

Australian Capital Territory

Civil Law (Wrongs) Victorian Bar Inc Scheme 2010 (No 1)

Disallowable instrument DI2010–72

made under the

Civil Law (Wrongs) Act 2002, section 4.10, Schedule 4 (Approval of schemes by Minister)

EXPLANATORY STATEMENT

Professional Standards Legislation (PSL) was developed on a national basis following the insurance crisis of 2002. PSL which has been passed by all States and Territories involves a trade-off whereby professionals have their negligence liability for economic loss capped in return for a commitment to higher standards of service delivery, monitored by a professional standards council operating on a national basis.

In 2004, the ACT passed its own PSL, which was incorporated as Schedule 4 of the *Civil Law (Wrongs) Act 2002* (the ACT Act). Section 4.10, Schedule 4 of the Act provides that the Minister may approve an interstate scheme submitted by the appropriate council for the jurisdiction in which the scheme was prepared.

The Victorian Bar Inc is an association of independent barristers based in Victoria providing legal representation and assistance to the community. It has prepared the Victorian Bar Inc Scheme (the Scheme) for the purposes of limiting occupational liability of Victorian barristers to the extent to which such liability may be limited under the Act.

The Scheme is intended to operate as a scheme of Victoria, New South Wales, Queensland, the ACT, and the Northern Territory. The Victorian Professional Standards Council (the Council) submitted the Scheme to the ACT Minister in accordance with the requirements under the Victorian *Professional Standards Act 2003* and the requirements under the ACT Act.

The Scheme submitted by the Council has been approved by the ACT Minister and this instrument evidences the approved scheme. The Scheme will remain in force for a period of 5 years from commencement unless the scheme is revoked, extended, or its operation ceases pursuant to section 34 of the Victorian *Professional Standards Act 2003*. The Scheme commences on the 11 May 2010.

A summary of the Scheme is attached for further information.



THE
VICTORIAN
BAR

VICTORIAN BAR

SCHEME SUMMARY

The way in which the association is constituted and the occupational group which the association represents

1. The Victorian Bar is constituted as an association incorporated under the *Associations Incorporation Act 1981 (Vic)* with the name “The Victorian Bar Inc”.
2. It represents Victorian barristers.

The jurisdiction(s) where it is intended the scheme will apply

3. The scheme is intended to apply both in Victoria and in each of the other States and Territories of the Commonwealth of Australia.

The classes and types of members of the association to whom the scheme applies; the likely proportion of members of the association to whom the scheme will apply

4. The scheme applies:
 - (a) to the class of persons within the Victorian Bar more particularly specified in paragraph 5 of this summary; and
 - (b) to persons to whom the Scheme applies by virtue of sections 20, 21 and 22 of the Act.
5. The class of Scheme members referred to in paragraph 4(a) comprises all members of the Victorian Bar –
 - (a) who hold a current 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.
6. At the inception of the Scheme it is estimated that the Scheme will apply to at least 25% of the Bar if not more.

The types of work carried out by members of the association to whom the scheme will apply

7. Advocacy in courts and tribunals, advice and drawing and settling documents.

The way in which liability is limited (insurance, business assets, combination of insurance and business assets);

8. 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 (including any amount payable by the person by way of excess under or in relation to the policy or policies) 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 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 for any amount above the monetary ceiling (a maximum amount of liability) subject to clause 4(2) of the Scheme document, of \$2 million as at the time of the act or omission giving rise to the occupational liability.

The different levels of limited liability for different cases or classes;

9. Subject to the discretionary higher limit, the maximum amount of liability specified in the scheme is \$2 million.

Whether the association may exempt members;

10. Clause 4(2) of the Scheme document provides:

“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 Council 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.”

Whether the scheme confers a discretionary authority on the association to specify higher maximum of liability;

11. Yes, see the above provision in clause 4(2) of the Scheme document.

The association's membership requirements for persons to whom the scheme applies

12. See paragraph 5 above.

The association's continuing occupational educational program

13. Each barrister is required each year to earn at least ten (10) continuing legal education points. The CLE activities undertaken by each barrister must cover four (4) compulsory fields:

- (i) Ethics and Professional Responsibility
- (ii) Skills
- (iii) Substantive Law
- (iv) Practice Management and Business Skills.

At least one (1) CLE point must be earned in compulsory fields (1), (2) and (3). For Practice Management and Business Skills, one (1) CLE point is both the minimum and maximum point.

The association's complaints and discipline system

14. All scheme members must comply with the provisions of the Legal Profession Act 2004 (Vic) which prescribes the system for handling complaints and discipline regulated by the Legal Services Commissioner. The Legal Services Commissioner can also refer the investigation of disciplinary complaints to the Victorian Bar.

15. The Code of Ethics and Code of Practice applicable to the members of the Victorian Bar are contained within the existing Rules of Conduct of the Victorian Bar Practice Rules. These Rules of Conduct were made by the Victorian Bar Council with the assistance of its Ethics Committee, a standing committee of 15 members appointed by the Council.

16. By operation of the *Legal Profession Act* 2004, the Victorian Bar's Rules of Conduct are now deemed to be 'legal profession rules' made by the Victorian Bar.

The association's quality assurance and insurance standards;

17. All members of the Victorian Bar are required to have professional indemnity insurance in order to obtain a practising certificate, and must take out their primary layer of insurance with the Legal Practitioners Liability Committee, a statutory insurer.

18. The policy of professional indemnity insurance for barristers with the LPLC for the financial year 1 July 2007 to 30 June 2008 provides cover up to \$2 million (including defence costs) for "any one loss."

19. The Bar as a delegate of the Legal Services Board is responsible for renewal of the practising certificates of barristers and must conduct an assessment each year as to whether a barrister is fit and proper to hold a practising certificate.

20. The Bar also administers compliance by barristers with the requirements for continuing legal education.

The key strategies to be undertaken by the association in its five year risk management plan;

21. Key strategies will include:

- (1) Promoting, maintaining and improving the quality of the membership of the Victorian Bar by educating and training members in all aspects of the theory and practice of advocacy, ethics and professional responsibility through training and instruction at the time of admission as readers paired with intensive instruction under the guidance of an experienced mentor, in mediation and other methods of alternative dispute resolution (for practitioners who provide alternative dispute resolution services), and through compulsory Continuing Legal Education for all;
- (2) Prescribing high standards of practice and professional conduct for its members and maintaining the observance of such standards;
- (3) Promoting the observance of such standards by fostering member association and involvement in standard setting across the Bar;
- (4) Preserving at all times the professional independence of members;
- (5) Prescribing disciplinary procedures and sanctions, exercising disciplinary powers and imposing sanctions for the better observance of the standards of practice and professional conduct of members;
- (6) Regulating the practice of those persons who are allocated to the Victorian Bar by the Legal Practice Board;
- (7) Maintaining accreditation for practitioners who provide alternative dispute resolution services;
- (8) Doing all such things in the area of risk management as may advance the objects and interests of the Bar.

A description of the management structure within the association for the management and administration of the scheme;

22. The Bar has appointed a General Manager to oversee the management of the association and administration of the Scheme with Managers responsible for Law Reform and Public Affairs, Legal Education and Accreditation and Professional Conduct respectively reporting to him.

The website of where the register of members to whom the scheme will apply can be found;

23. The website of the Victorian Bar – www.vicbar.com.au.

The website of the association where further information about the association and risk management strategies of the association can be found.

24. The website of the Victorian Bar – www.vicbar.com.au.