

**NOTIFICATION OF AN INSTRUMENT AMENDING A SCHEME
AND OF A SCHEME**

Professional Standards Act 1994 (NSW)

Notification is hereby given pursuant to Section 8 of the *Professional Standards Act 1994 (NSW)* of an Instrument amending a Scheme (“the Instrument”), and of a Scheme to operate in New South Wales, the Australian Capital Territory, the Northern Territory of Australia, Queensland, South Australia, Tasmania, Victoria and Western Australia, prepared by the New South Wales Bar Association (“the Bar”) of Selborne Chambers, 174 Phillip Street, Sydney NSW 2000.

The Instrument is intended to amend the New South Wales Bar Association Scheme (“the Scheme”), currently operating in New South Wales, the Australian Capital Territory, the Northern Territory, Queensland, South Australia, Victoria and Western Australia, by extending its operation to Tasmania.

The Scheme:

1. applies to all members of the Bar who hold a NSW barrister’s practising certificate issued by the Bar and who have the requisite professional indemnity insurance, without exemption;
2. limits the occupational liability of participants to \$1,500,000; and
3. requires that participating members have insurance for occupational liability of an amount not less than the amount of their limited liability.

The Instrument and the Scheme as amended will commence in New South Wales two months after publication in the *Government Gazette*, and will commence in other jurisdictions pursuant to the provisions of their respective professional standards legislation. The Scheme as amended may remain in force until 30 June 2020.

A copy of the Instrument and the Scheme as amended may be obtained from, or inspected at, the office or website of the Professional Standards Councils.

Before approving the Instrument or the Scheme, the Council hereby invites comments and submissions, to be made in writing and to be received by the Executive Director, Professional Standards Authority, within 28 days after the publication of this notice.

The Professional Standards Authority is located at Level 2, St James Centre, 111 Elizabeth St, Sydney, NSW, 2000.

Website: www.psc.gov.au

Email: pscinfo@psc.gov.au

Telephone: 1300 555 772 / (02) 8315 0800.

Comments and submissions received will be public unless confidentiality is specifically requested, and will be subject to the *Government Information (Public Access) Act 2009 (NSW)*.

Professional Standards Council

The New South Wales Bar Association Scheme

Professional Standards Act 1994 (NSW)

Instrument Amending the New South Wales Bar Association Scheme

PREAMBLE

- A. The New South Wales Bar Association (ACN 000 033 652) is an Occupational Association and Australian Public Company, Limited by Guarantee.
- B. The New South Wales Bar Association Scheme (the Scheme) commenced on 1 July 2015.
- C. This instrument of amendment is prepared by the New South Wales Bar Association for the purposes of amending its scheme to allow for mutual recognition of its scheme in Tasmania.

AMENDMENT TO THE SCHEME

1. This instrument to amend the New South Wales Bar Association Scheme is prepared pursuant to the Professional Standards Act 1994 (NSW) (the Act) by the New South Wales Bar Association whose business address is Selborne Chambers, 174 Phillip Street, Sydney NSW 2000.

PREAMBLE

In the second sentence of the first paragraph delete the word 'current' between the words 'Association's' and 'Scheme' and change the year from '2010' to '2015'.

In the last sentence of the second paragraph change the number '2100' to '2200'.

In the last sentence of the first paragraph under the heading 'Nature and operation of the scheme', delete the word 'and' and add a comma between the words 'Western Australia' and 'South Australia' and insert the words 'and Tasmania' at the end of the sentence.

Delete the existing paragraph under the heading 'complaints and discipline' and, in its place, insert the following:

Scheme members are subject to a complaints and discipline system operating under the *Legal Profession Uniform Law* (NSW), the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, the *Legal Profession Uniform Law Application Act 2014* (LPULAA) and Regulations thereunder. All scheme members must comply with this legislation.

At the end of the sentence in the paragraph headed 'scheme administration' substitute the words 'Policy Lawyer' with the words 'Senior Projects Lawyer'.

THE NEW SOUTH WALES BAR ASSOCIATION SCHEME

In the name of the Scheme, insert the words “Professional Standards” between the words “Association” and “Scheme”, thus:

THE NEW SOUTH WALES BAR ASSOCIATION PROFESSIONAL STANDARDS SCHEME

Under paragraph 1 ‘Occupational Association’ delete the word ‘and’ and add a comma between the words ‘Western Australia’ and ‘South Australia’ and insert the words ‘and Tasmania’ at the end of the sentence.

In clauses 2.3.2 and 2.3.3 delete the word ‘and’ and add a comma between the words ‘Western Australia’ and ‘South Australia’ and insert the words ‘and Tasmania’ at the end of the sentence.

After clause 3.3, insert a new clause 3.4, thus:

- 3.4 Notwithstanding anything to the contrary contained in this scheme, if in particular circumstances giving rise to occupational liability, the liability of any person who is subject to this scheme should be capped both by this scheme and also by any other scheme under Professional Standards Legislation (whether of this jurisdiction or under the 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.

Delete the existing paragraph 4.1 of the Scheme and, in its place, insert the following:

- 4.1 The scheme commenced on 1 July 2015 in New South Wales, the Australian Capital Territory, Northern Territory, Queensland, Victoria, Western Australia and South Australia and is to remain in force in those jurisdictions until 30 June 2020 unless:

Delete the existing paragraph 4.2 of the Scheme and, in its place, insert the following:

- 4.2 The scheme will commence in Tasmania 2 months after the date of its publication in the Gazette of Tasmania and is to remain in force until 30 June 2020, unless it is earlier revoked or ceases to have effect or its period of operation is extended for a period of up to 12 months, or it ceases to have effect in New South Wales.

COMMENCEMENT

The amendments to the scheme will commence 2 months after its publication in the Gazette.

PREAMBLE

OCCUPATIONAL ASSOCIATION

The New South Wales Bar Association (ACN 000 033 652) is an Australian Public Company, Limited by Guarantee. The Association's Scheme commenced on 1 July 2015. The NSW Bar Association's website is www.nswbar.asn.au

The occupational group represented by the Association is barristers holding a New South Wales practising certificate. The Scheme only applies to barristers who hold a New South Wales practising certificate, who are members of the Association and who hold approved professional indemnity insurance as provided for in the Scheme. The number of members eligible to be covered by the Scheme is approximately 2200.

The Association's objectives are outlined in clause 3 of the Constitution and include:

- to promote the administration of justice;
- to promote, maintain and improve the interests and standards of local practising barristers;
- to make recommendations with respect to legislation, law reform, rules of court and the business and procedure of courts;
- to seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community;
- to arrange and promote continuing legal education;
- to promote fair and honourable practice amongst barristers; to suppress, discourage and prevent malpractice and professional misconduct;
- to inquire into questions as to professional conduct and etiquette of barristers;
- to confer and cooperate with bodies in Australia or elsewhere representing the profession of the law;
- to encourage professional, educational, cultural and social relations amongst the members of the Bar Association; and
- to make donations to charities and such other objects in the public interest as determined from time to time by the Bar Council.

NATURE AND OPERATION OF THE SCHEME

The Scheme operates for the purpose of improving the occupational standards of barristers and to protect the consumers of their services. The Scheme limits the civil liability of barristers to whom it applies. The Scheme is intended to operate in New South Wales, the Australian Capital Territory, the Northern Territory, Queensland, Victoria, Western Australia, South Australia and Tasmania.

The liability limited by the Scheme includes, to the extent permitted by the Act, all civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member of the Association or to any person to whom the Scheme applies in acting in the performance of his or her occupation. The Scheme does not apply to liability for damages arising from any matter to which the Act does not apply, including, but not limited to, liability for damages arising from death or personal injury to a person, a breach of trust, fraud or dishonesty.

The Scheme does not affect damages which are below \$1.5 million. The Scheme limits liability for damages to \$1.5 million provided the person has insurance which is not less than \$1.5 million. To date, there has never been a successful claim against a NSW barrister that has reached \$1.5 million in damages.

RISK MANAGEMENT

The Association has adopted many risk management strategies, including:

- requirements for professional entry to practice at the Bar;

- continuing professional development in the areas of ethics and regulation of the profession; management; substantive law, practice and procedure, and evidence, advocacy, mediation and other barristers' skills;
- codes of ethical conduct;
- technical standards and guidance;
- advisory and support services;
- complaints and discipline systems; and
- claims monitoring.

The Bar Association will continue to report annually on the implementation and monitoring of its risk management strategies, the effect of those strategies and any changes made or proposed to be made to them.

COMPLAINTS AND DISCIPLINE

Scheme members are subject to a complaints and discipline system operating under the Legal Profession Uniform Law (NSW), the Legal Profession Uniform Conduct (Barristers) Rules 2015, the Legal Profession Uniform Law Application Act 2014 (LPULAA) and Regulations thereunder. All scheme members must comply with this legislation.

STANDARDS OF INSURANCE

Scheme members are required to have approved professional indemnity insurance before they are issued with a practising certificate. The NSW Attorney General determines the statutory minimum level of professional indemnity insurance required to be taken out by barristers and approves the professional indemnity insurance policies on offer by brokers each year. The professional indemnity insurance taken out by NSW barristers covers them for liability in all Australian States and Territories.

CLAIMS MONITORING

The Association will continue to request that the Attorney General's Order approving the policies for NSW barristers each year requires that the brokers/insurers provide the Association with claims data so that the Association can continue to monitor claims made against its members. The Association will continue to maintain its long-established relationship with the insurers. The Bar Association will continue to report annually to the Professional Standards Council on claims monitoring, tactics, performance measures and monitoring systems.

SCHEME ADMINISTRATION

Responsibility for administration of the scheme and ensuring that it complies with the requirements of the *Professional Standards Act 1994* (NSW) and of the Professional Standards Council rests with the Executive Director; who is assisted on a day to day basis by the Association's Senior Projects Lawyer.

DURATION

The scheme will remain in force for a period of 5 years from 1 July 2015 unless it is revoked, extended or ceases in accordance with section 32 of the Professional Standards Act.

THE NEW SOUTH WALES BAR ASSOCIATION
PROFESSIONAL STANDARDS SCHEME
Professional Standards Act 1994 (NSW)

1. Occupational Association

The New South Wales Bar Association (the Bar Association) is an occupational association whose business address is Selborne Chambers, 174 Phillip Street Sydney. The New South

Wales Bar Association Scheme (the scheme) is a scheme under the Professional Standards Act 1994 (NSW) (the Act). The scheme applies in New South Wales, the Australian Capital Territory, the Northern Territory, Queensland, Victoria, Western Australia, South Australia and Tasmania.

2. Persons to Whom the Scheme Applies (Participating Members & Other Persons)

- 2.1 The scheme applies to persons referred to in clause 2.2 and clause 2.3 of this scheme.
- 2.2 All members of the Bar Association who hold a NSW barrister's practising certificate issued by the Bar Association and who have professional indemnity insurance that is required under law to be held by New South Wales barristers in order to practise.
- 2.3 Persons to whom the scheme applies:
 - 2.3.1 In New South Wales by virtue of sections 18, 19, 20 and 20A of the Act; and
 - 2.3.2 In the Australian Capital Territory, the Northern Territory, Queensland, Victoria, Western Australia, South Australia and Tasmania by virtue of the comparable provisions to sections 18 and 19 of the Act in the corresponding legislation of those jurisdictions; and
 - 2.3.3 In the Australian Capital Territory, the Northern Territory, Victoria, Western Australia, South Australia and Tasmania by virtue of the comparable provision to section 20 of the Act in the corresponding legislation of those jurisdictions; and
 - 2.3.4 In Queensland by virtue of section 21A of the Professional Standards Act 2004 (Qld), and in Western Australia by virtue of section 34A of the Professional Standards Act 1997 (WA).

3. Limitation of Liability

- 3.1 Subject to clause 3.3 below, a person to whom the scheme applies against whom a cause of action relating to occupational liability is brought, is not liable in damages in relation to that cause of action for anything done or omitted on or after the commencement of the scheme above a monetary ceiling (a maximum amount of liability) of \$1,500,000.
- 3.2 For the purposes of the operation of the scheme in NSW 'occupational liability' has the same meaning as it has in the Act and excludes any liability which may not from time to time be limited pursuant to the Act. Similarly, for the purposes of the operation of the scheme in other jurisdictions in which it applies i.e. ACT, Northern Territory, Queensland, Victoria, Western Australia, South Australia and Tasmania, 'occupational liability' has the same meaning as it has in the corresponding legislation of those jurisdictions and excludes any liability which may not from time to time be limited pursuant to that legislation.
- 3.3 The person to whom the scheme applies must be able to satisfy the court that they have the benefit of:
 - 3.3.1 an insurance policy insuring them against that occupational liability, and
 - 3.3.2 an insurance policy under which the amount payable in respect of the occupational liability relating to that cause of action is not less than the maximum amount of liability specified in the scheme in relation to the person to whom the scheme applies and the kind of work to which the cause of action relates at the time at which the act or omission giving rise to the cause of action occurred.
- 3.4 Notwithstanding anything to the contrary contained in this scheme, if in particular circumstances giving rise to occupational liability, the liability of any person who is

subject to this scheme should be capped both by this scheme and also by any other scheme under Professional Standards Legislation (whether of this jurisdiction or under the 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.

4. Commencement and Duration

- 4.1 The scheme commenced on 1 July 2015 in New South Wales, the Australian Capital Territory, Northern Territory, Queensland, Victoria, Western Australia and South Australia and is to remain in force in those jurisdictions until 30 June 2020 unless:
 - 4.1.1 in the case of New South Wales, in accordance with section 32 of the Act it is earlier revoked or ceases to have effect or its period of operation is extended for a period of up to 12 months; or
 - 4.1.2 in so far as the scheme operates in the Australian Capital Territory, the Northern Territory, Queensland, Victoria, Western Australia and South Australia, in accordance with the law of those jurisdictions its operation in those jurisdictions is earlier revoked or ceases to have effect or its period of operation is extended for a period of up to 12 months, or it ceases to have effect in New South Wales.
- 4.2 The scheme will commence in Tasmania 2 months after the date of its publication in the Gazette of Tasmania and is to remain in force until 30 June 2020, unless it is earlier revoked or ceases to have effect or its period of operation is extended for a period of up to 12 months, or it ceases to have effect in New South Wales