

Policy Statement on Disclosure of Limited Liability

This policy statement provides guidance for persons subject to a professional standards scheme to meet their obligations to disclose limited liability. It addresses the following questions:

What does the Act say on disclosure?
Why disclose?
Who should disclose?
What form should the disclosure take?
On what should I disclose?
What if I don't disclose?

This is a statement of the Council's observations and policy and is not a substitute for obtaining separate legal advice.

We welcome any feedback about this document. If you have any comments or queries about this policy, please contact the secretariat

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1. Legislative Requirements

1.1 The *Professional Standards Act 1994* (NSW) ("the Act") provides for the limiting of occupational liability of professionals and other occupational groups under schemes approved by the Professional Standards Council ("Schemes").

1.2 The object of Schemes is to limit the civil liability of professionals and other occupational groups, improve occupational standards and protect consumers. A solicitor, accountant or other practitioner is liable for unlimited damages under the general law. However a practitioner to whom a scheme applies has limited liability to an amount specified in an approved scheme.

1.3 The *Professional Standards Act 1994* (NSW) has the following provision:

33 Notification of limitation of liability

(1) If a person's occupational liability is limited in accordance with this Part, all documents given by the person to a client or prospective client that promote or advertise the person or person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation and similar documents, must carry a statement to that effect.

(2) A person who contravenes this section is guilty of an offence.

Maximum penalty: 50 penalty units.

(3) The regulations may prescribe a form of statement for the purposes of this section.

(4) A person does not commit an offence against this section if the statement carried on the person's documents is in the prescribed form.

(5) In this section, a reference to a document does not include a reference to a business card.

2. Purpose of making a disclosure

2.1 It is important that clients and prospective clients are aware that the liability under the general law of their service provider or prospective service provider has been replaced with limited liability. The object of the disclosure requirement is to inform clients and prospective clients that the liability of the service provider profession is limited. The requirements provide a mechanism to systematically inform clients. The Acts require a person whose occupational liability is so limited to notify that fact on all documents and other material provided by the person to a client or prospective client that promote or advertise the person or a person's occupation.

3. Who should disclose?

3.1 A scheme applies to the members of an occupational association. It is most common that such associations have individuals as members but some associations do have firms as members. A scheme also applies to directors, officers, partners and employees of those members. Sole practitioners, partnerships and incorporated firms whose liability is limited by a scheme must disclose their limited liability on their documents.

3.2 There may arise instances where a scheme does not apply to a firm but does apply to its principals or employees as individual members of the association. In these circumstances, it would be prudent for members to seek independent legal advice as to appropriate disclosure under the relevant Act.

4. What should be disclosed?

4.1 The disclosure statement should be adequate to reveal to its audience that the liability of the service provider is limited.

4.2 The Regulation prescribes such a form of statement, as:

“Liability limited by a scheme approved under *Professional Standards Legislation*.”

5. Size of disclosure statement

5.1 If the disclosure cannot readily be noticed by a client, then the client would not be informed and the object of the provision would not have been fulfilled. Accordingly, the legislation prescribes a statement printed in a size not less than the face measurement of Times New Roman typeface in 8 point.

6. Documents affected

6.1 A disclosure statement is to appear on all documents given by the person to whom a scheme applies to a client or prospective client that promote or advertise the person or person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation.

6.2 Some documents are addressed to clients and prospective clients (such as letters, technical drawings, etc.), but others come to the attention of a wider audience (for example newsletters, promotional brochures, websites, etc).

6.3 As a minimum, the disclosure should appear on:

- letterhead, and business correspondence generally
- fax cover sheets
- documents such as written advice, plans, drawings, specifications and other documents produced by the service provider for clients, especially where those documents are not accompanied by a letter or other document on which appears a disclosure statement when

given to a client

- newsletters and other publications
- memorandum of fees and invoices, especially where those documents are not accompanied by a letter or other document on which appears a disclosure statement when given to a client
- email
- websites that promote or advertise the person or the person's occupation.

6.4 **Business cards** are specifically exempted from carrying words of disclosure.
Section 33 (5) Professional Standards Act 1994 (NSW)

6.5. Foreign Jurisdictions:

6.5.1 Where a practitioner commonly practices in one jurisdiction, but occasionally practices in other jurisdictions, and the practitioner is subject to a scheme in some but not all jurisdictions in which he practices, there arises an issue of appropriate disclosure. Practitioners must ensure disclosure is made where work is carried out in a jurisdiction where the practitioner is a member of a scheme.

6.5.2 Options available are:

- (i) Have multiple sets of letterhead, or
- (ii) Stamp the disclosure statement on communications to clients in cases where a Scheme applies in the jurisdiction where the work is carried out, or
- (iii) Include a statement on all communications to all clients to the effect that liability is limited by a Scheme approved under professional standards legislation in respect of matters arising within (insert relevant jurisdiction).

6.6 Disclosure need not appear in advertisements in print media, directory listings and similar forms of promotion or advertising.

6.7 Electronic documents

6.7.1 A form of disclosure on electronic transmissions may be warranted, particularly where the transmission may be interpreted by a client or prospective client as an official document. The disclosure should be included in the digital communication formats such as a practitioner's email to clients and prospective clients.

7. Contracts predating the Scheme

7.1 For contracts predating the scheme commencing to apply to a person, the practitioner should specifically and immediately notify the client of the practitioner's newly acquired limited liability status.

8. Consequences of non-disclosure

8.1 It is an offence not to disclose. If in doubt, practitioners should obtain legal advice on the possible consequences of their failure to comply with the disclosure provisions.

8.2 A Scheme limits liability only in respect of causes of action arising from acts or omissions occurring during the period when the Scheme is in force.

9. Summary

The disclosure should:

9.1 Be sufficiently prominent on a practitioner's business documents so that there is a reasonable prospect it will come to the attention of the intended audience, in a size not less

than Times New Roman typeface in 8 point.

9.2 State the authority for limited the practitioner's liability by referring to the relevant Scheme and the relevant state legislation.

9.3 Be included in digital communication formats such as a practitioner's email to clients and prospective clients, and websites.

9.4 Appear on brochures and similar promotional material of the practitioner, but need not appear on business cards, in advertisements in print media, directory listings or similar forms of promotion or advertising.