

Australian Capital Territory

# Civil Law (Wrongs) New South Wales Bar Association Scheme 2015 (No 1)

Disallowable instrument DI2015–92

made under the

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

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## 1 Name of instrument

This instrument is the *Civil Law (Wrongs) New South Wales Bar Association Scheme 2015 (No 1)*.

## 2 Commencement

This instrument commences on 1 July 2015.

## 3 Notice

I give notice of the New South Wales Professional Standards Council's approval of the attached New South Wales Bar Association Scheme.

Simon Corbell MLA  
Attorney-General  
18.5.15

## PREAMBLE

### OCCUPATIONAL ASSOCIATION

The New South Wales Bar Association (ACN 000 033 652) is an Australian Public Company, Limited by Guarantee. The Association's current Scheme commenced on 1 July 2010. The NSW Bar Association's website is [www.nswbar.asn.au](http://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 2100.

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 and South Australia.

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 Act 2004* (NSW). All scheme members must comply with the provisions of the *Legal Profession Act 2004* (NSW) and *Legal Profession Regulation 2005*.

## **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 also 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 Policy 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 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 and South Australia.

#### **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;

2.3.2 In the Australian Capital Territory, the Northern Territory, Queensland, Victoria, Western Australia and South Australia by virtue of the comparable provisions to sections 18 and 19 of the Act in the corresponding legislation of those jurisdictions;

2.3.3 In the Australian Capital Territory, the Northern Territory, Victoria, Western Australia and South Australia 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 and South Australia, ‘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.

#### **4. Commencement and Duration**

- 4.1 The scheme is intended to commence on 1 July 2015 and is to remain in force 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 In the event the scheme is published in the Gazette of any jurisdiction after 1 July 2015, the scheme will commence on such day 2 months after the date of its publication in that jurisdiction and is to remain in force for 5 years from that date of commencement subject to clause 4.1.1, and clause 4.1.2.