discretion to approve a higher limit of liability in specific cases seems to have operated effectively.

In addition, over the last decade there has not been any high profile case in Australia where a principal has suffered economic loss as a result of the liability cap.

It is unlikely that there will be any further applications for professional standards schemes in Tasmania unless section 27(c) is repealed. Because of this members of professional associations in Tasmania do not have the same limit on liability that colleagues in mainland jurisdictions enjoy.

In view of the fact that any risk from removing the provision is judged to be low and the fact that the removal of the provision will encourage professional standards schemes in Tasmania, the Government has decided to repeal section 27(c).

Madam Speaker this Bill also inserts into the Tasmanian Act the mutual recognition provisions adopted earlier by other Australian jurisdictions.

These are national model provisions developed in 2007 and endorsed by the then Standing Council of Attorneys General.

The aim of mutual recognition is to reduce the duplication and inefficiency that currently exists in requiring applications to be made to the Professional Standards Council in each jurisdiction and to provide a more seamless national system of professional standards schemes.

The mutual recognition provisions will allow an applicant for approval of a proposed scheme to indicate intent to operate in both the "home" state and in one or more other jurisdictions. Such a scheme will be advertised in all of those jurisdictions.

Where a scheme is intended to operate in more than one jurisdiction, the Professional Standards Councils must consider the matters required under the law of each of those jurisdictions. If the Councils approve such a scheme, the Councils may submit the scheme to

the appropriate Minister in each jurisdiction. The scheme will take effect in each jurisdiction if the relevant Minister authorises the publication in the Gazette of the scheme.

The Bill also makes consequential amendments to take into account the fact that a scheme may come into effect through mutual recognition.

Under the current Act, once a scheme is gazetted in Tasmania it will apply to proceedings relating to an act or omission that occurred after the commencement of the scheme (section 34).

While the Act does not apply to any course of action relating to a contract entered into before the commencement of the Act this means that a member of a scheme would be able to rely on a cap on liability under a scheme in respect to a contract negotiated after the commencement of the Act but before a scheme came into effect.

For example, a principal may have entered into a five year contract with a person in 2015 on the basis that the person is liable for, and has insurance to cover, any potential negligence claim up to $5 million. The contract would have been agreed and priced on that basis.

If a scheme which applies to that person is gazetted in January 2017, and a negligent act occurs after that date, then the scheme will retrospectively impose the liability cap (for example $2 million) that applies under the scheme. As a result the Principal would be left covering the balance of the loss, even though it arises solely from the negligence of the person and the contract was negotiated and priced on the basis that the person would cover losses to $5 million.

It is contrary to the general principles of contract law to allow one party to retrospectively and unilaterally alter the terms of a contract. The Bill therefore amends section 34 to ensure that a scheme may not retrospectively apply to a contract entered into either before the scheme commences or before a party to the contract becomes a member of the scheme.

In summary, The Bill provides for the removal of section 27(c) and the inclusion of the model mutual recognition provisions bring Tasmanian legislation into line with other jurisdictions.

I commend the Bill to the House.