

Australian Capital Territory

Civil Law (Wrongs) The Law Society of Western Australia Professional Standards Scheme 2019

Disallowable instrument DI2019–171

made under the

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

1 Name of instrument

This instrument is the *Civil Law (Wrongs) The Law Society of Western Australia Professional Standards Scheme 2019*.

2 Commencement

This instrument commences on 1 July 2019.

3 Notice

- (1) I give notice of the Professional Standards Council of Western Australia's approval of the attached The Law Society of Western Australia Professional Standards Scheme.
- (2) The scheme is in force until 30 June 2024.

Gordon Ramsay MLA
Attorney-General
26 June 2019

THE LAW SOCIETY OF WESTERN AUSTRALIA SCHEME
Professional Standards Act 1997 (WA)

PREAMBLE

Occupational Association

- A. The Law Society of Western Australia (“Law Society WA”) is a voluntary occupational association for legal practitioners in Western Australia.
- B. The occupational group, for the purposes of this Scheme, represented by the Law Society consists of legal practitioners who hold an Australian practising certificate.

Nature of Scheme

- C. The Law Society WA has made an application to the Professional Standards Council (“PS Council”) appointed under the *Professional Standards Act 1997 WA* (“Act”), for a scheme under the Act and this document comprises the scheme (“Scheme”).
- D. The scheme has been prepared by the Law Society WA for the purpose of limiting Occupational Liability of Participating Members to the extent to which such liability may be limited under the Act.
- E. The Scheme is intended to operate under the Act.
- F. The Scheme does not affect liability for damages which are below the amount specified in section 39 of the Act. The Scheme limits liability damages to the monetary ceiling specified for that member provided that the Participating Member has insurance as required under section 34 of the Act.
- G. The Scheme is to apply to all Participating Members.

Risk Management

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

Standards of Insurance

- J. Participating Members are required to maintain current professional indemnity insurance in accordance with the Law Society WA’s Insurance Standard.

Complaints and Discipline

- K. Participating Members are subject to a complaints and discipline regime operating under the *Legal Profession Act 2008*,

Scheme Administration

- L. Responsibility for administration of the Scheme and ensuring that it complies with the requirements of the Act and of the Professional Standards Councils rests with the Law Society WA.

Commencement and Duration

- M. The Scheme commences on 1 July 2019.
- N. The Scheme is intended to remain in force for a period of five (5) years from its commencement, subject to section 44A of the Act.

Jurisdiction

- O. The Scheme is intended to apply in all States and Territories within Australia.

THE LAW SOCIETY OF WESTERN AUSTRALIA SCHEME

1. Preparation of the Scheme

- 1.1 The Scheme is a scheme under the *Professional Standards Act 1997 WA* prepared by the Law Society WA whose business address is Level 4, 160 St Georges Terrace, Perth, Western Australia.

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

“Australian Practising Certificate” has the same meaning as it has in the *Legal Profession Act 2008 WA*.

“Corresponding laws” means the *Professional Standards Act 1994* (NSW), the *Professional Standards Act 2003* (Vic), the *Professional Standards Act 2004* (Qld), the *Professional Standards Act 2004* (SA), 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 member of the Law Society WA who is, or was, at the Relevant Time, exempted by the Law Society WA from participation in the Scheme pursuant to clause 3.2;

“Financial Year” means a financial accounting period ending 30 June.

“legal services” has the same meaning as it has in section 3 of the *Legal Profession Act 2008 WA*.

“Occupational liability” has the same meaning as it has in the Act.

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

“Previous Scheme” means the scheme under the *Professional Standards Act 1997* WA prepared by the Law Society WA which was in force immediately prior to the commencement of this Scheme.

“Principal” has the same meaning as in section 6(3) of the LP Act:

A principal of a law practice is an Australian legal practitioner who is —

- a sole practitioner (in the case of a law practice constituted by the practitioner); or
- a partner in the law practice (in the case of a law firm); or
- a legal practitioner director in the law practice (in the case of an incorporated legal practice); or
- a legal practitioner partner in the law practice (in the case of a multi-disciplinary partnership).

“Professional Standards Legislation” means the legislation applicable in each State and Territory, namely, the the *Professional Standards Act 1994* (NSW), the *Professional Standards Act 2003* (Vic)the *Professional Standards Act 2004* (Qld), the *Professional Standards Act 2004* (SA), the *Professional Standards Act 2005* (Tas), the *Professional Standards Act* (NT), and the *Civil Law (Wrongs) Act 2002* (ACT), as applicable.

“Relevant Time” refers to the time at which the act or omission occurs, not the time when the claim is brought.

“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 Participating Members.

2. **Jurisdiction**

2.1. The Scheme applies in Western Australia in accordance with the Act.

2.2. In addition to Western Australia, the Scheme is intended to operate in New South Wales, Victoria, Queensland, South 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 which 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. Incorporated Legal Practice members, and ordinary and life members of the Law Society who hold an Australian Practising Certificate who are not exempted under clause 3.2 of the Scheme and who are not persons referred to in clause 3.1.3.1;

3.1.2. All persons to whom, by virtue of sections 31, 32, 33 and 34A of the Act, the Scheme applies;

3.1.3. All members of the Law Society WA who:

3.1.3.1. Immediately prior to the date of commencement of this Scheme, had been exempted from the Previous Scheme pursuant to clause 2.2 of the Previous Scheme; and

3.1.3.2. Have, on the application of the person, been determined by the Law Society WA in writing to be persons whom this Scheme applies.

3.2. A person referred to in clause 3.1.1 or 3.1.3 may, on application by that person, be exempted by the Law Society WA from participation in the Scheme with effect from the date specified by the Law Society WA.

3.3. The Law Society WA 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 WA.

4. Limitation of liability

4.1 The Scheme only limits the Occupational Liability of a Participating Member for damages¹:

4.1.1 arising from a single 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.

4.1.2 to the extent that those Damages exceed the amounts specified in the table in clause 4.3.

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

¹ "Damages" as defined in section 4 of the Act means —

(a) damages awarded in respect of a claim or counter-claim or claim 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 the defendant); and

(c) any interest payable on the amount of those damages or costs.

4.2.2 the amount payable 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 3.3 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.

4.3 The monetary ceiling (maximum amount of liability) applicable for the purpose of limitation of liability under the Scheme at the Relevant Time is to be determined according to the following table.

Tier	Description	Monetary ceiling (Maximum amount of liability)
1	Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time up to and including \$5 million	\$1.5 million
2	Participating Members who were at the Relevant Time in a Law Practice that generated a total annual fee income for the financial year immediately preceding the Relevant Time of more than \$5 million and up to \$10 million	\$5 million
3	Participating Members who were at the Relevant Time in a Law Practice that Generated a total annual fee income for the financial year immediately preceding the Relevant Time of more than \$10 million	\$10 million

4.4 Notwithstanding anything to the contrary contained in this Scheme if, in particular circumstances giving rise to occupational liability, the liability of any person which 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.

5 Conferral of discretionary authority

5.1 The Law Society WA has discretionary authority, on application by a Participating Member, to specify in relation to a Participating Member, a higher maximum amount of liability (monetary ceiling) than would otherwise apply under the Scheme in relation to him or her either in all cases or any specified case or class of case.

5.2 If, in exercise of its discretion under clause 4.1 the Law Society of WA has specified a higher maximum amount of liability (monetary ceiling) than would otherwise apply under the Scheme in relation to a Participating Member, the maximum amount of

liability (monetary ceiling) in relation to that Participating Member is that higher maximum amount.

6 Duration

6.1 The Scheme will commence in Western Australia, New South Wales, Queensland, Tasmania and the Northern Territory on 1 July 2019.

6.2 In the Australian Capital Territory and in South Australia, 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 In Victoria, this Scheme will commence:

a. On 1 July 2019 if the Scheme is published in the Government Gazette at least two months prior to that date; or

b. On the first day two months after the Scheme is published in the Government Gazette, in any other case.

6.4 In Western Australia, the Scheme will be in force for five years from its commencement in the jurisdiction.

6.5 For any other jurisdiction, the Scheme will be in force for:

6.5.1 five years from the date of commencement in the jurisdiction; or

6.5.2 five years from the date of commencement in Western Australia;

whichever period ends first.

6.6 Clauses 6.4 and 6.5 are subject to the provisions of the Professional Standards Legislation of each jurisdiction applicable to the revocation, extension or cessation of Schemes.