



# THE LAW SOCIETY OF SOUTH AUSTRALIA

## MEMORANDUM

**TO:** Mr Tony Abbott  
Ms Margery Nicoll  
Mr Harold Cottee

**FROM:** Richard Mellows, President

**DATE:** 15 December 2009

**SUBJECT:** COAG National Legal Profession Reform Project  
Discussion Paper: Business Structures – 'law practices'

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### Introduction

Please find below the Law Society of South Australia's comments in relation to COAG's Discussion Paper on Business Structures.

Comments are limited to those matters where the Society feels further comment is warranted at this time and to draw to the attention of the Taskforce matters the Society considers worthy of further consideration.

It appears from the Discussion Paper that much of what was incorporated into the Model Laws will find its way into the national laws which is a positive thing but it also provides some opportunity for review and for strengthening or relaxing some regulation as considered necessary. In this regard the submissions from those jurisdictions in the eastern states will be particularly useful. However, South Australia makes the following comments in relation to the Consultative Group Paper.

### Role of National Legal Services Board

The functions of the National Legal Services Board appear to be growing with the suggestion that notifications by ILP and MDPs be made to the Board. If the Board is to be the arbiter of matters then it should be distant from the regulation. Unless it is intended that the Board assume responsibility for all regulation of legal practice then notifications should remain "local".

### Views of the large law firms in relation to MDPs

On the whole, the large law firms in South Australia are supportive of the regulatory principles described in the Discussion Paper. However they have expressed concern in relation to the definition of a MDP in the Model Bill. At present the definition of a MDP refers to a partnership of "persons" some of whom are legal practitioners. Although that definition can be construed to include partnerships comprised of natural persons and corporations, we understand that it is only intended to capture partnerships comprised of natural persons.

The large law firms in South Australia see no reason not to permit MDPs to be comprised of any one of natural persons, natural persons and corporations, or ILPs and corporations. In their view, it is essential that flexible business structures be permitted and that it should therefore be open for legal practitioners to carry on practice in partnership with a corporation whose business includes the provision of capital to the partnership. That is not necessarily the view of the Society as a whole, which would need to sight the specific provisions in detail before expressing any view on the matter.

### **Regulatory Principles**

Of concern is that the Paper speaks of dealing with the responsibilities and obligations of ILPs and MDPs in a set of Rules rather than Regulations. It is vital that these important requirements have legislative force and are set out in Regulations which are enforceable in law rather than having the force of mere Rules. In particular, where there are real possibilities for conflict with the Corporations Act we would think this would be highly desirable.

In relation to Principles 7 and 8, we query whether it is the Board that should be undertaking the "hands on" work of conducting compliance audits rather than an appropriate local authority.

The Paper states that the Board will have power to conduct an audit of a practice for compliance and "the management of the provision of legal services by the law practice". These "compliance audits" are discussed, but there is really no detail as to what is envisaged. Perhaps this was written with the electronic compulsory surveying of ILPs designed for Queensland in mind but it is unclear. If it is targeted at systems and risk management it could be useful, and in that event could be applied widely to practices of all structures.

There is a real risk that the profession, particularly those remaining in conventional practice structures, will see this type of intervention as intrusive and paternalistic, but if it was oriented more toward risk reduction than compliance-checking it could be seen as a positive measure, especially with practical Guidelines being promoted by the Board as part and parcel of a constructive approach.

### **Giving notice of commencing or ceasing practice as an Incorporated Legal Practice or Multi-Disciplinary Partnership**

Again, we believe that this is something which should rest with the local regulatory authority rather than a centralised Board.

### **Conflicts of interest or obligations**

Conflicts are more likely to arise where a legal practice is in business with persons or entities which do not have as their sole object the practise of the profession of the law. However it is naïve to say that some conflicts will be so "unambiguous" as not to warrant specific prohibition. The Northern Territory Profession Regulations are right in explicitly prohibiting the conflict there mentioned, and we would urge that such "unambiguous conflicts" be explicitly prohibited by the National Law, Regulations or Rules. Experience with real estate agents and conveyancers in South Australia has taught us that unless an activity is specifically prohibited, especially if it is a potentially lucrative one, there will be attempts to indulge in it, despite the most obvious conflict between the practitioner's various duties and interests. In our view, all types of conflicts should be prescribed as some lawyers appear to have difficulty in recognising they have a conflict and prescription may be of general assistance to the profession.

In addition, there is an intention to exclude managed investment funds expressed in the Discussion Paper, which is encouraging, but surprisingly no mention is made of mortgage financing anywhere. This type of activity should be prohibited also.

**Offences – specifically Offence 3 “It is an offence for a person (whether or not an officer or employee or a partner of a law practice) to cause, induce or attempt to cause or induce a principal or an employee of an Incorporated Legal Practice or Multi-Disciplinary Partnership to contravene the Act, Regulations or other legal professional obligations”.**

We believe that this offence was created to protect lawyers engaged in ILPs and/or MDPs in the Eastern States from being influenced by non-lawyers within the business structure to act other than in accordance with the lawyer's legal and professional obligations. Whilst most legal business structures registered to date appear to be principally conglomerations of lawyers, the opportunity does exist for others to enter into a recognised business structure with a lawyer. The legislation only requires one lawyer principal within either business structure therefore the potential for the lawyer principal to be the minority voice and thereby come under some influence from other non-principal lawyers is a reality.

**What if there is a conflict between legal professional obligations and the *Corporations Act 2001* (Cth)**

In our view there does need to be the clearest statement of principle that the practitioners' duties to the court and the administration of justice and to her/his client are paramount, before any of the *Corporations Act* duties come into play. The Paper appears to recognise this to some extent but in our view it should be strengthened.

Yours sincerely



Richard Mellows  
**PRESIDENT**