

Civil Law (Wrongs) The Victorian Bar Professional Standards Scheme 2019

Disallowable instrument DI2019–170

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) The Victorian Bar Professional Standards Scheme 2019*.

2 Commencement

This instrument commences on 1 July 2019.

3 Notice

- (1) I give notice of the Professional Standards Council of Victoria's approval of the attached The Victorian Bar Professional Standards Scheme.
- (2) The scheme is in force until 30 June 2024.

Gordon Ramsay MLA
Attorney-General
26 June 2019

THE VICTORIAN BAR PROFESSIONAL STANDARDS SCHEME

A Scheme under
the *Professional Standards Act 2003 (Vic)*

PREAMBLE

Occupational Association

- A. The Victorian Bar Inc (“the Victorian Bar”) is an incorporated association constituted under the *Associations Incorporation Reform Act 2012* and is an occupational association within the meaning of the Professional Standards Act 2003 (Vic) (“the Act”) at the time of the application and will remain so for the duration of the Scheme;
- B. The occupational group represented by the Victorian Bar consists of barristers practising in Victoria and in interstate or overseas jurisdictions;
- C. With effect from 1 July 2008, the Victorian Bar has had in operation the Victorian Bar Professional Standards Scheme under the Act. The current Scheme expires on 30 June 2019, subject to any extension;
- D. The Victorian Bar has applied for approval and gazettal of the Victorian Bar Professional Standards Scheme (“the Scheme”) as a scheme under the *Professional Standards Act 2003 (Vic)* (“the Act”). The Scheme has a specified commencement date of 1 July 2019;
- E. The Scheme applies to those persons referred to below in clause 3. The Scheme does not apply to all members of the Victorian Bar;
- F. The Scheme facilitates improvement in the standards of services provided by scheme members who provide services to the public and limits the occupational liability of those members;
- G. The approximate number of members eligible to apply to have the Scheme apply to them is 2073;
- H. The purposes of the Victorian Bar are expressed in clause 2 of its Constitution and include:

- (a) To maintain in the public interest a strong and independent Bar in the State of Victoria;
- (b) To promote, foster and develop within the executive and legislative arms of Australian Governments and within the general community, an understanding and appreciation that a strong and independent Bar is indispensable to the rule of law and to the continuation of a democratic society;
- (c) To improve the relationship with and understanding between the Victorian Bar and the executive, legislative and judicial arms of Australian Governments, without in any way diminishing the independence of the Victorian Bar and its members;
- (d) To improve the relationship with and understanding between the Victorian Bar and other professional associations and their members concerning the role of the independent Bar in the framework of advice and dispute resolution within the rule of law;
- (e) To liaise and work with the profession nationally and internationally, which may include membership of the Australian Bar Association and the Law Council of Australia, and does include advocacy training courses;
- (f) To promote, maintain and improve the quality of the Victorian Bar;
- (g) To seek to ensure that access to the courts is open to all members of the community;
- (h) To arrange training for Bar Readers and entry to membership of the Bar;
- (i) To arrange and promote Continuing Professional Development;
- (j) To promote the resolution of disputes by mediation, arbitration and other appropriate methods of alternative dispute resolution;
- (k) To perform such functions as may be assigned, permitted, referred or delegated to the Victorian Bar by or under legislation regulating the legal profession or the practice of law;
- (l) To seek to ensure that, as far as practicable, chambers are available for counsel;
- (m) To seek to promote the physical and mental wellbeing of members of the Victorian Bar;
- (n) To promote the rule of law including the proper administration of justice;
- (o) Without limiting (n), to make recommendations with respect to legislation, law reform, rules of court and the business and procedure of courts;

- (p) Incidental to the above purposes, in particular of maintaining and enhancing the quality of a strong and independent Bar in the service of the rule of law, to provide amenities and services and arrange social activities for members.

Nature of the Scheme

- I. The Scheme operates for the purpose of improving the occupational standards of professionals and to protect the consumers of their services. It also limits the civil liability of persons to whom the Scheme applies;
- J. The liability limited by the Scheme includes, to the extent permitted by the Act, civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member of the Victorian Bar or to any person to whom this Scheme applies in acting in the performance of their occupation. However the Scheme does not apply to liability for damages arising from any matter to which the Act does not apply;
- K. The Scheme does not affect damages which are below the monetary ceiling specified in the Scheme for each member. The Scheme limits liability for damages to the monetary ceiling specified for that member provided that the person has insurance as required by s 23 of the Act;

Risk Management

- L. The Victorian Bar has adopted strategies which cover requirements for professional entry to practice at the Bar and continuing professional development in the areas of ethics and regulation of the profession; management; substantive law, practice and procedure, evidence, advocacy, mediation and other barristers' skills;
- M. The complaints and disciplinary system of the Victorian Bar operates pursuant to the requirements of the *Legal Profession Uniform Law Application Act 2014*;
- N. The Bar Association will 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;

Standards of Insurance

- O. Scheme members are required to maintain current professional indemnity

insurance policies required of barristers with a Victorian practising certificate and otherwise to comply with any regulations of the Victorian Bar Council relating to professional indemnity insurance from time to time;

- P. The Victorian Legal Services Board determines the statutory minimum level of professional indemnity insurance required to be taken out by barristers and also approves the professional indemnity insurance policy on offer from the Legal Practitioners Liability Committee;

Claims Monitoring

- Q. The Victorian Bar has established a relationship with the Legal Practitioners Liability Committee which provides cover for Scheme members which will ensure the Victorian Bar will be able to obtain and monitor claims data. The Victorian Bar will report annually on claims monitoring, performance measures and monitoring systems;

Complaints and Discipline

- R. Scheme members are subject to a complaints and discipline system operating under the *Legal Profession Uniform Law Application Act* 2014. All scheme members must comply with the provisions of that Act and regulations made pursuant to it, the Constitution, and rules and regulations of the Victorian Bar;

Scheme Administration

- S. Responsibility for administration of the Scheme and ensuring that it complies with the requirements of the Act and of the Professional Standards Council rests with the Victorian Bar

THE VICTORIAN BAR PROFESSIONAL STANDARDS SCHEME

1. Occupational Association

- (1) The Victorian Bar Professional Standards Scheme is a scheme of the Victorian Bar under the *Professional Standards Act 2003* (Vic) (“the Act”). The registered address of the Victorian Bar is 205 William Street, Melbourne, Victoria.

2. Definitions

- (1) Unless the context otherwise requires -
- “Barrister” means an Australian legal practitioner who engages in legal practice solely as a barrister pursuant to sections 43 and 47(1)(b) of the LPUL, and whose Australian practicing certificate is subject to a condition that the holder is authorized to engage in legal practice as or in the manner of a barrister only;
- “Corresponding Law” means the law of another jurisdiction that corresponds to the Act;
- “Damages” has the meaning given it in section 4 of the Act;
- “LPUL” means the *Legal Profession Uniform Law* (Victoria), being schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic);
- “Occupational liability” has the same meaning as it has in the Act;
- “Scheme register” means the register of members to whom the Scheme applies maintained by the Victorian Bar Council;
- “the Act” means the *Professional Standards Act 2003* (Vic) as amended from time to time.

3. Persons to whom the Scheme applies (participating members and other persons)

- (1) The Scheme applies:
- (a) to the class of persons within the Victorian Bar more particularly specified in sub-clause 3(2) of this Scheme document; and
 - (b) to persons to whom the Scheme applies by virtue of sections 20, 21 and 22 of the Act.
- (2) The class of Scheme members referred to in sub-clause 3(1)(a) comprises

all members of the Victorian Bar –

- (a) who hold a current barrister's practising certificate issued by the Victorian Legal Services Board or the Victorian Bar;
 - (b) who are admitted to membership of the Scheme by resolution of the Victorian Bar Council; and
 - (c) whose names remain on the Scheme register maintained by the Victorian Bar Council.
- (3) On application in writing by a member to whom the Scheme applies under clause 3(1)(a), the Victorian Bar may exempt the member from the Scheme.

4. Jurisdiction

- (1) The Scheme applies in Victoria in accordance with the Act.
- (2) In addition to Victoria, the Scheme is intended to operate in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, and Western Australia, in accordance with the professional standards legislation of those states and territories and subject to the requirements of that legislation, so that references to a provision of the Act, the application of the Scheme to a liability, the limit of a liability under the Act or what constitutes Occupational Liability are intended to pick up the relevant provisions of the corresponding laws, applied *mutatis mutandis*, to the extent that is necessary for the application of the Scheme in any of those jurisdictions as an interstate Scheme.
- (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 both by 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.

5. Limitation of Liability

- (1) 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 the person has the benefit of an insurance policy or more than one

insurance policy-

- (a) that insures the person against that occupational liability; and
- (b) 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 class of person 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

the person 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 for any amount above the monetary ceiling (a maximum amount of liability) subject to clause 4(2), of \$2 million.

- (2) If on application from time to time or at any time by a person to whom the Scheme applies, in all cases or any specified case or class of case, the Victorian Bar has specified pursuant to the conferral of discretionary authority in clause 5 of this Scheme document a higher maximum amount of liability than would otherwise apply under the Scheme in relation to the person, the monetary ceiling (maximum amount of liability) in relation to that person either in all cases or in any specified case or class of case (as the case may be) is that higher maximum amount of liability.
- (3) In this Scheme document –
 - (a) for the operation of this Scheme in a jurisdiction other than Victoria under the Corresponding Law of that jurisdiction, “occupational liability” means any liability included in the meaning of “occupational liability” in the Corresponding Law which is in force in that jurisdiction from time to time; and
 - (b) a reference in clause 5(1) to the amount payable under an insurance policy in respect of occupational liability includes a reference to-
 - (i) defence costs payable in respect of 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 one sum insured under the policy in respect of the occupational liability; and
 - (ii) the amount payable in relation to the policy by way of excess.

- (4) If the provisions of section 23 of the Act are amended by any subsequent Act or Acts, the provisions of clause 5(1) above shall be taken to have been amended correspondingly and shall operate as so amended.

6. Discretionary authority

- (1) The Victorian Bar has a discretionary authority, on application from time to time or at any time 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.

7. Commencement and Duration

- (1) This Scheme will commence in New South Wales, Victoria, Queensland, Western Australia, Tasmania, and the Northern Territory on [insert date].
- (2) In the Australian Capital Territory and in South Australia, the Scheme will commence:
- a. On the date provided for in the Minister's notice in relation to the Scheme, if a date is provided; or
 - b. On the first day two months after the day on which notice was given, in any other case.
- (3) This Scheme will be in force for five years from its commencement in Victoria.
- (4) For any other jurisdiction, the Scheme will be in force for:
- a. Five years from the date of commencement in that jurisdiction; or
 - b. Five years from the date of commencement in Victoria;
- whichever period ends first.
- (5) Clauses 7(3) and 7(4) are subject to the provisions of each jurisdiction applicable to the revocation, extension or cessation of Schemes
