



LIV LIMITATION OF LIABILITY SCHEME

FREQUENTLY ASKED QUESTIONS





Professional benefits for LIV members

The LIV is pleased to announce that it has lodged a Limitation of Liability Scheme with the Professional Standards Council (PSC) pursuant to the *Professional Standards Act 2003 (Vic)*. This is an initiative of the LIV which showcases ways we work on behalf of our members to increase the value of membership.

Status of Scheme

The proposed Scheme was published in the Government Gazette on 11 March 2010. After gazettal there is a two-month Victorian statutory "waiting period" before the Scheme can commence.

The Scheme is scheduled to commence on 1 July 2010.

About the Scheme

In essence, the Scheme will cap the occupational liability of participating LIV members to an amount of \$2 million or \$10 million depending on the insurance policies, total revenue of the law practice and the number of principals of the law practice, and to the extent that liability can be limited under the *Professional Standards Act 2003 (Vic)*.

The cost of the Scheme for each Scheme member is \$105 (per annum) inclusive of administrative fees and GST.

Participating in the Scheme

A notification form regarding participation in the Scheme is available on our website at www.liv.asn.au. The notification form must be returned by 31 May 2010 together with payment in order for processing to be complete before the commencement of the Scheme on 1 July 2010. LIV membership is also due by 31 May 2010.

It is important to note that the Scheme operates on a 'one-in, all-in basis'. This means that for a law practice to gain the full benefit of

the Scheme and the limitation of liability, all solicitors (that is, any person who holds a current Australian practising certificate) within the law practice would need to be members of the LIV and of the LIV Scheme.

Frequently Asked Questions (FAQ)

- Read the FAQs
- Log your questions online at *Practising Victoria* at www.liv.asn.au
- Answers will be incorporated into the FAQs document available for all interested parties to view online
- Information is also available at the Professional Standards Council at www.psc.gov.au

If you have any further queries, please do not hesitate to contact Professional Standards at lls@liv.asn.au or (03) 9607 9562.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Michael Brett Young".

Michael Brett Young
LIV CEO



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Frequently Asked Questions

1. What is a limitation of liability scheme?

The Professional Standards legislation enables the establishment of schemes to limit liability of members of occupational associations. The legislation is state based, and the relevant Act in Victoria is the *Professional Standards Act 2003 (Vic) (Act)*.

- View the [Professional Standards Act 2003 \(Vic\) \(Act\) \(pdf\)](#)

The relevant regulations in Victoria are the *Professional Standards Regulations 2007 (Vic) (Regulations)*.

- View the [Professional Standards Regulations 2007 \(Vic\) \(Regulations\) \(word\)](#)

For a scheme to be approved under the Act, occupational associations are required to demonstrate a high commitment to professional standards and consumer protection; implement comprehensive risk management strategies; and set professional indemnity insurance standards for their members. An approved scheme will limit the occupational liability of members of the occupational association, subject to the scheme itself and the Act.

2. Where can I obtain a copy of the proposed Law Institute of Victoria Limitation of Liability Scheme?

The proposed Law Institute of Victoria Limitation of Liability Scheme (LIV Scheme) is available at Appendix A.

3. What is the status of the LIV Scheme?

Under the Act, the following must occur before a scheme commences:

- the scheme is prepared together with a scheme application;
- the scheme and scheme application are submitted to the Professional Standards Council established under the Act (PSC);
- the proposed scheme is subject to a 28-day period of public notification, and comments and submissions are invited;
- the scheme is reviewed and approved by the PSC;
- the scheme is submitted to the Victorian Attorney-General by the PSC;
- there is a two-month statutory consultation period regarding the scheme;
- the scheme is published in the Government Gazette; and
- at least two months passes after publication in the Government Gazette.

The proposed LIV Scheme was published in the Government Gazette on 11 March 2010.

4. When will the LIV Scheme commence?

The specified commencement date for the proposed LIV Scheme is 1 July 2010.

5. Who is covered by the LIV Scheme?

The LIV Scheme applies to:

- practising full members of the LIV (that is, 'full members' of the LIV as contemplated in the LIV's Constitution who hold a current Australian practising certificate) and who have not been exempted from participation in the LIV Scheme;
- the partners and employees of practising full members of the LIV who have not been exempted from participation in the LIV Scheme, provided that the partners and employees are also members of the LIV if they are also entitled to be; and
- any persons referred to in paragraphs a. or b. who are participating in the LIV Scheme at the time of an act or omission occurring on which a cause of action is founded, but later cease to participate in the LIV Scheme.

Please see clause 2.1 of the LIV Scheme. Please also see ss20 and 21 of the Act regarding the application of the LIV Scheme to partners and employees of the LIV Scheme members.

The LIV may apply to the PSC for approval to vary the LIV Scheme to specify new classes of members to whom or to which the LIV Scheme applies. Other classes of members, including incorporated legal practices, to be covered by the LIV Scheme will be considered by the LIV at a later date.

6. What if I do not wish to participate in the Scheme?

The LIV Scheme will not apply to any person who has applied to the LIV to be exempted from participation in the LIV Scheme. A person who is exempted from participation in the LIV Scheme will not be able to rely on the LIV Scheme to limit his or her liability if a claim against that person is brought.

Please see clause 2.3 of the LIV Scheme.

It is important to note that the Scheme operates on a 'one-in, all-in basis'. This means that for a law practice to gain the full benefit of the LIV Scheme and the limitation of liability, all solicitors (that is, any person who holds a current Australian practising certificate) within the law practice would need to be members of the LIV and of the LIV Scheme.

For example, a law practice might have ten principals, nine of whom are participating in the LIV Scheme, but the tenth principal is neither a member of the LIV nor the LIV Scheme. If a successful claim is made against the tenth principal, he or she might be liable for the full amount of the claim, but could possibly be entitled to bring a contribution claim against all other principals to contribute to the balance of the claim which exceeds the monetary limit of the insurance policy held by the law practice. This would undermine the effectiveness of the limitation of liability cap.



Issues may also arise if an employee solicitor is neither a member of the LIV nor the LIV Scheme. If a claim is brought against the employee solicitor, the principal/s as employer could possibly be vicariously liable for the employee's act or omission committed in the course of employment, but might not be able to rely on the limitation of liability cap.

Therefore, law practices wishing to benefit from the limitation of liability provided by the proposed LIV Scheme should ensure that:

- all solicitors (both principals and solicitor employees) renew their membership of the LIV and the LIV Scheme on an annual basis; and
- all new solicitors (both principals and solicitor employees) retain or immediately gain membership of both the LIV and the LIV Scheme.

Noting s21 of the Act and clause 2.1.2 of the LIV Scheme, law practices may also wish to apply for LIV membership for any person within the law practice who does not hold an Australian practising certificate but is eligible to be an Associate Member of the LIV. However, it is not necessary for those persons to provide information or pay the fees referred to in question 8 in order to participate in the LIV Scheme.

7. Who is excluded from the LIV Scheme?

The LIV Scheme will not apply to the following persons and entities:

- a. Corporate legal practitioners (as defined in the *Legal Profession Act 2004* (Vic));
- b. Incorporated legal practices (as defined in the *Legal Profession Act 2004* (Vic)) (please note, however, that the LIV Scheme can still apply to solicitors who are directors of or employed by incorporated legal practices. It is only the incorporated legal practice entity that is excluded from the LIV Scheme. As specified at question 5, the LIV will consider other classes of members, including incorporated legal practices, to be covered by the LIV Scheme); or
- c. See other exclusions specified at question 13 in relation to the type of liability which may be limited.

8. How do I participate in the LIV Scheme?

Practising full members of the LIV will need to provide a completed notification form to the LIV shortly after the membership renewal process for the 2010 / 2011 membership year. The form is available at www.liv.asn.au.

The notification form requires certain information to be provided to the LIV for each practising full member participating in the Scheme, including:

- a. Name of LIV member;
- b. LIV member number;
- c. Legal Services Board practitioner number;
- d. Type of practising certificate; and
- e. Name of law practice at which LIV member is working.

Additionally, the LIV will require information from law practices in order to administer the LIV Scheme and report to the PSC regarding the LIV Scheme. This information includes:

- a. Number of principals in the law practice;
- b. Name of each principal in the law practice;
- c. Approximate total annual fee income for the financial year ending 30 June 2010; and
- d. Professional indemnity insurance policy number/s (including for any top-up insurance) for the law practice.

The following fees will be payable for each practising full member to participate in the LIV Scheme:

- a. \$50 registration fee which the LIV will pay to the PSC; and
- b. \$55 (inclusive of GST) administration fee to enable the LIV to administer the Scheme.

The total amount of \$105 will need to be paid by 31 May 2010.

9. How will the LIV Scheme work?

In principle, if proceedings are brought against an LIV member participating in the LIV Scheme (Participating Member) relating to occupational liability for damages arising from a single cause of action, and the Participating Member is able to show that –

- a. the Participating Member has an insurance policy insuring him or her against occupational liability to which the cause of action relates; and
- b. the amount payable under the insurance policy is not less than the amount of the relevant monetary ceiling specified in the LIV Scheme -

the Court, in awarding damages, will limit those damages to the relevant monetary ceiling specified in the LIV Scheme.

Please see clauses 3.1 and 3.2 of the LIV Scheme.

Therefore, the LIV Scheme does not affect the requirements to obtain insurance from the Legal Practitioners' Liability Committee (LPLC).

If the Participating Member is not able to satisfy the Court that he or she has the requisite insurance policy, or that the amount payable under his or her insurance policy is not less than the amount of the relevant monetary ceiling specified in the LIV Scheme, he or she will not be entitled to rely on the LIV Scheme to limit his liability for damages. There may be instances where the mandatory LPLC insurance policy (LPLC Policy) is not consistent with the LIV Scheme or the Act. In such circumstances, a Participating Member might not be able to rely on the LIV Scheme. This is further discussed below at question 13.

The LIV Scheme may also be challenged as specified in s16 of the Act.



10. What are the monetary ceilings for limitation of liability under the LIV Scheme?

The LIV Scheme will limit the occupational liability of Participating Members for damages arising from a single cause of action to an amount of \$2 million or \$10 million depending on the insurance policies, total revenue and the number of principals of the law practice of the Participating Member, and to the extent that liability can be limited under the Act.

The monetary ceilings under the LIV Scheme are as follows:

1. \$2 million cap

where a law practice consists of up to and including 20 principals and where the law practice generated total annual fee income for the financial year at the relevant time (which refers to a cause of action founded on an act or omission, specifically to the time of that act or omission) up to and including \$10 million; and

2. \$10 million cap

where a law practice consists of more than 20 principals or where the law practice generated a total annual fee income for the financial year at the relevant time (which refers to a cause of action founded on an act or omission, specifically to the time of that act or omission) greater than \$10 million.

Please see clause 3.3 of the LIV Scheme.

11. Is it possible for a higher monetary ceiling to be specified?

The LIV has discretionary authority, upon application by a Participating Member, to specify a higher maximum amount of liability than would otherwise apply in relation to a Participating Member, either in all cases or in any specified case or class of case.

Please see clause 4 of the LIV Scheme.

12. What type of liability can be limited under the LIV Scheme?

Pursuant to the Act, the LIV Scheme provides for limitation of occupational liability arising from a single cause of action. Occupational liability is defined in the Act as follows:

occupational liability means civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted to be done by a member of an occupational association acting in the performance of his or her occupation.

13. What type of liability cannot be limited under the LIV Scheme?

Whilst the LIV Scheme offers significant protection against claims above the level of compulsory professional indemnity insurance, the protection provided is not absolute.

It is important to note that there are a range of exclusions which might prevent reliance on the LIV Scheme to limit liability.

Exclusions under the Act

The Act (and, therefore, the LIV Scheme) does not apply to liability for damages arising from:

- the death of, or personal injury to, a person;
- the negligence of an Australian legal practitioner (as defined in the *Legal Profession Act 2004* (Vic)) in acting for a client in a personal injury claim;
- a breach of trust;
- fraud or dishonesty; or
- liability which may be the subject of proceedings under s110 of the *Transfer of Land Act 1958* (Vic).

The LIV recognises the difference in the Act, compared to the NSW professional standards legislation, relating to Australian legal practitioners acting for clients in personal injury claims. In November 2008, the LIV made a submission to the Victorian Attorney-General seeking the repeal of s5(1)(b) of the Act which specifies this exclusion.

View the [submission](#) (pdf)

The LIV, together with the Victorian Bar, continues to pursue the repeal of s5(1)(b) of the Act. A joint submission was made in December 2009 which can be viewed below.

View the [joint submission](#) (pdf)

The repeal of s5(1)(b) of the Act aims to ensure that Australian legal practitioners acting in personal injury matters will not be prevented from relying on the LIV Scheme in the event of a negligence claim.

Exclusions and limitations arising from the LPLC Insurance Policy

It is stated above that if the Participating Member is not able to satisfy the Court that he or she has the requisite insurance policy, or that the amount payable under his or her insurance policy is less than the amount of the relevant monetary ceiling specified in the LIV Scheme, he or she will not be entitled to rely on the LIV Scheme to limit his or her liability for damages.

Some of the instances where the mandatory LPLC Policy presents issues regarding the LIV Scheme and the Act are set out below.



Defence costs

Section 4(2) of the Act permits a defence costs inclusive insurance policy for the purposes of the Act, which may reduce the amount available to be paid to a claimant in respect of occupational liability covered by the policy. Section 28A of the Act makes it clear that this does not reduce the cap on the liability of a Participating Member to the claimant, and accordingly the Participating Member will continue to be liable to the claimant for the amount of any difference between the amount payable to the claimant under the LPLC Policy and the amount of the cap.

The LPLC Policy is a costs-inclusive scheme, meaning that the \$2 million cover provided by LPLC includes the defence and related costs of handling the claim as well as damages, up to a total of \$2 million.

In contrast, the LIV Scheme operates to cap damages only.

In the situation where liability is capped at \$2 million, this creates a potential shortfall equal to the value of defence costs that a law practice will be required to finance from its own resources, in order to complete a full payment to the claimant. Participating Members would therefore need to consider how this shortfall could be financed.

As an example, if a practice was subject to a claim that was capped at \$2 million under the LIV Scheme, but LPLC incurred \$250,000 in defending the claim, only \$1,750,000 would remain under the LPLC Policy for payment to the claimant. A law practice would therefore need to finance the shortfall of \$250,000.

Law practices could apply for 'top-up' insurance in respect of any potential shortfall. 'Top-up' insurance is not available from the LPLC, so law practices would need to enquire with insurance brokers such as Marsh Australia or Aon Australia regarding 'top-up' insurance.

Single cause of action

Clause 3.1 of the LIV Scheme seeks to limit the occupational liability of a Participating Member for damages arising from a 'single cause of action' to the relevant monetary ceiling specified in the LIV Scheme.

Clause 3 and clause 7 of the LPLC Policy are broad aggregation provisions which mean that a series of related acts or omissions or a series of related matters or transactions with the same act or omission will be regarded as 'one loss' under the LPLC Policy. This means that the LPLC Policy limit of \$2 million applies to 'one loss' which could include a number of different causes of action and be based on a number of different acts or omissions.

This may be problematic in respect of the LIV Scheme, as the LPLC Policy might pay out only one sum insured of \$2 million (less defence costs), but there could be a number of ceilings under the LIV Scheme relating to individual causes of action, so the ceiling under the LIV Scheme might be many multiples of the LPLC Policy limit.

However, Participating Members should note that:

- claims by a number of persons who have a joint interest in a cause of action are to be treated as a 'single claim' for the purposes of the Act, despite the fact that they may also have several interests; and
- two or more claims by the same person arising out of a single event against persons to whom the LIV Scheme applies and who are associated persons (that is, partners or employees of the same employer or in the relationship of employer and employee) are to be treated as a single claim for the purposes of the Act.

Insurance coverage does not apply

Clause 20 of the LPLC Policy specifies a number of exclusions where the LPLC will not pay the insured any sum under the LPLC Policy, for example, if a claim arises as a result of fraud or dishonesty.

Where an exclusion under the LPLC Policy applies, a practitioner will not be able to satisfy a court that they have the benefit of an insurance policy insuring the practitioner against the relevant liability, and the LIV Scheme will not apply.

Relevant time vs claims made

The LIV Scheme is intended to limit liability arising from an act or omission where a person was a Participating Member at the 'Relevant Time' – that is, the time of an act or omission occurring on which a cause of action is founded.

However, the LPLC Policy is written on a 'claims made' basis rather than an 'occurrence' basis. This means that the right to claim on the LPLC Policy only arises at the time of a claim being made against the practitioner, rather than at the time at which the cause of action giving rise to the claim occurred.

The result of this inconsistency is that, even though individuals might be participating in the LIV Scheme, claims made against them might relate to acts or omissions that took place some years ago, in some instances before the LIV Scheme was in place. In such circumstances, those individuals would not enjoy the benefit of the LIV Scheme.

Impact if there are LIV Scheme members and non members in a law practice

As noted above, if not all of the law practice's principals were LIV and LIV Scheme members at the Relevant Time, a principal without the benefit of the LIV Scheme might be able to bring a contribution claim against the other principals to contribute to the balance of any claim which exceeds the LPLC Policy limit.

Therefore, as stated above at question 6, for a law practice to have complete coverage under the LIV Scheme, all its principals and employee solicitors should be members of the LIV and the LIV Scheme at the Relevant Time. Also, employees who do not hold Australian practising certificates but are eligible to be Associate Members of the LIV are encouraged to take up such membership.



Policy amendments

The LPLC has the right to amend its LPLC Policy wording at the end of each LPLC Policy period (30 June of each year). If there are amendments, this may affect the operation of the LIV Scheme, which is intended to run for five years.

14. Will the LIV Scheme apply to all claims made after the LIV Scheme commencement date?

The LIV Scheme will only limit liability in respect of an act or omission that occurs while the LIV Scheme is in operation. This means that a Participating Member cannot rely on the LIV Scheme to limit liability arising from an act or omission that occurred before the LIV Scheme commenced.

15. Will the LIV Scheme be enforceable under Commonwealth laws?

The Commonwealth Government has a mechanism called 'prescription' for recognising and exempting schemes under the *Trade Practices Act 1974* (Cth), the *Corporations Act 2001* (Cth), and the *Australian Securities and Investment Commission Act 2001* (Cth). 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.

The LIV is seeking prescription of the LIV Scheme under Commonwealth law.

16. Is the LIV Scheme enforceable under the laws of other Australian states or territories?

The LIV Scheme will apply only in Victoria. This means that it will apply only to acts or omissions by Participating Members that occur in Victoria.

The LIV may apply for an amendment to the LIV 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 legislation. At present, there are mutual recognition provisions in the Victorian, New South Wales, Northern Territory, Australian Capital Territory and Queensland professional standards legislation. The professional standards legislation in South Australia, Western Australia and Tasmania does not contain mutual recognition provisions.

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

17. What should I tell my clients if I am participating in the LIV Scheme?

Under the Act, Participating Members will need to disclose their limited liability status.

The Act and the Regulations prescribe the following form of statement:

"Liability limited by a scheme approved under Professional Standards Legislation."

The statement must be printed in a size equal or greater than the face measurement of Times New Roman typeface in 8 point.

The PSC 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 table below is an extract from the PSC website.

Participating Members may also elect to display an optional PSC Cover of Excellence® logo. Use of the Cover of Excellence® symbol shows that the Participating Member

DOCUMENTS ON WHICH DISCLOSURE SHOULD APPEAR:

- 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.

DOCUMENTS NOT REQUIRING DISCLOSURE:

- advertisements in print media, directory listings and similar forms of promotion or advertising; and
- business cards.



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. Please see the Cover of Excellence Common Questions Answered information sheet.

View [Cover of Excellence Common Questions Answered information sheet](#) (pdf)

18. What if I do not notify my clients that I am participating in the LIV Scheme?

Non-disclosure is an offence under the Act.

Also, a Participating Member will not be able to rely on the LIV Scheme to limit his or her liability if before the time at which the act or omission giving rise to the cause of action occurred, the Participating Member did not –

- a. give, or cause to be given to the client a document that carried a disclosure statement; or
- b. otherwise inform the client, whether orally or in writing, that the Participating Member's liability was limited.

Disclaimer

The information in this Frequently Asked Questions document regarding the proposed Law Institute of Victoria Limitation of Liability Scheme is intended to be a general guide only. The information is not intended to constitute professional or legal advice, and you should rely on your own enquiries and assessment.

The Law Institute of Victoria expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this Frequently Asked Questions document. This document has been updated on 6 May 2010.



APPENDIX A – LIV SCHEME

LAW INSTITUTE OF VICTORIA LIMITED SCHEME

Professional Standards Act 2003 (Vic)

PREAMBLE

- A. The Law Institute of Victoria Limited (“the LIV”) is a voluntary occupational association for legal practitioners (solicitors) in Victoria.
- B. The LIV has made an application to the Professional Standards Council (“Council”), appointed under the *Professional Standards Act 2003 (Vic)* (“the Act”) for approval of a scheme under the Act, and this document comprises the scheme (“the Scheme”).
- C. The Scheme has been prepared by the LIV for the purposes of limiting Occupational Liability of Participating Members to the extent to which such liability may be limited under the Act.
- D. The Scheme is to apply to all Participating Members.
- E. The LIV has furnished the 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 Scheme is intended to remain in force for a period of five (5) years from its commencement, subject to s34 of the Act.
- G. The Scheme commences on 1 July 2010.

LAW INSTITUTE OF VICTORIA SCHEME

1. Preparation of the Scheme

- 1.1 This Scheme is a scheme under the Act prepared by the LIV, whose business address is 470 Bourke Street, Melbourne, Victoria.
- 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 2004 (Vic)*;
 - “Corporate Legal Practitioner” has the same meaning as it has in the *Legal Profession Act 2004 (Vic)*;
 - “Court” has the same meaning as it has in the Act;
 - “Damages” has the same meaning as it has in the Act;
 - “Financial Year” means a financial accounting period ending 30 June;
 - “Full Member” means a person within the category of full membership of the LIV as contemplated in the LIV’s constitution (as amended from time to time);

“Law Practice” has the same meaning as it has in the *Legal Profession Act 2004 (Vic)*;

“Occupational Liability” has the same meaning as it has in the Act¹;

“Participating Members” means those persons specified in clause 2.1 of the Scheme;

“Principal” has the same meaning as it has in the *Legal Profession Act 2004 (Vic)*;

“Relevant Time” refers to a cause of action founded on an act or omission, specifically to the time of that act or omission occurring; and

“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. Persons to whom the Scheme applies

- 2.1 The Scheme applies to:
 - 2.1.1 Full Members who hold a current Australian Practising Certificate who are not excluded or exempted under clauses 2.2 or 2.3 of the Scheme;
 - 2.1.2. all persons to whom, by virtue of ss20, 21 or 22 of the Act², the Scheme applies;
 - 2.1.3 all persons to whom clause 2.1.1 applied at the Relevant Time but no longer applies;
 - 2.1.4 all persons to whom clause 2.1.2 applied at the Relevant Time but no longer applies.
- 2.2 A person referred to in clause 2.1 does not include a Corporate Legal Practitioner.
- 2.3 A person referred to in clause 2.1 may, on application, be exempted from participation in the Scheme by the LIV. This clause does not apply to persons to whom the Scheme applies by virtue of ss20 or 21 of the Act.

3. Limitation of liability

- 3.1. The Scheme limits the Occupational Liability of a Participating Member for Damages³:
 - 3.1.1 arising from a single cause of action founded on the act or omission; and
 - 3.1.2. to the extent those Damages exceed \$2 million for Participating Members in Class 1 of the table in clause 3.3, or as the case may be, \$10 million for Participating Members in Class 2 of the table in clause 3.3.



- 3.2. If a Participating Member against whom a proceeding relating to Occupational Liability is brought is able to satisfy the Court that –
- 3.2.1 the Participating Member has the benefit of an insurance policy or policies described in the fourth column of the table in clause 3.3 insuring him or her against the Occupational Liability to which the cause of action relates; and
 - 3.2.2 the amount payable under the policy or policies in respect of that Occupational Liability⁴ is not less than the amount of the monetary ceiling (maximum amount of liability) specified in the third column of the table in clause 3.3 as applying to such Participating Member to which the cause of action relates –
- the Participating Member is not liable in Damages in relation to that cause of action above the amount of that monetary ceiling.
- 3.3 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 table below.

4. Conferral of discretionary authority

- 4.1 The LIV has discretionary authority, on application by a Participating Member, to specify in relation to the 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 in any specified case or class of case.
- 4.2 If, in the exercise of its discretion under clause 4.1, the LIV 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.

5. Duration

- 5.1. Subject to s34 of the Act, the Scheme will remain in force for a period of 5 years from the date of its commencement. The date of the Scheme’s commencement is 1 July 2010.

CLASS	DESCRIPTION	MONETARY CEILING	DESCRIPTION OF POLICY OR POLICIES FOR CLAUSE 3.2
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 generated Total Annual Fee Income for the Financial Year at the Relevant Time up to and including \$10 million.	\$2 million	An insurance policy or policies that provide(s) coverage of \$2 million whether inclusive or exclusive of defence costs.
2	<ul style="list-style-type: none"> 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 generated Total Annual Fee Income for the Financial Year at the Relevant Time greater than \$10 million 	\$10 million	An insurance policy or policies that provide(s) coverage of \$10 million, whether inclusive or exclusive of defence costs.

1. 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, any negligence or other fault of an Australian legal practitioner in acting for a client in a personal injury claim; 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 s110 of the *Transfer of Land Act 1958* (Vic).

2. Sections 20 and 21 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 of a person, and if the Scheme applies to a person, the Scheme also applies to each employee of that person, provided that if such officer of the corporation or partner of the person or employee of the person is entitled to be a member of the same occupational association, such officer, partner or employee is a member of the occupational association. Section 22 provides that the Scheme also applies to other persons prescribed by the regulations for the purposes of s 31(4) as being associated with persons to whom a scheme applies.

3. Damages as defined in s4 of the Act means:

- a. damages awarded in respect of a claim or counter-claim or by way of set-off; or
- 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); or
- c. any interest payable on the amount of those damages or costs.

4. Section 4(2) 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 s 28A of the Act and its note, which has the effect that s 4(2) does not reduce the cap on the liability of the Participating Member to the client.

