

## What is the Law Society's Professional Standards Scheme?

The Law Society's Professional Standards Scheme (the 'Scheme') is a legal instrument as approved by the Professional Standards Councils. It is established under the *Professional Standards Act 1994 (NSW)* (the 'Act'). It binds the Law Society of New South Wales (the Law Society) to monitor, enforce and improve the professional standards of its Members, and protect consumers of professional services.

The Law Society has demonstrated to the Professional Standards Council that it represents a professional community that can protect consumers and meet high levels of professionalism and as such its Scheme has been approved. In return for these commitments, its Professional Standards Scheme caps the civil liability or damages that professionals who take part in an occupational association's scheme may be required to pay if a court upholds a claim against them.

The Scheme commenced on 22 November 2018 and is due to expire on 21 November 2024.

## What does the Scheme do?

The Scheme caps the civil liability or damages, of Members who take part in the Scheme, may be required to pay if a court upholds a claim against them.

Under the Act, the Scheme provides for limitation of occupational liability arising from a single cause of action. The Scheme covers acts or omissions that occur after the commencement of the Scheme.

The Act defines: "*occupational liability*" to mean 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.

## How does the Scheme work?

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

- a) the participating Scheme member has the requisite professional indemnity insurance (PII) cover insuring 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 Scheme member is not able to satisfy the Court that;

- a) he/she/it has the requisite insurance cover; or
- b) the amount payable under the PII policy is no less than the relevant monetary ceiling specified in the Scheme Instrument, he/she/it has the requisite insurance cover, or that the amount payable under the insurance policy is not less than the amount of the relevant monetary ceiling specified in the Scheme,

then he/she/it will not be entitled to rely on the Scheme to limit liability for damages.

## Who can participate in the Scheme?

- Solicitor Members of the Law Society;
- Life Members of the Law Society; and
- Incorporated Legal Practice Members ('ILP') of the Law Society,

engaging in private practice.

## What is an ILP Member of the Law Society

An ILP as defined by section 6 of the *Legal Profession Uniform Law (NSW)*, is a legal entity in its own right. Pursuant to Clause 6.2.5 of the Constitution of The Law Society of New South Wales, an ILP is qualified to be an ILP Member of the Law Society if all of its principals and Australian legal practitioners who are recorded by the Law Society as having their principal place of practice in New South Wales are Solicitor Members.



Under the current Scheme, pursuant to Clause 3.1.2 and Clause 1.2 of the Scheme Instrument, for an ILP to gain the full benefit of the Scheme and the limitation of liability, all legal practitioners within the law practice, would need to be Members of the Law Society *and* participating in the Scheme. It is a matter for each ILP Member as to whether they elect to take up the option.

### Who is covered by the Scheme?

Subject to meeting *all* Scheme requirements coverage under the Scheme extends to:

- a) A Solicitor Member or Life Member who is engaging in private practice who is not excluded or exempted from the Scheme;
- b) An ILP entity that is itself an ILP Member of the Law Society that is not excluded or exempted from the Scheme;
- c) Partners and employees of Solicitor Members and Life Members of the Law Society who are not excluded or exempted from the Scheme;
- d) Officers or employees of law practices that are Members of the Law Society and who have not been excluded or exempted from the Scheme;
- e) All persons to whom the Scheme applied when the act or omission giving rise to the relevant cause of action arose.

### What is the cost for Law Society Members to join the Scheme?

#### Solicitor Members

An annual participation fee of \$105.00 is payable for each Solicitor Member or Life Member to participate in the Scheme.

This fee made up as follows:

- a) \$50.00 annual Professional Standards Council registration fee; and
- b) \$55.00 (\$50 + \$5 GST) Society administration fee

#### ILP Member Fee

Only the annual Professional Standards Councils fee of \$50.00 is payable for an ILP Member to participate in the Scheme.

**Note:** The Law Society does not charge a fee for ILP Law Society Membership.

### What are the monetary ceilings for limitation of liability under the Scheme?

The Scheme is intended to operate so as to limit the occupational liability of participating Scheme 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 PII, total revenue and the number of principals of the law practice and to the extent that liability can be limited under the Act. The monetary ceilings under the Scheme are set out in the Scheme Instrument as follows:

#### Class 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.*

#### Class 2 - \$10 million cap

- a) *Participating Scheme Members who were at the Relevant Time in a Law Practice consisting of more 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.*

#### Discretionary Higher Cap

Participating Scheme Members who, upon successful application, can be granted a higher maximum amount of liability than would otherwise apply under the Scheme.

### 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 Scheme covers acts or omissions that occur after the commencement of the Scheme. Damages do not include defence costs.

### **Aggregation of claims**

The Scheme limits those damages that may be awarded for a single claim arising out of a single event.

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.

### **Can a participant contract out of the Scheme for specific clients or matters?**

The Act prohibits contracting out of the Scheme. The Law Society, however, has a discretion to increase the monetary ceiling in accordance with clause 5 of the Scheme Instrument that provides:

#### **5. Conferral of discretionary authority**

**5.1** *The Law Society Council has discretionary authority, on application by a Participating Member, to specify in relation to the Participating Member, a higher maximum amount of liability 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.*

**5.2** *If, in the exercise of its discretion under clause 5.1, the Law Society Council has specified a higher maximum amount of liability than would otherwise apply under the Scheme in relation to a Participating Member, after satisfying itself that there is evidence of top up Professional Indemnity Insurance commensurate with the higher maximum amount of liability sought, then the maximum amount of liability in relation to that Participating Member is that higher maximum amount.*

### **How do I disclose my Scheme status to clients?**

If the occupational liability of a person is limited under the Scheme, subsection 33 of the *Professional Standards Act 1994* (NSW) prescribes that all documents given by the person to a client or prospective client that promote or advertise the person or person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation and similar documents, must carry a statement to that effect.

**Clause 9** of the *Professional Standards Regulation 2019* (NSW) (the 'Regulation') prescribes the following form of disclosure notification:

Liability limited by a scheme approved under Professional Standards Legislation.

The prescribed 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 (as defined) 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 Professional Standards Councils advise that notification should appear on the following documents:

- On all materials that are or could be given to current or prospective clients by your participating members to promote themselves or their occupation. Examples include, but are not limited to:
- Letterhead and letters signed by the company or on its behalf
- Fax cover sheets
- Newsletters and other publications
- Emails
- Your website(s)
- Written advice, plans, drawings, specifications and any other client documents not accompanied by a separate document with the disclosure statement
- Memorandum of fees and invoices unaccompanied by a separate document with the disclosure statement.

The statement does *not* need to appear on:

- Advertisements in print media, directory listings and similar forms of promotion
- Business cards
- Social media networks, blogs, etc. that are accessed voluntarily by consumers, rather than being given, or caused to be given, by professionals to their clients or prospective clients.

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 the Act and attracts 50 penalty units.

### **Variations of Disclosure for an ILP Member**

If the ILP entity is not one in which all legal practitioners are individually recorded as Solicitor or Life Members of the Law Society thereby entitling it to register its participation in the Scheme - then it would seem wrong to say on letters from the ILP that liability is limited by a scheme approved under Professional Standards Legislation, when the liability of the ILP entity itself is not so limited.

Such a statement on correspondence from an ILP may be conceived as being in breach of sections 29(1)(m) and 151(1)(m) of the *Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cwlth))*. Those sections proscribe the making of a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services.

It is important to remember that if an ILP Member is not entitled to participate in the Scheme, provided that all legal practitioners employed by an ILP are indeed persons to whom the Scheme applies in accordance with the Scheme instrument, the following expanded statement does not appear to contravene the Australian Consumer Law while still satisfying the requirements of New South Wales Professional Standards Legislation.

The prescribed statement may need to be varied further where legal practitioners who are participants of the Scheme are, for example, directors but are not employees. The ability for the ILP to participate in the Scheme would serve to remove the risk of possible contraventions by ILPs and their practitioners of the disclosure requirement and sections 29(1)(m) and 151(1)(m) of the *Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cwlth))*.

**Important:** Please note that no variation on the prescribed disclosure notification is required where all the legal practitioners *and* the ILP entity are participating in the Scheme.

### **Mutual recognition**

The Scheme recognises that the provision of legal services transcends State boundaries. Approval of the Scheme under professional standards legislation of another State or Territory is designed to have the effect of limiting liability of any person to whom the Scheme applied at the Relevant Time (as defined in the Scheme Instrument) when the relevant act or omission occurred and where the act or omission occurred in the State or Territory that has recognised the Scheme.

### **Why must Solicitor, Life and ILP Members of the Law Society register participation in, or apply for exemption from the Scheme?**

In order to meet the requirements of the Scheme, as approved by the Professional Standards Councils and in accordance with the Act, Solicitor Members, Life Members and ILP Members are required to either register participation in, or apply for exemption from, the Scheme annually, in advance of the Scheme year commencing (22 November - 21 November). The Law Society administers this participation and exemption process through the relevant law practice.

Coverage under the Scheme is subject to, or satisfying, all Scheme participation requirements. For a law practice to gain the full benefit of the Scheme, all Australian legal practitioners holding a practicing certificate issued by the Council of the Law Society, within the law practice, will need to be Members of the Law Society and participants in 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 Law Society and not participating in 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 Law 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.

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

- All Australian legal practitioners who hold a practicing certificate issued by the Council of the Law Society should renew their membership of the Law Society and register their Scheme participation on an annual basis (by 30 June each year); and
- All new legal practitioners who join the law practice during the year should retain or immediately apply for membership of the Law Society and the Scheme.

### **Who is exempt from the Scheme?**

The Scheme will not apply to any Solicitor Member, Life Member or ILP Member (as defined in the Scheme Instrument) who has applied for, and been granted, an exemption from participation in the Scheme. If a person has been granted an exemption it only applies whilst that person is a member or employee of the law practice that has applied for exemption on the solicitor's behalf.

### **How is the Scheme different to professional indemnity insurance?**

The approved Scheme is an insurance-based Scheme (see s. 21 of the Act). The Law Society requires all Scheme participants to provide:

- a) evidence of PII (that meets the limitation cap they apply for); and
- b) certification that their law practice has sufficient business assets to cover any PII excess, payable in the event of a claim.

For those Scheme applicants who seek a cap higher than \$1.5M they must provide evidence of top up PII that:

- 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.

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#### **DISCLAIMER**

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