

DISCRETIONARY HIGHER MAXIMUM AMOUNT OF LIABILITY

The Law Society of New South Wales Professional Standards Scheme (the Scheme) provides Law Society Members who participate in the Scheme 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 (PII). Insurance, however, is required to participate in the Scheme.

To participate in the Scheme members must already be insured to an amount no less than the limitation of liability cap applicable to the member at the Relevant Time (as defined in *Professional Standards Act 1994* (as amended) (the Act) . PII must comply with s.27 of the Act. In New South Wales, all legal practitioners must hold the approved Lawcover PII policy under the *Legal Profession Uniform Law*, unless exempted.

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 PII.

For more information on PII please, contact Lawcover on (02) 9264 8855.

Monetary ceilings under the Scheme

It is essential to select a primary limitation amount appropriate for the law practice. In addition, the law practice may then choose to apply for a Discretionary Higher Maximum Amount (Discretionary Higher Cap).

Participating members of the Scheme may choose to hold top-up PII at a level higher than the maximum amount of liability than would ordinarily apply to them, without

applying for a discretionary higher cap - this is a risk management and commercial decision. If a higher maximum amount of liability than would normally apply is sought, and top-up PII commensurate with that amount is held, an application for discretionary higher cap may be completed.

If a law practice has less than 20 principals and generates fee income of less than \$10 million, the law practice automatically participates in Class 1 of the Scheme (\$1.5m). If a law practice requires a monetary ceiling higher than \$1.5m, the law practice should apply for a discretionary higher cap by completing and submitting an Application for a Discretionary Higher Cap.

Law practices either participating in the Scheme in Class 2 (\$10 million) and those in Class 1 who then elect to apply for a Discretionary Higher Cap in excess of \$1.5 million, must ensure that they have top up PII cover that:

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

If the Participating Member is unable to satisfy the Court that he or she has the requisite PII policy, 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.

The following table sets out the corresponding limitation of liability amounts.

Class	Description	Monetary Ceiling
1	Participating 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 a total annual fee income for the financial year at the Relevant Time up to and including \$10m.	\$1.5 million
2	a) Participating Members who were at the Relevant Time in a Law Practice consisting of more than 20 Principals; or b) Participating 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.	\$10 million (Note: certificate of top up PII cover must be provided)
Discretionary Higher Monetary Ceiling	Participating Members may apply for a discretionary higher maximum amount of liability, and which higher amount if authorised by the Law Society.	Discretionary Higher Maximum Amount (Note: certificate of top up PII cover must be provided)

Varying the statutory ceiling for all cases or for specific clients or matters

Section s.24 (1)(b) of the Act, and clauses 5.1 and 5.2 of the Scheme Instrument confer on the Law Society a discretion to approve 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 by a Participating Member.

For law practices wishing to choose a higher maximum amount of liability in addition to their primary Scheme participation limit of \$1.5 million or \$10 million, a principal of the law practice should complete an Application for Discretionary Higher Cap and submit it to the Scheme Manager.

Examples of Discretionary Higher Cap Applications:

- A small law practice participates in Class 1 for Scheme purposes and has the 'approved' PII for \$2 million. If the law practice decides that a discretionary higher cap of \$5 million is appropriate for the type of legal service provided, that law practice can submit an Application for a Discretionary Higher Cap, which must be accompanied by evidence of top up PII not less than the monetary ceiling of \$5 million sought.
- A larger law practice, participating in Class 2 for Scheme purposes, will have already provided evidence of top up PII to \$10 million. This law practice may have a particular client, matter or transaction where a discretionary higher cap of \$20 million is more

appropriate for them. The law practice can submit an Application for Discretionary Higher Cap for that specific client, matter or transaction, together with evidence of top up PII not less than the higher \$20 million monetary ceiling sought, and any other material the Society requires to properly consider the application.

The law practice is obliged, at the time of the application, to inform the Law Society how the Discretionary Higher Cap will be communicated to their client(s).

All Applications for a Discretionary Higher Cap will be submitted to the Scheme Administration Committee for consideration, including review of all relevant documentation. The Committee makes its determination pursuant to a delegated authority from the Council of the Law Society under clauses 5.1 and 5.2 referred to above. The Scheme Administration Committee then notifies the applicant law practice of its determination.

DISCLAIMER

The information in this Discretionary Higher Maximum Amount of Liability document regarding The Law Society of New South Wales Professional Standards 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 Discretionary Higher Maximum Amount of Liability document.