

Civil Law (Wrongs) The Law Society of New South Wales Professional Standards Scheme 2018

Disallowable instrument DI2018–286

made under the

Civil Law (Wrongs) Act 2002, schedule 4, section 4.10 (Schemes are subject to disallowance)

1 Name of instrument

This instrument is the *Civil Law (Wrongs) The Law Society of New South Wales Professional Standards Scheme 2018*.

2 Commencement

This instrument commences on 30 November 2018.

3 Notice

- (1) I give notice of the Professional Standards Councils' approval of the attached The Law Society of New South Wales Professional Standards Scheme.
- (2) The scheme is in force for a period of five years, from the date of commencement in New South Wales.

Gordon Ramsay MLA
Attorney-General
29 November 2018

**THE LAW SOCIETY OF NEW SOUTH WALES
PROFESSIONAL STANDARDS SCHEME**

PREAMBLE

Occupational Association

- A. The Law Society of New South Wales (“the Law Society”) is a voluntary occupational association for local legal practitioners in New South Wales.
- B. The occupational group, for the purposes of this Scheme, represented by the Law Society consists of legal practitioners with a principal place of practice in New South Wales who hold Australian practising certificates issued by the Council of the Law Society (“the Law Society Council”).

Nature of Scheme

- C. The Law Society has made an application to the Professional Standards Council (“the 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”).
- D. The Scheme is intended to operate under the Act, which has the purpose of improving occupational standards of professional persons and to protect consumers of their services.
- E. The Scheme has been prepared by the Law Society for the purposes of limiting occupational liability of Participating Members who provide services to the public to the extent to which such liability may be limited under the Act.
- F. The Scheme does not affect damages which are below the monetary ceiling specified in the Scheme for each Participating Member. The Scheme limits liability for damages to the monetary ceiling specified for that member provided that that Participating Member has insurance as required under s.21 of the Act.
- G. The Scheme is to apply to all Participating Members.

Risk Management

- H. 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.
- I. The Law Society will report annually to the Council on the implementation and monitoring of its risk management strategies, the effect of those strategies and any changes made to them.

Insurance

- J. Participating Members are required to maintain current professional indemnity insurance with an approved insurer, as required of legal practitioners who hold an Australian practising certificate issued by the Law Society Council under the *legal profession legislation* (as defined in s.3A of the *Legal Profession Uniform Law Application Act 2014* (NSW) (“the Application Act”).

Complaints and Discipline

- K. Participating Members are subject to a complaints and discipline process regime operating under the *legal profession legislation*. All Participating Members must comply with the provisions of the Memorandum and Articles of Association of the Law Society (“the Constitution”) and the *legal profession legislation*.
- L. Responsibility for the administration of the Scheme and ensuring that it complies with the requirements of the Act and of the Council rests with the Law Society Council.

Commencement and Duration

- M. The Scheme commenced in New South Wales on 22 November 2018.
- N. 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.

Jurisdiction

- O. The Scheme is intended to apply in all jurisdictions within Australia.

THE LAW SOCIETY OF NEW SOUTH WALES PROFESSIONAL STANDARDS SCHEME

1. Occupational Association

1.1 This Scheme is a scheme under the Act prepared by and for 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 legal practitioner” has the same meaning as it has in s.6 of the Legal Profession Uniform Law;

“Australian practising certificate” has the same meaning as it has in s.6 of the Legal Profession Uniform Law;

“Corporate Legal Practitioner” has the same meaning as it has in s.6 of the Legal Profession Uniform Law and who has their principal place of practice in New South Wales;

“Corresponding laws” means the *Professional Standards Act 2003* (Vic), the *Professional Standards Act 2004* (Qld), the *Professional Standards Act 2004* (SA), the *Professional Standards Act 1997* (WA), the *Professional Standards Act 2005* (Tas), the *Professional Standards Act* (NT), and the *Civil Law (Wrongs) Act 2002* (ACT), as applicable;

“Court” has the same meaning as it has in the Act;

“damages” has the same meaning as it has in the Act;

“Exempted Member” means a Full Member or an Incorporated Legal Practice Member who is, or was, at the Relevant Time, exempted by the Law Society Council from participation in the Scheme pursuant to clause 3.3;

“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 Constitution (as amended from time to time);

“Government Legal Practitioner” has the same meaning as it has in s.6 of the Legal Profession Uniform Law and who has their principal place of practice in New South Wales;

“Incorporated Legal Practice” means an incorporated legal practice as defined in s.6 of the Legal Profession Uniform Law that is a member of the Law Society;

“Incorporated Legal Practice Member” means an Incorporated Legal Practice specified in the Register of the Law Society as an Incorporated Legal Practice Member and in which all legal practitioner directors and employed legal practitioners are individually recorded as Full Members on the Register of the Law Society;

“Law Practice” has the same meaning as it has in s.6 of the Legal Profession Uniform Law;

“legal profession legislation” has the same meaning as set out in s.3A of the Application Act;

“the Legal Profession Uniform Law” means the *Legal Profession Uniform Law (NSW) (2014)* set out in Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* of Victoria, which applies as a law of New South Wales pursuant to section 4 of the Application Act as amended;

“legal services” has the same meaning as it has in s.6 of the Legal Profession Uniform Law;

“local legal practitioner” has the same meaning as it has in s.3 of the Application Act;

“Occupational Liability” has the same meaning as it has in the Act;¹

“Participating Members” means those persons specified in clause 3.1 of the Scheme;

“person” means an individual or a body corporate;

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.

“Principal” has the same meaning as it has in s.6 of the Legal Profession Uniform Law;

“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. Jurisdiction

- 2.1 The Scheme applies in New South Wales in accordance with the Act.
- 2.2 In addition to New South Wales, the Scheme is intended to operate in Victoria, Queensland, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory in accordance with the professional standards legislation of those states and territories and subject to the requirements of that legislation (‘the corresponding laws’), so that references to a provision of the Act, the application of the Scheme to a liability, the limit of a liability under the Act or what constitutes Occupational Liability are intended to pick up the relevant provisions of the corresponding laws, applied *mutatis mutandis*, to the extent that is necessary for the application of the Scheme in any of those jurisdictions as an interstate scheme.
- 2.3 Notwithstanding anything to the contrary contained in this Scheme if, in particular circumstances giving rise to occupational liability, the liability of any person who is subject to this Scheme is capped both by this Scheme and also by any other scheme under professional standards legislation (whether of this jurisdiction or under the corresponding law of any other Australian state or territory) and, if the amount of such caps should differ, then the cap on the liability of such person arising from such circumstances which is higher shall be the applicable cap.

3. Persons to whom the Scheme applies

3.1 The Scheme applies to:

- 3.1.1 Full Members who hold a current Australian Practising Certificate who are not excluded or exempted under clauses 3.2 or 3.3 of the Scheme;
- 3.1.2 Incorporated Legal Practice Members who are not exempted under clause 3.3 of the Scheme;
- 3.1.3 all persons to whom the scheme applies, by virtue of ss.18, 19, 20 or 20A of the Act²

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 section 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.

- 3.1.4 all persons to whom clause 3.1.1 applied at the Relevant Time but no longer applies;
- 3.1.5 all persons to whom clause 3.1.2 applied at the Relevant Time but no longer applies.
- 3.2 A person referred to in clause 3.1 does not include a person who is a corporate legal practitioner or a government legal practitioner.
- 3.3 A person referred to in clause 3.1 may, on application, be exempted from participation in the Scheme by the Law Society Council with effect from the date specified 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.
- 3.4 The Law Society Council may, upon application by an Exempted Member, revoke an exemption of that person from participation in the Scheme with effect from the date specified by the Law Society Council.

4. Limitation of liability

- 4.1 The Scheme³ limits the Occupational Liability of a Participating Member for damages;
 - 4.1.1 arising from a single cause of action founded on an act or omission in relation to the provision of legal services; and
 - 4.1.2 to the extent those damages exceed the amounts specified in the table in clause 4.4.
- 4.2 If a Participating Member against whom a proceeding relating to Occupational Liability is brought is able to satisfy the Court that –
 - 4.2.1 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
 - 4.2.2 the amount payable⁴ 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 4.4 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 Damages as defined in section 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
- (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 section 26A of the Act and its note, which has the effect that section 4 (1A) does not reduce the cap on the liability of the Participating Member to the client.

- 4.3 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 the applicable monetary ceiling set out in clause 4.4 below.
- 4.4 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 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

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 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.

6. Duration

- 6.1 This Scheme commenced in New South Wales, Victoria, Queensland, Western Australia, Tasmania, South Australia and the Northern Territory on 22 November 2018.
- 6.2 In the Australian Capital Territory the Scheme will commence:
- 6.2.1 on the date provided for in the Minister's notice in relation to the Scheme, if a date is provided; or
- 6.2.2 on the first day two months after the day on which notice was given, in any other case.

- 6.3 This Scheme will be in force for five years from its commencement in New South Wales.
- 6.4 For any other jurisdiction, the Scheme will be in force for:
- 6.4.1 five years from the date of commencement in that jurisdiction; or
 - 6.4.2 five years from the date of commencement in New South Wales;
- whichever period ends first.
- 6.5 Clauses 6.3 and 6.4 are subject to the provisions of each jurisdiction applicable to the revocation, extension or cessation of Schemes.