

Teleconference Outcomes – 4.00pm 12 November 2010

Attendees: Michael Lavarch (Chair), Roger Wilkins, Stephen Goggs, Joe Catanzariti, Barbara Bradshaw, Philip Selth, Murray Tobias, Tony de Govrik, Dudley Stow, John Briton, Noela L'Estrange, Peta Spender, Robert Milliner, Carolyn Bond, Rob Cornall and Tony Abbott

Secretariat: Marjorie Todd, Brendan Atkinson

Apologies: Steven Penglis, Andrew Phelan, Andrew Grech, Harold Cottee

Please note: Members of the Consultative Group were speaking on their own behalf and in their personal capacity. This is a general record of discussions only.

1. Michael Lavarch opened the meeting noting that this may be the last time the Consultative Group meets and noted the purpose of the meeting was to discuss the Taskforce's amended proposals on key issues and funding that appear in the revised interim report released this week.
2. A number of members of the Consultative Group thought that the consultation process conducted to date was insufficient. Support was shown for the need for further consultation to provide members with some understanding of the changes made to the Bill following the public consultation period. Others thought that, apart from the key issues, there were a number of other matters raised in submissions and, without seeing the amended Bill, it was hard to give fair and reasonable comment on the Bill. The lack of such comment should not be seen as an endorsement of the Bill.

Update from the Taskforce (Roger Wilkins and Stephen Goggs)

3. Roger Wilkins noted that the Working Group was in the process of writing a report to COAG and is continuing with its work in order to lodge with COAG in December. He agreed with Michael's statement that this may be the last opportunity for the Consultative Group to discuss these issues.
4. He noted that there had been a number of small changes to the Taskforce's proposals in key areas since the last meeting of the Consultative Group, including:
 - A proposed jurisdictional rotational requirement for Board membership
 - Disallowance of National Rules by SCAG now proposed to require reasons to be published
 - More clearly defined power for the Commissioner to undertake compliance audits, and
 - Commissioner's guidelines and directions can be of a general nature only, issued to promote national consistency.
5. The Consultative Group then discussed the key issues and the Taskforce's proposed responses outlined in the Interim Report.
 - (i) **Commercial and government clients** – The majority of the Consultative Group are comfortable with the Taskforce's proposal to carve out commercial and government clients from the consumer protection provisions in relation to legal costs and consumer complaints, provided that the extent of the carve out is appropriately framed and is not wrongly capturing people who are not "sophisticated" clients.

A strong majority of the Consultative Group were not in favour of a proposal put to the Group that the commercial and government clients should be able to opt into the consumer complaints provisions as they are able to under the proposed legal costs regime.

- (ii) **Compliance audits and management system directions** – The majority of the Consultative Group was not in favour of the proposed limitation of the circumstances in which the Commissioner can issue management service directions. That is, following a compliance audit only. It was suggested that there are numerous situations where a management system direction may be usefully issued before a compliance audit was undertaken, for example, where deficiencies emerge during investigation or complaint. The Consultative Group agreed that it was unfortunate that the power has been limited in this way.

One member raised concerns that the majority of audits conducted under the compliance audit power in relation to incorporated legal practices have been self assessment audits which, by their very nature, are incompatible with the proposed ‘reasonable grounds’ pre-condition. He noted that self-assessment audits have dramatically reduced complaints rates against firms that have been through the process. The suggestion was that the National Law include a capacity for regulators to require law practices to conduct an in-house review of their management systems – in which case compliance audits could continue to be framed in the way suggested, ie on reasonable grounds, in response to some identified problem.

- (iii) **SCAG policy directions and disallowance of rules** – The Consultative Group agreed to note in their report to COAG that the sounder principle is for the power to disallow rules to rest with Parliament and not the Executive for reasons of transparency, accountability and accessibility. Here, as a matter of practicality, this would be the Parliament of the host jurisdiction. However, the Group accepts the reality that it will be difficult to achieve such a result, and that the likely and practical outcome is for the power to rest with SCAG. While some members noted that this appeared to increase executive power without parliamentary oversight, the majority view was that this was acceptable as long as the power is properly constrained against criteria. For example, a disallowance power where proposed rules would impose restrictive or anti-competitive practices that are not in the public interest.

The Consultative Group unanimously agreed to the need for criteria for disallowance and noted a formulation of Murray Tobias from his submission of 24 June that relates to this:

Under s 716 of the Legal Profession Act 2004 (NSW), the Attorney-General may, by order published in the Gazette, declare any legal profession rule or any part thereof inoperative if:

- (a) *the Commissioner has reported to the Attorney-General that the rule is not in the public interest, or*
- (b) *the Attorney General is of the opinion that the rule imposes restrictive or anti-competitive practices that are not in the public interest or the rule is not otherwise in the public interest.*

Given that the Board under the draft Law relevantly takes the place of the Commissioner under the NSW Act, I suggest that the power of veto of SCAG should be confined to those rules submitted to it by the Board where SCAG is of the opinion that the rule or any part thereof

“imposes restrictive or anti-competitive practices that are not in the public interest or which is otherwise not in the public interest because it is inimical to one or more of the objectives of this Law as set out in clause 1.1.3”.

(iv) **The Board** – Roger Wilkins clarified that the members of the Board will be appointed by the host Attorney-General on recommendations outlined in the Interim Report. There were differing views amongst the Consultative Group in relation to the Taskforce’s proposed Board composition. Some members of the Consultative Group raised concerns with continuing with a proposed Board composition that was opposed by the Council of Chief Justices (CCJ), saying it would be unfortunate if the regime commenced without the support of the Chief Justices. These members supported the proposal put forward by the CCJ, where the Council appoints (or recommends for appointment) the Chair in consultation with SCAG rather than having a veto power against appointments. However, other members stated that the Taskforce proposal is a reasonable compromise and does not seem to be unsatisfactory to the Chief Justices or the profession.

The Group noted that for the proposed scheme to be successful the issue of the appointment of the Chair needs to be resolved.

(v) **The Commissioner** – Roger Wilkins clarified that the Commissioner is proposed to be appointed by the host Attorney-General with the concurrence of the Board which, in this context, means approval. He said that he does not see a conflict with the Commissioner being the CEO of the Board. Some members of the Consultative Group considered that the opportunity should have been seized to further nationalise the Commissioner’s structure, and that the inability of the Commissioner to call in individual matters or drive national consistency is particularly disappointing. However, other members of the Group were quite satisfied with the Taskforce’s proposal in relation to the Commissioner.

(vi) **Admissions** – The Consultative Group noted that there has always been healthy scepticism surrounding the costs of the reform, though some of this may be muted with the release of the revised admissions structure and the constraint of the proposed national framework. The majority of the Group would have liked to have seen a more national outcome, but believe that the proposed structure is workable and satisfactory.

Some members expressed doubts as to whether the system is in fact workable, raising in particular concerns of how local bodies are to assist with complex applications if funding from admissions, which currently funds local bodies, will go towards funding of the national structures.

(vii) **Funding** – The Consultative Group is interested in receiving further details on the breakdown of costings. Stephen Goggs confirmed that the Taskforce is arranging to make some of that information available. Some members expressed grave concerns about the funding of the scheme.

Further consultation

6. Some members of the Group noted that the process will not have been adequate if there is no further consultation following lodgement with COAG. They want the opportunity to discuss the revised Bill in detail, particularly those issues that do not appear in the interim report. The Chair acknowledged the strength of views expressed. The Consultative Group recommends the need for further consultation following lodgement of the Bill.

7. Roger Wilkins noted that what happens following lodgement with COAG will be COAG’s decision, this may or may not include further consultation. A decision about which jurisdiction is to take carriage of the project following lodgement with COAG will also reside with COAG.

Further business

8. It was agreed that a copy of these Minutes would be sent to the Law Council for their 27 November Meeting.