

**LLFG Limited**  
**(ACN 123 965 707)**

Mr Roger Wilkins AO  
The Secretary  
Attorney General's Department  
Central Office  
3 - 5 National Circuit  
BARTON ACT 2600

**Copy to:**

22 December 2009

Professor Michael Lavarch  
Chair  
NLPRP Consultative Group  
Attorney General's Department  
3 - 5 National Circuit  
BARTON ACT 2600

Ms Marjorie Todd  
Strategic Policy and Law  
Reform Branch  
Attorney General's Department  
3 - 5 National Circuit  
BARTON ACT 2600

Dear Mr Wilkins

**National Legal Profession Reform**

I refer to my letter dated 9 December 2009.

In that letter I foreshadowed that LLFG would be commenting separately on each of the consultation papers issued by the Taskforce. I now attach our detailed comments in the form of annotated versions of each of the papers on Legal Costs, the Ombudsman, Business Structures, Trust Accounts and Professional Indemnity.

As you are aware, LLFG supports the aims of the reform process. However, there are a number of areas of concern. To put the detailed comments in some context, I would like to make some general observations on the proposed reforms and some themes that run through the papers.

**1 Regulatory framework**

- In order to achieve true and meaningful reform, we need to move to a truly uniform national system of regulation.

We appreciate that there are existing institutions at the State and Territory levels which currently play an active role in the regulatory framework. We recognise that, as a practical matter, it will be necessary for these bodies to continue to play that role, at least for a period, after the new regime is introduced.

However, it is critical that the reforms create a national organisational structure which over time will lead to a streamlining of State and Territory bodies and the allocation of resources nationally based on need and efficiency rather than based on territorial considerations. LLFG suggests that there should be a plan for reviewing the operation of the proposed

model at a defined future date, with a view to implementing any further streamlining needed to achieve greater uniformity and efficiencies.

- One of the stated objectives of the reform process is to achieve a simplification of the regulatory regime. However, on occasion, the papers take the Model Laws as a given and proceed to add further obligations and layers of regulation. This is sometimes done without demonstrating that there is a meaningful need for the further regulation. This appears to us to be inconsistent with the objectives of the process.
- The papers indicate an intention to simplify and shorten the legislation by focusing on “principles” and dealing with matters of detail in the National Rules:
  - First, it is vital that the profession has a very significant voice on the National Legal Services Board and plays the major role in the development of the National Rules.
  - Secondly, we are concerned that the shifting of legislative provisions out of the legislation and into the National Rules simply defers the resolution of issues which may be difficult to resolve in the overly-ambitious timeline set for the new legislation.
  - Thirdly, the shifting of legislative provisions into the National Rules is likely to increase the significance and complexity of the National Rules. This highlights the need for meaningful consultation with the profession on those rules, as well as the need for law practices to have a sufficient period to transition to any changed requirements (at least 6 months). Our concern on this issue arises as a direct result of our experience with the implementation of the Model Laws, where regulations were introduced without consultation and without adequate lead-time for implementation.

## **2 Consumer protection (costs and disputes)**

- The protective elements of the legislation need to be directed to areas where there is a demonstrable need for protection, ie consumers who are not sophisticated clients.

The legal services sector throughout Australia is extremely varied. The law practices that operate in the sector, the clients they service and the types of matters involved cover a very wide spectrum. There are clearly a number of issues which are common to all parts of the profession and which should be regulated uniformly for all members. However, there are many issues that are specific to some but not other parts of the profession and which do not justify uniform regulation of the entire profession. We therefore believe it appropriate that the consumer protection elements of the legislation (such as costs disclosure, costs assessments, billing and disputes) apply only to those clients who have a need for that protection.

- In a number of cases, the papers use examples of incidents that are said to justify a particular regulatory response. For example, concern is expressed about incidents where awards in

personal injuries claims have been consumed by the legal costs of the matter. It is important to recognise that these examples represent only a small percentage of the market. We believe it is inappropriate to extrapolate from these individual incidents to onerous regulation that affects the entire profession.

- One of the stated justifications for the regulation of lawyers in relation to costs and other matters is that it is the *quid pro quo* for the monopoly that lawyers have over legal work. We think this is misconceived and overly simplistic. The fact that certain qualifications are needed to provide legal services does not give law practices the ability to charge monopoly fees. Any monopoly that lawyers enjoy needs to be balanced against the intensely competitive nature of the Australian legal services market, particularly amongst the large law firms. This competition provides a natural commercial incentive for law practices to respond to what clients want and value and to implement transparent and robust management practices. The consequence for a law firm of not meeting those client needs is the loss of the client to a competitor.

For example, much has been said in recent times about the rigorous tendering processes being used by large commercial clients to select their legal service providers, and the focus of those tenders on pricing and performance measurement. More and more it is the clients who have the bargaining power in these situations.

- LLFG members support the use of alternative methods of charging for legal services. Time-charging is only one method, among others. It has been used by the profession for many years. We are concerned at suggestions in the papers that time charging is inherently unethical. It is not a practice unique to the legal profession. Time-charging is commonly utilised by a wide-range of professionals, trades-people and other businesses, including accountants, architects, doctors and plumbers.

The criticism of time-charging is also not counter-balanced by any consideration of the pros and cons of alternative charging methods. For example, there is no mention of the criticisms that have been levelled at other charging methods, such as that used by investment banks where the fee is based on a percentage of the transaction.

### **3 Business structures**

- The discussion around alternative business structures for law practices largely goes over old ground. It appears in part to be based on an underlying and unjustified suspicion about the motivation of law practices that seek to adopt those alternative business structures. For example, the paper says the Taskforce is proposing a system which seeks “*to ensure that legal service providers cannot hide behind the corporate veil*”. This is a real concern. A law practice that seeks to adopt an alternative business structure (such as incorporation) is doing no more than seeking to take advantage of a business structure that is generally available to all other types of business.
- We disagree with the proposal that the Board have power to audit a law practice’s management systems and to require a law practice to adopt particular management systems. The proposal is presented merely as an extension to all law practices of the regime that

already applies to incorporated law practices. However, this is overly simplistic. It ignores the fact that these powers were applied to incorporated practices as a counter-balance to the structural advantage of limited liability that those practices achieved through incorporation. It is entirely inappropriate for the Board to be able to give similar directions about management systems to law practices whose principals have unlimited personal liability and who directly bear the consequences that flow from those management systems. Those law practices should be able to determine the best manner in which to manage their risk.

- The papers also fail to address the most fundamental issue concerning alternative business structures, namely the tax and stamp duty issues that inhibit the adoption of alternative structures and the absence of a limited liability partnership model in Australia. This is a disappointing omission with the result that the discussion around alternative business structures has not been advanced in a significant way.

#### **4 Liability of principals**

The papers attempt in a number of places to extend the personal liability of principals of law practices beyond the current position. This can be seen, for example, in the context of the proposal that principals sign bills and be personally liable for any overcharging in those bills. We believe that there is no justification for this expansion of the current rules which make individual practitioners liable for their own professional conduct.

#### **5 Fidelity Cover**

We have not provided a detailed response to the Fidelity Cover paper as it has only recently been made available and we support the proposals in it.

We note that the proposals in the paper maintain the status quo in relation to fidelity cover. However, we do think there would be benefit in reviewing at a future date the efficacy of the existing fidelity fund arrangements (which in some ways are anachronistic).

#### **6 General observations about the consultation process and papers**

LLFG has been disappointed in the process adopted in relation to the papers. We had expected that the papers would be the first round of a consultation process. However, we understand that there will in fact be no further consultation on the subjects covered by the papers until draft legislation is released. We remain very concerned that the Taskforce timetable does not allow for adequate consultation. True consultation in relation to matters of this sort requires an iterative exchange of views.

We have also noted with concern that the thrust of some proposals appears to be based on what might be seen as an unduly negative attitude to lawyers, their business practices and their motivations.

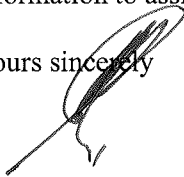
There are numerous comments throughout the papers which represent a biased view of the profession. By way of example, the following prejudices can be found in, or inferred from, the papers:

- that all lawyers are engaged in a lucrative industry and that this of itself justifies complex regulation of the industry;
- that time-charging is inherently unethical and exploitative of clients;
- that lawyers need to be legislatively compelled to charge their clients fairly;
- that lawyers necessarily have an unfair bargaining position in relation to their clients;
- that lawyers who wish to take advantage of alternative business structures (such as incorporation) must be doing so in order to avoid responsibilities they would otherwise have, even though these are business structures that are legitimately available to all other businesses.

Our concern is that these prejudices have been used in the papers to justify particular regulatory responses which, we believe, are often neither justified nor appropriate. The papers show a tendency to extrapolate from isolated examples of rogue or inappropriate behaviour to sometimes heavy-handed or paternalistic regulation that affects the entire profession. Furthermore, the papers often propose additional regulation where the existing regime already provides adequate mechanisms for dealing with the identified problem (contrary to the stated aim of simplification). We submit that this is a recipe for bad law and the intrusion of regulation in places it is not needed or wanted.

We would welcome the opportunity to discuss any of these matters with you or to provide further information to assist the reform process

Yours sincerely



Robert Milliner  
Chairman, LLFG Limited  
Direct line +61 2 9296 2111  
Fax line +61 2 9296 3999  
Email [robert.milliner@malleasons.com](mailto:robert.milliner@malleasons.com)