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Parliament House
Canberra ACT 2600

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Copy to

Ms. Kerin Leonard
Strategic Policy and Law Reform Branch
Australian Government Attorney-General's Department

Dear Michael

National Legal Profession Consultative Group - Issues for consideration by the Task Force

I refer to our discussion at the first consultation group meeting where you asked members of the group to raise issues for consideration by the Task Force.

I am responding on behalf of LLFG Limited. LLFG Limited represents the following large law firms: Allens Arthur Robinson; Blake Dawson; Clayton Utz; Corrs Chambers Westgarth; Deacons; DLA Phillips Fox; Freehills; Mallesons Stephen Jaques and Minter Ellison. While this letter is written on behalf of and from the perspective of large law firms, this is not an issue just for the large law firms. Any law firm that operates in 2 or more jurisdictions faces these issues to some degree and as consolidation continues across the profession this will increase.

The large law firms support the Task Force's aim that its work deliver "(a) a national legal profession and a national legal services market through simplified uniform legislation and regulatory standards; (b) clear and accessible consumer protection, so that consumers have the same rights and remedies regardless of where they live; and (c) a system of regulation that is efficient and effective".

This letter raises a number of areas where, from the large law firms' perspective, the present system gives rise to unnecessary cost and inefficiencies and changes are necessary to meet the Task Force's aims.

- 1 Practising throughout Australia:** Each jurisdiction retains a separate process in relation to solicitors in their home jurisdiction, including different requirements for admission, different forms and processes for admissions and practising certificate renewals and different fees. Cost savings would occur if admissions and renewals were administered on a national basis. This would also enable some electronic processing.

The intent of the Model Law was to enable a solicitor practising in one Australian State to freely practise in another State. Currently, however, Western Australia still retains a separate registration requirement for solicitors who are taken to have established an office in that State.

There should be one set of requirements and process for admission as an Australian lawyer, one body to issue practising certificates (preferably allowing electronic processing) with one fee (ie no state differences) and a single practising certificate allowing practise anywhere in Australia.

- 2 **Professional Conduct :** Work is ongoing in relation to National Conduct Rules to be adopted in each State but in the meantime, differences between the current State regimes create costs in relation to administration, training and general compliance. There are also inconsistencies in relation to who has to comply (in some jurisdictions, for example, government lawyers may be exempt) and the legal force of the Rules. The legal profession needs certainty in relation to what is required of them. Accordingly, the Rules should apply to the extent of any inconsistency with the common law. At present, this could not be the case in all jurisdictions as in some jurisdictions the Rules do not have any statutory force. (While the Rules should be given the status of subordinate legislation, conduct rules should continue to be developed by the profession for the profession.)

As each State has its own bodies responsible for professional conduct, where there are queries affecting a practice which practises in more than one jurisdiction at present it is necessary to approach different bodies which can lead to different outcomes.

- 3 **Continuing Professional Development:** There are differences in present requirements, for example around content and record keeping, which leads to extra administrative and training costs. There should be one uniform set of CPD requirements for all Australian lawyers. There is no cogent argument for any State differences.
- 4 **Cost disclosures, costs agreements and billing:** It is probably fair to say that lawyers are more heavily regulated than most other professions and service providers in relation to their agreement with their clients.

There are complex provisions to work out which State law is relevant and to provide for shifting of instructions between States.

At present, there must be disclosure of a range of things to clients, subject to certain exceptions. We acknowledge the disclosures are primarily designed to protect consumers but heavy regulation can make for lengthy, complex disclosures which do not reflect the needs of all clients (eg. sophisticated corporate clients). There are also differences between the cost disclosure regimes in different States in relation to both the entities to whom disclosure is compulsory and as to what must be disclosed .

By way of example, one of the requirements is that firms disclose the various complaint avenues a client has. Each State provides for different recourse. Therefore, it is difficult for

law firms to adopt common cost disclosures throughout Australia, except perhaps at the expense of a lot of paper.

Further there are also different billing requirements at present in the different states, including format and mode of delivery, which leads to additional administrative and training expenses. (Again these provisions are out of step with modern practice, even in the consumer context, such as requiring bills (or covering letters) to be signed).

Essentially, what is needed is one set of (simpler) disclosure rules, directed to consumers only, and one official method of dealing with complaints over bills, again directed to consumers rather than sophisticated clients. Rather than provide for one regime subject to exceptions, there should be a simpler regime for the benefit of consumers only. The Act at present treats a consumer as any client who is not a sophisticated client. We suggest it would be better to have specific requirements in relation to consumers with specific tests for who constitutes a consumer. A consumer would be an individual seeking personal advice - their status as a consumer might depend on the area of work (for example: family law; migration law; wills and probates; personal conveyancing) with a test to exclude experienced, high income individuals.

There should also be one set of requirements for bills which recognise modern modes of delivery.

There are some other odd features of the current legislation (which go back some way and were intended presumably for consumer protection) such as allowing for minimum time periods before action can be taken on recovery of bills. In the context of dealing with sophisticated clients these notions are out of step with ordinary concepts of freedom of contract and can add to costs.

- 5 Trust provisions:** We are required to administer separate trust accounts in each of the jurisdictions in which we practise with some subtle differences between the various regimes. Costs savings and efficiencies could be achieved if we were able to maintain trust accounts in one jurisdiction. Trust accounts are also audited on a State-by-State basis whereas one audit would create cost efficiencies.

The rules are also inflexible at present as in some cases they mandate requirements which can require changes to the firms' electronic practice management systems. The rules seem to have been designed with particular practice management systems in mind. Because these are administered on a State-by-State basis any request for an exemption needs to be obtained in every State in which a firm has offices. There should be one national body to deal with administration of audits and exemptions.

- 6 Too many regulators and complaint handling mechanisms:** Each State has different regulators and complaint handling mechanisms, some themselves overlapping. For example, if a matter involves more than one State, a complaint may be made to more than one regulator with enquiries in relation to the same set of facts. There is a need for one regulator and one complaint handling process. We understand that consideration may be given to having a national regulator setting standards with delegation to separate

independent state based regulators. Our concern is that this could lead to unnecessary additional paperwork and regulation nationally rather than ensuring one coherent national system.

- 7 **Fidelity Fund:** At present each State has its own fidelity fund and there are differences with respect to the scope of claims that can be met from the fund. The amount to be paid to the funds differs between States and there can be requirements for interstate practitioners to pay in more than one State. Ideally there would be only one fidelity fund. We recognise this will raise issues with respect to the claims which can be met out of a fund. Like the proposal for one trust account, it will also raise issues for the States as they use their fund (and other monies such as the interest on general trust accounts) in different ways.

- 8 **Types of law practice:** Generally the legislation recognises lawyers can practise by themselves, though law firms with other Australian solicitors, through an incorporated law practice or through a multi disciplinary partnership.

As the practice of law globalises, more flexibility is needed. For example it should be recognised that Australian lawyers may practise in an overseas based law partnership or limited liability partnership. Further, many common law jurisdictions now allow limited liability law partnerships and that is a structure which should be able to be used in Australia. (The limited liability partnership allows lawyers who may practise in different jurisdictions to be a member of a partnership which is a separate legal entity and has limited liability. It is a different structure from limited liability partnerships in Australia currently which require a general partner.)

The limited nature of the structure through which solicitors may practise creates inefficiencies at present as in some jurisdictions solicitors employed by an overseas law practice can be compelled to take out practising certificates as sole practitioners.

- 9 **Professional indemnity insurance requirements:** Where the Model Law has been adopted, the large firms can take out the compulsory first layer of insurance through a statutory insurer in one jurisdiction to cover the firm's practitioners but must seek exemption from the insuring in other relevant jurisdictions. While the administrative costs are small, it would be more cost effective to administer this process so that an exemption is automatically granted as of right.
- 10 **Limitation of liability:** Only New South Wales has adopted a scheme under which firms may limit their liability. While some other jurisdictions are taking steps to adopt a scheme it is not clear that the schemes, when adopted, will take a common form. While there may be commercial impediments to some firms capping liability, for those which intend to do so, the lack of a national scheme may mean they cannot reduce their insurance in line with the cap and take advantage of lower insurance premiums. This is a longer term issue, as it would still no doubt be necessary for firms to retain higher run-off cover for a period.
- 11 **Taxation issues:** There are a number of tax impediments to law firms moving to a corporate model. These largely arise because the corporate model does not cater for the "no goodwill" or "fixed value" structure used by many partnerships under which, when a partner leaves, their partnership interest is not assigned and they receive nothing over and above any

capital contributed (in the case of a no goodwill partnership) or a fixed value (which may be fixed or determined in accordance with a formula) for their partnership interest.

In particular:

- the existing rollover provisions from partnerships into companies does not allow for redeemable shares to be issued. A redeemable share is conventionally used to replicate a partner's interest as it enables the share to be redeemed when a partner retires rather than transferred or bought back.
- the provisions also need to be changed not to require the market value of the shares to match the market value of the interest in the partnership and to allow for the rollover from multiple partnership into the one company. (A number of law firms trading under one name may be constituted as a number of different partnerships.)
- it should be put beyond doubt that the shares initially issued to the partners are not issued in connection with their new employment.

There are other ongoing issues:

- the employee share scheme provisions would require amendment to ensure that shares issued to "partners" from time to time (ie not just upon incorporation), including as they become more senior ("unit progression") are not subject to the tax treatment under the employee share scheme rules (eg any "discount" element on issue which might arise because of the different valuation treatment of a partner's interest as against a share is not taxed on issue).
- similarly, it would be necessary to ensure the value shifting rules are not engaged when shares are issued or redeemed (or there are changes in "units") and that market value substitution rules are not engaged when "partners" retire and their shares are redeemed or disposed of.

It would also be necessary to ensure that dividends on the shares can be franked. In the case of redeemable shares redeemed at no value or some fixed value it should be clarified that the shares are still regarded as "at risk" for the purpose of the 45 day rule (a condition of franking).

If, as submitted, law firms also ought to be able to move to a limited liability partnership model (along the lines of the UK model) there would need to be special tax treatment for that model to deal with taxation on "partners" income at corporate rates with franking credits and changes in partnership interests.

- 12 Stamp duty** - Each State and Territory has a different regime for stamp duty on transfer of property under which duty may be payable on the transfer from the partnership into the company. Notably, jurisdictions other than Victoria, Tasmania and the ACT impose duty on the transfer of goodwill and would seek to impose some market value on the goodwill despite the treatment given by the partnership itself.

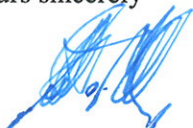
At present, there is no relief in any Australian jurisdiction for the transfer of assets of a partnership into a company. (Yet, all jurisdictions except Tasmania provide some relief for

corporate reconstructions). The relief needs to be provided and drawn widely to enable the transfers. The relief cannot be unduly restrictive, recognising that a number of partnerships may move to the one company and that there are likely to be some changes in the partnership both prior to and on incorporation.

We have discussed whether it is possible to quantify the costs of the current system. For the large firms the cost to each of the firms of the outworking of these issues varies, depending on how they are structured and the jurisdictions in which they practise. In particular it is difficult to quantify the costs as they are incurred in connection with a number of roles across a variety of back office staff in various jurisdictions as well as in respect of the additional measures required of the lawyers in the way in which they practice.

We would be happy to expand on any of these issues or to provide further information to assist the reform process.

Yours sincerely



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