

National legal regulation: What happens next

Like Rome, a truly national legal services market was never going to be built in a day. But while the Colosseum was built in 10 years, the building of a national regime for lawyers has been akin to a hobby project of adding a deck to the holiday house – there have been bursts of activity but the project never gets finished.

With the intervention of the Council of Australian Governments (COAG), this might be about to change, with a new deadline of 12 months being imposed to achieve a national regulatory framework for Australia's lawyers.

The current drive towards a national legal services market stems from the micro-economic reform agenda adopted by Australian governments in the early 1990s. The endorsement of a national competition policy led to the creation of the Australian Competition Council, now the ACCC. Importantly, the reach of the *Trade Practices Act* went beyond compa-

nies and extended into the professions.

The legal profession's response to the changing public policy environment was the development by the Law Council of Australia of its 'Blueprint for the Structure of the Legal Profession: A National Market for Legal Services' (July 1994). The blueprint recognised that national competition policy applied to legal services and it set out a reform agenda which, in many ways, has been followed in the following 15 years. This agenda included:

- National practice achieved by removing constraints on interstate practice
- Mutual recognition of practising certificates based on common pre-admission standards
- National uniformity in areas such as professional conduct and ethics, regulation of foreign lawyers, trust accounting rules and the management of fidelity funds.



Professor Michael Lavarch is chairing a consultative committee which will advise the Council of Australian Governments on national reform of legal regulation. Here he explains the background, and next step, in this process.



The Standing Committee of Attorneys-General (SCAG) has pursued the goal of a national legal services market for well over a decade. In 2001 the SCAG officers (officials from the Commonwealth and various state and territory Justice and Attorney-General Departments) were tasked to develop a paper on how a national model for legal practice regulation might work.

The officers' report, completed in July 2002, has guided the subsequent policy framework for the so-called model laws project. Critically, the officers proposed, consistent with the view of the profession as advocated by the Law Council, that the reform process should focus solely on harmonising the laws applying to legal practice. The report expressly excluded the examination of regulatory structures and the funding of legal practice regulation. >>

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The decision to focus solely on the laws, rather than who applied them and how this was to be funded, was understandable. The theory was that, if the laws were essentially uniform, at least in respect of those provisions which impacted on the ability of lawyers and their clients to operate nationally, then jurisdictional differences and how regulatory and quasi-regulatory bodies work should not be vital to the success of the project. In reality, however, even if nationally consistent laws were achieved, the virtual army of different bodies (55) across jurisdictions, each having some stake in administering part of the system, would invariably contribute to continuing fragmentation in regulatory experience.

The national model law institutes a range of worthwhile and, in some cases, world-leading reforms. The facilitation of incorporation of legal practice has been highly influential in leading thinking at an international level, with the United Kingdom now following the Australian approach. The model laws approach to trust account regulation recognised the role of the legal practice as a whole, rather than the individual lawyer, and aligned regulation with modern operational realities.

The achievements of the project need to be recognised, but progress remains deeply unsatisfactory in many respects. As Chief Justice of the High Court Justice Robert French remarked on the 75th anniversary of the Law Council last year: "Today Australia's popula-

tion comprises 21 million people. This is the population of New York State. It seems ridiculous to think of anything less than a national profession and a national judiciary, albeit within the framework of a working federation which retains a useful pluralism." Ridiculous it may be, but Australia remains far away from a national legal profession.

The model laws have not been enacted uniformly across Australia. The South Australian Upper House has refused to pass the Bill in that state because of local politics around a fidelity fund issue. The model itself distinguished between "core" and "non-core" provisions and variation between state Acts continue to frustrate firms operating across state boundaries.

Funding

In February 2009 COAG intervened, removing the national practice project from SCAG. In its place COAG developed a plan to draft legislation to achieve uniform laws regulating the legal profession within 12 months and to expressly tackle the issue of regulatory structures. Although the COAG paper has not expressly mentioned funding, it is inevitable that this issue will also have to be examined if a truly national system is to emerge.

The plan adopted by COAG, which has in effect been delegated to the federal Attor-

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ney-General's Department to pursue, models closely the process put in place to tackle corporate law simplification. A specialist taskforce will drive the project and will consult with a broader committee which I have been asked to chair. The first output from the taskforce will be presumably be a process document as to how it intends to proceed, together with an audit of the existing regulatory structures.

The consultative committee should be formed and operating by the end of June. It will consist of representatives from law societies and bar associations, as well as the major law firms and consumers of legal services.

Without predetermining different options, it is likely that the outcome must embody:

- Recognition of the role of the state Supreme Courts in oversighting the profession
- A uniform legislative regime which is sufficiently robust not to lose uniformity as a result of individual circumstances in one jurisdiction
- A national regulatory structure which, if not responsible for all regulation of itself, is responsible for setting and maintaining standards which are applied by any state or territory bodies
- An ongoing role for professional associations in fostering best-practice standards in lawyers' conduct and service to clients and to the rule of law
- Greater transparency in the true costs of regulation and how regulation is to be funded.

A national legal profession will no longer be a hobby project for government. Our aim now is to build a regime which maintains the best of the current system, while taking the profession, the public and the nation to a new era. ■

Professor Michael Lavarch has been executive dean of law at the Queensland University of Technology since March 2004. He was a federal Labor MP from 1987 to 1996, Attorney-General from 1993 to 1996 and Secretary-General of the Law Council of Australia from 2001 to 2004, during which time there was significant progress on national practice standards for all lawyers. He is chair of the consultative committee appointed by Attorney-General Robert McClelland to advise the Council of Australian Governments (COAG) on national regulation reform.
