

BAQ CONTINUING PROFESSIONAL DEVELOPMENT

PROFESSIONAL STANDARDS OBLIGATIONS – CAPPED LIABILITY

GRAHAM GIBSON KC

RICHARD DOUGLAS KC

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Introduction

1. BAQ's first five year Professional Standards Scheme commenced on 1 July 2013. It was extended, for a year, to 30 June 2019. BAQ's second, and current, five year Professional Standards Scheme commenced on 1 July 2019, and is hereinafter referred to as "the current scheme" or "the BAQ scheme".
2. The current scheme document is attached.
3. Apart from this document, updated information will be available on the BAQ website. We recommend reference to it. That material includes retainer letters incorporating reference to the BAQ scheme.
4. The BAQ scheme was established and approved under the *Professional Standards Act 2004* (Qld), which is referred to below as "the PSA".
5. Like schemes exist in Queensland with respect to solicitors, accountants, engineers, valuers and surveyors. Such a scheme operates by limiting, or capping the amount of damages awardable for professional liability.
6. The benefit to professionals of such a scheme is to minimise the risk of loss of personal assets on a negligence claim exceeding professional indemnity insurance cover. Such risk, to date, by some, has been addressed by personal asset protection measures.
7. Similar legislation exists in the other mainland states and territories. The current BAQ scheme also operates under that interstate legislation.
8. The PSA, in s5, is expressed to bind the State of Queensland and (to the extent the legislative power of the Parliament permits) the Commonwealth.
9. This paper attempts to address a number of practical questions pertaining to the scheme. We assume members have a broad understanding of the nature of the scheme.
10. The following questions are addressed in relation to the scheme:
 - What is the scheme?
 - Who is entitled to the benefit of the scheme?

- To what does the scheme apply?
- To what does the scheme not apply?
- What are a barrister's scheme obligations?
- Is a barrister able to obtain an exemption from the scheme limit or an amendment of the limit?
- What should be done about insurance cover after 1 July 2013?

11. Members are advised to formulate their own views, and practice regime, in response to the scheme.

What is the scheme?

12. To appreciate the import of the scheme, and how it operates, it is necessary to address not just the approved scheme document, but also, the *PSA* under which it is made.
13. The *PSA*, like its analogues across the mainland states and territories, makes provision for occupational groups to apply to the Professional Standards Council for approval of a scheme to limit (or cap) what is described as the “occupational liability” of the members of the applying occupational association. BAQ so applied in January 2011 for its first scheme which was in operation from 1 July 2013 to 30 June 2018, as extended to 30 June 2019. The BAQ's second and current scheme commenced operation on 1 July 2019 and will continue until 30 June 2024.
14. Such “occupational liability” describes the professional liability for damages of the member of the occupational association in question.
15. The limitation applied for can be grounded on various bases, e.g. insurance arrangements, business assets.
16. The BAQ scheme limits liability for damages based on insurance arrangements.
17. Section 22 of the *PSA* provides:

22 Limitation of liability by insurance arrangements

A scheme may provide that if a person to whom the 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 the scheme** 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**.

(emphasis added)

18. Those provisions are reproduced in the scheme, at clause 3.1.

Monetary ceiling on damages for “occupational liability” of \$1.5m

19. Scheme clauses 3.8 and 3.9 provide that the amount of the “monetary ceiling” is AUD\$1.5m. By *PSA* s7A (see para 22 below) a reference to “the amount payable under an insurance policy in relation to an occupational liability” includes reference to defence costs (subject to the limitation stated in the provision) and to an amount payable under the policy by way of excess. The definition of “damages” (see para 33 below) includes costs (subject to the limitation stated in the definition) and interest.
20. Those provisions are worded a little differently, but are very similar in operation, to the requirements of s353, *Legal Profession Act* 2007 and s73, *Legal Profession Regulation* 2017, which provide to the effect that the requirement of a barrister to hold a policy of professional indemnity insurance in order to obtain a practising certificate is satisfied if “... the insurance is for at least \$1.5m inclusive of defence costs”.
21. *PSA* s27A (see para 23 below) should be noted in this context. It provides to the effect that, notwithstanding that an insurance policy complies with the requirements of s22 (and consequently, scheme clauses 3.1, 3.8 and 3.9) a barrister’s liability in damages is not reduced below the relevant limitation (AUD \$1.5m including costs and interest) simply because the amount available to be paid to the claimant under the insurance policy is less than that amount. As the Note to s27A makes clear, although a “defence costs inclusive policy” will satisfy the requirements of the *PSA* and the scheme, to the extent that such a policy results in a shortfall between the amount available to be paid to the claimant, and

the amount of the capped liability under the scheme, the barrister will be liable to make up that shortfall. Note also, however, that (as noted at para 49 below) the insurance policies currently available to barristers do provide for payment of defence costs in addition to the amount of the sum insured.

22. Section 7A provides:

7A References to amounts payable in relation to an occupational liability

A reference in this Act to the amount payable under an insurance policy in relation to an occupational liability includes a reference to—

- (a) defence costs payable in relation to a claim, or notification that may lead to a claim (other than reimbursement of the defendant for time spent in relation to the claim), but only if those costs are payable out of the 1 sum insured under the policy in relation to the occupational liability; and
- (b) the amount payable under or in relation to the policy by way of excess.

23. Section 27A provides:

27A Liability in damages not reduced to below relevant limit

The liability in damages of a person to whom a scheme applies is not reduced below the relevant limitation imposed by a scheme in force under this Act because the amount available to be paid to the claimant under the insurance policy required for the purposes of this Act in relation to that liability is less than the relevant limitation.

Note—

Section 7A permits a defence costs inclusive policy for the purposes of this Act that may reduce the amount available to be paid to a client in relation to occupational liability covered by the policy. Section 27A makes it clear that this does not reduce the cap on the liability of the scheme participant to the client, and accordingly the scheme participant will continue to be liable to the client for the amount of any difference between the amount payable to the client under the policy and the amount of the cap.

24. Note that s22 (see para 17 above) requires the policy to respond, by payment of the liability in relation to the claim for damages in question (“amount **payable** under the insurance policy in relation to **the** liability”). Thus if the policy does not respond to that particular claim, for example because of activation of a policy exclusion or breach of a policy condition, the scheme limitation will not apply.
25. It is intended that the current scheme remain in force for a term of 5 years, until 30 June 2024. Application will, no doubt, be made for a new scheme to commence on that date. Even if no new scheme is promulgated, the protection of the terminated scheme remains in respect of an act or omission occurring during the scheme term (see below).

26. In return for the scheme BAQ is obliged to pay the sum of \$50 per participating member per annum (just under \$50,000) to the Professional Standards Council, and BAQ members are obliged, under the *Legal Profession Act* and otherwise, to maintain and to demonstrate the maintenance of proper professional standards, including ethical standards and continuing legal education. The specific obligations of members are addressed further below.

Who is entitled to the benefit of the scheme?

27. This question can be addressed succinctly.

28. *PSA* s29 provides:

29 Limit of occupational liability by schemes

- (1) A scheme, to the extent provided by this Act and 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.

...

29. Scheme clause 2.1 addresses this issue:

2.1 The Scheme applies to any barrister who holds a Queensland practising certificate issued under the LP Act or regulations made under it, 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.

30. Thus, the scheme applies only to a person who is a BAQ member at the time of the act or omission founding the liability for damages the subject of the limitation. Non-members have no entitlement to scheme liability limitation.
31. Further, not all BAQ members are entitled to scheme limitation. By clause 2.1 Class A members, namely local practising barristers (barristers whose sole or principal place of legal practice is in the State of Queensland), and life members, are so entitled.

To what does the scheme apply?

32. As noted above (at para 17), *PSA* s22 provides that, upon compliance with the prerequisites therein, the scheme applies to:-

... a cause of action relating to occupational liability ... the person [to whom the scheme applies] is not liable in damages in relation to that cause of action above the amount of that monetary ceiling.

33. The *PSA* Schedule 2 Dictionary includes the following definitions:

damages means—

- (a) damages awarded for 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.

...

occupational liability means 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.

...

34. Importantly, “damages” means not only compensatory damages, but also interest and costs payable to the claimant (subject to the exception noted in subparagraph (b) of the definition) The conventional order is reflected in one of the recent authorities (concerning a \$10m scheme limit):

... had it been necessary to do so, I would have entered judgment for the plaintiff for the sum of \$7 million or such other sum of damages as had been assessed due, and then declared that in addition to those damages as assessed the plaintiffs were entitled to apply for interest on the damages pursuant to s 32 and if interest were awarded to recover such amount of interest plus the costs of the action but only to a limit of \$10 million, and that to the extent that the aggregate exceeded \$10 million the excess is barred and irrecoverable by virtue of the limitation of liability specified in the Professional Standards Act: *Allstate Explorations NL v Blake Dawson Waldron (A Firm)* [2010] WASC 97 per Heenan J, at [228].

35. Finally, the scheme applies only to a cause of action founded on an act or omission occurring after commencement of the scheme. Once that occurs, however, the scheme limit is engaged irrespective of later amendment or termination of the scheme.

36. That is the effect of *PSA* s29, which relevantly provides:

29 Limit of occupational liability by schemes

...

- (4) The limitation of liability that applies is the limitation stated by the scheme as in force when the act or omission giving rise to the cause of action concerned happened.

- (5) A limitation of liability that, under this section, applies for an act or omission continues to apply to every cause of action founded on it, irrespective of—
 - (a) when the cause arises or proceedings are started for it; or
 - (b) any amendment of the scheme; or
 - (c) whether the scheme has ceased to be in force.

...

37. That outcome has a bearing on the level of insurance cover which ought to be maintained after 1 July 2013 (see further below).

To what does the scheme not apply?

38. *PSA* s6 provides:

6 Application

- (1) This Act does not apply to 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) This Act does not apply to liability that may be the subject of proceedings under the *Land Title Act 1994*, part 9, division 2, subdivision C.
- (3) This Act does not apply to 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 this Act, vary the relevant contract so as to make express provision for the application of this Act.

Personal injury claims

39. **First**, by subs (1)(b), the scheme does not apply to a barrister who is liable for damages arising from a brief in a “personal injury claim”. For those taking interstate briefs, a similar exception exists in Victoria, South Australia, ACT, Northern Territory and Tasmania, but not in New South Wales or Western Australia.
40. Does this exception apply to a barrister acting for the defendant or its insurer in such a “claim”? The use of the word “claim” may suggest not, but it would be prudent to assume that it does.

Death, breach of trust, fraud or dishonesty

41. **Secondly**, for obvious reasons the exceptions in subs (1)(a) and (c) are unlikely to arise in a barrister's practice. So too, subs (2), which concerns entitlement to compensation for deprivation of a lot, or an interest in a lot, registered under that Act. The exception in subs (1)(d) is obvious.

What are a barrister's scheme obligations?

42. There are five core obligations.

Insurance policy for at least \$1.5m

43. **First**, a barrister must have the benefit of an insurance policy against 'occupational liability' for at least the amount of \$1.5M inclusive of defence costs. Keep in mind the exceptions to scheme application referred to above in paragraphs 38 to 41. A critical example is "any negligence or other fault of a lawyer in acting for a client in a personal injury claim".
44. As we understand them, each of the BAQ's approved professional indemnity insurers currently provide cover for defence costs. Barristers should, however, confirm the provisions of their policies for themselves.
45. As noted above (at para 21), however, *PSA s27A* makes it clear that even though the prerequisite is satisfied by a "defence costs inclusive policy", the scheme limit is applied regardless of any reduction of the policy limit by the amount of defence costs that may have been incurred in any given case.
46. Given the contingencies of litigation -with the potential for claims being made, inter se, by the lay client, the solicitor and the barrister - there is good reason to consider being insured for at least double the amount of the limit so as to provide adequate cover. One such contingency arose in *Artistic Builders Pty Limited v Nash* [2011] NSWSC 350. There two firms of solicitors were the defendants. The unsuccessful defendant firm was ordered to pay part of the costs of the successful defendant. The limitation cap was held not to apply in respect of such costs.

47. We would recommend that barristers give serious consideration to obtaining cover for \$3m to \$5m, primarily because there is a risk to a barrister arising from the potential for multiple or successive claims or cross-claims for damages by the lay client and solicitor (or solicitors) respectively, with a separate cause of action by each in respect of which the limit may operate.

48. For example:

- assume a barrister has entered a retainer agreement with the solicitor not the solicitor's client ("the lay client").
- a cause of action may arise against the barrister for an act or omission leading to a substantial (multi-million dollar) claim for damages. The common law advocates' immunity may or may not apply: Douglas & Cleary "Has advocates immunity from suit survived the Australian Consumer Law"? (2013) 87 ALJ 172.
- the lay client may sue the barrister for damages in respect of such act or omission. The lay client may (and probably ordinarily would) also sue the solicitor.
- the solicitor may cross-claim against the barrister. This will not be for tortfeasor contribution because ordinarily the liability of the lay client would be for economic loss. That would then be the subject of proportionate liability under Part 2 of Chapter 2 of the *Civil Liability Act* 2003 (Qld). There is a real prospect (despite s 32A of the *Civil Liability Act*¹) of a cross-claim for damages by the solicitor against the barrister, for the amount to which the solicitor has been exposed to the lay client.
- that cross-claim could be upon a cause of action in contract for breach by the barrister of a prescriptive term (e.g. "counsel draft a notice complying with X Act") or consumer guarantee under s61 of the Australian Consumer Law providing for fitness for purpose (not reasonable care). ACL s61 (like s60) is subject to State law which, upon

¹ **32A Contribution not recoverable from concurrent wrongdoer**

Subject to this part, a concurrent wrongdoer against whom judgment is given under this part in relation to an apportionable claim—

- (a) can not be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer for the apportionable claim, whether or not the damages are recovered or recoverable in the same proceeding in which the judgment is given; and
- (b) can not be required to indemnify the other concurrent wrongdoer.

prescription of the scheme by a regulation made under the Commonwealth legislation,² would include the scheme limit under the *PSA* scheme. In either case no issue of reasonable care arises, so contributory negligence is not open,³ with the prospect that the barrister liable for the full measure of the solicitor's otherwise separately adjudicated loss.

- thus, there is potential for the barrister to be exposed to a claim for damages by the lay client in tort but with a scheme limit, and also to a separate cross-claim by the solicitor in contract, albeit also with that limit.
- in the last-mentioned scenario a barrister with only \$1.5m in insurance cover will be \$1.5m short. It will be worse in the case of a large claim with two firms of solicitors, and two cross-claims involved.

Disclosure statement on “business documents”

49. **Secondly**, *PSA* s34 (see para 54 below) requires that a barrister include on all “business documents” given to a client or prospective client, a statement (“disclosure statement”) to the effect that the barrister’s occupational liability is limited under the *PSA*.
50. Note that the failure to include a disclosure statement on a business document given to a client or prospective client is an offence, in respect of which the maximum penalty is 65 penalty units.
51. A further question may be thought to arise in respect of the operation of s34 (1): Namely, whether it is necessary to include the disclosure statement on a business document given to a client or prospective client for whom a barrister is acting in a personal injury claim (such claims being excluded from the operation of the *PSA*: s6 (1)(b) - see para 38 above).
52. In our opinion the plainly preferable view is that the disclosure statement must be included on business documents given to clients or prospective clients in relation to personal injuries claims. Neither the *PSA* nor regulations include any exemption from the operation of s34 in relation to such claims. The question then arises whether the inclusion of an unqualified

² *Competition and Consumer Act* 2010 (Cth) s137. Similar provisions exist in the *Corporations Act* (Cth) s1044B and the *ASIC Act* 2001 (Cth) s12GNA.

³ *BHP Coal Pty Ltd v O & K Orenstein and Koppel AG (No 2)* [2008] QSC 141 at [477]-[479]; *French v QBE Insurance (Aust) Ltd* [2011] QSC 105 at [154]-[162]; *Gharbian v Propix Pty Ltd* [2007] NSWCA 151 at [61]-[64].

disclosure statement in such a matter would be misleading, given that the limit on liability does not apply in such a case. We do not think it would be regarded as misleading to adopt the form of words prescribed by the regulation, especially as the regulation does not provide for a different form of words in the case of personal injury claims. Out of an abundance of caution, however, we see no reason why a business document given to a client or prospective client in such a matter could not include the wording noted at para 57 below and we think the better view is that it should do so.

Provision of copy of scheme to client, or prospective client, on request

53. **Thirdly**, *PSA* s34 (4) requires that if the occupational liability of a barrister is limited under the *PSA*, the barrister “must ensure that a copy of the scheme concerned is given, or caused to be given, to any client or prospective client who requests a copy.” Once again, noncompliance with that requirement is an offence, the maximum penalty for which is 65 penalty units.

54. Section 34 provides:

34 Notification of limitation of liability

- (1) A person whose occupational liability is limited under this part must not give a business document to a **client or prospective client** of the person unless the business document includes a statement to that effect.
Maximum penalty—65 penalty units.
- (2) A regulation may prescribe—
 - (a) a statement for subsection (1); or
 - (b) other particulars about the minimum type size of the statement and how it must be displayed on a business document.
- (3) If a regulation prescribes a statement for subsection (1), the person does not contravene subsection (1) if the person includes the prescribed statement on the person’s business documents and the statement is in accordance with any prescribed particulars.
- (4) If the occupational liability of a person is limited under this part, the person must ensure that a copy of the scheme concerned is given, or caused to be given, to any **client or prospective client** who requests a copy.
Maximum penalty—65 penalty units.
- (5) In this section—
***business document* means a document promoting or advertising a person or the person’s occupation and includes business correspondence and other similar documents the person ordinarily uses in performing the person’s occupation, but does not include a business card.**

(emphasis added)

“Business documents”

55. The definition of “business document” in s34 (5) is wide. The Professional Standards Council has advised that the following documents should include the disclosure statement:

- letterheads and letters signed by the barrister or signed on his or her behalf;
- emails;
- fax cover sheets;
- memoranda of fees and invoices not accompanied by another document containing a disclosure statement;
- documents (such as written advices) produced for clients and not accompanied by another document containing a disclosure statement;
- newsletters and other publications;
- websites.

56. Notwithstanding the advice noted in the fourth and fifth dot points above, out of an abundance of caution we recommend that the disclosure statement be included on all advices and tax invoices, regardless whether they are accompanied by another document containing a disclosure statement.

57. Pursuant to *PSA* 34(3), the *Professional Standards Regulation*, s6, prescribes the following words for the disclosure statement:

“Liability limited by a scheme approved under professional standards legislation”.

58. Further, the disclosure statement must be printed in a size “not less than the face measurement of Times New Roman typeface in 8 point”: *Professional Standards Regulation*, s6 (2).

59. The definition of “business document” in *PSA* s34 (5) expressly does not include “a business card”. The Professional Standards Council advises that a disclosure statement is not required to be included on:

- business cards;
- advertisements in print media, directory listings and similar forms of promotion or advertising.

60. Given that non-compliance with the disclosure requirement in s34(1) is an offence, we recommend that barristers err on the side of caution in determining whether it is necessary to include the disclosure statement on a “document” created in or in relation to the conduct of their practice. So, for example, we recommend inclusion of the disclosure statement on “With Compliments” cards or notes and, as a matter of general practice, on LinkedIn communications. Although the latter may be regarded as a form of promotion or advertising similar to a directory listing, its correct characterisation for the purposes of the *PSA* may be open to debate.
61. Apart from the offence provision noted above, a further consequence of not notifying the fact of limited liability or otherwise notifying the scheme’s existence, is provided for by *PSA* s29:

29 Limit of occupational liability by schemes

...

- (2) A scheme does not limit the liability of a person (***professional***) to another person (***client***) if, at no stage before the time of the relevant act or omission, did the professional—

- (a) **give, or cause to be given, to the client** a document that carried a statement of a kind mentioned in section 34(1); **or**
- (b) otherwise **inform the client**, whether orally or in writing, that the professional’s liability was limited under this part.

Note—

A professional may also be prosecuted under section 34 for a contravention of section 34(1).

- (3) Subsection (2) does not affect any limitation of the liability of a professional to a person other than the client.

62. The term “client” is not defined in the *PSA*.
63. Is the “client” in ss29 and 34 the solicitor, or is it the solicitor’s client?
64. It will be remembered that the *PSA* is generic, not lawyer-specific legislation.
65. The *Legal Profession Act* so operates as to oblige a barrister retained by a solicitor to disclose the barrister’s costs and billing arrangements to the solicitor but not “directly to

the client”: s309, and the Example noted to s309. That is notwithstanding that s309 recognises the solicitor retains the barrister “on behalf of the client”.

66. In *Leo Dimos trading as “Leo Dimos and Associates” v Hanos* [2001] VSC 173 a Victorian analogue of s309 was found not to be conclusive. A barrister sued an instructing solicitor for unpaid fees. The solicitor admitted retaining the barrister but alleged that because he did so on behalf of his client, the resulting contract was between the barrister and the client. Gillard J observed and concluded that:

- [99] The mere fact that a contract is entered into between A and B, pursuant to which B is to perform services for A for the benefit of C, does not change the nature of the contract or the parties. The parties are still A and B. As a general rule, C cannot enforce the agreement. But as has been stated often, the parties may themselves contract in a way which does give enforceable rights to third parties or does limit the liability of a particular party.
- [100] In the normal course of events, a client who retains the services of a solicitor, engages the solicitor to provide professional services for him. In providing those services, the solicitor may advise the client that it is necessary to brief a barrister to provide specialist services. For example, it may be necessary to retain a barrister to appear in court. Retention of a barrister is, in part, satisfaction of the provision of legal services by the solicitor. In the absence of any contrary evidence, the retention of the barrister would result in a contract between the barrister and the solicitor.
- [101] The rules stated above are subject to exceptions, one of which is where the contracting party is acting as agent for a disclosed principal. The general rule is that the principal alone can sue, or be sued, on the contract. In certain cases, the agent can also be sued.
- [102] However, whether he acts as agent and whether he contracts as such, are questions of fact. The starting point in those circumstances, is proof of the agency and authority to contract on behalf of the principal. The next issue to consider is, the capacity in which the agent purported to enter into the contract.
- [103] I repeat the trite often quoted principle, that each case will depend upon its own particular circumstances.

(emphasis added)

Dimos was followed in *Levy v Bergseng* (2008) 72 NSWLR 178 at [122] and *Keesing v Adams* [2010] NSWSC 336 at [20] and has been referred to approvingly in other cases.

67. So in the absence of evidence to the contrary, it is reasonable to expect that the relevant contract will ordinarily be held to be between the barrister and the solicitor. Ultimately, however, the question is one of fact, dependent on the circumstance of each case.
68. Significant practical issues arise if the “client” referred to in ss29 and 34 is the solicitor’s client. How does the barrister go about giving notice to the lay client? Several measures come to mind. First, direct communication with the lay client. Second, insistence the solicitor provides a written acknowledgement from the lay client of receipt of the notification. Each of those harbours practical, and possibly ethical, difficulty, however.
69. Another measure may be to assume the client will be given your fee letter or advices at some point. But this lacks certainty, and is not an acceptable solution.
70. Then there is, of course, the general law of agency. If the lay client is the barrister’s “client” under s29/s34, the solicitor will be the agent of the “client”, as principal, in retaining the barrister and in relation to all matters incidental thereto. Notification to such agent ought to be imputed to the agent’s principal.
71. Finally, and again out of an abundance of caution, both for *PSA* s34 compliance, and also for fee recovery, barristers may see fit to address the issue in clear language in the fee letter, so that it is clear that the solicitor is the “client”. Barristers may consider wording to the following effect to be appropriate :

“Acceptance of my offer will result in a retainer agreement with you, not your client. You are my client, from whom I take instructions and to whom I am accountable. I will have no direct dealings with your client other than through you.”

72. In consequence, in relation to the barrister, the solicitor’s client, would be, in the words of *PSA* s29 (3) “a person other than the client”, i.e. other than the solicitor as the barrister’s s29/s34 “client”.

Annual audit of members

73. **Fourthly**, it is a requirement of the Professional Standards Council that BAQ conduct an annual audit of at least 10% of members, to monitor compliance with *PSA* and other statutory obligations. This is important, as unsatisfactory audit outcomes would expose the scheme to a risk of revocation by the Professional Standards Council.

Declaration of compliance

74. **Fifthly and finally**, as part of the annual application for a practising certificate, a member must declare his or her prior compliance with *PSA* obligations.

Is a barrister able to obtain an exemption from the scheme limit or an amendment of the limit?

75. Each of the *PSA* (s19) and the scheme (clause 2.4) provides for a barrister to apply to BAQ to be exempted from the operation of the scheme.
76. In addition, each of the *PSA* (s25) and the scheme (clause 4.1) provides that BAQ, in its discretion, on application by a person to whom the scheme applies, may specify a higher maximum amount of liability than would otherwise apply to that person, either in all cases or a specified class of case, to an amount not exceeding \$50m.
77. Section 25(2) provides:

25 Different limits of liability for different persons and different work

...

- (2) A scheme may also confer a discretionary authority on an occupational association, on application by a person to whom the scheme applies, 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.

...

78. Application for exemption from the scheme limit or to increase the limit is likely to be the exception rather than the rule. That said, it is conceivable that commercial considerations may prompt such an application.

What should be done about insurance cover after 1 July 2013?

79. As is noted above, the scheme applies only to a negligent act or omission occurring after 1 July 2013.
80. The limitation provided in respect of professional negligence pre-dating 1 July 2013 will ordinarily have expired by now. That stated there may be delayed accrual of such limitation period.

81. The “claims made” form of insurance cover held by barristers will respond (prima facie) to such claims.
82. In consequence, barristers may consider it prudent to maintain higher levels of cover, for another few years at least.
83. In any event, in respect of any negligent act or omission after 1 July 2013, for reasons noted earlier (e.g. acting in a personal injury claim), members ought to be astute to take out more than the minimum cover.

Conclusion

84. Approval of the scheme by the Professional Standards Council is a most significant achievement by BAQ that will produce considerable benefits for most members. In return, members must strictly comply with the (comparatively modest) obligations imposed on them by the scheme. Failure to do so will not only deprive the barrister concerned of the benefit of the scheme, but could risk the ongoing operation of the scheme, as compliance is subject to annual audit.
85. Despite schemes of this type having been in existence for some years in respect of various professional organisations, in Queensland and interstate, there has been little litigation on the subject. One expects this will change with the passage of time. Members will find much of the case law that has been decided, and helpfully summarised, on the website of the Professional Standards Councils: see <https://www.psc.gov.au/legislation/judicial-consideration>. Members ought to take the time to read such case summaries.

Graham Gibson KC
Richard Douglas KC
1 July 2019