

Australian Capital Territory

Civil Law (Wrongs) The Law Society of New South Wales Professional Standards Scheme 2024

Disallowable instrument DI2024–292

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 2024*.

2 Commencement

This instrument commences on 22 November 2024.

3 Notice

- 1) I give notice of the Professional Standards Council’s approval of the attached The Law Society of New South Wales Professional Standards Scheme.
- 2) The Scheme is in force until 21 November 2029.

Shane Rattenbury
Attorney-General
8/9/24

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

PREAMBLE

- A. The Law Society of New South Wales (“the Law Society”) is an occupational association for the purposes of the *Professional Standards Act 1994 (NSW)* (“the Act”).
- B. The Law Society of New South Wales Professional Standards Scheme (“the Scheme”) is 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.
- C. The Scheme applies to all Participating Members.
- D. The Scheme will have force in New South Wales, and, under the provisions for mutual recognition contained in the Act, in Victoria, Western Australia, Australian Capital Territory, Northern Territory, Queensland, South Australia and Tasmania. To the extent that the scheme applies to limit liability in jurisdictions other than New South Wales, it is subject to the professional standard legislation of those jurisdictions.
- E. The Law Society has furnished the Professional Standards 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 Law Society has furnished the Professional Standards Council with details of its insurance standards.
- G. The Law Society has advised its members to whom the Scheme applies of the requirements of sections 26A and 27 of the Act.
- H. The Law Society has furnished the Professional Standards Council with details of its complaints system and discipline system.
- I. The Law Society will comply with its reporting obligations under the Act, in furtherance of the statutory objects of improvement of the occupational standards of its members, and protection of the consumers of such members’ services.
- J. The Law Society will remit all fees payable under the Act to the Professional Standards Council as and when these become due, pursuant to the Act.
- K. The Scheme is intended to commence on 22 November 2024. The Scheme is intended to remain in force for a period of five (5) years from its commencement, subject to section 32 of the Act.
- L. Sections 12GNA of the *Australian Securities and Investments Commission Act 2001 (Cth)*, 137 of the *Competition and Consumer Act 2010 (Cth)*, and 1044B of the *Corporations Act 2001 (Cth)* provide for limited liability where a professional standards scheme is prescribed in the relevant regulation. The Scheme does not apply to limit any liability pursuant to these provisions unless it has been prescribed under the relevant regulations.

1. Occupational Association

1.1 The Law Society of New South Wales Professional Standards Scheme (“the Scheme”) is a Scheme under the *Professional Standards Act 1994* (NSW) (“the Act”), prepared by and for The Law Society of New South Wales (“the Law Society”), whose business address is 170 Phillip Street, Sydney, New South Wales.

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

“Application Act” means the *Legal Profession Uniform Law Application Act 2014* (NSW);

“Australian legal practitioner” has the same meaning as it has in section 6 of the Legal Profession Uniform Law;

“community legal service” has the same meaning as it has in section 6 of the Legal Profession Uniform Law;

“community legal service legal practitioner” means an Australian legal practitioner who engages in legal practice only for or on behalf of a community legal service;

“corporate legal practitioner” has the same meaning as it has in section 6 of the Legal Profession Uniform Law;

“corresponding law” has the same meaning as it has in the Act;

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

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

“engage in legal practice” has the same meaning as it has in section 6 of the Legal Profession Uniform Law;

“Exempted Member” means a person 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;

“government legal practitioner” has the same meaning as it has in section 6 of the Legal Profession Uniform Law

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

“Incorporated Legal Practice Member” has the same meaning as it has in the Constitution of the Law Society of New South Wales (as amended from time to time)

“interstate scheme” has the same meaning as it has in the Act or a corresponding law, as applicable;

“Law Practice” has the same meaning as it has in section 6 of the Legal Profession Uniform Law but does not include a community legal service;

“Law Society Council” means the Council of the Law Society appointed under the Constitution of the Law Society of New South Wales (as amended from time to

time);

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

“the Legal Profession Uniform Law” means the *Legal Profession Uniform Law (NSW)* 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 and where amended, re-enacted or replaced means that amended, re-enacted or replaced legislation or instrument;

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

“Life Member” has the same meaning as in the Constitution of the Law Society of New South Wales (as amended from time to time);

“Occupational Liability” has the same meaning as it has in section 4 of the Act and does not include liability as set out in section 5 of the Act ;

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

“person” means an individual or a body corporate;

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

“Professional Standards Council” means the Professional Standards Council constituted by the Act;

“Relevant Time” refers to, in the case of a cause of action founded on an act or omission, to the time when that act or omission occurred;

“Solicitor” has the same meaning as it has in the Constitution of the Law Society of New South Wales (as amended from time to time);

“Solicitor Member” has the same meaning as it has in the Constitution of the Law Society of New South Wales (as amended from time to time) and, for the avoidance of doubt, includes but is not limited to all Life Members;

“total annual fee income” means the amount charged during a financial year for services provided by or on behalf of a Law Practice.

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 corresponding law in each jurisdiction, 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 law, 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 the Scheme if, in particular circumstances giving rise to Occupational Liability, the liability of any person who is subject to the Scheme is capped both by the Scheme and also by any other scheme under the Act or a corresponding law 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 Subject to clauses 3.2 and 3.3, the Scheme applies to any person covered by or holding an approved professional indemnity insurance policy within the meaning of the Legal Professional Uniform Law and who is either a:
- 3.1.1 Solicitor Member;
 - 3.1.2 Incorporated Legal Practice Member; or
 - 3.1.3 a person to whom the Scheme applies, by virtue of sections 18, 19 or 20 of the Act¹.
- 3.2 A person referred to in clause 3.1 does not include a person who:
- 3.2.1 is a corporate legal practitioner;
 - 3.2.2 is a government legal practitioner;
 - 3.2.3 is a community legal service legal practitioner; or
 - 3.2.4 has been granted an Australian practicing certificate by the Law Society Council by reason of s 44(5) of the Legal Profession Uniform Law and r 18 of the Legal Profession Uniform General Rules 2015 (NSW).
- 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 Council. This clause does not apply to persons to whom the Scheme applies by virtue of sections 18, 19 or 20 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

¹ 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 and employee of that person, provided that if such officer of the corporation or partner or employee of the person is entitled to be a member of the same occupational association, such officer, partner or employee is a member. 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.

date specified by the Law Society Council.

4. Limitation of liability

4.1 The Scheme only affects the Occupational Liability of a Participating Member for Damages arising from a single cause of action founded on an act or omission to the extent to which the liability results in Damages exceeding the amounts specified in the table in clause 4.3.

4.2 If a person who is, or was, at the time of the act or omission giving rise to Occupational Liability, a person to whom the Scheme applies, or applied, and against whom a proceeding relating to Occupational Liability is brought is able to satisfy the Court that such a person has the benefit of an insurance policy or policies:

4.2.1 of a kind which, at the time of the act or omission giving rise to the Occupational Liability, complies with the standards then determined by the Law Society Council;

4.2.2 that insures such person against Occupational Liability to which the cause of action relates; and

4.2.3 under which the amount payable in respect of that Occupational Liability² is not less than the amount of the monetary ceiling (maximum amount of liability) specified in clause 4.3 of this Scheme,

then the person is not liable in damages in relation to that cause of action above the amount of that monetary ceiling.

² 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 in damages of the Participating Member to a client.

- 4.3 The monetary ceiling (maximum amount of liability) applicable for the purposes of limitation of liability under the Scheme 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 \$10 million.	\$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 \$10 million.	\$10 million

- 4.4 Clause 4.2 does not limit the amount of Damages to which a person to whom the Scheme applies is liable if the amount is less than the amount specified for the purpose of this Scheme in relation to a person to whom the Scheme applies.
- 4.5 The Scheme limits the Occupational Liability in respect of a 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.

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, 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 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. Commencement and Duration

- 6.1 The Scheme will commence:
- 6.1.1 in New South Wales, Victoria, Queensland, Western Australia, Tasmania, and the Northern Territory on 22 November 2024; and
- 6.1.2 in the Australian Capital Territory and in South Australia, on this same date, or such other later date, provided the date is specified in the relevant Minister's notice in relation to the Scheme; or

- 6.1.3 in all other cases, subject to the statutory provisions of each applicable jurisdiction.
- 6.2 The Scheme will be in force in all applicable jurisdictions for five (5) years from the date of its commencement in New South Wales.
- 6.3 Clause 6.2 is subject to the corresponding law of each jurisdiction in relation to the revocation, extension or cessation of a scheme.