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12 January 2015

Hon. Michael Black AC QC
Chairperson
Legal Services Council
Level 11, 170 Phillip Street
Sydney NSW 2000.

Dear Mr Black

I write on behalf of the Transport Accident Commission (TAC) in response to the invitation of the Legal Services Council to comment on the draft *Legal Profession General Uniform Rules (draft Rules)*.

The TAC makes submissions concerning the draft *Rules* in relation to two topics:

- the appropriate practising certificate to be held (generally)¹ by lawyers directly employed by the TAC; and
- an exemption from the obligation for those lawyers to hold professional indemnity insurance.

The TAC

The TAC is a body corporate established by the *Transport Accident Act 1986* (Vic) (the **TA Act**). It administers a comprehensive no-fault and common law damages compensation scheme for people who are injured, and the dependents of those who die, as a result of a transport accident within Victoria or, where a Victorian registered vehicle is involved, interstate.

In the 2013/2014 financial year, the TAC provided 47,115 people with benefits and paid a total of \$1.101 billion in support services and common law benefits.

To assist it in the performance of its statutory duties, the TAC employs numerous lawyers. It presently employs approximately 50 lawyers (most full time, some part time).

¹

There will no doubt be exceptions, for example where a lawyer is directly employed by the TAC but also works with a community legal service. The question of the appropriate practising certificate to be held in such cases ought to be considered once the appropriate practising certificate to be held by most lawyers employed directly by the TAC has been resolved.

Generally, the duties performed by lawyers employed by the TAC encompass:

- providing legal advice to the TAC;
- acting as solicitor on the record for the TAC where it is named as a party to court or tribunal proceedings;²
- acting as solicitor on the record for an owner or driver who is indemnified by the TAC where, pursuant to s.94(10) of the TA Act the TAC has assumed the conduct and control of a proceeding on behalf of and in the name of such an indemnified owner or driver.³

Currently, most solicitors employed by the TAC hold corporate practising certificates, as do most government lawyers in Victoria. To date, solicitors holding a corporate practising certificate who are employed by the TAC have not taken out professional indemnity insurance.

² Typically, the TAC is named as a party in 4 types of proceeding: (1) an application at the Victorian Civil and Administrative Tribunal seeking review of a decision of the TAC in the administration of the "no fault" benefits scheme, (2) an application to a court pursuant to s.93(4)(b) of the TA Act for leave to commence a proceeding seeking recovery of damages on the ground the claimant has a "serious injury", (3) a statutory cause of action pursuant to s.96 of TA Act against the TAC where liability is alleged in respect of an unidentified vehicle or an unindemnified vehicle and (more rarely) (4) a disputed claim for indemnity under s.94 of the TA Act.

³ Section 94 of the TA Act obliges the TAC to indemnify the owner or driver of a registered motor vehicle in respect of any liability in respect of an injury or death of a person caused by or arising out of the use of the motor vehicle in Victoria or in another State or in a Territory. The TAC cannot avoid indemnity in any circumstance. Claimants are entitled to look directly to the TAC for payment of damages and costs awarded to them. The TAC's powers to control the indemnified person's defence are more extensive than the powers typically given by commercial insurance policies. Sub-s.94(10) provides:

"The Commission—

- (a) may undertake the settlement of any claim against the owner or driver in respect of which the Commission is liable under this section to indemnify the owner or driver; and*
- (b) may take over during such period as it thinks proper the conduct and control on behalf of the owner or driver of any proceedings to enforce the claim or for the settlement of any question arising from it; and*
- (c) may defend or conduct such proceedings in the name of the owner or driver and on the owner's or driver's behalf and, if need be may, without the consent of the owner or driver, to the extent of the liability of the Commission but no further or otherwise, admit liability; and*
- (d) subject to this section, must indemnify the owner or driver against all costs and expenses of or incidental to any such proceedings while the Commission retains the conduct and control of them."*

The scope of the TAC's powers to control such proceedings was considered by the Victorian Court of Appeal in *Davies v Pyke* (2004) 10 VR 339, where it was held that in exercising its powers under s.94(10), in contrast with a commercial provider of liability insurance, the TAC was not limited to propounding a case that accorded with the instructions of the owner or driver; rather, it was entitled to act in its own interests as the entity liable to pay the claim if the claim succeeded.

Practising certificates

Under the *Uniform Law*, a new category of practising certificate is to be introduced, namely a practising certificate by which "*the holder is authorised to engage in legal practice ... as a government legal practitioner*" (s.47(1)(a)(iv)). Such a practising certificate is to be available to a "*government lawyer*," relevantly defined in s.6 of the *Uniform Law* to mean:

"a person who engages in legal practice only -

- (a) as an officer or employee of a government authority; or
- (b) as the holder of a statutory office of the Commonwealth or of a jurisdiction; or
- (c) in another category specified by the Uniform Rules."

The term "*government authority*" is defined, again in s.6 of the *Uniform Law*. The term is defined to include (among other things) "*a public authority of ... a jurisdiction*," and to include "*a body or organisation (or a class of bodies or organisations) declared in the Uniform Rules to be within [the] definition*."

The TAC submits it is a "*public authority of a jurisdiction*," but to avoid controversy it ought be declared in the *Uniform Rules* to be within the definition. Ideally, such a declaration ought be expressed to be "for the avoidance of doubt" so as not to give rise to an inference that, by virtue of the declaration, casts doubt on whether the TAC is a "*public authority*."

The TAC is properly regarded as a "*public authority*." It is a statutory corporation established for public purposes that administers a statutory fund. Its budget is subject to Ministerial approval. It may repay capital and pay dividends to the State. See the TA Act 1986 esp. ss 1, 10, 11, 12, 14, 15, 27, 29A and 29B.

Rule 7 of the draft *Rules* reads:

"The Australian Government Solicitor is declared to be within the definition of government authority in section 6(1) of the Uniform Law."

The TAC submits there ought be a comparable declaration that the TAC is declared to be within the definition of **government authority** in section 6(1) of the *Uniform Law*. The AGS might be thought to be quite obviously within the definition of "*government authority*," so that the non-declaration of the TAC might be argued to have significance in the construction of the meaning of that term.

A declaration that the TAC is a "government authority" is consistent with the recommendations made in a report in 2009 to the Victorian Attorney-General entitled "Regulation of Government Lawyers."⁴ The authors of that Report recommended that government lawyers be required to take out practising certificates, and that the legislation make clear that the requirement (then found in the definition of "corporate legal practitioner" set out in s.1.2.1 of the *Legal Profession Act* 2004 (Vic) and more recently set out in s.2.4.3(5A) of the same Act) that corporate legal practitioners "must provide legal services only to, and for the purposes of, his or her employer" did not preclude solicitors employed by public authorities such as the TAC from acting as solicitor on the record in litigation involving persons indemnified by the TAC.⁵

It seems to the TAC that the new legislative scheme envisages that the lawyers directly employed by it ought to hold practising certificates entitling them to practise as government legal practitioners, and that such right of practice encompass the 3 practice areas referred to on page 2 of these submissions.

Insurance

The TAC also seeks to put beyond doubt that its employed solicitors, including those who act as solicitor on the record for persons other than the TAC whose defences have been taken over by the TAC, are exempt from the obligation to take out professional indemnity insurance.

The obligation to have such insurance is found in s.215 of the *Uniform Law*. It contemplates exemptions made under the *Rules*. The exceptions currently proposed are in draft rule 76, which reads:

"Exemptions

- (1) *For the purposes of section 215 (8) of the Uniform Law, the following are exempt from the requirement to hold or be covered by an approved insurance policy:*
 - (a) *a corporate legal practitioner or government legal practitioner who:*

⁴

The report is available at:

<https://assets.justice.vic.gov.au/justice/resources/924ab1be-a445-4fcd-b56f-8f3cb51d0baa/4188%2Bdoj%2Breggovlawyers%2Bv3.pdf>

A "hard copy" is enclosed with the "hard copy" of these submissions.

⁵

See esp. section 5.1.7 of the Report (at pp.29-31) and recommendation 7 (at p.31).

- (i) *provides legal services only as an employee to the practitioner's employer in the course of employment; and*
 - (ii) *does not receive a fee, gain or reward other than the practitioner's ordinary remuneration as an employee;*
 - (b) *a holder of a statutory office of the Commonwealth or of a jurisdiction;*
 - (c) *a person holding an office or position, or acting as, parliamentary counsel, legislative counsel or legislative drafter (however described) under a contract of service, or contract for services, with the Crown;*
 - (d) *an incorporated legal practice or community legal service (or class of incorporated legal practices or class of community legal services) determined by the designated local regulatory authority, on any grounds that the regulatory authority considers sufficient, as warranting exemption.*
- (2) *Subrule (1) does not affect the requirement for an Australian Legal Practitioner to have professional indemnity insurance when engaging in legal practice as a volunteer at a community legal service or otherwise on a pro bono basis."*

Given the third category of legal work performed by lawyers directly employed by the TAC as noted on page 2 of these submissions (namely acting as solicitor on the record for an owner or driver who is indemnified by the TAC where, pursuant to s.94(10) of the TA Act the TAC has assumed the conduct and control of a proceeding on behalf of and in the name of such an indemnified owner or driver), the requirement that the practitioner "*provides legal services only as an employee to the practitioner's employer in the course of employment*" may give rise to uncertainty.

The TAC considers that generally its employed solicitors are providing legal services only **to** it (the employer), which is the "real party" controlling the conduct of the proceeding under s.94(10) of the TA Act, even though the solicitor is acting as solicitor **for** the indemnified named owner or driver, but the TAC acknowledges that question is open to debate. The TAC submits clarity is to be preferred, and that there is no occasion to require professional indemnity insurance where all realistically foreseeable risk of loss from any professional negligence falls on the employer, the TAC.

The clarity the TAC seeks might be achieved either by:

- (a) redrafting draft r.76(d) so as to make reference to government legal practitioners; or

- (b) redrafting draft r.76(1)(a)(i).

The first option

If draft r.76(d) were varied in that way, the Victorian Legal Services Commissioner could make a determination as to whether circumstances warrant an exemption from the obligation to hold professional indemnity insurance. The TAC has no equivalent in New South Wales and so the issue is presently a peculiarly Victorian issue. Such redrafting would provide greater flexibility and opportunity for the position to change promptly without the need for quasi-legislative process should relevant circumstances arise.

The second option

Draft r.76(1)(a)(i) proposes to exempt "a ... government legal practitioner who provides legal services only as an employee to the practitioner's employer in the course of employment."

In order to put beyond doubt the availability of the exemption to TAC's proposed government practitioners who may be argued to provide legal services to indemnified persons, as solicitor on the record for such persons in litigation, the TAC respectfully urges the Council to amend the draft rule so that the final version of the rule reads:

"a ... government legal practitioner who provides legal services only in the course of their employment"

or

"a ... government legal practitioner who provides legal services only as an employee to, or for the purposes of, the practitioner's employer in the course of such employment."

If the Council has not formed a policy position in relation to the insurance situation of government lawyers who may be argued to provide legal services to persons other than their employer in the course of their employment and at the direction of their employer, where the employer's public function includes conducting litigation on behalf of others, the TAC would be pleased to make further submissions in support of the proposition that public policy does not require that such persons hold professional indemnity insurance.

We would be please to expand on any aspect of these submissions if the Council feels it might be so assisted.

Yours Sincerely



Joe Calafiore

Acting CEO

Transport Accident Commission

Cc Mr Michael McGarvie, CEO, Legal Services Board, Victoria.