



New South Wales

Legal Profession Amendment (Professional Indemnity Insurance) Bill 2001

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Legal Profession Act 1987* as follows:

- (a) to require payments to be made from the Indemnity Fund for the purpose of satisfying the obligations of HIH Casualty and General Insurance Limited (**HIH**), or any other member of the HIH group, under an approved professional indemnity insurance policy,
- (b) to allow payments to be made from the Indemnity Fund for the purpose of satisfying the obligations of any other defaulting insurer under an approved professional indemnity insurance policy,
- (c) to allow the Attorney General to obtain advice as to the state and sufficiency of the Indemnity Fund, and other matters relating to the Indemnity Fund, from an independent investigator,

- (d) to allow the company responsible for the management of the Indemnity Fund to require different contributions to be paid to the Indemnity Fund by particular solicitors or classes of solicitors,
- (e) to require certain indemnity arrangements to be made in respect of insurable solicitors if the duration of current practising certificates held by insurable solicitors is extended beyond 30 June 2001, and to extend the regulation-making powers conferred by the Act in connection with any change made to the duration of practising certificates,
- (f) to make other amendments of a minor, consequential or ancillary nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on 30 June 2001.

Clause 3 is a formal provision giving effect to the amendments to the *Legal Profession Act 1987* set out in Schedule 1.

Schedule 1 Amendments

Arrangements relating to HIIH group and other defaulting insurers

At present, the Law Society Council cannot issue or renew a practising certificate of an insurable solicitor unless there is or will be in force in respect of the solicitor an insurance policy of a kind approved by the Attorney General. The Indemnity Fund may be used to pay the premiums in respect of that insurance policy and to “top up” the coverage provided by that insurance policy (that is, to meet the difference between the indemnity provided by the policy and the liability of any person insured under it). Insurable solicitors are required to make contributions to the Indemnity Fund.

HIIH was the approved insurer in respect of the professional indemnity insurance policy that applied to solicitors for the period from 1 July 1998 to immediately before 1 July 2001. HIIH, and other members of the HIIH group, were approved insurers under policies that had effect before 1 July 1998. A provisional liquidator was appointed in respect of members of the HIIH group on 15 March 2001.

The amendments will require the Indemnity Fund to be used for the purpose of indemnifying persons who are insured under an HIIH group insurance policy, to the extent of the indemnity provided by the insurance policy.

Payments from the Indemnity Fund will result in the company that manages the Indemnity Fund being subrogated to the rights and remedies of the insured person under the approved insurance policy in connection with the subject matter of the payment.

The company that manages the Indemnity Fund will be able to enter into agreements with an HIH group member (including with a liquidator or provisional liquidator), and an insured person, in connection with the making of payments from the Indemnity Fund.

The company will be able to require the persons insured under an HIH group policy, or formerly insured under such a policy, to pay a special annual contribution or levy to the Indemnity Fund so as to ensure that it is sufficient to meet the obligations provided for by the amendments.

The amendments will also allow the Indemnity Fund to be used, in accordance with arrangements approved from time to time by the Attorney General, for the purpose of indemnifying persons who are insured under an insurance policy that was issued or renewed by a defaulting insurer. An insurer will be considered to be a defaulting insurer if the company is satisfied that:

- (a) the insurer is unwilling or unable to meet any claims or other liabilities under the approved insurance policy, or
- (b) a liquidator or provisional liquidator has been appointed in respect of the insurer, or
- (c) the insurer has been dissolved.

See **Schedule 1 [8]** and **[12]**. **Schedule 1 [1], [4], [5], [13]** and **[15]** are consequential amendments.

Independent investigation of Indemnity Fund

The amendments will allow the Attorney General to appoint an appropriately qualified person to conduct an investigation into the state and sufficiency of the Indemnity Fund, and other matters relating to the Indemnity Fund. The investigator will have power to require information or other records in connection with the investigation. A report is to be made to the Attorney General following the investigation. The reasonable costs of the investigation are payable from the Indemnity Fund.

See **Schedule 1 [7]** and **[14]**.

Contributions to Indemnity Fund

At present, the company that manages the Indemnity Fund determines the contributions payable to the Indemnity Fund by insurable solicitors. The company may make different determinations in respect of particular classes of solicitors. The amendments will allow the company to make a different determination in respect of a particular solicitor (or class of solicitors).

See **Schedule 1 [9]**.

Arrangements relating to extensions of practising certificates

Section 36 of the Act provides that practising certificates are to be renewed on 1 July each year or another date specified by the regulations. The amendments contain transitional arrangements that will have effect if a regulation is made that specifies another date (that is, a date other than 1 July) for the renewal of practising certificates held by insurable solicitors.

The purpose of the amendments is to ensure that, if the duration of current practising certificates is extended as a result of such a change to the renewal date, suitable indemnity arrangements are made in respect of insurable solicitors for the extension period. The Law Society will not be able to issue a practising certificate to an insurable solicitor that will be in force for the next practising period (or any part of that period) unless suitable indemnity arrangements have been made in respect of the extension period (that is, unless an approved insurance policy has effect in relation to the extension period or solicitors will be indemnified under an agreement entered into with the Attorney General to use the Indemnity Fund for that purpose). The agreement with the Attorney General must include requirements as to the contributions and other levies payable to the Indemnity Fund, so as to ensure that the Indemnity Fund is sufficient to meet the purposes for which it may be used.

The amendments to section 36 will also authorise the regulations:

- (a) to specify the period in which renewed practising certificates remain in force, and
- (b) to make other savings and transitional provisions consequent on a change being made to the renewal date for practising certificates.

See **Schedule 1 [2]**, **[3]** and **[16]**. **Schedule 1 [6]** is a consequential amendment. **Schedule 1 [18]** contains transitional provisions.

Other amendments

An amendment is also made to section 45 of the Act for the purposes of law revision. Section 45 provides for the payment of annual contributions to the Indemnity Fund by insurable solicitors. The amendment takes account of the fact that regulations under section 36 may change the annual date for renewal of practising certificates from 1 July to some other date. See **Schedule 1 [10]** and **[11]**.

The amendments allow savings and transitional regulations to be made as a consequence of the proposed Act. See **Schedule 1 [17]**.

First print



New South Wales

Legal Profession Amendment (Professional Indemnity Insurance) Bill 2001

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Legal Profession Act 1987 No 109	2
Schedule 1 Amendments	3



New South Wales

Legal Profession Amendment (Professional Indemnity Insurance) Bill 2001

No. , 2001

A Bill for

An Act to amend the *Legal Profession Act 1987* to make further provision in connection with solicitors' professional indemnity insurance and the use of the Solicitors' Mutual Indemnity Fund; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Legal Profession Amendment (Professional Indemnity Insurance) Act 2001</i> .	3 4
2 Commencement	5
This Act commences, or is taken to have commenced, on 30 June 2001.	6 7
3 Amendment of Legal Profession Act 1987 No 109	8
The <i>Legal Profession Act 1987</i> is amended as set out in Schedule 1.	9

Schedule 1 Amendments

	1
(Section 3)	2
[1] Section 31 Non-payment of contributions and levies by solicitors in respect of Indemnity Fund or Fidelity Fund	3 4
Insert “, 46A” after “46” in section 31 (c).	5
[2] Section 36 Duration of practising certificates	6
Insert “or for such other period as may be specified by the regulations” after “12 months” in section 36 (1).	7 8
[3] Section 36 (5)	9
Omit the subsection. Insert instead:	10
(5) The regulations may contain savings and transitional provisions consequent on a change in the relevant date. In particular, the regulations may:	11 12 13
(a) specify the period for which practising certificates in force when the change is made are to remain in force, and	14 15 16
(b) specify the period for which practising certificates that take effect on the new relevant date are to remain in force, and	17 18 19
(c) modify the application of section 45 in respect of contributions payable in respect of any such certificates.	20 21
(6) Schedule 2A has effect.	22
[4] Section 39 Definitions	23
Insert in alphabetical order:	24
<i>HIH group member</i> means:	25
(a) HIH Casualty and General Insurance Limited, FAI General Insurance Company Limited or CIC Insurance Limited, or	26 27 28

(b) any corporation that is, with respect to one of the corporations referred to in paragraph (a), a related body corporate (within the meaning of the *Corporations Law*).

insured person means a person who is insured under an approved insurance policy.

[5] Section 41 Solicitor to be insured and to make contributions 7

Omit “section 45 or 46” from section 41 (1) (b). 8

Insert instead “section 45, 46 or 46A”. 9

[6] Section 41 (1), note 10

Insert after section 41 (1): 11

Note. See Schedule 2A, which qualifies the above arrangements, but only in relation to 2001–2002. 12
13

[7] Section 44 Payments from the Indemnity Fund 14

Insert after section 44 (1): 15

(1A) The company is required to pay from the Indemnity Fund the costs of an investigation of the Indemnity Fund, as referred to in section 47AA, in accordance with a direction given by the Attorney General under that section. 16
17
18
19

[8] Sections 44A and 44B 20

Insert after section 44: 21

44A Payments relating to HIH group insurance policies 22

(1) Payments must be made by the company from the Indemnity Fund for the purpose of indemnifying any person who is insured under an approved insurance policy that was issued or renewed by an HIH group member, to the extent of the indemnity provided by the approved insurance policy. 23
24
25
26
27

Note. HIH Casualty and General Insurance Limited (HIH) was the insurer under the approved insurance policy for the period from 1 July 1998 to 1 July 2001. HIH, together with other HIH group members, were also insurers under approved policies that pre-date that period. A provisional liquidator was appointed in respect of the HIH and other HIH group members on 15 March 2001. 28
29
30
31
32
33

-
- (2) On the making of such a payment from the Indemnity Fund, the company is subrogated to the rights and remedies of the insured person under the approved insurance policy, in connection with the subject matter of the payment, subject to the terms of any agreement entered into under this section. 1
2
3
4
5
- (3) Subsection (2) extends, but is not limited to, a right or remedy against any of the following: 6
7
- (a) an HIIH group member, 8
 - (b) any insurer or re-insurer of an HIIH group member, 9
 - (c) any person who, under any Act or other law, is liable for a failure of an HIIH group member to satisfy its obligations under or in connection with an approved insurance policy. 10
11
12
13
- (4) The company may exercise its rights and remedies under this section in its own name or in the name of an insured person. 14
15
- (5) If the company exercises its rights and remedies under this section in the name of an insured person, the company is to indemnify the insured person against any liability incurred by the insured person as a result of the exercise of those rights and remedies. 16
17
18
19
20
- (6) The Law Society and the company may enter into an agreement with an HIIH group member (including a provisional liquidator or liquidator of an HIIH group member), or with any insured person, in connection with the payment of amounts from the Indemnity Fund under this section. 21
22
23
24
25
- (7) In particular, any such agreement may provide for the following: 26
27
- (a) the assignment or subrogation to the company of the rights and remedies of an HIIH group member or the insured person (or both) under or in connection with the approved insurance policy, 28
29
30
31
 - (b) the recovery by the company from an HIIH group member of any amount paid from the Indemnity Fund under this section. 32
33
34

- (8) Any payment made from the Indemnity Fund under this section, and any agreement entered into with an insured person under this section, does not prevent the recovery by the company from an HIH group member of any amount that would have been recoverable by the insured person under or in connection with the approved insurance policy had the payment not been made or the agreement not been entered into. 1
2
3
4
5
6
7
- (9) Any amount recovered by the company as a result of the exercise of its functions under this section (including its functions under a subrogation or agreement referred to in this section) is to be paid into the Indemnity Fund. This does not apply to any amount that is payable to another person: 8
9
10
11
12
- (a) under any other Act or law, or 13
- (b) under any agreement referred to in this section, or 14
- (c) under the regulations. 15
- (10) Payments may be made from the Indemnity Fund for the purpose of meeting any reasonable costs and expenses incurred by the company in exercising its functions under this section, including its functions under a subrogation or agreement referred to in this section. 16
17
18
19
20
- 44B Payments relating to other defaulting insurers** 21
- (1) Payments may be made by the company from the Indemnity Fund for the purpose of indemnifying any person who is insured under an approved insurance policy that was issued or renewed by a defaulting insurer, in accordance with arrangements approved from time to time by the Attorney General. 22
23
24
25
26
27
- (2) The Law Society and the company may enter into an agreement with a defaulting insurer (including a provisional liquidator or liquidator of a defaulting insurer), or with any insured person, in connection with the payment of amounts from the Indemnity Fund under this section. 28
29
30
31
32

-
- (3) In particular, any such agreement may provide for the following:
- (a) the assignment or subrogation to the company of the rights and remedies of a defaulting insurer or the insured person (or both) under or in connection with the approved insurance policy,
 - (b) the recovery by the company from a defaulting insurer of any amount paid from the Indemnity Fund under this section.
- (4) Any payment made from the Indemnity Fund under this section, and any agreement entered into with an insured person under this section, does not prevent the recovery by the company from a defaulting insurer of any amount that would have been recoverable by the insured person under or in connection with the approved insurance policy had the payment not been made or the agreement not been entered into.
- (5) Any amount recovered by the company as a result of the exercise of its functions under this section (including its functions under an agreement referred to in this section) is to be paid into the Indemnity Fund. This does not apply to any amount that is payable to another person:
- (a) under any other Act or law, or
 - (b) under any agreement referred to in this section, or
 - (c) under the regulations.
- (6) Payments may be made from the Indemnity Fund for the purpose of meeting any reasonable costs and expenses incurred by the company in exercising its functions under this section, including its functions under an agreement referred to in this section.
- (7) For the purposes of this section, an insurer under an approved insurance policy is a **defaulting insurer** if the company is satisfied that:
- (a) the insurer is unwilling or unable to meet any claims or other liabilities under the approved insurance policy, or
 - (b) a liquidator or provisional liquidator has been appointed in respect of the insurer, or
 - (c) the insurer has been dissolved.

[9] Section 45 Contributions	1
Omit section 45 (2). Insert instead:	2
(2) The company may make a different determination under subsection (1) for a particular solicitor or class of solicitors.	3 4
[10] Section 45 (3)	5
Omit “1 July”. Insert instead “the relevant date”.	6
[11] Section 45 (6)	7
Insert after section 45 (5):	8
(6) In this section, <i>the relevant date</i> means 1 July or another relevant date specified by the regulations under section 36.	9 10
[12] Section 46A	11
Insert after section 46:	12
46A Special contributions and levies: HIH liabilities	13
(1) The company may, for the purposes of ensuring that the Indemnity Fund, or any part of the Indemnity Fund, is sufficient to meet the purposes for which it may be used under section 44A:	14 15 16 17
(a) require any insurable solicitor who is or was insured under an approved insurance policy issued or renewed by an HIH group member to pay a special annual contribution to the Indemnity Fund, or	18 19 20 21
(b) require any solicitor or former solicitor who is or was insured under an approved insurance policy issued or renewed by an HIH group member to pay a special levy to the Indemnity Fund.	22 23 24 25
(2) Any such special annual contribution or levy is to be of an amount determined by the company and approved by the Law Society Council.	26 27 28
(3) The company may make a different determination under subsection (2) in relation to particular classes of solicitors or former solicitors.	29 30 31

(4) The special annual contribution or levy is to be paid within the time and in the manner specified by the company by notice in writing to the solicitor or former solicitor concerned.	1 2 3
(5) A special annual contribution or levy that is payable under this section:	4 5
(a) is to be paid to the company on account of the Indemnity Fund, and	6 7
(b) is recoverable by the company as a debt in a court of competent jurisdiction, and	8 9
(c) if payable by an insurable solicitor, is payable in addition to any contribution or levy that is payable under section 45 or 46.	10 11 12
[13] Section 47 Failure to pay contribution or levy	13
Omit “this Division”. Insert instead “section 45, 46 or 46A”.	14
[14] Sections 47AA and 47AB	15
Insert after section 47:	16
47AA Investigation of Indemnity Fund	17
(1) The Attorney General may at any time appoint an appropriately qualified person to conduct an investigation in relation to the Indemnity Fund, including in relation to any of the following:	18 19 20
(a) the state and sufficiency of the Indemnity Fund,	21
(b) the adequacy of the amount or rate of any contributions or levies paid or payable under this Division,	22 23
(c) the management of the Indemnity Fund by the company, and the adequacy of the investment strategies being adopted by the company,	24 25 26
(d) such other matters relating to the Indemnity Fund as the Attorney General determines.	27 28
(2) The company is to provide all reasonable assistance to the person appointed to conduct the investigation.	29 30
(3) The person appointed to conduct the investigation is to report to the Attorney General on the result of the investigation.	31 32

(4) The Attorney General may, by notice in writing served on the company, require the company to pay from the Indemnity Fund the costs of the investigation.	1 2 3
(5) For the purposes of subsection (4), the <i>costs of the investigation</i> means:	4 5
(a) the reasonable costs and expenses incurred in connection with the investigation by the person appointed to conduct the investigation, and	6 7 8
(b) the reasonable cost of any remuneration paid to that person in connection with the investigation.	9 10
47AB Powers of investigators	11
(1) For the purpose of conducting an investigation under section 47AA, an investigator may, by notice in writing served on any person, require the person to provide to the investigator such information or records relating to the Indemnity Fund or the company's management of the Indemnity Fund as the investigator specifies in the notice.	12 13 14 15 16 17
(2) The notice must specify the manner in which information or records are required to be provided and a reasonable time by which the information or records are required to be provided.	18 19 20
(3) A person who, without reasonable excuse, neglects or fails to comply with a requirement made of the person under this section is guilty of an offence.	21 22 23
Maximum penalty: 100 penalty units.	24
(4) A person who provides any information in purported compliance with a requirement made under this section, knowing that it is false or misleading in a material particular, is guilty of an offence.	25 26 27 28
Maximum penalty: 100 penalty units.	29
(5) In this section:	30
<i>investigator</i> means a person appointed by the Attorney General under section 47AA to conduct an investigation in relation to the Indemnity Fund.	31 32 33

[15] Section 48 Application of Division to other persons	1
Insert “, 46A” after “sections 41”.	2
[16] Schedule 2A	3
Insert after Schedule 2:	4
 Schedule 2A Extension of practising certificates in 2001–2002	5
 <p style="text-align: right;">(Section 36 (6))</p>	6 7
 1 Application	8
(1) This Schedule has effect if a regulation is made under section 36 (4) (b) that specifies another date (other than 1 July) as the common date for the duration of any practising certificates held by insurable solicitors immediately before 1 July 2001.	9 10 11 12 13
(2) This Schedule applies only if the date so specified is a date within the period from 1 July 2001 to immediately before 1 July 2002.	14 15 16
(3) For avoidance of doubt, this Schedule applies even if more than one regulation is made under section 36 (4) (b) in relation to the duration of the practising certificates referred to in subclause (1).	17 18 19 20
 2 Definitions	21
(1) In this Schedule:	22
<i>extension period</i> means the period from 1 July 2001 to immediately before the relevant date.	23 24
<i>indemnity agreement</i> means an agreement entered into under clause 4.	25 26
<i>next practising period</i> means the period during which practising certificates that take effect on the relevant date will remain in force.	27 28 29

- professional liability claim*** means a claim against a solicitor or former solicitor: 1
2
- (a) relating to any civil liability that arises in connection with: 3
 - (i) the solicitor's practice or former solicitor's practice or former practice, or 4
5
6
 - (ii) the solicitor's or former solicitor's administration of any trust or deceased estate of which the solicitor or former solicitor is or was a trustee or executor, or 7
8
9
10
 - (b) of a kind that is generally covered by a policy of indemnity insurance referred to in section 41. 11
12

relevant date means any date specified in a regulation made under section 36 (4) (b) as the common date for the duration of any practising certificates held by insurable solicitors immediately before 1 July 2001. 13
14
15
16

- (2) Other expressions used in this Schedule have the same meanings as they have in Division 2 of Part 3. 17
18

3 Practising certificate may be issued in 2001–2002 only if indemnity arrangements are in place 19
20

- (1) The Law Society Council must not issue a practising certificate to an insurable solicitor that will be in force during the next practising period or any part of that period unless subclause (2) or (3) applies. 21
22
23
24
- (2) The Law Society Council may issue the practising certificate if it is satisfied that: 25
26
 - (a) there is or will be in force with respect to the solicitor an approved insurance policy, and 27
28
 - (b) the indemnity insurance provided by the policy extends to professional liability claims made against the solicitor during the extension period (unless the solicitor was not an insurable solicitor during the extension period). 29
30
31
32
- (3) The Law Society Council may issue the practising certificate if: 33
 - (a) it is satisfied that there is, or will be, in force with respect to the solicitor an approved insurance policy, and 34
35
36

(b)	an indemnity agreement has been entered into, and the indemnity agreement provides for the use of the Indemnity Fund for the purposes of indemnifying solicitors or former solicitors against any professional liability claims made during the extension period.	1 2 3 4 5
(4)	This clause applies despite section 41 (1) (a).	6
(5)	This clause ceases to have effect on 1 July 2002.	7
4	Indemnity agreement	8
(1)	The Law Society and the company may enter into an agreement with the Attorney General relating to the use of the Indemnity Fund for the purposes of indemnifying solicitors or former solicitors against professional liability claims made during the extension period.	9 10 11 12 13
(2)	Payments are to be made by the company from the Indemnity Fund, for the purpose of indemnifying solicitors or former solicitors against any professional liability claims made during the extension period, in accordance with the terms of that agreement.	14 15 16 17 18
(3)	Without limiting subclause (1), the terms of the agreement must include requirements relating to the contributions or levies to be paid by insurable solicitors to the Indemnity Fund, for the purpose of ensuring that:	19 20 21 22
(a)	the Indemnity Fund is sufficient to meet the purposes for which it may be used under this Schedule, and	23 24
(b)	the use of the Indemnity Fund for those purposes does not affect the sufficiency of the Indemnity Fund to meet the other purposes for which it may be used or is required to be used under Division 2 of Part 3.	25 26 27 28
(4)	The company is required to determine the annual contribution payable by insurable solicitors under section 45 for the next practising period in accordance with any terms of the agreement that relate to contributions to be paid to the Indemnity Fund by insurable solicitors. The approval of the Law Society Council is not required if that determination is made in accordance with the terms of the agreement (despite section 45).	29 30 31 32 33 34 35 36

(5) The company is required to impose a levy on insurable solicitors under section 46 in accordance with any terms of the agreement that relate to levies to be paid to the Indemnity Fund by insurable solicitors.	1 2 3 4
(6) In such a case, the company is also required to determine the levy, and the time and manner of its payment, in accordance with the terms of the agreement.	5 6 7
(7) Nothing in this clause limits the other purposes for which the Indemnity Fund may be used under Division 2 of Part 3.	8 9
[17] Schedule 8 Savings, transitional and other provisions	10
Insert at the end of clause 1A (1):	11
<i>Legal Profession Amendment (Professional Indemnity Insurance) Act 2001</i>	12 13
[18] Schedule 8	14
Insert at the end of Schedule 8 (with appropriate Part and clause numbering):	15 16
Part Provisions consequent on enactment of Legal Profession Amendment (Professional Indemnity Insurance) Act 2001	17 18 19
Amendments to section 36	20
A reference in section 36 (5), as substituted by the <i>Legal Profession Amendment (Professional Indemnity Insurance) Act 2001</i> , to a change in the relevant date includes a change in the relevant date that was made before the substitution of that subsection.	21 22 23 24 25

Indemnity arrangements for 2001–2002

An indemnity agreement referred to in Schedule 2A may be entered into on or after the commencement of that Schedule and may have effect in relation to the whole of the extension period (within the meaning of that Schedule), even if entered into after the commencement of the extension period.

1
2
3
4
5
6