

SCHEME DOCUMENT

Professional Standards Act 1994 (NSW) THE LAW SOCIETY OF NEW SOUTH WALES SCHEME

PREAMBLE

- A. The Law Society of New South Wales ("the Law Society") is a voluntary occupational association for legal practitioners (solicitors) in New South Wales.
- B. The Law Society has made an application to the Professional Standards Council ("Council"), appointed under the *Professional Standards Act 1994 (NSW)* ("the Act") for approval of a scheme under the Act and this document comprises the scheme ("the Scheme").
- C. The Scheme has been prepared by the Law Society for the purposes of limiting occupational liability of Participating Members to the extent to which such liability may be limited under the Act.
- D. The Scheme is to apply to all Participating Members.
- E. The Law Society has furnished the Council with a detailed list of the risk management strategies intended to be implemented in respect of its Participating Members and the means by which these strategies are intended to be implemented.
- F. The Scheme is intended to commence in New South Wales on 22 November 2012.
- G. The Scheme is intended to remain in force for a period of five (5) years from its commencement, subject to s.32 of the Act.
- H. The Scheme is intended to operate as a scheme of New South Wales.

THE LAW SOCIETY OF NEW SOUTH WALES

1. Preparation of the Scheme

- 1.1 This Scheme is a scheme under the Act prepared by the Law Society, whose business address is 170 Phillip Street, Sydney New South Wales.

- 1.2 Relevant definitions for the purpose of this Scheme are as follows:

"Australian Lawyer" has the same meaning as it has in the *Legal Profession Act 2004 (NSW)*;

"Australian Practising Certificate" has the same meaning as it has in the *Legal Profession Act 2004 (NSW)*;

"Corporate Practising Certificate" means a practising certificate issued to an Australian Lawyer that has a condition that the holder is not to engage in legal practice other than in the course of employment by a corporation (other than an incorporated legal practice) or a non-lawyer entity;

"Court" has the same meaning as it has in the Act;

"damages" has the same meaning as it has in the Act;

“financial year” means a financial accounting period commencing on 1 July and ending 30 June;

“Full Member” means a person within the category of Solicitor Member and Life Member of The Law Society as contemplated in the Society’s constitution (as amended from time to time);

“Government Practising Certificate” means a practising certificate issued to an Australian Lawyer that has a condition that the holder is not to engage in legal practice other than in the course of employment by a State or Territory government or the Commonwealth government or a prescribed corporation;

“Law Practice” has the same meaning as it has in the *Legal Profession Act 2004* (NSW);

“occupational liability” has the same meaning as it has in the Act¹;

“Participating Members” means those persons specified in clause 2.1 of the Scheme;

“Principal” has the same meaning as it has in the *Legal Profession Act 2004* (NSW);

“Relevant Time” refers to a cause of action founded on an act or omission, specifically to the time of that act or omission occurring; and

“Total annual fee income” means the amount charged during a financial year for services provided by or on behalf of a Law Practice some of whose members are members of the Law Society to whom the Scheme applies.

2. Persons to whom the Scheme applies

2.1 The Scheme applies to:

2.1.1 Full Members who hold a current Australian Practising Certificate who are not excluded or exempted under clauses 2.2 or 2.3 of the Scheme;

2.1.2 all persons to whom the scheme applies, by virtue of ss.18, 19, 20 or 20A of the Act²

2.1.3 all persons to whom clause 2.1.1 applied at the Relevant Time but no longer applies;

2.1.4 all persons to whom clause 2.1.2 applied at the Relevant Time but no longer applies.

2.2 A person referred to in clause 2.1 does not include a person who only holds a Corporate Practising Certificate or a Government Practising Certificate.

2.3 A person referred to in clause 2.1 may, on application, be exempted from participation in the Scheme by the Law Society. This clause does not apply to persons to whom the Scheme applies by virtue of ss. 18, 19, 20 or 20A of the Act.

3. Limitation of liability

3.1 The Scheme limits the occupational liability of a Participating Member for damages³;

¹ Section 5(1) of the Act provides that the Act does not apply to liability for damages arising from the death of or personal injury to a person; a breach of trust or fraud or dishonesty. Section 5(2) of the Act also provides that the Act does not apply to liability which may be the subject of proceedings under Part 14 of the Real Property Act 1900.

² Sections 18 and 19 of the Act provide that if the Scheme applies to a body corporate, the Scheme also applies to each officer of the body corporate and if the Scheme applies to a person, the Scheme also applies to each partner of that person, and if the Scheme applies to a person, the Scheme also applies to each employee of that person, provided that if such officer of the corporation or partner of the person or employee of the person is entitled to be a member of the same occupational association, such officer, partner or employee is a member of the occupational association. Section 20 provides that the Scheme also applies to other persons prescribed by the regulations for the purposes of s.29(4) as being associated with persons to whom a scheme applies. Section 20A extends the limitation of liability of persons to whom the Scheme applies by virtue of sections 18 to 20.

³ Damages as defined in s.4 of the Act means:

- (a) damages awarded in respect of a claim or counter-claim or by way of set-off; and
- (b) costs in or in relation to the proceedings ordered to be paid in connection with such an award (other than costs incurred in enforcing a judgment or incurred on an appeal made by a defendant); and

- 3.1.1 arising from a single cause of action founded on the act or omission; and
- 3.1.2 to the extent those damages exceed the amounts specified in the table in clause 3.4.

- 3.2 If a Participating Member against whom a proceeding relating to occupational liability is brought is able to satisfy the Court that –
 - 3.2.1 the Participating Member has the benefit of an insurance policy or policies insuring him or her against the occupational liability to which the cause of action relates; and
 - 3.2.2 the amount payable under the policy or policies in respect of that occupational liability⁴ is not less than the amount of the monetary ceiling (maximum amount of liability) specified in clause 3.4 as applying to such Participating Member to which the cause of action relates –

the Participating Member is not liable for damages in relation to that cause of action above the amount of that monetary ceiling.

- 3.3 For the purposes of section 26 of the Act, the Scheme only affects a liability for damages arising from a single cause of action to the extent to which the liability results in damages exceeding \$1.5 million.
- 3.4 The monetary ceiling (maximum amount of liability) applicable for the purposes of limitation of liability under the Scheme at the Relevant Time is to be determined according to the following table-

Class	Description	Monetary ceiling (Maximum amount of liability)
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 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 greater 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

(c) any interest payable on the amount of those damages or costs.

⁴ Section 4(1A) of the Act provides that a reference in the Act “to the amount payable under an insurance policy in respect of an occupational liability includes a reference to –

- (a) defence costs payable in respect of a claim, or notification that may lead to a claim (other than reimbursement of the defendant for the time spent in relation to the claim), but only if those costs are payable out of the one sum insured under the policy in respect of the occupational liability; and
- (b) the amount payable under or in relation to the policy by way of excess.

However, see also s.26A of the Act and its note, which has the effect that s.4(1A) does not reduce the cap on the liability of the Participating Member to the client.

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.

5. Duration

- 5.1 Subject to s.32 of the Act, the Scheme will remain in force for a period of 5 years from the date of its commencement. The date of the Scheme's commencement is 22 November 2012.