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Introduction

Professional benefits for Law Society of Western Australia members

The Law Society of Western Australia (Society) has launched a Professional Standards Scheme (Scheme) with the Professional Standards Council (PSC) pursuant to the Professional Standards Act 1997 (WA). This is an initiative of the Society which showcases ways we work on behalf of our members to increase the benefits of membership.

Status of Scheme

The Scheme will commence on Tuesday, 1 July 2014. It does not apply to claims prior to that date or prior to your commencement with the Scheme.

About the Scheme

This is an ‘opt-out’ limitation of liability scheme that applies to Participating Members as defined in the Scheme document. The Scheme caps the occupational liability of participating Society members to an amount of $1.5 million, $5 million or $10 million depending on the insurance policies and total annual fee income of the law practice, (see paragraph 9 of this guide for further information).

This is a Scheme for limiting liability of members and is not an insurance policy or product.

Participation in the Scheme

A Professional Standards Scheme Participant Information form regarding participation in the Scheme is available on our website at lawsocietywa.asn.au. The Professional Standards Scheme Information form must be returned together with payment.

Practitioners who are not members of the Society, who wish to benefit from the Scheme, must also return a completed membership application form with payment at the same time. A Society membership application form is also available on our website lawsocietywa.asn.au.

For a law practice to gain the full benefit of the Scheme and the limitation of liability, all legal practitioners (that is, any person who holds a current Australian practising certificate) within the law practice, and the law practice itself if it is an incorporated legal practice (ILP), would need to be members of the Society and the Scheme.

If you have any enquiries, please contact Scheme Coordinator, on (08) 9324 8624 or pss@lawsocietywa.asn.au
1 What is a Professional Standards Scheme?

1.1 The Professional Standards legislation enables the establishment of schemes to limit liability of members of occupational associations.

1.2 The legislation is state based, and the relevant Act in Western Australia is the Professional Standards Act 1997 (WA) (Act).

1.3 The relevant regulations in Western Australia are the Professional Standards Regulations 1998 (WA) (Regulations).

1.4 For a scheme to be approved under the Act, occupational associations such as the Society are required to demonstrate a high commitment to professional standards and consumer protection, and implement comprehensive risk management strategies. An approved scheme will limit the occupational liability of members of the occupational association, subject to the scheme itself and the Act.

2 Where can I obtain a copy of the Law Society of Western Australia’s Professional Standards Scheme?

The Society’s Scheme is attached to this Guide as an appendix and is also available, together with the Act, at lawsocietywa.asn.au.

3 What is the Scheme’s commencement date?

The specified commencement date for the Scheme is 1 July 2014. The Scheme is not retrospective. It applies to practitioners at the date they join the Scheme and ongoing protection applies only for the time a practitioner remains within the Scheme by renewing their Society membership and Scheme participation annually.

4 Who is covered by the Scheme?

4.1 Members should refer to sections 30 to 34A of the Act and clause 2 of the Scheme. In general the Scheme applies to and defines as Participating Members:

(a) Ordinary and Life members of the Society (Law Society’s Constitution rules 9 and 13) who hold a current Australian practising certificate and who have not been exempted from participation in the Scheme; and

(b) Incorporated legal practice members of the Society (Law Society Constitution rule 14A) that have not been exempted from participation in the Scheme; and

(c) Partners and employees of Ordinary and Life members of the Society who have not been exempted from participation in the Scheme, provided that the partners and employees are members of the Society if they are entitled to be members; and

(d) Officers of incorporated legal practices that are members of the Society and who have not have been exempted from participation in the Scheme, provided that the officers are members of the Society if they are entitled to be members; and

(e) Any persons referred to in paragraphs (a) or (c) who are participating in the Scheme at the time of an act or omission occurring on which a cause of action is founded, but later cease to participate in the Scheme; and

(f) Any persons or corporations referred to in paragraphs (b) or (d) who or which are participating in the Scheme at the time of an act or omission occurring on which a cause of action is founded, but later cease to participate in the Scheme.

5 How do I notify the Society of Participation?

Ordinary and Life members of the Society, or law practices on their behalf, should provide a completed Professional Standards Scheme Participant Information form to the Society. The form is at lawsocietywa.asn.au.

The Scheme may also apply to employees of a law practice who are not legal practitioners or who do not hold a current practising certificate, but who are members of the Society.

The Professional Standards Scheme Participant Information form requires certain information to be provided to the Society for each Ordinary and Life member who is a Participating Member of the Scheme, including:

(a) Name of Society member;

(b) Society member number; and

(c) Name of law practice at which Society member is working.

Additionally, the Society will require information from law practices in order to administer the Scheme and to report to the PSC regarding the Scheme. This information includes:

(a) Approximate total annual fee income for the relevant financial year; and

(b) Professional indemnity insurance policy number/s for any top-up insurance for the law practice.

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

• All Australian legal practitioners (both principals and legal practitioner employees) renew their membership of the Society and the Scheme on an annual basis;

• If the law practice is an ILP, the ILP retains or gains membership of the Society and the Scheme and renews membership on an annual basis; and

• All Australian legal practitioners who join a law practice (both principals and legal practitioner employees) retain or immediately gain membership of both the Society and the Scheme.

A total fee of $50 (per annum) including GST which is to be remitted to the Professional Standards Council, will be payable by each Participating Member in the Scheme. This fee will be reviewed annually.
6 How does the Scheme apply to an Incorporated Legal Practice (ILP)?

6.1 ILPs that are members of the Society will need to provide a completed Professional Standards Scheme Participant Information form to the Society. The form is available at lawsocietywa.asn.au.

6.2 The Professional Standards Scheme Participant Information form requires certain information to be provided to the Society for each incorporated legal practice that is to participate in the Scheme, including:
   (a) Name of ILP; and
   (b) Society member number.

6.3 Additionally, the Society will require information from the ILP in order to administer the Scheme and report to the PSC regarding the Scheme. This information includes:
   (a) Name of each principal (legal practitioner director) of the ILP; and
   (b) Approximate total annual fee income for the relevant financial year; and
   (c) Professional indemnity insurance policy number/s for any top-up insurance for the ILP.

6.4 From 1 July 2015, a total fee of $50 (per annum) including GST which is to be remitted to the Professional Standards Council, will be payable by ILPs participating in the Scheme. This fee will be reviewed annually.

7 What if I do not wish to participate in the Scheme?

This is an ‘opt-out’ Scheme which, subject to the provisions of the Act, applies to Society members. However, the Scheme provides for circumstances in which members may be exempt and such members can seek exemption by making an application to the Society. Members seeking exemption should refer to clause 2 of the Scheme and sections 30 to 34A of the Act. An Application for Exemption form can be found at lawsocietywa.asn.au. 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.

8 How will the Scheme work in the event of a claim?

8.1 The Scheme is not an insurance product and does not affect a practitioner’s requirement to obtain insurance through Law Mutual (WA) or otherwise, as applicable.

8.2 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) 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
   (b) the amount payable under the policy or policies in respect of that occupational liability is not less than the amount of the monetary ceiling (maximum amount of liability) specified in the Scheme 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 (clause 3 of the Scheme).

8.3 If the Participating Member 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 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 liability for damages.

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

The Scheme will limit the occupational liability of Participating Members for damages arising from a single cause of action to an amount of $1.5 million, $5 million or $10 million depending on the insurance policies and total annual fee income of the law practice of the Participating Member, and to the extent that liability can be limited under the Act. The ceiling on liability under the Scheme is in accordance with the following table:

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<tr>
<th>TIER</th>
<th>DESCRIPTION</th>
<th>MONETARY CEILING</th>
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<tr>
<td>1</td>
<td>Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time up to and including $5 million</td>
<td>$1.5 million</td>
</tr>
<tr>
<td>2</td>
<td>Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time of more than $5 million and up to $10 million</td>
<td>$5 million</td>
</tr>
<tr>
<td>3</td>
<td>Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time of more than $10 million</td>
<td>$10 million</td>
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</table>

10 Is it possible for a higher monetary ceiling to be specified?

The ability of a Participating Member to request a higher maximum amount of liability is not subject to any terms or conditions under the Act or the Scheme. The Society contemplates that such a request may be made for the purpose of a Participating Member’s commercial relationship with a client or other parties to a commercial transaction. On such an application the Society is entitled to approve a higher maximum amount of liability either in all cases or in any specified case or class of case (clause 4 of the Scheme).

The Higher Maximum Amount Application Form is available at lawsocietywa.asn.au.
11 What type of liability can be limited under the Scheme?

In compliance with 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.

12 What type of liability cannot be limited under the Scheme?

12.1 It is important to note that there are a range of exclusions which might prevent reliance on the Scheme to limit liability.

Participating Members should therefore seek their own independent legal advice both in relation to the adequacy or otherwise of their insurance arrangements and the operation of the Scheme.

12.2 Exclusions Under the Act

The Act (and, therefore, the Scheme) does not apply to liability for damages arising from:

• the death of, or personal injury to, a person; or
• a breach of trust; or
• fraud or dishonesty; or
• liability which may be the subject of proceedings under Part XII of the Transfer of Land Act 1893 (WA).

However, the Act does not operate to exclude liability for damages arising out of any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim.

12.3 Defence costs

The Scheme operates to cap damages only. However, the compulsory insurance scheme run by Law Mutual (WA) is a defence costs and excess inclusive scheme, meaning that the $2 million cover provided by Law Mutual (WA) includes the defence and related costs of handling the claim as well as damages, up to a total of $2 million.

Again, Participating Members should seek their own independent legal advice both in relation to the adequacy or otherwise of their insurance arrangements and the operation of the Scheme.

12.4 Single Causes of Action

Clause 3.1 of the Scheme seeks to limit the occupational liability of a Participating Member for damages arising from a ‘single cause of action’ to the relevant monetary ceiling specified in the Scheme.

Participating Members should also note that:

• Claims by a number of persons who have a joint interest in a cause of action are to be treated as a ‘single claim’ for the purposes of the Act, despite the fact that they may also have several interests; and
• Two or more claims by the same person arising out of a single event against persons to whom the Scheme applies and who are associated persons (that is, partners or employees of the same employer or in the relationship of employer and employee) are to be treated as a single claim for the purposes of the Act, (section 42 of the Act).

It is important to note that there may be potential inconsistencies between the Scheme and the insurance arrangements applicable to a Participating Member, including but not limited to insurance provisions relating to ‘aggregation’, which might prevent reliance on the Scheme to limit liability.

Participating Members should therefore seek their own independent legal advice both in relation to the adequacy or otherwise of their insurance arrangements and the operation of the Scheme.

12.5 Relevant Time vs Claims Made

The Scheme is intended to limit liability arising from an act or omission where a person was a Participating Member at the relevant time – that is, the time an act or omission occurred on which a cause of action is founded – rather than at the time the claim is made.

13 Will the Scheme apply to all claims made after the Scheme commencement date?

The Scheme will only limit liability in respect of an act or omission that occurs while the Scheme is in operation. This means that a Participating Member cannot rely on the Scheme to limit liability arising from an act or omission that occurred before the Scheme commenced.

As professional indemnity insurance policies are generally written on a claims made, or claims made and notified basis, Participating Members will remain liable to claims made following the commencement of the Scheme that are based on a single cause of action that pre-dated the Scheme.

14 Is the Scheme enforceable under the laws of other Australian states or territories?

In addition to this jurisdiction, the Scheme was designed to apply in New South Wales, Victoria, Queensland, South Australia, the Northern Territory and the ACT by means of provisions for mutual recognition in the other jurisdictions. Members should note, however, that provisions for mutual recognition are not uniform nationally and this may affect the extent to which they can benefit from schemes outside of Western Australia.

15 What should I tell my clients if I am participating in the Scheme?

Participating members need to disclose their limited liability status. Non-disclosure is an offence under the Act.

Section 45(1) of the Act states:

45. Notification of limitation of liability

(1) If the occupational liability of a person is limited under this Part, the person must ensure that all documents given, or caused to be given, by the person to a client or prospective client that promote or advertise the person or his or her occupation,
What if I do not notify my clients that I am participating in the Scheme?

Failure by a Participating Member to comply with disclosure requirements exposes the Participating Member to a penalty under section 45 of the Act. The Society must undertake an annual audit of Participating Members compliance with the disclosure requirements. In the event of non-compliance the PSC is required to be informed.

DOCUMENTS ON WHICH DISCLOSURE SHOULD APPEAR

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

DOCUMENTS NOT REQUIRING DISCLOSURE

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

The statement must be printed in a size equal or greater than Times New Roman 8 point.

The below is an extract from the PSC council website www.psc.gov.au.

STANDARD DISCLAIMER: The Professional Standards Scheme is administered by the Law Society of Western Australia. The Society is unable to provide any legal advice, and gives no warranties and makes no representations as to whether any claim brought against a Participating Member or Law Practice will be covered by the Scheme. Participating Members should rely on their own enquiries and assessments, specifically as to the adequacy or otherwise of any insurance arrangements and as to the consistency or otherwise of such arrangements with either the Scheme or the Act, and seek their own independent legal advice.
THE LAW SOCIETY OF WESTERN AUSTRALIA SCHEME

Professional Standards Act 1997 (WA)

PREAMBLE

A. The Law Society of Western Australia (Law Society) is a voluntary occupational association for legal practitioners in Western Australia.

B. The Law Society has made an application to the Professional Standards Council (PS Council) appointed under the Professional Standards Act 1997 WA (Act), for a scheme under the Act and this document comprises the scheme (Scheme).

C. The scheme has been prepared by the Law Society for the purpose 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 PS 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 those strategies are intended to be implemented.

F. The Scheme is intended to remain in force for a period of five (5) years from its commencement, subject to section 44A of the Act.

G. The Scheme commences on 1 July 2014.

H. The scheme is intended to apply in Western Australia, New South Wales, Victoria, Queensland and South Australia, Northern Territory and Australian Capital Territory.

THE LAW SOCIETY OF WESTERN AUSTRALIA SCHEME

1 Preparation of the Scheme

1.1 The Scheme is a scheme under the Professional Standards Act 1997 WA prepared by the Law Society whose business address is Level 4, 160 St Georges Terrace, Perth, Western Australia.

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

“Australian Practising Certificate” has the same meaning as it has in the Legal Profession Act 2008 WA.

“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 ending 30 June.

“Occupational liability” has the same meaning as it has in the Act.

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

“Principal” has the same meaning as in section 6(3) of the LP Act:

A principal of a law practice is an Australian legal practitioner who is —

- a sole practitioner (in the case of a law practice constituted by the practitioner); or
- a partner in the law practice (in the case of a law firm); or
- a legal practitioner director in the law practice (in the case of an incorporated legal practice); or
- a legal practitioner partner in the law practice (in the case of an multidisciplinary partnership).

“Relevant Time” refers to the time at which the act or omission occurs, not the time when the claim is brought.

“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 Participating Members.

Persons to Whom the Scheme Applies

The Scheme applies to:

2.1.1 Incorporated Legal Practice members, and ordinary and life members of the Law Society who hold an Australian Practising Certificate who are not exempted under clause 2.2 of the Scheme;

2.1.2 All persons to whom, by virtue of sections 31, 32, 33 and 34A of the Act, the Scheme applies;

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.

A person referred to in clause 2.1 may, on application by that person, be exempted by the Law Society from participation in the Scheme.

Limitation of liability

The Scheme only limits the Occupational Liability of a Participating Member for damages:

3.1.1 arising from a single cause of action founded on an act or omission occurring during the period when the Scheme was in force, of any person to whom the Scheme applied at the time of the act or omission.

3.1.2 to the extent that those Damages exceed $1.5 million for Participating Members in class 1 of the table in clause 3.3, or, as the case may be, $5 million for Participating Members in class 2 and $10 million for Participating Members in class 3.

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 liability is not less than the amount of the monetary ceiling.
(maximum amount of liability) specified in clause 3.3 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 The monetary ceiling (maximum amount of liability) applicable for the purpose of limitation of liability under the Scheme at the Relevant Time is to be determined according to the following table.

4 Conferral of discretional authority

4.1 The Law Society of Western Australia has discretional authority, on application by a Participating Member, to specify in relation to a 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 any specified case or class of case.

4.2 If, in exercise of its discretion under clause 4.1 the Law Society of Western Australia 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 section 44A of the Act, the Scheme will remain in force for a period of 5 years from the date of commencement. The date of the Scheme’s commencement is 1 July 2014.

<table>
<thead>
<tr>
<th>TIER</th>
<th>DESCRIPTION</th>
<th>Monetary ceiling (Maximum amount of liability)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time up to and including $5 million.</td>
<td>$1.5 million</td>
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<td>Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time of more than $5 million and up to $10 million.</td>
<td>$5 million</td>
</tr>
<tr>
<td>3</td>
<td>Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time of more than $10 million.</td>
<td>$10 million</td>
</tr>
</tbody>
</table>

NOTES:

1 “Damages” as defined in section 4 of the Act means —
(a) damages awarded in respect of a claim or counter-claim or claim 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 the defendant); and
(c) any interest payable on the amount of those damages or costs.