PROFESSIONAL STANDARDS ACT 1997

THE NEW SOUTH WALES BAR ASSOCIATION SCHEME

Amendment

I, John Quigley MLA, Attorney General, pursuant to section 26 of the Professional Standards Act 1997 (the Act), authorise the publication of the Instrument Amending The New South Wales Bar Association Scheme (the Scheme) submitted to me by the Professional Standards Council of New South Wales pursuant to the mutual recognition provisions of the New South Wales and Western Australian professional standards legislation. The Instrument is published with this authorisation and commences in accordance with section 27 of the Act.

Hon JOHN QUIGLEY MLA, Attorney General.

Dated: 7 December 2017.

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 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 New South Wales Bar Association Professional Standards Scheme

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 and 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, 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.