

FREQUENTLY ASKED QUESTIONS

Updated 23 July 2018

This is an information sheet containing frequently asked questions on a Limitation of Liability Scheme in accordance with the *Professional Standards Act 1994 (NSW)*.

WHAT IS A LIMITATION OF LIABILITY SCHEME?

The Professional Standards legislation enables the establishment of schemes to limit liability of members of occupational associations. The legislation is state based, and the relevant Act in NSW is the *Professional Standards Act 1994* (as amended) ('the Act').

The Law Society of New South Wales has administered Schemes for its Members since 1996.

WHAT IS THE SCHEME DURATION?

The current Law Society of New South Wales Scheme (the Scheme), gazetted on 27 July 2012, commenced on 22 November 2012 and was due to expire on 21 November 2017. The Scheme has been extended, by order of the Minister for Innovation and Better Regulation, a further 12 months to operate until 21 November 2018.

WHO IS COVERED BY THE SCHEME?

A Participating Scheme Member must hold a current NSW practising certificate issued by The Law Society of New South Wales (the Society), be a member of the Society and is required to pay the annual Scheme fee.

Participating Scheme Members are required to choose their level of limitation within the two classes indicated or a specified higher maximum amount that would otherwise apply and insure accordingly (i.e. if selecting Class 2 or the specified higher maximum amount).

Participating Scheme Members must have the benefit of insurance no less than the amount of the limitation of liability applying to the Member at the Relevant Time, which insurance complies with standards set from time to time by the Law Society in accordance with section 27 of the Act.

Each year Members are required to provide to the Society evidence of coverage by a policy/policies of insurance to the necessary standard and certify that their law practice has sufficient business assets to cover any claim made up to the amount of any excess applicable to the law practice's insurance.

Participating Scheme Members are required to certify annually with their practising certificate application that they have completed continuing education requirements.

Members who are required or 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;
- (e) is a "claims made" policy.

WHO IS EXEMPTED FROM THE SCHEME?

The Scheme will not apply to any person who has applied to the Society to be exempted from participation in the Scheme or fails to satisfy Scheme membership requirements. 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.

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 (that is, any person who holds a current practising certificate) within the law practice need to be members of the Society and the Scheme.

For example, a law practice might have ten principals, nine of whom are participating in the Scheme, but the tenth principal is not a member of the Society and the Scheme. If a successful claim is made against the tenth principal, he or she 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.

Issues may also arise if an employee solicitor is not a member of the Society and the Scheme. If a claim is brought against the employee solicitor, the principal/s (as the employer) could be vicariously liable for the employee's act or omission committed in the course of employment, and might not be able to rely on the limitation of liability cap.

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

- All legal practitioners renew their membership of the Society and the Scheme on an annual basis; and
- All new legal practitioners who join the law practice during the year should retain or immediately apply for membership of the Society and the Scheme.

The Society requires Solicitor Members to pay the annual fee and nominate a monetary ceiling to participate in the Scheme.

WHAT IS THE COST TO JOIN?

Fees totalling **\$105.00** will be payable for each Solicitor Member 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.

HOW WILL THE SCHEME WORK?

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

- (a) the Participating Member has the requisite insurance cover insuring him or her against occupational liability to which the cause of action relates; and
- (b) 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 specified in the Scheme.

If the Participating Member is not able to satisfy the Court that he or she has the requisite insurance cover, or that the amount payable under his or her insurance policy is not less than 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.

WHAT ARE THE MONETARY CEILINGS FOR LIMITATION OF LIABILITY UNDER THE SCHEME?

The Scheme will limit the occupational liability of Solicitor Members for damages arising from a single cause of action to an amount of \$1.5 million, \$10 million or the specified higher maximum amount than would otherwise apply depending on the insurance policies, total revenue and the number of principals of the law practice of the Participating Member, and to the extent that liability can be limited under the Act.

The monetary ceilings under the Scheme are as follows:

1. \$1.5 million cap

Participating Scheme Members who were at the Relevant Time in a Law Practice consisting of up to and including 20 Principals and where the Law Practice generates total annual fee income for the financial year at the Relevant Time up to and including \$10m.

2. \$10 million cap

- (a) Participating Scheme Members who were at the Relevant Time in a Law Practice consisting of greater than 20 Principals; or
- (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.

3. Discretionary Higher Cap

Participating Scheme Members who, upon successful application, have a higher maximum amount of liability than would otherwise apply as specified by the Law Society.

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WHAT IS THE LIABILITY LIMITED UNDER THE SCHEME?

Pursuant to 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 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.

INCLUSIONS/EXCLUSIONS UNDER THE ACT

- The Act provides that civil liability arising directly or vicariously from anything done or omitted by a member covered by the Scheme acting in the performance of their occupation is covered to the extent permitted by the Act

However, s.5 of the Act specifically excludes coverage of liability arising from:

1. 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.)*
 2. a breach of trust;
 3. fraud or dishonesty; or
 4. 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.
 - The limitation under the Scheme is a limitation of damages that may be awarded for a single claim arising out of single event. Damages **do not include** defence costs.
 - 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.
- 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 only applies in New South Wales and 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.

CAN A PARTICIPATING MEMBER CONTRACT OUT OF THE SCHEME FOR SPECIFIC CLIENTS OR MATTERS?

The Act prohibits contracting out of the Scheme.

The Society, however, has a discretion to increase the monetary ceiling in accordance with clause 4 of the Scheme that provides:

4. Conferral of discretionary authority

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.*

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HOW DO I DISCLOSE TO CLIENTS?

Under [s.33](#) of the Act, Participating Scheme Members will need to disclose their limited liability status. The Act and [Clause 9](#) of the Professional Standards Regulation 2014 (the Regulation) prescribe the following form of disclosure 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 documents that carried the required disclosure 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 notification does not need to appear on the following documents:

- Advertisements in print media, directory listings and similar forms of promotion or advertising; and
- Business cards.

It is the responsibility of the principals of the law practice to ensure that the disclosure requirements are met. A failure to comply is a breach of s.33 of the Act.

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.