

Australian Capital Territory

Civil Law (Wrongs) The Bar Association of Queensland Professional Standards Scheme 2019

Disallowable instrument DI2019–172

made under the

Civil Law (Wrongs) Act 2002, sch 4, s 4.10 (Schemes are subject to disallowance)

1 Name of instrument

This instrument is the *Civil Law (Wrongs) The Bar Association of Queensland Professional Standards Scheme 2019*.

2 Commencement

This instrument commences on 1 July 2019.

3 Notice

- (1) I give notice of the Professional Standards Council of Queensland's approval of the attached The Bar Association of Queensland Professional Standards Scheme.
- (2) The scheme is in force until 30 June 2024.

Gordon Ramsay MLA
Attorney-General
26 June 2019

THE BAR ASSOCIATION OF QUEENSLAND

Professional Standards Scheme

PREAMBLE

Occupational Association

- A. The Bar Association of Queensland (ACN 009 717 739) (“the Association”) 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 Association consists of barristers practising in or from Queensland who hold a Queensland practising certificate.
- C. The objectives of the Association are expressed in clause 3 of its Constitution and include:
- (a) to promote the cause of justice;
 - (b) to maintain the high tradition of the Bar;
 - (c) to uphold the honour and promote the interests of the Association and members of the Association
 - (d) to maintain correct and cordial relations with the Bench and the other branches of the profession;
 - (e) to arrange and promote continuing professional development;
 - (f) to promote fair and honourable practice amongst barristers; to suppress, discourage and prevent unsatisfactory professional conduct and professional misconduct; to inquire into so far as the law permits and decide questions as to professional conduct and etiquette of barristers; to make rules (including rules for the imposition on members of penalties, including expulsion, suspension or fines), with regard to the foregoing to the extent the law permits and in the absence of other rules and regulations made under the *Legal Profession Act 2007* (Qld) (“the LP Act”) for breach of such rules; and if deemed necessary, to report any of such rules or decisions to the Supreme Court of Queensland and to the Members of the Association and to the public as the Council sees fit;
 - (g) to raise with the appropriate bodies established under the LP Act all such matters as are necessary in respect of the discipline of members;
 - (h) to be represented in any matter before any Court, tribunal, body or person;
 - (i) to exercise such powers as may be conferred upon the Association by the LP Act, any other legislation, Rules of Court, or otherwise;
 - (j) to confer, and when thought fit, to cooperate with bodies in Australia or elsewhere representing the profession of the law or any branch thereof, or with any other bodies in Australia or elsewhere, as to matters directly or indirectly affecting the profession of the law, or which may affect the Association or its members, or may affect the attainment of the objects of Association; and, form and maintain associations with the Australian Bar Association and the Law Council of Australia, or any other body in Australia or elsewhere whether or not connected with the profession of the law;
 - (k) to make suggestions upon legislation, Rules of Court, the business and procedure of Courts, and the accommodation and condition of Court buildings;
 - (l) to inquire into and report upon applications for admission as a legal practitioner and to take such action thereon as may be deemed proper;

- (m) to promote, conduct or cooperate in the promotion or conduct of activities of a professional, educational, cultural, sporting and social nature amongst Members of the Association.

Nature of the Scheme

- D. The Bar Association of Queensland Professional Standards Scheme (“the Scheme”) is a scheme under the *Professional Standards Act 2004* (Qld) (“the PS Act”) that applies to the persons referred to below in clause 2.
- E. The Scheme does not apply to all members of the Association. Article 4.1 of the Bar Association of Queensland Constitution provides for four types of membership: Ordinary Member - Class A, Class B or Class C; Associate Member; Honorary Member; or Life Member. The Constitution provides that a person, who agrees before admission to membership to undertake to abide by the Constitution and Rules of the Association, may be admitted as an Ordinary Member:
 - (a) in Class A for any local practising barrister;
 - (b) in Class B for any person who holds a practising certificate issued by the Association who is not a local practising barrister; or
 - (c) in Class C, being an interstate practising barrister.Article 4.8 of the Constitution provides that Life Members are members or former members of the Association appointed for exceptional service to justice, the law or the Association upon nomination by the President, seconded by the Vice-President and approved by no less than three-quarters majority of a general meeting. A Life Member may also belong to another class of membership.

The Scheme will only apply to Class A Ordinary members and Life Members.
- F. The approximate number of members of the Association to whom the Scheme might apply at its commencement is 955.
- G. The Scheme is intended to operate under the PS Act, which has the purpose of improving the occupational standards of professional persons, and to protect the consumers of their services.
- H. The Scheme limits the occupational liability of a person to whom it applies.
- I. The occupational liability limited by the Scheme is that provided for by the PS Act, which at present in Queensland is all civil liability for damages (in tort, contract, 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.
- J. The Scheme does not apply to any liability to which the PS Act does not apply from time to time, which at present is any liability for damages arising from death or personal injury to a person, any negligence or other fault of a lawyer in acting for a client in a personal injury claim, a breach of trust, fraud or dishonesty or liability that may be the subject of proceedings under the *Land Title Act 1994* (Qld), part 9, division 2, subdivision C.
- K. The Scheme does not affect any claim for damages below the monetary ceiling specified in the Scheme for each member.

- L. The Scheme limits liability for damages above the monetary ceiling specified for a person to whom it applies provided that the person has insurance as required by s 22 of the PS Act.

Risk Management

- M. The Association has adopted strategies which cover requirements for professional entry to practice at the Bar 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 barristers' skills, including making rules about legal practice in this jurisdiction engaged in by an Australian legal practitioner as a barrister. The Association has provided the Professional Standards Councils with a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented.
- N. The Association 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

- O. Association members are subject to a complaints and discipline system. The system operates pursuant to the requirements of the LP Act.
- P. The Association is actively engaged in that system, and has the functions of investigation and of making a recommendation as to whether a discipline application should be started when a complaint is referred to the Association by the Legal Services Commissioner.

Standards of Insurance

- Q. Members of the Association are required by the LP Act 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; and
 - (b) provided by an insurer approved by the Association.
- R. The Association annually approves insurers for that purpose to provide annual insurance cover on the terms of particular standard form policies.
- S. The standard form policies cover occupational liability in all Australian States and Territories.

Claims Monitoring

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

Scheme Administration

- W. Responsibility for administration of the Scheme and ensuring that it complies with the requirements of the PS Act and of the Professional Standards Councils rests with the Association.

Duration

- X. The Scheme will remain in force for a period of 5 years from its commencement unless it is revoked, extended or ceases in accordance with section 33 of the PS Act.

Operation as an interstate scheme

- Y. The Scheme is intended to operate in every Australian State and Territory in accordance with the corresponding law to the PS Act of that jurisdiction and subject to the requirements of the corresponding law, so that references to a provision of the PS Act, the application of the Scheme to a liability, the limit of a liability under the PS 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 BAR ASSOCIATION OF QUEENSLAND PROFESSIONAL STANDARDS SCHEME

1. Occupational association

- 1.1 The Bar Association of Queensland Professional Standards Scheme (“the Scheme”) is a scheme under the PS Act.
- 1.2 The Scheme was prepared by the Association, whose business address is: Ground Floor, Inns of Court, 107 North Quay, Brisbane, Queensland. 4000.
- 1.3 A reference in this Scheme to the PS Act or its provisions includes, where the Scheme operates in a jurisdiction other than Queensland, a reference to the corresponding legislation in that jurisdiction and, where applicable, its equivalent provisions.

2. Persons to Whom the Scheme Applies

- 2.1 The Scheme applies to any barrister who holds a Queensland practising certificate issued under the LP Act, is a Class A Ordinary member or a Life member of the Association and is insured under an approved professional indemnity insurance policy which complies with the requirements under the LP Act and regulations made under it (or any Act replacing those requirements) and clause 3.1 below.
- 2.2 This Scheme also applies to any person to whom it applies by the operation of ss 20, 21 or 21A of the PS Act.
- 2.3 The Scheme limits the occupational liability, in relation to a cause of action founded on an act or omission that happens when the Scheme is in force, of any person to whom the Scheme applies when the act or omission happens.
- 2.4 The Association may, upon application by a person to whom the Scheme applies, exempt that person from participation in the Scheme with effect from a date specified by the Bar on or after the date on which the exemption is granted.

- 2.5 The Association may, upon application by a person exempted from the Scheme under clause 2.4, revoke such exemption with effect from a date specified by the Bar.

3. Limitation of Liability

- 3.1 If a person to whom this Scheme applies and against whom a cause of action relating to occupational liability is brought is able to satisfy the Court that:
- (a) the person has the benefit of an insurance policy insuring the person against the occupational liability; and
 - (b) the amount payable under the insurance policy in relation to the occupational liability is at least the amount of the monetary ceiling specified in clause 3.8 in relation to the class of person and the kind of work to which the cause of action relates;

the person is not liable in damages in relation to that cause of action above the amount of that monetary ceiling. For the purposes of s 27 of the PS Act, the Scheme only affects a liability for damages arising from a single cause of action to the extent that the liability results in damages exceeding \$1,500,000.

- 3.2 For the operation of this Scheme in Queensland or in a jurisdiction other than Queensland pursuant to the PS Act, “occupational liability” in this Scheme means any civil liability arising whether in tort, contract or otherwise, directly or vicariously from anything done or omitted by a member of the Association acting in the performance of the member’s occupation and any other liability included in the meaning of “occupational liability” under the PS Act from time to time.
- 3.3 For the operation of this Scheme in a jurisdiction other than Queensland under a corresponding law of that jurisdiction, “occupational liability” means any liability included in the meaning of “occupational liability” in the corresponding law which is in force in that jurisdiction from time to time.
- 3.4 The occupational liability for which a person is not liable above the amount of the monetary ceiling is an occupational liability in relation to a cause of action founded on an act or omission that happens when the Scheme is in force in a jurisdiction to which the Scheme applies.
- 3.5 Notwithstanding clause 3.1, for the operation of this Scheme in Queensland or in a jurisdiction other than Queensland pursuant to the PS Act the occupational liability to which this Scheme applies does not include liability to which the PS Act states, from time to time, that it does not apply.
- 3.6 Notwithstanding clause 3.1, for the operation of this Scheme in a jurisdiction other than Queensland under a corresponding law of that jurisdiction the occupational liability to which this Scheme applies does not include liability to which the corresponding law states, from time to time, that it does not apply.
- 3.7 The Scheme is intended to apply in respect of occupational liability of a person to whom the Scheme applies arising in the jurisdictions of Queensland, New South Wales, Victoria, South Australia, Western Australia, the Australian Capital Territory, the Northern Territory and Tasmania.
- 3.8 The monetary ceiling is \$1,500,000.
- 3.9 The monetary ceiling is in Australian currency.

- 3.10 Notwithstanding anything to the contrary contained in the Scheme, if in particular circumstances giving rise to occupational liability, the liability of any person who is subject to the Scheme is 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 Scheme confers on the Association a discretionary authority, on application by a person to whom the Scheme applies, to specify a higher maximum amount of liability than would otherwise apply under the Scheme in relation to the person, either in all cases or in any specified case or class of case, being a specified monetary ceiling not exceeding \$50 million.

5. Duration

- 5.1 In Queensland the Scheme will commence:

- (a) on 1 July 2019, if the Minister gives notice of the approval of the Scheme prior to that date; or
- (b) two months after the day the notice is notified, in any other case.

- 5.2 In New South Wales, the Northern Territory, Tasmania and Western Australia, the Scheme will commence:

- (a) on 1 July 2019, if the Scheme is published in the Government Gazette of the jurisdiction prior to that date; or
- (b) on the day immediately following the date of the Scheme's publication in the Government Gazette of the jurisdiction, in any other case.

- 5.3 In the Australian Capital Territory and in South Australia, the Scheme will commence:

- (a) on the date provided for in the Minister's notice in relation to the Scheme, if a date is provided; or
- (b) on the first day two months after the day on which notice was given, in any other case.

- 5.4 In Victoria, this Scheme will commence:

- (a) on 1 July 2019, if the Scheme is published in the Government Gazette at least two months prior; or
- (b) on the first day two months after the Scheme is published in the Government Gazette, in any other case.

- 5.5 The Scheme will remain in force in Queensland for a period of 5 years from its commencement unless it is revoked, extended or ceases in accordance with s 33 of the PS Act.

- 5.6 Subject to s 33 of the PS Act, the Scheme will remain in force in each other jurisdiction for a period of five years from its commencement unless it is extended, terminated or otherwise ceases in accordance with the corresponding law of the relevant jurisdiction.