

Australian Capital Territory

Civil Law (Wrongs) Queensland Law Society Professional Standards Scheme 2016

Disallowable instrument DI2016–54

made under the

Civil Law (Wrongs) Act 2002, schedule 4, section 4.10 (Schemes are subject to disallowance)

1 Name of instrument

This instrument is the *Civil Law (Wrongs) Queensland Law Society Professional Standards Scheme 2016*.

2 Commencement

This instrument commences on 1 July 2016.

3 Notice

I give notice of the Professional Standards Council of Queensland's approval of the attached Queensland Law Society Professional Standards Scheme.

Simon Corbell MLA
Attorney-General
16 May 2016

THE QUEENSLAND LAW SOCIETY PROFESSIONAL STANDARDS SCHEME

PREAMBLE

Occupational Association

- A. The Queensland Law Society (“the Society”) is a voluntary association for legal practitioners (solicitors) in Queensland. It is an occupational association constituted as an Australian Public Company, limited by Guarantee pursuant to the *Corporations Act 2001* (Cth).
- B. The occupational group for the purposes of the Scheme represented by the Society consists of solicitors practising in or from Queensland who hold a practising certificate issued by the Society.
- C. The objectives of the Society are expressed in rule 5 of the *Legal Profession (Society) Rules 2007* and include advancing the interest of the solicitors’ branch of the legal profession.

Nature of the Scheme

- D. The Society has made an application to the Professional Standards Council (“Council”), appointed under the *Professional Standards Act 2004* (Qld) (“the Act”), for approval of a scheme under the Act, and this document comprises the scheme (“the Scheme”). The Scheme is a scheme under the Act that applies to the persons referred to below in clause 2.
- E. The approximate number of members of the Society to whom the Scheme (only full and honorary) might apply at its commencement is 4802.
- F. The Scheme is intended to operate under the Act, which has the purpose of improving the occupational standards of professional persons, and to protect the consumers of their services.
- G. The Scheme has been prepared by the Society for the purposes of limiting the Occupational liability of Participating Members to the extent to which such liability may be limited under the Act.
- H. The Occupational liability limited by the Scheme is, that provided for by the Act, which at present is all civil liability for damages (in tort, contract equity, or otherwise) in relation to a cause of action founded on an act or omission of a person to whom the Scheme applies acting in the performance of the person’s occupation that happens when the Scheme is in force.
- I. The Scheme does not have any application in accordance with s6 of the Professional Standards Act to:
 - (1) Any liability for damages because of any of the following –
 - (a) the death of, or personal injury to, a person;
 - (b) any negligence or other fault of a lawyer in acting for a client in a personal injury claim;
 - (c) a breach of trust;

- (d) fraud or dishonesty.
 - (2) Liability that may be the subject of proceedings under the *Land Title Act 1994*, part 9, division 2, subdivision C.
 - (3) Any cause of action arising under, or in relation to, a contract, or contractual relations, entered into before the commencement of this Act (whether or not the action lies in contract) unless the parties, after the commencement of the Professional Standards Act, vary the relevant contract so as to make express provision for the application of the Act.
- J. The Scheme does not affect any claim for damages below the monetary ceiling specified in the Table in clause 3.3 of the Scheme for each member.
- K. The Scheme limits liability for damages to the monetary ceiling specified for a person to whom it applies provided that the person has insurance as required by s 22 of the *Act*.

Risk Management

- L. The Society has adopted strategies which cover requirements for professional entry to legal practice in Queensland, and continuing professional development in the areas of ethics and regulation of the profession management, substantive law, court practice and procedure, and evidence, and advocacy, mediation and other legal practitioners' skills, including making rules about legal practice in this jurisdiction engaged in by an Australian legal practitioner. The Society 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.
- M. The Society will 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

- N. Society members are subject to a complaints and discipline system. The system operates pursuant to the requirements of, inter alia, the *Legal Profession Act 2007* (Qld) ("the LPA").

Standards of Insurance

- O. Members of the Society are required by, inter alia, the LPA and regulations made under it, as a condition precedent to the issue of a required annual practising certificate, to have professional indemnity insurance:
- (a) for at least \$1.5m inclusive of defence costs;
 - (b) provide at least one automatic reinstatement;
 - (c) covers claims on a claims made basis;

- (d) which excess does not exceed 2% of the amount insured; and
 - (e) provided by an insurer approved by the Society.
- P. The Society annually approves insurers for that purpose to provide annual insurance cover on the terms of particular standard form policies.
- Q. The standard form policies cover Occupational liability in all Australian States and Territories.

Claims Monitoring

- R. As a condition of approval of an insurer each year, the Society requires that the insurer provide claims data to the Society, so that the Society can continue to monitor claims made against its members from time to time.
- S. The Society will establish or maintain relationships with approved insurers from time to time.
- T. The Society will report annually to the Professional Standards Council on claims monitoring, tactics, performance measures and monitoring systems.

Scheme Administration

- U. Responsibility for administration of the Scheme and ensuring that it complies with the requirements of the Act and of the Professional Standards Council rests with the Society.

Duration

- V. It is intended for the Scheme to remain in force for a period of 5 years from its commencement unless it is revoked, extended or ceases in accordance with s 33 of the Act.

Operation as an interstate scheme

- W. The Scheme is intended to operate in a jurisdiction other than Queensland in accordance with the corresponding law to the Act of that jurisdiction and subject to the requirements of the corresponding law, so that references to a provision of the Act, the application of the Scheme to a liability, the limit of a liability under the Act or what constitutes Occupational liability are intended to pick up the relevant provisions of the corresponding law, applied *mutatis mutandis*, to the extent that is necessary for the application of the Scheme in that jurisdiction as an interstate scheme.

THE QUEENSLAND LAW SOCIETY PROFESSIONAL STANDARDS SCHEME

1. Occupational association

- 1.1 The Queensland Law Society Professional Standards Scheme is a scheme under the *Professional Standards Act 2004* (Qld) (the *Act*) prepared by the Queensland Law Society whose business address is: 179 Ann Street, Brisbane, Queensland.

1.2 Relevant definitions for the purpose of the Scheme are as follows:

“**Australian practising certificate**” has the same meaning as in the LPA.

“**Corporate practising certificate**” means a practising certificate issued to an Australian lawyer that has a condition that the lawyer is not to engage in legal work other than providing in-house legal services to a corporation that is not an ILP (incorporated legal practice).

“**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 the Society as contemplated in the *Legal Profession (Society) Rules 2007*.

“**Government Legal Officer**” has the same meaning as in the LPA.

“**Law Practice**” has the same meaning as in the LPA.

“**Legal Services**” has the same meaning as in the LPA.

“**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 in the LPA.

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

“**Scheme**” means the Queensland Law Society Professional Standards Scheme.

“**Society**” means the Queensland Law Society.

“**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 members of the Society to whom the Scheme applies.

2. Persons to Whom the Scheme Applies

2.1 The Scheme applies to:

2.1.1 Full and Honorary 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 ss 20, 21 or 21A² of the Act, the Scheme applies

¹ Occupational liability is defined in Schedule 2 of the Act as ‘any civil liability arising, whether in tort, contract or otherwise, directly or vicariously from anything done or omitted by a member of an occupational association acting in the performance of the member’s occupation.’ However, s6(1) of the Act provides that the Act does not apply to liability for damages arising in a personal injury claim; a breach of trust or fraud and dishonesty. Section 6(2) of the Act also provides that the Act does not apply to liability, which may be the subject of proceedings under part 9, division 2, subdivision C of the *Land Title Act 1994*.

² Section 20(1) of the Act provides that if the Scheme applies to a body corporate, the Scheme also applies to each officer of the body corporate. Section 20(2) provides that if the Scheme applies to a person, the Scheme also applies to each partner of the person. However, s20(3) provides that if the officer of a body corporate or partner of a person is entitled to be member of the same occupational association, but is not a member, the Scheme will not apply to that officer or partner. Section 21 of the Act provides that if the Scheme applies to a person, the Scheme also applies to

- 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 practitioner who only holds a Corporate practising certificate, or is a Government Legal Officer.
- 2.3 A person referred to in clause 2.1 may, on application, be exempted from participation in the Scheme by the Society. This clause does not apply to persons to whom the Scheme applies by virtue of ss 20 or 21 of the Act.
- 2.4 The Scheme is intended to operate as a scheme of Victoria, New South Wales, Queensland, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory.

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 in relation to the provision of legal services; and
 - 3.1.2. to the extent those Damages exceed \$1.5 million for the Participating Members in Class 1 of 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 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 insuring him or her against the Occupational liability to which the cause of action relates;
 - 3.2.2. the insurance policy or policies comply with the insurance standards of the Society; and
 - 3.2.3. the amount payable under the policy or policies in respect of that Occupational liability⁴ is not less than the amount of the monetary ceiling

each employee of that person. However, if an employee of a person is entitled to be a member of the same occupational association as the person, but is not a member, the Scheme does not apply to that employee. Section 21A provides that the Scheme may also apply to other persons as specified in that section.

³ Damages as defined in Schedule 2 of the Act means

- a) damages awarded in respect of a claim or counter-claim or by way of set-off, and
- b) costs in relation to the proceedings ordered to be paid in connection with the award, other than costs incurred in enforcing a judgment or incurred on an appeal made by a defendant; and
- c) any interest payable on the amount of those damages or costs.

⁴ Section 7A 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 excess⁵.

(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 following table.

Class	Description	Monetary ceiling
1	Participating Members who at the Relevant Time were in a Law Practice that consisted of up to and including 20 principals and where the Law Practice generates total annual fee income for the financial year at the Relevant Time up to and including \$10 million	\$1.5m
2	a) Participating Members who at the Relevant Time were a Law Practice that consisted of greater than 20 Principals; or b) Participating Members who at the Relevant Time were in a Law Practice that generated total annual fee income for the financial year at the Relevant Time greater than \$10 million.	\$10m

3.4 Clause 3.2 does not limit the amount of damages to which a person to whom the Scheme applies is liable if the amount is less than the amount specified in the Table in clause 3.3 in relation to a person to whom the Scheme applies.

3.5 This Scheme limits the Occupational liability in respect of a cause of action founded on an act or omission occurring during the period when the Scheme was in force of any person to whom the Scheme applied at the time the act or omission occurred.

3.6 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. Conferral of Discretionary Authority

4.1 The Society has discretionary authority, on application by a Participating Member, to specify in relation to the Participating Member, a higher

However, see also s27A of the Act and its note, which has the effect that s7A does not reduce the cap on the liability of the Participating Member to the client.

maximum amount of liability (monetary ceiling) than would otherwise apply under the Scheme in relation to him or her either in all cases or any specified case or class of case.

- 4.2 If, in the exercise of its discretion under clause 4.1, the Society 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) to that Participating Member is that higher maximum amount.

5. Commencement

- 5.1 This Scheme will commence on 1 July 2016. In the alternative, the Scheme will commence on the day that is 2 months after the date of notification in the Gazette in all States in which the Scheme is to apply.

6. Duration

- 6.1 This Scheme will be in force for a period of five (5) years from its commencement, subject to s33 of the Act