

Civil Law (Wrongs) South Australian Bar Association Professional Standards Scheme 2022 (No 1)

Disallowable instrument DI2022–110

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) South Australian Bar Association Professional Standards Scheme 2022 (No 1)*.

2 Commencement

This instrument commences on 1 July 2022.

3 Notice

- (1) I give notice of the Professional Standards Council of South Australia's approval of the attached 'South Australian Bar Association Professional Standards Scheme'.
- (2) The scheme is in force until 30 June 2027.

Shane Rattenbury MLA
Attorney-General
22 June 2022

SOUTH AUSTRALIAN BAR ASSOCIATION PROFESSIONAL STANDARDS SCHEME

PREAMBLE

- A. The South Australian Bar Association (“SABA”) is an occupational association.
- B. SABA has made an application to the Professional Standards Council, established by the *Professional Standards Act 2004 (SA)*, for approval of a scheme under the Act.
- C. The Scheme is prepared by SABA for the purposes of limiting occupational liability of its participants to the extent to which such liability may be limited under the Act.
- D. The Scheme propounded by SABA applies to Ordinary Members of SABA who have professional indemnity insurance that complies with the approved Insurance Standard.
- E. SABA has furnished the Professional Standards Council 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.
- F. The Scheme is to commence on 1 July 2022 and remain in force for five (5) years from its commencement unless, prior to that time, it is revoked, its operation ceases, or it is extended.
- G. The Scheme is intended to apply in all States and Territories within Australia.
- H. The Scheme only applies to Ordinary Members holding an Australian practising certificate in the practise of domestic law within Australia.
- I. The Scheme will have force in South Australia and, if relevant, the other jurisdictions in which the Scheme will apply under the provisions for mutual recognition contained in the Act. To the extent that the Scheme applies to limit liability in the other jurisdictions, it is subject to the professional standards legislation of those jurisdictions.
- J. Section 12GNA(2) of the *Australian Securities and Investments Commission Act 2001 (Cth)*; section 137(2) of the *Competition and Consumer Act 2010 (Cth)*; and section 1044B(2) of the *Corporations Act 2001 (Cth)* provide for limited liability in respect of actions for contravention of certain provisions, but only where a professional standards scheme is prescribed in the relevant regulation. The Scheme does not apply to limit any liability under a Commonwealth law unless the Scheme has been prescribed by the Commonwealth.

1. Definitions

“Act” means the *Professional Standards Act 2004* (SA);

“Corresponding Law” means a law of another State or Territory of Australia that corresponds to the Act, including for the avoidance of doubt:

(a) *Professional Standards Act 1994* (NSW);

(b) *Professional Standards Act 2004* (Qld);

(c) *Professional Standards Act 2003* (Vic);

(d) *Professional Standards Act 1997* (WA);

(e) *Professional Standards Act 2005* (Tas);

(f) *Professional Standards Act 2004* (NT); and

(g) *Civil Law (Wrongs) Act 2002* (ACT);

“Court” has the same meaning as it has in the Act;

“Damages” has the same meaning as it has in the Act;

“Duration of the Scheme” means the period commencing on the date specified in clause 7.1 and ending upon the cessation of the Scheme pursuant to clause 7.2;

“Exempted Member” means an Ordinary Member who is or was at the Relevant Time exempted by SABA from participation in the Scheme pursuant to clause 4.3;

“Insurance Standard” means the Insurance Standard approved by the Law Society of South Australia on 21 June 2021 and adopted by the Bar Council of SABA on 29 July 2021;

“Legal Practitioners Act” means the *Legal Practitioners Act 1981* (SA) or any act enacted in substitution thereof;

“Monetary Ceiling” means, in respect of a liability in respect of a cause of action founded on an act or omission occurring after the commencement of the Scheme, \$1,500,000;

“Occupational Liability” has the same meaning as it has in the Act;

“Ordinary Member” for the purposes of the Scheme means a person who is or was at a relevant time an ordinary member or bar reader member within the meaning of and pursuant to the Constitution of SABA (as amended from time to time);

“Person” means an individual or a body corporate;

“Relevant Time” means, in respect of a liability potentially limited by the Scheme, the time(s) of the act(s) or omission(s) giving rise to the liability;

“SABA” means the South Australian Bar Association Incorporated;

“the Scheme” means the South Australian Bar Association Professional Standards Scheme constituted herein;

“Scheme Participant” means a person referred to in clause 4.1 or 4.2.

2. Occupational Association

- 2.1. The Scheme is a scheme under the Act prepared and conducted by SABA whose scheme management address is 24 Flinders Street, Adelaide, South Australia.

3. Jurisdictions in which the Scheme Applies

- 3.1. The Scheme applies in South Australia pursuant to the Act.
- 3.2. The Scheme applies in New South Wales, Victoria, Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory pursuant to the Corresponding Laws of each of those jurisdictions respectively.
- 3.3. 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 by both 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. Persons to Whom the Scheme Applies

- 4.1. The Scheme applies to all persons who:
- 4.1.1. are or at the Relevant Time were Ordinary Members of SABA holding a current practising certificate;
 - 4.1.2. are or were at the Relevant Time not Exempted Members; and
 - 4.1.3. have professional indemnity insurance that complies with the Insurance Standard.
- 4.2. The Scheme applies to all persons to whom the Scheme applies by virtue of sections 20, 21, and 22 of the Act and any Corresponding Laws.
- 4.3. SABA may, upon application by an Ordinary Member, exempt that person from participation in the Scheme with effect from a date specified by SABA on or after the date on which the exemption is granted.
- 4.4. SABA may, upon application by an Ordinary Member, revoke an exemption of that person from participation in the Scheme with effect from a date specified by SABA.

5. Conferral of Discretionary Authority

- 5.1. The Scheme confers on SABA a discretionary authority, on application by a Scheme Participant, to specify in relation to the person 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 amount not exceeding \$50 million.

6. Limitation of Liability

- 6.1 The Occupational Liability of a person who is or at the Relevant Time was a Scheme Participant in respect of a cause of action founded on an act or omission occurring during the Duration of the Scheme is limited to the amount of the Monetary Ceiling.
- 6.2 The liability which is limited by clause 6.1 extends to a liability for Damages but excludes a liability to which the Act does not apply from time to time by reason of section 5 thereof or, if the liability is governed by a Corresponding Law, excludes a liability to which the Corresponding Law does not apply from time to time by reason of its provisions.
- 6.3 The operation of clause 6.1 limiting the liability of a person is subject to the proviso that the person is able to satisfy the Court that:
- 6.3.1 the person has the benefit of an insurance policy or policies in accordance with the Insurance Standard insuring the person against the Occupational Liability to which the cause of action relates; and
 - 6.3.2 the amount payable under the policy or policies in respect of that occupational liability is not less than the amount of the Monetary Ceiling.
- 6.4 The limitation of liability that, in accordance with this Scheme and the Acts, applies in respect of an act or omission continues to apply to every cause of action founded on it, irrespective of when the proceedings are brought in respect of it, and even if the Scheme has been amended or has ceased to be in force.
- 6.5 For the purposes of section 28 of the Act and corresponding provisions in Corresponding Laws, the Scheme only affects a liability for Damages arising from a single claim (including a claim by a person who has 2 or more causes of action arising out of a single event) exceeding \$1,500,000.

7. Commencement and Duration of the Scheme

- 7.1. The Scheme will commence:
- 7.1.1 in New South Wales, the Northern Territory, Tasmania, Western Australia, Victoria and Queensland on 1 July 2022; and
 - 7.1.2 in South Australia and the Australian Capital Territory:
 - 7.1.2.1 on this same date or such other later date as may be specified in the relevant Minister's notice in relation to the Scheme; or
 - 7.1.2.2 if no date is specified in the relevant Minister's notice, on the first day two months after the date of the publication of the Minister's notice.
- 7.2 The Scheme will be in force in South Australia for a period of five years from the date of its commencement in that jurisdiction.

7.2. For any other jurisdiction, the Scheme will be in force for:

7.2.1. five years from the date of commencement in that jurisdiction; or

7.2.2. five years from the date of commencement in South Australia,

whichever period ends first.

7.3. Clauses 7.2 and 7.3 are subject to the provisions of the Act and the Corresponding Law in each jurisdiction in relation to the revocation, extension or cessation of a Scheme.