

CLERKING REGULATIONS

[These Regulations commenced on 1 October 1993 and were amended 3 March 2005 and were further amended and consolidated on 22 August 2013]

Pursuant to clauses 19.1 and 19.2 of the constitution the Bar Council makes the following regulations.

1. INTRODUCTION

- 1.1 Unless otherwise specified these regulations commence on 1 October 1993.
- 1.2 On the commencement of these regulations all rules or other regulations relating to clerking made by the Bar Council before these regulations are revoked and no longer of any effect.
- 1.3 Nothing in regulation 1.2 shall affect the validity of anything done or existing before the commencement of these regulations.

2. INTERPRETATION

- 2.1 In these regulations, unless inconsistent with the context or subject matter -

“bank” means a financial institution that holds a banking licence;

“barristers’ clearing account” means the bank account referred to and required to be operated by a clerk as set out in regulation 8.4;

“barristers money” means money received by a clerk in payment of barristers’ fees and disbursements for services rendered by a barrister or for reimbursement of associated expenses incurred by barristers but, for the avoidance of doubt, does not include trust money;

"clerk" means a person for the time being employed, licensed or approved by the Bar Council to act as a barristers' clerk;

"clerking committee" means the clerking committee appointed by the Bar Council pursuant to regulation 3.1;

"compliance audit" in relation to a barristers’ clearing account means the audit undertaken pursuant to regulation 8.9 and includes testing the system of internal controls governing transactions conducted through the account, the reconciliation of the account and reporting to members of the list concerning disposition of barristers’ money credited to and debited from that account, in order for the auditor to satisfy itself that regulation 8 has been complied with;

"Constitution" means the constitution of the Victorian Bar;

"list" means a group of counsel engaging a clerk;

"list committee" means a list committee comprised of counsel elected pursuant to regulation 6.2;

"person" includes a company or other body corporate;

“regulations” mean these regulations (as amended from time to time);

“Rules” mean the Victorian Bar Incorporated Clerks’ (Audit and Trust Money) Practice Rules (as amended from time to time);

“*the Act*” means the *Legal Profession Act 2004 (Vic)*;

“trust money” has the meaning ascribed to it by the Rules.

3. THE CLERKING COMMITTEE

3.1 The Bar Council shall from time to time appoint such counsel as it thinks fit to be the members of and to constitute the clerking committee.

3.2 The functions of the clerking committee are to:

- (a) advise the Bar Council on matters relating to clerking and clerks;
- (b) formulate policies for the Bar Council in respect of clerking and clerks;
- (c) make recommendations to the Bar Council and the counsel committee in respect of applications for exemptions under these regulations; and
- (d) perform such other functions as the Bar council may from time to time confer on it.

4. DIRECT EMPLOYMENT OF CLERKS

4.1 The Bar Council in its discretion may employ any person it thinks fit to act as a clerk on such terms and conditions as it thinks fit.

4.2 The Bar Council may make financial and other arrangements with a person employed as a clerk.

4.3 The Bar Council may use or commit the funds of the Bar for the purposes of regulation 4.2.

4.4 The Bar Council at any time may in its discretion revoke the employment of a clerk pursuant to regulation 4.1.

5. LICENSING OF CLERKS

5.1 The Bar Council in its discretion may license any person it thinks fit to act as a clerk on such terms and conditions as it thinks fit.

5.2 The Bar Council shall not license a person to act as a clerk unless it is satisfied that the person:

- (a) is a fit and proper person to act as a clerk; and
- (b) will be financially viable as a clerk; and
- (c) will be able to provide adequate services as a clerk.

- 5.3 All persons who with the authority of the Bar Council are acting as clerks at the commencement of these regulations are deemed to be licensed pursuant to regulation 5.1.
- 5.4 The Bar Council at any time may in its discretion revoke the licence of a clerk granted or deemed to have been granted pursuant to these regulations if:
- (a) it is satisfied that the clerk no longer meets the conditions of Regulation 5.2; or.
 - (b) the clerk has failed to comply with any of these regulations

6. LIST COMMITTEES

- 6.1 The affairs of a list shall be managed by a list committee.
- 6.2 A list committee must be elected annually by the list.
- 6.3 A list committee shall consist of at least 5 members of the list of whom 2 must be of less than 7 years standing.
- 6.4 Subject to these regulations the manner of election of a list committee is in the discretion of the list.
- 6.5 Each list committee shall elect one of its members to be chairman.
- 6.6 The procedure of a list committee is in its discretion.

7. CLERKS BOUND BY LIST COMMITTEES

- 7.1 A clerk must comply with any directions made by and is bound by any determination of the list committee.
- 7.2 A clerk must provide to the list committee such information from time to time as the list committee directs, including information necessary for the list committee to determine that the clerk then satisfies and will continue to satisfy the criteria set out in regulation 5.2 and any other information that the list committee requires to discharge its reporting function to the Bar Council as set out in regulation 9

8. RECEIPT OF MONEY BY CLERKS AND ESTABLISHMENT OF BANK ACCOUNTS

- 8.1 Except where required by the Act or as directed by the Bar Council, all business bank accounts of the clerking business must be in the name of the licensed entity.
- 8.2 If required by the list or as directed by the list committee, a Clerk must establish and maintain at all times a trust bank account as stipulated by and operated in accordance with the Act and the Rules to deal with trust money;

- 8.3 A clerk must pay or cause to be paid to the credit of the trust bank account maintained in accordance with regulation 8.2 all trust money received by the Clerk and must not disburse or otherwise apply any money so credited to the trust account except in accordance with the Act and the Rules.
- 8.4 Other than trust money, all barristers' money received by a clerk, whether in cash, by cheque, credit card, bank transfer or other method in payment of barristers' fees and disbursements for services rendered, must as soon as possible be credited to a bank account entitled "barristers' clearing account". A clerk shall operate only one barristers' clearing account for the list.
- 8.5 A barristers' clearing account shall only have credited to it barristers' money and no other funds.
- 8.6 Money credited to the barristers' clearing account must be paid or credited as soon as possible but not later than 3 days following receipt, and may only be disbursed towards payment of
- (a) related disbursements incurred by the barrister for whom the credit was received;
 - (b) any fee or other amount due to the clerk by the barrister;
 - (c) the balance to the barrister's banking account or otherwise as the barrister in writing directs.
- 8.7 In the event that money is credited to a barristers' clearing account maintained in accordance with Regulation 8.4 but the relevant barrister or barristers cannot be identified, the clerk must take all reasonable steps and make all reasonable enquiries to ascertain the source or payer of the money and the circumstances giving rise to the receipt, and record in an exception report details of the receipt and the enquiries made and must pursue further enquiry until the person entitled to the money has been identified.
- 8.8 The clerk shall ensure that the clearing account maintained by the clerk is reconciled weekly except during the week between Christmas Day and New Year's Day.
- 8.9 The clerk shall cause
- (a) where a trust bank account is kept by the clerk under and as required by the Rules – the same auditor; and
 - (b) where no such trust bank account is kept - an auditor appointed by the clerk who would otherwise be qualified to act as an "approved auditor" under the Rules,

to conduct an annual compliance audit of the barristers' clearing account in accordance with this regulation 8 and shall cause the auditor to provide to the Bar Council and to the relevant list committee a copy of the compliance report not later than 31 October next following the end of the year in respect of which the audit has been conducted.

8.10 The clerk shall make available to

- (a) the relevant list committee;
- (b) the auditor; and
- (c) Bar Council;

all reconciliations, exception reports and other accounting information relating to the operation of the barristers' clearing account as may be required by them from time to time to determine whether the barristers' clearing account is being operated in compliance with this regulation 8.

8.11 No later than 31 October in each year, the clerk shall provide an annual attestation in respect of the previous financial year to the list committee and the Bar Council that all transactions undertaken through the barristers' clearing account have been processed in accordance with this regulation 8, all transactions notified in any exception report have been satisfactorily addressed or otherwise rectified, and that the clerk has complied with this regulation 8 in respect of that year.

8.12 If the Bar Council is bona fide of the belief that a concern has arisen as to the conduct of a barristers' clearing account, the Bar Council may appoint an inspector to investigate such an account and its operation, and the provisions of rule 10 of the Rules shall *mutatis mutandis* apply to such appointment and investigation of that account.

8.13 This regulation 8 shall commence operation on and from 1 July 2013.

9. PROVISION OF INFORMATION

9.1 A list committee, shall not later than 31 October each year, provide a statement in writing to the Bar Council setting forth:

- (a) the date of the last annual general meeting of the list;
- (b) the name of each person elected at that meeting as the list committee;
- (c) whether the list committee in the preceding year has satisfied itself that the clerking activities are operating effectively and the clerk's remuneration is appropriate for the viable operation of the Clerk for the forthcoming year;
- (d) whether to the list committee's knowledge the clerk has failed to comply with any one or more of these regulations in the preceding year; and if so, whether that non-compliance has been adequately addressed and rectified; and
- (e) whether the list committee has determined that the clerk then satisfies and will continue to satisfy the criteria set out in regulation 5.2 for the forthcoming year;

9.2 In making a determination for the purposes of regulation 9.1(e), the list committee may have regard to but is not bound by the Guidance Notes annexed to these regulations.

9.3 The Bar Council may by notice require a list committee to inform the Bar

Council of:

- (a) the number and names of counsel on the list;
- (b) the name of any counsel who is absent from active practice;
- (c) the clerking services or the methods provided or maintained by the clerk; and
- (d) any other matter concerning clerking as the Bar Council thinks fit.

9.4 A notice pursuant to regulation 9.3 shall:

- (a) be in writing in the name of the Secretary of the Bar Council;
- (b) be addressed to the chairman of the list;
- (c) set forth the information required; and
- (d) specify the time within which the information must be supplied.

9.5 A list committee in receipt of a notice pursuant to regulation 9.3 shall comply with the notice within the time specified in the notice.

10. CHANGING CLERKS

10.1 Counsel shall not change clerks without the consent of the list committee of the new clerk.

10.2 Counsel who changes clerks shall give a notice in writing to:

- (a) the manager responsible for maintaining the Bar Roll;
- (b) the chairman of the clerking committee;
- (c) the present clerk; and
- (d) the new clerk;

setting forth the name of counsel, the name of the present clerk, the name of the new clerk and the date upon which the new clerk will commence to act as counsel's clerk.

10.3 A change of clerks shall not be effective until counsel has delivered each notice pursuant to regulation 10.2.

Guidance Notes for List Committees

Regulation 9.1(e)

A list committee may consider the following matters to be relevant in making a determination of the type referred to in regulation 9.1(e). However, the following list of matters is not exhaustive. Moreover, a list committee is not necessarily obliged to consider any one or more of the following matters in making such a determination.

Matters that may be relevant to

I. Regulation 5.2(a)

- Whether the clerk and each person engaged by the clerk is appropriately trained in:
 - (i) the clerking business or relevant part thereof;
 - (ii) the content and application of these regulations, the Rules and the Act;
 - (iii) the standards expected of a clerk or a clerking business;
- Whether the clerk's business systems and processes are adequate for the purpose of providing accurate and complete records of the clerk's:
 - (i) dealings with members of the list;
 - (ii) dealings with third parties;
 - (iii) financial transactions engaged in by the clerk whether as agent for members of the list or on the clerk's own account.
- Whether the clerk has appropriate internal controls in place to receive and pay out barristers' money and to transact the business of the list, specifically considering whether duties of staff involved in transaction processing are appropriately segregated and/or independently oversighted;
- Whether consideration has been given to taking out fidelity insurance, and if so, whether the clerk has an appropriate level of fidelity insurance;
- Whether investigation of any reports of non-compliance with
 - (i) the clerking regulations and the clerk's licence agreement;
 - (ii) the Rules and the Act;have failed to be satisfactorily resolved;
- Whether investigation of any reports of impropriety in the clerk's dealings with:
 - (i) list members;
 - (ii) the list committee;
 - (iii) third parties;have failed to be satisfactorily resolved;

- Whether the clerk has complied in a timely way with reasonable directions or requests made by the list committee.

II. Regulation 5.2(b)

In addition to the matters referred to in sub-paragraph I above:

- Whether the clerking business is and is likely to continue to be generally profitable, based on historical earnings and estimates of future maintainable earnings;
- Whether the clerking business requires or may require injections of capital or additional finance in the foreseeable future ;
- Whether there are foreseeable financial or business risks which are not able to be managed in the ordinary course of its business operations.

III. Regulation 5.2(c)

In addition to the matters referred to in sub-paragraphs I and II above:

- Whether the clerk offers and provides to members of the list the range and quality of services reasonably required or expected by them;
- Whether the clerk has systems in place to deal with complaints by members of the list and whether complaints have been adequately dealt with.