

# THE LAW SOCIETY OF NEW SOUTH WALES SCHEME 2017 - 2018

## GUIDE ON A LIMITATION OF LIABILITY SCHEME FOR LAW SOCIETY MEMBERS



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THIS IS A GUIDE ON A LIMITATION OF LIABILITY SCHEME IN ACCORDANCE WITH THE  
*PROFESSIONAL STANDARDS ACT 1994 (NSW)*.

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### BACKGROUND

The Professional Standards legislation enables the establishment of schemes to limit liability of members of occupational associations. As the legislation is state based, the [Professional Standards Act 1994](#) (as amended) (the Act) is the relevant Act in New South Wales.

The Law Society of New South Wales (the Law Society) has established [limitation of liability schemes](#) for its Members since 1996. For a Scheme to be approved under the Act, occupational associations are required to demonstrate a high commitment to professional standards and consumer protection, implement comprehensive risk management strategies, and set professional indemnity insurance standards for the members of their occupational association, subject to the Scheme itself and the Act.

### THE CURRENT SCHEME

This Law Society of New South Wales Scheme (the Scheme) is effective from 22 November 2012 to 21 November 2017. The gazetted document establishing this Scheme is available on the Professional Standards Council (PSC) website (see [Scheme Document](#)). The Scheme has been extended by a further 12 months to operate until 21 November 2018.

Established pursuant to the Act and the [Professional Standards Regulations 2014 \(NSW\)](#) (the Regulation), the current Scheme is a statutory scheme, enforced by the courts, that allows a scheme participant (*Participating Member*) to limit damages in respect of an occupational liability claim to an amount of \$1.5 million or \$10 million or other nominated higher limitation amount.

**The Scheme is not an insurance scheme and does not displace the requirements for insurable solicitors to obtain insurance under the approved policy in New South Wales.** In fact, a Participating Member, who is not able to satisfy the Court that he or she has the requisite insurance policy, or that the amount payable under his or her insurance policy is at least the amount of the cap nominated (\$1.5 million or \$10 million or other nominated higher amount), will not be entitled to rely on the Scheme to limit his or her liability for damages.

### HOW DOES THE SCHEME WORK?

In principle, if proceedings are brought against a Participating Member relating to occupational liability for damages arising from a single cause of action, and the Participating Member is able to show that:

- (a) S/he is a member of the Law Society and participant in the Scheme at the time the cause of action arose; and
- (b) S/he has an insurance policy insuring the scheme participant against occupational liability to which the cause of action relates; and
- (c) the amount payable under the insurance policy is not less than the amount of the relevant

monetary ceiling specified in the Scheme,

the Court, in awarding damages, will limit those damages to the relevant monetary ceiling or cap specified in the Scheme subject to the provisions of the Act being met.

## WHO IS ELIGIBLE TO JOIN THE SCHEME?

Solicitor Members and Life Members of the Law Society who hold current NSW practising certificates issued by the Law Society are eligible. Solicitors who are not members will need to become Law Society members first by completing a [membership application form](#).

Practitioners who hold a Corporate practising certificate or a Government practising certificate are not eligible to join the Scheme.

## WHO IS COVERED BY THE SCHEME?

Unless exempted by the Law Society of New South Wales, the Scheme applies to **Solicitor Members** who:

- hold current NSW practising certificates; and
- have the benefit of the applicable professional Indemnity Insurance; and
- pay the annual Scheme fee; and
- nominate the cap or monetary ceiling (maximum amount of liability).

The Scheme also applies to partners, employees and associates, subject their being Law Society members if eligible, as specified in sections 18, 19, 20 and 20A of the Act:

### **18 Officers or partners of persons to whom scheme applies**

- (1) If a scheme applies to a body corporate, the scheme also applies to each officer of the body corporate.*
- (2) If a scheme applies to a person, the scheme also applies to each partner of the person.*
- (3) However, if an officer of a body corporate or a partner of a person 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 or partner.*
- (4) In this section: "officer":*
  - (a) in relation to a body corporate that is a corporation within the meaning of the Corporations Act 2001 of the Commonwealth, has the same meaning as in that Act, and*
  - (b) in relation to a body corporate that is not a corporation within the meaning of that Act, means any person (by whatever name called) who is concerned in or takes part in the management of the body corporate.*

### **19 Employees of persons to whom a scheme applies**

- (1) If a scheme applies to a person, the scheme also applies to each employee of the person.*
- (2) However, if an employee of a person is entitled to be a member of the same occupational association as the person but is not a member, the scheme does not apply to the employee.*

### **20 Other persons to whom a scheme applies**

*If persons are prescribed by the regulations for the purposes of section 29 (4) as being associated with persons to whom a scheme applies, the scheme also applies to the prescribed persons.*

## **20A Extension of liability limitation to other persons to whom scheme applies**

- (1) A limitation that applies under this Act to the occupational liability of a person as a member of an occupational association in respect of a cause of action (the "**principal cause of action**") also applies, in respect of the principal cause of action and any related cause of action, to the liability of any other person to whom the scheme concerned applies as a partner, officer, employee or associate of the member (whether or not the other person's liability is an occupational liability). Sections 18-20 provide for a scheme to apply to a partner, officer, employee or associate of a member of an occupational association to whom the scheme applies.
- (2) A "**related cause of action**" is a cause of action in respect of civil liability of the other person arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by that person that caused or contributed to the loss or damage with which the principal cause of action is concerned and that resulted from the same or substantially the same event as that from which the principal cause of action arose.
- (3) A reference in this section to a person who is a partner, officer, employee or associate of a member of an occupational association is a reference to a person who was such a partner, officer, employee or associate at the time of the event that gave rise to the principal cause of action.
- (4) A reference in this section to a limitation on liability that applies to a person as a member of an occupational association includes a reference to a limitation on liability that would apply to the person if a cause of action relating to the liability were brought against the person.
- (5) In this section: "**associate**" of a person means someone who is associated with the person pursuant to the regulations under section 29 (4) (b) "**officer**":
  - (a) in relation to a body corporate that is a corporation within the meaning of the Corporations Act 2001 of the Commonwealth, has the same meaning as in that Act, and
  - (b) in relation to a body corporate that is not a corporation within the meaning of that Act, means any person (by whatever name called) who is concerned in or takes part in the management of the body corporate.

## **LIMITATION OF LIABILITY AND PROFESSIONAL INDEMNITY INSURANCE**

The Scheme provides Participating Members with the benefit of a statutory cap should damages be awarded against them as a result of a successful occupational liability claim.

The Scheme is not professional indemnity insurance. Participating members must already be insured to an amount at least equal to the amount of the limitation of liability applying to the member at the relevant time, which insurance complies with s 27 of the Act. In addition, the Participating Member must have sufficient business assets to cover any claim made up to the amount of the uninsured deductible (or excess) under their professional indemnity insurance. For more information on professional indemnity insurance, contact Lawcover Insurance Services on (02) 9264 8332 or visit the [Lawcover website](#).

Scheme Participants required, or who choose to take out insurance in excess of \$1.5 million must ensure the excess cover:

- a) has at least one automatic reinstatement each year;
- b) covers all civil liability arising in connection with the practice;
- c) is retrospective for any event giving rise to a claim made during the insured period;
- d) extends to all employees of the practice or service entity; and
- e) Is a "claims made" policy.

If the Participating Member is unable to satisfy the Court that he or she has the requisite insurance

policy, or that the amount payable under his or her insurance policy is at least the amount of the relevant monetary ceiling specified in the Scheme, he or she will not be entitled to rely on the Scheme to limit his or her liability for damages.

It is essential to select the limitation amount appropriate for the law practice. In addition the law practice may choose to apply for a Discretionary Higher Maximum Amount. The following table sets out the corresponding limitation of liability amounts.

<b>Class</b>	<b>Description</b>	<b>Monetary Ceiling (Maximum amount of liability)</b>
1	Participating Scheme Members who were at the Relevant Time in a Law Practice consisting of up to and including 20 principals <i>and</i> where the Law Practice generates a total annual fee income for the financial year at the Relevant Time up to and including \$10m.	\$1.5 million
2	<ul style="list-style-type: none"> <li>a) Participating Scheme Members who were at the Relevant Time in a Law Practice consisting of greater than 20 Principals; or</li> <li>b) Participating Scheme Members who were at the Relevant Time in a Law Practice where the Law Practice generates total annual fee income for the financial year at the Relevant Time greater than \$10m.</li> </ul>	\$10 million (Note; Certificate of top up PII cover must be provided)
<b>Discretionary Higher Monetary Ceiling</b>	Participating Scheme Members who apply for a discretionary higher maximum amount of liability, and which higher amount is authorised by the Law society.	Discretionary Higher Maximum Amount

### **CAN A PARTICIPATING MEMBER VARY THE CAP OR CONTRACT OUT OF THE SCHEME FOR SPECIFIC CLIENTS OR MATTERS?**

Under s 24 (1) (b) of the Act, the Scheme confers on the Law Society a discretionary authority to specify a higher monetary ceiling (maximum amount of liability) in all cases or in any specified case or class of case than would otherwise apply under the Scheme on application of a Participating Member.

Clause 4.1 and 4.2 of the Scheme document states:

*4.1 The Law Society has discretionary authority, on application by a Participating Member, to specify in relation to the Participating Member, a higher maximum amount of liability (monetary ceiling) than would otherwise apply under the Scheme in relation to him or her either in all cases or in any specified case or class of case.*

*4.2 If, in the exercise of its discretion under clause 4.1, the Law Society has specified a higher*

*maximum amount of liability (monetary ceiling) than would otherwise apply under the Scheme in relation to a Participating Member, the maximum amount of liability (monetary ceiling) in relation to that Participating Member is that higher maximum amount.*

Law practices wishing to choose the Discretionary Limitation Amount under Clause 4.1 should complete an additional Application for Higher Cap form. An additional information guide '[Guidelines for Discretionary Higher Monetary Ceilings](#)' and Applications for Discretionary Higher Cap can be found at <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1399147.pdf>

## **PARTICIPATION IN THE SCHEME**

Law practices will need to provide a completed Application for Participation or Exemption form to the Law Society.

Fees totalling **\$105.00** will be payable for each Solicitor Member (SM) to participate in the Scheme made up as follows:

- a) \$50.00 annual registration fee which the Society is required to pay to the Professional Standards Council (PSC); and
- b) \$55.00 (\$50 + \$5 GST) annual administration fee.

For Scheme coverage during each Scheme year ending 21 November, all solicitors in the law practice who hold New South Wales practising certificates must be, and remain, both members of the Law Society (the occupational association) and participants in the Scheme for the entire period. New solicitors joining the law practice during the year need to ensure they become members of the Law Society, if they are not already, and should also be registered immediately in the Scheme by notifying [scheme@lawsociety.com.au](mailto:scheme@lawsociety.com.au) to benefit from the limitation of liability.

It is important to note that the Scheme operates on a 'one-in, all-in basis'. This means that for a law practice to gain the full benefit of the Scheme and the limitation of liability, all solicitors within the law practice must choose to be members of the Law Society and participants in the Scheme.

For example, a law practice might have 10 principals, nine of whom are participating in the Scheme, but the tenth principal, although eligible, is not in the Scheme. If a successful claim is made against this principal, s/he might be liable for the full amount of the claim, but could possibly be entitled to bring a contribution claim against all other principals to contribute to the balance of the claim which exceeds the monetary limit of the insurance policy held by the law practice. This would undermine the effectiveness of the limitation of liability cap.

Issues may also arise if an employee legal practitioner, although eligible, is not a scheme participant. If a claim is brought against the employee legal practitioner, the principal/s or the Incorporated Legal Practice (ILP) as employer could possibly be vicariously liable for the employee's act or omission committed in the course of employment, but might not be able to rely on the limitation of liability cap.

Therefore, law practices wishing to benefit from the limitation of liability provided by the Scheme should ensure that:

- All solicitors (both principals and solicitor employees) renew their membership of the Law Society and their participation in the Scheme on an annual basis; and

- All new solicitors to the law practice (both principals and solicitor employees) immediately gain membership of the Law Society and join the Scheme.

Participating Scheme Members are reminded of their obligations under [Rule 57.7 of the Solicitors' Rules](#) to complete continuing education requirements as the Law Society is obliged to report non-compliances to the PSC.

## SCHEME CO-ORDINATOR FOR THE LAW PRACTICE

In the Application for Participation form, the Law Practice is requested to nominate a principal of that law practice to act as Scheme Co-ordinator for the Law Practice. All communication regarding the Scheme will be forwarded to the Scheme Co-ordinator. The Scheme Co-ordinator will also make the required declarations and undertakings when completing the annual online participation application or signing the application form. The Law Practice should notify the Scheme Manager at the Law Society IMMEDIATELY if there are changes to the Scheme Co-ordinator.

## WHAT IS COVERED BY THE SCHEME?

Under the Act, the Scheme provides for limitation of occupational liability arising from a single cause of action. Occupational liability is defined in the Act as follows:

*Occupational liability* means civil liability arising (in tort, contract or under statute) directly or vicariously from anything done or omitted to be done by a member of an occupational association acting in the performance of his or her occupation.

The Scheme covers acts or omissions that occur after the commencement of the Scheme.

As the legislation allowing the creation of Schemes is a New South Wales statute, the coverage applies in New South Wales and generally does not provide protection against torts committed outside of New South Wales or breaches of contract where the governing law is not New South Wales law.

The Commonwealth Government has a mechanism called 'prescription' for recognising and exempting schemes. The Law Society of New South Wales Scheme is granted prescription under the [Treasury Legislation Amendment \(Professional Standards\) Act 2004](#) (Cth Act) in limited circumstances.

## EXCLUSIONS AND RESTRICTIONS

Whilst the Scheme offers significant protection against claims above the level of compulsory professional indemnity insurance, the protection provided is not absolute. It is important to note [s 5](#) of the Act specifically excludes coverage of liability arising from:

- the death of or personal injury to a person;

*Until the amendment pursuant to Professional Standards Amendment Act 2004, the Act also specifically excluded "any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim". The amendment removed this exclusion for causes of action arising after 15 November 2004.*



- a breach of trust;
- fraud or dishonesty; or
- liability, the subject of proceedings under Parts 13 or 14 of the *Real Property Act 1900*.

The Scheme can only affect liability for damages arising from a single cause of action to the extent to which liability results in damages exceeding the limitation amount.

Claimants who have a joint interest in a cause of action are treated as a single claim for the purposes of the Act. Where one person has two or more claims arising out of a single event against persons to whom the Scheme applies and who are associated, those claims are treated as a single claim under the Act. Associated defendants are partners, employees of the same employer or persons who are in a relationship of employer and employee.

Damages do NOT include defence costs.

## NOTICE REQUIREMENTS TO CLIENTS

Section 33 of the Act, requires Participating Scheme Members to disclose their limited liability status. The Act and Clause 9 of the Regulation prescribe the following form of Notification:

“Liability limited by a scheme approved under Professional Standards Legislation.”

The statement *must* be printed in a size equal to or greater than the face measurement of Times New Roman typeface in 8 point. A Participating Member will not be able to rely on the Scheme to limit liability if, before the time at which the act or omission giving rise to the cause of action occurred, the Participating Member did not give or cause to be given to the client a document that carried the required Notification.

The Notification should appear on the following documents:

- Documents (written advice, plans, drawings, specifications and other) produced for clients not accompanied by another document containing a notification statement;
- Emails;
- Fax cover sheets;
- Letterheads and letters signed by the company or on its behalf;
- Memorandum of fees and invoices not accompanied by another document containing a disclosure statement;
- Websites; and
- Newsletters and other publications.

The Professional Standards Council (the PSC) has directed that, generally, the Notification should appear on all documents given to clients or prospective clients to promote or advertise the scheme member or their business, including websites. Advertisements in print media, directory listings and similar forms of promotion or advertising and business cards do not require the notification statement.

It should be noted that the use of the disclosure notification by a law practice, where not all practitioners are participating members of the Scheme, may be misleading to consumers, if it is not appropriately qualified.

## EXEMPTION FROM THE SCHEME

The Scheme will not apply to any person who has applied to the Law Society to be exempted from participation in the Scheme by signing Part B of the Application for Participation or Exemption Form.

A person who is exempted from participation in the Scheme will not be able to rely on the Scheme to limit his or her liability if a claim is brought against that person as he or she has neither paid the annual fee nor indicated the monetary ceiling (maximum amount of liability).

Solicitor Members who have not paid the annual fee cannot claim to be participants in the Scheme and must complete and return to the Scheme Manager the Part B Application for Exemption.

## HISTORY

The original Solicitors Limitation of Liability Scheme commenced on 4 December 1996 and expired on 4 December 2000. On 22 November 1999 the *Professional Standards Amendment Act 1999* was proclaimed. This Act made certain changes to the *Professional Standards Act 1994*, in particular, in relation to Schemes.

The Society made application for a new Scheme and this was approved by the PSC. The Scheme commenced on 22 November 2000 and terminated on 21 November 2006. The *Professional Standards Amendment Act 2004* made further changes to the operation of Schemes under the Act and extended coverage to claims for negligence against a solicitor acting in a personal injury claim for any cause of action arising after 15 November 2004.

The amending Act provided for a Scheme to confer a discretionary authority on an occupational association to specify a higher maximum amount of liability than would otherwise apply under the Scheme either in all cases or in any specified case or class of case.

The Law Society of NSW (NSW) Scheme commenced on 22 November 2006 and terminated on 21 November 2012.

The current Scheme (known as the Law Society of New South Wales Scheme) commenced on 21 November 2012.

## NECESSARY APPLICATIONS

If you wish to have your liability limited under the Scheme, you must complete Part A of the Application for Participation or Exemption form indicating your chosen monetary ceiling, have it signed by a principal of the law practice in a manner binding upon the members of the law practice and return it to the Law Society together with payment of the annual fee required. If you do not wish to join the Scheme, please sign and return Part B of the Application for Participation or Exemption form seeking an exemption.

## DISCLAIMER

The information in this Fact Sheet document regarding The Law Society of New South Wales Scheme is intended as **a general guide** only. The information is not intended to constitute professional or legal advice, and you should make your own enquiries and assessment. The Law Society of New South Wales expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this Fact Sheet document.