

Australian Capital Territory

# Civil Law (Wrongs) Association of Consulting Surveyors National Professional Standards Scheme 2020 (No 1)

Disallowable instrument DI2020–123

made under the

Civil Law (Wrongs) Act 2002, sch 4, s 4.10 (Schemes are subject to disallowance)

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## 1 Name of instrument

This instrument is the *Civil Law (Wrongs) Association of Consulting Surveyors National Professional Standards Scheme 2020 (No 1)*.

## 2 Commencement

This instrument commences on 1 July 2020.

## 3 Notice

- (1) I give notice of the Professional Standards Council of New South Wales' approval of the attached 'Association of Consulting Surveyors National Professional Standards Scheme.'
- (2) The scheme is in force until 30 June 2025.

Gordon Ramsay MLA  
Attorney-General  
21 May 2020

*Professional Standards Act 1994 (NSW)*

**ASSOCIATION OF CONSULTING SURVEYORS NATIONAL  
PROFESSIONAL STANDARDS SCHEME**

**PREAMBLE**

**Occupational Association**

- A Association of Consulting Surveyors National Limited (**CSN**) is a voluntary occupational association for Consulting Surveyors in Australia.
- B The occupational group for the purposes of this Scheme, represented by CSN, consists of Consulting Surveyors with a principal place of practice in Australia.

**Nature of Scheme**

- C CSN 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 (**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 CSN for the purposes of limiting occupational liability of Participating Members 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 applying in respect of a Participating Member. The Scheme limits liability for Damages to the Monetary Ceiling applying in respect of a Participating Member only if the Participating Member has insurance as required under section 21 of the Act.
- G The Scheme is to apply to all Participating Members.
- H Responsibility for the administration of the Scheme and ensuring that it complies with the requirements of the Act and of the Council rests with CSN.

**Risk Management**

- I CSN has furnished the Council with a detailed list of the risk management strategies intended to be implemented in respect of its Participating Members and an outline of how these strategies are intended to be implemented.
- J CSN 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.

## Jurisdiction

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

# Association of Consulting Surveyors National Limited Professional Standards Scheme

## 1. Preliminary Matters

- 1.1 This Scheme is a scheme under the Act prepared by CSN, whose business address is Level 7, 350 Kent Street, Sydney NSW 2000.
- 1.2 Relevant definitions for the purpose of this Scheme are as follows:
- (a) **“Annual Fee Income”** means the amount charged during a Financial Year for services provided by or on behalf of the Consulting Surveying Practice;
  - (b) **“Court”** has the same meaning as it has in the Act;
  - (c) **“Consulting Surveyor”** means a person engaging in the following professional activities:
    - (i) practising the science of measurement; and
    - (ii) assembling and assessing land and geographic related information and using that information for the purpose of

planning and implementing the efficient administration of the land and the sea and the structures on them.<sup>1</sup>

- (d) **“Corporate Member”** has the same meaning it has in CSN’s Constitution (as amended from time to time);
- (e) **“Consulting Surveying Practice”** means an Individual Member or Corporate Member that carries on (whether alone or jointly) a business

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<sup>1</sup> For the avoidance of doubt, the professional activities described in this definition of Consulting Surveyor include but are not limited to the following which may occur either on, above or below surface of the land or the sea:

- (i) the determination of the size and shape of the earth and the measurement of all data needed to define the size, position, shape and contour of any part of the earth’s surface;
- (ii) the positioning of objects in space and the positioning and monitoring of physical features, structures and engineering works on, above or below the surface of the earth;
- (iii) the determination of the position of the boundaries of public or private land or structures, including national and international boundaries, and the registration of those lands with the appropriate authorities;
- (iv) the design, establishment and administration of land and geographic information systems and the collection, storage, analysis and management of data within those systems;
- (v) the study of the natural and social environment, the measurement of land and marine resources and the use of the data in the planning of development in urban, rural and regional areas;
- (vi) the planning, development and redevelopment of property, whether urban or rural and whether land or buildings;
- (vii) the assessment of value and the management of property, whether urban or rural and whether land or buildings;
- (viii) the planning, measurement, design and management of construction works, including the estimation of costs; and
- (ix) the production of plans, maps, files, charts and reports.

In the application of the foregoing activities a Consulting Surveyor takes into account the relevant legal, economic, environmental and social aspects affecting each project.

of providing professional services of a type a Consulting Surveyor typically provides;

- (f) **“Corresponding Law”** has the meaning given in clause 2.2;
- (g) **“CSN Insurance Standards”** means the insurance standards approved from time to time by CSN;
- (h) **“Damages”** has the same meaning as it has in the Act;
- (i) **“Financial Year”** means a financial accounting period commencing on 1 July and ending 30 June;
- (j) **“Individual Member”** has the same meaning it has in CSN’s Constitution (as amended from time to time);
- (k) **“Monetary Ceiling”** is, in respect of a Participating Member at the Relevant Time, the monetary ceiling applicable for the purposes of limitation of liability under the Scheme, being the greater of:
  - (i) the amount determined according to the table in clause 4.4;  
or
  - (ii) the amount specified by CSN in accordance with its discretionary authority under the amount specified by CSN in accordance with its discretionary authority under clause 5;
- (l) **“Occupational Liability”**:
  - (i) for the operation of this scheme in New South Wales or in a jurisdiction other than New South Wales pursuant to the Act, has the meaning given to it in the Act<sup>2</sup>; and
  - (ii) for the operation of the Scheme in a jurisdiction other than New South Wales under a Corresponding Law of that jurisdiction, means any liability included in the meaning of “occupational liability” in the Corresponding Law which is on force in that jurisdiction from time to time;
- (m) **“Participating Members”** means those persons specified in clause 3.1 of the Scheme;
- (n) **“PI Insurance Policy”** means a policy of insurance insuring the Participating Member against Occupational Liability to which the cause of action relates that complies with the CSN Insurance Standards; and
- (o) **“Relevant Time”** means, in respect of a cause of action founded on an act or omission, the time of that act or omission occurring.

## 2. Jurisdiction

2.1 The Scheme applies in New South Wales in accordance with the Act.

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<sup>2</sup> 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*.

- 2.2 In addition to New South Wales, the Scheme is intended to operate in ACT, Northern Territory, Queensland, South Australia, Victoria, Western Australia and Tasmania in accordance with the professional standards legislation of those states and territories and subject to the requirements of that legislation (each a **Corresponding Law**), 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.

### **3. Persons to whom the Scheme applies**

3.1 The Scheme applies to:

- (a) all Individual Members and Corporate Members of CSN who are not exempted under clause 3.2 of the Scheme; and
- (b) all persons to whom the scheme applies pursuant to sections 18, 19, 20 or 20A of the Act.

3.2 A person referred to in clause 3.1(a) may, on application, be exempted from participation in the Scheme by CSN with effect from the date specified by CSN. This clause 3.2 does not apply to persons to whom the Scheme applies pursuant to sections 18, 19, or 20 of the Act.

3.3 The Scheme also applies to all persons to whom the Scheme applied under clause 3.1 at the Relevant Time, whether or not the Scheme would otherwise still apply to those persons.

3.4 CSN may, upon application by a person who has been exempted from the Scheme under clause 3.2, revoke an exemption of that person from participation in the Scheme with effect from the date specified by CSN.

### **4. Limitation of liability**

4.1 The Scheme limits the Occupational Liability of a Participating Member for Damages<sup>3</sup>:

- (a) arising from a single cause of action founded on an act or omission by a Participating Member acting in the performance of providing services of a Consulting Surveyor; and
- (b) to the extent those Damages exceed the Monetary Ceiling applying in respect of the Participating Member at the Relevant Time.

4.2 If a proceeding relating to Occupational Liability is brought against a Participating Member, the Participating Member is not liable for Damages in relation to that cause of action above the amount of the Monetary Ceiling

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<sup>3</sup> 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.

applying in respect of the Participating Member if the Participating Member can satisfy a Court that:

- (a) the Participating Member has the benefit of a PI Insurance Policy; and
- (b) the amount payable under the PI Insurance Policy in relation to the Occupational Liability<sup>4</sup> is at least the amount of the Monetary Ceiling applying in respect of the Participating Member.

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 Monetary Ceiling applying in respect of the Participating Member, as determined by the Council and set out in clause 4.4.

4.4 The monetary ceiling applicable for the purposes of limitation of liability under the Scheme at the Relevant Time is to be determined according to the following table:

<b>Class</b>	<b>Description</b>	<b>Monetary ceiling (Maximum amount of liability)</b>
1	<p>A Participating Member who is at the Relevant Time an Individual Member who is a principal, partner, officer or employee of a Consulting Surveying Practice that generated Annual Fee Income for the Financial Year immediately preceding the Relevant Time of up to and including \$2 million.</p> <p>A Participating Member which is at the Relevant Time a Corporate Member that generated Annual Fee Income for the Financial Year immediately preceding the Relevant Time of up to and including \$2 million.</p>	\$2 million
2	<p>A Participating Member who is at the Relevant Time an Individual Member who is a principal, partner, officer or employee of a Consulting Surveying Practice that generated Annual Fee Income for the Financial Year immediately preceding the Relevant Time of greater than \$2 million and up to and including \$5 million.</p>	\$5 million

<sup>4</sup> Section 4(1A) of the Act provides that a reference in the Act “to an 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.

	A Participating Member which is at the Relevant Time a Corporate Member that generated Annual Fee Income for the Financial Year immediately preceding the Relevant Time of greater than \$2 million and up to and including \$5 million.	
3	<p>A Participating Member who is at the Relevant Time an Individual Member who is a principal, partner, officer or employee of a Consulting Surveying Practice that generated Annual Fee Income for the Financial Year immediately preceding the Relevant Time of greater than \$5 million.</p> <p>A Participating Member which is at the Relevant Time a Corporate Member that generated Annual Fee Income for the Financial Year immediately preceding the Relevant Time of greater than \$5 million.</p>	\$10 million

- 4.5 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 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 will be the applicable cap.

## 5. Conferral of discretionary authority

- 5.1 CSN 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 the Participating Member, either in all cases or in any specified case or class of case.
- 5.2 Before specifying a higher maximum amount of liability in respect of a Participating Member under clause 5.1, CSN must satisfy itself that there is evidence of top-up professional indemnity insurance commensurate with the higher Monetary Ceiling sought.
- 5.3 If, in the exercise of its discretion under clause 5.1 CSN has specified a higher maximum amount of liability than would otherwise apply under the Scheme in

respect of a Participating Member, the Monetary Ceiling applying in respect of that Participating Member is that higher maximum amount.

## **6. Duration**

- 6.1 The date of the Scheme's commencement in New South Wales, Victoria, Queensland, Western Australia, Tasmania, and the Northern Territory is 1 July 2020.
- 6.2 In the Australian Capital Territory and in South Australia, the Scheme will commence:
- (a) on the date provided for in the Minister's notice in relation to the Scheme, if a date is provided; or
  - (b) on the first day two months after the day on which notice was given, in any other case.
- 6.3 The Scheme will be in force in New South Wales for a period of five years from the date of its commencement in New South Wales.
- 6.4 For any other jurisdiction, the Scheme will be in force for whichever of the following periods ends first:
- (a) five years from the date of commencement in the applicable jurisdiction; or
  - (b) five years from the date of commencement in New South Wales.
- 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.