

Limitation of Liability Scheme

Guidance for members

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Introduction

The *Professional Standards Act 2004* (Qld) (the Act) provides for the development by occupational associations of schemes to improve professional standards, protect consumers and limit the civil liability of members.

The Professional Standards Council approved a Scheme for Queensland Law Society Inc which commenced on July 1 2010. A copy of the Scheme is attached. The Scheme provides significant protection against claims above the requisite professional indemnity insurance cover, although that protection is not absolute.

The Limitation of Liability Scheme is not an insurance scheme but acts to limit a participating practitioner's liability for negligence claims. It's a statutory scheme, enforced by the courts, that caps the amount of damages that can be awarded against a practitioner in court.

Most practitioners have insurance up to \$2 million (inclusive of defence costs) through the QLS/ Lexon Insurance professional indemnity insurance scheme. If, however, they were sued for \$3 million, \$5 million, \$10 million, in the absence of top-up insurance they would not have enough insurance to cover damages and would be at risk. The Scheme would protect them by limiting the damages awarded against them in court to \$1.5 million (in most cases) – less than their insurance (in such circumstances, there is an extra \$500,000 in their insurance to cover defence costs).

Important notice

It is important that members read this guidance, especially those sections covering exemptions and shortcomings of the Scheme, before deciding whether to retain membership of the Scheme or to make any changes to their top-up insurance arrangements.

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Persons to whom the Scheme applies

Unless exempted by Queensland Law Society (QLS), the Scheme applies to:

1. full Members of QLS who hold a current Australian practising certificate; and
2. who have the benefit of the applicable professional indemnity insurance.

The Scheme also applies to partners, employees or associates subject to their being members, if eligible, of QLS and holding an Australian Practising Certificate, as specified in ss20, 21 or 21A of the Act:

20 Officers or partners of persons to whom a scheme applies

1. *If a scheme applies to a body corporate, the scheme also applies to each officer of the body corporate (see later note re ILPs).*
2. *If a scheme applies to a person, the scheme also applies to each partner of the person.*
3. *However, if an officer of a body corporate or a partner of a person is entitled to be a member of the same occupational association as the body corporate or person but is not a member, the scheme does not apply to the officer or partner.*

21 Employees of persons to whom a scheme applies

1. *If a scheme applies to a person, the scheme also applies to each employee of the person.*
2. *However, if an employee of a person is entitled to be a member of the same occupational association as the person but is not a member, the scheme does not apply to the employee.*

21A Extension of liability limitation to other persons to whom scheme applies

1. *A limitation applying under this Act to the occupational liability of a person as a member of an occupational association (first scheme member) in relation to a cause of action (principal cause of action) also applies, in relation to the principal cause of action and any related cause of action, to the liability of any other person to whom the scheme concerned applies (second scheme member) as a partner, officer, employee or associate of the first scheme member.*
2. *Subsection (1) applies in relation to the liability of the second scheme member whether or not the second scheme member's liability is an occupational liability.*

3. *A reference in this section to a person who is a partner, officer, employee or associate of the first scheme member is a reference to a person who was a partner, officer, employee or associate of the first scheme member at the time of the event that gave rise to the principal cause of action.*
4. *A reference in this section to a limitation on liability that applies to a person as a member of an occupational association includes a reference to a limitation on liability that would apply to the person if a cause of action relating to the liability were brought against the person.*
5. *In this section—*
associate, of the first scheme member, includes a person who carries out work for or with the first scheme member whether the work is carried out voluntarily or for financial reward.
related cause of action means a cause of action in relation to the civil liability of the second scheme member arising, in tort, contract or otherwise, directly or vicariously from anything done or omitted to be done by the second scheme member that—
 - a. *caused or contributed to the loss or damage with which the principal cause of action is concerned; and*
 - b. *resulted from the same or substantially the same event as that from which the principal cause of action arose.*

A person may, on application, be exempted from the Scheme by Queensland Law Society.

From a practical perspective, to gain the full benefit of the liability cap, all solicitors within the practice should be members of Queensland Law Society, and therefore members of the Scheme.

Practices wishing to gain the full benefit of the liability cap should therefore ensure that:

1. all newly admitted solicitors immediately become members of Queensland Law Society (and of the Scheme); and
2. all solicitors promptly renew their membership of Queensland Law Society (and of the Scheme) on an annual basis.

The consequences of a tortfeasor solicitor not being a member of QLS (and, therefore, a member of the Scheme) or exempted from the Scheme, and the consequences for other principals of the law practice is open to debate. Members need to consider and form their own views on this legal issue when deciding whether to participate in the Scheme.

Limitation of Liability

The second requirement of a Scheme member is to have the benefit of the applicable level of professional indemnity insurance. A table setting out the applicable level of insurance and the corresponding limit of liability is set out as follows:

Class	Description	Monetary ceiling
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 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 \$10 million.	\$10 million

'Relevant Time' refers to a cause of action founded on an act or omission, specifically to the time of that act or omission occurring.

Conferral of discretionary authority

Pursuant to s25 of the Act, the Scheme confers on QLS a discretionary authority to specify, on application of a Participating Member, a higher monetary ceiling (maximum amount of liability) in all cases or in any specified case or class of case than would otherwise apply under the Scheme in relation to the Participating Member.

Requirements of members

1. Members of the Scheme must hold a current Australian practising certificate, and be members of QLS. All solicitors in any firm should remain members of both Queensland Law Society and the Scheme for the cap to effectively apply.
2. Members must ensure they have the benefit of insurance policy/policies under which the amount payable in respect of Occupational Liability is not less than the maximum amount of liability applicable to that person at the Relevant Time.
3. Members who take out top-up insurance in relation to a higher cap (either Class 2 or discretionary) must ensure the excess cover complies with Queensland Law Society standards of insurance, namely:
 - the insurer should either be:
 - subject to a recognised prudential regulatory regime
 - approved by a Commonwealth or State instrumentality, or
 - authorised, licensed or approved under Commonwealth or State legislation.
 - the insuring clause should be reasonably broad to cover all persons (partners, directors, officers and employees) to whom the Scheme applies
 - terms should extend cover to all reasonable occupational activities and services that might give rise to occupational liability, with minimal exclusions
 - deductibles or excess should be set at reasonable levels having regard to the relevant cap under the Scheme, the apparent capacity of the member to meet the deductible or excess from other available assets, and the underlying principle of reasonable assurance of effective recourse to the consumer for occupational liability claims up to the amount of the relevant cap under the Scheme
 - the retroactive date should not be unreasonably limited and the policy must be on a 'claims made' basis
 - there should be reasonable run-off cover, preferably extending beyond traditional statutory limitation periods
 - there should be a minimum of one automatic reinstatement where the policy limits the aggregate of claims to the indemnity limit. In the event the indemnity cover exceeds twice the amount required under the Scheme, or the person demonstrates on past experience and other bases that the reinstatement is unlikely to be invoked, Queensland Law Society may exempt the person from this requirement.

4. Members who are either in Class 2, or who apply to Queensland Law Society for approval of a higher monetary ceiling under QLS's discretionary authority must also either:
 - a. submit a copy of the standard policy under which they are insured, or
 - b. submit broker's advice as to the compliance of any insurance policy with the Society's standards.

Where costs-inclusive cover is obtained, sign a statement to the effect that either:

- a. coverage has been obtained sufficiently above the relevant liability cap under the Scheme so as to ensure sufficient funds to cover defence costs, or
 - b. the Scheme member has the capacity to fund any additional defence costs from available assets.
5. Members are required to pay an annual fee to QLS that will cover administrative costs of the Society and the annual fee payable to the Professional Standards Council. The fee per member for 2017/18 is \$135.14 (including GST) per annum of which \$50 is payable to the Professional Standards Council as prescribed by the *Professional Standards Regulation 2007 (Qld)*.
 6. Members in the Scheme may not contract out of the provisions of the *Professional Standards Act 2004 (Qld)*, though any member may apply to be exempt from the Scheme¹.

Notice requirements

Members covered must ensure that all business documents given to a client or prospective client that promote or advertise the member's occupation, including correspondence and memoranda of fees, carry a prescribed statement. This requirement does not apply to business cards.

The *Professional Standards Regulation 2007 (Qld)* prescribes a statement of words for practitioners to use to ensure that clients are aware of the practitioners participation in the Scheme. The wording, which must be printed in a size not less than the face measurement of Times New Roman typeface in 8 point, is:

"Liability limited by a scheme approved under professional standards legislation."

Whilst the prescribed statement cannot be altered, it can be added to at either end to clarify a practice's specific situation.

- Incorporated legal practices, for instance, might consider adding the word 'Individual' to their statement to clarify that individual rather than corporate liability is limited, with the statement therefore reading: "individual liability limited by a scheme approved under professional standards legislation".
- Practices who do personal injury work might also wish to clarify that personal injury work is excluded from the cap by adding to the statement as follows: "Liability limited by a scheme approved under professional standards legislation (personal injury work exempted)".

Such additions are a matter of preference for each practice. Provided the original prescribed statement is included, and the practice avoids any false or misleading additions, the practice will be meeting their disclosure obligations.

The Professional Standards Council has directed that generally, disclosure should appear on all documents given to clients or prospective clients to promote or advertise the scheme member or their occupation. The following table is an extract from the Professional Standards Council website.

Documents disclosure should appear	Documents not requiring disclosure
<ul style="list-style-type: none"> • documents (written advice, plans, drawings, specifications and other) produced for clients not accompanied by another document containing a disclosure statement • email • fax cover sheets • letterheads and letters signed by the company or on its behalf • memorandum of fees and invoices not accompanied by another document containing a disclosure statement, and • newsletters and other publications 	<ul style="list-style-type: none"> • advertisements in print media, directory listings and similar forms of promotion or advertising, and • business cards

¹ See 67 of the Act

Subs 34(5) of the Act defines business document as, 'a document promoting or advertising a person or the person's occupation and includes business correspondence and other similar documents the person ordinarily uses in performing the person's occupation, but does not include a business card'.

Note: Failure to comply with these requirements exposes the member to a penalty under s34(1) of the Act. Queensland Law Society undertakes an annual compliance audit of members' compliance with the disclosure requirements.

Participating Members may also elect to display an optional Professional Standards Council Cover of Excellence® logo. Use of the Cover of Excellence® symbol shows that the Participating Member is a part of an association that has a scheme approved by the Professional Standards Council. However, the Cover of Excellence® does not replace the requirement for disclosure to be provided to clients. The Cover of Excellence® logo is not used to disclose the restrictions of limited liability, but rather to further indicate that the Participating Member is a part of a scheme that strives for higher excellence and quality service.

The use of the logo must conform to prescribed placement, colour and size requirements. The logo and usage requirements are available from Queensland Law Society.

What is covered by the Scheme?

The Scheme limits the Occupational Liability of a member to the relevant Scheme cap. The occupational liability is defined in Schedule 2 of the Act as 'any civil liability arising, whether 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 the member's occupation.

The Scheme liability cap:

1. which applies is the cap in force as at the date of the relevant act or omission
2. only applies if the Scheme was in force at the date of the relevant act or omission
3. does not apply to any cause of action arising under, or in relation to, a contract entered into before the commencement of the Act on 13 September 2004, unless after the commencement of the Act, the parties vary the relevant contract so to make expressed provisions for the application of the Act.

It is therefore important to note that the Scheme cap will not apply to any claim which arises from an act or omission which occurred prior to the commencement of the Scheme on 1 July 2010. Members will be aware of the *Limitations of Actions Act 1974* and that generally, claimants will have up to six years within which to commence an action.

Will QLS's Scheme be enforceable under Commonwealth Laws?

The Commonwealth Government has a mechanism called 'prescription' for recognising and exempting schemes under relevant Commonwealth legislation. Members of occupational associations who participate in schemes that have been prescribed will have their limited liability recognised under specific sections of these Commonwealth Laws.

Queensland Law Society's Scheme has been prescribed under the *Competition and Consumer Act 2010* and the *Trade Practices Act 1974*.

Is QLS's Scheme enforceable under the laws of other Australian States or territories?

QLS's Scheme will only apply in Queensland. This means that it will only apply to acts or omissions by Participating Members that occur in Queensland.

Queensland Law Society may apply for an amendment to its Scheme to allow it to operate in the other jurisdictions which have mutual recognition provisions in their professional standards legislation.

Not all jurisdictions have mutual recognition provisions in their professional standards legislation. At present, there are mutual recognition provisions in the Queensland, New South Wales, Northern Territory, Australian Capital Territory and Victorian professional standards legislation. The professional standards legislation in South Australia, Western Australia and Tasmania does not contain mutual recognition provisions.

Queensland Law Society is determining whether those jurisdictions are proposing amendments to their professional standards legislation to include mutual recognition provisions and if so, the timelines for such amendment.

Exemptions, Scheme-insurance inconsistencies and other areas of concern

Members should be aware that, whilst the scheme offers significant protection against claims above the level of compulsory professional indemnity insurance, the protection provided is less than absolute.

Members should consider the following issues before deciding whether to remain in the Scheme or making decisions as to the necessity of top-up insurance.

Exemptions

The Act specifically excludes coverage of liability arising from:

- the death of, or personal injury to, a person
- any negligence or other fault of a lawyer in acting for a client in a personal injury claim or a breach of trust, or
- fraud or dishonesty².

Section 6(2) of the Act also provides that the Act does not apply to liability which may be the subject of proceedings under part 9, division 2, subdivision C of the *Land Title Act 1994* (claims under the Queensland State Government Fidelity Fund for title fraud)

In relation to the exemption for personal injury work, the equivalent section of the New South Wales Act, upon which the Queensland legislation was based, was repealed in 2004, thus extending the provisions of that Act to personal injury lawyers in New South Wales. Queensland Law Society has twice written to the Queensland Attorney-General seeking a similar repeal of the relevant section, but we have not as yet been successful in our efforts.

Limitation of Liability by Insurance

A Scheme member against whom a claim is made has to be able to satisfy the Court that:

1. the member has the benefit of an insurance policy insuring him or her against the occupational liability to which the cause of action relates
2. the sum insured under the policy of insurance is not less than the relevant Scheme cap.

QLS has entered into a Master Policy of professional indemnity insurance cover for Queensland members. This policy is insured by Lexon. The terms and conditions of the Lexon policy are very broad and exceed what could be obtained from the commercial insurance market. There are a number of inconsistencies between the Act and the Lexon policy which may impact upon the Scheme liability cap.

Insuring clause

The Act contains a broad definition of occupational liability and covers anything done or omitted to be done by a member acting in the performance of the member's occupation: that is the occupation as a solicitor. This is broadly consistent with the insuring clause and definitions in the Lexon policy, which provides insurance for any civil liability arising from the provision of legal services.

For the purposes of insurance, Lexon policy covers:

'any civil liability incurred in connection with the Assured's Practice'

There is the possibility of some inconsistency between the definition in the Act and the definition in the Lexon policy. Any such inconsistency would give rise to a gap between the coverage provided by the insurance policy and the limitation of liability provided by the Scheme.

By way of illustration, the Council of the Society has the power to declare certain activities as being inappropriate to be undertaken by an Australian legal practitioner as part of a law practice. The Society's Council has declared, pursuant to clause 1.23.4 of the Certificate of Insurance for 2008 – 2011³, the following activities to be inappropriate to be undertaken as part of engaging in legal practice:

- Acting as a 'pure' investment advisor or otherwise acting in association with an investment advisor so that the firm is seen as giving that advice and guaranteeing that advisor's advice.
- Acting as a representative of a fixed-term property syndicate.
- Acting as agent for the Australian Securities and Investments Commission.
- Provision of management services to a client unless the activities carried out are directly in connection with a particular transaction such as a conveyance.
- Acting as Councillor of the Society of Notaries of Queensland.

Any claim arising out of these activities would not be subject to the Scheme cap.

Exclusions

The Lexon policy does have a number of exclusions which relate to employment liability, directors' and officers' liability, client mortgage loans, online products and services, trust account claims and warranty or guarantee claims. These exclusions are set out in section 6 of the Certificate of Insurance.

Where insurance exclusions apply, the member will not be able to satisfy the Court that they had the benefit of an insurance policy insuring the member against that liability, and the Scheme cap would not apply.

Some members may have Employment Practices Liability, Directors and Officers Liability or General Liability insurance policies covering those liabilities. If the insurance limits provided in those policies are not less than the Scheme liability cap, then the Scheme cap of liability could apply.

² Subs 6(1) of the Act

³ The Society's Council made identical declarations under clause 1.18.4 of the Certificate of Insurance 2011-2012

Cost Inclusive Policy

The Lexon policy provides the sum insured of \$2 million inclusive of defence costs. The Scheme operates to provide a liability cap which is exclusive of defence costs.

In the event that liability is capped at \$1.5 million, the practice therefore has an additional \$500,000 under the Lexon policy to finance defence costs. This is sufficient for the vast majority of claims although there remains the possibility that where defence costs exceed \$500,000, there will be a shortfall that the practice will be required to finance from its own resources.

Claims aggregation

Aggregation clauses are to be found in professional indemnity policies and the Lexon policy includes such a clause⁴. Whilst the Act does allow for a limited aggregation of claims⁵, this does not mirror the scope of the aggregation clause contained in the Lexon policy. This means that in some circumstances claims will be aggregated by Lexon which are not otherwise aggregated under the Scheme. As a consequence, the Scheme may not offer full protection to members in circumstances where a claim has been aggregated.

By way of example, the Lexon policy aggregates and treats as one claim under the policy all third party claims:

1. arising from one matter, transaction or retainer, or
2. arising from an act or omission of the same or similar character in more than one transaction.

Occasions when this can arise are when there is a systematic error in a precedent document, be it a will, lease or contract or such like, which is used in the law practice.

As the aggregation of claims under the Lexon policy limits the insurance cover available to \$2 million, then once that sum has been exhausted, the member would lose the benefit of any Scheme cap for the remaining claims.

Incorporated legal practices

Whilst individual solicitors within Incorporated Legal Practices (ILPs) are protected by the cap on liability, ILPs as corporate entities are currently not protected.

To become a member of the Scheme and to benefit from a cap on liability, an ILP would have to be a member of Queensland Law Society. As Queensland Law Society currently only has categories for individual membership, ILPs as corporate entities cannot currently be 'members' of Queensland Law Society in their own right.

Queensland Law Society is seeking amendments to the *Legal Profession Act 2007*, which will allow for changes to both its membership arrangements and its Limitation of Liability Scheme, which will in turn enable ILPs to benefit from a cap on liability in the near future.

Lack of notification of Scheme to client⁶

The Scheme does not limit the liability of a person (professional) to another person (client) if, at no stage before the time of the relevant act or omission, did the professional –

- a. give, or cause to be given, to the client a document that carried the statement 'Liability limited by a scheme approved under professional standards legislation', or
- b. otherwise inform the client, whether orally or in writing, that the professional's liability was limited under Part 2 of the *Professional Standards Act 2004*.

Further information

For more information on Queensland Law Society Limitation of Liability Scheme, please contact us at capscheme@qls.com.au or 1300 367 757.

⁴ See clause 2.3 of the Certificate of Insurance

⁵ See section 30 of the Act

⁶ Subsection 29(2) of the Act