A. J. ABBOTT SC
BARRISTER~AT~LAW

MALTHOUSE CHAMBERS
119 HAMPDEN ROAD
PO BOX 20
BATTERY POINT 7004
TELEPHONE: (03) 6223 3844
FAX: (03) 6223 5466
AUSDOC: DX 160

ABN: 33 308 092 879

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Tasmanian Bar

Email

Dear Colleague,

THE LEGAL PROFESSION (BARRISTERS) RULES 2016 and

LIMITATION OF PROFESSIONAL LIABILITY

I write to provide information to you, as a member of the Tasmanian Bar, in relation to the abovementioned two matters.

The Legal Profession (Barristers) Rules 2016

I have become aware that Bar Council has embarked upon a process by which it apparently intends to adopt, in place of the existing rules governing the professional conduct of barristers in Tasmania, a slightly modified version of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* ("the model rules") which I understand to operate in NSW. The new rules are apparently to be made by Bar Council as subordinate legislation entitled the *Legal Profession (Barristers) Rules 2016* ("the Tasmanian Rules").

I attach for your information what I understand to be the latest draft of the Tasmanian Rules, and what I understand to be the model rules as they currently apply in NSW.

I invite you to consider whether or not this process should go any further forward, and, when you have formed your own view, to provide a response by email to me in relation to it.

I record my view that it is grossly unsatisfactory that, so far as I am aware, Bar Council has taken no step to inform or consult with you in relation to this issue, which is obviously of great importance in relation to the conduct of our practices in Tasmania.

In my view the process should be stopped now. There is no good reason to replace our simple, easy to comprehend and apply, and longstanding Bar Rules with this interstate monstrosity. Some of it reflects the common law, but a lot of it does not.

I consider the lowlights of the model rules to be:

(a) an outright ban on the undertaking of the office of trustee (sub-rule 13 (h)) or attorney (ibid. sub-clause (a)) on usual commercial terms (which I doubt can sit with the national competition law);

(b) a monstrous restriction of individual freedom to utilise one's skills &c. as a barrister in the ordinary conduct of one's life, made under rule 10 in terms which purport to give to Bar Council and the regulatory authorities the power to determine whether or not the conduct of a person *qua* barrister but in a private capacity is "usual or reasonable". In my view this rule would *prima facie* ban participation in any kind of political activity including for example Lawyers for Forests, on the one hand, or in the support of the forestry industry, on the other. It would also prohibit for example the federal Attorney General and the Shadow Attorney General from using their Queens Counsel qualification in politics;

(c) the abolition of the right to sue for fees; presently the rules enable a Tasmanian barrister to sue his instructor (or the client) for his or her fees, and in my experience the existence of that rule is very useful and results in instructors taking care to ensure that the fees involved in a matter are covered. That position in my view should continue; and

(d) the direct instructions provisions contained under rule 22 seem to me to be inconsistent with our legislation.

Limitation of Professional Liability

I became aware of the activity of Bar Council in relation to the proposed new rules in the following circumstances.

I have for the past five years been working on the procuration for at first the whole Tasmanian profession but more lately the local members of the Tasmanian Bar of the benefit of a limitation of liability scheme promulgated under the *Professional Standards Act 2005* ("the PSA"). The schemes apply in all of the larger interstate jurisdictions and, generally, require only that there be added to one's letterhead and business cards &c. a statement to the effect that liability is limited under a scheme under the PSA. The basic proposal is to apply as the limit the compulsory insurance cover plus $500K, viz all up $1.5 million.

My activity is probably not a brief in the strict sense but, rather, work being done by me, in my capacity as member of the Independent Bar, without charge to promote the interests of the profession. It was undertaken from the outset in co-operation and with the authority of the then President Mr Michael O'Farrell SC, and then in co-operation and with the authority of Mr Bruce McTaggart SC, both of whom I understood to be always acting within their authority. I always kept both of them fully informed, as I did the current President shortly after he assumed office.

Limitation of liability schemes brought into existence under the PSA are highly unsatisfactory in a number of respects, not the least of which is the monumental amount of grief and trouble that is involved in their procuration. I have spent hundreds of hours and expended huge effort over an extended period, culminating of the lodgement in November 2015 of all necessary documents with the relevant authority -if this was a brief it would owe me well over $200K. The final version of the application for the scheme runs for more than 60 pages, excluding annexures, and incorporates voluminous material including statistics in relation to the claims made against Tasmanian practitioners over a ten year period, broken up into various classes. That information had to be procured from the insurers and provided to the relevant authority in tabular form. The annexures run into several volumes.

The relevant authority is the Professional Standards Council for Tasmania ("the PSC"), which was brought into existence under the PSA. It is one of a number of such State councils all of which have their common head office in Sydney. They are all staffed by the same public servants.

The PSA has to me the appearance, borne out by my experience in this matter, of being drafted by public servants primarily for their own benefit, who have seduced Government into the acceptance of the view that the infliction on the professions of a public service business model, necessarily reflecting the views of public servants, is in the public interest.

After the application was lodged in draft with the PSC in about October 2015 I received from it 59 pages of requisitions the pedantry and vacuity of which cannot be adequately described in polite terms. What then became abundantly clear, if it was not already clear, was that, if a scheme was to be procured on reasonable commercial terms, the issue may have to be forced to litigation. Accordingly I drafted and provided to the PSC an affidavit setting out the history of my work on the application, which was lodged as a draft and as part of the final version of the application, which was modified from the draft only to comply with so much of the requisitions as may arguably have been lawful (but without any admissions).

I call upon Bar Council to release to you a copy of that draft affidavit and the other documents which together comprise the application.

Between November 2015 and April 2016 I continued to press the application, on which the PSC has as yet made no decision, to the point at which a decision was to be made, with a view to either forcing the issue against the PSC by litigation or waving the flag of surrender and recommending to Bar Council that the Attorney be approached with a view to amending our governing Act to implement a simple scheme providing for limitation of liability as an adjunct to the compulsory insurance schemes (which was always what should have happened, instead of the present monstrosity). It was proceeding well enough; I was contacted by an actuary briefed by the PSC to assess it, and I promptly provided to him further information about our miniscule claims history. But in March 2016 the current President intervened and, without any consultation with or notice to me, directed the PSC to stop work on the application. I only discovered that was the case in April 2016, when I contacted the PSC as part of my regular review of the progress of the application.

The President has since informed me in writing that the application will not be progressed for the time being and will only be progressed when Bar Council considers it appropriate to do so, and that that will not be until the new rules are in place. In my view the two issues are quite separate, and there is no reason to hold up the progress of the application. Rather, it should be pressed to finality. I remain happy to continue to wield the cudgel and I will do so if that is the wish of a majority of the affected members of the Bar.

As noted at the outset, the utility of a scheme under the PSA is limited. It is but one facet of a much wider asset protection strategy about which I assume you have taken your own advice. Those strategies must necessarily vary with your personal circumstances but, absent a scheme, must necessarily be more conservative than would otherwise be the case. On balance my view is that a scheme under the PSA is better than nothing, and that, as one facet of a wider asset protection strategy, it is of reasonable utility. Certainly, however, it would not be worthwhile to yield to the infliction of some public service business model on our practices as the price of procuration of the scheme. I add that participation in the scheme is voluntary, so if the best that can be winkled out of the public servants just isn't worth it then it can simply be ignored.

I invite your feedback in relation to this issue as well as the rules issue. After a reasonable time has elapsed I will then confer *inter alia* with the members of Bar Council who are also members of Malthouse Chambers, and then determine what is to happen next.

Yours faithfully,

A.J. ABBOTT SC