

Limitation of Liability Scheme

Guidance for members

August 2020

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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 1 July 2010. That scheme was to operate for 5 years. It was extended to a period of 6 years. A new scheme commenced on 1 July 2016. 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 insurance. It acts to limit a participating practitioner's damages in causes of action arising from the provision of legal services.

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 to \$1.5 million (in most cases) – less in most cases than the limit of their professional indemnity cover and with \$500,000 to meet 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:

Full and Honorary Members of QLS who hold a current Australian practising certificate who have the benefit of applicable professional indemnity insurance.

The Scheme also applies to partners, employees or associates of the law practice of those full or honorary members subject to their being members, if eligible, of QLS and holding an Australian Practising Certificate (ss20, 21 and 21A of the Act).

A member may, on application, be exempted from the Scheme by Queensland Law Society. Unless exempted an eligible member of the Society is a participant in the scheme.

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

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

1. all newly admitted solicitors immediately become members of QLS and so participants in the Scheme; and
2. all solicitors renew their membership of QLS and participation in the Scheme annually.

The consequences of a tortfeasor solicitor not being a participant in the Scheme or exempted from the Scheme and the consequences for 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 or seek exemption from the Scheme.

Limitation of Liability

A scheme participant must 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 below:

Class	Description	Monetary ceiling
1.	Scheme participants 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) Scheme participants who were at the relevant time in a law practice of greater than 20 principals; or (b) Scheme participants 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

'relevant time' is the time that act or omission that is the basis of the cause of action arising out of the provision of legal services occurred.

Discretionary Authority to confer a higher cap

Section 25 of the Act and the Scheme confers on QLS discretionary authority to specify, on application of a scheme participant, 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 scheme participant. This extends the cap in line with top up insurance above the bare minimum required under the *Legal Profession Act 2007* or offered by an insurer. As a general rule the Society will approve an extension in the cap to within \$1 million of total professional indemnity cover.

Requirements of Scheme Participants

1. Participants in the Scheme must hold a current Australian practising certificate and be members of QLS. All solicitors in any firm should remain members of QLS and participate in the Scheme for the cap to effectively apply.
2. Participants 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. Participants must take out top-up insurance to avail themselves of a higher cap either Class 2 or the discretionary limit.
4. Participants who apply to QLS for approval of a higher monetary ceiling under QLS's discretionary authority must submit a copy of the professional indemnity policy under which they are insured including top up cover.
5. Participants 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 2019/20 is \$144 (including GST) per annum of which \$50 is payable to the Professional Standards Council as prescribed by the *Professional Standards Regulation 2007* (Qld).
6. Participants in the Scheme may not contract out of the provisions of the *Professional Standards Act 2004* (Qld) though any member of QLS may apply to be exempt and thus not be a participant in the Scheme.

Notice requirements

Participants must ensure that all business documents given to a client or prospective client that promote or advertise their 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 participants 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• websites*• 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• 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.

*Websites are specifically mentioned as business documents only in the Professional Standards Act (S.A.). However the Professional Standards Councils is of the view that a higher standard of consumer protection is achieved by making the disclosure on websites. QLS agrees with this view and suggests the disclosure be made on the home page.

Subsection 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 participant to a penalty under s34(1) of the Act. QLS undertakes an annual compliance audit of compliance with the disclosure requirements.

What is covered by the Scheme?

The Scheme limits the occupational liability of a participant 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 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 express provision for the application of the Act.

The Scheme cap will not apply to any claim which arises from an act or omission which occurred prior to the commencement of the QLS 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 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 Scheme enforceable under the laws of other Australian States or Territories?

QLS's Scheme applies by way of mutual recognition in New South Wales, Northern Territory, Australian Capital Territory, Victoria, South Australia and Western Australia.

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 participate 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;
- a breach of trust; or
- Fraud or dishonesty.

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).

Limitation of Liability by Insurance

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

1. The participant 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 with 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 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 participant acting in the performance of their 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:

Against any civil liability (including claimant's costs and defence costs):

- 2.1.1. arising from any claim first made against the insured during the period of insurance; and
- 2.1.2. arising from the provision of legal services by the Insured.

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

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.

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 clause (cl 2.3 of the Certificate of Insurance for 2020/21). Whilst the Act does allow for a limited aggregation of claims, 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 claims arising from:

1. the same source or originating source; or
2. the same act or omission;
3. a series of related or similar acts or omissions whether on the same or different occasions; or
4. acts or omissions of the same or similar or substantially the same or similar character whether or not in the same matter or 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 participant 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.

Lack of Notification of Scheme to Client

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 –

1. 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
2. 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 QLS Limitation of Liability Scheme, please contact us at capscheme@qls.com.au or 1300 367 757.