From: A J Abbott ajabbott@bigpond.com
Subject: Welcome El Presidente
Date: 15 March 2016 9:23 am
To: Chris Gunson chris.gunson@me.com

Congratulations ,

I have one current pro bono brief assisting the Bar in procuring limitation of liability (in essence to $1.5m in all matters except the exclusions under the Act, mainly personal injuries litigation).
To achieve this I have had to deal over an extended period with a hive of Sydney insects working under the auspices of the Professional Services Councils. It is an almost unbelievably cumbersome bureaucracy.

The history is set out in my draft affidavit attached. Give me a call when u have read same and I will bring u up-to-date. At the moment they are not giving us the minutes dealing with out application.

Kind regards

A.J.Abbott SC
Malthouse Chambers
(03)62233844

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IN THE SUPREME COURT OF TASMANIA
HOBART REGISTRY

No.

BETWEEN:

THE TASMANIAN BAR INC.
(INCORPORATION NO.IA08914) **Plaintiff**

and

THE PROFESSIONAL STANDARDS COUNCIL **Defendant**

AFFIDAVIT

I, ANDREW JAMES ABBOTT, c/- Malthouse Chambers, 119 Hampden Road, Battery Point in Tasmania make oath and say as follows:

1. I am a senior legal practitioner who has practised continuously in Tasmania, short holiday breaks excepted, since my admission by the Supreme Court of Tasmania on 2 March 1982. I was for 10 years ending in September 1995 a partner in Dobson Mitchell and Allport, then an 8 partner circa 50 staff commercial law firm (large for Tasmania). Since October 1995 I have been at the Bar practising from Malthouse Chambers. On 12 April 2010 I was appointed by Crawford CJ as senior counsel for the State of Tasmania. I am authorised to make this affidavit for and on behalf of the plaintiff.

2. On 8 December 2008 I commenced the process, for the plaintiff (then known as the Tasmanian Independent Bar), of the procuration of the promulgation of a scheme limiting liability under and in accordance with the Professional Standards Act 2005 ("the Act"). This activity was commenced in accordance with discussions with and with the authority of the plaintiff communicated by its then President, Mr Michael O'Farrell. I offered to undertake the task *pro bono*, with a view to advancing and better protecting the interests of the Tasmanian professional as a whole. The original plan was to undertake the necessary activity in conjunction with the Law Society ("the Society"), and for the scheme to extend to all legal practitioners to whom the Society issues or for whom the Society renews a practising certificate under and in accordance with the *Legal Profession Act 2007*.

3. The task of drafting the necessary application to the defendant turned out to be very onerous and exceedingly tedious, and required liaison with the insurers who provided cover under the schemes which have been at all material times in force in Tasmania. There have been at all material times two schemes, one offered by the Society through its underwriters and the other, confined to barristers, offered direct to members of the Bar by Suncorp. The schemes are relevantly approved, and have always been approved, under the

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compulsory insurance provisions of the LPA and, as to barristers, under r.88A of the *Rules of Practice 1994*.

4. By 22 November 2011 I had a draft application, including a draft scheme, prepared and it was provided to the Society for its approval. That did not occur. There then commenced the first of a number of lengthy inexcusable delays on the part of the Society. The delay continued for so long that, on 7 August 2012, I provided to the Society a further draft document brought up to that date.

5. The Society continued to delay the progress of the matter and required of me the provision of submissions in support of the benefits of the scheme and its *raison d'etre*. Those submissions were provided by letter dated 19 December 2012. They include, as to the desirability of a scheme, the following:

> "*The members of the profession should be aware that their liability for negligence is not limited to the compulsory or any insurance cover which the member is required or chooses to take out to cover the member for damages (and costs) resulting from the member's negligence. That liability is at common law and by statute unlimited.*
>
> *The unlimited nature of the liability of a member of the profession poses a clear and present high level of danger to the member's estate, in that all of the assets of the member are exposed to the claims of predatory creditors, including any client who successfully sues for damages for negligence. It is notorious that, in larger transactions, the exposure of a member for negligence will be a multiple of the available insurance cover.*
>
> *For example, senior members of the profession routinely advise in relation to infrastructure and other large transactions. An infrastructure transaction may involve total expenditure of $1 billion or more; if the member is negligent in or in relation to the advice given about that transaction then the member's assets will be exposed to a claim the extent of which can never be covered by insurance.*
>
> *Further, it is notorious that insurance cover may prove to be an illusion. Indeed there was a recent case in the Supreme Court in which, as I understand it, that was the fact. The individual members of the profession involved in it were, thus, left permanently holding a very ugly soiled baby.*
>
> *It follows that the implementation of a scheme is something which in my view the Society ought to pursue for the benefit of its members. Failure to do so will leave Tasmanian practitioners exposed to substantial risk which, if it comes to fruition, will involve financial loss that may be ruinous.*
>
> *As to the terms of the scheme, my submission is that it is sensible and desirable to set the limits of liability prima facie at the amount of insurance required by statute. Doing so will make the scheme*

consistent with statute, and avoid any confusion in the mind of the public. Further, it will still be open to any member of the scheme, with the consent of the Society, to apply some higher limit throughout the member's practice. It is difficult to see why such a higher general limit would be chosen by a member, but there is a clear albeit qualified right given to the member by statute to do so. The scheme needs to recognise that right.

Finally, presently the Tasmanian Act gives to a member of a scheme an unqualified right to apply a higher liability limit in a specific case. There is in my view nothing wrong with, or odious about, the existence of such a right."

6. I understood my submissions to have been accepted by the Society, but in early 2013 the Executive Director of the Society, Mr Hagan, was replaced by Mr Rheinberger, who continues in that role to this day. I commenced the movement forward of the matter with Mr Rheinberger in about February 2013, and over the next several months I continued to press Mr Rheinberger in relation to completion of the draft documents with a view to having them lodged with the defendant. For reasons unknown to me the Society continued to delay and it was not until May 2014 that I received from the Society (and its insurer) material sufficient to bring into existence a final draft of the application. That was followed in May 2014 by a meeting with the Chief Executive Officer of the defendant, one of his staff, and Mr Rheinberger at the premises of the Law Society in Hobart. At that meeting the defendant exhibited a façade of cooperation. It was agreed that the matter would go forward.

7. The Society continued, however, to delay the progress of the application. I remain unaware of the reasons but I note that throughout this extended period the Society has been obsessed with increasing the pain involved in and the costs of doing business through the infliction on the profession of compulsory "continuing professional development" and has employed a person for that purpose.

8. On or about 3 February 2015 I received from the Society a letter advising "*that no application for approval of a scheme will be submitted by the Society in the near future*". I thereupon consulted with the President of the plaintiff, Mr McTaggart, and it was determined that the Bar would proceed to procure the implementation of a scheme for the benefit of its members. I accordingly embarked upon the very substantial task of redrafting all of the documents so as to restrict the scheme to members of the Bar. I completed that task by 15 April 2015, when a final draft application (and associated documents) were submitted by email to the defendant. There then followed email contact between the plaintiff and the defendant resulting in the submission of further material on 20 May 2015, which was intended to be read with and to form part of the draft application sent on 15 April 2015.

9. I followed up the lodgement of the draft application by email on a number of occasions from time to time between 20 May 2015 and 16 November 2015,

with it being necessary, shortly prior to 16 November 2015, to procure a response, to threaten an action for orders in the nature of mandamus.

10. On 16 November 2015 I received from the defendant an email which required the submission of a further draft of the application, and included 59 pages of requisitions ("the requisitions").

11. I annexe a copy of:

    (a) the draft application lodged on 14 April 2015, with its annexures, marked "AJA1";

    (b) my letter dated 20 May 2015, and its annexures, marked "AJA2"; and

    (c) the requisitions, marked "AJA3"

    (d) the re-drafted application referred to below, marked "AJA4".

12. I have spent over 35 years in private practice in Tasmania. It has been a substantial commercial success since I have been at the Bar. Over that period I have come across more than my fair share of bureaucratic balderdash generated by public servants who have no experience in relation to the conduct of business in the real world, from which they are obscenely detached. I provide as an example the proposal, in part put into effect, to re-write the *Income Tax Assessment Act 1936* (Cth) in plain language such that the man in the street would be able to read, comprehend and apply the same in relation to his tax affairs. This project was commenced, and led to the *Income Tax Assessment Act 1997* (Cth). It rapidly became apparent, however, that the implementation of the project was doomed from the outset, and was in fact making the position worse, with the new Act making what was formerly barely comprehensible incomprehensible. Accordingly it was abandoned.

13. Another example, germane to the present circumstances for reasons which I will explain in a moment, was the proposal, implemented for a short period I think during the early 1990's, to inflict upon trade and commerce a training levy struck as a percentage of the payroll of a business. This was a form of payroll tax but its imposition could be alleviated if the employer went to an enormous amount of time and administrative trouble to document and put in place training systems by which its already perfectly competent staff were required to waste part of their paid-for employment hours on "training". The hullabaloo this unsurprisingly created was such as to so embarrass government that it abandoned the scheme.

14. In both of the examples just given, if I may adopt phraseology and explanation coined by the late rightly well respected Financial Review journalist Peter Ruehl, the public servants who conceived the proposals must have done so just after completing their morning 100 sit-ups underneath a parked car.

15. The requisitions presently are in all of my experience a *piece de resistance* in the world of bureaucratic balderdash. I scan perused them on their arrival late

in the day on 16 November, which resulted in a level of anger which would not abate throughout a sleepless night until the following morning. I then embarked on the task of producing a second draft of the application, which occupied the whole of the rest of that week. The re-draft takes appropriate technical objections where appropriate, but is tolerably plain from the requisitions viewed as a whole that:

(a) similarly to the activity of others in relation to the training levy, the PSC intends to inflict by force a public service anti-business model on the occupation-in-commerce of providing professional legal services as a barrister in Tasmania, in circumstances in which that infliction has no proper or commercial basis whatsoever howsoever arising; and

(b) the PSC glorifies in the infliction just mentioned; the requisitions are calculated to and did in fact infuriate and cause substantially increased expense and delay.

I add that I understand that the PSC has expended its resources in publishing about itself a book by which it extols its own virtues as mandarin overlord of all of the professions across Australia. I was invited to the cocktail function in Sydney at which the book was to be launched, but I did not attend.

16. The public service anti-business model sought to be inflicted upon the profession by the PSC would substantially increase the cost of doing business, even if it is capable of implementation, which is denied. The views expressed about risk management, which it would inflict on an individual in commercial private practice, are an Orwellian fantasy which would in any event generate zero benefit. What is occurring is, therefore, in summary a monstrous abuse of power that cannot have been contemplated by government when this execrable statutory regime was enacted.

17. The defendant should be restrained, and required to act, in the manner sought by the application.

Sworn by the abovenamed deponent)
at Hobart in Tasmania)
this day of 2016)

Before me,

....
A JUSTICE OF THE PEACE