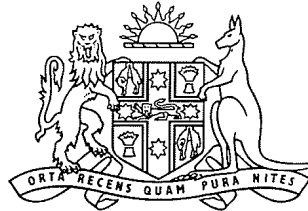


Passed by both Houses



New South Wales

# Legal Profession Bill 2004

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2004*



New South Wales

## **Legal Profession Bill 2004**

Act No , 2004

---

An Act to provide for the regulation of legal practice in New South Wales and to facilitate the regulation of legal practice on a national basis, to repeal the *Legal Profession Act 1987*; and for other purposes.

---

*I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.*

*Chairman of Committees of the Legislative Assembly.*



Clause 1	Legal Profession Bill 2004
Chapter 1	Introduction
Part 1.1	Preliminary

**The Legislature of New South Wales enacts:**

## **Chapter 1 Introduction**

### **Part 1.1 Preliminary**

#### **1 Name of Act**

This Act is the *Legal Profession Act 2004*.

#### **2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

#### **3 Purposes**

The purposes of this Act are as follows:

- (a) to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of clients of law practices and the public generally,
- (b) to facilitate the regulation of legal practice on a national basis across State and Territory borders.

### **Part 1.2 Interpretation**

#### **4 Definitions**

(1) In this Act:

***accountant*** means an accountant who is a registered company auditor within the meaning of the *Corporations Act 2001* of the Commonwealth.

***ADI*** means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth.

***Admission Board*** means the Legal Profession Admission Board constituted under Part 7.1.

**admission rules** means rules relating to the admission of local lawyers and associated matters made under Part 2.3 (Admission of local lawyers).

**admission to the legal profession** means admission by the Supreme Court under this Act as a lawyer or by a Supreme Court under a corresponding law as:

- (a) a lawyer, or
- (b) a legal practitioner, or
- (c) a barrister, or
- (d) a solicitor, or
- (e) a barrister and solicitor, or
- (f) a solicitor and barrister,

but does not include the grant or issue of a practising certificate under this Act or a corresponding law; and **admitted to the legal profession** has a corresponding meaning.

**Advisory Council** means the Legal Profession Advisory Council constituted under this Act.

**affairs** of a law practice includes the following:

- (a) all accounts and records required under this Act or the regulations to be maintained by the practice or an associate or former associate of the practice,
- (b) other records of the practice or an associate or former associate of the practice,
- (c) any transaction:
  - (i) to which the practice or an associate or former associate of the practice was or is a party, or
  - (ii) in which the practice or an associate or former associate of the practice has acted for a party.

**amend** includes:

- (a) in relation to a practising certificate:
  - (i) impose a condition on the certificate, and
  - (ii) amend or revoke a condition already imposed on the certificate, and
- (b) in relation to registration as a foreign lawyer:
  - (i) amend the lawyer's registration certificate, and
  - (ii) impose a condition on the registration, and

- (iii) amend or revoke a condition already imposed on the registration.

**appropriate Council** means:

- (a) in relation to matters relating to barristers or former barristers (including an application for a practising certificate to practise as a barrister)—the Bar Council, or
- (b) in relation to matters relating to solicitors or former solicitors (including an application for a practising certificate to practise as a solicitor)—the Law Society Council.

**approved form**—see section 734 (Approved forms).

**associate**—see section 7 (Terms relating to associates and principals of law practices).

**Australian lawyer**—see section 5 (Terms relating to lawyers).

**Australian legal practitioner**—see section 6 (Terms relating to legal practitioners).

**Australian practising certificate** means a local practising certificate or an interstate practising certificate.

**Australian-registered foreign lawyer** means a locally registered foreign lawyer or an interstate-registered foreign lawyer.

**Australian roll** means the local roll or an interstate roll.

**Australian trust account** means a local trust account or an interstate trust account.

**Bar Association** means the New South Wales Bar Association.

**Bar Council** means the Council of the Bar Association.

**barrister** means:

- (a) a local legal practitioner who holds a current local practising certificate to practise as a barrister, or
- (b) an interstate legal practitioner who holds a current interstate practising certificate that entitles the practitioner to engage in legal practice only as or in the manner of a barrister.

**barristers rules** means:

- (a) the legal profession rules made by the Bar Council, and
- (b) the joint rules so far as they apply to barristers.

**client** means a person to or for whom legal services are provided, and includes a person who is legally liable to pay for the services even if the services are not provided to or for that person.

**Commissioner** means the Legal Services Commissioner appointed under Part 7.3.

**community legal centre**—see definition of **complying community legal centre**.

**compliance certificate**—see section 36 (Compliance certificates).

**complying community legal centre**—see section 240 (Community legal centres).

**conditions** means conditions, limitations or restrictions.

**contravene** includes fail to comply with.

**conviction**—see section 11 (References to convictions for offences).

**corresponding authority** means:

- (a) a person or body having powers or functions under a corresponding law, or
- (b) when used in the context of a person or body having powers or functions under this Act (the **local authority**):
  - (i) a person or body having corresponding powers or functions under a corresponding law, and
  - (ii) without limiting subparagraph (i), if the powers or functions of the local authority relate to local lawyers or local legal practitioners generally or are limited to any particular class of local lawyers or local legal practitioners—a person or body having corresponding powers or functions under a corresponding law regardless of whether they relate to interstate lawyers or interstate legal practitioners generally or are limited to any particular class of interstate lawyers or interstate legal practitioners.

**corresponding disciplinary body** means:

- (a) a court or tribunal having powers or functions under a corresponding law that correspond to any of the powers and functions of the Tribunal, or
- (b) the Supreme Court of another jurisdiction exercising:
  - (i) its inherent jurisdiction or powers in relation to the control and discipline of any Australian lawyers, or

- (ii) its jurisdiction or powers to make orders under a corresponding law of the other jurisdiction in relation to any Australian lawyers.

***corresponding foreign law*** means the following:

- (a) a law of a foreign country that corresponds to the relevant provisions of this Act or, if a regulation is made declaring a law of the foreign country to be a law that corresponds to this Act, the law declared under that regulation for the foreign country,
- (b) if the term is used in relation to a matter that happened before the commencement of the law of a foreign country that, under paragraph (a), is the corresponding law for the foreign country, a previous law applying to legal practice in the foreign country.

***corresponding law*** means the following:

- (a) a law of another jurisdiction that corresponds to the relevant provisions of this Act or, if a regulation is made declaring a law of the other jurisdiction to be a law that corresponds to this Act, the law declared under that regulation for the other jurisdiction,
- (b) if the term is used in relation to a matter that happened before the commencement of the law of another jurisdiction that, under paragraph (a), is the corresponding law for the other jurisdiction, a previous law applying to legal practice in the other jurisdiction.

***costs***—see definition of ***legal costs***.

***Council*** means the Bar Council or the Law Society Council.

***Director-General*** means the Director-General of the Attorney General's Department.

***disqualified person*** means any of the following persons whether the thing that has happened to the person happened before or after the commencement of this definition:

- (a) a person whose name has (whether or not at his or her own request) been removed from an Australian roll and who has not subsequently been admitted or re-admitted to the legal profession under this Act or a corresponding law,
- (b) a person whose Australian practising certificate has been suspended or cancelled under this Act or a corresponding law and who, because of the cancellation, is not an Australian legal

practitioner or in relation to whom that suspension has not finished, or

- (c) a person who has been refused a renewal of an Australian practising certificate under this Act or a corresponding law, and to whom an Australian practising certificate has not been granted at a later time,
- (d) a person who is the subject of an order under this Act or a corresponding law prohibiting a law practice from employing or paying the person in connection with the relevant practice, or
- (e) a person who is the subject of an order under this Act or a corresponding law prohibiting an Australian legal practitioner from being a partner of the person in a business that includes the practitioner's practice, or
- (f) a person who is the subject of an order under section 154 (Disqualification from managing incorporated legal practice) or section 179 (Prohibition on partnerships with certain partners who are not Australian legal practitioners) or under provisions of a corresponding law that correspond to section 154 or 179.

**document** means any record of information, and includes:

- (a) anything on which there is writing, and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, and
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, and
- (d) a map, plan, drawing or photograph,

and a reference in this Act to a document (as so defined) includes a reference to:

- (e) any part of the document, and
- (f) any copy, reproduction or duplicate of the document or of any part of the document, and
- (g) any part of such a copy, reproduction or duplicate.

**engage in legal practice** includes practise law.

**exercise** of a function includes, where the function is a duty, the performance of the duty.

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**fee, gain or reward** includes any form of, and any expectation of, a fee, gain or reward.

**Fidelity Fund** means the fund established under Part 3.4 (Fidelity cover).

**financial year** means a year ending on 30 June.

**foreign country** means:

- (a) a country other than Australia, or
- (b) a state, province or other part of a country other than Australia.

**foreign lawyer**—see definition of *Australian-registered foreign lawyer*.

**foreign roll** means an official roll of lawyers (whether admitted, practising or otherwise) kept in a foreign country, but does not include a prescribed roll or a prescribed kind of roll.

**function** includes a power, authority or duty.

**home jurisdiction**—see section 8 (Home jurisdiction).

**incorporated legal practice** has the same meaning as in Part 2.6 (Incorporated legal practices and multi-disciplinary partnerships).

**Indemnity Fund** has the same meaning as in Part 3.3 (Professional Indemnity Insurance).

**information notice**—see section 10 (Information notices).

**insolvent under administration** means:

- (a) a person who is an undischarged bankrupt within the meaning of the *Bankruptcy Act 1966* of the Commonwealth (or the corresponding provisions of the law of a foreign country or external territory), or
- (b) a person who has executed a deed of arrangement under Part X of the *Bankruptcy Act 1966* of the Commonwealth (or the corresponding provisions of the law of a foreign country or external territory) if the terms of the deed have not been fully complied with, or
- (c) a person whose creditors have accepted a composition under Part X of the *Bankruptcy Act 1966* of the Commonwealth (or the corresponding provisions of the law of a foreign country or external territory) if a final payment has not been made under that composition, or

- (d) a person for whom a debt agreement has been made under Part IX of the *Bankruptcy Act 1966* of the Commonwealth (or the corresponding provisions of the law of a foreign country or external territory) if the debt agreement has not ended or has not been terminated, or
- (e) a person who has executed a personal insolvency agreement under Part X of the *Bankruptcy Act 1966* of the Commonwealth (or the corresponding provisions of the law of a foreign country or external territory) but not if the agreement has been set aside or terminated or all of the obligations that the agreement created have been discharged.

***interstate lawyer***—see section 5 (Terms relating to lawyers).

***interstate legal practitioner***—see section 6 (Terms relating to legal practitioners).

***interstate practising certificate*** means a practising certificate granted under a corresponding law.

***interstate-registered foreign lawyer*** means a person who is registered as a foreign lawyer under a corresponding law.

***interstate roll*** means a roll of lawyers maintained under a corresponding law.

***interstate trust account*** means a trust account maintained under a corresponding law.

***investigator***—see section 658 (Definitions).

***joint rules*** means the legal profession rules made jointly by the Bar Association and the Law Society Council.

***jurisdiction*** means a State or Territory of the Commonwealth.

***law firm*** means a partnership consisting only of:

- (a) Australian legal practitioners, or
- (b) one or more Australian legal practitioners and one or more Australian-registered foreign lawyers.

***law practice*** means:

- (a) an Australian legal practitioner who is a sole practitioner, or
- (b) a law firm, or
- (c) a multi-disciplinary partnership, or
- (d) an incorporated legal practice, or



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(e) a complying community legal centre.

**Law Society** means the Law Society of New South Wales.

**Law Society Council** means the Council of the Law Society.

**lay associate**—see section 7 (Terms relating to associates and principals of law practices).

**lay person** means a person who is not an Australian lawyer.

**legal costs** means amounts that a person has been or may be charged by, or is or may become liable to pay, a law practice for the provision of legal services including disbursements but not including interest.

**legal practitioner associate**—see section 7 (Terms relating to associates and principals of law practices).

**legal practitioner director**, in relation to an incorporated legal practice, has the meaning given in Part 2.6 (Incorporated legal practices and multi-disciplinary partnerships).

**legal practitioner partner**, in relation to a multi-disciplinary partnership, has the meaning given in Part 2.6 (Incorporated legal practices and multi-disciplinary partnerships).

**legal profession rules** means rules made under Part 7.5 (Legal profession rules).

**legal services** means work done, or business transacted, in the ordinary course of legal practice.

**Legal Services Division** of the Tribunal means the Legal Services Division of the Tribunal established by the *Administrative Decisions Tribunal Act 1997*.

**local lawyer**—see section 5 (Terms relating to lawyers).

**local legal practitioner**—see section 6 (Terms relating to legal practitioners).

**local practising certificate** means a practising certificate granted under this Act.

**local roll** means the roll of persons admitted as lawyers under this Act.

**local trust account** means a trust account maintained under this Act.

**locally registered foreign lawyer** means a person who is registered as a foreign lawyer under this Act.

**managed investment scheme** has the same meaning as in Chapter 5C of the *Corporations Act 2001* of the Commonwealth.

***Manager, Costs Assessment*** means the person holding office as Manager, Costs Assessment in the Attorney General's Department, and includes a delegate of that person.

***modifications*** includes modifications by way of alteration, omission, addition or substitution.

***mortgage*** means an instrument under which an interest in real property is charged, encumbered or transferred as security for the payment or repayment of money, and includes:

- (a) any instrument of a kind that is prescribed by the regulations as being a mortgage, and
- (b) a proposed mortgage.

***mortgage financing*** means facilitating a loan secured or intended to be secured by mortgage by:

- (a) acting as an intermediary to match a prospective lender and borrower, or
- (b) arranging the loan, or
- (c) receiving or dealing with payments for the purposes of, or under, the loan,

but does not include providing legal advice or preparing an instrument for the loan.

***multi-disciplinary partnership*** has the meaning given in Part 2.6 (Incorporated legal practices and multi-disciplinary partnerships).

***practical legal training*** means:

- (a) legal training by participation in course work, or
- (b) legal training under the supervision of an Australian lawyer, whether involving articles of clerkship or otherwise,

or a combination of both.

***pre-admission event***, in relation to an applicant for or holder of a local practising certificate, means a show cause event (as defined in Division 7 of Part 2.4) in relation to the applicant or holder before the applicant or holder was first admitted to the legal profession in this or another jurisdiction.

***principal***—see section 7 (Terms relating to associates and principals of law practices).

***professional misconduct***—see section 497 (Professional misconduct).

***Prothonotary*** means:

- (a) the officer of the Supreme Court with that title, except where paragraph (b) applies, or
- (b) a registrar or other officer of the Supreme Court prescribed by rules of the Supreme Court in relation to specified provisions of this Act.

***Public Purpose Fund*** means the Public Purpose Fund established under Division 7 of Part 3.1.

***Register*** means the Register of Disciplinary Action referred to in section 577 (Register of Disciplinary Action).

***regulatory authority*** means:

- (a) in relation to this jurisdiction:
  - (i) an authority having functions under this Act, or
  - (ii) a person or body prescribed by the regulations as a regulatory authority of this jurisdiction, or
- (b) in relation to another jurisdiction, means:
  - (i) an authority having functions under a corresponding law of that jurisdiction, or
  - (ii) a person or body prescribed by the regulations as a regulatory authority of that jurisdiction.

***related entity***, in relation to a person, means:

- (a) if the person is a company within the meaning of the *Corporations Act 2001* of the Commonwealth—a related body corporate within the meaning of section 50 of that Act, or
- (b) if the person is not a company with the meaning of that Act—a person specified or described in the regulations.

***rules***—see definition of ***admission rules*** and ***legal profession rules***.

***serious offence*** means an offence whether committed in or outside this jurisdiction that is:

- (a) an indictable offence against a law of the Commonwealth or any jurisdiction (whether or not the offence is or may be dealt with summarily), or
- (b) an offence against a law of another jurisdiction that would be an indictable offence against a law of this jurisdiction if committed in this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction), or

- (c) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction).

***sole practitioner*** means an Australian legal practitioner who engages in legal practice on his or her own account.

***solicitor*** means:

- (a) a local legal practitioner who holds a current local practising certificate to practise as a solicitor and barrister, or
- (b) an interstate legal practitioner who holds a current interstate practising certificate that does not restrict the practitioner to engage in legal practice only as or in the manner of a barrister.

***solicitors rules*** means:

- (a) the legal profession rules made by the Law Society Council, and
- (b) the joint rules so far as they apply to solicitors.

***suitability matter***—see section 9 (Suitability matters).

***supervised legal practice*** means legal practice by a person who is an Australian legal practitioner:

- (a) as an employee of, or other person working under supervision in, a law practice, where:
  - (i) at least one partner, legal practitioner director or other employee of the law practice is an Australian legal practitioner who holds an unrestricted practising certificate, and
  - (ii) the person engages in legal practice under the supervision of an Australian legal practitioner referred to in subparagraph (i), or
- (b) as a partner in a law firm, where:
  - (i) at least one other partner is an Australian legal practitioner who holds an unrestricted practising certificate, and
  - (ii) the person engages in legal practice under the supervision of an Australian legal practitioner referred to in subparagraph (i), or
- (c) in a capacity approved under a legal profession rule.

Clause 4	Legal Profession Bill 2004
Chapter 1	Introduction
Part 1.2	Interpretation

**tax offence** means any offence under the *Taxation Administration Act 1953* of the Commonwealth, whether committed in or outside this jurisdiction.

**this jurisdiction** means this State.

**Tribunal** means the Administrative Decisions Tribunal established by the *Administrative Decisions Tribunal Act 1997*.

**trust money** has the meaning given in Part 3.1 (Trust money and trust accounts).

**trust property** means property received in the course of or in connection with the provision of legal services by a law practice for or on behalf of another person, but does not include trust money.

**unrestricted practising certificate** means an Australian practising certificate that:

- (a) is not subject to a condition under section 53 (Statutory condition regarding practice as solicitor) or a similar condition under a corresponding law, and
- (b) is not subject to a condition that restricts the holder of the certificate to practise as or in the manner of a barrister, and
- (c) is not subject to any other condition, except any of the following conditions:
  - (i) a condition requiring the holder of the certificate to undertake and complete one or more courses of continuing legal education,
  - (ii) a condition under section 55 (Statutory condition regarding notification of offence),
  - (iii) a condition of a kind prescribed by the regulations, and
- (d) in the case of an interstate practising certificate—is not subject to a condition similar to a condition under section 53 and whose holder would not be subject to a condition under that section if the holder were to apply for and be granted a local practising certificate.

**unsatisfactory professional conduct**—see section 496 (Unsatisfactory professional conduct).

- (2) Notes included in this Act do not form part of this Act.

## 5 Terms relating to lawyers

For the purposes of this Act:

- (a) an *Australian lawyer* is a person who is admitted to the legal profession under this Act or a corresponding law, and
- (b) a *local lawyer* is a person who is admitted to the legal profession under this Act (whether or not the person is also admitted under a corresponding law), and
- (c) an *interstate lawyer* is a person who is admitted to the legal profession under a corresponding law, but not under this Act.

## 6 Terms relating to legal practitioners

For the purposes of this Act:

- (a) an *Australian legal practitioner* is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate, and
- (b) a *local legal practitioner* is an Australian lawyer who holds a current local practising certificate, and
- (c) an *interstate legal practitioner* is an Australian lawyer who holds a current interstate practising certificate, but not a local practising certificate.

**Note.** The application of Chapter 4 (Complaints and discipline) to conduct of Australian legal practitioners is broadened by Division 2 of Part 4.1 of that Chapter.

## 7 Terms relating to associates and principals of law practices

(1) For the purposes of this Act, an *associate* of a law practice is:

- (a) an Australian legal practitioner who is:
  - (i) a sole practitioner (in the case of a law practice constituted by the practitioner), or
  - (ii) a partner in the law practice (in the case of a law firm), or
  - (iii) a legal practitioner director in the law practice (in the case of an incorporated legal practice), or
  - (iv) a legal practitioner partner in the law practice (in the case of a multi-disciplinary partnership), or
  - (v) an Australian legal practitioner whose services are made use of by the law practice to provide legal services (in the case of a complying community legal centre), or
  - (vi) an employee of the law practice, or

- (b) an agent of the law practice who is not an Australian legal practitioner, or
  - (c) an employee of, or person paid in connection with, the law practice who is not an Australian legal practitioner, or
  - (d) an Australian-registered foreign lawyer who is a partner in the law practice, or
  - (e) an Australian-registered foreign lawyer who has a relationship with the law practice, being a relationship that is of a class prescribed by the regulations, or
  - (f) a person (not being an Australian legal practitioner) who is a partner in a business that includes the law practice, or
  - (g) a person (not being an Australian legal practitioner) who shares the receipts, revenue or other income arising from the law practice.
- (2) For the purposes of this Act:
- (a) a **legal practitioner associate** of a law practice is an associate of the practice who is an Australian legal practitioner, and
  - (b) a **lay associate** of a law practice means an associate of the practice who is not an Australian legal practitioner.
- (3) For the purposes of this Act, a **principal** of a law practice is an Australian legal practitioner who is:
- (a) a sole practitioner (in the case of a law practice constituted by the practitioner), or
  - (b) a partner in the law practice (in the case of a law firm), or
  - (c) a legal practitioner director in the law practice (in the case of an incorporated legal practice), or
  - (d) a legal practitioner partner in the law practice (in the case of a multi-disciplinary partnership), or
  - (e) the person who is generally responsible for the provision of legal services by the law practice (in the case of a complying community legal centre).
- (4) For the purposes of this Act, an **associate** of an Australian lawyer is:
- (a) a person who is a partner, agent or employee of the Australian lawyer, or

- (b) a person who is an associate of a law practice of which the Australian lawyer is also an associate.

## **8 Home jurisdiction**

- (1) This section has effect for the purposes of this Act.
- (2) The *home jurisdiction* for an Australian legal practitioner is the jurisdiction in which the practitioner's only or most recent current Australian practising certificate was granted.
- (3) The *home jurisdiction* for an Australian-registered foreign lawyer is the jurisdiction in which the lawyer's only or most recent current registration was granted.
- (4) The *home jurisdiction* for an associate of a law practice who is neither an Australian legal practitioner nor an Australian-registered foreign lawyer is:
  - (a) where only one jurisdiction is the home jurisdiction for the only associate of the practice who is an Australian legal practitioner or for all the associates of the practice who are Australian legal practitioners—that jurisdiction, or
  - (b) where no one jurisdiction is the home jurisdiction for all the associates of the practice who are Australian legal practitioners:
    - (i) the jurisdiction in which the office is situated at which the associate performs most of his or her duties for the law practice, or
    - (ii) if a jurisdiction cannot be determined under subparagraph (i)—the jurisdiction in which the associate is enrolled under a law of the jurisdiction to vote at elections for the jurisdiction, or
    - (iii) if a jurisdiction can be determined under neither subparagraph (i) nor subparagraph (ii)—the jurisdiction determined in accordance with criteria specified or referred to in the regulations.

## **9 Suitability matters**

- (1) Each of the following is a suitability matter in relation to a natural person:
  - (a) whether the person is currently of good fame and character,
  - (b) whether the person is or has been an insolvent under administration,



- (c) whether the person has been convicted of an offence in Australia or a foreign country, and if so:
- (i) the nature of the offence, and
  - (ii) how long ago the offence was committed, and
  - (iii) the person's age when the offence was committed,
- Note.** The rules may make provision for the convictions that must be disclosed by an applicant and those that need not be disclosed. Section 11 (References to convictions for offences) provides that reference to a conviction includes a finding of guilt, or the acceptance of a guilty plea, whether or not a conviction is recorded.
- (d) whether the person engaged in legal practice in Australia:
- (i) when not admitted, or not holding a practising certificate, as required under this Act or a previous law of this jurisdiction that corresponds to this Act or under a corresponding law, or
  - (ii) if admitted, in contravention of a condition on which admission was granted, or
  - (iii) if holding an Australian practising certificate, in contravention of a condition of the certificate or while the certificate was suspended,
- (e) whether the person has practised law in a foreign country:
- (i) when not permitted by or under a law of that country to do so, or
  - (ii) if permitted to do so, in contravention of a condition of the permission,
- (f) whether the person is currently subject to an unresolved complaint, investigation, charge or order under any of the following:
- (i) this Act or a previous law of this jurisdiction that corresponds to this Act, or
  - (ii) a corresponding law or corresponding foreign law,
- (g) whether the person:
- (i) is the subject of current disciplinary action, however expressed, in another profession or occupation in Australia or a foreign country, or
  - (ii) has been the subject of disciplinary action, however expressed, relating to another profession or occupation that involved a finding of guilt,
- (h) whether the person's name has been removed from:
- (i) a local roll, and whether the person's name has since been restored to or entered on a local roll, or

- (ii) an interstate roll, and whether the person's name has since been restored to or entered on an interstate roll, or
  - (iii) a foreign roll,
- (i) whether the person's right to engage in legal practice has at any time been suspended or cancelled in Australia or a foreign country,
  - (j) whether the person has contravened, in Australia or a foreign country, a law about trust money or trust accounts,
  - (k) whether, under this Act, a law of the Commonwealth or a corresponding law, a supervisor, manager or receiver, however described, is or has been appointed in relation to any legal practice engaged in by the person,
  - (l) whether the person is or has been subject to an order, under this Act, a law of the Commonwealth or a corresponding law, disqualifying the person from being employed by, or a partner of, an Australian legal practitioner or from managing a corporation that is an incorporated legal practice,
  - (m) whether the person currently is unable to carry out the inherent requirements of practice as an Australian legal practitioner and that inability arises from infirmity, injury or mental or physical illness, impairment or disability.
- (2) A matter is a suitability matter even if it happened before the commencement of this section.

## 10 Information notices

For the purposes of this Act, an *information notice* is a written notice to a person about a decision stating:

- (a) the decision, and
- (b) the reasons for the decision, and
- (c) the rights of appeal or review available to the person in respect of the decision and the period within which any such appeal or review must be made or applied for.

## 11 References to convictions for offences

- (1) A reference in this Act to a conviction includes a finding of guilt, or the acceptance of a guilty plea, whether or not a conviction is recorded.

Clause 11	Legal Profession Bill 2004
Chapter 1	Introduction
Part 1.2	Interpretation

- (2) Without limiting subsection (1), a reference in this Act to the quashing of conviction for an offence includes a reference to the quashing of:
  - (a) a finding of guilt in relation to the offence, or
  - (b) the acceptance of a guilty plea in relation to the offence.
- (3) However, a reference in this Act to the quashing of a conviction for an offence does not include a reference to the quashing of a conviction where:
  - (a) a finding of guilt in relation to the offence, or
  - (b) the acceptance of a guilty plea in relation to the offence, remains unaffected.

## **Chapter 2    General requirements for engaging in legal practice**

### **Part 2.1 Preliminary**

#### **12    Simplified outline of Chapter**

- (1) This Chapter sets out general requirements for engaging in legal practice in this jurisdiction.
- (2) The following is a general outline of the contents of this Chapter:
  - Part 2.2 provides for the reservation of legal work and legal titles to properly qualified persons and bodies,
  - Part 2.3 sets out the qualifications and procedure for admission to legal practice in this jurisdiction,
  - Part 2.4 provides for the grant, renewal, amendment, suspension and cancellation of practising certificates in this jurisdiction and sets out the entitlements of holders of interstate practising certificates to engage in legal practice in this jurisdiction,
  - Part 2.5 provides a scheme for notification of and response to action taken by courts and other authorities in this and other jurisdictions regarding admission to the legal profession and the right to engage in legal practice,
  - Part 2.6 regulates the provision of legal services in this jurisdiction by corporations (which are called “incorporated legal practices”) and by partnerships that provide legal services and non-legal services (called “multi-disciplinary partnerships”),
  - Part 2.7 regulates the practice of the law of a foreign country in this jurisdiction,
  - Part 2.8 regulates community legal centres.
- (3) Subsection (2) is intended only as a guide to readers as to the general scheme of this Chapter.

Clause 13	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.2	Reservation of legal work and legal titles

## **Part 2.2 Reservation of legal work and legal titles**

### **Division 1 Preliminary**

#### **13 Purposes**

The purposes of this Part are as follows:

- (a) to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by those who are properly qualified to do so,
- (b) to protect clients of law practices by ensuring that persons carrying out legal work are entitled to do so.

### **Division 2 General prohibitions on unqualified practice**

#### **14 Prohibition on engaging in legal practice when not entitled**

- (1) A person must not engage in legal practice in this jurisdiction for fee, gain or reward unless the person is an Australian legal practitioner.  
Maximum penalty: 200 penalty units.
- (2) Subsection (1) does not apply to engaging in legal practice of the following kinds:
  - (a) legal practice engaged in under the authority of a law of this jurisdiction or of the Commonwealth,
  - (b) legal practice engaged in by an incorporated legal practice in accordance with Part 2.6 (Incorporated legal practices and multi-disciplinary partnerships),
  - (c) the practice of foreign law by an Australian-registered foreign lawyer in accordance with Part 2.7 (Legal practice by foreign lawyers),
  - (d) legal practice engaged in by a complying community legal centre,
  - (e) conveyancing work carried out in accordance with a licence in force under the *Conveyancers Licencing Act 2003*,

- (f) work performed by a land agent in respect of instruments he or she is entitled to draw, fill up or prepare, and to charge for, under the *Land Agents Act 1927*,
  - (g) the drawing of instruments by an officer or employee in the service of the Crown (including the Public Service) in the course of his or her duty,
  - (h) legal practice of a kind prescribed by the regulations.
- (3) Subsection (1) does not apply to:
- (a) a person who as an employee provides legal services to his or her employer or a related entity if he or she:
    - (i) so acts in the ordinary course of his or her employment, and
    - (ii) receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee, or
  - (b) a person or class of persons declared by the regulations to be exempt from the operation of subsection (1).
- (4) A person is not entitled to recover any amount in respect of anything the person did in contravention of subsection (1) and must repay any amount so received to the person from whom it was received.
- (5) A person may recover from another person, as a debt due to the person, any amount the person paid to the other person in respect of anything the other person did in contravention of subsection (1).
- (6) The regulations may make provision for or with respect to the application (with or without specified modifications) of provisions of this Act to persons engaged in legal practice of a kind referred to in subsection (2) (other than subsection (2) (b)–(f)) or persons referred to in subsection (3).

**15 Prohibition on representing or advertising entitlement to engage in legal practice when not entitled**

- (1) A person must not represent or advertise that the person is entitled to engage in legal practice unless the person is an Australian legal practitioner.
- Maximum penalty: 100 penalty units.
- (2) A director, officer, employee or agent of a body corporate must not represent or advertise that the body corporate is entitled to engage in

Clause 15	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.2	Reservation of legal work and legal titles

legal practice unless the body corporate is an incorporated legal practice or a complying community legal centre.

Maximum penalty: 100 penalty units.

- (3) Subsections (1) and (2) do not apply to a representation or advertisement about being entitled to engage in legal practice of a kind referred to in section 14 (2) (Prohibition on engaging in legal practice when not entitled) by a person so entitled.
- (4) A reference in this section to a person:
  - (a) representing or advertising that the person is entitled to engage in legal practice, or
  - (b) representing or advertising that a body corporate is entitled to engage in legal practice,

includes a reference to the person doing anything that states or implies that the person or the body corporate is entitled to engage in legal practice.

**16 Presumptions about taking or using certain names, titles or descriptions specified in regulations**

- (1) This section applies to the following names, titles and descriptions:  
lawyer, legal practitioner, barrister, solicitor, attorney, counsel, Queen’s Counsel, King’s Counsel, Her Majesty’s Counsel, His Majesty’s Counsel, Senior Counsel
- (2) The regulations may specify the kind of persons who are entitled, and the circumstances in which they are entitled, to take or use a name, title or description to which this section applies.
- (3) For the purposes of section 15 (1) (Prohibition on representing or advertising entitlement to engage in legal practice when not entitled), the taking or using of a name, title or description to which this section applies by a person who is not entitled to take or use that name, title or description gives rise to a rebuttable presumption that the person represented that they are entitled to engage in legal practice.
- (4) For the purposes of section 15 (2), the taking or using of a name, title or description to which this section applies by a person in relation to a body corporate, of which the person is a director, officer, employee or agent, gives rise to a rebuttable presumption that the person represented that the body corporate is entitled to engage in legal practice.

### **Division 3      Prohibitions regarding associates, clerks and non-legal partners**

#### **17 Associates who are disqualified or convicted persons**

- (1) A law practice must not have a lay associate whom any principal or legal practitioner associate of the law practice knows to be:
  - (a) a disqualified person, or
  - (b) a person who has been convicted of a serious offence,unless the associate is approved by the relevant authority under subsection (3).
- (2) A contravention by a law practice of subsection (1) is capable of being unsatisfactory professional conduct or professional misconduct on the part of a principal or legal practitioner associate of the law practice involved in the contravention.
- (3) The *relevant authority* to approve a person for the purposes of subsection (1) is:
  - (a) in the case of a disqualified person who is an associate of a barrister—the Bar Council, or
  - (b) in the case of a disqualified person who is an associate of a solicitor—the Law Society Council,
  - (c) in the case of a person who has been convicted of a serious offence—the Tribunal.
- (4) If a Council decides to refuse an application by a person for approval under subsection (3) (a) or (b) or to grant the approval subject to conditions, the person may apply to the Tribunal for a review of the decision. If the Tribunal decides to refuse an application by a person for approval under subsection (3) (c) or to grant the approval subject to conditions, the person may appeal under Chapter 7 of the *Administrative Decisions Tribunal Act 1997* against the decision to an Appeal Panel of the Tribunal.
- (5) An approval under this section may be subject to specified conditions.
- (6) A disqualified person, or a person convicted of a serious offence, must not seek to become a lay associate of a law practice unless the person first informs the law practice of the disqualification or conviction.

Maximum penalty: 100 penalty units.



Clause 17	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.2	Reservation of legal work and legal titles

- (7) Proceedings for an offence under subsection (6) may only be brought within 6 months after discovery of the offence by the law practice.
- (8) This section does not apply in circumstances prescribed by the regulations.

### **18 Prohibition on employment of certain non-legal clerks**

- (1) This section applies to a person who is not an Australian legal practitioner and who:
  - (a) is or was a clerk to a local legal practitioner or a law practice engaging in legal practice principally in this jurisdiction, or
  - (b) is or was a clerk to an Australian legal practitioner or law practice employed by the practitioner or law practice to work principally in this jurisdiction.
- (2) On application by a Council, the Tribunal may make an order prohibiting (without approval under section 17 (Associates who are disqualified or convicted persons)) any Australian legal practitioner or law practice from employing or paying in connection with his or her practice a specified person to whom this section applies if:
  - (a) the Tribunal is satisfied that the person is not a fit and proper person to be employed or paid in connection with an Australian legal practitioner's practice, or
  - (b) the Tribunal is satisfied that the person has been guilty of conduct that, if the person were an Australian legal practitioner, would have constituted unsatisfactory professional conduct or professional misconduct.
- (3) An order made under this section may be revoked by the Tribunal on application by a Council or by the person against whom the order was made.
- (4) The death of an Australian legal practitioner does not prevent an application being made for, or the making of, an order under this section in relation to a person who was a clerk to the practitioner.

### **19 Prohibition on partnerships with certain non-legal partners**

- (1) This section applies to a person who is not an Australian legal practitioner and who:
  - (a) is or was a partner of a local legal practitioner, or

- (b) is or was a partner of an Australian legal practitioner and engaged in a business conducted by the partnership principally in this jurisdiction.
- (2) On application by a Council, the Tribunal may make an order prohibiting (without approval under section 17 (Associates who are disqualified or convicted persons)) any Australian legal practitioner from being a partner, in a business that includes the practitioner's practice, of a specified person to whom this section applies if:
  - (a) the Tribunal is satisfied that the person is not a fit and proper person to be such a partner, or
  - (b) the Tribunal is satisfied that the person has been guilty of conduct which, if the person were an Australian legal practitioner, would have constituted unsatisfactory professional conduct or professional misconduct.
- (3) An order made under this section may be revoked by the Tribunal on application by a Council or by the person against whom the order was made.
- (4) The death of an Australian legal practitioner does not prevent an application being made for, or the making of, an order under this section in relation to a person who was a partner of the practitioner.

## **20 Proceedings on prohibition orders**

- (1) The parties to an application to the Tribunal under this Division may be represented by an Australian legal practitioner at the hearing of the application.
- (2) On making an order under this Division, or on determining an application for approval under section 17 (Associates who are disqualified or convicted persons), the Tribunal may make orders for costs.
- (3) An order for costs:
  - (a) may be for a specified amount or an unspecified amount, and
  - (b) if for an unspecified amount, may specify the basis on which the amount is to be determined, and
  - (c) may specify the terms on which costs must be paid.

Clause 20	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.2	Reservation of legal work and legal titles

- (4) A Council must:
- (a) retain in its office a register of orders made under section 18 or 19 on its application or approvals given by it under section 17, and
  - (b) permit the register to be inspected during office hours and without charge, but only if the inspection is made by an Australian legal practitioner.
- (5) In any proceedings under this Act, a document that purports:
- (a) to be an order under section 18 or 19, and
  - (b) to be signed by the member constituting, or presiding at the sitting of, the Tribunal when the order was made,
- is, without further proof, evidence of the order it purports to be.

## **Division 4      General**

### **21 Professional discipline**

- (1) A contravention of this Part by an Australian lawyer who is not an Australian legal practitioner is capable of being professional misconduct.
- (2) Nothing in this Part affects any liability that a person who is an Australian lawyer but not an Australian legal practitioner may have under Chapter 4 (Complaints and discipline), and the person may be punished for an offence under this Part as well as being dealt with under Chapter 4 in relation to the same matter.

## **Part 2.3 Admission of local lawyers**

### **Division 1      Preliminary**

#### **22 Purpose**

- (1) The purpose of this Part is, in the interests of the administration of justice and for the protection of clients of law practices, to provide a system under which only applicants who have appropriate academic qualifications and practical legal training and who are otherwise fit and

proper persons become qualified for admission and are admitted to the legal profession in this jurisdiction.

- (2) A person is admitted to the legal profession in this jurisdiction by being admitted as a local lawyer.

### 23 Definitions

In this Part:

**admission** means admission as a lawyer under this Act.

**applicant** or **applicant for admission** means an applicant for admission as a lawyer under this Act.

## Division 2 Eligibility and suitability for admission

### 24 Eligibility for admission

- (1) A person is eligible for admission only if the person is a natural person aged 18 years or over and:
- (a) the person has attained:
    - (i) approved academic qualifications, or
    - (ii) corresponding academic qualifications, and
  - (b) the person has satisfactorily completed:
    - (i) approved practical legal training requirements, or
    - (ii) corresponding practical legal training requirements.
- (2) In this section:

**approved academic qualifications** means academic qualifications that are approved, under the admission rules, for admission to the legal profession in this jurisdiction.

**approved practical legal training requirements** means legal training requirements that are approved, under the admission rules, for admission to the legal profession in this jurisdiction.

**corresponding academic qualifications** means academic qualifications that would qualify the person for admission to the legal profession in another jurisdiction if the Admission Board is satisfied that substantially the same minimum criteria apply for the approval of academic qualifications for admission in the other jurisdiction as apply in this jurisdiction.

*corresponding practical legal training requirements* means legal training requirements that would qualify the person for admission to the legal profession in another jurisdiction if the Admission Board is satisfied that substantially the same minimum criteria apply for the approval of legal training requirements for admission in the other jurisdiction as apply in this jurisdiction.

- (3) The admission rules must not require a person to satisfactorily complete before admission a period of supervised training that exceeds in length a period or periods equivalent to one full-time year (as determined in accordance with the admission rules).
- (4) The admission rules may authorise the Admission Board to exempt a person from the requirements of:
  - (a) subsection (1) (a)—to the extent that the person has engaged in relevant studies in a foreign country to the satisfaction of the Board, or
  - (b) subsection (1) (b)—to the extent that the person has completed a period of relevant service with a government department or other government agency (including, for example, service in courts administration) to the satisfaction of the Board.
- (5) For the purposes of subsection (2), the Admission Board may satisfy itself regarding the minimum criteria for the approval of academic qualifications, or legal training requirements, for admission in another jurisdiction by considering appropriate advice from an authority of the other jurisdiction that those criteria were established consistently with relevant agreed standards, and accordingly the Admission Board need not examine (in detail or at all) the content of courses of legal study or legal training requirements prescribed in the other jurisdiction. The regulations may identify or provide a means of identifying those agreed standards.

## **25 Suitability for admission**

- (1) In deciding if an applicant is a fit and proper person to be admitted, the Admission Board:
  - (a) must consider each of the suitability matters in relation to the applicant to the extent a suitability matter is appropriate, and
  - (b) may consider any other matter it considers relevant.

- (2) However, the Admission Board may consider a person to be a fit and proper person to be admitted despite a suitability matter because of the circumstances relating to the matter.

#### **26 Early consideration of suitability**

- (1) A person may apply to the Admission Board for a declaration that matters disclosed by the person will not, without more, adversely affect an assessment by the Board as to whether the person is a fit and proper person to be admitted.
- (2) The Admission Board is to consider each application under this section and, subject to section 27 (Referral of matters to Supreme Court), make the declaration sought or refuse to do so.

#### **27 Referral of matters to Supreme Court**

- (1) The Admission Board may refer the issue of whether or not an applicant is a fit and proper person to be admitted to the Supreme Court for determination if, in the opinion of the Board, it would be appropriate for the Court to consider that issue.
- (2) The Admission Board may refer to the Supreme Court any application for a declaration under section 26 (Early consideration of suitability) if, in the opinion of the Board, it would be appropriate for the Court to consider the application.
- (3) The Supreme Court has the same powers as the Admission Board to deal with an application referred to it under this section and its decision on the application is taken to be a decision of the Board.
- (4) On a referral under this section, the Supreme Court may make an order or declaration as it thinks fit.
- (5) The Admission Board is to bear the costs of a referral under this section.

#### **28 Appeals**

- (1) An applicant for admission may appeal to the Supreme Court against the refusal of the Admission Board to give a compliance certificate in respect of the applicant.
- (2) An applicant for a declaration sought under section 26 (Early consideration of suitability) may appeal to the Supreme Court against the refusal of the Admission Board to make the declaration.

- (3) A Council may appeal to the Supreme Court against the giving of a compliance certificate.
- (4) A Council may appeal to the Supreme Court against the making of a declaration under section 26 (Early consideration of suitability).
- (5) An appeal under this section is to be by way of rehearing, and fresh evidence or evidence in addition to or in substitution for the evidence before the Admission Board may be given on the appeal, and the decision of the Supreme Court is taken to be a decision of the Admission Board.
- (6) On an appeal under this section, the Supreme Court may make an order or declaration as it thinks fit.

**29 Binding effect of declaration or order**

A declaration made under section 26, or an order or declaration under section 27 or 28, is binding on the Admission Board unless the applicant failed, on the application or appeal, to make a full and fair disclosure of all matters relevant to the declaration sought.

**30 Entitlement to be represented, heard and make representations**

- (1) A Council and the applicant concerned are entitled:
  - (a) to make representations in writing to the Admission Board in relation to any matter under consideration by the Board under this Division, and
  - (b) to be represented and heard at any inquiry or appeal under this Division.
- (2) The Admission Board must notify each Council in accordance with the admission rules of:
  - (a) any application for a declaration under section 26 (Early consideration of suitability), and
  - (b) any declaration made under that section.
- (3) The Admission Board may notify a Council of any application for admission.

### **Division 3      Admission to the legal profession**

#### **31    Admission**

- (1) The Supreme Court may admit persons as lawyers in accordance with this Part.
- (2) The Supreme Court may admit an applicant as a lawyer if the Admission Board advises the Court that the Board considers that the applicant:
  - (a) is eligible for admission, and
  - (b) is a fit and proper person to be admitted.
- (3) The advice of the Admission Board is to be given by means of a compliance certificate in the form prescribed by the admission rules.

#### **32    Roll of local lawyers**

- (1) The Supreme Court is to maintain a roll of persons admitted as lawyers under this Act (referred to in this Act as the *local roll*).
- (2) When a person is admitted under this Act, the Supreme Court is to cause the person's name to be entered on the local roll.
- (3) A person admitted as a lawyer under this Act must sign the local roll.
- (4) The admission of a person as a lawyer under this Act is effective from the time the person signs the local roll.
- (5) The local roll must be available for inspection, without charge, during normal business hours.
- (6) The Supreme Court may publish the name of persons admitted as lawyers under this Act and any relevant particulars concerning those persons.
- (7) The Supreme Court's functions under this section may be exercised by a person or body designated by the Court for the purpose.
- (8) The regulations may make provision for or with respect to:
  - (a) the information that may or must be included in the local roll,
  - (b) publication of information contained in the local roll.



Clause 33	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.3	Admission of local lawyers

### **33 Local lawyer is officer of Supreme Court**

A person becomes an officer of the Supreme Court on being admitted as a lawyer under this Act.

### **34 Miscellaneous provisions respecting admission**

- (1) The Supreme Court can only admit or enrol persons as lawyers, and cannot admit or enrol persons as barristers, solicitors or legal practitioners.
- (2) Any inherent power or jurisdiction of the Supreme Court to admit or enrol persons as barristers, solicitors or legal practitioners is and remains revoked.
- (3) The Supreme Court Charter is and remains revoked in New South Wales in so far as it relates to the admission of barristers, advocates, proctors, solicitors and attorneys.
- (4) In this section:

*Supreme Court Charter* means the Charter dated 13 October 1823 under the Imperial Act 4 Geo IV c 96 establishing Courts of Justice in New South Wales.

## **Division 4 Legal Profession Admission Board**

**Note.** Provisions for the constitution of the Admission Board are located in Part 7.1 and Schedule 2.

### **35 Determination of applications for admission**

- (1) The Admission Board is to advise the Supreme Court whether or not the Board considers:
  - (a) an applicant for admission is:
    - (i) eligible for admission (under section 24), and
    - (ii) a fit and proper person to be admitted (in accordance with section 25), and
  - (b) the application is made in accordance with the admission rules and the applicant has complied with the admission rules.
- (2) The Admission Board may refuse:
  - (a) to consider the application if it is not made in accordance with the admission rules, or

- (b) to advise that the applicant is eligible for admission if the person has not complied with the admission rules.

### **36 Compliance certificates**

- (1) If, after considering an application for admission, the Admission Board considers:
  - (a) the applicant is:
    - (i) eligible for admission, and
    - (ii) a fit and proper person to be admitted, and
  - (b) the application conforms with the requirements of the admission rules and there are no grounds for refusing to give a certificate for the applicant,

the Board must, within the time specified in or determined in accordance with the admission rules, advise the Supreme Court to that effect by filing with the Prothonotary a certificate in the approved form (a *compliance certificate*).
- (2) If the Admission Board refuses to give a compliance certificate for the applicant, the Board must, within the time specified in or determined in accordance with the admission rules, give the Prothonotary and the applicant an information notice about the refusal.

### **37 Consideration of applicant's eligibility and suitability**

- (1) To help it consider whether or not an applicant is eligible for admission or is a fit and proper person to be admitted, the Admission Board may, by notice to the applicant, require:
  - (a) the applicant to give it specified documents or information, or
  - (b) the applicant to co-operate with any inquiries by the Board that it considers appropriate.
- (2) An applicant's failure to comply with a notice under subsection (1) by the date specified in the notice and in the way required by the notice is a ground for refusing to approve the applicant as a suitable candidate for admission.
- (3) The Admission Board may refer a matter to the Supreme Court for directions.

## **Division 5                      Admission rules**

### **38                      Admission rules**

- (1) The Admission Board may make rules for the admission of persons as lawyers under this Act.
- (2) Without limiting subsection (1), rules may be made about any of the following:
  - (a) the procedure for admission, including:
    - (i) how an application is to be made, and
    - (ii) giving notice of the application to an entity or public notice of the application, and
    - (iii) the affidavits or certificates the applicant must provide with or for the application,
  - (b) admission requirements regarding, and the approval of, academic qualifications and practical legal training,
  - (c) the examination of applicants for admission and the assessment of their qualifications,
  - (d) the disclosure of matters that may affect consideration of the eligibility of an applicant for admission, or affect consideration of the question whether the applicant is a fit and proper person to be admitted, including convictions that must be disclosed and those that need not be disclosed,
  - (e) applications for admission under the trans-Tasman mutual recognition legislative scheme,
  - (f) the assessment of the qualifications and practical legal training of overseas qualified or trained applicants against the academic requirements and practical legal training requirements that apply to local applicants,
  - (g) the conferral of a right of objection to an applicant's admission on persons of appropriate standing,
  - (h) the procedure to be adopted in the conduct of inquiries under this Part,
  - (i) registration as a student-at-law and the qualifications for registration,
  - (j) examinations in academic subjects of candidates for registration as students-at-law or of applicants for admission,

- (k) the establishment and conduct of boards or other bodies with functions concerning:
    - (i) the examination of applicants for admission, and
    - (ii) the assessment of applicants as to whether they are eligible for admission and as to whether they are fit and proper persons to be admitted,
  - (l) authorising the Board to exempt a person from the requirements of section 24 (1) (a) or (b) as provided by section 24 (4),
  - (m) accreditation of legal education and practical legal training courses,
  - (n) prescribing the fees and costs to be payable under the rules and providing for the refund or remission of fees,
  - (o) any other matters relating to the functions of the Board.
- (3) Without limiting subsection (1), the rules may provide for abridging, in specified circumstances, any period of practical legal training required by the rules.
- (4) Part 6 of the *Interpretation Act 1987* applies to a rule made under this section in the same way as it applies in relation to a statutory rule within the meaning of that Act.

**Note.** Part 6 of the *Interpretation Act 1987* contains provisions relating to the publication and parliamentary disallowance of statutory rules and other standard provisions relating to the making, amendment and repeal of statutory rules.

## Part 2.4 Legal practice by Australian legal practitioners

### Division 1 Preliminary

#### 39 Purposes

The purposes of this Part are as follows:

- (a) to facilitate the national practice of law by ensuring that Australian legal practitioners can engage in legal practice in this jurisdiction and to provide for the certification of Australian lawyers whether or not admitted in this jurisdiction,
- (b) to provide a system for the granting and renewing of local practising certificates.

Clause 40	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.4	Legal practice by Australian legal practitioners

## **Division 2      Legal practice in this jurisdiction by Australian legal practitioners**

### **40    Entitlement of holder of Australian practising certificate to practise in this jurisdiction**

An Australian legal practitioner is, subject to this Act, entitled to engage in legal practice in this jurisdiction.

## **Division 3      Local practising certificates generally**

### **41    Local practising certificates**

- (1) Practising certificates may be granted under this Part.
- (2) The Bar Council may, on application, grant a practising certificate to an Australian lawyer authorising the lawyer to practise as a barrister.
- (3) The Law Society Council may, on application, grant a practising certificate to an Australian lawyer authorising the lawyer to practise as a solicitor and barrister.
- (4) An Australian lawyer may not at the same time hold current local practising certificates as a barrister and as a solicitor and barrister.
- (5) A practising certificate granted to a person must be granted on the condition that it does not have effect while another current local or interstate practising certificate is in force in relation to the person.

### **42    Suitability to hold local practising certificate**

- (1) This section has effect for the purposes of section 48 (Grant or renewal of local practising certificate) or any other provision of this Act where the question of whether or not a person is a fit and proper person to hold a local practising certificate is relevant.
- (2) A Council may, in considering whether or not the person is a fit and proper person to hold a local practising certificate, take into account any suitability matter relating to the person, and any of the following, whether happening before or after the commencement of this section:
  - (a) whether the person obtained an Australian practising certificate because of incorrect or misleading information,

- (b) whether the person has contravened a condition of an Australian practising certificate held by the person,
  - (c) whether the person has contravened this Act or a corresponding law or the regulations or legal profession rules under this Act or a corresponding law,
  - (d) whether the person has contravened:
    - (i) an order of the Tribunal, or
    - (ii) an order of a corresponding disciplinary body or of another court or tribunal of another jurisdiction exercising jurisdiction or powers by way of appeal or review of an order of a corresponding disciplinary body,
  - (e) without limiting any other paragraph:
    - (i) whether the person has failed to pay a required contribution or levy to the Fidelity Fund, or
    - (ii) whether the person has contravened a requirement of, or imposed under, this Act or the regulations, about professional indemnity insurance, or
    - (iii) whether the person has contravened a requirement of this Act or the regulations about trust money, or
    - (iv) whether the person has failed to pay other costs, expenses or fines for which the person is liable under this Act or the regulations,
  - (f) other matters the Council thinks appropriate.
- (3) A person may be considered a fit and proper person to hold a local practising certificate even though the person is within any of the categories of the matters referred to in subsection (2), if the Council considers that the circumstances warrant the determination.
- (4) If a matter was:
- (a) disclosed in an application for admission to the legal profession in this or another jurisdiction, and
  - (b) determined by a Supreme Court or by the Admission Board or a corresponding authority not to be sufficient for refusing admission,

the matter cannot be taken into account as a ground for refusing to grant or renew or for suspending or cancelling a local practising certificate unless the matter was a pre-admission event (whether it happened before or after the commencement of this section), but the

Clause 42	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
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matter may be taken into account when considering other matters in relation to the person concerned.

- (5) A Council may decide to take no action or no further action in connection with a pre-admission event, if satisfied that it is appropriate to do so given the passage of time and other circumstances the Council considers relevant.

#### **43 Duration of local practising certificate**

- (1) A local practising certificate granted under this Act is in force from the date specified in it until the end of the financial year in which it is granted, unless the certificate is sooner suspended or cancelled.
- (2) A local practising certificate renewed under this Act is in force until the end of the financial year following its previous period of currency, unless the certificate is sooner suspended or cancelled.
- (3) If an application for the renewal of a local practising certificate as a solicitor has been properly made as required by this Act but has not been determined by the Law Society Council by the following 1 July, the certificate:
- (a) continues in force on and from that 1 July until the Law Society Council renews or refuses to renew the certificate or the holder withdraws the application for renewal, unless the certificate is sooner cancelled or suspended, and
  - (b) if renewed, is taken to have been renewed on and from that 1 July.

#### **44 Local legal practitioner is officer of Supreme Court**

A person who is not already an officer of the Supreme Court becomes an officer of the Supreme Court on being granted a local practising certificate.

### **Division 4 Grant or renewal of local practising certificates**

#### **45 Application for grant or renewal of local practising certificate**

- (1) An Australian lawyer may apply to the appropriate Council for the grant or renewal of a local practising certificate if eligible to do so.
- (2) An Australian lawyer is eligible to apply for the grant or renewal of a local practising certificate if the lawyer complies with any regulations

and legal profession rules relating to eligibility for the practising certificate and if:

- (a) where the lawyer is not an Australian legal practitioner at the time of making the application:
  - (i) the lawyer reasonably expects to be engaged in legal practice principally from this jurisdiction during the currency of the certificate applied for, or
  - (ii) if it is not reasonably practicable to determine whether subparagraph (i) applies to the lawyer—the lawyer’s place of residence in Australia is this jurisdiction or the lawyer does not have a place of residence in Australia, or
- (b) where the lawyer is an Australian legal practitioner at the time of making the application:
  - (i) the jurisdiction in which the lawyer engages in legal practice principally is this jurisdiction, or
  - (ii) the lawyer holds a current local practising certificate and engages in legal practice in another jurisdiction under an arrangement that is of a temporary nature, or
  - (iii) the lawyer reasonably expects to be engaged in legal practice principally in this jurisdiction during the currency of the certificate applied for, or
  - (iv) if it is not reasonably practicable to determine whether subparagraph (i), (ii) or (iii) applies to the lawyer—the lawyer’s place of residence in Australia is this jurisdiction or the lawyer does not have a place of residence in Australia.
- (3) For the purposes of subsection (2) (b), the jurisdiction in which an Australian lawyer engages in legal practice principally is to be decided by reference to the lawyer’s legal practice during the certificate period current at the time:
  - (a) the application is made, or
  - (b) in the case of a late application—the application should have been made.
- (4) An Australian lawyer must not apply for the grant or renewal of a local practising certificate if the lawyer is not eligible to make the application.
- (5) An Australian legal practitioner who engages in legal practice principally in this jurisdiction during a financial year and intends to



engage in legal practice principally in this jurisdiction in the following year must apply for the grant or renewal of a local practising certificate in respect of the following financial year.

- (6) Subsection (5) does not apply to an interstate legal practitioner who applied for the grant or renewal of an interstate practising certificate on the basis that:
  - (a) the practitioner reasonably expected to engage in legal practice principally in this jurisdiction under an arrangement that is of a temporary nature, or
  - (b) the practitioner reasonably expected to engage in legal practice principally in another jurisdiction during the currency of the interstate practising certificate.
- (7) Subsection (5) does not apply to a local legal practitioner who applied for the grant of an interstate practising certificate on the basis that the practitioner reasonably expected to engage in legal practice principally in the other jurisdiction during the currency of the interstate practising certificate.
- (8) The exemption provided by subsection (6) (a) ceases to operate at the end of the period prescribed by the regulations for the purposes of this subsection.
- (9) Contravention of this section by an Australian lawyer is capable of being unsatisfactory professional conduct or professional misconduct.

#### **46 Manner of application**

- (1) An application for the grant or renewal of a local practising certificate must be:
  - (a) made in accordance with the regulations and must provide or be accompanied by such information as may be required by the regulations, and
  - (b) accompanied by the appropriate fees.
- (2) The regulations may require the applicant to disclose matters that may affect the applicant's eligibility for the grant or renewal of a local practising certificate or the question whether the applicant is a fit and proper person to hold a local practising certificate.
- (3) The regulations may indicate that particular kinds of matters previously disclosed in a particular manner need not be disclosed for the purposes of the current application.

- (4) Without limiting subsection (2), the regulations may require the applicant to disclose details of, or details of the nature of, pre-admission events.

**47 Timing of application for renewal of local practising certificate**

- (1) An application for the renewal of a local practising certificate must be made within the period prescribed by the regulations.
- (2) That period must be within the currency of the local practising certificate being sought to be renewed.
- (3) The appropriate Council must reject and not further consider an application made after that period.

**Note.** If an application made after that period is rejected, the applicant will have to apply for the grant of a new practising certificate.

**48 Grant or renewal of local practising certificate**

- (1) The appropriate Council must consider an application that has been made for the grant or renewal of a local practising certificate and may:
- (a) grant or refuse to grant the certificate, or
  - (b) renew or refuse to renew the certificate,
- and in granting or renewing the certificate may impose conditions as referred to in section 50 (Conditions imposed by Council).
- (2) The Council may refuse:
- (a) to consider an application if:
    - (i) it is not made in accordance with this Act, the regulations or the legal profession rules, or
    - (ii) the required fees and costs have not been paid, or
  - (b) to grant or renew a local practising certificate if the applicant has not complied with the regulations or the legal profession rules in relation to the application.
- (3) The Council must not grant a local practising certificate unless it is satisfied that the applicant:
- (a) was eligible to apply for the grant when the application was made, and
  - (b) is a fit and proper person to hold the certificate.

**Note.** Section 42 (Suitability to hold local practising certificate) deals with the question of whether or not a person is a fit and proper person to hold a practising certificate.

- (4) The Council must not renew a local practising certificate if it is satisfied that the applicant:
  - (a) was not eligible to apply for the renewal when the application was made, or
  - (b) is not a fit and proper person to continue to hold the certificate.
- (5) The Council must not grant or renew a local practising certificate if the Council considers the applicant's circumstances have changed since the application was made and the applicant would (having regard to information that has come to the Council's attention) not have been eligible to make the application when the application is being considered.
- (6) Without limiting any other provision of this section, the Council may refuse to grant or renew a local practising certificate if a finding of unsatisfactory professional conduct or professional misconduct has been made in respect of the applicant and:
  - (a) a fine imposed because of the finding has not been paid, or
  - (b) costs awarded against the applicant because of the finding have been assessed but have not been paid or, if an arrangement for their payment has been made, the applicant is in default under the arrangement.
- (7) Without limiting any other provision of this section, the Council may refuse to grant or renew a local practising certificate if:
  - (a) any costs of an investigation or examination payable under Part 3.1 by or in respect of the applicant have not been paid, or
  - (b) any fees, costs or expenses of external intervention payable under Chapter 5 by or in respect of the applicant have not been paid, or
  - (c) the applicant is required by this Act to contribute to the Indemnity Fund and the application is not accompanied by the contribution payable under that section, or
  - (d) the applicant is required by this Act to contribute to the Fidelity Fund and the application is not accompanied by the contribution payable under that section, or
  - (e) any levy payable by the applicant under Part 3.3 or 3.4 or Schedule 7 is unpaid.

- (8) Without limiting any other provision of this section, the Council may refuse to grant or renew a local practising certificate on any ground on which the local practising certificate could be suspended or cancelled.
- (9) Without limiting any other provision of this section, the Bar Council may refuse to grant a local practising certificate for a barrister if the applicant has not successfully completed any examination required by the Bar Council to be passed as a prerequisite to undertaking a reading program.
- (10) This section does not affect any other provision of this Act that provides for the refusal to grant a local practising certificate.
- Note.** Sections 403 and 406 provide for the refusal to grant a local practising certificate if any required professional indemnity insurance has not been obtained. Section 485 provides for the refusal to grant a local practising certificate if any required fidelity cover in respect of regulated mortgages has not been obtained.
- (11) If the Council grants or renews a local practising certificate, the Council must, as soon as practicable, give the applicant:
- (a) for the grant of a certificate—a local practising certificate, or
  - (b) for the renewal of a certificate—a new local practising certificate.
- (12) If the Council refuses to grant or renew a local practising certificate, the Council must, as soon as practicable, give the applicant an information notice.
- (13) If an application for the grant of a local practising certificate is not determined within 3 months after the application is made, the application is deemed to have been refused.

## **Division 5      Conditions on local practising certificates**

### **49    Conditions generally**

- (1) A local practising certificate is subject to:
- (a) any conditions imposed by the appropriate Council, and
  - (b) any statutory conditions imposed by this or any other Act, and
  - (c) any conditions imposed by or under the legal profession rules or the regulations, and

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- (d) any conditions imposed or varied by the Tribunal under section 51 (Imposition or variation of conditions pending criminal proceedings), and
  - (e) any conditions imposed under Chapter 4 (Complaints and discipline) or under provisions of a corresponding law that correspond to Chapter 4.
- (2) If a condition is imposed, varied or revoked under this Act (other than a statutory condition) during the currency of the local practising certificate concerned, the certificate is to be amended by the appropriate Council, or a new certificate is to be issued by the Council, to reflect on its face the imposition, variation or revocation.

#### **50 Conditions imposed by Council**

- (1) The appropriate Council may impose conditions on a local practising certificate:
- (a) when it is granted or renewed, or
  - (b) during its currency (in accordance with section 61 (Amending, suspending or cancelling local practising certificate)).
- (2) A condition imposed under this section must be reasonable and relevant.
- (3) A condition imposed under this section may be about any of the following:
- (a) requiring the holder of the practising certificate to undertake and complete:
    - (i) continuing legal education, or
    - (ii) an academic or training course, or
    - (iii) a period of supervised legal practice,
  - (b) restricting the areas of law practised,
  - (c) controlling, restricting or prohibiting the operation of a trust account,
  - (d) restricting the holder to particular conditions concerning employment or supervision,
  - (e) requiring the holder of the practising certificate to undergo counselling or medical treatment or to act in accordance with medical advice given to the holder,

- (f) requiring the holder of the practising certificate to use the services of an accountant or other financial specialist in connection with his or her practice,
  - (g) requiring the holder of the practising certificate to provide the appropriate Council with evidence as to any outstanding tax obligations of the holder and as to provision made by the holder to satisfy any such outstanding obligations,
  - (h) a matter agreed to by the holder.
- (4) Subsection (3) does not limit the matters about which a condition may be imposed under this section.
- (5) The appropriate Council must not impose a condition requiring the holder to undertake and complete an academic or training course unless:
- (a) the Council is satisfied, having regard to the holder's previous academic studies, legal training, experience or conduct, that the holder falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, or
  - (b) the condition is one that is imposed generally on holders of local practising certificates or any class of holders of local practising certificates.
- Note.** A class of holders might comprise newly qualified lawyers, or lawyers returning to legal practice after suspension or an extended break.
- (6) The appropriate Council may vary or revoke conditions imposed under this section.
- (7) If the appropriate Council imposes, varies or revokes a condition during the currency of the local practising certificate concerned, the imposition, variation or revocation takes effect when the holder has been notified of it or a later time specified by the Council.
- (8) If the appropriate Council imposes a condition on the certificate when it is granted or renewed and the holder of the certificate within one month after the grant or renewal notifies the Council in writing that he or she does not agree to the condition, the Council must, as soon as practicable, give the holder an information notice.
- (9) This section has effect subject to section 61 (Amending, suspending or cancelling local practising certificate) in relation to the imposition of a condition on a local practising certificate during its currency.

**51 Imposition or variation of conditions pending criminal proceedings**

- (1) If a local legal practitioner has been charged with a relevant offence but the charge has not been determined, the appropriate Council may apply to the Tribunal for an order under this section.
- (2) On an application under subsection (1), the Tribunal, if it considers it appropriate to do so having regard to the seriousness of the offence and to the public interest, may make either or both of the following orders:
  - (a) an order varying the conditions on the practitioner's local practising certificate, or
  - (b) an order imposing further conditions on the practitioner's local practising certificate.
- (3) An order under this section has effect until the sooner of:
  - (a) the end of the period specified by the Tribunal, or
  - (b) if the practitioner is convicted of the offence—28 days after the day of the conviction, or
  - (c) if the charge is dismissed—the day of the dismissal.
- (4) The Tribunal, on application by any party, may vary or revoke an order under this section at any time.
- (5) In this section:

*relevant offence* means a serious offence or an offence that would have to be disclosed under the admission rules in relation to an application for admission to the legal profession under this Act.

**52 Statutory condition regarding conditions imposed on interstate admission**

It is a statutory condition of a local practising certificate that the holder must not contravene a condition that was imposed on the admission of the person to the legal profession under a corresponding law (with any variations of the condition made from time to time) and that is still in force.

**Note.** Contravention of a condition imposed on admission locally is dealt with in section 58 (Compliance with conditions).

**53 Statutory condition regarding practice as solicitor**

- (1) It is a statutory condition of a local practising certificate for a solicitor that the holder must engage in supervised legal practice only, until the holder has completed:

- (a) if the holder completed practical legal training principally under the supervision of an Australian legal practitioner, whether involving articles of clerkship or otherwise, to qualify for admission to the legal profession in this or another jurisdiction—a period or periods equivalent to 18 months' supervised legal practice, worked out under relevant regulations, after the day the holder's first practising certificate was granted, or
  - (b) if the holder completed other practical legal training to qualify for admission to the legal profession in this or another jurisdiction—a period or periods equivalent to 2 years' supervised legal practice, worked out under relevant regulations, after the day the holder's first practising certificate was granted.
- (2) Subsection (1) has effect subject to any other conditions that relate to engaging in supervised legal practice as a solicitor after a period or periods referred to in that subsection.
- (3) Without limiting any other regulation-making power, the regulations may authorise a Council to exempt a person from all or any of the requirements of subsection (1).

**54 Statutory condition regarding practice as a barrister**

It is a statutory condition of a local practising certificate for a barrister (but not a solicitor and barrister) that the barrister must not:

- (a) engage in legal practice otherwise than as a sole practitioner, or
- (b) engage in legal practice in partnership with any person, or
- (c) engage in legal practice as the employee of any person, or
- (d) hold office as a legal practitioner director of an incorporated legal practice.

**55 Statutory condition regarding notification of offence**

- (1) It is a statutory condition of a local practising certificate that the holder of the certificate:
- (a) must notify the appropriate Council that the holder has been:
    - (i) convicted of an offence that would have to be disclosed under the admission rules in relation to an application for admission to the legal profession under this Act, or
    - (ii) charged with a serious offence, and



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- (b) must do so within 7 days of the event and by a written notice.
- (2) The regulations, or the legal profession rules if the regulations do not do so, may specify the form of the notice to be used and the person to whom or the address to which it is to be sent or delivered.
- (3) The giving of notice in accordance with Division 7 (Special powers in relation to local practising certificates—show cause events) of a conviction for a serious offence satisfies the requirements of subsection (1) (a) (i) in relation to the conviction.

#### **56 Additional conditions on practising certificates of barristers**

- (1) Without limiting section 50 (Conditions imposed by Council), the Bar Council may under that section impose conditions of the following kinds on the practising certificate of a barrister:
  - (a) a condition requiring the holder to undertake and complete to the satisfaction of the Bar Council a full-time component or other component of a reading program applicable to the holder and determined or approved by the Bar Council,
  - (b) a condition requiring the holder to read with a barrister of a specified class or description chosen by the holder (including a barrister chosen from a list of at least 10 barristers kept by the Bar Council for the purpose) for a specified period and to comply with such requirements as will enable the barrister, at the end of the specified period, to certify to the Bar Council that the holder is fit to practise as a barrister without restriction.
- (2) A condition of a kind referred to in subsection (1) that is imposed on the practising certificate of a barrister may limit the practising rights of the barrister until the condition is complied with.
- (3) The Bar Council may cancel or suspend a local practising certificate if the holder fails to comply with a condition of the kind referred to in subsection (1).

#### **57 Conditions imposed by legal profession rules**

The legal profession rules may:

- (a) impose conditions on local practising certificates or any class of local practising certificates, or
- (b) authorise conditions to be imposed on local practising certificates or any class of local practising certificates.

**58 Compliance with conditions**

- (1) The holder of a current local practising certificate must not contravene (in this jurisdiction or elsewhere) a condition to which the certificate is subject.

Maximum penalty: 100 penalty units.

- (2) A contravention of subsection (1) is capable of being unsatisfactory professional conduct or professional misconduct whether or not the holder is convicted of an offence in relation to the contravention.

**Division 6 Amendment, suspension or cancellation of local practising certificates**

**59 Application of this Division**

This Division does not apply in relation to matters referred to in Division 7 (Special powers in relation to local practising certificates—show cause events).

**60 Grounds for amending, suspending or cancelling local practising certificate**

Each of the following is a ground for amending, suspending or cancelling a local practising certificate:

- (a) the holder is no longer a fit and proper person to hold the certificate,

**Note.** Section 42 (Suitability to hold local practising certificate) deals with the question of whether or not a person is a fit and proper person to hold a practising certificate.

- (b) if the holder is an insurable barrister or insurable solicitor within the meaning of Part 3.3 (Professional indemnity insurance)—the holder does not have, or no longer has, professional indemnity insurance that complies with this Act in relation to the certificate,

- (c) if the holder is an insurable solicitor within the meaning of Part 3.3 (Professional indemnity insurance)—the holder fails to pay a contribution, instalment of a contribution, or levy in accordance with section 411 (Contributions) or 412 (Levies) or Schedule 7 (Professional indemnity insurance—provisions relating to HIH insurance),

- (d) if a condition of the certificate is that the holder is limited to legal practice specified in the certificate—the holder is engaging in legal practice that the holder is not entitled to engage in under this Act.

#### **61 Amending, suspending or cancelling local practising certificate**

- (1) If the appropriate Council believes a ground exists to amend, suspend or cancel a local practising certificate (the *proposed action*), the authority must give the holder a notice (the *show cause notice*) that:
  - (a) states the proposed action and:
    - (i) if the proposed action is to amend the certificate—states the proposed amendment, and
    - (ii) if the proposed action is to suspend the certificate—states the proposed suspension period, and
  - (b) states the grounds for proposing to take the proposed action, and
  - (c) outlines the facts and circumstances that form the basis for the Council’s belief, and
  - (d) invites the holder to make written representations to the Council within a specified time of not less than 7 days and not more than 28 days, as to why the proposed action should not be taken.
- (2) If, after considering all written representations made within the specified time and, in its discretion, written representations made after the specified time, the Council still believes a ground exists to take the proposed action, the Council may:
  - (a) if the show cause notice stated the proposed action was to amend the practising certificate—amend the certificate in the way stated or in a less onerous way the Council considers appropriate because of the representations, or
  - (b) if the show cause notice stated the proposed action was to suspend the practising certificate for a specified period:
    - (i) suspend the certificate for a period no longer than the specified period, or
    - (ii) amend the certificate in a less onerous way the Council considers appropriate because of the representations, or
  - (c) if the show cause notice stated the proposed action was to cancel the practising certificate:

- (i) cancel the certificate, or
  - (ii) suspend the certificate for a period.
- (3) The Council may, at its discretion, consider representations made after the specified time.
- (4) The Council must give the person notice of the authority's decision.
- (5) If the Council decides to amend, suspend or cancel the practising certificate, the Council must give the holder an information notice about the decision.

**62 Operation of amendment, suspension or cancellation of local practising certificate**

- (1) **Application of section**  
This section applies if a decision is made to amend, suspend or cancel a local practising certificate under section 61 (Amending, suspending or cancelling local practising certificate).
- (2) **Action to take effect on giving of notice or specified date**  
Subject to subsections (3) and (4), the amendment, suspension or cancellation of the practising certificate takes effect on the later of the following:
  - (a) the day notice of the decision is given to the holder,
  - (b) the day specified in the notice.
- (3) **Grant of stay**  
If the practising certificate is amended, suspended or cancelled because the holder has been convicted of an offence:
  - (a) the Supreme Court may, on the application of the holder, order that the operation of the amendment, suspension or cancellation of the practising certificate be stayed until:
    - (i) the end of the time to appeal against the conviction, and
    - (ii) if an appeal is made against the conviction—the appeal is finally decided, lapses or otherwise ends, and
  - (b) the amendment, suspension or cancellation does not have effect during any period in respect of which the stay is in force.
- (4) **Quashing of conviction**  
If the practising certificate is amended, suspended or cancelled because the holder has been convicted of an offence and the conviction is quashed:

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- (a) the amendment or suspension ceases to have effect when the conviction is quashed, or
- (b) the cancellation ceases to have effect when the conviction is quashed and the certificate is restored as if it had merely been suspended.

### **63 Other ways of amending or cancelling local practising certificate**

- (1) The appropriate Council may amend or cancel a local practising certificate if the holder requests the appropriate Council to do so.
- (2) The appropriate Council may amend a local practising certificate:
  - (a) for a formal or clerical reason, or
  - (b) in another way that does not adversely affect the holder's interests.
- (3) The appropriate Council must cancel a local practising certificate if the holder's name has been removed from the local roll or the holder ceases to be an Australian lawyer.
- (4) The amendment or cancellation of a local practising certificate under this section is effected by written notice given to the holder.
- (5) Section 61 (Amending, suspending or cancelling local practising certificate) does not apply in a case to which this section applies.

### **64 Relationship of this Division with Chapter 4**

Nothing in this Division prevents a Council from making a complaint under Chapter 4 (Complaints and discipline) about a matter to which this Division relates.

## **Division 7 Special powers in relation to local practising certificates—show cause events**

### **65 Definition of "show cause event"**

In this Division:

*show cause event*, in relation to a person, means:

- (a) his or her becoming bankrupt or the subject of a creditor's petition presented to the Court under section 43 of the *Bankruptcy Act 1966* of the Commonwealth, or

- (b) his or her presentation (as a debtor) of a declaration to the Official Receiver under section 54A of the *Bankruptcy Act 1966* of the Commonwealth of his or her intention to present a debtor's petition or his or her presentation (as a debtor) of such a petition under section 55 of that Act, or
- (c) his or her applying to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit, or
- (d) his or her conviction for a serious offence or a tax offence, whether or not:
  - (i) the offence was committed in or outside this jurisdiction, or
  - (ii) the offence was committed while the person was engaging in legal practice as an Australian legal practitioner or was practising foreign law as an Australian-registered foreign lawyer, as the case requires, or
  - (iii) other persons are prohibited from disclosing the identity of the offender.

**66 Applicant for local practising certificate—show cause event**

- (1) This section applies if:
  - (a) a person (referred to in this Division as *the applicant*) is applying for the grant of a local practising certificate, and
  - (b) a show cause event in relation to the person happened, whether before or after the commencement of this section and whether before or after the person was first admitted to the legal profession in this or another jurisdiction.
- (2) As part of the application, the applicant must provide to the appropriate Council a written statement:
  - (a) about the show cause event, and
  - (b) explaining why, despite the show cause event, the applicant considers himself or herself to be a fit and proper person to hold a local practising certificate.
- (3) A contravention of subsection (2) is capable of being unsatisfactory professional conduct or professional misconduct.

- (4) However, the applicant need not provide a statement under subsection (2) if the applicant has previously provided to the appropriate Council a statement under this section, or a notice and statement under section 67 (Holder of local practising certificate—show cause event), explaining why, despite the show cause event, the applicant considers himself or herself to be a fit and proper person to hold a local practising certificate.
- (5) If the show cause event is a pre-admission event, the appropriate Council may decide to take no action under this Division in connection with the event, if satisfied that it is appropriate to do so given the passage of time and other circumstances the Council considers relevant (in which case the Council is not required to investigate and determine the matter under section 69).
- (6) A Council must, within 7 days after receiving a written statement from a local legal practitioner under this section about a show cause event, provide a copy of the statement to the Commissioner.
- (7) A Council may refuse to issue a local practising certificate if the applicant:
  - (a) is required by this section to provide a written statement about a show cause event and has failed to provide the statement in accordance with this section, or
  - (b) has provided a written statement in accordance with this section but, in the opinion of the Council to which the statement was provided, the statement is not a genuine or reasonable attempt to show that the applicant is a fit and proper person to hold a practising certificate, or
  - (c) has failed without reasonable excuse to comply with a requirement under Chapter 6 (Provisions relating to investigations) made in connection with an investigation of the show cause event concerned or has committed an offence under that Chapter in connection with any such investigation.

**67 Holder of local practising certificate—show cause event**

- (1) This section applies to a show cause event that happens in relation to a person (referred to in this Division as *the holder*) who is the holder of a local practising certificate.

- (2) The holder must provide to the appropriate Council both of the following:
  - (a) within 7 days after the happening of the event—notice that the event happened,
  - (b) within 28 days after the happening of the event—a written statement explaining why, despite the show cause event, the person considers himself or herself to be a fit and proper person to hold a local practising certificate.
- (3) A contravention of subsection (2) is capable of being unsatisfactory professional conduct or professional misconduct.
- (4) If a written statement is provided after the 28 days mentioned in subsection (2) (b), the appropriate Council may accept the statement and take it into consideration.
- (5) A Council must, within 7 days after receiving a notice or statement from a local practitioner under this section, provide a copy of the notice or statement to the Commissioner.
- (6) A Council may cancel or suspend a local practising certificate if the holder:
  - (a) is required by this section to provide notice or a written statement about a show cause event and has failed to provide the notice or statement in accordance with this section, or
  - (b) has provided a written statement in accordance with this section but, in the opinion of the Council to which the statement was provided, the statement is not a genuine or reasonable attempt to show that the applicant is a fit and proper person to hold a practising certificate, or
  - (c) has failed without reasonable excuse to comply with a requirement under Chapter 6 (Provisions relating to investigations) made in connection with an investigation of the show cause event concerned or has committed an offence under that Chapter in connection with any such investigation.

#### **68 Investigation and consideration of show cause event**

- (1) On becoming aware of the happening of a show cause event in relation to an applicant or holder, the appropriate Council must investigate and determine within the required period whether the applicant or holder is a fit and proper person to hold a local practising certificate.



- (2) The appropriate Council must within 14 days of becoming aware of the happening of the show cause event give notice in writing to the applicant or holder:
  - (a) if the Council has not received a statement or notice under section 66 or 67 in relation to the show cause event, requiring the applicant or holder to provide the required statement, and
  - (b) informing the applicant or holder that a determination in relation to the matter is required to be made under this Division, and
  - (c) informing the applicant or holder of the required period under this section in relation to the determination of the matter and that the applicant or holder will be notified of any extension of that period, and
  - (d) informing the applicant or holder of the effect of the automatic suspension provisions in section 70 in the event of the matter not being determined by the Council or the Commissioner within the required period.
- (3) The appropriate Council must determine the matter by:
  - (a) deciding that the applicant or holder is a fit and proper person to hold a local practising certificate, or
  - (b) deciding that the applicant or holder is not a fit and proper person to hold a local practising certificate, or
  - (c) deciding that the applicant or holder is a fit and proper person to hold a local practising certificate but that it is appropriate to impose conditions on the applicant's or holder's local practising certificate for a specified period.
- (4) In investigating and determining a matter under this section the appropriate Council:
  - (a) is not limited to investigating and making its determination on the basis of just the show cause event concerned, and
  - (b) must have regard to the facts and circumstances that surround, arise in connection with, relate to or give rise to the show cause event concerned.
- (5) For the purposes of this section, the *required period* within which the matter must be determined is the period of 3 months (or 4 months if the Commissioner decides in a particular case to extend the period) commencing on:

- (a) the date on which the appropriate Council receives a statement or notice under section 66 or 67 in relation to the show cause event, or
  - (b) if the appropriate Council has not received a statement or notice as referred to in paragraph (a) when it gives a notice under subsection (2) to the applicant or holder, the date specified in the notice as the date of issue of the notice.
- (6) If the Commissioner extends a period under subsection (5), the Commissioner must give notice in writing to the applicant or holder concerned of the extension of the period.
- (7) The appropriate Council is not required to deal with a matter under this section if the matter has previously been the subject of investigation and determination under this section.
- (8) The appropriate Council must give the applicant or holder an information notice about a decision under subsection (3) (b) or (c). The Commissioner must give that notice if the Commissioner makes the decision in the exercise of the functions of the Council under section 71 (Commissioner taking over determination of matter).

**69 Power to renew practising certificate or defer action in special circumstances**

- (1) Despite any other provision of this Division, a Council may renew a holder's local practising certificate if the end of the financial year for which the holder's current practising certificate is in force is imminent and the Council has not made a determination under section 68 in relation to the holder.
- (2) The renewal of a practising certificate in the circumstances referred to in subsection (1) does not prevent a determination from subsequently being made and action taken under this Division to cancel or suspend the holder's local practising certificate.
- (3) Despite any other provision of this Act, a Council required to determine a matter under section 68 in relation to a holder may, for the purpose of enabling the proper arrangement of the affairs of the holder:
- (a) renew the holder's local practising certificate for such period, specified in the local practising certificate, as the Council considers necessary to achieve that purpose, or

- (b) defer cancelling or suspending the holder's local practising certificate for such period as the Council considers necessary to achieve that purpose.

**70 No decision in required period—suspension of practising certificate and referral to Commissioner**

- (1) If the appropriate Council has not determined a matter under section 68 (Investigation and consideration of show cause event) within the required period under that section:
  - (a) the Commissioner must take over the determination of the matter under that section from the Council, and
  - (b) if the matter concerns the holder of a local practising certificate, the local practising certificate of the holder concerned is suspended.

**Note.** Subsection (1) extends to an applicant for a local practising certificate but the rest of this section applies only to the holder of a local practising certificate that is suspended under subsection (1).
- (2) A suspension imposed by this section remains in force (unless the Tribunal orders its removal sooner) until:
  - (a) the Commissioner decides that the holder is a fit and proper person to hold a local practising certificate, or
  - (b) the appropriate Council has given effect to any other decision of the Commissioner as required by section 72 (Council to implement decisions under this Division).
- (3) The holder whose local practising certificate is suspended by this section may make an application to the Tribunal to remove the suspension.
- (4) When dealing with such an application, the Tribunal may make any one or more of the following orders:
  - (a) an order removing the suspension on the grounds that the holder is a fit and proper person to hold a local practising certificate,
  - (b) an order continuing the suspension for a specified period,
  - (c) an order that specified conditions be imposed on the holder's local practising certificate for a specified period,

- (d) an order that the appropriate Council cancel the holder's local practising certificate on the ground that the holder is not a fit and proper person to hold a local practising certificate,
  - (e) an order that the Commissioner suspend any investigation or determination of the matter pending the Tribunal's decision on the application.
- (5) The Commissioner may investigate and determine a matter under this Division and exercise powers under this Division in relation to the matter despite a suspension under this section of the local practising certificate concerned unless the Tribunal otherwise orders under this section.
- (6) The Commissioner and a Council are to give effect to any order of the Tribunal under this section.

#### **71 Commissioner taking over determination of matter**

When the Commissioner takes over the determination of a matter under section 68 (Investigation and consideration of show cause event) from a Council:

- (a) the Council is not required to determine the matter and is to cease to deal with the matter, and
- (b) the Commissioner has and may exercise the functions of the Council to investigate and determine the matter under section 68 (Investigation and consideration of show cause event), and
- (c) the Council is to provide any assistance required by the Commissioner to investigate the matter (including copies of or access to all documents held by the Council that relate to the matter or are required for the purpose of investigating the matter).

#### **72 Council to implement decisions under this Division**

- (1) If the appropriate Council or the Commissioner decides under this Division that the applicant or holder is not a fit and proper person to hold a local practising certificate:
- (a) the Council must give effect to that decision by refusing the grant of a local practising certificate to the applicant or by immediately cancelling or suspending the holder's local practising certificate, and

- (b) the Council may make a complaint in relation to the matter under Part 4.2, or institute proceedings in relation to the matter in the Tribunal under Part 4.8 (as if the matter had been the subject of complaint and investigation under Chapter 4).
- (2) If a Council institutes proceedings in the Tribunal as referred to in subsection (1) (b), the Council must notify the Commissioner that those proceedings have been instituted.
- (3) If the appropriate Council decides under this Division that it is appropriate to impose conditions on an applicant's or holder's local practising certificate, the Council must give effect to that decision by imposing those conditions.
- (4) If the Commissioner decides under this Division that it is appropriate to impose conditions on an applicant's or holder's local practising certificate, the Council must give effect to that decision by imposing such of those conditions as it considers to be appropriate after consultation with the Commissioner.
- (5) If the appropriate Council or the Commissioner decides under this Division that the applicant or holder is a fit and proper person to hold a local practising certificate, the Council must, subject to this Act, grant a local practising certificate to the applicant or lift any suspension of the holder's local practising certificate.
- (6) Conditions imposed as referred to in this section must continue to be imposed for such period as the appropriate Council has decided is the period for which they should be imposed or (in the case of conditions that the Commissioner has decided it is appropriate to impose) for such period as the appropriate Council has decided is the period for which they should be imposed after consultation with the Commissioner.
- (7) The appropriate Council must not grant a local practising certificate to an applicant during any period that the Commissioner has directed under this Division that the person is not to be granted a local practising certificate.
- (8) A cancellation or suspension of or imposition of conditions on a local practising certificate takes effect when the appropriate Council gives notice in writing of it to the holder.
- (9) Despite section 60 of the *Administrative Decisions Tribunal Act 1997*, an application to the Tribunal for a review of a decision referred to in this section does not affect the operation of the decision under review

or prevent the taking of action under this section to implement that decision.

**73 Failure to comply with conditions imposed under this Division**

- (1) If the holder of a local practising certificate contravenes without reasonable excuse a condition of the practising certificate imposed under this Division:
  - (a) the contravention is professional misconduct, and
  - (b) the appropriate Council may, by written notice given to the holder, cancel or suspend the local practising certificate.
- (2) The notice under this section must:
  - (a) include an information notice about the cancellation or suspension, and
  - (b) state that the holder may apply for a review of the decision of the Council under section 75.
- (3) The Council may revoke a suspension under this section at any time.

**74 Restriction on making further applications**

- (1) If the appropriate Council refuses to grant a local practising certificate to an applicant or cancels a holder's local practising certificate under this Division, the Council may also decide that the applicant or holder is not entitled to apply for the grant of a local practising certificate for a specified period not exceeding 5 years.
- (2) The Commissioner may, in making a decision that an applicant or holder is not a fit and proper person to hold a local practising certificate, also decide that the applicant or holder is not entitled to apply for the grant of a local practising certificate for a specified period not exceeding 5 years.
- (3) If the Council or Commissioner makes such a decision, the decision must be included in the information notice required under section 68 (8).
- (4) A person in respect of whom a decision has been made under this section, or under a provision of a corresponding law, is not entitled to apply for the grant of a local practising certificate during the period specified in the decision.

## **75 Review of decisions by Tribunal**

- (1) An applicant or holder who is dissatisfied with a decision of a Council or the Commissioner under this Division with respect to the applicant or holder may apply to the Tribunal for a review of the decision.
- (2) A Council must notify the Commissioner of the lodging of any application for review of a decision of the Council. The Commissioner must notify the appropriate Council of the lodging of any application for review of a decision of the Commissioner.
- (3) In proceedings on a review by the Tribunal of a decision under this Division in which the question of whether a person is a fit and proper person to hold a local practising certificate is at issue:
  - (a) the onus of establishing that a person is a fit and proper person to hold a local practising certificate is on the person asserting that fact, and
  - (b) it is to be presumed in the absence of evidence to the contrary that any statement of facts in the reasons of a Council or Commissioner for the decision concerned is a correct statement of the facts in the matter, and
  - (c) a certificate of conviction of an offence (being a certificate referred to in section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*) is admissible in the proceedings and is evidence of the commission of the offence by the person to whom it relates, and
  - (d) a document that appears to be a document issued for the purposes of or in connection with any application, proceedings or other matter arising under the *Bankruptcy Act 1966* of the Commonwealth is admissible in the proceedings and is evidence of the matters stated in the document.
- (4) The Tribunal may make any order it considers appropriate on a review under this section, including any of the following orders:
  - (a) an order directing the appropriate Council to grant, or to refuse to grant, an application for a local practising certificate,
  - (b) an order directing the appropriate Council to cancel or suspend for a specified period a local practising certificate, or to reinstate a local practising certificate that has been cancelled or suspended,

- (c) an order that an applicant or holder is not entitled to apply for the grant of a local practising certificate for a specified period not exceeding 5 years,
  - (d) an order directing the appropriate Council to impose conditions on a local practising certificate for a specified period, or to vary or revoke conditions imposed by the appropriate Council or to vary the period for which they are required to be imposed.
- (5) The Tribunal may not order the imposition of conditions on a local practising certificate without first taking submissions from the appropriate Council as to the appropriateness of the proposed conditions.
- (6) The appropriate Council is to give effect to any order of the Tribunal under this section.

#### **76 Parties to Tribunal proceedings**

- (1) The following persons are entitled to appear at a hearing conducted by the Tribunal on a review under section 75 (Review of decisions by Tribunal):
- (a) the applicant or holder who applied for the review,
  - (b) the relevant Council,
  - (c) the Commissioner,
  - (d) the Attorney General.
- (2) The Tribunal may grant leave to any other person to appear at the hearing if satisfied that it is appropriate for that person to appear at the hearing.
- (3) Despite section 71 of the *Administrative Decisions Tribunal Act 1997*, a person who is entitled to appear at the hearing or who is granted leave to appear at the hearing may appear personally or be represented by an Australian legal practitioner or (with the leave of the Tribunal) by any other person.
- (4) Any person who appears at a hearing (otherwise than as a witness) is taken to be a party to the proceedings concerned.

#### **77 Relationship of this Division with Chapters 4 and 6**

- (1) The provisions of Part 4.4 (Investigation of complaints), and the provisions of Chapter 6 (Provisions relating to investigations) that are relevant to Part 4.4, apply, with any necessary adaptations, in relation



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to a matter under this Division, as if the matter were the subject of a complaint under Chapter 4.

- (2) Nothing in this Division prevents a Council from making a complaint under Chapter 4 about a matter to which this Division relates.

## **Division 8 Further provisions relating to local practising certificates**

### **78 Immediate suspension of local practising certificate**

- (1) This section applies, despite Divisions 6 and 7, if the appropriate Council considers it necessary in the public interest to immediately suspend a local practising certificate on:

- (a) any of the grounds on which the certificate could be suspended or cancelled under Division 6, or
- (b) the ground of the happening of a show cause event (within the meaning of Division 7) in relation to the holder, or
- (c) any other ground that the Council considers warrants suspension of the local practising certificate in the public interest,

whether or not any action has been taken or commenced under Division 6 or 7 in relation to the holder.

- (2) The Council may, by written notice given to the holder, immediately suspend the practising certificate until the earlier of the following:

- (a) the time at which the Council informs the holder of the Council's decision by notice under section 61 (Amending, suspending or cancelling local practising certificate),
- (b) the end of the period of 56 days after the notice is given to the holder under this section.

- (3) The notice under this section must:

- (a) include an information notice about the suspension, and
- (b) state that the practitioner may make written representations to the Council about the suspension, and
- (c) state that the person may appeal against the suspension under section 108 (Appeal against certain decisions of Councils).

- (4) The holder may make written representations to the Council about the suspension, and the Council must consider the representations.
- (5) The Council may revoke the suspension at any time, whether or not in response to any written representations made to it by the holder.
- (6) Nothing in this section prevents a Council from making a complaint under Chapter 4 about a matter to which this section relates. The suspension of a local practising certificate under this section does not affect any disciplinary processes in respect of matters arising before the suspension.

**79 Surrender and cancellation of local practising certificate**

- (1) The holder of a local practising certificate may surrender the certificate to the appropriate Council.
- (2) The Council may cancel the surrendered certificate.

**80 Return of local practising certificate**

- (1) This section applies if a local practising certificate granted to an Australian legal practitioner:
  - (a) is amended, suspended or cancelled by the appropriate Council, or
  - (b) is replaced by another certificate.
- (2) The appropriate Council may give the practitioner a notice requiring the practitioner to return the certificate to the Council in the way specified in the notice within a specified period of not less than 14 days.
- (3) The practitioner must comply with the notice, unless the practitioner has a reasonable excuse.  
Maximum penalty: 20 penalty units.
- (4) The Council must return the practising certificate to the practitioner as soon as practicable:
  - (a) if the certificate is amended—after amending it, or
  - (b) if the certificate is suspended and is still current at the end of the suspension period—at the end of the suspension period.

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## **Division 9 Practice as a barrister or solicitor**

### **81 Practice as a barrister**

- (1) Practice as a barrister is subject to the barristers rules.
- (2) Practice as a barrister is not subject to any other rules, practice guidelines or rulings of the Bar Association or Bar Council.

### **82 Practice as a solicitor**

- (1) Practice as a solicitor is subject to the solicitors rules.
- (2) Practice as a solicitor is not subject to any other rules, practice guidelines or rulings of the Law Society or Law Society Council.

### **83 Client access**

- (1) **Barristers**  
Barristers may accept any clients, subject to the barristers rules and the conditions of any relevant practising certificate.
- (2) **Solicitors**  
Solicitors may accept any clients, subject to the solicitors rules and the conditions of any relevant practising certificate.
- (3) **Contracts**  
A barrister or solicitor may enter into a contract for the provision of services with a client or with another legal practitioner. The barrister or solicitor may accordingly sue and be sued in relation to the contract.
- (4) **Barristers contracts**  
A barrister may enter into a contract with a client even though the barrister has accepted a brief from a solicitor in the matter.
- (5) **Immunity**  
Nothing in this section affects any law relating to immunity to suit in relation to advocacy.

### **84 Advertising**

- (1) A barrister or solicitor may advertise in any way the barrister or solicitor thinks fit, subject to any regulations under section 85.
- (2) However, an advertisement must not be of a kind that is or that might reasonably be regarded as:
  - (a) false, misleading or deceptive, or

- (b) in contravention of the *Trade Practices Act 1974* of the Commonwealth, the *Fair Trading Act 1987* or any similar legislation.
- (3) A contravention by a barrister or solicitor of subsection (2) is capable of being professional misconduct or unsatisfactory professional conduct, whether or not the barrister or solicitor is convicted of an offence in relation to the contravention.

#### **85 Regulation of advertising and other marketing of services**

- (1) The regulations may make provision for or with respect to regulating or prohibiting conduct by any person that relates to the marketing of legal services, including (without limitation) regulating or prohibiting any of the following:
  - (a) advertising by a barrister or solicitor,
  - (b) advertising by any person for or on behalf of a barrister or solicitor,
  - (c) advertising by any person in connection with the provision of legal services,
  - (d) advertising by any person of services connected with personal injury.
- (2) The regulations under this section may create an offence punishable by a penalty not exceeding 100 penalty units.
- (3) The Attorney General may direct a person in writing not to engage in conduct described in the direction if the Attorney General is satisfied that:
  - (a) the conduct contravenes the regulations under this section, and
  - (b) the person has been engaging in conduct of that or a similar kind.
- (4) The Tribunal may, on application made under subsection (5), direct a barrister or solicitor not to engage in conduct if the Tribunal is satisfied that:
  - (a) the conduct contravenes the regulations under section 142 of the *Workplace Injury Management and Workers Compensation Act 1998*, and
  - (b) the barrister or solicitor has been engaging in conduct of that or a similar kind.

- (5) An application made to the Tribunal may be made under this section by the appropriate Council or the Commissioner.
- (6) The Tribunal cannot deal with an application for a direction with respect to conduct that is the subject of a direction by the Attorney General under this section or by the appropriate Minister under section 142 of the *Workplace Injury Management and Workers Compensation Act 1998*. Any such ministerial direction may be given with respect to any conduct even if proceedings are pending before, or have been dealt with by, the Tribunal with respect to the conduct.
- (7) The following applies in connection with proceedings before the Tribunal under this section:
  - (a) the parties to the proceedings are the applicant and the person to whom the direction is proposed to be given,
  - (b) the matter is to be allocated to the Legal Services Division of the Tribunal,
  - (c) the Tribunal is to conduct an initial ex parte hearing for the purpose of determining whether to issue a direction pending the final determination of the matter.
- (8) A person who contravenes a direction under this section is guilty of an offence.  
Maximum penalty: 100 penalty units.
- (9) A contravention by a barrister or solicitor:
  - (a) of a direction under this section or under section 142 of the *Workplace Injury Management and Workers Compensation Act 1998* is professional misconduct, or
  - (b) of a regulation under this section (or under section 142 of that Act) is professional misconduct, but only if the regulation declares that the contravention is professional misconduct.
- (10) The Attorney General is not required, before giving a direction under this section, to notify the person to whom the direction is given or any other person who may be affected by the direction.
- (11) A direction under this section may be amended or revoked.
- (12) Payments are to be made from the Public Purpose Fund for the purposes of meeting the costs and expenses of a Council or the Commissioner in exercising functions under this section (including the prosecution of offences under this section).

- (13) In this section:  
*personal injury* includes pre-natal injury, impairment of a person's physical or mental condition or a disease.

#### **86 Specialisation**

- (1) A barrister or solicitor must not advertise or hold himself or herself out as being a specialist or as offering specialist services, unless the barrister or solicitor:
  - (a) has appropriate expertise and experience, or
  - (b) is appropriately accredited under an accreditation scheme conducted or approved by the Bar Council or Law Society Council.
- (2) The Bar Council or Law Society Council is required to approve an accreditation scheme if directed to do so by the Attorney General.

#### **87 Advocates**

- (1) Barristers and solicitors may act as advocates.
- (2) Barristers and solicitors may appear, and have a right of audience, in any court as advocates.
- (3) Joint rules may be made about ethical rules to be observed by barristers and solicitors in the practice of advocacy.

#### **88 Joint advocates**

- (1) In any proceedings, one or more barristers and one or more solicitors may appear together as advocates.
- (2) The appearance together as advocates of a barrister and solicitor may be regulated by joint rules, but not by legal profession rules made by one Council only.

#### **89 Attendance**

- (1) There is no rule or practice that prevents a barrister from attending on another barrister or solicitor or a solicitor from attending on another solicitor or barrister.
- (2) Nothing in this section prevents arrangements being made between individual Australian legal practitioners with regard to attendance on each other.

Clause 90	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.4	Legal practice by Australian legal practitioners

## **90 Prohibition of official schemes for recognition of seniority or status**

- (1) Any prerogative right or power of the Crown to appoint persons as Queen's Counsel or to grant letters patent of precedence to counsel remains abrogated.
- (2) Nothing in this section affects the appointment of a person who was appointed as Queen's Counsel before the commencement of this section.
- (3) Nothing in this section abrogates any prerogative right or power of the Crown to revoke such an appointment.
- (4) No law or practice prevents a person who was Queen's Counsel immediately before the commencement of this section from continuing to be Queen's Counsel while a barrister or solicitor.
- (5) Executive or judicial officers of the State have no authority to conduct a scheme for the recognition or assignment of seniority or status among legal practitioners.
- (6) Nothing in subsection (5) prevents the publication of a list of legal practitioners in the order of the dates of their admission, or a list of barristers or solicitors in the order of the dates of their becoming barristers or solicitors, or a list of Queen's Counsel in their order of seniority.
- (7) In this section:
 

*executive or judicial officers* includes the Governor, Ministers of the Crown, Parliamentary Secretaries, statutory office holders, persons employed in the Public Service or by the State, an authority of the State or another public employer, and also includes judicial office holders or persons acting under the direction of the Chief Justice of New South Wales or other judicial office holder.

*Queen's Counsel* means one of Her Majesty's Counsel learned in the law for the State of New South Wales and extends to King's Counsel where appropriate.

## Division 10 Fees for practising certificates

### 91 Fee for practising certificate

- (1) A fee is payable for the grant or renewal of a local practising certificate of such amount as is determined by the appropriate Council and approved by the Attorney General.
- (2) A Council may determine different practising certificate fees according to such different factors as are specified in the determination and approved by the Attorney General.
- (3) A Council may waive payment of the practising certificate fee or any part of the fee.
- (4) Subject to the regulations (if any), a Council is to determine the practising certificate fee on a cost recovery basis, with the fee being such amount as is required from time to time for the purpose of recovering the costs of or associated with the regulatory functions of the Council or of the Bar Association or Law Society, as the case requires.
- (5) The *regulatory functions* of a Council, the Bar Association or the Law Society are its functions under this Act, and any other functions it exercises that are associated with the regulation of legal practice or maintaining professional standards of legal practice.
- (6) The practising certificate fee is not to include any charge for membership of the Bar Association or Law Society and is not to include any amount that is required for the purpose of recovering any costs of or associated with providing services or benefits to which local legal practitioners become entitled as members of the Bar Association or Law Society.
- (7) In addition, in determining the practising certificate fee, a Council must exclude costs that are otherwise recoverable under this Act (for example, costs payable from the Public Purpose Fund under this Act).
- (8) The regulations may make provision for or with respect to the determination of practising certificate fees, including by specifying the costs that may or may not be recovered by the charging of practising certificate fees.
- (9) In this section:  
*costs* includes expenses.



Clause 92	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.4	Legal practice by Australian legal practitioners

## **92 Late fee**

If an application for a practising certificate is accepted by a Council after the end of the period prescribed by the regulations for the purposes of section 47 (Timing of application for renewal of local practising certificate) during which the application is authorised to be made, payment of a late fee prescribed by the regulations may, if the Council thinks fit, be required as a condition of acceptance of the application.

## **93 Refund of fees**

- (1) The regulations may provide for the refund of a portion of a fee paid in respect of a local practising certificate if it is suspended or cancelled during its currency.
- (2) Without limiting subsection (1), the regulations may specify:
  - (a) the circumstances in which a refund is to be made, and
  - (b) the amount of the refund or the manner in which the amount of the refund is to be determined.

## **94 Submission of budget to Attorney General**

- (1) The Attorney General may from time to time require a Council to prepare and submit a budget to the Attorney General, in respect of such period as the Attorney General directs, relating to any costs (or projected costs) that are recoverable (or are proposed to be recovered) by the charging of a practising certificate fee.
- (2) The budget is to include such information as the Attorney General directs. In particular, the Attorney General may require the provision of information about the administration of the Council (including the Bar Association and the Law Society).
- (3) The Attorney General may refuse to approve the amount of a practising certificate fee under section 91 (Fee for practising certificate) if the Council has failed to submit a budget as required under this section.
- (4) In this section:
 

*costs* includes expenses.

## **95 Audit of Council activities**

- (1) The Attorney General may appoint an appropriately qualified person to conduct an audit of all or any particular activities of a Council for the purpose of determining the following:
  - (a) whether any activities the costs of which are recoverable, or are proposed to be recovered, by the charging of a practising certificate fee are being carried out economically and efficiently and in accordance with the relevant laws,
  - (b) whether practising certificate fees are being expended for the purpose of defraying the costs in respect of which the fees are charged.
- (2) A Council is to provide all reasonable assistance to the person appointed to conduct the audit.
- (3) The person appointed to conduct the audit is to report to the Attorney General on the result of the audit.
- (4) An audit may be conducted under this section whenever the Attorney General considers it appropriate.
- (5) In this section:

*audit* includes an examination and inspection.

*costs* includes expenses.

*Council* includes the Bar Association and the Law Society.

## **Division 11 Interstate legal practitioners**

### **96 When does an interstate legal practitioner establish an office?**

For the purposes of this Division, an interstate legal practitioner establishes an office in this jurisdiction when the practitioner offers and provides legal services to the public in this jurisdiction from an office maintained by the practitioner, or by the employer or a partner in legal practice of the practitioner, for that purpose in this jurisdiction.

### **97 Notification of establishment of office required**

- (1) An interstate legal practitioner who establishes an office in this jurisdiction must, within the period after establishing the office prescribed by the regulations, give written notice:

Clause 97	Legal Profession Bill 2004
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- (a) if he or she proposes to practise as a barrister—to the Bar Council, or
- (b) if he or she proposes to practise as a solicitor—to the Law Society Council.

Maximum penalty: 20 penalty units.

- (2) A notice under this section is to contain the particulars prescribed by the regulations.

#### **98 Professional indemnity insurance if office established**

- (1) This section applies to an interstate legal practitioner:
  - (a) who establishes an office in this jurisdiction, and
  - (b) who, if he or she were a local legal practitioner, would be an insurable barrister or insurable solicitor (within the meaning of section 403 or 406 respectively).
- (2) The interstate legal practitioner must not practise as a barrister or as a solicitor in this jurisdiction unless he or she has appropriate indemnity insurance in respect of his or her practice in this jurisdiction.

Maximum penalty: 100 penalty units.

- (3) The interstate legal practitioner has *appropriate indemnity insurance* in this jurisdiction as a barrister or solicitor if there is in force in respect of the practitioner a policy of indemnity insurance that provides the same (or a higher) minimum level of indemnity in respect of his or her practice in this jurisdiction as, and has terms that are broadly equivalent to, that approved by the Attorney General in respect of insurable barristers or solicitors (as appropriate) under section 403 (Professional indemnity insurance for barristers) or 406 (Solicitor to be insured and to make contributions).

#### **99 Professional indemnity insurance if office not established**

- (1) If the indemnity under a policy of indemnity insurance in force in respect of an interstate legal practitioner who has not established an office in this jurisdiction is less than that required to be maintained by an interstate legal practitioner to whom section 98 (Professional indemnity insurance if office established) applies, the interstate legal practitioner must disclose the difference to a client or prospective client before being retained by the client or prospective client.

- (2) A failure to comply with this section is capable of being unsatisfactory professional conduct or professional misconduct.

**100 Extent of entitlement of interstate legal practitioner to practise in this jurisdiction**

- (1) This Division does not authorise an interstate legal practitioner to engage in legal practice in this jurisdiction to a greater extent than a local legal practitioner could be authorised under a local practising certificate.
- (2) Also, an interstate legal practitioner's right to engage in legal practice in this jurisdiction:
- (a) is subject to:
    - (i) any conditions imposed by the appropriate Council under section 101 (Additional conditions on practice of interstate legal practitioners), and
    - (ii) any conditions imposed by or under the legal profession rules as referred to in that section, and
  - (b) is, to the greatest practicable extent and with all necessary changes:
    - (i) the same as the practitioner's right to engage in legal practice in the practitioner's home jurisdiction, and
    - (ii) subject to any condition on the practitioner's right to engage in legal practice in that jurisdiction, including any conditions imposed on his or her admission to the legal profession in this or another jurisdiction.
- (3) If there is an inconsistency between conditions mentioned in subsection (2) (a) and conditions mentioned in subsection (2) (b), the conditions that are, in the opinion of the appropriate Council, more onerous prevail to the extent of the inconsistency.
- (4) An interstate lawyer must not engage in legal practice in this jurisdiction in a manner not authorised by this Act or in contravention of any condition referred to in this section.
- (5) A contravention of this section is capable of being unsatisfactory professional conduct or professional misconduct.

Clause 101	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.4	Legal practice by Australian legal practitioners

**101 Additional conditions on practice of interstate legal practitioners**

- (1) The appropriate Council may, by written notice to an interstate legal practitioner engaged in legal practice in this jurisdiction, impose any condition on the practitioner's practice that it may impose under this Act on a local practising certificate.
- (2) Also, an interstate legal practitioner's right to engage in legal practice in this jurisdiction is subject to any condition imposed by or under an applicable legal profession rule.
- (3) Conditions imposed under or referred to in this section must not be more onerous than conditions applying to local legal practitioners.
- (4) A notice under this section must include an information notice about the decision to impose a condition.

**102 Special provisions about interstate legal practitioner engaging in unsupervised legal practice in this jurisdiction**

An interstate legal practitioner must not engage in unsupervised legal practice in this jurisdiction unless:

- (a) if the practitioner completed practical legal training principally under the supervision of an Australian lawyer, whether involving articles of clerkship or otherwise, to qualify for admission to the legal profession in this or another jurisdiction—the practitioner has undertaken a period or periods equivalent to 18 months' supervised legal practice, worked out under relevant regulations, after the day the practitioner's first practising certificate was granted, or
- (b) if the practitioner completed other practical legal training to qualify for admission to the legal profession in this or another jurisdiction—the practitioner has undertaken a period or periods equivalent to 2 years' supervised legal practice, worked out under relevant regulations, after the day the practitioner's first practising certificate was granted.

**103 Interstate legal practitioner is officer of Supreme Court**

An interstate legal practitioner engaged in legal practice in this jurisdiction has all the duties and obligations of an officer of the Supreme Court, and is subject to the jurisdiction and powers of the Supreme Court in respect of those duties and obligations.

## **Division 12      Miscellaneous**

### **104    Protocols**

- (1) The Councils separately or jointly may enter into arrangements (referred to in this Division as *protocols*) with regulatory authorities of other jurisdictions about determining:
  - (a) the jurisdiction from which an Australian lawyer engages in legal practice principally or can reasonably expect to engage in legal practice principally, or
  - (b) the circumstances in which an arrangement under which an Australian legal practitioner practises in a jurisdiction:
    - (i) can be regarded as being of a temporary nature, or
    - (ii) ceases to be of a temporary nature, or
  - (c) the circumstances in which an Australian legal practitioner can reasonably expect to engage in legal practice principally in a jurisdiction during the currency of an Australian practising certificate.
- (2) For the purposes of this Act, and to the extent that the protocols are relevant, a matter referred to in subsection (1) (a), (b) or (c) is to be determined in accordance with the protocols.
- (3) The Councils may enter into arrangements that amend, revoke or replace a protocol.
- (4) A protocol does not have effect in this jurisdiction unless it is embodied or identified in the regulations.

### **105    Consideration and investigation of applicants or holders**

- (1) To help it consider whether or not to grant, renew, suspend or cancel a local practising certificate, or impose conditions on a local practising certificate, a Council may, by notice to the applicant or holder, require the applicant or holder:
  - (a) to give it specified documents or information, or
  - (b) to be medically examined by a medical practitioner nominated by the Council, or
  - (c) to co-operate with any inquiries by the authority that it considers appropriate.

- (2) A failure to comply with a notice under subsection (1) by the date specified in the notice and in the way required by the notice is a ground for making an adverse decision in relation to the action being considered by the Council.
- (3) Without limiting subsection (2), a failure to comply with a requirement for medical examination may be accepted by the Council as evidence of the unfitness of the person to engage in legal practice.

**106 Register of local practising certificates**

- (1) A Council must keep a register of the names of Australian lawyers to whom it grants local practising certificates.
- (2) The regulations may make provision for or with respect to the following:
  - (a) the information that may be included in the register,
  - (b) the information that must be included in the register,
  - (c) the notification by local legal practitioners to the appropriate Council of changes of particulars,
  - (d) the notification by the Council to other authorities of particulars contained in the register.
- (3) The register must state the conditions (if any) imposed on a local practising certificate in relation to engaging in legal practice.
- (4) A condition imposed on a local practising certificate relating to infirmity, injury or mental or physical illness is not to be stated on the register unless:
  - (a) the condition restricts the holder's right to engage in legal practice, or
  - (b) the holder consents to the condition being stated on the register.
- (5) The register may be kept in the way the Council decides.
- (6) The Council may publish, in circumstances that it considers appropriate, the names of persons kept on the register and any other information included in the register concerning those persons.
- (7) The register must be available for inspection, without charge, at the Council's office during normal business hours.

#### **107 Orders or injunctions**

- (1) The Commissioner or a Council may apply to the Supreme Court for an order or injunction that a local legal practitioner not contravene a condition imposed under this Part.
- (2) The Commissioner or a Council may apply to the Supreme Court for an order or injunction that an interstate legal practitioner not contravene a requirement of section 100 (4) (Extent of entitlement of interstate legal practitioner to practise in this jurisdiction).
- (3) No undertaking as to damages or costs is required.
- (4) The Supreme Court may grant an order or injunction on such terms as it considers appropriate, and make any order it considers appropriate, on the application.
- (5) This section does not affect the generality of section 720 (Injunctions).

#### **108 Appeal against certain decisions of Councils**

- (1) A person who is dissatisfied with any of the following decisions of a Council may appeal to the Supreme Court against the decision:
  - (a) a decision to refuse to grant or renew a local practising certificate, or
  - (b) a decision to amend, suspend or cancel a local practising certificate.
- (2) The Supreme Court may make such order in the matter as it thinks fit.
- (3) Except to the extent (if any) that may be ordered by the Supreme Court, the lodging of an appeal does not stay the effect of the refusal, cancellation, amendment or suspension appealed against.
- (4) This section does not apply to a decision under Division 7.

#### **109 Attorney General**

The Attorney General, while admitted to the legal profession in this or any other jurisdiction, is entitled to an unconditional practising certificate. The Attorney General may elect to hold a practising certificate as a barrister or as a solicitor.



**110 Crown Solicitor**

- (1) The Crown Solicitor may, in his or her official capacity, act as solicitor for:
- (a) the State of New South Wales, or
  - (b) a person suing or being sued on behalf of the State of New South Wales, or
  - (c) a Minister of the Crown in his or her official capacity as such a Minister, or
  - (d) a body established by an Act or other law of New South Wales, or
  - (e) an officer or employee of the Public Service or any other service of the State of New South Wales or of a body established by an Act or other law of New South Wales, or
  - (f) a person holding office under an Act or other law of New South Wales or because of the person's appointment to that office by the Governor or a Minister of the Crown, or
  - (g) any other person or body, or any other class of persons or bodies, approved by the Attorney General.
- (2) The Crown Solicitor may act under subsection (1):
- (a) with or without charge, or
  - (b) for a party in a matter that is not the subject of litigation, even if also acting under that subsection for another party in the matter.
- (3) The Crown Solicitor may, in his or her official capacity, act as agent for:
- (a) another State or a Territory, or
  - (b) at the request of another State or a Territory—an instrumentality of, or a person in the service of, that State or Territory.
- (4) If, under subsection (1) (g), the Crown Solicitor is given approval to act as solicitor for a Minister of the Crown (otherwise than in his or her official capacity as such a Minister), the following must be included in the annual report under the *Annual Reports (Departments) Act 1985* of the Crown Solicitor's activities:
- (a) the name of the Minister,

- (b) the matter in which the Crown Solicitor acted (but without disclosure of any confidential client information),
  - (c) the costs incurred by the Crown Solicitor in acting for the Minister and the amount charged to the Minister for so acting.
- (5) In this section, a reference to a State or a Territory includes a reference to the Crown in right of the State or Territory and to the Government of the State or Territory.

**111 Government and other lawyers—exemption from certain conditions**

- (1) This section applies to each of the following persons:
- (a) a local legal practitioner who is the holder of a statutory position under the Crown (whether in the right of this jurisdiction or in another right),
  - (b) a local legal practitioner who acts as parliamentary counsel under a contract of service, or contract for services, with the Crown (whether in the right of this jurisdiction or in another right),
  - (c) a local legal practitioner who is, or is a member of a class or description of local legal practitioners, specified by the appropriate Council for the purposes of this subsection,
  - (d) a local legal practitioner who is, or is a member of a class or description of local legal practitioners, specified by the regulations for the purposes of this subsection,

while the person is a local legal practitioner to whom at least one of the paragraphs of this subsection applies.

- (2) The local practising certificate of a person to whom this section applies is not subject to conditions of the kind referred to in section 50 (3) (a), (b) and (d) (Conditions imposed by Council) or 56 (1) (Additional conditions on practising certificates of barristers), other than a condition relating to continuing legal education.

**112 Government lawyers—exemption from certain provisions**

- (1) Nothing in Division 9 (Practice as a barrister or solicitor) affects:
- (a) practice as a barrister as the holder of a statutory office under the Crown (whether in right of New South Wales or in another right), or

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- (b) practice as parliamentary counsel under a contract of service, or contract for services, with the Crown (whether in right of New South Wales or in another right).
- (2) This section does not limit the operation of section 114 (Government lawyers of other jurisdictions).

### **113 Government lawyers—imposition of additional conditions**

Without limiting section 50 (Conditions imposed by Council), the Bar Council may under that section impose conditions of the following kinds on the local practising certificate of a barrister:

- (a) a condition limiting the holder to practising as a barrister as the holder of a statutory office under the Crown (whether in right of New South Wales or in another right),
- (b) a condition limiting the holder to practising as a barrister in any other office under a contract of service, or contract for services, with the Crown (whether in right of New South Wales or in another right),
- (c) a condition limiting the holder to practising as parliamentary counsel under a contract of service, or contract for services, with the Crown (whether in right of New South Wales or in another right).

### **114 Government lawyers of other jurisdictions**

- (1) A government employee of another jurisdiction is not subject to:
  - (a) any prohibition under this Act about:
    - (i) engaging in legal practice in this jurisdiction, or
    - (ii) making representations about engaging in legal practice in this jurisdiction, or
  - (b) conditions imposed on a local practising certificate, or
  - (c) requirements of legal profession rules, or
  - (d) professional discipline,

in respect of the performance of his or her official duties or functions as a government employee of the other jurisdiction to the extent that he or she is exempt from matters of the same kind under a law of the other jurisdiction.

- (2) Contributions and levies are not payable to the Fidelity Fund by or in respect of a government employee of another jurisdiction in his or her capacity as a government employee.
- (3) Without affecting subsections (1) and (2), nothing in this section prevents a government employee of another jurisdiction from being granted or holding a local practising certificate.

- (4) In this section:

***another jurisdiction*** means:

- (a) another State or Territory of the Commonwealth, or
- (b) the Commonwealth.

***government agency*** of another jurisdiction means:

- (a) a government department of that jurisdiction, or
- (b) a body or organisation that is established by or under the law of that jurisdiction for a public purpose or to exercise governmental functions,

and includes a body or organisation (or a class of bodies or organisations) prescribed by the regulations as being within this definition.

***government employee*** means an employee of a government agency of another jurisdiction.

#### **115 Non-compellability of certain witnesses**

- (1) A person referred to in section 601 (Protection from liability) is not compellable in any legal proceedings to give evidence or produce documents in respect of any matter in which the person was involved in the course of the administration of this Part.
- (2) This section does not apply to:
  - (a) proceedings under Part 3 of the *Royal Commissions Act 1923*, or
  - (b) proceedings before the Independent Commission Against Corruption, or
  - (c) a hearing under the *Special Commissions of Inquiry Act 1983*, or
  - (d) an inquiry under the *Ombudsman Act 1974*.

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Part 2.5	Inter-jurisdictional provisions regarding admission and practising certificates

## **Part 2.5 Inter-jurisdictional provisions regarding admission and practising certificates**

### **Division 1 Preliminary**

#### **116 Purpose**

The purpose of this Part is to provide a nationally consistent scheme for the notification of and response to action taken by courts and other authorities in relation to the admission of persons to the legal profession and their right to engage in legal practice in Australia.

#### **117 Definition**

In this Part:

*foreign regulatory action* taken in relation to a person means:

- (a) removal of the person's name from a foreign roll for disciplinary reasons, or
- (b) suspension or cancellation of, or refusal to renew, the person's right to engage in legal practice in a foreign country.

#### **118 Other requirements not affected**

Powers and duties under this Part are additional to those under Chapter 4 (Complaints and discipline) or any other Chapter of this Act.

### **Division 2 Notifications to be given by local authorities to interstate authorities**

#### **119 Official notification to other jurisdictions of applications for admission and associated matters**

- (1) This section applies if an application for admission to the legal profession is made under this Act.
- (2) The Admission Board may give the corresponding authority for another jurisdiction written notice of any of the following (as relevant):
  - (a) the making of the application,

- (b) the withdrawal of the application,
  - (c) the refusal to issue a compliance certificate in relation to the application.
- (3) The notice must state the applicant's name and address as last known to the Admission Board and may contain other relevant information.

**120 Official notification to other jurisdictions of removals from local roll**

- (1) This section applies if a local lawyer's name is removed from the local roll, except where the removal occurs under section 126 (Peremptory removal of local lawyer's name from local roll following removal in another jurisdiction).
- (2) The Prothonotary must, as soon as practicable, give written notice of the removal to:
- (a) the corresponding authority of every other jurisdiction, and
  - (b) the registrar or other proper officer of the High Court.
- (3) The notice must state:
- (a) the lawyer's name and address as last known to the Prothonotary, and
  - (b) the date the lawyer's name was removed from the roll, and
  - (c) the reason for removing the lawyer's name,
- and may contain other relevant information.

**121 Council to notify other jurisdictions of certain matters**

- (1) If:
- (a) the appropriate Council takes any of the following actions:
    - (i) refuses to grant an Australian lawyer a local practising certificate,
    - (ii) suspends, cancels or refuses to renew an Australian lawyer's local practising certificate, or
  - (b) the lawyer successfully appeals against the action taken,
- the Council must, as soon as practicable, give the corresponding authorities of other jurisdictions written notice of the action taken or the result of the appeal.
- (2) The notice must state:

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- (a) the lawyer's name and address as last known to the Council, and
- (b) particulars of:
  - (i) the action taken and the reasons for it, or
  - (ii) the result of the appeal,
 and may contain other relevant information.
- (3) The appropriate Council may give corresponding authorities written notice of a condition imposed on an Australian lawyer's local practising certificate.

### **Division 3      Notifications to be given by lawyers to local authorities**

#### **122    Lawyer to give notice of removal of name from interstate roll**

- (1) If a local lawyer's name has been removed from an interstate roll, the lawyer must, as soon as practicable, give the Prothonotary a written notice of the removal.  
Maximum penalty: 50 penalty units.
- (2) If a local legal practitioner's name has been removed from an interstate roll, the practitioner must, as soon as practicable, give the appropriate Council a written notice of the removal.  
Maximum penalty: 50 penalty units.
- (3) This section does not apply where the name has been removed from an interstate roll under a provision that corresponds to section 126 (Peremptory removal of local lawyer's name from local roll following removal in another jurisdiction).

#### **123    Lawyer to give notice of interstate orders**

- (1) If an order is made under a corresponding law recommending that the name of a local lawyer be removed from the local roll, the lawyer must, as soon as practicable, give the Prothonotary written notice of the order.  
Maximum penalty: 50 penalty units.

**Note.** Chapter 4 requires the Supreme Court to order removal of the local lawyer's name from the local roll in these circumstances.

- (2) If an order is made under a corresponding law in relation to a local legal practitioner that:
- (a) the practitioner's local practising certificate be suspended or cancelled, or
  - (b) a local practising certificate not be granted to the practitioner for a period, or
  - (c) an order that conditions be imposed on the practitioner's local practising certificate,

the person must, as soon as practicable, give the appropriate Council written notice of the order.

Maximum penalty: 50 penalty units.

**Note.** Chapter 4 requires the appropriate Council to give effect to orders made under corresponding laws.

#### **124 Lawyer to give notice of foreign regulatory action**

- (1) If foreign regulatory action has been taken in relation to a local lawyer, the lawyer must, as soon as practicable, give the Prothonotary a written notice of the action taken.

Maximum penalty: 50 penalty units.

- (2) If foreign regulatory action has been taken in relation to a local legal practitioner, the practitioner must, as soon as practicable, give the appropriate Council a written notice of the action taken.

Maximum penalty: 50 penalty units.

#### **125 Provisions relating to requirement to notify**

- (1) A notice to be given under this Division by a local lawyer or local legal practitioner must:

- (a) state his or her name and address, and
- (b) identify the interstate roll from which his or her name has been removed, or describe the order made (as referred to in section 123) or the foreign regulatory action taken, and
- (c) state the date of the removal or the date the order was made or the action was taken, and
- (d) be accompanied by a copy of any official notification provided to him or her in connection with the removal or the order made or action taken.



Clause 125	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.5	Inter-jurisdictional provisions regarding admission and practising certificates

- (2) A failure of a local lawyer or local legal practitioner to comply with this Division is capable of being unsatisfactory professional conduct or professional misconduct.

#### **Division 4      Taking of action by local authorities in response to notifications received**

##### **126    Peremptory removal of local lawyer's name from local roll following removal in another jurisdiction**

- (1) This section applies if the Prothonotary is satisfied that:
- (a) a local lawyer's name has been removed from an interstate roll, and
  - (b) no order referred to in section 130 (1) (a) (Order for non-removal of name or non-cancellation of local practising certificate) is, at the time of that removal, in force in relation to it.
- (2) The Prothonotary must remove the lawyer's name from the local roll.
- (3) The Prothonotary may, but need not, give the lawyer notice of the date on which the Prothonotary proposes to remove the name from the local roll.
- (4) The Prothonotary must, as soon as practicable, give the former local lawyer notice of the removal of the name from the local roll, unless notice of the date of the proposed removal was previously given.
- (5) The name of the former local lawyer is, on his or her application to the Prothonotary or on the Prothonotary's own initiative, to be restored to the local roll if the name is restored to the interstate roll.
- (6) Nothing in this section prevents the former local lawyer from afterwards applying for admission under Part 2.3 (Admission of local lawyers).

##### **127    Peremptory cancellation of local practising certificate following removal of name from interstate roll**

- (1) This section applies if:
- (a) a local legal practitioners's name is removed from an interstate roll, and

- (b) no order referred to in section 130 (1) (b) (Order for non-removal of name or non-cancellation of local practising certificate) is, at the time of that removal, in force in relation to it.
- (2) The appropriate Council must cancel the local practising certificate as soon as practicable after receiving official written notification of the removal and may cancel the practising certificate before that time.
- (3) The Council may, but need not, give the person notice of the date on which the Council proposes to cancel the local practising certificate.
- (4) The Council must, as soon as practicable, give the person notice of the cancellation, unless notice of the date of the proposed cancellation was previously given.
- (5) Nothing in this section prevents the former local legal practitioner from afterwards applying for a local practising certificate.

**128 Show cause procedure for removal of lawyer's name from local roll following foreign regulatory action**

- (1) This section applies if the appropriate authority is satisfied that:
  - (a) foreign regulatory action has been taken in relation a local lawyer, and
  - (b) no order referred to in section 130 (1) (a) (Order for non-removal of name or non-cancellation of local practising certificate) is, at the time of that removal, in force in relation to it.
- (2) The authority may serve on the lawyer a notice stating that the authority will apply to the Supreme Court for an order that the lawyer's name be removed from the local roll unless the lawyer shows cause to the authority why his or her name should not be removed.
- (3) If the lawyer does not satisfy the authority that his or her name should not be removed from the local roll, the authority may apply to the Supreme Court for an order that his or her name be removed from the local roll.
- (4) Before applying for an order that the lawyer's name be removed, the authority must afford the lawyer a reasonable opportunity to show cause why his or her name should not be removed.

Clause 128	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.5	Inter-jurisdictional provisions regarding admission and practising certificates

- (5) The Supreme Court may, on application made under this section, order that the lawyer's name be removed from the local roll, or may refuse to do so.
- (6) The lawyer is entitled to appear before and be heard by the Supreme Court at a hearing in respect of an application under this section.
- (7) In this section:
 

***appropriate authority*** means:

  - (a) if the local lawyer holds a local practising certificate—the appropriate Council, or
  - (b) if the local lawyer does not hold a local practising certificate but holds an interstate practising certificate—either Council, or
  - (c) if the local lawyer holds neither a local practising certificate nor an interstate practising certificate—the Law Society Council.

**129 Show cause procedure for cancellation of local practising certificate following foreign regulatory action**

- (1) This section applies if the appropriate Council is satisfied that:
  - (a) foreign regulatory action has been taken in relation to a local legal practitioner, and
  - (b) no order referred to in section 130 (1) (b) (Order for non-removal of name or non-cancellation of local practising certificate) is, at the time the action was taken, in force in relation to it.
- (2) The Council may serve on the practitioner a notice stating that the Council proposes to cancel his or her local practising certificate unless the practitioner shows cause to the Council why his or her name should not be removed.
- (3) The Council must afford the lawyer a reasonable opportunity to show cause why his or her practising certificate should not be cancelled.
- (4) If the practitioner does not satisfy the Council that the practising certificate should not be cancelled, the Council may cancel the certificate.
- (5) The practitioner may appeal to the Supreme Court against a decision of the Council to cancel the practising certificate.

- (6) The Supreme Court may make any order it considers appropriate on the appeal.

**130 Order for non-removal of name or non-cancellation of local practising certificate**

- (1) If an Australian lawyer reasonably expects that his or her name will be removed from an interstate roll or that foreign regulatory action will be taken against the lawyer, the lawyer may apply to the Supreme Court for:
- (a) an order that his or her name not be removed from the local roll under section 126 (Peremptory removal of local lawyer's name from local roll following removal in another jurisdiction) or section 128 (Show cause procedure for removal of lawyer's name from local roll following foreign regulatory action), or
  - (b) an order that his or her local practising certificate not be cancelled under section 127 (Peremptory cancellation of local practising certificate following removal of name from interstate roll) or section 129 (Show cause procedure for cancellation of local practising certificate following foreign regulatory action),
- or both.
- (2) The Supreme Court may make the order or orders applied for if satisfied that:
- (a) the lawyer's name is likely to be removed from the interstate roll or the foreign regulatory action is likely to be taken, and
  - (b) the reason for the removal of the name or the taking of the foreign regulatory action will not involve disciplinary action or the possibility of disciplinary action,
- or may refuse to make an order.
- (3) An order under this section may be made subject to any conditions the Supreme Court considers appropriate and remains in force for the period specified in it.
- (4) The Supreme Court may revoke an order made under this section, and sections 126–129 (as relevant) then apply as if the lawyer's name were removed from the interstate roll or the foreign regulatory action were taken when the revocation takes effect.

Clause 130	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
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- (5) Nothing in this section affects action being taken in relation to the lawyer under other provisions of this Act.

**131 Local authority may give information to other local authorities**

A regulatory authority of this jurisdiction that receives information from a regulatory authority of another jurisdiction under provisions of a corresponding law that correspond to this Part may furnish the information to other regulatory authorities of this jurisdiction that have powers or duties under this Act.

## **Part 2.6 Incorporated legal practices and multi-disciplinary partnerships**

### **Division 1 Preliminary**

**132 Purposes**

The purposes of this Part are:

- (a) to regulate the provision of legal services by corporations in this jurisdiction, and
- (b) to regulate the provision of legal services in this jurisdiction in conjunction with the provision of other services (whether by a corporation or persons acting in partnership with each other).

**133 Definitions**

In this Part:

**corporation** means:

- (a) a company within the meaning of the *Corporations Act 2001* of the Commonwealth, or
- (b) any other body corporate, or body corporate of a kind, prescribed by the regulations.

**director**, in relation to:

- (a) a company within the meaning of the *Corporations Act 2001* of the Commonwealth—means a director as defined in section 9 of that Act, or

- (b) any other body corporate, or body corporate of a kind, prescribed by the regulations—means a person specified or described in the regulations.

**legal practitioner director** means a director of an incorporated legal practice who is an Australian legal practitioner holding an unrestricted practising certificate.

**legal practitioner partner** means a partner of a multi-disciplinary partnership who is an Australian legal practitioner holding an unrestricted practising certificate.

**officer** means:

- (a) in relation to a company within the meaning of the *Corporations Act 2001* of the Commonwealth—an officer as defined in section 9 of that Act, or
- (b) in relation to any other body corporate, or body corporate of a kind, prescribed by the regulations—a person specified or described in the regulations.

**professional obligations** of an Australian legal practitioner include:

- (a) duties to the Supreme Court, and
- (b) obligations in connection with conflicts of interest, and
- (c) duties to clients, including disclosure, and
- (d) ethical rules required to be observed by the practitioner.

**Regulator** means:

- (a) in relation to this jurisdiction—the Commissioner, or
- (b) in relation to another jurisdiction—the person or body defined as the Regulator in relation to that jurisdiction by the corresponding law of that jurisdiction or, if there is no such definition, the corresponding authority.

**related body corporate** means:

- (a) in relation to a company within the meaning of the *Corporations Act 2001* of the Commonwealth—a related body corporate within the meaning of section 50 of that Act, or
- (b) in relation to any other body corporate, or body corporate of a kind, prescribed by the regulations—a person specified or described in the regulations.

Clause 134	Legal Profession Bill 2004
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## **Division 2      Incorporated legal practices**

### **134    Nature of incorporated legal practice**

- (1) An incorporated legal practice is a corporation that engages in legal practice in this jurisdiction, whether or not it also provides services that are not legal services.
- (2) However, a corporation is not an incorporated legal practice if:
  - (a) the corporation does not receive any form of, or have any expectation of, a fee, gain or reward for the legal services it provides, or
  - (b) the only legal services that the corporation provides are any or all of the following services:
    - (i) in-house legal services, namely, legal services provided to the corporation concerning a proceeding or transaction to which the corporation (or a related body corporate) is a party,
    - (ii) services that are not legally required to be provided by an Australian legal practitioner and that are provided by an officer or employee who is not an Australian legal practitioner, or
  - (c) the corporation is a complying community legal centre, or
  - (d) this Division or the regulations so provide.
- (3) The regulations may make provision for or with respect to the application (with or without specified modifications) of provisions of this Act to corporations that are not incorporated legal practices because of the operation of subsection (2).
- (4) Nothing in this Division affects or applies to the provision by an incorporated legal practice of legal services in one or more other jurisdictions.

### **135    Non-legal services and businesses of incorporated legal practices**

- (1) An incorporated legal practice may provide any service and conduct any business that the corporation may lawfully provide or conduct, except as provided by this section.
- (2) An incorporated legal practice (or a related body corporate) must not conduct a managed investment scheme.

- (3) The regulations may prohibit an incorporated legal practice (or a related body corporate) from providing a service or conducting a business of a kind specified by the regulations.

**136 Corporations eligible to be incorporated legal practice**

- (1) Any corporation is, subject to this Division, eligible to be an incorporated legal practice.
- (2) This section does not authorise a corporation to provide legal services if the corporation is prohibited from doing so by any Act or law (whether of this jurisdiction, the Commonwealth or any other jurisdiction) under which it is incorporated or its affairs are regulated.
- (3) An incorporated legal practice is not itself required to hold an Australian practising certificate.

**137 Notice of intention to start providing legal services**

- (1) Before a corporation starts to engage in legal practice in this jurisdiction, the corporation must give the Law Society written notice, in the approved form, of its intention to do so.
- (2) A corporation must not engage in legal practice in this jurisdiction if it is in default of this section.

Maximum penalty: 50 penalty units.

- (3) A corporation that starts to engage in legal practice in this jurisdiction without giving a notice under subsection (1) is in default of this section until it gives the Law Society written notice, in the approved form, of the failure to comply with that subsection and the fact that it has started to engage in legal practice.
- (4) The giving of a notice under subsection (3) does not affect a corporation's liability under subsection (1) or (2).
- (5) A corporation is not entitled to recover any amount for anything the corporation did in contravention of subsection (2).
- (6) A person may recover from a corporation or a legal practitioner associate of the corporation, as a debt due to the person, any amount the person paid to or at the direction of the corporation for anything the corporation did in contravention of subsection (2).
- (7) This section does not apply to a corporation referred to in section 134 (2) (a) or (b).



Clause 138	Legal Profession Bill 2004
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**138 Prohibition on representations that corporation is incorporated legal practice**

- (1) A corporation must not, without reasonable excuse, represent or advertise that the corporation is an incorporated legal practice unless a notice in relation to the corporation has been given under section 137 (Notice of intention to start providing legal services).

Maximum penalty: 500 penalty units.

- (2) A director, officer, employee or agent of a corporation must not, without reasonable excuse, represent or advertise that the corporation is an incorporated legal practice unless a notice in relation to the corporation has been given under section 137 (Notice of intention to start providing legal services).

Maximum penalty: 100 penalty units.

- (3) A reference in this section to a person, being:

- (a) a corporation—representing or advertising that the corporation is an incorporated legal practice, or
- (b) a director, officer, employee or agent of a corporation—representing or advertising that the corporation is an incorporated legal practice,

includes a reference to the person doing anything that states or implies that the corporation is entitled to engage in legal practice.

**139 Notice of termination of provision of legal services**

- (1) A corporation must, within the prescribed period after it ceases to engage in legal practice in this jurisdiction as an incorporated legal practice, give the Law Society a written notice, in the approved form, of that fact.

Maximum penalty: 50 penalty units.

- (2) The regulations may make provision for or with respect to determining whether and when a corporation ceases to engage in legal practice in this jurisdiction.

**140 Incorporated legal practice must have legal practitioner director**

- (1) An incorporated legal practice is required to have at least one legal practitioner director.

- (2) Each legal practitioner director of an incorporated legal practice is, for the purposes of this Act only, responsible for the management of the legal services provided in this jurisdiction by the incorporated legal practice.
- (3) Each legal practitioner director of an incorporated legal practice must ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the incorporated legal practice:
  - (a) in accordance with the professional obligations of Australian legal practitioners and other obligations imposed by or under this Act, the regulations or the legal profession rules, and
  - (b) so that those obligations of Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice.
- (4) If it ought reasonably to be apparent to a legal practitioner director of an incorporated legal practice that the provision of legal services by the practice will result in breaches of the professional obligations of Australian legal practitioners or other obligations imposed by or under this Act, the regulations or the legal profession rules, the director must take all reasonable action available to the director to ensure that:
  - (a) the breaches do not occur, and
  - (b) appropriate remedial action is taken in respect of breaches that do occur.
- (5) A contravention of subsection (3) or (4) or both by a legal practitioner director is capable of being professional misconduct.
- (6) Nothing in this Division derogates from the obligations or liability of a director of an incorporated legal practice under any other law.
- (7) The reference in subsection (1) to a legal practitioner director does not include a reference to a person who is not validly appointed as a director, but this subsection does not affect the meaning of the expression “legal practitioner director” in other provisions of this Act.  
**Note:** The requirements of this section may be subject to audit under section 670.

#### **141 Obligations of legal practitioner director relating to misconduct**

- (1) Each of the following is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner director:

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- (a) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the incorporated legal practice,
  - (b) conduct of any other director (not being an Australian legal practitioner) of the incorporated legal practice that adversely affects the provision of legal services by the practice,
  - (c) the unsuitability of any other director (not being an Australian legal practitioner) of the incorporated legal practice to be a director of a corporation that provides legal services.
- (2) A legal practitioner director of an incorporated legal practice must ensure that all reasonable action available to the legal practitioner director is taken to deal with any unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the practice.
- (3) A contravention of subsection (2) is capable of being unsatisfactory professional conduct or professional misconduct by the legal practitioner director.

**142 Incorporated legal practice without legal practitioner director**

- (1) An incorporated legal practice contravenes this subsection if it does not have any legal practitioner directors for a period exceeding 7 days.  
Maximum penalty: 500 penalty units.
- (2) If an incorporated legal practice ceases to have any legal practitioner directors, the incorporated legal practice must notify the Law Society as soon as possible.  
Maximum penalty: 500 penalty units.
- (3) An incorporated legal practice must not provide legal services in this jurisdiction during any period it is in default of director requirements under this section.  
Maximum penalty: 100 penalty units.
- (4) An incorporated legal practice that contravenes subsection (1) is taken to be in default of director requirements under this section for the period from the end of the period of 7 days until:
- (a) it has at least one legal practitioner director, or
  - (b) a person is appointed under this section or a corresponding law in relation to the practice.

- (5) The Law Society Council may, if it thinks it appropriate, appoint an Australian legal practitioner who is an employee of the incorporated legal practice or another person nominated by the Council, in the absence of a legal practitioner director, to exercise the functions conferred or imposed on a legal practitioner director under this Part.
- (6) An Australian legal practitioner is not eligible to be appointed under this section unless the practitioner holds an unrestricted practising certificate.
- (7) The appointment under this section of a person to exercise the functions of a legal practitioner director does not, for any other purpose, confer or impose on the person any of the other functions or duties of a director of the incorporated legal practice.
- (8) An incorporated legal practice does not contravene subsection (1) during any period during which a person holds an appointment under this section in relation to the practice.
- (9) A reference in this section to a legal practitioner director does not include a reference to a person who is not validly appointed as a director, but this subsection does not affect the meaning of the expression “legal practitioner director” in other provisions of this Act.

**143 Obligations and privileges of practitioners who are officers or employees**

- (1) An Australian legal practitioner who provides legal services on behalf of an incorporated legal practice in the capacity of an officer or employee of the practice:
  - (a) is not excused from compliance with professional obligations as an Australian legal practitioner, or any obligations as an Australian legal practitioner under any law, and
  - (b) does not lose the professional privileges of an Australian legal practitioner.
- (2) For the purposes only of subsection (1), the professional obligations and professional privileges of a practitioner apply as if:
  - (a) where there are 2 or more legal practitioner directors of an incorporated legal practice—the practice were a partnership of the legal practitioner directors and the employees of the practice were employees of the legal practitioner directors, or

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- (b) where there is only 1 legal practitioner director of an incorporated legal practice—the practice were a sole practitioner and the employees of the practice were employees of the legal practitioner director.
- (3) The law relating to client legal privilege (or other legal professional privilege) is not excluded or otherwise affected because an Australian legal practitioner is acting in the capacity of an officer or employee of an incorporated legal practice.
- (4) The directors of an incorporated legal practice do not breach their duties as directors merely because legal services are provided pro bono by an Australian legal practitioner employed by the practice.

#### **144 Professional indemnity Insurance**

- (1) An incorporated legal practice, and each insurable solicitor who is a legal practitioner director or an officer or employee of the practice, is required to comply with the obligations of an insurable solicitor under Part 3.3 (Professional indemnity insurance) with respect to insurance policies and payments to or on account of the Solicitors Mutual Indemnity Fund.
- (2) Each solicitor who is an interstate legal practitioner who is a legal practitioner director or an officer or employee of the practice and who if, he or she were a local practitioner, would be an insurable solicitor is required to comply with the obligations of an interstate legal practitioner under section 98 with respect to appropriate indemnity insurance.
- (3) If an obligation referred in subsection (1) or (2) is not complied with, the Law Society Council may:
  - (a) in the case of a legal practitioner director who holds a local practising certificate—suspend the director’s practising certificate while the failure continues, or
  - (b) in the case of a legal practitioner director who is an interstate legal practitioner—suspend that director’s entitlement under Part 2.4 to practise in this State while the failure continues and request the corresponding authority in the jurisdiction in which the practitioner has his or her sole or principal place of legal practice to suspend the director’s interstate practising certificate until the Law Society Council notifies the corresponding authority that the obligation has been complied with.

- (4) The insurance premiums or other amounts payable under Part 3.3 by an incorporated legal practice may be determined by reference to the total number of solicitors employed by the practice and other relevant matters.
- (5) The amounts payable from the Solicitors Mutual Indemnity Fund include payments for such liability of an incorporated legal practice, and of the solicitors who are officers and employees of the practice, in connection with the provision of legal services as the Law Society Council determines with the approval of the Attorney General.
- (6) The Law Council Society may exempt an incorporated legal practice from this section on such grounds as the Council considers sufficient.

#### **145 Conflicts of interest**

- (1) For the purposes of the application of any law (including the common law) or legal profession rules relating to conflicts of interest to the conduct of an Australian legal practitioner who is:
  - (a) a legal practitioner director of an incorporated legal practice, or
  - (b) an officer or employee of an incorporated legal practice,the interests of the incorporated legal practice or any related body corporate are also taken to be those of the practitioner (in addition to any interests that the practitioner has apart from this subsection).
- (2) Legal profession rules may be made for or with respect to additional duties and obligations in connection with conflicts of interest arising out of the conduct of an incorporated legal practice.

**Note.** Under section 143 (Obligations and privileges of practitioners who are officers or employees), an Australian legal practitioner who is an officer or employee of an incorporated legal practice must comply with the same professional obligations as other practitioners.

#### **146 Disclosure obligations**

- (1) This section applies if a person engages an incorporated legal practice to provide services that the person might reasonably assume to be legal services, but does not apply where the practice provides only legal services in this jurisdiction.
- (2) Each legal practitioner director of the incorporated legal practice, and any employee who is an Australian legal practitioner and who provides the services on behalf of the practice, must ensure that a disclosure, complying with the requirements of this section and the

regulations made for the purposes of this section, is made to the person in connection with the provision of the services.

Maximum penalty: 50 penalty units.

- (3) The disclosure must be made by giving the person a notice in writing:
- (a) setting out the services to be provided, and
  - (b) stating whether or not all the legal services to be provided will be provided by an Australian legal practitioner, and
  - (c) if some or all of the legal services to be provided will not be provided by an Australian legal practitioner—identifying those services and indicating the status or qualifications of the person or persons who will provide the services, and
- Note.** For example, the person might be a licensed conveyancer. However, this paragraph would not apply in a case where a law applying in the jurisdiction prohibits a particular legal service from being provided by a person who is not an Australian legal practitioner.
- (d) stating that this Act applies to the provision of legal services but not to the provision of the non-legal services.
- (4) The regulations may make provision for or with respect to the following matters:
- (a) the manner in which a disclosure is to be made,
  - (b) additional matters required to be disclosed in connection with the provision of legal services or non-legal services by an incorporated legal practice.
- (5) Without limiting subsection (4), the additional matters may include the kind of services provided by the incorporated legal practice and whether those services are or are not covered by the insurance or other provisions of this Act.
- (6) A disclosure under this section to a person about the provision of legal services may relate to the provision of legal services on one occasion or on more than one occasion or on an on-going basis.

#### **147 Effect of non-disclosure of provision of certain services**

- (1) This section applies if:
- (a) section 146 (Disclosure obligations) applies in relation to a service that is provided to a person who has engaged an incorporated legal practice to provide the service and that the person might reasonably assume to be a legal service, and

- (b) a disclosure has not been made under that section in relation to the service.
- (2) The standard of care owed by the incorporated legal practice in respect of the service is the standard that would be applicable if the service had been provided by an Australian legal practitioner.

**148 Application of legal profession rules**

Legal profession rules, so far as they apply to Australian legal practitioners, also apply to Australian legal practitioners who are officers or employees of an incorporated legal practice, unless the rules otherwise provide.

**149 Requirements relating to advertising**

- (1) Any restriction imposed by or under this or any other Act, the regulations or the legal profession rules in connection with advertising by Australian legal practitioners applies to advertising by an incorporated legal practice with respect to the provision of legal services.
- (2) If a restriction referred to in subsection (1) is limited to a particular branch of the legal profession or for persons who practise in a particular style of legal practice, the restriction applies only to the extent that the incorporated legal practice carries on the business of the relevant class of Australian legal practitioners.
- (3) Any advertisement of the kind referred to in this section is, for the purposes of disciplinary proceedings taken against an Australian legal practitioner, taken to have been authorised by each legal practitioner director of the incorporated legal practice.
- (4) This section does not apply if the provision by which the restriction is imposed expressly excludes its application to incorporated legal practices.

**150 Extension of vicarious liability relating to failure to account, pay or deliver and dishonesty to incorporated legal practices**

- (1) This section applies to any of the following proceedings (being proceedings based on the vicarious liability of an incorporated legal practice):
  - (a) civil proceedings relating to a failure to account for, pay or deliver money or property received by, or entrusted to, the



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practice (or to any officer or employee of the practice) in the course of the provision of legal services by the practice, being money or property under the direct or indirect control of the practice,

- (b) civil proceedings for any other debt owed, or damages payable, to a client as a result of a dishonest act or omission by an Australian legal practitioner who is an employee of the practice in connection with the provision of legal services to the client.
- (2) If the incorporated legal practice would not (but for this section) be vicariously liable for any acts or omissions of its officers and employees in those proceedings, but would be liable for those acts or omissions if the practice and those officers and employees were carrying on business in partnership, the practice is taken to be vicariously liable for those acts or omissions.

#### **151 Sharing of receipts, revenue or other income**

- (1) Nothing in this Act, the regulations or the legal profession rules prevents an Australian legal practitioner from sharing with an incorporated legal practice receipts, revenue or other income arising from the provision of legal services by the practitioner.
- (2) This section does not extend to the sharing of receipts, revenue or other income in contravention of section 152 (Disqualified persons), and has effect subject to section 54 (Statutory condition regarding practice as a barrister).

#### **152 Disqualified persons**

- (1) An incorporated legal practice is guilty of an offence if a person who is a disqualified person:
  - (a) is an officer or employee of the incorporated legal practice (whether or not the person provides legal services) or is an officer or employee of a related body corporate, or
  - (b) is a partner of the incorporated legal practice in a business that includes the provision of legal services, or
  - (c) shares the receipts, revenue or other income arising from the provision of legal services by the incorporated legal practice, or
  - (d) is engaged or paid in connection with the provision of legal services by the incorporated legal practice.

Maximum penalty: 100 penalty units.

- (2) The failure of a legal practitioner director of an incorporated legal practice to ensure that the practice complies with subsection (1) is capable of being unsatisfactory professional conduct or professional misconduct.

### **153 Banning of incorporated legal practices**

- (1) The Supreme Court may, on the application of the Law Society Council or the Regulator, make an order disqualifying a corporation from providing legal services in this jurisdiction for the period the Court considers appropriate if satisfied that:
  - (a) a ground for disqualifying the corporation under this section has been established, and
  - (b) the disqualification is justified.
- (2) An order under this section may, if the Supreme Court thinks it appropriate, be made:
  - (a) subject to conditions as to the conduct of the incorporated legal practice, or
  - (b) subject to conditions as to when or in what circumstances the order is to take effect, or
  - (c) together with orders to safeguard the interests of clients or employees of the incorporated legal practice.
- (3) Action may be taken against an incorporated legal practice on any of the following grounds:
  - (a) that a legal practitioner director or an Australian legal practitioner who is an officer or employee of the corporation is found guilty of professional misconduct under a law of this jurisdiction or another jurisdiction,
  - (b) that the Law Society Council or the Regulator is satisfied, after conducting an audit of the incorporated legal practice, that the incorporated legal practice has failed to implement satisfactory management and supervision of its provision of legal services,
  - (c) that the incorporated legal practice (or a related body corporate) has contravened section 135 (Non-legal services and businesses of incorporated legal practices) or the regulations made under that section,

- (d) that the incorporated legal practice has contravened section 152 (Disqualified persons),
  - (e) that a person who is an officer of the incorporated legal practice and who is the subject of an order under:
    - (i) section 154 (Disqualification from managing incorporated legal practice) or under provisions of a corresponding law that correspond to that section, or
    - (ii) section 179 (Prohibition on partnerships with certain partners who are not Australian legal practitioners) or under provisions of a corresponding law that correspond to that section,is acting in the management of the incorporated legal practice.
- (4) If a corporation is disqualified under this section, the Law Society Council or the Regulator that applied for the order must, as soon as practicable, notify the Regulator of every other jurisdiction.
- (5) If a corporation is disqualified from providing legal services in another jurisdiction under a corresponding law, the Regulator or the Law Society Council may determine that the corporation is taken to be disqualified from providing legal services in this jurisdiction for the same period, but nothing in this subsection prevents the Regulator or the Law Society Council from instead applying for an order under this section.
- (6) A corporation that provides legal services in contravention of a disqualification under this section is guilty of an offence.  
Maximum penalty: 500 penalty units.
- (7) A corporation that is disqualified under this section ceases to be an incorporated legal practice.
- (8) Conduct of an Australian legal practitioner who provides legal services on behalf of a corporation in the capacity of an officer or employee of the corporation is capable of being unsatisfactory professional conduct or professional misconduct where the practitioner ought reasonably to have known that the corporation is disqualified under this section.
- (9) The regulations may make provision for or with respect to the publication and notification of orders made under this section, including notification of appropriate authorities of other jurisdictions.

**154 Disqualification from managing incorporated legal practice**

- (1) The Supreme Court may, on the application of the Law Society Council or the Regulator, make an order disqualifying a person from managing a corporation that is an incorporated legal practice for the period the Court considers appropriate if satisfied that:
  - (a) the person is a person who could be disqualified under section 206C, 206D, 206E or 206F of the *Corporations Act 2001* of the Commonwealth from managing corporations, and
  - (b) the disqualification is justified.
- (2) The Supreme Court may, on the application of a person subject to a disqualification order under this section, revoke the order.
- (3) A disqualification order made under this section has effect for the purposes only of this Act and does not affect the application or operation of the *Corporations Act 2001* of the Commonwealth.
- (4) The regulations may make provision for or with respect to the publication and notification of orders made under this section.
- (5) A person who is disqualified from managing a corporation under provisions of a corresponding law that correspond to this section is taken to be disqualified from managing a corporation under this section.

**155 Disclosure of information to Australian Securities and Investments Commission**

- (1) This section applies if the Law Society Council or the Regulator, in connection with exercising functions under this Act, acquired information concerning a corporation that is or was an incorporated legal practice.
- (2) The Law Society Council or the Regulator may disclose to the Australian Securities and Investments Commission information concerning the corporation that is relevant to the Commission's functions.
- (3) Information may be provided under subsection (2) despite any law relating to secrecy or confidentiality, including any provisions of this Act.

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### **156 External administration proceedings under Corporations Act 2001 (Cth)**

- (1) This section applies to proceedings in any court under Chapter 5 (External administration) of the *Corporations Act 2001* of the Commonwealth:
  - (a) relating to a corporation that is an externally-administered body corporate under that Act, or
  - (b) relating to a corporation becoming an externally-administered body corporate under that Act,
 being a corporation that is or was an incorporated legal practice.
- (2) The Law Society Council and the Regulator are entitled to intervene in the proceedings, unless the court determines that the proceedings do not concern or affect the provision of legal services by the incorporated legal practice.
- (3) The court may, when exercising its jurisdiction in the proceedings, have regard to the interests of the clients of the incorporated legal practice who have been or are to be provided with legal services by the practice.
- (4) Subsection (3) does not authorise the court to make any decision that is contrary to a specific provision of the *Corporations Act 2001* of the Commonwealth.
- (5) The provisions of subsections (2) and (3) are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of Chapter 5 of that Act.

**Note.** Section 5G of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

### **157 External administration proceedings under other legislation**

- (1) This section applies to proceedings for the external administration (however expressed) of an incorporated legal practice, but does not apply to proceedings to which section 156 (External administration proceedings under *Corporations Act 2001* (Cth)) applies.

- (2) The Law Society Council and the Regulator are entitled to intervene in the proceedings, unless the court determines that the proceedings do not concern or affect the provision of legal services by the incorporated legal practice.
- (3) The court may, when exercising its jurisdiction in the proceedings, have regard to the interests of the clients of the incorporated legal practice who have been or are to be provided with legal services by the practice.
- (4) Subsection (3) does not authorise the court to make any decision that is contrary to a specific provision of any legislation applicable to the incorporated legal practice.

**158 Incorporated legal practice that is subject to receivership under this Act and external administration under Corporations Act 2001 (Cth)**

- (1) This section applies if an incorporated legal practice is the subject of both:
  - (a) the appointment of a Part 5.5 receiver, and
  - (b) the appointment of a Corporations Act administrator.
- (2) The Part 5.5 receiver is under a duty to notify the Corporations Act administrator of the appointment of the Part 5.5 receiver, whether the appointment precedes, follows or is contemporaneous with the appointment of the Corporations Act administrator.
- (3) The Part 5.5 receiver or the Corporations Act administrator (or both of them jointly) may apply to the Supreme Court for the resolution of issues arising from or in connection with the dual appointments and their respective powers, except where proceedings referred to in section 156 (External administration proceedings under *Corporations Act 2001* (Cth)) have been commenced.
- (4) The Supreme Court may make any orders it considers appropriate, and no liability attaches to the Part 5.5 receiver or the Corporations Act administrator for any act or omission done by the receiver or administrator in good faith for the purpose of carrying out or acting in accordance with the orders.
- (5) The Law Society Council and the Regulator are entitled to intervene in the proceedings, unless the court determines that the proceedings do not concern or affect the provision of legal services by the incorporated legal practice.

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- (6) The provisions of subsections (3) and (4) are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of Chapter 5 of that Act.
- (7) In this section:
- Corporations Act administrator*** means:
- (a) a receiver, receiver and manager, liquidator (including a provisional liquidator), controller, administrator or deed administrator appointed under the *Corporations Act 2001* of the Commonwealth, or
  - (b) a person who is appointed to exercise powers under that Act and who is prescribed, or of a class prescribed, by the regulations for the purposes of this definition.

***Part 5.5 receiver*** means a receiver appointed under Part 5.5.

**159 Incorporated legal practice that is subject to receivership under this Act and external administration under other legislation**

- (1) This section applies if an incorporated legal practice is the subject of both:
  - (a) the appointment of a Part 5.5 receiver, and
  - (b) the appointment of an external administrator.
- (2) The Part 5.5 receiver is under a duty to notify the external administrator of the appointment of the Part 5.5 receiver, whether the appointment precedes, follows or is contemporaneous with the appointment of the external administrator.
- (3) The Part 5.5 receiver or the external administrator (or both of them jointly) may apply to the Supreme Court for the resolution of issues arising from or in connection with the dual appointments and their respective powers.
- (4) The Supreme Court may make any orders it considers appropriate, and no liability attaches to the Part 5.5 receiver or the external administrator for any act or omission done by the receiver or administrator in good faith for the purpose of carrying out or acting in accordance with the orders.

(5) The Law Society Council and the Regulator are entitled to intervene in the proceedings, unless the court determines that the proceedings do not concern or affect the provision of legal services by the incorporated legal practice.

(6) In this section:

*external administrator* means a person who is appointed to exercise powers under other legislation (whether or not of this jurisdiction) and who is prescribed, or of a class prescribed, by the regulations for the purposes of this definition.

*Part 5.5 receiver* means a receiver appointed under Part 5.5.

**160 Co-operation between courts**

Courts of this jurisdiction may make arrangements for communicating and co-operating with other courts or tribunals in connection with the exercise of powers under this Division.

**161 Relationship of Act to constitution of incorporated legal practice**

The provisions of this Act or the regulations that apply to an incorporated legal practice prevail, to the extent of any inconsistency, over the constitution or other constituent documents of the practice.

**162 Relationship of Act to legislation establishing incorporated legal practice**

- (1) This section applies to a corporation that is established by or under a law (whether or not of this jurisdiction), and is an incorporated legal practice, but is not a company within the meaning of the *Corporations Act 2001* of the Commonwealth.
- (2) The provisions of this Act or the regulations that apply to an incorporated legal practice prevail, to the extent of any inconsistency, over provisions of the legislation by or under which the corporation is established or regulated that are specified or described in the regulations.

**163 Relationship of Act to Corporations legislation**

- (1) The regulations may declare any provision of this Act or the regulations that relates to an incorporated legal practice to be a Corporations legislation displacement provision for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth.



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- (2) The regulations may declare any matter relating to an incorporated legal practice that is prohibited, required, authorised or permitted by or under this Act or the regulations to be an excluded matter for the purposes of section 5F of the *Corporations Act 2001* of the Commonwealth in relation to:
- (a) the whole of the Corporations legislation, or
  - (b) a specified provision of the Corporations legislation, or
  - (c) the Corporations legislation other than a specified provision, or
  - (d) the Corporations legislation otherwise than to a specified extent.
- (3) In this section:  
*matter* includes act, omission, body, person or thing.

#### **164 Undue influence**

A person (whether or not an officer or an employee of an incorporated legal practice) must not cause or induce:

- (a) a legal practitioner director, or
- (b) another Australian legal practitioner who provides legal services on behalf of an incorporated legal practice,

to contravene this Act, the regulations, the legal profession rules or his or her professional obligations as an Australian legal practitioner.

Maximum penalty: 100 penalty units.

### **Division 3 Multi-disciplinary partnerships**

#### **165 Nature of multi-disciplinary partnership**

- (1) A multi-disciplinary partnership is a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services.
- (2) However, a partnership consisting only of one or more Australian legal practitioners and one or more Australian-registered foreign lawyers is not a multi-disciplinary partnership.
- (3) A complying community legal centre is not a multi-disciplinary partnership.

- (4) Nothing in this Division affects or applies to the provision by a multi-disciplinary partnership of legal services in one or more other jurisdictions.

**166 Conduct of multi-disciplinary partnerships**

- (1) An Australian legal practitioner may be in partnership with a person who is not an Australian legal practitioner, where the business of the partnership includes the provision of legal services.
- (2) Subsection (1) does not prevent an Australian legal practitioner from being in partnership with a person who is not an Australian legal practitioner, where the business of the partnership does not include the provision of legal services.
- (3) The regulations may prohibit an Australian legal practitioner from being in partnership with a person providing a service or conducting a business of a kind specified by the regulations, where the business of the partnership includes the provision of legal services.

**167 Notice of intention to start practice in multi-disciplinary partnership**

A legal practitioner partner must, before starting to provide legal services in this jurisdiction as a member of a multi-disciplinary partnership, give the Law Society written notice, in the approved form, of his or her intention to do so.

Maximum penalty: 50 penalty units.

**168 General obligations of legal practitioner partners**

- (1) Each legal practitioner partner of a multi-disciplinary partnership is, for the purposes only of this Act, responsible for the management of the legal services provided in this jurisdiction by the partnership.
- (2) Each legal practitioner partner must ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the multi-disciplinary partnership:
  - (a) in accordance with the professional obligations of Australian legal practitioners and the other obligations imposed by this Act, the regulations or the legal profession rules, and
  - (b) so that the professional obligations of legal practitioner partners and employees who are Australian legal practitioners are not affected by other partners and employees of the partnership.

Clause 168	Legal Profession Bill 2004
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- (3) A contravention of subsection (2) by a legal practitioner partner is capable of being unsatisfactory professional conduct or professional misconduct.

**169 Obligations of legal practitioner partner relating to misconduct**

- (1) Each of the following is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner partner:
- (a) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the multi-disciplinary partnership,
  - (b) conduct of any other partner (not being an Australian legal practitioner) of the multi-disciplinary partnership that adversely affects the provision of legal services by the partnership,
  - (c) the unsuitability of any other partner (not being an Australian legal practitioner) of the multi-disciplinary partnership to be a member of a partnership that provides legal services.
- (2) A legal practitioner partner of a multi-disciplinary partnership must ensure that all reasonable action available to the legal practitioner partner is taken to deal with any unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the partnership.
- (3) A contravention of subsection (2) is capable of being unsatisfactory professional conduct or professional misconduct.

**170 Actions of partner who is not an Australian legal practitioner**

A partner of a multi-disciplinary partnership who is not an Australian legal practitioner does not contravene a provision of this Act, the regulations or the legal profession rules merely because of any of the following:

- (a) the partner is a member of a partnership where the business of the partnership includes the provision of legal services,
- (b) the partner receives any fee, gain or reward for business of the partnership that is the business of an Australian legal practitioner,
- (c) the partner holds out, advertises or represents himself or herself as a member of a partnership where the business of the partnership includes the provision of legal services,

- (d) the partner shares with any other partner the receipts, revenue or other income of business of the partnership that is the business of an Australian legal practitioner,

unless the provision expressly applies to a partner of a multi-disciplinary partnership who is not an Australian legal practitioner.

**171 Obligations and privileges of practitioners who are partners or employees**

- (1) An Australian legal practitioner who provides legal services in the capacity of a partner or an employee of a multi-disciplinary partnership:
  - (a) is not excused from compliance with professional obligations as an Australian legal practitioner, or any other obligations as an Australian legal practitioner under any law, and
  - (b) does not lose the professional privileges of an Australian legal practitioner.
- (2) The law relating to client legal privilege (or other legal professional privilege) is not excluded or otherwise affected because an Australian legal practitioner is acting in the capacity of a partner or an employee of a multi-disciplinary partnership.

**172 Conflicts of interest**

- (1) For the purposes of the application of any law (including the common law) or legal profession rules relating to conflicts of interest to the conduct of an Australian legal practitioner who is:
  - (a) a legal practitioner partner of a multi-disciplinary partnership,  
or
  - (b) an employee of a multi-disciplinary partnership,the interests of the partnership or any partner of the multi-disciplinary partnership are also taken to be those of the practitioner concerned (in addition to any interests that the practitioner has apart from this subsection).
- (2) Legal profession rules may be made for or with respect to additional duties and obligations in connection with conflicts of interest arising out of the conduct of a multi-disciplinary partnership.

Clause 173	Legal Profession Bill 2004
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### 173 Disclosure obligations

- (1) This section applies if a person engages a multi-disciplinary partnership to provide services that the person might reasonably assume to be legal services.
- (2) Each legal practitioner partner of the multi-disciplinary partnership, and any employee of the partnership who is an Australian legal practitioner and who provides the services on behalf of the partnership, must ensure that a disclosure, complying with the requirements of this section and the regulations made for the purposes of this section, is made to the person in connection with the provision of the services.

Maximum penalty: 50 penalty units.

- (3) The disclosure must be made by giving the person a notice in writing:
  - (a) setting out the services to be provided, and
  - (b) stating whether or not all the legal services to be provided will be provided by an Australian legal practitioner, and
  - (c) if some or all of the legal services to be provided will not be provided by an Australian legal practitioner—identifying those services and indicating the status or qualifications of the person or persons who will provide the services, and

**Note.** For example, the person might be a licensed conveyancer. However, this paragraph would not apply in a case where a law applying in the jurisdiction prohibits a particular legal service from being provided by a person who is not an Australian legal practitioner.

  - (d) stating that this Act applies to the provision of legal services but not to the provision of the non-legal services.
- (4) The regulations may make provision for or with respect to the following matters:
  - (a) the manner in which disclosure is to be made,
  - (b) additional matters required to be disclosed in connection with the provision of legal services or non-legal services by a multi-disciplinary partnership.
- (5) Without limiting subsection (4), the additional matters may include the kind of services provided by the multi-disciplinary partnership and whether those services are or are not covered by the insurance or other provisions of this Act.

- (6) A disclosure under this section to a person about the provision of legal services may relate to the provision of legal services on one occasion or on more than one occasion or on an on-going basis.

**174 Effect of non-disclosure of provision of certain services**

- (1) This section applies if:
- (a) section 173 (Disclosure obligations) applies in relation to a service that is provided to a person who has engaged a multi-disciplinary partnership to provide the service and that the person might reasonably assume to be a legal service, and
  - (b) a disclosure has not been made under that section in relation to the service.
- (2) The standard of care owed by the multi-disciplinary partnership in respect of the service is the standard that would be applicable if the service had been provided by an Australian legal practitioner.

**175 Application of legal profession rules**

Legal profession rules, so far as they apply to Australian legal practitioners, also apply to Australian legal practitioners who are legal practitioner partners or employees of a multi-disciplinary partnership, unless the rules otherwise provide.

**176 Requirements relating to advertising**

- (1) Any restriction imposed by or under this or any other Act, the regulations or the legal profession rules in connection with advertising by Australian legal practitioners applies to advertising by a multi-disciplinary partnership with respect to the provision of legal services.
- (2) If a restriction referred to in subsection (1) is limited to a particular branch of the legal profession or for persons who practise in a particular style of legal practice, the restriction applies only to the extent that the multi-disciplinary partnership carries on the business of the relevant class of Australian legal practitioners.
- (3) An advertisement of the kind referred to in this section is, for the purposes of disciplinary proceedings taken against an Australian legal practitioner, taken to have been authorised by each legal practitioner partner of the multi-disciplinary partnership.

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- (4) This section does not apply if the provision by which the restriction is imposed expressly excludes its application to multi-disciplinary partnerships.

**177 Sharing of receipts, revenue or other income**

- (1) Nothing in this Act, the regulations or the legal profession rules prevents a legal practitioner partner, or an Australian legal practitioner who is an employee of a multi-disciplinary partnership, from sharing receipts, revenue or other income arising from the provision of legal services by the partner or practitioner with a partner or partners who are not Australian legal practitioners.
- (2) This section does not extend to the sharing of receipts, revenue or other income in contravention of section 178 (Disqualified persons), and has effect subject to section 54 (Statutory condition regarding practice as a barrister).

**178 Disqualified persons**

- (1) A legal practitioner partner of a multi-disciplinary partnership must not knowingly:
- be a partner of a disqualified person in the multi-disciplinary partnership, or
  - share with a disqualified person the receipts, revenue or other income arising from the provision of legal services by the multi-disciplinary partnership, or
  - employ or pay a disqualified person in connection with the provision of legal services by the multi-disciplinary partnership.

Maximum penalty: 100 penalty units.

- (2) A contravention of subsection (1) by a legal practitioner partner of a multi-disciplinary partnership is capable of being unsatisfactory professional conduct or professional misconduct.

**179 Prohibition on partnerships with certain partners who are not Australian legal practitioners**

- (1) This section applies to a person who:
- is not an Australian legal practitioner, and
  - is or was a partner of an Australian legal practitioner.

- (2) On application by the Law Society Council or the Regulator, the Supreme Court may make an order prohibiting any Australian legal practitioner from being a partner, in a business that includes the provision of legal services, of a specified person to whom this section applies if:
  - (a) the Court is satisfied that the person is not a fit and proper person to be a partner, or
  - (b) the Court is satisfied that the person has been guilty of conduct that, if the person were an Australian legal practitioner, would have constituted unsatisfactory professional conduct or professional misconduct, or
  - (c) in the case of a corporation, if the Court is satisfied that the corporation has been disqualified from providing legal services in this jurisdiction or there are grounds for disqualifying the corporation from providing legal services in this jurisdiction.
- (3) An order made under this section may be revoked by the Supreme Court on application by the Law Society Council or the Regulator or by the person against whom the order was made.
- (4) The death of an Australian legal practitioner does not prevent an application being made for, or the making of, an order under this section in relation to a person who was a partner of the practitioner.
- (5) The regulations may make provision for or with respect to the publication and notification of orders made under this section.

#### **180 Undue influence**

A person (whether or not a partner, or an employee, of a multi-disciplinary partnership) must not cause or induce:

- (a) a legal practitioner partner, or
- (b) an employee of a multi-disciplinary partnership who provides legal services and who is an Australian legal practitioner,

to contravene this Act, the regulations, the legal profession rules or his or her professional obligations as an Australian legal practitioner.

Maximum penalty: 100 penalty units.



Clause 181	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.6	Incorporated legal practices and multi-disciplinary partnerships

## **Division 4      Miscellaneous**

### **181    Obligations of individual practitioners not affected**

Except as provided by this Part, nothing in this Part affects any obligation imposed on:

- (a) a legal practitioner director or an Australian legal practitioner who is an employee of an incorporated legal practice, or
- (b) a legal practitioner partner or an Australian legal practitioner who is an employee of a multi-disciplinary partnership, or
- (c) an Australian legal practitioner who is an officer or employee of, or whose services are used by, a complying community legal centre,

under this or any other Act, the regulations or the legal profession rules in his or her capacity as an Australian legal practitioner.

### **182    Regulations**

- (1) The regulations may make provision for or with respect to the following matters:
  - (a) the legal services provided by incorporated legal practices or legal practitioner partners or employees of multi-disciplinary partnerships,
  - (b) other services provided by incorporated legal practices or legal practitioner partners or employees of multi-disciplinary partnerships in circumstances where a conflict of interest relating to the provision of legal services may arise.
- (2) A regulation prevails over any inconsistent provision of the legal profession rules.
- (3) A regulation may provide that a breach of the regulations is capable of being unsatisfactory professional conduct or professional misconduct:
  - (a) in the case of an incorporated legal practice—by a legal practitioner director, or by an Australian legal practitioner responsible for the breach, or both, or
  - (b) in the case of a multi-disciplinary partnership—by a legal practitioner partner, or by an Australian legal practitioner responsible for the breach, or both.

## Part 2.7 Legal practice by foreign lawyers

### Division 1 Preliminary

#### 183 Purpose

The purpose of this Part is to encourage and facilitate the internationalisation of legal services and the legal services sector by providing a framework for the regulation of the practice of foreign law in this jurisdiction by foreign lawyers as a recognised aspect of legal practice in this jurisdiction.

#### 184 Definitions

In this Part:

*Australia* includes the external Territories.

*Australian law* means law of the Commonwealth or of a jurisdiction.

*commercial legal presence* means an interest in a law practice practising foreign law.

*domestic registration authority* means the Bar Council or the Law Society Council.

*foreign law* means law of a foreign country.

*foreign law practice* means a partnership or corporate entity that is entitled to engage in legal practice in a foreign country.

*foreign registration authority* means an entity in a foreign country having the function, conferred by the law of the foreign country, of registering persons to engage in legal practice in the foreign country.

*local registration certificate* means a registration certificate given or issued under this Part.

*overseas-registered foreign lawyer* means a natural person who is properly registered to engage in legal practice in a foreign country by the foreign registration authority for the country.

*practise foreign law* means doing work, or transacting business, in this jurisdiction concerning foreign law, being work or business of a kind that, if it concerned the law of this jurisdiction, would ordinarily be done or transacted by an Australian legal practitioner.

Clause 184	Legal Profession Bill 2004
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Part 2.7	Legal practice by foreign lawyers

**registered**, when used in connection with a foreign country, means having all necessary licences, approvals, admissions, certificates or other forms of authorisation (including practising certificates) required by or under legislation for engaging in legal practice in that country.

**show cause event**, in relation to a person, means:

- (a) his or her becoming an insolvent under administration, or
- (b) his or her conviction for a serious offence or a tax offence, whether or not:
  - (i) the offence was committed in or outside this jurisdiction, or
  - (ii) the offence was committed while the person was engaging in legal practice as an Australian legal practitioner or was practising foreign law as an Australian-registered foreign lawyer, as the case requires, or
  - (iii) other persons are prohibited from disclosing the identity of the offender.

**Note.** The terms **Australian-registered foreign lawyer**, **foreign country**, **interstate-registered foreign lawyer** and **locally registered foreign lawyer** are defined in section 4 (Definitions).

### **185 This Part does not apply to Australian legal practitioners**

- (1) This Part does not apply to an Australian legal practitioner (including an Australian legal practitioner who is also an overseas-registered foreign lawyer).
- (2) Accordingly, nothing in this Part requires or enables an Australian legal practitioner (including an Australian legal practitioner who is also an overseas-registered foreign lawyer) to be registered as a foreign lawyer under this Act in order to practise foreign law in this jurisdiction.

## **Division 2 Practice of foreign law**

### **186 Requirement for registration**

- (1) A person must not practise foreign law in this jurisdiction unless the person is:
  - (a) an Australian-registered foreign lawyer, or

- (b) an Australian legal practitioner.  
Maximum penalty: 200 penalty units.
- (2) However, a person does not contravene subsection (1) if the person is an overseas-registered foreign lawyer:
  - (a) who:
    - (i) practises foreign law in this jurisdiction for one or more continuous periods that do not in aggregate exceed 12 months in any 3 year period, or
    - (ii) is subject to a restriction imposed under the *Migration Act 1958* of the Commonwealth that has the effect of limiting the period during which work may be done, or business transacted, in Australia by the person, and
  - (b) who:
    - (i) does not maintain an office for the purpose of practising foreign law in this jurisdiction, or
    - (ii) does not have a commercial legal presence in this jurisdiction.

**187 Entitlement of Australian-registered foreign lawyer to practise in this jurisdiction**

An Australian-registered foreign lawyer is, subject to this Act, entitled to practise foreign law in this jurisdiction.

**188 Scope of practice**

- (1) An Australian-registered foreign lawyer may provide only the following legal services in this jurisdiction:
  - (a) doing work, or transacting business, concerning the law of a foreign country where the lawyer is registered by the foreign registration authority for the country,
  - (b) legal services (including appearances) in relation to arbitration proceedings of a kind prescribed under the regulations,
  - (c) legal services (including appearances) in relation to proceedings before bodies other than courts, being proceedings in which the body concerned is not required to apply the rules of evidence and in which knowledge of the foreign law of a country referred to in paragraph (a) is essential,

- (d) legal services for conciliation, mediation and other forms of consensual dispute resolution of a kind prescribed under the regulations.
- (2) Nothing in this Act authorises an Australian-registered foreign lawyer to appear in any court (except on the lawyer's own behalf) or to practise Australian law in this jurisdiction.
- (3) Despite subsection (2), an Australian-registered foreign lawyer may advise on the effect of an Australian law if:
  - (a) the giving of advice on Australian law is necessarily incidental to the practice of foreign law, and
  - (b) the advice is expressly based on advice given on the Australian law by an Australian legal practitioner who is not an employee of the foreign lawyer.

**189 Form of practice**

- (1) An Australian-registered foreign lawyer may (subject to any conditions attaching to the foreign lawyer's registration) practise foreign law:
  - (a) on the foreign lawyer's own account, or
  - (b) in partnership with one or more Australian-registered foreign lawyers or one or more Australian legal practitioners, or both, in circumstances where, if the Australian-registered foreign lawyer were an Australian legal practitioner, the partnership would be permitted under a law of this jurisdiction, or
  - (c) as a director or employee of an incorporated legal practice or a partner or employee of a multi-disciplinary partnership that is permitted by a law of this jurisdiction, or
  - (d) as an employee of an Australian legal practitioner or law firm in circumstances where, if the Australian-registered foreign lawyer were an Australian legal practitioner, the employment would be permitted under a law of this jurisdiction, or
  - (e) as an employee of an Australian-registered foreign lawyer.
- (2) An affiliation referred to in subsection (1) (b)–(e) does not entitle the Australian-registered foreign lawyer to practise Australian law in this jurisdiction.

**190 Application of Australian professional ethical and practice standards**

- (1) An Australian-registered foreign lawyer must not engage in any conduct in practising foreign law that would, if the conduct were engaged in by an Australian legal practitioner in practising Australian law in this jurisdiction, be capable of being professional misconduct or unsatisfactory professional conduct.
- (2) Chapter 4 (Complaints and discipline) applies to a person who:
  - (a) is an Australian-registered foreign lawyer, or
  - (b) was an Australian-registered foreign lawyer when the relevant conduct allegedly occurred, but is no longer an Australian-registered foreign lawyer (in which case Chapter 4 applies as if the person were an Australian-registered foreign lawyer),and so applies as if references in Chapter 4 to an Australian legal practitioner were references to a person of that kind.
- (3) The regulations may make provision with respect to the application (with or without modification) of the provisions of Chapter 4 for the purposes of this section.
- (4) Without limiting the matters that may be taken into account in determining whether a person should be disciplined for a contravention of subsection (1), the following matters may be taken into account:
  - (a) whether the conduct of the person was consistent with the standard of professional conduct of the legal profession in any foreign country where the person is registered,
  - (b) whether the person contravened the subsection wilfully or without reasonable excuse.
- (5) Without limiting any other provision of this section or the orders that may be made under Chapter 4 as applied by this section, the following orders may be made under that Chapter as applied by this section:
  - (a) an order that a person's registration under this Act as a foreign lawyer be cancelled,
  - (b) an order that a person's registration under a corresponding law as a foreign lawyer be cancelled.

Clause 191	Legal Profession Bill 2004
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## 191 Designation

- (1) An Australian-registered foreign lawyer may use only the following designations:
  - (a) the lawyer's own name,
  - (b) a title or business name the lawyer is authorised by law to use in a foreign country where the lawyer is registered by a foreign registration authority,
  - (c) subject to this section, the name of a foreign law practice with which the lawyer is affiliated or associated (whether as a partner, director, employee or otherwise),
  - (d) if the lawyer is a principal of any law practice in Australia whose principals include both one or more Australian-registered foreign lawyers and one or more Australian legal practitioners—a description of the practice that includes reference to both Australian legal practitioners and Australian-registered foreign lawyers (for example, “Solicitors and locally registered foreign lawyers” or “Australian solicitors and US attorneys”).
- (2) An Australian-registered foreign lawyer who is a principal of a foreign law practice may use the practice's name in or in connection with practising foreign law in this jurisdiction only if:
  - (a) the lawyer indicates, on the lawyer's letterhead or any other document used in this jurisdiction to identify the lawyer as an overseas-registered foreign lawyer, that the foreign law practice practises only foreign law in this jurisdiction, and
  - (b) the lawyer has provided the domestic registration authority with acceptable evidence that the lawyer is a principal of the foreign law practice.
- (3) An Australian-registered foreign lawyer who is a principal of a foreign law practice may use the name of the practice as referred to in this section whether or not other principals of the practice are Australian-registered foreign lawyers.
- (4) This section does not authorise the use of a name or other designation that contravenes any requirements of the law of this jurisdiction concerning the use of business names or that is likely to lead to any confusion with the name of any established domestic law practice or foreign law practice in this jurisdiction.

## 192 Letterhead and other identifying documents

- (1) An Australian-registered foreign lawyer must indicate, in each public document distributed by the lawyer in connection with the lawyer's practice of foreign law, the fact that the lawyer is an Australian-registered foreign lawyer and is restricted to the practice of foreign law.
- (2) Subsection (1) is satisfied if the lawyer includes in the public document the words:
  - (a) "registered foreign lawyer" or "registered foreign practitioner", and
  - (b) "entitled to practise foreign law only".
- (3) An Australian-registered foreign lawyer may (but need not) include any or all of the following on any public document:
  - (a) an indication of all foreign countries in which the lawyer is registered to engage in legal practice,
  - (b) a description of himself or herself, and any law practice with which the lawyer is affiliated or associated, in any of the ways designated in section 191 (Designation).
- (4) In this section:  
*public document* includes any business letter, statement of account, invoice, business card, and promotional and advertising material.

## 193 Advertising

- (1) An Australian-registered foreign lawyer is required to comply with any advertising restrictions imposed by the domestic registration authority or by law on the practice of law by an Australian legal practitioner that are relevant to the practice of law in this jurisdiction.
- (2) Without limiting subsection (1), an Australian-registered foreign lawyer must not advertise (or use any description on the lawyer's letterhead or any other document used in this jurisdiction to identify the lawyer as a lawyer) in any way that:
  - (a) might reasonably be regarded as:
    - (i) false, misleading or deceptive, or
    - (ii) suggesting that the Australian-registered foreign lawyer is an Australian legal practitioner, or
  - (b) contravenes any requirements of the regulations.



Clause 194	Legal Profession Bill 2004
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#### **194 Foreign lawyer employing Australian legal practitioner**

- (1) An Australian-registered foreign lawyer may employ one or more Australian legal practitioners.
- (2) Employment of an Australian legal practitioner does not entitle an Australian-registered foreign lawyer to practise Australian law in this jurisdiction.
- (3) An Australian legal practitioner employed by an Australian-registered foreign lawyer may practise foreign law.
- (4) An Australian legal practitioner employed by an Australian-registered foreign lawyer must not:
  - (a) provide advice on Australian law to, or for use by, the Australian-registered foreign lawyer, or
  - (b) otherwise practise Australian law in this jurisdiction in the course of that employment.
- (5) Subsection (4) does not apply to an Australian legal practitioner employed by a law firm a partner of which is an Australian-registered foreign lawyer, if at least one other partner is an Australian legal practitioner.
- (6) Any period of employment of an Australian legal practitioner by an Australian-registered foreign lawyer cannot be used to satisfy a requirement imposed by a condition on a local practising certificate to complete a period of supervised legal practice.

#### **195 Trust money and trust accounts**

- (1) The provisions of Part 3.1 (Trust money and trust accounts), and any other provisions of this Act, the regulations or any legal profession rule relating to requirements for trust money and trust accounts, apply (subject to this section) to Australian-registered foreign lawyers in the same way as they apply to Australian legal practitioners.
- (2) In this section, a reference to money is not limited to a reference to money in this jurisdiction.
- (3) The regulations may make provision with respect to the application (with or without modification) of the provisions of this Act relating to trust money and trust accounts for the purposes of this section.

#### **196 Professional Indemnity insurance**

An Australian-registered foreign lawyer who practises foreign law in this jurisdiction must have professional indemnity insurance that conforms with the requirements (if any) prescribed by the regulations.

#### **197 Fidelity cover**

The regulations may provide that provisions of Part 3.4 (Fidelity cover) apply to prescribed classes of Australian-registered foreign lawyers and so apply with any modifications specified in the regulations.

**Note.** Section 398 applies the provisions of Part 3.2 to Australian-registered foreign lawyers.

### **Division 3 Local registration of foreign lawyers generally**

#### **198 Local registration of foreign lawyers**

Overseas-registered foreign lawyers may be registered as foreign lawyers under this Act.

#### **199 Duration of registration**

- (1) Registration as a foreign lawyer granted under this Act is in force from the day specified in the local registration certificate until the end of the financial year in which it is granted, unless the registration is sooner suspended or cancelled.
- (2) Registration as a foreign lawyer renewed under this Act is in force until the end of the financial year following its previous period of currency, unless the registration is sooner suspended or cancelled.
- (3) If an application for the renewal of registration as a foreign lawyer has not been determined by the following 1 July, the registration:
  - (a) continues in force on and from that 1 July until the domestic registration authority renews or refuses to renew the registration or the holder withdraws the application for renewal, unless the registration is sooner suspended or cancelled, and
  - (b) if renewed, is taken to have been renewed on and from that 1 July.

Clause 200	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.7	Legal practice by foreign lawyers

**200 Locally registered foreign lawyer is not officer of Supreme Court**

A locally registered foreign lawyer is not an officer of the Supreme Court.

**Division 4 Applications for grant or renewal of local registration**

**201 Application for grant or renewal of registration**

An overseas-registered foreign lawyer may apply to a domestic registration authority for the grant or renewal of registration as a foreign lawyer under this Act.

**202 Manner of application**

- (1) An application for the grant or renewal of registration as a foreign lawyer must be:
  - (a) made in the approved form, and
  - (b) accompanied by the fees determined by the domestic registration authority.
- (2) Different fees may be set according to different factors determined by the domestic registration authority.
- (3) The fees are not to be greater than the maximum fees for a local practising certificate.
- (4) The domestic registration authority may also require the applicant to pay any reasonable costs and expenses incurred by the authority in considering the application, including (for example) costs and expenses of making inquiries and obtaining information or documents about whether the applicant meets the criteria for registration.
- (5) The fees and costs must not include any component for compulsory membership of any professional association.
- (6) The approved form may require the applicant to disclose:
  - (a) matters that may be relevant to or affect the grant or renewal of registration, and
  - (b) particulars of any offences for which the applicant has been convicted in Australia or a foreign country, whether before or after the commencement of this section.

- (7) The approved form may indicate that convictions of a particular kind need not be disclosed for the purposes of the current application.
- (8) The approved form may indicate that specified kinds of matters or particulars previously disclosed in a particular manner need not be disclosed for the purposes of the current application.

**203 Requirements regarding applications for grant or renewal of registration**

- (1) An application for grant of registration must state the applicant's educational and professional qualifications.
- (2) An application for grant or renewal of registration must:
  - (a) state that the applicant is registered to engage in legal practice by one or more specified foreign registration authorities in one or more foreign countries, and
  - (b) state that the applicant is not an Australian legal practitioner, and
  - (c) state that the applicant is not the subject of disciplinary proceedings in Australia or a foreign country (including any preliminary investigations or action that might lead to disciplinary proceedings) in his or her capacity as:
    - (i) an overseas-registered foreign lawyer, or
    - (ii) an Australian-registered foreign lawyer, or
    - (iii) an Australian lawyer, and
  - (d) state that the applicant is not a party in any pending criminal or civil proceedings in Australia or a foreign country that is likely to result in disciplinary action being taken against the applicant, and
  - (e) state that the applicant's registration is not cancelled or currently suspended in any place as a result of any disciplinary action in Australia or a foreign country, and
  - (f) state that the applicant is:
    - (i) not otherwise personally prohibited from carrying on the practice of law in any place or bound by any undertaking not to carry out the practice of law in any place, and

- (ii) not subject to any special conditions in carrying on any practice of law in any place,  
as a result of criminal, civil or disciplinary proceedings in Australia or a foreign country, and
  - (g) specify any special conditions imposed in Australia or a foreign country as a restriction on the practice of law by the applicant or any undertaking given by the applicant restricting the applicant's practice of law, and
  - (h) give consent to the making of inquiries of, and the exchange of information with, any foreign registration authorities the domestic registration authority considers appropriate regarding the applicant's activities in engaging in legal practice in the places concerned or otherwise regarding matters relevant to the application, and
  - (i) provide the information or be accompanied by the other information or documents (or both) that is specified in the application form or in material accompanying the application form as provided by the domestic registration authority.
- (3) The application must (if the domestic registration authority so requires) be accompanied by an original instrument, or a copy of an original instrument, from each foreign registration authority specified in the application that:
  - (a) verifies the applicant's educational and professional qualifications, and
  - (b) verifies the applicant's registration by the authority to practise law in the foreign country concerned, and the date of registration, and
  - (c) describes anything done by the applicant in engaging in legal practice in that foreign country of which the authority is aware and that, in the opinion of the authority, has had or is likely to have had an adverse effect on the applicant's professional standing within the legal profession of that place.
- (4) The applicant must (if the domestic registration authority so requires) certify in the application that the accompanying instrument is the original or a complete and accurate copy of the original.
- (5) The domestic registration authority may require the applicant to verify the statements in the application by statutory declaration or by other proof acceptable to the authority.

- (6) If the accompanying instrument is not in English, it must be accompanied by a translation in English that is authenticated or certified to the satisfaction of the domestic registration authority.

## **Division 5      Grant or renewal of registration**

### **204    Grant or renewal of registration**

- (1) The domestic registration authority must consider an application that has been made for the grant or renewal of registration as a foreign lawyer and may:
  - (a) grant or refuse to grant the registration, or
  - (b) renew or refuse to renew the registration,and in granting or renewing the certificate may impose conditions as referred to in section 224 (Conditions imposed by domestic registration authority).
- (2) If the domestic registration authority grants or renews registration, the authority must, as soon as practicable, give the applicant a registration certificate or a notice of renewal.
- (3) If the domestic registration authority refuses to grant or renew registration, the domestic registration authority must, as soon as practicable, give the applicant an information notice.
- (4) A notice of renewal may be in the form of a new registration certificate or any other form the authority considers appropriate.

### **205    Requirement to grant or renew registration if criteria satisfied**

- (1) The domestic registration authority must grant an application for registration as a foreign lawyer if the domestic registration authority:
  - (a) is satisfied the applicant is registered to engage in legal practice in one or more foreign countries and is not an Australian legal practitioner, and
  - (b) considers an effective system exists for regulating the practice of law in one or more of the foreign countries, and
  - (c) considers the applicant is not, as a result of criminal, civil or disciplinary proceedings in any of the foreign countries, subject to:

- (i) any special conditions in carrying on the practice of law in any of the foreign countries, or
  - (ii) any undertakings concerning the practice of law in any of the foreign countries,that would make it inappropriate to register the person, and
- (d) is satisfied the applicant demonstrates an intention:
  - (i) to practise foreign law in this jurisdiction, and
  - (ii) to establish an office or a commercial legal presence in this jurisdiction within a reasonable period after grant of registration for practice,unless the authority refuses the application under this Division.
- (2) The domestic registration authority must grant an application for renewal of a person's registration, unless the authority refuses renewal under this Division.
- (3) Residence or domicile in this jurisdiction is not to be a prerequisite for or a factor in entitlement to the grant or renewal of registration.

## **206 Refusal to grant or renew registration**

- (1) The domestic registration authority may refuse to consider an application if it is not made in accordance with this Act or the regulations or the required fees and costs have not been paid.
- (2) The domestic registration authority may refuse to grant or renew registration if:
  - (a) the application is not accompanied by, or does not contain, the information required by this Division or prescribed by the regulations, or
  - (b) the applicant has contravened this Act or a corresponding law, or
  - (c) the applicant has contravened an order of the Tribunal or a corresponding disciplinary body, including but not limited to an order to pay any fine or costs, or
  - (d) the applicant has contravened an order of a regulatory authority of any jurisdiction to pay any fine or costs, or
  - (e) the applicant has failed to comply with a requirement under this Act to pay a contribution to, or levy for, the Fidelity Fund, or
  - (f) the applicant has contravened a requirement of or made under this Act about professional indemnity insurance, or

- (g) the applicant has failed to pay any expenses of receivership payable under this Act.
- (3) The domestic registration authority may refuse to grant or renew registration if an authority of another jurisdiction has under a corresponding law:
- (a) refused to grant or renew registration for the applicant, or
  - (b) suspended or cancelled the applicant's registration.
- (4) The domestic registration authority may refuse to grant registration if the authority is satisfied that the applicant is not a fit and proper person to be registered after considering:
- (a) the nature of any offence for which the applicant has been convicted in Australia or a foreign country, whether before or after the commencement of this section, and
  - (b) how long ago the offence was committed, and
  - (c) the person's age when the offence was committed.
- (5) The domestic registration authority may refuse to renew registration if the authority is satisfied that the applicant is not a fit and proper person to continue to be registered after considering:
- (a) the nature of any offence for which the applicant has been convicted in Australia or a foreign country, whether before or after the commencement of this section, other than an offence disclosed in a previous application to the domestic registration authority, and
  - (b) how long ago the offence was committed, and
  - (c) the person's age when the offence was committed.
- (6) The domestic registration authority may refuse to grant or renew registration on any ground on which registration could be suspended or cancelled.
- (7) If the domestic registration authority refuses to grant or renew registration, the authority must, as soon as practicable, give the applicant an information notice.
- (8) Nothing in this section affects the operation of Division 7 (Special powers in relation to local registration—show cause events).



## **Division 6            Amendment, suspension or cancellation of local registration**

### **207    Application of this Division**

This Division does not apply in relation to matters referred to in Division 7 (Special powers in relation to local registration—show cause events).

### **208    Grounds for amending, suspending or cancelling registration**

Each of the following is a ground for amending, suspending or cancelling a person's registration as a foreign lawyer:

- (a) the registration was obtained because of incorrect or misleading information,
- (b) the person fails to comply with a requirement of this Part,
- (c) the person fails to comply with a condition imposed on the person's registration,
- (d) the person becomes the subject of disciplinary proceedings in Australia or a foreign country (including any preliminary investigations or action that might lead to disciplinary proceedings) in his or her capacity as:
  - (i) an overseas-registered foreign lawyer, or
  - (ii) an Australian-registered foreign lawyer, or
  - (iii) an Australian lawyer,
- (e) the person is a party in pending criminal or civil proceedings in Australia or a foreign country, or is convicted of an offence, that is likely to result in disciplinary action being taken against the applicant,
- (f) the person's registration is cancelled or currently suspended in any place as a result of any disciplinary action in Australia or a foreign country,
- (g) the person does not have professional indemnity insurance that complies with the requirements mentioned in section 196 (Professional indemnity insurance),
- (h) the person has not established an office to practise foreign law or a commercial legal presence in this jurisdiction within the period prescribed by the regulations after being granted registration,

- (i) the person, having ceased to have an office or commercial legal presence in this jurisdiction after being granted registration, has not had an office or a commercial legal presence in this jurisdiction for a period prescribed by the regulations,
- (j) another ground the domestic registration authority considers sufficient.

### **209 Amending, suspending or cancelling registration**

- (1) If the domestic registration authority believes a ground exists to amend, suspend or cancel a person's registration by it as a foreign lawyer (the *proposed action*), the authority must give the person a notice (the *show cause notice*) that:
  - (a) states the proposed action and:
    - (i) if the proposed action is to amend the registration in any way—states the proposed amendment, and
    - (ii) if the proposed action is to suspend the registration—states the proposed suspension period, and
  - (b) states the grounds for proposing to take the proposed action, and
  - (c) outlines the facts and circumstances that form the basis for the authority's belief, and
  - (d) invites the person to make written representations to the authority, within a specified time not less than 7 days and not more than 28 days, as to why the proposed action should not be taken.
- (2) If, after considering all written representations made within the specified time, the domestic registration authority still believes grounds exist to take the action, the authority may:
  - (a) if the show cause notice stated the proposed action was to amend the registration—amend the registration in the way specified or in another way the authority considers appropriate because of the representations, or
  - (b) if the show cause notice stated the proposed action was to suspend the registration for a specified period:
    - (i) suspend the registration for a period no longer than the specified period, or

- (ii) amend the registration in a less onerous way the authority considers appropriate because of the representations, or
- (c) if the show cause notice stated the proposed action was to cancel the registration:
  - (i) cancel the registration, or
  - (ii) suspend the registration for a period.
- (3) The domestic registration authority may, at its discretion, consider representations made after the specified time.
- (4) The domestic registration authority must give the person notice of the authority's decision.
- (5) If the domestic registration authority decides to amend, suspend or cancel the registration, the authority must give the person an information notice about the decision.

## **210 Operation of amendment, suspension or cancellation of registration**

- (1) **Application of section**

This section applies if a decision is made to amend, suspend or cancel a person's registration under section 209 (Amending, suspending or cancelling registration).
- (2) **Action to take effect on giving of notice or specified date**

Subject to subsections (3) and (4), the amendment, suspension or cancellation of the registration takes effect on the later of the following:

  - (a) the day notice of the decision is given to the person,
  - (b) the day specified in the notice.
- (3) **Grant of stay**

If the registration is amended, suspended or cancelled because the person has been convicted of an offence:

  - (a) the Supreme Court may, on the application of the person, order that the operation of the amendment, suspension or cancellation of the registration be stayed until:
    - (i) the end of the time to appeal against the conviction, and
    - (ii) if an appeal is made against the conviction—the appeal is finally decided, lapses or otherwise ends, and
  - (b) the amendment, suspension or cancellation does not have effect during any period in respect of which the stay is in force.

**(4) Quashing of conviction**

If the registration is amended, suspended or cancelled because the person has been convicted of an offence and the conviction is quashed:

- (a) the amendment or suspension ceases to have effect when the conviction is quashed, or
- (b) the cancellation ceases to have effect when the conviction is quashed and the registration is restored as if it had merely been suspended.

**211 Other ways of amending or cancelling registration**

- (1) The appropriate domestic registration authority may amend or cancel the registration of a locally registered foreign lawyer if the foreign lawyer requests the authority to do so.
- (2) The appropriate domestic registration authority may amend the registration of a locally registered foreign lawyer:
  - (a) for a formal or clerical reason, or
  - (b) in another way that does not adversely affect the lawyer's interests.
- (3) The amendment or cancellation of a registration under this section is effected by written notice given to the foreign lawyer.
- (4) Section 209 (Amending, suspending or cancelling registration) does not apply in a case to which this section applies.

**212 Relationship of this Division with Chapter 4**

Nothing in this Division prevents the domestic registration authority from making a complaint under Chapter 4 (Complaints and discipline) about a matter to which this Division relates.

**Division 7 Special powers in relation to local registration—  
show cause events**

**213 Applicant for local registration—show cause event**

- (1) This section applies if:
  - (a) a person is applying for registration as a foreign lawyer under this Act, and

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- (b) a show cause event in relation to the person happened, whether before or after the commencement of this section, after the person first became an overseas-registered foreign lawyer.
- (2) As part of the application, the person must provide to the domestic registration authority a written statement, in accordance with the regulations:
  - (a) about the show cause event, and
  - (b) explaining why, despite the show cause event, the applicant considers himself or herself to be a fit and proper person to be a locally registered foreign lawyer.
- (3) However, the person need not provide a statement under subsection (2) if the person has previously provided to the domestic registration authority a statement under this section, or a notice and statement under section 214 (Locally registered foreign lawyer—show cause event), explaining why, despite the show cause event, the person considers himself or herself to be a fit and proper person to be a locally registered foreign lawyer.
- (4) A contravention of subsection (2) is capable of being unsatisfactory professional conduct or professional misconduct.

**214 Locally registered foreign lawyer—show cause event**

- (1) This section applies to a show cause event that happens in relation to a locally registered foreign lawyer.
- (2) The locally registered foreign lawyer must provide to the domestic registration authority both of the following:
  - (a) within 7 days after the happening of the event—notice, in the approved form, that the event happened,
  - (b) within 28 days after the happening of the event—a written statement explaining why, despite the show cause event, the person considers himself or herself to be a fit and proper person to be a locally registered foreign lawyer.
- (3) A contravention of subsection (2) is capable of being unsatisfactory professional conduct or professional misconduct.
- (4) If a written statement is provided after the 28 days mentioned in subsection (2) (b), the domestic registration authority may accept the statement and take it into consideration.

**215 Refusal, amendment, suspension or cancellation of local registration—failure to show cause**

- (1) The domestic registration authority may refuse to grant or renew, or may amend, suspend or cancel, local registration if the applicant for registration or the locally registered foreign lawyer:
  - (a) is required by section 213 (Applicant for local registration—show cause event) or 214 (Locally registered foreign lawyer—show cause event) to provide a written statement relating to a matter and has failed to provide a written statement in accordance with that requirement, or
  - (b) has provided a written statement in accordance with section 213 or 214 but the authority does not consider that the applicant or foreign lawyer has shown in the statement that, despite the show cause event concerned, he or she is a fit and proper person to be a locally registered foreign lawyer.
- (2) For the purposes of this section only, a written statement accepted by the domestic registration authority under section 214 (4) is taken to have been provided in accordance with section 214.
- (3) The domestic registration authority must give the applicant or foreign lawyer an information notice about the decision to refuse to grant or renew, or to suspend or cancel, the registration.

**216 Restriction on making further applications**

- (1) If the domestic registration authority determines under this Division to cancel a person's registration, the authority may also determine that the person is not entitled to apply for registration under this Part for a specified period (being a period not exceeding 5 years).
- (2) A person in respect of whom a determination has been made under this section, or under a provision of a corresponding law that corresponds to this section, is not entitled to apply for registration under this Part during the period specified in the determination.
- (3) If the domestic registration authority makes a determination under this section, the authority must, as soon as practicable, give the applicant an information notice.

**217 Relationship of this Division with Chapters 4 and 6**

- (1) The domestic registration authority has and may exercise powers under Part 4.4 (Investigation of complaints) of Chapter 4, and Chapter 6

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(Provisions relating to investigations), in relation to a matter under this Division, as if the matter were the subject of a complaint under Chapter 4.

- (2) Accordingly, the provisions of Part 4.4 of Chapter 4, and Chapter 6, apply in relation to a matter under this Division, and so apply with any necessary modifications.
- (3) Nothing in this Division prevents the domestic registration authority from making a complaint under Chapter 4 about a matter to which this Division relates.

## **Division 8 Further provisions relating to local registration**

### **218 Immediate suspension of registration**

- (1) This section applies, despite Divisions 6 and 7, if the domestic registration authority considers it necessary in the public interest to immediately suspend a person's registration as a foreign lawyer.
- (2) The domestic registration authority may, by written notice given to the person, immediately suspend the registration until the earlier of the following:
  - (a) the time at which the authority informs the person of the authority's decision by notice under section 209,
  - (b) the end of the period of 56 days after the notice is given to the person under this section.
- (3) The notice under this section must:
  - (a) include an information notice about the suspension, and
  - (b) state that the person may make written representations to the domestic registration authority about the suspension, and
  - (c) state that the person may appeal against the suspension under section 238.
- (4) The person may make written representations to the domestic registration authority about the suspension, and the authority must consider the representations.
- (5) The domestic registration authority may revoke the suspension at any time, whether or not in response to any written representations made to it by the person.

**219 Surrender of local registration certificate and cancellation of registration**

- (1) A person registered as a foreign lawyer under this Part may surrender the local registration certificate to the domestic registration authority.
- (2) The domestic registration authority may cancel the surrendered registration certificate.

**220 Automatic suspension or cancellation of registration on grant of practising certificate or other disciplinary action**

- (1) A person's registration as a foreign lawyer under this Part is taken to be:
  - (a) cancelled if the person becomes an Australian legal practitioner, or
  - (b) suspended or cancelled if a foreign registration authority suspends or cancels, or a disciplinary body of another jurisdiction corresponding to the Tribunal orders the suspension or cancellation of, the person's registration in a foreign country because of criminal, civil or disciplinary proceedings against the person, or
  - (c) cancelled if the person's registration in a foreign country lapses.
- (2) A suspension under this section has effect while the person's registration in the foreign country is suspended.

**221 Suspension or cancellation of registration not to affect disciplinary processes**

The suspension or cancellation of a person's registration as a foreign lawyer under this Part does not affect any disciplinary processes in respect of matters arising before the suspension or cancellation.

**222 Return of local registration certificate on amendment, suspension or cancellation of registration**

- (1) This section applies if a person's registration under this Part as a foreign lawyer is amended, suspended or cancelled.
- (2) The domestic registration authority may give the person a notice requiring the person to return the registration certificate to the authority in the way specified in the notice within a specified period of not less than 14 days.



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- (3) The person must comply with the notice, unless the person has a reasonable excuse.

Maximum penalty: 20 penalty units.

- (4) If the registration is amended, the domestic registration authority must return the registration certificate to the person as soon as practicable after amending it.

## **Division 9      Conditions on registration**

### **223    Conditions generally**

- (1) Registration as a foreign lawyer under this Part is subject to:
- (a) any conditions imposed by the domestic registration authority, and
  - (b) any statutory conditions imposed by this or any other Act, and
  - (c) any conditions imposed by or under the legal profession rules, and
  - (d) any conditions imposed under Chapter 4 (Complaints and discipline) or under provisions of a corresponding law that correspond to Chapter 4.
- (2) If a condition is imposed, varied or revoked under this Act (other than a statutory condition) during the currency of the registration concerned, the registration certificate is to be amended by the domestic registration authority, or a new certificate is to be issued by the authority, to reflect on its face the imposition, variation or revocation.

### **224    Conditions imposed by domestic registration authority**

- (1) The domestic registration authority may impose conditions on registration as a foreign lawyer:
- (a) when it is granted or renewed, or
  - (b) during its currency.
- (2) A condition imposed under this section must be reasonable and relevant.

- (3) A condition imposed under this section may be about any of the following:
  - (a) any matter in respect of which a condition could be imposed on a local practising certificate,
  - (b) a matter agreed to by the foreign lawyer.
- (4) The domestic registration authority must not impose a condition under subsection (3) (a) that is more onerous than a condition that would be imposed on a local practising certificate of a local legal practitioner in the same or similar circumstances.
- (5) The domestic registration authority may vary or revoke conditions imposed by it under this section.
- (6) If the domestic registration authority imposes, varies or revokes a condition during the currency of the registration concerned, the imposition, variation or revocation takes effect when the holder has been notified of it or at a later time specified by the authority.
- (7) If the domestic registration authority imposes a condition on registration when it is granted or renewed and the foreign lawyer within one month after the grant or renewal notifies the authority in writing that he or she does not agree to the condition, the authority must, as soon as practicable, give the holder an information notice.
- (8) This section has effect subject to section 209 (Amending, suspending or cancelling registration) in relation to the imposition of a condition on registration during its currency.

**225 Imposition or variation of conditions pending criminal proceedings**

- (1) If a person registered as a foreign lawyer under this Part has been charged with a relevant offence but the charge has not been determined, the appropriate domestic registration authority may apply to the Tribunal for an order under this section.
- (2) On an application under subsection (1), the Tribunal, if it considers it appropriate to do so having regard to the seriousness of the offence and to the public interest, may make either or both of the following orders:
  - (a) an order varying the conditions on the practitioner's registration, or
  - (b) an order imposing further conditions on the practitioner's registration.

- (3) An order under this section has effect until the sooner of:
  - (a) the end of the period specified by the Tribunal, or
  - (b) if the practitioner is convicted of the offence—28 days after the day of the conviction, or
  - (c) if the charge is dismissed—the day of the dismissal.
- (4) The Tribunal, on application by any party, may vary or revoke an order under this section at any time.
- (5) In this section:

*relevant offence* means a serious offence or an offence that would have to be disclosed under the admission rules in relation to an application for admission to the legal profession under this Act.

**226 Statutory condition regarding notification of offence**

- (1) It is a statutory condition of registration as a foreign lawyer that the lawyer:
  - (a) must notify the domestic registration authority that the lawyer has been:
    - (i) convicted of an offence that would have to be disclosed in relation to an application for registration as a foreign lawyer under this Act, or
    - (ii) charged with a serious offence, and
  - (b) must do so within 7 days of the event and by a written notice.
- (2) The regulations, or the legal profession rules if the regulations do not do so, may specify the form of the notice to be used and the person to whom or the address to which it is to be sent or delivered.
- (3) The giving of a notice in accordance with Division 7 (Special powers in relation to local registration—show cause events) of a conviction for a serious offence satisfies the requirements of subsection (1) (a) (i) in relation to the conviction.

**227 Conditions imposed by legal profession rules**

The legal profession rules may:

- (a) impose conditions on the registration of foreign lawyers or any class of foreign lawyers, or

- (b) authorise conditions to be imposed on the registration of foreign lawyers or on the registration of any class of foreign lawyers.

**228 Compliance with conditions**

- (1) A locally registered foreign lawyer must not contravene a condition to which the registration is subject.

Maximum penalty: 100 penalty units.

- (2) A contravention of subsection (1) is capable of being unsatisfactory professional misconduct or professional misconduct.

**Division 10 Interstate-registered foreign lawyers**

**229 Extent of entitlement of interstate-registered foreign lawyer to practise in this jurisdiction**

- (1) This Part does not authorise an interstate-registered foreign lawyer to practise foreign law in this jurisdiction to a greater extent than a locally registered foreign lawyer could be authorised under a local registration certificate.
- (2) Also, an interstate-registered foreign lawyer's right to practise foreign law in this jurisdiction:
  - (a) is subject to:
    - (i) any conditions imposed by the domestic registration authority under section 230 (Additional conditions on practice of interstate-registered foreign lawyers), and
    - (ii) any conditions imposed by or under the legal profession rules as referred to in that section, and
  - (b) is, to the greatest practicable extent and with all necessary changes:
    - (i) the same as the interstate-registered foreign lawyer's right to practise foreign law in the lawyer's home jurisdiction, and
    - (ii) subject to any condition on the interstate-registered foreign lawyer's right to practise foreign law in that jurisdiction.

Clause 229	Legal Profession Bill 2004
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- (3) If there is an inconsistency between conditions mentioned in subsection (2) (a) and conditions mentioned in subsection (2) (b), the conditions that are, in the opinion of the domestic registration authority, more onerous prevail to the extent of the inconsistency.
- (4) An interstate-registered foreign lawyer must not practise foreign law in this jurisdiction in a manner not authorised by this Act or in contravention of any condition referred to in this section.
- (5) A contravention of this section is capable of being unsatisfactory professional conduct or professional misconduct.

**230 Additional conditions on practice of interstate-registered foreign lawyers**

- (1) The domestic registration authority may, by written notice to an interstate-registered foreign lawyer practising foreign law in this jurisdiction, impose any condition on the interstate-registered foreign lawyer's practice that it may impose under this Act in relation to a locally registered foreign lawyer.
- (2) Also, an interstate-registered foreign lawyer's right to practise foreign law in this jurisdiction is subject to any condition imposed by or under an applicable legal profession rule.
- (3) Conditions imposed under or referred to in this section must not be more onerous than conditions applying to locally registered foreign lawyers in the same or similar circumstances.
- (4) A notice under this section must include an information notice about the decision to impose a condition.

**Division 11 Miscellaneous**

**231 Consideration and investigation of applicants and locally registered foreign lawyers**

- (1) To help it consider whether or not to grant, renew, suspend or cancel registration under this Part, or impose conditions on a person's registration under this Part, the domestic registration authority may, by notice to the applicant or locally registered foreign lawyer, require the applicant or locally registered foreign lawyer:
  - (a) to give it specified documents or information, or
  - (b) to co-operate with any inquiries that it considers appropriate.

- (2) A failure to comply with a notice under subsection (1) by the date specified in the notice and in the way required by the notice is a ground for making an adverse decision in relation to the action being considered by the domestic registration authority.

**232 Register of locally registered foreign lawyers**

- (1) The domestic registration authority must keep a register of the names of locally registered foreign lawyers.
- (2) The register must:
  - (a) state the conditions (if any) imposed on a foreign lawyer's registration, and
  - (b) include other particulars prescribed by the regulations.
- (3) The register may be kept in the way the domestic registration authority decides.
- (4) The register must be available for inspection, without charge, at the domestic registration authority's office during normal business hours.

**233 Publication of information about locally registered foreign lawyers**

The domestic registration authority may publish, in circumstances that it considers appropriate, the names of persons registered by it as foreign lawyers under this Part and any relevant particulars concerning those persons.

**234 Supreme Court orders about conditions**

- (1) The domestic registration authority may apply to the Supreme Court for an order or injunction that an Australian-registered foreign lawyer not contravene a condition imposed under this Part.
- (2) No undertaking as to damages or costs is required.
- (3) The Supreme Court may grant an order or injunction in such terms as it considers appropriate, and make any order it considers appropriate, on the application.
- (4) This section does not affect the generality of section 720 (Injunctions).

**235 Exemption by domestic registration authority**

- (1) The domestic registration authority may exempt an Australian-registered foreign lawyer or class of Australian-registered foreign lawyers from compliance with a specified provision of this Act

Clause 235	Legal Profession Bill 2004
Chapter 2	General requirements for engaging in legal practice
Part 2.7	Legal practice by foreign lawyers

or the regulations, or from compliance with a specified rule or part of a rule that would otherwise apply to the foreign lawyer or class of foreign lawyers.

- (2) An exemption may be granted unconditionally or subject to conditions specified in writing.
- (3) The domestic registration authority may revoke or vary any conditions imposed under this section or impose new conditions.

#### **236 Membership of professional association**

An Australian-registered foreign lawyer is not required to join (but may, if eligible, join) any professional association.

#### **237 Refund of fees**

- (1) The regulations may provide for the refund of a portion of a fee paid in respect of registration as a foreign lawyer if it is suspended or cancelled during its currency.
- (2) Without limiting subsection (1), the regulations may specify:
  - (a) the circumstances in which a refund is to be made, and
  - (b) the amount of the refund or the manner in which the amount of the refund is to be determined.

#### **238 Appeals or reviews**

- (1) If the domestic registration authority:
  - (a) refuses to grant or renew the registration of a person as a foreign lawyer, or
  - (b) amends, suspends or cancels a person's registration as a foreign lawyer, or
  - (c) takes any action under Divisions 3 and 4 of Part 3.1,
 the foreign lawyer may appeal to the Supreme Court against the refusal, amendment, suspension, cancellation or action.
- (2) The Supreme Court may make such an order in the matter as it thinks fit.

#### **239 Joint rules**

Practice as a locally registered foreign lawyer is subject to the legal profession rules that apply to locally registered foreign lawyers.

## Part 2.8 Community legal centres

### 240 Community legal centres

- (1) An organisation, whether incorporated or not, is a *complying community legal centre* for the purposes of this Act if:
- (a) it is held out or holds itself out as being a community legal centre (or a centre or establishment of a similar description), and
  - (b) it provides legal services:
    - (i) that are directed generally to persons or organisations that lack the financial means to obtain privately funded legal services or whose cases are expected to raise issues of public interest or are of general concern to disadvantaged groups in the community, and
    - (ii) that are made available to persons or organisations that have a special need arising from their location or the nature of the legal matter to be addressed or have a significant physical or social disability, and
    - (iii) that are not intended, or likely, to be provided at a profit to the community legal centre and the income (if any) from which cannot or will not be distributed to any member or employee of the centre otherwise than by way of reasonable remuneration under a contract of service or for services, and
    - (iv) that are funded or expected to be funded to a significant level by donations or by grants from government, charitable or other organisations, and
  - (c) at least one of the persons who is employed or otherwise used by it to provide those legal services is an Australian legal practitioner and is generally responsible for the provision of those legal services (whether or not the person has an unrestricted practising certificate).
- (2) A complying community legal centre does not contravene this Act merely because:
- (a) it employs, or otherwise uses the services of, Australian legal practitioners to provide legal services to members of the public, or



- (b) it has a contractual relationship with a member of the public to whom those legal services are provided or receives any fee, gain or reward for providing those legal services, or
  - (c) it shares with an Australian legal practitioner employed or otherwise used by it to provide those legal services receipts, revenue or other income arising from the business of the centre, being business of a kind usually conducted by an Australian legal practitioner, or
  - (d) it adopts or uses the word “legal” or a name, description or title specified in regulations under section 16 (or some related term) in its name or any registered business name under which it provides legal services to members of the public.
- (3) This section has effect despite anything to the contrary in this Act.
- (4) The regulations may make provision for or with respect to:
- (a) the application (with or without specified modifications) of provisions of this Act to complying community legal centres, and
  - (b) the legal services provided by complying community legal centres or officers or employees of, or persons whose services are used by, complying community legal centres.
- (5) A regulation may provide that a breach of the regulations is capable of being unsatisfactory professional conduct or professional misconduct by, in the case of a complying community legal centre, an Australian legal practitioner responsible for the breach.

#### **241 Application of legal profession rules**

Legal profession rules, so far as they apply to Australian legal practitioners, also apply to Australian legal practitioners who are officers or employees of, or whose services are used by, a complying community legal centre, unless the rules otherwise provide.

## Chapter 3 Conduct of legal practice

### Part 3.1 Trust money and trust accounts

#### Division 1 Preliminary

##### 242 Purposes

The purposes of this Part are as follows:

- (a) to ensure trust money is held by law practices in a way that protects the interests of persons for or on whose behalf money is held, both inside and outside this jurisdiction,
- (b) to minimise compliance requirements for law practices that provide legal services within and outside this jurisdiction,
- (c) to ensure the Law Society Council can work effectively with corresponding authorities in other jurisdictions in relation to the regulation of trust money and trust accounts.

##### 243 Definitions

(1) In this Part:

***approved ADI*** means an ADI approved under section 280 (Approval of ADIs) by the Law Society Council.

***controlled money*** means trust money received by a law practice in respect of which there is a written direction to deposit the money in an account (other than a general trust account) over which the practice has or will have exclusive control.

**Note.** See section 256 (6) (Controlled money), which prevents pooling of controlled money.

***controlled money account*** means an account maintained by a law practice with an approved ADI for the holding of controlled money received by the practice.

***external examination*** means an external examination under Division 4 of Part 3.1 of a law practice's trust records.

***external examiner*** means a person holding an appointment as an external examiner under Division 4 of Part 3.1.

**general trust account** means an account maintained by a law practice with an approved ADI for the holding of trust money received by the practice, other than controlled money or transit money.

**investigation** means an investigation under Division 3 of Part 3.1 of the affairs of a law practice.

**investigator** means a person holding an appointment as an investigator under Division 3 of Part 3.1.

**permanent form**, in relation to a trust record, means printed or, on request, capable of being printed, in English on paper or other material.

**power** includes authority.

**transit money** means money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice.

**trust account** means an account maintained by a law practice with an approved ADI to hold trust money.

**trust money** means money received in the course of or in connection with the provision of legal services by a law practice for or on behalf of another person, and includes:

- (a) money received on account of legal costs in advance of providing the services, and
- (b) controlled money, and
- (c) transit money, and
- (d) money controlled by a law practice (or by an associate, alone or with another associate), pursuant to a power to deal with money for or on behalf of another person that is:
  - (i) exercisable by the practice (or by an associate alone or with another associate), or
  - (ii) exercisable jointly and severally with the person or a nominee or nominees of the person,

but does not include money to which section 244 applies.

**trust records** includes the following documents:

- (a) receipts,
- (b) cheque butts or cheque requisitions,
- (c) records of authorities to withdraw by electronic funds transfer,
- (d) duplicate deposit slips,

- (e) trust account ADI statements,
- (f) trust account receipts and payments cash books,
- (g) trust ledger accounts,
- (h) records of monthly trial balances,
- (i) records of monthly reconciliations,
- (j) trust transfer journals,
- (k) statements of account as required to be furnished under the regulations,
- (l) registers required to be kept under the regulations,
- (m) monthly statements required to be kept under the regulations,
- (n) files relating to trust transactions or bills of costs or both,
- (o) written directions, authorities or other documents required to be kept under this Act or the regulations,
- (p) supporting information required to be kept under the regulations in relation to powers to deal with trust money.

*Trustees* means the Trustees of the Public Purpose Fund.

- (2) A reference in this Part to a law practice's trust account or trust records includes a reference to an associate's trust account or trust records.

#### **244 Money involved in financial services or investments**

- (1) Money that is entrusted to or held by a law practice for or in connection with:
- (a) a financial service provided by the practice or an associate of the practice in circumstances where the practice or associate is required to hold an Australian financial services licence covering the provision of the service (whether or not such a licence is held at any relevant time), or
  - (b) a financial service provided by the practice or an associate of the practice in circumstances where the practice or associate provides the service as a representative of another person who carries on a financial services business (whether or not the practice or associate is an authorised representative at any relevant time),

is not trust money for the purposes of this Act.

- (2) Without limiting subsection (1), money that is entrusted to or held by a law practice for or in connection with:
- (a) a managed investment scheme, or
  - (b) mortgage financing,
- undertaken by the practice is not trust money for the purposes of this Act.
- (3) Without limiting subsections (1) and (2), money that is entrusted to or held by a law practice for investment purposes, whether on its own account or as agent, is not trust money for the purposes of this Act, unless:
- (a) the money or property was entrusted to or held by the practice:
    - (i) in the ordinary course of legal practice, and
    - (ii) primarily in connection with the provision of legal services to or at the direction of the client, and
  - (b) the investment is or is to be made:
    - (i) in the ordinary course of legal practice, and
    - (ii) for the ancillary purpose of maintaining or enhancing the value of the money or property pending completion of the matter or further stages of the matter or pending payment or delivery of the money or property to or at the direction of the client.
- (4) In this section:
- Australian financial services licence, authorised representative, financial service* and *financial services business* have the same meanings as in Chapter 7 of the *Corporations Act 2001* of the Commonwealth.

#### **245 Determinations about status of money**

- (1) This section applies to money received by a law practice if the Law Society Council considers that there is doubt or a dispute as to whether the money is trust money.
- (2) The Council may determine that the money is or is not trust money.
- (3) The Council may revoke or modify a determination under this section.
- (4) While a determination under this section is in force that money is trust money, the money is taken to be trust money for the purposes of this Act.

- (5) While a determination under this section is in force that money is not trust money, the money is taken not to be trust money for the purposes of this Act.
- (6) This section has effect subject to a decision of a court or administrative review body made in relation to the money concerned.

**Note.** Section 298 requires notice to be given to a client when money entrusted to a law practice is not trust money because of a determination under this section.

#### **246 Application of Part to law practices and trust money**

(1) **Trust money received in this jurisdiction**

This Part applies to the following law practices in respect of trust money received by them in this jurisdiction:

- (a) a law practice that has an office in this jurisdiction, whether or not the practice has an office in another jurisdiction,
- (b) a law practice that does not have an office in any jurisdiction at all.

**Note.** It is intended that a law practice that receives trust money in this jurisdiction, that does not have an office in this jurisdiction, but that has an office in another jurisdiction, must deal with the money in accordance with the corresponding law of the other jurisdiction.

(2) **Trust money received in another jurisdiction**

This Part applies to the following law practices in respect of trust money received by them in another jurisdiction:

- (a) a law practice that has an office in this jurisdiction and in no other jurisdiction,
- (b) a law practice that has an office in this jurisdiction and in one or more other jurisdictions but not in the jurisdiction in which the trust money was received, unless the money is dealt with in accordance with the corresponding law of another jurisdiction.

(3) **Exclusions**

However, this Part does not apply to:

- (a) prescribed law practices or classes of law practices, or
- (b) prescribed law practices or classes of law practices in prescribed circumstances, or
- (c) prescribed kinds of trust money, or
- (d) prescribed kinds of trust money in prescribed circumstances.

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- (4) **Money received for costs not trust money**  
 Money received in the course of or in connection with the provision of legal services by a law practice for or on behalf of another person for the payment of costs due to the practice (including costs that have been awarded by a court, tribunal or other body that has power to award costs), is not trust money for the purposes of this Act.
- (5) **Meaning of having an office in a jurisdiction**  
 A reference in this section to having an office in a jurisdiction is a reference to having, or engaging in legal practice from, an office or business address in the jurisdiction.
- Note.** Section 195 (Trust money and trust accounts) applies this Part to Australian-registered foreign lawyers.

#### **247 Protocols for determining where trust money is received**

- (1) The Law Society Council may enter into arrangements (referred to in this Part as *protocols*) with corresponding authorities about any or all of the following:
- determining the jurisdiction where a law practice receives trust money,
  - sharing information about whether, and (if so) how, trust money is being dealt with under this Act or a corresponding law.
- (2) For the purposes of this Act, to the extent that the protocols are relevant, the jurisdiction where a law practice receives trust money is to be determined in accordance with the protocols.
- (3) The Law Society Council may enter into arrangements that amend, revoke or replace a protocol.
- (4) A protocol does not have effect in this jurisdiction unless it is embodied or identified in the regulations.

#### **248 When money is received**

- (1) For the purposes of this Act, a law practice receives money when:
- the practice obtains possession or control of it directly, or
  - the practice obtains possession or control of it indirectly as a result of its delivery to an associate, or

- (c) the practice is given a power enabling the practice to deal with it whether alone or with an associate or jointly with another person, or
  - (d) an associate is given a power enabling the associate to deal with it, on behalf of the practice, whether alone or with another associate or jointly with another person.
- (2) For the purposes of this Act, a law practice or associate is taken to have received money if the money is available to the practice or associate by means of an instrument or other way of authorising an ADI to credit or debit an amount to an account with the ADI, including, for example, an electronic funds transfer, credit card transaction or telegraphic transfer.

**249 Discharge by legal practitioner associate of obligations of law practice**

- (1) The following actions, if taken by a legal practitioner associate of a law practice on behalf of the practice in relation to trust money received by the practice, discharge the corresponding obligations of the practice in relation to the money:
- (a) the establishment of a trust account,
  - (b) the maintenance of a trust account,
  - (c) the payment of trust money into and out of a trust account and other dealings with trust money,
  - (d) the maintenance of trust records,
  - (e) engaging an external examiner to examine trust records,
  - (f) the payment of an amount into an ADI account as referred to in section 283 (Statutory deposits),
  - (g) an action of a kind prescribed by the regulations.
- (2) If the legal practitioner associate maintains a trust account in relation to trust money received by the law practice, the provisions of this Part and the regulations made for the purposes of this Part apply to the associate in the same way as they apply to a law practice.
- (3) Subsection (1) does not apply to the extent that the associate is prevented by the regulations from taking any action referred to in that subsection.



Clause 250	Legal Profession Bill 2004
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### **250 Liability of principals of law practice**

- (1) A provision of this Part or the regulations made for the purposes of this Part expressed as imposing an obligation on a law practice imposes the same obligation on the principals of the law practice jointly and severally, but discharge of the practice's obligation also discharges the corresponding obligation imposed on the principals.
- (2) Accordingly, references in this Part and the regulations made for the purposes of this Part to a law practice include references to the principals of the law practice.

### **251 Former practices, principals and associates**

This Part applies in relation to former law practices and former principals and associates of law practices in relation to conduct occurring while they were respectively law practices, principals and associates in the same way as it applies to law practices, principals and associates, and so applies with any necessary modifications.

### **252 Barristers receiving money on behalf of other persons**

- (1) A barrister is not, in the course of practising as a barrister, to receive money on behalf of another person unless authorised under this section.
- (2) The regulations may authorise a barrister to do so. For that purpose, the regulations may apply to barristers any of the provisions of this Part or make other provision relating to the matter.

## **Division 2 Trust accounts and trust money**

### **253 Maintenance of general trust account**

- (1) A law practice that receives trust money to which this Part applies must maintain a general trust account in this jurisdiction.  
Maximum penalty: 100 penalty units.
- (2) A law practice that is required to maintain a general trust account in this jurisdiction must establish and maintain the account in accordance with the regulations.  
Maximum penalty: 100 penalty units.

- (3) Subsection (1) does not apply to a law practice in respect of any period during which the practice receives only controlled money or transit money (or both), except where it is received in the form of cash.
- (4) Subject to any requirements of the regulations, a requirement of this section for a law practice to maintain, or establish and maintain, a general trust account in this jurisdiction does not prevent the practice from maintaining, or establishing and maintaining, more than one general trust account in this jurisdiction, whether during the same period or during different periods.
- (5) Without limiting the other provisions of this section, the regulations may provide that a law practice must not close a general trust account except as permitted by the regulations, either generally or in any prescribed circumstances.

**254 Certain trust money to be deposited in general trust account**

- (1) As soon as practicable after receiving trust money, a law practice must deposit the money in a general trust account of the practice unless:
  - (a) the practice has a written direction by an appropriate person to deal with it otherwise than by depositing it in the account, or
  - (b) the money is controlled money, or
  - (c) the money is transit money, or
  - (d) the money is to be dealt with under a power to receive or disburse money for or on behalf of another person exercisable jointly and severally with the other person or a nominee of the other person.

Maximum penalty: 100 penalty units.

- (2) A law practice that has received money that is the subject of a written direction mentioned in subsection (1) (a) must deal with the money in accordance with the direction:
  - (a) within the period (if any) specified in the direction, or
  - (b) subject to paragraph (a), as soon as practicable after it is received.

Maximum penalty: 100 penalty units.

- (3) The law practice must keep a written direction mentioned in subsection (1) (a) for the period prescribed by the regulations.

Maximum penalty: 50 penalty units.

- (4) Paragraphs (a) to (d) of subsection (1) do not apply to cash.
- (5) A person is an *appropriate person* for the purposes of this section if the person is legally entitled to give the law practice directions in respect of dealings with the trust money.

**255 Holding, disbursing and accounting for trust money**

- (1) A law practice must:
  - (a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received, and
  - (b) disburse the trust money only in accordance with a direction given by the person.

Maximum penalty: 50 penalty units.

- (2) Subsection (1) applies subject to an order of a court of competent jurisdiction or as authorised by law.
- (3) The law practice must account for the trust money as required by the regulations.

Maximum penalty: 50 penalty units.

**256 Controlled money**

- (1) As soon as practicable after receiving controlled money, a law practice must deposit the money in the account specified in the written direction relating to the money.

Maximum penalty: 50 penalty units.

- (2) The law practice must hold controlled money deposited in a controlled money account in accordance with subsection (1) exclusively for the person on whose behalf it was received.

Maximum penalty: 50 penalty units.

- (3) The law practice that holds controlled money deposited in a controlled money account in accordance with subsection (1) must not disburse the money except in accordance with:

- (a) the written direction mentioned in that subsection, or
- (b) a later written direction given by or on behalf of the person on whose behalf the money was received.

Maximum penalty: 50 penalty units.

- (4) The law practice must maintain the controlled money account, and account for the controlled money, as required by the regulations.  
Maximum penalty: 50 penalty units.
- (5) The law practice must keep a written direction mentioned in this section for the period prescribed by the regulations.  
Maximum penalty: 50 penalty units.
- (6) The law practice must ensure that the controlled money account is used for the deposit of controlled money received on behalf of the person referred to in subsection (2), and not for the deposit of controlled money received on behalf of any other person, except to the extent that the regulations otherwise permit.  
Maximum penalty: 50 penalty units.
- (7) Subsection (3) applies subject to an order of a court of competent jurisdiction or as authorised by law.

**257 Transit money**

- (1) A law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money:
  - (a) within the period (if any) specified in the instructions, or
  - (b) subject to paragraph (a), as soon as practicable after it is received.Maximum penalty: 50 penalty units.
- (2) The law practice must account for the money as required by the regulations.  
Maximum penalty: 50 penalty units.

**258 Trust money subject to specific powers**

- (1) A law practice that exercises a power to deal with trust money must deal with the money only in accordance with the power relating to the money.  
Maximum penalty: 50 penalty units.
- (2) The law practice must account for the money as required by the regulations.  
Maximum penalty: 50 penalty units.

Clause 259	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
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**259 Protection of trust money**

- (1) Money standing to the credit of a trust account maintained by a law practice is not available for the payment of debts of the practice or any of its associates.
- (2) Money standing to the credit of a trust account maintained by a law practice is not liable to be attached or taken in execution for satisfying a judgment against the practice or any of its associates.
- (3) This section does not apply to money to which a law practice or associate is entitled.

**260 Intermixing money**

A law practice must not, otherwise than as allowed by the regulations, mix trust money with other money.

Maximum penalty: 100 penalty units.

**261 Dealing with trust money: legal costs and unclaimed money**

- (1) A law practice may do any of the following, in relation to trust money held in a general trust account or controlled money account of the practice for a person:
  - (a) exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the practitioner,
  - (b) withdraw money for payment to the practice's account for legal costs owing to the practice if the procedure prescribed in the regulations is complied with,
  - (c) after deducting any legal costs properly owing to the practice, deal with the balance as unclaimed money under section 266 (Unclaimed money).
- (2) Subsection (1) applies despite any other provision of this Part but has effect subject to Part 3.2 (Costs disclosure and assessment).

**262 Deficiency in trust account**

- (1) An Australian legal practitioner is guilty of an offence if he or she, without reasonable excuse, causes:
  - (a) a deficiency in any trust account or trust ledger account, or

(b) a failure to pay or deliver any trust money.

Maximum penalty: 200 penalty units.

(2) A reference in subsection (1) to an account includes a reference to an account of the practitioner or of the law practice of which the practitioner is an associate.

(3) In this section:

*cause* includes be responsible for.

*deficiency* in a trust account or trust ledger account includes the non-inclusion or exclusion of the whole or any part of an amount that is required to be included in the account.

### **263 Reporting certain irregularities and suspected irregularities**

(1) As soon as practicable after a legal practitioner associate of a law practice becomes aware that there is an irregularity in any of the practice's trust accounts or trust ledger accounts, the associate must give written notice of the irregularity to:

(a) the Law Society Council, and

(b) if a corresponding authority is responsible for the regulation of the accounts concerned—the corresponding authority.

Maximum penalty: 50 penalty units.

(2) If an Australian legal practitioner believes on reasonable grounds that there is an irregularity in connection with the receipt, recording or disbursement of any trust money received by a law practice of which the practitioner is not a legal practitioner associate, the practitioner must, as soon as practicable after forming the belief, give written notice of it to:

(a) the Law Society Council, and

(b) if a corresponding authority is responsible for the regulation of the accounts relating to the trust money concerned—the corresponding authority.

Maximum penalty: 50 penalty units.

(3) An Australian legal practitioner is not liable for any loss or damage suffered by another person as a result of the practitioner's compliance with subsection (1) or (2).

**264 Keeping trust records**

- (1) A law practice must keep in permanent form trust records in relation to trust money received by the practice.

Maximum penalty: 100 penalty units.

- (2) The law practice must keep the trust records:
- (a) in accordance with the regulations, and
  - (b) in a way that at all times discloses the true position in relation to trust money received for or on behalf of any person, and
  - (c) in a way that enables the trust records to be conveniently and properly investigated or externally examined, and
  - (d) for a period determined in accordance with the regulations.

Maximum penalty: 100 penalty units.

**265 False names**

- (1) A law practice must not knowingly receive money or record receipt of money in the practice's trust records under a false name.

Maximum penalty: 100 penalty units.

- (2) If a person on whose behalf trust money is received by a law practice is commonly known by more than one name, the practice must ensure that the practice's trust records record all names by which the person is known.

Maximum penalty: 100 penalty units.

**266 Unclaimed money**

- (1) If a law practice holding money in a trust account cannot find the person on whose behalf the money is held or a person authorised to receive it, the practice may:

- (a) pay the money to the Treasurer for credit to the Consolidated Fund, and
- (b) provide the Treasurer with such information as the Treasurer requires in relation to the money and the person on whose behalf the money was held by the practice.

- (2) If a law practice pays money to the Treasurer under subsection (1), the practice is relieved from any further liability in relation to the money.

- (3) The Treasurer must pay money deposited under this section to a person who satisfies the Treasurer as to his or her entitlement to the money.
- (4) Payment of money to a person under subsection (3):
  - (a) discharges the Crown and the Treasurer from any liability in relation to the money, and
  - (b) does not discharge the person from any liability to another person who establishes a right to the money.
- (5) The Treasurer may require any person to provide information that the person has, or can obtain, about the entitlement of a person to money paid to the Treasurer under this section and attempts made to locate the person.
- (6) A person of whom a requirement is made under subsection (5):
  - (a) must comply with the requirement, and
  - (b) must not, in purported compliance with the requirement, give information that he or she knows is false or misleading in a material particular.

Maximum penalty (subsection (6)): 20 penalty units.

### **Division 3      Investigations**

#### **267    Appointment of investigators**

- (1) The Law Society Council may, in writing, appoint a suitably qualified person to investigate the affairs or specified affairs of a law practice.
- (2) The appointment may be made generally or for the law practice specified in the instrument of appointment.
- (3) An investigator may, with the approval of the Law Society Council, appoint an assistant.

#### **268    Investigations**

- (1) The instrument of appointment may authorise the investigator to conduct either or both of the following:
  - (a) routine investigations on a regular or other basis,
  - (b) investigations in relation to particular allegations or suspicions regarding trust money, trust property, trust accounts or any other aspect of the affairs of the law practice.



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- (2) The principal purposes of an investigation are to ascertain whether the law practice has complied with or is complying with the requirements of this Part and the regulations under this Part and to detect and prevent fraud or defalcation, but this subsection does not limit the scope of the investigation or the powers of the investigator.

**269 Application of Chapter 6**

Chapter 6 (Provisions relating to investigations) applies to an investigation under this Division.

**270 Investigator's report**

As soon as practicable after completing the investigation, the investigator must give a written report of the investigation to the Law Society Council.

**271 When costs of investigation are debt**

- (1) The Law Society Council may decide that the whole or part of the costs of carrying out an investigation is payable to the Law Society and may specify the amount payable.
- (2) The amount specified by the Law Society Council is a debt owing to the Law Society by the law practice whose affairs are under investigation, if:
- (a) the investigator states in his or her report that there is evidence a breach of this Act or the regulations has been committed or that fraud or defalcation has been detected, and
  - (b) the Council is satisfied the breach is wilful or of a substantial nature.

**Division 4 External examinations**

**272 Designation of external examiners**

- (1) The Law Society Council may, in writing, designate persons (referred to in this Division as *designated persons*) as being eligible to be appointed as external examiners.
- (2) Only designated persons may be appointed as external examiners.
- (3) A person appointed as an external examiner may, with the approval of the Law Society Council, appoint an assistant.

- (4) An employee or agent of the Law Society may be a designated person.
- (5) The Law Society Council may revoke a person's designation under this section.

**273 Designation and appointment of associates as external examiners**

- (1) The Law Society Council may designate an associate of a law practice under this Division only if the Council is satisfied that it is appropriate to do so.
- (2) However, an associate of a law practice cannot be appointed as an external examiner under this Division to examine any trust records of a law practice of which he or she is an associate.

**274 Law practice must have trust records externally examined**

- (1) A law practice must at least once in each financial year have its trust records externally examined by an external examiner appointed in accordance with the regulations.  
Maximum penalty: 100 penalty units.
- (2) The Law Society Council must ensure each law practice's trust records are externally examined as required by this section.
- (3) If the Law Society Council is satisfied a law practice has not had the practice's trust records externally examined as required by this section or that an external examination of the practice's trust records has not been carried out in accordance with the regulations, the Council may appoint an external examiner to examine the practice's trust records.

**275 Final examination of trust records**

- (1) This section applies if a law practice:
  - (a) ceases to be authorised to receive trust money, or
  - (b) ceases to engage in legal practice in this jurisdiction.
- (2) The law practice must appoint an external examiner to examine the practice's trust records:
  - (a) in respect of the period since an external examination was last conducted, and

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- (b) in respect of each period thereafter, comprising a completed period of 12 months or any remaining partly completed period, during which the practice continued to hold trust money.

Maximum penalty: 50 penalty units.

- (3) The law practice must lodge with the Law Society:
  - (a) a report of each examination under subsection (2) within 60 days after the end of the period to which the examination relates, and
  - (b) a statutory declaration in the prescribed form within 60 days of ceasing to hold trust money.

Maximum penalty: 20 penalty units.

- (4) The law practice must ensure that, within 12 months after the law practice ceases to be authorised to receive trust money or ceases to engage in legal practice in this jurisdiction:
  - (a) any general trust account maintained by the law practice in this jurisdiction is closed, and
  - (b) trust money held in any such account is dealt with as required by this Act and the regulations (such as by being disbursed in accordance with a direction given by the person on whose behalf it was received).
- (5) If an Australian legal practitioner dies, the practitioner's legal personal representative must comply with this section as if the representative were the practitioner.
- (6) Nothing in this section affects any other requirements under this Part.

#### **276 Examination of affairs in connection with examination of trust records**

- (1) An external examiner appointed to examine a law practice's trust records may examine the affairs of the practice for the purposes of and in connection with an examination of the trust records.
- (2) If the law practice is an incorporated legal practice or multi-disciplinary partnership, the reference in subsection (1) to the affairs of the law practice extends to the affairs of the incorporated legal practice or multi-disciplinary partnership or of an associate, so far as they are relevant to trust money, trust records and associated matters.

- (3) A reference in this Division and Chapter 6 (Provisions relating to investigations) to *trust records* includes a reference to the affairs of a law practice that may be examined under this section for the purposes of and in connection with an examination of the practice's trust records.

#### **277 Carrying out examination**

- (1) Chapter 6 (Provisions relating to investigations) applies to an external examination under this Division.
- (2) Subject to Chapter 6, an external examination of trust records is to be carried out in accordance with the regulations.
- (3) Without limiting subsection (2), the regulations may provide for the following:
  - (a) the standards to be adopted and the procedures to be followed by external examiners,
  - (b) the form and content of an external examiner's report on an examination.

#### **278 External examiner's report**

- (1) As soon as practicable after completing an external examination, an external examiner must give a written report of the examination to the Law Society.
- (2) The examiner must not disclose information in the report or acquired in carrying out the examination, unless permitted to do so under subsection (3) or under section 677 (Permitted disclosure of confidential information obtained in course of investigation, examination or audit).

Maximum penalty: 20 penalty units.
- (3) The examiner may disclose information in the report or acquired in carrying out the examination:
  - (a) as is necessary for properly conducting the examination and making the report of the examination, or
  - (b) to an investigator or a supervisor, manager or receiver appointed under this Act, or
  - (c) if the law practice is an incorporated legal practice—to a receiver, receiver and manager, liquidator (including a provisional liquidator), controller, administrator or deed

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administrator appointed for the practice under the *Corporations Act 2001* of the Commonwealth, or

- (d) to the law practice concerned or an associate of the law practice.

**279 Law practice liable for costs of examination**

- (1) A law practice whose trust accounts have been externally examined must pay the costs of the examination.
- (2) If the Law Society Council appointed the external examiner to carry out the examination, the Council may specify the amount payable as the costs of the examination, and the specified amount is a debt payable to it by the law practice.

**Division 5 Provisions relating to ADIs**

**280 Approval of ADIs**

- (1) The Law Society Council may approve ADIs at which trust accounts to hold trust money may be maintained.
- (2) The Law Society Council may impose conditions, of the kinds prescribed by the regulations, on an approval under this section, when the approval is given or during the currency of the approval, and may amend or revoke any conditions imposed.
- (3) The Law Society Council may revoke an approval given under this section.

**281 ADI not subject to certain obligations and liabilities**

- (1) An ADI at which a trust account is maintained by a law practice:
  - (a) is not under any obligation to control or supervise transactions in relation to the account or to see to the application of money disbursed from the account, and
  - (b) does not have, in relation to any liability of the law practice to the ADI, any recourse or right (whether by way of set-off counterclaim, charge or otherwise) against money in the account.
- (2) Subsection (1) does not relieve an ADI from any liability to which it is subject apart from this Act.

**282 Reports, records and information**

- (1) An ADI at which a trust account is maintained must report any deficiency in the account to the Law Society as soon as practicable after becoming aware of the deficiency.  
Maximum penalty: 50 penalty units.
- (2) An ADI at which a trust account is maintained must report a suspected offence in relation to the trust account to the Law Society as soon as practicable after forming the suspicion.  
Maximum penalty: 50 penalty units.
- (3) An ADI must furnish to the Law Society reports about trust accounts in accordance with the regulations.  
Maximum penalty: 50 penalty units.
- (4) An ADI at which a trust account is maintained must without charge:
  - (a) produce for inspection or copying by an investigator or external examiner any records relating to the trust account or trust money deposited in the trust account, and
  - (b) provide the investigator or external examiner with full details of any transactions relating to the trust account or trust money, on demand by the investigator or external examiner and on production to the ADI of evidence of the appointment of the investigator or the external examiner in relation to the law practice concerned.Maximum penalty: 50 penalty units.
- (5) Subsections (1)–(4) apply despite any duty of confidence to the contrary.
- (6) An ADI or an officer or employee of an ADI is not liable to any action for any loss or damage suffered by another person as a result of:
  - (a) reporting a deficiency in accordance with subsection (1), or
  - (b) making or furnishing a report in accordance with subsection (2) or (3), or
  - (c) producing records or providing details in accordance with subsection (4).

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## **Division 6      Statutory deposits**

### **283    Statutory deposits**

- (1) The regulations may require a law practice to pay amounts out of a general trust account of the practice into an ADI account maintained by the Law Society.
- (2) Without limiting subsection (1), the regulations may provide for the following:
  - (a) the type of account to be maintained by the Law Society,
  - (b) the amount of the payments to be made.
- (3) All interest on the money in the account is payable to the Law Society on account of the Public Purpose Fund.
- (4) This section applies despite any other provision of this Part.

### **284    Status and repayment of deposited money**

- (1) Money paid under section 283 (Statutory deposits) into an ADI account maintained by the Law Society:
  - (a) is held by the Law Society in trust for the law practice depositing the money, and
  - (b) is repayable on demand.
- (2) Subsection (1) does not excuse a failure to comply with section 283 (Statutory deposits).
- (3) Until repaid, money deposited under section 283 (Statutory deposits) may be invested by the Law Society:
  - (a) in accordance with Division 2 of Part 2 of the *Trustee Act 1925* as if the money were trust funds, or
  - (b) on deposit with the Treasurer, or
  - (c) in an account with any ADI.
- (4) All interest on investments made under this section is payable to the Law Society on account of the Public Purpose Fund.

## **Division 7      Public Purpose Fund**

### **285    Public Purpose Fund**

- (1) There is to be established a fund called the “Public Purpose Fund”.
- (2) The following amounts are to be paid to the credit of the Fund:
  - (a) interest payable to the Law Society on account of the Public Purposes Fund under section 283 (Statutory deposits), section 284 (Status and repayment of deposited money) and section 288 (Agreements relating to payment of interest on general trust accounts),
  - (b) such other amounts as are payable to the Fund by or under this Act.

### **286    Trustees of Public Purpose Fund**

- (1) There are to be Trustees of the Public Purpose Fund.
- (2) The Trustees consist of:
  - (a) 3 persons appointed by the Attorney General, of whom:
    - (i) 2 are to be members of the Law Society Council nominated by the President of the Law Society, and
    - (ii) 1 is to be a person whom the Attorney General considers to have appropriate qualifications and experience to act as a trustee, and
  - (b) the Director-General.
- (3) Schedule 4 has effect with respect to the Trustees.

### **287    Management and control of Fund**

- (1) The Trustees are to manage and control the Public Purpose Fund.
- (2) The Trustees may invest any amount standing to the credit of the Fund in accordance with Division 2 of Part 2 of the *Trustee Act 1925* as if the money were trust funds.
- (3) The Trustees may enter into any agreement or arrangement with a person or body under which:
  - (a) the person or body provides the Trustees with advice concerning the investment of any amount standing to the credit of the Fund, or



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- (b) the person or body agrees to invest any such amount on behalf of the Trustees.
- (4) The Law Society is to administer the Fund on behalf of, and in accordance with the directions of, the Trustees.

**288 Agreements relating to payment of interest on general trust accounts**

- (1) All interest on money in any general trust account at an ADI is payable to the Law Society on account of the Public Purpose Fund.
- (2) The Trustees may enter into an agreement with an ADI relating to the manner of payment to the Public Purpose Fund of interest on money in any such trust account at the ADI.

**289 Payments from Fund**

- (1) The Trustees are to pay from the Public Purpose Fund the following:
  - (a) any amounts payable from the Fund for a purpose referred to in section 290 (Payment of certain costs and expenses from Fund), in accordance with the approval of the Director-General under that section,
  - (b) any amounts that the Trustees, with the concurrence of the Attorney General, determine should be paid from the Fund for a purpose referred to in section 292 (Discretionary payments from Fund for other purposes),
  - (c) any amounts required to be paid from the Fund in accordance with an order of the Tribunal under section 566 (3) (Costs),
  - (d) any costs or expenses incurred in collecting the interest payable to the Fund and in the management or administration of the Fund.
- (2) Payments from the Public Purpose Fund may be made from the capital or income of the Fund, at the discretion of the Trustees.
- (3) The fact that money is paid out of the Public Purpose Fund under this section does not preclude the recovery of that money in accordance with this Act from any person liable to pay the money. Any such money recovered must be paid to the credit of the Public Purpose Fund.

**290 Payment of certain costs and expenses from Fund**

- (1) Payments are to be made from the Public Purpose Fund for the purpose of meeting the following costs and expenses:
- (a) the costs of a Council in making representations, or being represented or heard, under section 30 (Entitlement to be represented, heard and make representations),
  - (b) the costs of a Council in exercising its functions under Part 2.4 (Legal practice by Australian legal practitioners), including in responding to any appeal referred to in that Part,
  - (c) the costs of a Council or the Commissioner in exercising its functions in taking action under section 107 (Orders or injunctions), 234 (Supreme Court orders about conditions) or 721 (Injunctions),
  - (d) the costs of a Council in exercising its functions under Part 2.7 (Legal practice by foreign lawyers), including in responding to any appeal referred to in that Part,
  - (e) the costs of a Council in exercising its functions under Division 3 of Part 2.2 and Parts 2.5, 2.6 and 3.4,
  - (f) the costs of the Law Society Council (including its members, employees or agents) in respect of an investigation or external examination under this Part, to the extent that such costs are not recoverable under section 271 (When costs of investigation are debt) or 279 (Law practice liable for costs of examination),
  - (g) the costs of the Advisory Council in exercising its functions for the purposes of this Act, including remuneration payable under Schedule 3 (see section 685 (Payment of costs of Advisory Council)),
  - (h) the costs of a Council in connection with an external intervention in relation to a law practice (including costs in connection with an application under section 630 or an appeal under section 649) and any fees, costs and expenses payable from the Fund under section 653 (Fees, legal costs and expenses),
  - (i) the costs of the Commissioner in exercising functions under Division 7 of Part 2.4,
  - (j) the costs of the Commissioner or the Tribunal in relation to the administration of Chapter 4, as provided for in section 607 (Costs of administering Part),

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- (k) the costs of a Council in exercising its functions for the purposes of Chapter 4 (Complaints and discipline),
  - (l) the costs of a Council in relation to any proceedings in or on appeal from the Supreme Court with respect to the discipline of an Australian legal practitioner or an Australian-registered foreign lawyer, including in relation to proceedings concerning the inherent jurisdiction and powers of the Supreme Court as referred to in section 590 (Jurisdiction of Supreme Court),
  - (m) the costs of a Council or the Commissioner in connection with the provision of mediators for the mediation of consumer disputes under Chapter 4,
  - (n) the costs of the costs assessors' rules committee in exercising its functions for the purposes of this Act (see section 394 (Rules of procedure for applications).
- (2) Such payments are to be made by the Trustees in accordance with the approval of the Director-General.
  - (3) The Director-General is to approve the payment from the Fund of such amounts as the Director-General considers necessary for the purpose of meeting any reasonable costs and expenses referred to in subsection (1), having regard to any budget submitted under section 291 (Submission of budgets to Director-General).
  - (4) An approval is subject to such conditions as the Director-General specifies in the approval.
  - (5) Payments under this section are to be made in advance of the relevant cost or expense.

**291 Submission of budgets to Director-General**

- (1) For the purpose of determining the amount to be paid from the Public Purpose Fund for a purpose referred to in section 290 (Payment of certain costs and expenses from Fund), the Director-General may require the beneficiary of the payment to prepare and submit a budget to the Director-General, in respect of such period as the Director-General directs, relating to the costs or expenses of the beneficiary (including projected costs and expenses).
- (2) The budget is to include such information as the Director-General directs. In particular, the Director-General may require the provision of information about the administration of the beneficiary.

- (3) The Director-General may refuse to approve a payment under section 290 if the beneficiary has failed to submit a budget as required under this section.
- (4) In this section:  
*beneficiary* of a payment means the person or body to whom or in respect of whom a payment from the Fund may be made.

**292 Discretionary payments from Fund for other purposes**

- (1) The Trustees may from time to time, with the concurrence of the Attorney General, determine that an amount is to be paid from the Public Purpose Fund for any of the following purposes:
- (a) the supplementation of any of the following funds:
    - (i) the Legal Aid Fund,
    - (ii) the Fidelity Fund,
    - (iii) the Law and Justice Foundation Fund,
  - (b) the promotion and furtherance of legal education in New South Wales,
  - (c) the advancement, improvement and extension of the legal education of members of the community,
  - (d) the conduct of research into the law, the legal system, law reform and the legal profession and into their impact on the community,
  - (e) the furtherance of law reform,
  - (f) the establishment and improvement of law libraries and the expansion of the community's access to legal information,
  - (g) the collection, assessment and dissemination of information relating to legal education, the law, the legal system, law reform, the legal profession and legal services,
  - (h) the encouragement, sponsorship or support of projects aimed at facilitating access to legal information and legal services,
  - (i) the improvement of the access of economically or socially disadvantaged people to the legal system, legal information or legal services.
- (2) The Trustees are to invite applications for payments from the Fund for the purposes referred to in this section at such intervals as the Director-General directs.

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- (3) Before making a payment from the Fund for a purpose other than the supplementation of the Legal Aid Fund, the Trustees are to consider whether adequate provision has been made from the Fund for the purpose of supplementation of the Legal Aid Fund.
- (4) The Trustees may approve the making of a payment in advance under this section, but the period with respect to which the payment is made must not exceed 3 years.
- (5) A determination of the Trustees under this section may be made only by a unanimous decision of the Trustees. A unanimous decision is a decision supported unanimously at a meeting of the Trustees at which all the Trustees for the time being are present and vote.
- (6) This section does not require the Trustees to distribute all of the income or any of the capital of the Public Purpose Fund.
- (7) In this section:

*Law and Justice Foundation Fund* means the Law and Justice Foundation Fund established under the *Law and Justice Foundation Act 2000*.

*Legal Aid Fund* means the Legal Aid Fund established under the *Legal Aid Commission Act 1979*.

### **293 Performance audits**

- (1) The Auditor-General may conduct a performance audit under Division 2A of Part 3 of the *Public Finance and Audit Act 1983* of:
  - (a) the activities of the Commissioner and the Councils for which costs and expenses may be paid from the Public Purpose Fund, and
  - (b) the present and future liability of the Fund for the payment of those costs and expenses.
- (2) The performance audit may be conducted whenever the Auditor-General considers it appropriate.
- (3) For the purposes of the performance audit, Division 2A of Part 3 of the *Public Finance and Audit Act 1983* applies as if the Attorney General were the head of the relevant authority.

**294 Information about Fund to be included in Law Society Council report**

- (1) As soon as practicable after 30 June in each year, the Trustees are to provide the Law Society Council with a report about the income and expenditure of the Public Purpose Fund for the period of 12 months ending on 30 June in that year.
- (2) The Law Society Council is to include a copy of the report of the Trustees in its annual report for the same period under section 700 (Council to submit annual report).

**Division 8 Miscellaneous provisions**

**295 Restrictions on receipt of trust money**

- (1) A law practice (other than an incorporated legal practice) must not receive trust money unless a principal holds an Australian practising certificate authorising the receipt of trust money.

Maximum penalty: 200 penalty units.

- (2) A law practice must not permit an associate of the law practice to receive trust money unless:
  - (a) the associate is an Australian legal practitioner holding an Australian practising certificate authorising the receipt of trust money, or
  - (b) the associate, as soon as practicable after receipt, pays the money into a trust account in Australia, or
  - (c) the associate, as soon as practicable after receipt, gives the money to an Australian legal practitioner who is authorised to receive trust money and that practitioner accepts the money.

Maximum penalty: 50 penalty units.

- (3) An Australian legal practitioner must not receive trust money unless:
  - (a) the practitioner holds an Australian practising certificate authorising the receipt of trust money, or
  - (b) the practitioner, as soon as practicable after receipt, pays the money into a trust account in Australia, or

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- (c) the practitioner, as soon as practicable after receipt, gives the money to another Australian legal practitioner who is authorised to receive trust money and that other practitioner accepts the money.

Maximum penalty: 200 penalty units.

**Note.** Section 252 (Barristers receiving money on behalf of other persons) provides that a barrister is not to receive money on behalf of another person unless authorised under that section.

- (4) An incorporated legal practice must not receive trust money unless:
  - (a) at least one legal practitioner director of the practice holds an Australian practising certificate authorising the receipt of trust money, or
  - (b) a person is holding an appointment under section 142 (Incorporated legal practice without legal practitioner director) in relation to the practice and the person holds an Australian practising certificate authorising the receipt of trust money, or
  - (c) the money is received during any period during which the practice:
    - (i) does not have any legal practitioner directors, and
    - (ii) is not in default of director requirements under section 142,
 so long as there was, immediately before the start of that period, at least one legal practitioner director of the practice who held an Australian practising certificate authorising the receipt of trust money.

Maximum penalty: 200 penalty units.

## **296 Application of Part to incorporated legal practices and multi-disciplinary partnerships**

- (1) The regulations may provide that specified provisions of this Part, and any other provisions of this Act or any provisions of the regulations or legal profession rules relating to trust money and trust accounts, do not apply to incorporated legal practices or multi-disciplinary partnerships or both or apply to them with specified modifications.
- (2) For the purposes of the application of the provisions of this Part, and any other provisions of this Act or any provisions of the regulations or any legal profession rules relating to trust money and trust accounts, to an incorporated legal practice or multi-disciplinary partnership:

- (a) the obligations and rights of a law practice under those provisions extend to an incorporated legal practice or multi-disciplinary partnership, but only in connection with legal services provided by the practice or partnership, and
- (b) money received by a law practice on behalf of another person includes money received by any officer or employee of the incorporated legal practice or multi-disciplinary partnership on behalf of another person in the course of providing legal services.

**297 Application of Part to community legal centres**

- (1) The regulations may provide that specified provisions of this Part, and any other provisions of this Act or any provisions of the regulations or legal profession rules relating to trust money and trust accounts, do not apply to complying community legal centres or apply to them with specified modifications.
- (2) For the purposes of the application of the provisions of this Part, and any other provisions of this Act or any provisions of the regulations or legal profession rules relating to trust money and trust accounts, to a complying community legal centre:
  - (a) the obligations and rights of an Australian legal practitioner under those provisions extend to a complying community legal centre that is a body corporate, but only in connection with legal services provided by the centre, and
  - (b) money received by an Australian legal practitioner on behalf of another person in the course of practising as an Australian legal practitioner includes money received by any officer or employee of the complying community legal centre on behalf of another person in the course of providing legal services.
- (3) In this section:  
*employee* of a complying community legal centre includes a person whose services are made use of by the community legal centre in connection with the provision of legal services by the centre.

**298 Disclosure to clients—money not received as trust money**

- (1) When money entrusted to a law practice is not trust money for the purposes of this Act because of section 244 (Money involved in financial services or investments) or because of a determination under



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section 245 (Determinations about status of money), the law practice must notify the person who entrusted the money that:

- (a) the money is not treated as trust money for the purposes of this Act and is not subject to any supervision, investigation or audit requirements of this Act, and
- (b) a claim against the Fidelity Fund under this Act cannot be made in respect of the money.

Maximum penalty: 20 penalty units.

- (2) The notification must be given to the person at the time the money is entrusted to the law practice.
- (3) Legal profession rules may make provision for or with respect to the form and manner in which notification required by this section is to be given and the contents of the notification.

### **299 Disclosure of accounts used to hold money entrusted to legal practitioners**

A law practice must in accordance with the regulations notify the appropriate Council of the details required by the regulations of each account maintained at an ADI in which the law practice or any legal practitioner associate of the law practice holds money entrusted to the law practice or legal practitioner associate, whether or not the money is trust money and whether or not section 244 (Money involved in financial services or investments) or 245 (Determinations about status of money) applies to the money.

Maximum penalty: 50 penalty units.

### **300 Regulations**

The regulations may make provision for or with respect to:

- (a) requiring legal practitioners to notify the Law Society of details about trust accounts, including details about trust account balances, or
- (b) providing exemptions, or the giving of exemptions, from all or any specified requirements of this Part in relation to trust money that is regulated by a corresponding law, or
- (c) the creation and exercise of liens over trust money.

## Part 3.2 Costs disclosure and assessment

### Division 1 Preliminary

#### 301 Purposes

The purposes of this Part are as follows:

- (a) to provide for law practices to make disclosures to clients and prospective clients regarding legal costs,
- (b) to regulate the making of costs agreements in respect of legal services, including conditional costs agreements,
- (c) to regulate the billing of costs for legal services,
- (d) to provide a mechanism for the review of legal costs and the setting aside of certain costs agreements.

#### 302 Definitions

- (1) In this Part:

**bill** means a bill of costs for providing legal services.

**business day** means a day other than a Saturday, a Sunday or a bank or public holiday.

**conditional costs agreement** means a costs agreement that provides that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate, as referred to in section 323 (Conditional costs agreements), but does not include a costs agreement to the extent to which section 324 (Conditional costs agreement involving uplift fees) or section 325 (Contingency fees are prohibited) applies.

**costs** includes fees, charges, disbursements, expenses and remuneration.

**costs agreement** means an agreement about the payment of legal costs.

**costs assessment** means an assessment of legal costs under Division 11.

**costs assessor** means a person appointed as a costs assessor under Division 11.

**disbursements** includes outlays.

***fixed costs provision*** means a determination, scale, arrangement or other provision fixing the costs or maximum costs of any legal services that is made by or under legislation.

***itemised bill*** means a bill that specifies in detail how the legal costs are made up in a way that would allow them to be assessed under Division 11.

***litigious matter*** means a matter that involves, or is likely to involve, the issue of proceedings in a court or tribunal.

**Note.** A matter is a litigious matter when proceedings are initiated or at any stage when proceedings are reasonably likely.

***lump sum bill*** means a bill that describes the legal services to which it relates and specifies the total amount of the legal costs.

- (2) In this Part, a reference to a law practice includes a reference to:
- (a) in the case of a person who was a sole practitioner when the legal services concerned were provided:
    - (i) the former sole practitioner, or
    - (ii) the executor of the will of the former sole practitioner, or
    - (iii) the trustee or administrator of the estate of the former sole practitioner, and
  - (b) subject to any other applicable arrangements:
    - (i) the persons who were the partners of a former law firm or multi-disciplinary partnership when the legal services concerned were provided, and
    - (ii) in the case of a law firm or multi-disciplinary partnership where there has been a change of partners since the legal services concerned were provided—subject to any other applicable arrangements, the firm or partnership as currently constituted, and
    - (iii) the assignee of a law practice or former law practice, and
    - (iv) the receiver of a law practice or former law practice appointed under this Act, and
  - (c) any person of a class prescribed by the regulations for the purposes of this subsection.

## **Division 2      Application of this Part**

### **303    Application of Part—first instructions rule**

This Part applies to a matter if the client first instructs the law practice in relation to the matter in this jurisdiction.

### **304    Part also applies by agreement or at client's election**

- (1) This Part applies to a matter if:
  - (a) either:
    - (i) this Part does not currently apply to the matter, or
    - (ii) it is not possible to determine the jurisdiction in which the client first instructs the law practice in relation to the matter, and
  - (b) either:
    - (i) the legal services are or will be provided wholly or primarily in this jurisdiction, or
    - (ii) the matter has a substantial connection with this jurisdiction,or both, and
  - (c) either:
    - (i) the client signs an agreement under subsection (2) (a) in respect of the matter, or
    - (ii) the client gives a notification under subsection (2) (b) in respect of the matter.
- (2) For the purposes of subsection (1) (c), the client may:
  - (a) sign a written agreement with the law practice that this Part is to apply to the matter, or
  - (b) notify the law practice in writing that the client requires this Part to apply to the matter.
- (3) A notification has no effect for the purposes of subsection (2) (b) if it is given after the period of 28 days after the law practice discloses to the client (under a corresponding law) information about the client's right to make a notification of that kind, but nothing in this subsection prevents an agreement referred to in subsection (2) (a) from coming into effect at any time.

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### **305 Displacement of Part**

- (1) This section applies if this Part applies to a matter by the operation of section 303 or 304.
- (2) This Part ceases to apply to the matter if:
  - (a) either:
    - (i) the legal services are or will be provided wholly or primarily in another jurisdiction, or
    - (ii) the matter has a substantial connection with another jurisdiction,
 or both, and
  - (b) either:
    - (i) the client signs under the corresponding law of the other jurisdiction a written agreement with the law practice that the corresponding provisions of the corresponding law apply to the matter, or
    - (ii) the client notifies under the corresponding law of the other jurisdiction (and within the time allowed by the corresponding law) the law practice in writing that the client requires the corresponding provisions of the corresponding law to apply to the matter.
- (3) Nothing in this section prevents the application of this Part to the matter by means of a later agreement or notification under section 304.

### **306 How and where does a client first instruct a law practice?**

A client first instructs a law practice in relation to a matter in a particular jurisdiction if the client first provides instructions to the law practice in relation to the matter at an office of the law practice in that jurisdiction, whether in person or by post, telephone, fax, e-mail or other form of communication.

### **307 When does a matter have a substantial connection with this jurisdiction?**

The regulations may prescribe the circumstances in which, or the rules to be used to determine whether, a matter has or does not have a substantial connection with this jurisdiction for the purposes of this Part.

**308 What happens when different laws apply to a matter?**

- (1) This section applies if this Part applies to a matter for a period and a corresponding law applies for another period.
- (2) If this Part applied to a matter for a period and a corresponding law applies to the matter afterwards, this Part continues to apply in respect of legal costs (if any) incurred while this Part applied to the matter.
- (3) If a corresponding law applied to a matter for a period and this Part applies to the matter afterwards, this Part does not apply in respect of legal costs (if any) incurred while the corresponding law applied to the matter, so long as the corresponding law continues to apply in respect of those costs.
- (4) However:
  - (a) the client may sign a written agreement with the law practice that the cost assessment provisions of this Part are to apply in respect of all legal costs incurred in relation to the matter, and Division 11 (Costs assessment) accordingly applies in respect of those legal costs, or
  - (b) if the client signs a written agreement with the law practice that the cost assessment provisions of a corresponding law are to apply in respect of all legal costs incurred in relation to the matter, Division 11 accordingly does not apply in respect of those legal costs.
- (5) This section has effect despite any other provisions of this Part.

**Division 3 Costs disclosure**

**309 Disclosure of costs to clients**

- (1) A law practice must disclose to a client or prospective client in accordance with this Division:
  - (a) the basis on which legal costs will be calculated, including whether a fixed costs provision applies to any of the legal costs, and
  - (b) the client's or prospective client's right to:
    - (i) negotiate a costs agreement with the law practice, and
    - (ii) receive a bill from the law practice, and

- (iii) request an itemised bill within 30 days after receipt of a lump sum bill, and
  - (iv) be notified under section 316 of any substantial change to the matters disclosed under this section, and
- (c) an estimate of the total legal costs if reasonably practicable or, if it is not reasonably practicable to estimate the total legal costs, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs, and
- (d) details of the intervals (if any) at which the client or prospective client will be billed, and
- (e) the rate of interest (if any) that the law practice charges on overdue legal costs, and
- (f) if the matter is a litigious matter, an estimate of:
  - (i) the range of costs that may be recovered if the client or prospective client is successful in the litigation, and
  - (ii) the range of costs the client or prospective client may be ordered to pay if the client or prospective client is unsuccessful, and
- (g) the client's or prospective client's right to progress reports in accordance with section 318, and
- (h) details of the person whom the client or prospective client may contact to discuss the legal costs, and
- (i) the following avenues that are open to the client or prospective client in the event of a dispute in relation to legal costs:
  - (i) costs assessment under Division 11,
  - (ii) the setting aside of a costs agreement under section 328 (Setting aside costs agreements),
  - (iii) mediation under Division 8, and
- (j) any time limits that apply to the taking of any action referred to in paragraph (i), and
- (k) that the law of this jurisdiction applies to legal costs in relation to the matter, and
- (l) information about the client's or prospective client's right:
  - (i) to sign under a corresponding law a written agreement with the law practice that the corresponding provisions of the corresponding law apply to the matter, or

- (ii) to notify under a corresponding law (and within the time allowed by the corresponding law) the law practice in writing that the client or prospective client requires the corresponding provisions of the corresponding law to apply to the matter.

**Note.** The client's or prospective client's right to sign an agreement or give a notification as mentioned in paragraph (l) will be under provisions of the law of the other jurisdiction that correspond to section 304 (Part also applies by agreement or at client's election).

- (2) For the purposes of subsection (1) (l), the disclosure must include:
  - (a) a statement that an order by a court for the payment of costs in favour of the client or prospective client will not necessarily cover the whole of the client's or prospective client's legal costs, and
  - (b) if applicable, a statement that disbursements may be payable by the client or prospective client even if the client or prospective client enters a conditional costs agreement.

### **310 Disclosure if another law practice is to be retained**

- (1) If a law practice intends to retain another law practice on behalf of the client, the first law practice must disclose to the client the details specified in section 309 (1) (a), (c), (d) and (e) in relation to the other law practice, in addition to any information required to be disclosed to the client under section 309.
- (2) A law practice retained or to be retained on behalf of a client by another law practice is not required to make disclosure to the client under section 309, but must disclose to the other law practice the information necessary for the other law practice to comply with subsection (1).
- (3) This section does not apply if the first law practice ceases to act for the client in the matter when the other law practice is retained.

**Note.** An example of the operation of this section is where a barrister is retained by a firm of solicitors on behalf of a client of the firm. The barrister must disclose to the firm details of the barrister's legal costs and billing arrangements, and the firm must disclose those details to the client. The barrister is not required to make a disclosure directly to the client.



**311 How and when must disclosure be made?**

- (1) Disclosure under section 309 must be made in writing before, or as soon as practicable after, the law practice is retained in the matter.
- (2) Disclosure under section 310 (1) must be made in writing before the other law practice is retained except in urgent circumstances, in which case it may be made orally before the law practice is retained and confirmed in writing as soon as practicable afterwards.

**312 Exceptions to requirement for disclosure**

- (1) Disclosure under section 309 or 310 (1) is not required to be made in any of the following circumstances:
  - (a) if the total legal costs in the matter, excluding disbursements, are not likely to exceed \$750 or the amount prescribed by the regulations (whichever is higher),
  - (b) if:
    - (i) the client has received one or more disclosures under section 309 or 310 (1) from the law practice in the previous 12 months, and
    - (ii) the client has agreed in writing to waive the right to disclosure, and
    - (iii) a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, the further disclosure is not warranted,
  - (c) if the client or prospective client is:
    - (i) a law practice or an Australian legal practitioner, or
    - (ii) a public company, a subsidiary of a public company, a foreign company, a subsidiary of a foreign company or a registered Australian body (within the meaning of the *Corporations Act 2001* of the Commonwealth), or
    - (iii) a financial services licensee (within the meaning of the *Corporations Act 2001* of the Commonwealth), or
    - (iv) a Minister of the Crown in right of a jurisdiction or the Commonwealth acting in his or her capacity as such, or a government department or public authority of a jurisdiction or the Commonwealth,
  - (d) if the legal costs or the basis on which they will be calculated have or has been agreed as a result of a tender process,

- (e) if the client or prospective client will not be required to pay the legal costs or they will not otherwise be recovered by the law practice,

**Note.** For instance, disclosure would not be required where the law practice acts in the matter on a pro bono basis.

- (f) in any circumstances prescribed by the regulations.
- (2) Despite subsection (1) (a), if a law practice becomes aware that the total legal costs are likely to exceed \$750 or the amount prescribed by the regulations (whichever is higher), the law practice must disclose the matters in section 309 or 310 (as the case requires) to the client as soon as practicable.
  - (3) A law practice must ensure that a written record of a principal's decision that further disclosure is not warranted as mentioned in subsection (1) (b) is made and kept with the files relating to the matter concerned.
  - (4) The reaching of a decision referred to in subsection (3) otherwise than on reasonable grounds is capable of being unsatisfactory professional conduct or professional misconduct on the part of the principal.
  - (5) Nothing in this section affects or takes away from any client's right:
    - (a) to progress reports in accordance with section 318, or
    - (b) to obtain reasonable information from the law practice in relation to any of the matters specified in section 309, or
    - (c) to negotiate a costs agreement with a law practice and to obtain a bill from the law practice.

### **313 Additional disclosure—settlement of litigious matters**

- (1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, the law practice must disclose to the client, before the settlement is executed:
  - (a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay), and
  - (b) a reasonable estimate of any contributions towards those costs likely to be received from another party.
- (2) A law practice retained on behalf of a client by another law practice is not required to make a disclosure to the client under subsection (1), if

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the other law practice makes the disclosure to the client before the settlement is executed.

**314 Additional disclosure—uplift fees**

If a costs agreement involves an uplift fee, the law practice must disclose to the client in writing, before entering the agreement the law practice’s usual fees, the uplift fee (expressed as a percentage of those fees) and reasons why the uplift fee is warranted.

**315 Form of disclosure**

- (1) Written disclosures under this Division:
  - (a) must be expressed in clear plain language, and
  - (b) may be in a language other than English if the client or prospective client is more familiar with that language.
- (2) If the law practice is aware that the client or prospective client is unable to read, the law practice must arrange for the information required to be given to a client or prospective client under this Division to be conveyed orally to the client or prospective client in addition to providing the written disclosure.

**316 Ongoing obligation to disclose**

A law practice must notify the client in writing of any substantial change to anything included in a disclosure under this Division as soon as is reasonably practicable after the law practice becomes aware of that change.

**317 Effect of failure to disclose**

- (1) If a law practice does not disclose to a client anything required by this Division to be disclosed, the client need not pay the legal costs unless they have been assessed under Division 11.
 

**Note.** Under section 369 (Recovery of costs of costs assessment), the costs of an assessment in these circumstances are payable by the law practice.
- (2) If a law practice does not disclose to a client anything required by this Division to be disclosed and the client has entered a costs agreement with the law practice, the client may also apply under section 328 for the costs agreement to be set aside.
- (3) A law practice that does not disclose to a client anything required by this Division to be disclosed may not maintain proceedings for the

recovery of legal costs unless the costs have been assessed under Division 11.

- (4) Failure by a law practice to comply with this Division is capable of being unsatisfactory professional conduct or professional misconduct on the part of any Australian legal practitioner or Australian-registered foreign lawyer involved in the failure.

### **318 Progress reports**

- (1) A law practice must give a client, on reasonable request:
  - (a) a written report of the progress of the matter in which the law practice is retained, and
  - (b) a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter.
- (2) A law practice may charge a client a reasonable amount for a report under subsection (1) (a) but must not charge a client for a report under subsection (1) (b).
- (3) A law practice retained on behalf of a client by another law practice is not required to give a report to the client under subsection (1), but must disclose to the other law practice any information necessary for the other law practice to comply with that subsection.
- (4) Subsection (3) does not apply if the other law practice ceases to act for the client in the matter when the law practice is retained.

## **Division 4 Legal costs generally**

### **319 On what basis are legal costs recoverable?**

- (1) Subject to the provisions of this Part, legal costs are recoverable:
  - (a) in accordance with an applicable fixed costs provision, or
  - (b) if paragraph (a) does not apply, under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law, or
  - (c) if neither paragraph (a) or (b) applies, according to the fair and reasonable value of the legal services provided.
- (2) However, the following kinds of costs are not recoverable:
  - (a) the costs associated with the preparation of a bill for a client,

- (b) the costs associated with the making of disclosures for the purposes of Division 3.

**320 Security for legal costs**

A law practice may take reasonable security from a client for legal costs (including security for the payment of interest on unpaid legal costs).

**321 Interest on unpaid legal costs**

- (1) A law practice may charge interest on unpaid legal costs if the costs are unpaid 30 days or more after the practice has given a bill for the costs in accordance with this Part.
- (2) A law practice may not charge interest on unpaid legal costs unless the bill for those costs contains a statement that interest is payable and of the rate of interest.
- (3) A law practice may also charge interest on unpaid legal costs in accordance with a costs agreement.
- (4) A law practice may not charge interest under this section or under a costs agreement at a rate that exceeds:
  - (a) except as provided by paragraph (b)—the rate prescribed under the *Supreme Court Act 1970* in respect of unpaid judgments of the Supreme Court, or
  - (b) the rate prescribed by the regulations.

**Division 5      Costs agreements**

**322 Making costs agreements**

- (1) A costs agreement may be made:
  - (a) between a client and a law practice retained by the client, or
  - (b) between a client and a law practice retained on behalf of the client by another law practice, or
  - (c) between a law practice and another law practice that retained that law practice on behalf of a client.
- (2) A costs agreement must be written or evidenced in writing.

- (3) A costs agreement may consist of a written offer in accordance with subsection (4) that is accepted in writing or by other conduct.

**Note.** Acceptance by other conduct is not permitted for conditional costs agreements—see section 323 (3) (c) (i).

- (4) The offer must clearly state:
- (a) that it is an offer to enter a costs agreement, and
  - (b) that the client may accept it in writing or by other conduct, and
  - (c) the type of conduct that will constitute acceptance.
- (5) A costs agreement cannot provide that the legal costs to which it relates are not subject to costs assessment under Division 11.

**Note.** If it attempts to do so, the costs agreement will be void—see section 327 (1).

### **323 Conditional costs agreements**

- (1) A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate, and a costs agreement containing a provision of that kind is referred to in this Act as a ***conditional costs agreement***.
- (2) A conditional costs agreement may relate to any matter, except a matter that involves criminal proceedings or proceedings under the *Family Law Act 1975* of the Commonwealth.
- (3) A conditional costs agreement:
- (a) must set out the circumstances that constitute the successful outcome of the matter to which it relates, and
  - (b) may provide for disbursements to be paid irrespective of the outcome of the matter, and
  - (c) must be:
    - (i) in writing, and
    - (ii) in clear plain language, and
    - (iii) signed by the client, and
  - (d) must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement, and
  - (e) must contain a cooling-off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement.

- (4) Subsection (3) (c) (iii), (d) and (e) do not apply to a conditional costs agreement made under section 322 (1) (c) (Costs agreements between law practices).
- (5) If a client terminates an agreement within the period referred to in subsection (3) (e), the law practice may recover only those legal costs in respect of legal services performed for the client before that termination that were reasonably necessary to preserve the client's rights.

#### **324 Conditional costs agreements involving uplift fees**

- (1) A law practice must not enter into a conditional costs agreement in relation to a claim for damages that provides for the payment of a premium on the legal costs payable under the agreement on the successful outcome of the claim to which the costs relate.
- (2) Except as provided by subsection (1), a conditional costs agreement may provide for the payment of a reasonable premium on the legal costs (excluding unpaid disbursements) otherwise payable under the agreement on the successful outcome of the matter to which those costs relate.

**Note.** Section 314 requires a law practice to make certain disclosures to a client before entering into a costs agreement that provides for an uplift fee.

- (3) The premium must be a specified percentage of the legal costs (excluding unpaid disbursements) otherwise payable and must be separately identified in the agreement.
- (4) The premium is not to exceed 25% of those costs.
- (5) However, the regulations may vary that maximum percentage of costs. Different percentages may be prescribed for different circumstances.
- (6) A law practice must not enter into a costs agreement in contravention of this section.

Maximum penalty: 100 penalty units.

#### **325 Contingency fees are prohibited**

- (1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to:
  - (a) the value of any property or of any transaction involved in the matter to which the agreement relates, or

- (b) the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

Maximum penalty: 100 penalty units.

- (2) Subsection (1) does not apply to the extent that the costs agreement adopts an applicable fixed costs provision.

### **326 Effect of costs agreement**

Subject to this Division and Division 11, a costs agreement may be enforced in the same way as any other contract.

### **327 Certain costs agreements are void**

- (1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.
- (2) Subject to this section and Division 11, legal costs under a void costs agreement are recoverable as set out in section 319 (1) (a) or (c) (On what basis are legal costs recoverable?).
- (3) However, a law practice is not entitled to recover any amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.
- (4) A law practice that has entered into a costs agreement in contravention of section 324 (Conditional costs agreements involving uplift fees) or 325 (Contingency fees are prohibited) is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.
- (5) If a law practice does not repay an amount required by subsection (3) or (4) to be repaid, the person entitled to be repaid may recover the amount from the law practice as a debt in a court of competent jurisdiction.

### **328 Setting aside costs agreements**

- (1) On application by a client, a costs assessor may order that a costs agreement be set aside if satisfied that the agreement is not fair, just or reasonable.

**Note.** Section 317 (2) also enables a client to make an application under this section for an order setting aside a costs agreement where the law practice



concerned has failed to make the disclosures concerning costs required by Division 3.

- (2) In determining whether or not a costs agreement is fair, just or reasonable, the costs assessor may have regard to any or all of the following matters:
- (a) whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice or of any representative of the law practice,
  - (b) whether any Australian legal practitioner or Australian-registered foreign lawyer acting on behalf of the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct in relation to the provision of legal services to which the agreement relates,
  - (c) whether the law practice failed to make any of the disclosures required under Division 3,
  - (d) the time at which the agreement was made.
- (3) The costs assessor may adjourn the hearing of an application under this section pending the completion of any investigation or determination of any information in relation to the conduct of any Australian legal practitioner or Australian-registered foreign lawyer.
- (4) If the costs assessor determines that a costs agreement be set aside, it may make an order in relation to the payment of legal costs the subject of the agreement.
- (5) In making an order under subsection (4), the costs assessor must determine the fair and reasonable legal costs in relation to the work to which the agreement related, taking into account:
- (a) the seriousness of the conduct of the law practice or any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf, and
  - (b) whether or not it was reasonable to carry out the work, and
  - (c) whether or not the work was carried out in a reasonable manner.
- (6) In making an order under subsection (4), the costs assessor may not order the payment of an amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been set aside.

- (7) For the purposes of subsection (5), the costs assessor may have regard to any or all of the following matters:
- (a) whether the law practice and any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf complied with any relevant legislation or legal profession rules,
  - (b) any disclosures made by the law practice under Division 3, or the failure to make any disclosures required under that Division,
  - (c) any relevant advertisement as to:
    - (i) the law practice's costs, or
    - (ii) the skills of the law practice or of any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf,
  - (d) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
  - (e) the retainer and whether the work done was within the scope of the retainer,
  - (f) the complexity, novelty or difficulty of the matter,
  - (g) the quality of the work done,
  - (h) the place where, and circumstances in which, the work was done,
  - (i) the time within which the work was required to be done,
  - (j) any other relevant matter.
- (8) The costs assessor may determine whether or not a costs agreement exists.
- (9) The costs assessor may order the payment of the costs of and incidental to a hearing under this section.
- (10) A party to a costs agreement may apply to the Manager, Costs Assessment under section 373 for a review of a determination to make, or not make, an order under subsection (4).

## **Division 6      Costs fixed by regulations**

### **329    Regulations to provide for fixed costs**

- (1) The regulations may make provision for or with respect to the following:
  - (a) fixing fair and reasonable costs for legal services provided in any workers compensation matter,
  - (b) fixing the costs payable for legal services provided in connection with any claim for personal injury damages (within the meaning of the *Civil Liability Act 2002*),
  - (c) fixing the costs payable for the enforcement of a lump sum debt or liquidated sum for damages,
  - (d) fixing the costs payable for the enforcement of a judgment by a judgment creditor,
  - (e) fixing the costs payable for legal services provided in respect of probate or the administration of estates,
  - (f) fixing an amount of costs for a matter that is not a legal service but is related to proceedings (for example, expenses for witnesses).
- (2) A law practice is not entitled to be paid or recover for a legal service an amount that exceeds the fair and reasonable cost fixed for the service by the regulations under this section.

### **330    Provisions relating to regulations generally**

- (1) The regulations may fix a cost under this Division for a particular legal service, for a class of legal services or for any part of a legal service.
- (2) The regulations may fix a cost under this Division:
  - (a) as a gross amount for legal services, or
  - (b) as an amount for specified elements in the legal services provided (for example, documents prepared), or
  - (c) in any other manner.

## **Division 7      Billing**

### **331    Legal costs cannot be recovered unless bill has been served**

- (1) A law practice must not commence legal proceedings to recover legal costs from a person until at least 30 days after the law practice has given a bill to the person in accordance with sections 332 (Bills) and 333 (Notification of client's rights).
- (2) The Supreme Court may make an order authorising a law practice to commence legal proceedings against a person sooner if satisfied that:
  - (a) the law practice has given a bill to the person in accordance with sections 332 and 333, and
  - (b) the person is about to leave this jurisdiction.
- (3) A court or tribunal before which any proceedings are brought in contravention of subsection (1) must stay those proceedings on the application of a party, or on its own initiative.
- (4) This section applies whether or not the legal costs are the subject of a costs agreement.

### **332    Bills**

- (1) A bill may be in the form of a lump sum bill or an itemised bill.
- (2) A bill must be signed on behalf of a law practice by an Australian legal practitioner or an employee of the law practice.
- (3) It is sufficient compliance with subsection (2) if a letter signed on behalf of a law practice by an Australian legal practitioner or an employee of the law practice is attached to, or enclosed with, the bill.
- (4) A bill or letter is taken to have been signed by a law practice that is an incorporated legal practice if it has the practice's seal affixed to it or is signed by a legal practitioner director of the practice or an officer or employee of the practice who is an Australian legal practitioner.
- (5) A bill is to be given to a person:
  - (a) by delivering it personally to the person or to an agent of the person, or
  - (b) by sending it by post to the person or agent at:
    - (i) the usual or last known business or residential address of the person or agent, or

- (ii) an address nominated for the purpose by the person or agent, or
  - (c) by leaving it for the person or agent at:
    - (i) the usual or last known business or residential address of the person or agent, or
    - (ii) an address nominated for the purpose by the person or agent,  
with a person on the premises who is apparently at least 16 years old and apparently employed or residing there, or
  - (d) by sending it by facsimile transmission to a number specified by the person (by correspondence or otherwise) as a number to which facsimile transmissions to that person may be sent, or
  - (e) by delivering it to the appropriate place in a document exchange in which the person has receiving facilities, or
  - (f) in any other way authorised by the regulations.
- (6) A reference in subsection (5) to any method of giving a bill to a person includes a reference to arranging for the bill to be given to that person by that method (for example, by delivery by courier).
- (7) In this section:
- agent** of a person means an agent, law practice or Australian legal practitioner who has authority to accept service of legal process on behalf of the person.

### 333 Notification of client's rights

A bill must include or be accompanied by a written statement setting out:

- (a) the following avenues that are open to the client in the event of a dispute in relation to legal costs:
  - (i) costs assessment under Division 11,
  - (ii) the setting aside of a costs agreement under section 328 (Setting aside costs agreements),
  - (iii) mediation under Division 8, and
- (b) any time limits that apply to the taking of any action referred to in paragraph (a).

**Note.** These matters will already have been disclosed under section 309 (1) (Disclosure of costs to clients).

### **334 Interim bills**

- (1) A law practice may give a person an interim bill covering part only of the legal services the law practice was retained to provide.
- (2) Legal costs that are the subject of an interim bill may be assessed under Division 11 (Costs assessment), either at the time of the interim bill or at the time of the final bill, whether or not the interim bill has been paid.

## **Division 8 Mediation of costs disputes**

### **335 Meaning of “client” and “costs dispute”**

In this Division:

*client* has the same meaning as in section 350 (Application by clients for costs assessment).

*costs dispute* means a dispute between a client and an Australian legal practitioner concerning a bill, and includes a dispute over an amount claimed to be payable under a costs agreement.

### **336 Referral for mediation**

- (1) A client who is given a bill may refer a costs dispute about the bill to the Commissioner or to a Council for mediation if the amount in dispute is less than \$10,000.
- (2) The Manager, Costs Assessment may refer a costs dispute about a bill to the Commissioner if the amount in dispute is less than \$10,000.
- (3) The Manager, Costs Assessment may, by notice in writing, require the client and the Australian legal practitioner concerned to enter into a process of mediation if the amount in dispute is less than \$5,000.
- (4) A costs dispute about a bill may be referred under this section at any time before an application for an assessment of the whole or part of a bill is accepted by the Manager, Costs Assessment.
- (5) Mediation is not limited to formal mediation procedures and extends to encompass preliminary assistance in dispute resolution, such as the giving of informal advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.

Clause 336	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.2	Costs disclosure and assessment

- (6) Failure on the part of an Australian legal practitioner to comply with the terms of a notice under subsection (3) is capable of being unsatisfactory professional conduct or professional misconduct.

## **Division 9      Maximum costs in personal injury damages matters**

### **337 Interpretation and application**

- (1) In this Division:

*defendant* means a person against whom a claim for personal injury damages is or may be made.

*party* means plaintiff or defendant.

*personal injury damages* has the same meaning as in Part 2 of the *Civil Liability Act 2002*.

*plaintiff* means a person who makes or is entitled to make a claim for personal injury damages.

- (2) This Division does not apply to the following costs:

- (a) costs payable to an applicant for compensation under Part 2 of the *Victims Support and Rehabilitation Act 1996* in respect of the application for compensation,
- (b) costs for legal services provided in respect of a claim under the *Motor Accidents Act 1988* or *Motor Accidents Compensation Act 1999*,
- (c) costs for legal services provided in respect of a claim for work injury damages (as defined in the *Workplace Injury Management and Workers Compensation Act 1998*),
- (d) costs for legal services provided in respect of a claim for damages in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989*.

### **338 Maximum costs fixed for claims up to \$100,000**

- (1) If the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:

- (a) in the case of legal services provided to a plaintiff—maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,
  - (b) in the case of legal services provided to a defendant—maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff or \$10,000, whichever is greater.
- (2) The regulations may prescribe an amount to replace the amount of \$100,000 or \$10,000 in subsection (1) and may prescribe a percentage to replace the percentage of 20% in subsection (1). When such a replacement amount or percentage is prescribed, it applies for the purposes of subsection (1) in place of the amount or percentage that it replaces.
- (3) The regulations may contain provisions of a savings or transitional nature consequent on the making of regulations under this section.
- (4) When the maximum costs for legal services provided to a party are fixed by this Division the following provisions apply (subject to sections 339–341):
  - (a) a law practice is not entitled to be paid or recover for those legal services an amount that exceeds those maximum costs,
  - (b) a court or tribunal cannot order the payment by another party to the claim of costs in respect of those legal services in an amount that exceeds that maximum,
  - (c) in assessing the amount of those costs that is a fair and reasonable amount, a costs assessor cannot determine an amount that exceeds the maximum set by this section.
- (5) In this Division:
  - (a) a reference to legal services provided to a party is a reference to legal services provided to the party by a law practice (including by an associate of the law practice), and
  - (b) a reference to costs for legal services does not include costs charged as disbursements for services provided by any other person or other disbursements.
- (6) If proceedings are commenced on a claim, the amount sought to be recovered by the plaintiff is taken to be the amount sought to be proved by the plaintiff at the hearing of the claim.



Clause 338	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.2	Costs disclosure and assessment

- (7) Maximum costs fixed by this section apply despite regulations under section 329 (1) (b) (Regulations to provide for fixed costs) fixing those costs.

**339 Maximum costs do not affect solicitor-client costs under costs agreements**

- (1) This Division does not apply to the recovery of costs payable as between a law practice and the practice's client to the extent that recovery of those costs is provided for by a costs agreement that complies with Division 5 (Costs agreements).
- (2) The regulations may make provision for or with respect to requiring disclosure by a law practice to the practice's client of information in relation to the effect of a costs agreement in connection with the operation of this Division.
- (3) The regulations may provide that a failure by a law practice to comply with the requirements of the regulations under this section disentitles the law practice to the benefit of this section, and in such a case this Division applies in respect of the claim concerned despite the terms of any costs agreement.

**340 Costs can be awarded on indemnity basis for costs incurred after failure to accept offer of compromise**

- (1) If a party to a claim for personal injury damages makes a reasonable offer of compromise on the claim that is not accepted, this Division does not prevent the awarding of costs against another party to be assessed on an indemnity basis in respect of legal services provided after the offer is made.
- (2) An offer of compromise on a claim by a party is reasonable if the court determines or makes an order or award on the claim in terms that are no less favourable to the party than the terms of the offer.
- (3) The regulations may make provision for or with respect to requiring disclosure by a law practice to the practice's client of information in relation to the operation of this section in respect of any refusal by the client to accept an offer of compromise.
- (4) If it appears to the court in which proceedings are taken on a claim for personal injury damages that a law practice has failed to comply with any provision of the regulations under this section, and that the client

of the practice has incurred an increased liability for costs as a result of refusing a reasonable offer of compromise in connection with the claim concerned, the court may of its own motion or on the application of the client make either or both of the following orders:

- (a) an order directing the law practice to repay to the client the whole or any part of those increased costs that the client has been ordered to pay to any other party,
- (b) an order directing the law practice to indemnify any party other than the client against the whole or any part of the costs payable by the party indemnified in respect of legal services provided after the offer is refused.

**341 Court may order certain legal services to be excluded from maximum costs limitation**

A court hearing a claim for personal injury damages may by order exclude from the operation of this Division legal services provided to a party to the claim if the court is satisfied that the legal services were provided in response to any action on the claim by or on behalf of the other party to the claim that in the circumstances was not reasonably necessary for the advancement of that party's case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim.

**342 Apportionment of maximum costs between law practices**

- (1) If more than one law practice provides legal services to a party in connection with a claim, the maximum costs fixed by this Division are to be apportioned between them as agreed by them or (failing agreement) as ordered by the court hearing proceedings on the claim.

**Note.** For example, this provision would apply in relation to the provision of legal services by both a firm of solicitors and a barrister.

- (2) The maximum then applicable to a particular law practice is the law practice's apportioned share of those maximum costs.

**343 Meaning of "amount recovered" on a claim**

- (1) A reference in this Division to the amount recovered on a claim includes any amount paid under a compromise or settlement of the claim (whether or not legal proceedings have been instituted).

Clause 343	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.2	Costs disclosure and assessment

- (2) In determining the amount recovered on a claim for personal injury damages, no regard is to be had to any part of the amount recovered that is attributable to costs or to the addition of interest.

## **Division 10      Costs in civil claims where no reasonable prospects of success**

### **344    Application of Division**

- (1) **Division extends to appeals**  
This Division extends to legal services in connection with proceedings in a court on appeal as well as a court at first instance.
- (2) **Legal services provided by both barrister and solicitor**  
If legal services in relation to a particular matter are provided by both a solicitor and a barrister instructed by the solicitor, any function imposed by this Division on a law practice in respect of the provision of the services is to be read as imposing the function on both the solicitor and barrister.

### **345    Law practice not to act unless there are reasonable prospects of success**

- (1) A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
- (2) A fact is provable only if the associate reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
- (3) This Division applies despite any obligation that a law practice or a legal practitioner associate of the practice may have to act in accordance with the instructions or wishes of the client.
- (4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.

- (5) Provision of legal services in contravention of this section constitutes for the purposes of this Division the provision of legal services without reasonable prospects of success.

**346 Preliminary legal work not affected**

This Division does not apply to legal services provided as a preliminary matter for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success.

**347 Restrictions on commencing proceedings without reasonable prospects of success**

- (1) The provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.
- (2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or a legal practitioner associate responsible for the provision of the legal service concerned, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
- (3) Court documentation on a claim or defence of a claim for damages is not to be accepted for lodgment unless accompanied by the certification required by this section. Rules of court may make provision for or with respect to the form of that certification.
- (4) In this section:
- court documentation* means:
- (a) an originating process (including for example, a statement of claim, summons or cross-claim), defence or further pleading, or
  - (b) an amended originating process, defence or further pleading, or
  - (c) a document amending an originating process, defence or further pleading, or
  - (d) any other document of a kind prescribed by the regulations.
- cross-claim* includes counter-claim and cross-action.

**348    Costs order against law practice acting without reasonable prospects of success**

- (1) If it appears to a court in which proceedings are taken on a claim for damages that a law practice has provided legal services to a party without reasonable prospects of success, the court may of its own motion or on the application of any party to the proceedings make either or both of the following orders in respect of the practice or of a legal practitioner associate of the practice responsible for providing the services:
  - (a) an order directing the practice or associate to repay to the party to whom the services were provided the whole or any part of the costs that the party has been ordered to pay to any other party,
  - (b) an order directing the practice or associate to indemnify any party other than the party to whom the services were provided against the whole or any part of the costs payable by the party indemnified.
- (2) The Supreme Court may on the application of any party to proceedings on a claim for damages make any order that the court in which proceedings on the claim are taken could make under this section.
- (3) An application for an order under this section cannot be made after a final determination has been made under this Part by a costs assessor of the costs payable as a result of an order made by the court in which the proceedings on the claim concerned were taken.
- (4) A law practice or legal practitioner associate of the practice is not entitled to demand, recover or accept from a client any part of the amount for which the practice or associate is directed to indemnify a party pursuant to an order under this section.

**349    Onus of showing facts provided reasonable prospects of success**

- (1) If the court (the *trial court*) hearing proceedings on a claim for damages finds that the facts established by the evidence before the court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Division that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.

- (2) If the Supreme Court (when the Supreme Court is not the trial court) is satisfied, either as a result of a finding of the trial court or otherwise on the basis of the judgment of the trial court, that the facts established by the evidence before the trial court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Division that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.
- (3) A presumption arising under this section is rebuttable and a person seeking to rebut it bears the onus of establishing that at the time legal services were provided there were provable facts (as provided by section 345 (Law practice not to act unless there are reasonable prospects of success)) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success.
- (4) A law practice or legal practitioner associate of the practice may, for the purpose of establishing that at the time legal services were provided there were provable facts (as provided by section 345 (Law practice not to act unless there are reasonable prospects of success)) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success, produce information or a document despite any duty of confidentiality in respect of a communication between the law practice or a legal practitioner associate of the practice and a client, but only if:
  - (a) the client is the client to whom the legal services were provided or consents to its disclosure, or
  - (b) the court is satisfied that it is necessary for the law practice or associate to do so in order to rebut a presumption arising under this section.

## **Division 11      Costs assessment**

### **Subdivision 1   Applications**

#### **350   Application by clients for costs assessment**

- (1) A client who is given a bill may apply to the Manager, Costs Assessment for an assessment of the whole or any part of legal costs.

- (2) An application for a costs assessment may be made even if the legal costs have been wholly or partly paid.
- (3) If any legal costs have been paid without a bill, the client may nevertheless apply for a costs assessment and, for that purpose, the request for payment is taken to be a bill.
- (4) An application under this section must be made within 60 days after the bill was given or the request was made or after the costs were paid in full (whichever is earlier or earliest).
- (5) However, a costs assessor must deal with an application made out of time, unless the costs assessor considers that the law practice has established that to do so would, in all the circumstances, cause unfair prejudice to the law practice.
- (6) In this section:  
*client* includes the following:
  - (a) a person who has been given a bill by a law practice (other than a person who is acting merely in the capacity of agent or a similar capacity, for example, a courier),
  - (b) a person who has paid legal costs,
  - (c) a person (other than a person who was given a bill) who is liable to pay legal costs,
  - (d) an executor, administrator or assignee of a person referred to in paragraph (a), (b) or (c),
  - (e) a trustee of the estate of a person referred to in paragraph (a), (b) or (c),
  - (f) a person interested in any property out of which a trustee, executor or administrator who is liable to pay legal costs has paid, or is entitled to pay, those costs.

**351 Application for costs assessment by law practice retaining another law practice**

- (1) A law practice that retains another law practice to act on behalf of a client may apply to the Manager, Costs Assessment for an assessment of the whole or any part of the legal costs to which a bill given by the other law practice in accordance with Division 7 (Billing) relates.
- (2) If any legal costs have been paid without a bill, the law practice may nevertheless apply for a costs assessment and, for that purpose, the request for payment is taken to be a bill.

- (3) An application is to be made within 60 days after the bill is given or the request for payment is made or within such further time as the Manager, Costs Assessment may allow, and may be made even if the legal costs have been wholly or partly paid.
- (4) An application cannot be made under this section if there is a costs agreement between the client and the other law practice.

**352 Application for costs assessment by law practice giving bill**

- (1) A law practice that has given a bill may apply to a costs assessor for an assessment of the whole or any part of the legal costs to which the bill relates.
- (2) If any legal costs have been paid without a bill, the law practice may nevertheless apply for a costs assessment and, for that purpose, the request for payment is taken to be a bill.
- (3) An application may not be made unless at least 30 days have passed since the bill was given or the request for payment was made or since an application has been made under this Division by another person in respect of the legal costs.

**353 Application for assessment of party/party costs**

- (1) A person who has paid or is liable to pay, or who is entitled to receive or who has received, costs as a result of an order for the payment of an unspecified amount of costs made by a court or a tribunal may apply to the Manager, Costs Assessment for an assessment of the whole of, or any part of, those costs.
- (2) A court or tribunal may direct the Manager, Costs Assessment to refer for assessment costs payable as a result of an order made by the court or tribunal. Any such direction is taken to be an application for assessment duly made under this Division.
- (3) An application or direction under this section may not be made in relation to costs arising out of criminal proceedings in a court.

**354 How to make an application for costs assessment**

- (1) An application for a costs assessment:
  - (a) must be in the form prescribed by the regulations (if any), and
  - (b) subject to subsection (4), must be accompanied by the fee prescribed by the regulations.



Clause 354	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.2	Costs disclosure and assessment

- (2) The application must authorise a costs assessor to have access to, and to inspect, all documents of the applicant that are held by the applicant, or by any law practice, Australian legal practitioner or Australian-registered foreign lawyer concerned, in respect of the matter to which the application relates.
- (3) The application must contain a statement by the applicant that there is no reasonable prospect of settlement of the matter by mediation.
- (4) The Manager, Costs Assessment may waive or postpone payment of the application fee either wholly or in part if satisfied that the applicant is in such circumstances that payment of the fee would result in serious hardship to the applicant or his or her dependants.
- (5) The Manager, Costs Assessment may refund the application fee either wholly or in part if satisfied that it is appropriate because the application is not proceeded with.

### **355 Consequences of application**

If an application for a costs assessment is made in accordance with this Division:

- (a) the costs assessment must take place without any money being paid into court on account of the legal costs the subject of the application, and
- (b) the law practice must not commence any proceedings to recover the legal costs until the costs assessment has been completed.

### **356 Persons to be notified of application**

The Manager, Costs Assessment is to cause a copy of an application for costs assessment to be given to any law practice or client concerned or any other person whom the Manager thinks it appropriate to notify.

## **Subdivision 2 Assessment**

### **357 Referral of matters to costs assessors**

- (1) The Manager, Costs Assessment is to refer each application for costs assessment to a costs assessor to be dealt with under this Division.

- (2) A costs assessor who has an interest in an application must, as soon as practicable after becoming aware of that fact, refer the application to the Manager, Costs Assessment for referral to another costs assessor.
- (3) If the Manager, Costs Assessment is satisfied that it is inappropriate for a costs assessor to determine a particular application that has been referred to the costs assessor, the Manager, Costs Assessment may:
  - (a) revoke the referral of the application, and
  - (b) refer the application for assessment to another costs assessor.
- (4) An application that has been referred to another costs assessor under this section is to be dealt with as a new assessment or, if the Manager, Costs Assessment so directs, by continuing the assessment.
- (5) When a referral has been revoked, the costs assessor to whom the application was initially referred must return all documents relating to the assessment of the application to the Manager, Costs Assessment. This includes documents relating to any work done on the assessment and a statement of the amount calculated for costs in respect of any work done on the assessment.

**358 Costs assessor may require documents or further particulars**

- (1) For the purposes of determining an application for a costs assessment, a costs assessor may, by notice in writing, require a person (including the applicant, the law practice concerned, or any other law practice or client) to do any one or more of the following:
  - (a) to produce, at a specified time and place, any specified document (or a copy of the document),
  - (b) to provide written information on or before a specified date (verified by statutory declaration if the requirement so states) including, for example:
    - (i) information as to the instructions given to, or work done by, any law practice in respect of the matter concerned, and
    - (ii) information as to the basis on which the costs concerned were calculated,
  - (c) to otherwise assist in, or co-operate with, the determination of the assessment in a specified manner.

- (2) A person who is subject to a requirement under subsection (1) must comply with the requirement.

Maximum penalty: 50 penalty units.

- (3) If a person fails, without reasonable excuse, to comply with a notice under this section, the costs assessor may decline to deal with the application or may continue to deal with the application on the basis of the information provided.
- (4) A failure by an Australian legal practitioner to comply with a notice under this section without reasonable excuse is capable of being professional misconduct.

**359 Consideration of applications by costs assessors**

- (1) A costs assessor must not determine an application for assessment unless the costs assessor:
- (a) has given both the applicant and any law practice or client or other person concerned a reasonable opportunity to make written submissions to the costs assessor in relation to the application, and
  - (b) has given due consideration to any submissions so made.
- (2) In considering an application, a costs assessor is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit.
- (3) For the purposes of determining an application for assessment or exercising any other function, a costs assessor may determine any of the following:
- (a) whether or not disclosure has been made in accordance with Division 3 (Costs disclosure) and whether or not it was reasonably practicable to disclose any matter required to be disclosed under Division 3,
  - (b) whether a costs agreement exists, and its terms.

**360 Non-attendance of party**

If, after proper notice that a costs assessment will take place, a party to the assessment does not attend, the costs assessor may proceed with the assessment in the absence of that party.

### 361 Assessment of complying costs agreements

- (1) A costs assessor must assess any disputed costs that are subject to a costs agreement by reference to the provisions of the costs agreement if:
  - (a) the agreement complies with Division 5 (Costs agreements) and, in particular, nothing in that Division precludes the law practice concerned from recovering the amount of the costs, and  
**Note.** For example, section 327 precludes the recovery of certain amounts payable under costs agreements entered into in contravention of Division 5.
  - (b) a relevant provision of the costs agreement specifies the amount, or a rate or other means for calculating the amount, of the costs, and
  - (c) the costs assessor is satisfied that the agreement, or the relevant provision of the agreement, should not be set aside under section 328.
- (2) Nothing in this section limits the operation of section 365.

**Note.** Section 365 provides that a costs assessor must have regard to, but not necessarily apply, a costs agreement in assessing party/party costs.

### 362 Costs fixed by regulations or other legislation

- (1) An assessment of costs fixed by a regulation under section 329 (1) (a), (b), (c), (d) or (e) is to be made in accordance with that regulation.
- (2) An assessment of costs fixed by a regulation under section 329 (1) (f) is to be made having regard to that regulation.
- (3) An assessment of costs fixed by a regulation under section 149 of the *Motor Accidents Compensation Act 1999* is to be made in accordance with that regulation (despite anything to the contrary in a regulation under section 329).
- (4) An assessment of costs fixed by a provision of any other Act, or a statutory rule made under any other Act, is to be made:
  - (a) if the costs are fixed by a provision of any other Act—in accordance with that provision (despite anything to the contrary in a regulation under section 329), or
  - (b) if the costs are fixed by a provision of a statutory rule made under any other Act—in accordance with that provision (but

only to the extent that the provision is not inconsistent with a regulation under section 329).

**363    Criteria for assessment**

- (1) In conducting an assessment of legal costs, the costs assessor must consider:
  - (a) whether or not it was reasonable to carry out the work to which the legal costs relate, and
  - (b) whether or not the work was carried out in a reasonable manner, and
  - (c) the fairness and reasonableness of the amount of legal costs in relation to the work.
- (2) In considering what is a fair and reasonable amount of legal costs, the costs assessor may have regard to any or all of the following matters:
  - (a) whether the law practice and any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf complied with any relevant legislation or legal profession rules,
  - (b) any disclosures made by the law practice under Division 3 (Costs disclosure), or the failure to make any disclosures required under that Division,
  - (c) any relevant advertisement as to:
    - (i) the law practice's costs, or
    - (ii) the skills of the law practice or of any Australian legal practitioner or Australian-registered foreign lawyer acting on its behalf,
  - (d) any relevant costs agreement,
  - (e) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
  - (f) the retainer and whether the work done was within the scope of the retainer,
  - (g) the complexity, novelty or difficulty of the matter,
  - (h) the quality of the work done,
  - (i) the place where, and circumstances in which, the legal services were provided,

- (j) the time within which the work was required to be done,
- (k) any other relevant matter.

### **Subdivision 3 Party/party costs**

#### **364 Assessment of costs—costs ordered by court or tribunal**

- (1) In conducting an assessment of legal costs payable as a result of an order made by a court or tribunal, the costs assessor must consider:
  - (a) whether or not it was reasonable to carry out the work to which the costs relate, and
  - (b) whether or not the work was carried out in a reasonable manner, and
  - (c) what is a fair and reasonable amount of costs for the work concerned.
- (2) In considering what is a fair and reasonable amount of legal costs, a costs assessor may have regard to any or all of the following matters:
  - (a) the skill, labour and responsibility displayed on the part of the Australian legal practitioner or Australian-registered foreign lawyer responsible for the matter,
  - (b) the complexity, novelty or difficulty of the matter,
  - (c) the quality of the work done and whether the level of expertise was appropriate to the nature of the work done,
  - (d) the place where and circumstances in which the legal services were provided,
  - (e) the time within which the work was required to be done,
  - (f) the outcome of the matter.
- (3) An assessment must be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs and any relevant regulations.
- (4) If a court or a tribunal has ordered that costs are to be assessed on an indemnity basis, the costs assessor must assess the costs on that basis, having regard to any relevant rules of the court or tribunal and relevant regulations.

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**365 Effect of costs agreements in assessments of party/party costs**

- (1) A costs assessor may obtain a copy of, and may have regard to, a costs agreement.
- (2) However, a costs assessor must not apply the terms of a costs agreement for the purposes of determining appropriate fair and reasonable costs when assessing costs payable as a result of an order by a court or tribunal.

**366 Court or tribunal may determine matters**

This Division does not limit any power of a court or a tribunal to determine in any particular case the amount of costs payable or that the amount of the costs is to be determined on an indemnity basis.

**Subdivision 4 Determinations**

**367 Determinations of costs assessments**

- (1) A costs assessor is to determine an application for a costs assessment relating to a bill by confirming the bill or, if the assessor is satisfied that the disputed costs are unfair or unreasonable, by substituting for the amount of the costs an amount that, in the assessor's opinion, is a fair and reasonable amount.
- (2) Any amount substituted for the amount of the costs may include an allowance for any fee paid or payable for the application by the applicant.
- (3) A costs assessor may not determine that any part of a bill that is not the subject of an application is unfair or unreasonable.

**368 Certificate as to determination**

- (1) On making a determination of costs referred to in Subdivision 2 or 3 of this Division, a costs assessor is to issue to each party a certificate that sets out the determination.
- (2) A costs assessor may issue more than one certificate in relation to an application for costs assessment. Such certificates may be issued at the same time or at different stages of the assessment process.

- (3) However, any such certificate may not set out the costs of the costs assessment within the meaning of section 369.

**Note.** Section 369 makes provision for the recovery of the costs of costs assessments relating to costs to which either section 317 (Effect of failure to disclose) or 364 (Assessment of costs—costs ordered by court or tribunal) applies. The section requires a costs assessor to issue a separate certificate setting out the costs of such costs assessments. That section also makes provision for the effect of such a certificate.

- (4) In the case of an amount of costs that has been paid, the amount (if any) by which the amount paid exceeds the amount specified in any such certificate may be recovered as a debt in a court of competent jurisdiction.
- (5) In the case of an amount of costs that has not been paid, the certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs, and the rate of any interest payable in respect of that amount of costs is the rate of interest in the court in which the certificate is filed.
- (6) If the costs of the costs assessor are payable by a party to the assessment as referred to in section 369, the costs assessor may refuse to issue a certificate relating to his or her determination under this section until the costs of the costs assessor have been paid.
- (7) Subsection (6) does not apply:
- (a) in respect of a certificate issued before the completion of the assessment process under subsection (4), or
  - (b) in such circumstances as may be prescribed by the regulations.

### **369 Recovery of costs of costs assessment**

- (1) This section applies to the costs of a costs assessment in relation to:
- (a) costs to which section 317 (Effect of failure to disclose) applies, and
  - (b) costs to which section 364 (Assessment of costs—costs ordered by court or tribunal) applies.
- (2) A costs assessor is, subject to this section, to determine the costs of a costs assessment to which this section applies.



- (3) The costs of a costs assessment to which this section applies are payable:
  - (a) for a costs assessment in relation to costs to which section 317 (Effect of failure to disclose) applies—by the law practice that provided the legal services concerned, or
  - (b) for a costs assessment in relation to costs to which section 364 (Assessment of costs—costs ordered by court or tribunal) applies—by such persons, and to such extent, as may be determined by the costs assessor.
- (4) The costs assessor may refer to the Supreme Court any special circumstances relating to a costs assessment and the Court may make any order it thinks fit concerning the costs of the costs assessment.
- (5) On making a determination, a costs assessor may issue to each party a certificate that sets out the costs of the costs assessment.
- (6) If the application for a costs assessment has been dealt with by more than one costs assessor, a certificate issued can set out the costs of any other costs assessor.
- (7) The certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs.
- (8) The costs of the costs assessor are to be paid to the Manager, Costs Assessment.
- (9) The Manager, Costs Assessment may take action to recover the costs of a costs assessor or Manager, Costs Assessment.
- (10) In this section:

*costs of the costs assessment* means the costs incurred by the costs assessor or the Manager, Costs Assessment in the course of a costs assessment under this Division, and includes the costs related to the remuneration of the costs assessor.

### **370 Reasons for determination**

- (1) A costs assessor must ensure that a certificate issued under section 368 (Certificate as to determination) or 369 (Recovery of costs of costs assessment) that sets out his or her determination is accompanied by:
  - (a) a statement of the reasons for the costs assessor's determination, and

- (b) such supplementary information as may be required by the regulations.
- (2) The statement of reasons must be given in accordance with the regulations.

**371 Correction of error in determination**

- (1) At any time after making a determination, a costs assessor may, for the purpose of correcting an inadvertent error in the determination:
  - (a) make a new determination in substitution for the previous determination, and
  - (b) issue a certificate under section 368 (Certificate as to determination) or 369 (Recovery of costs of costs assessment) that sets out the new determination.
- (2) Such a certificate replaces any certificate setting out the previous determination of the costs assessor that has already been issued by the costs assessor and, on the filing of the replacement certificate in the office or registry of a court having jurisdiction to order the payment of the amount of the new determination, any judgment that is taken to have been effected by the filing of that previously issued certificate is varied accordingly.

**372 Determination to be final**

A costs assessor's determination of an application is binding on all parties to the application and no appeal or other assessment lies in respect of the determination, except as provided by this Division.

**Subdivision 5 Review of determination by panel**

**373 Application for review of determination**

- (1) A party to a costs assessment who is dissatisfied with a determination of a costs assessor may, within 30 days after the issue of the certificate under section 368 (Certificate as to determination) or 369 (Recovery of costs of costs assessment) that sets out the determination of the costs assessor or within such further time as the Manager, Costs Assessment may allow, apply to the Manager, Costs Assessment for a review of the determination.

**Note.** Section 328 (10) provides that a party to a costs agreement may apply to the Manager, Costs Assessment under this section for a review of a determination

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to make, or not make, an order under section 328 to set aside the costs agreement.

- (2) The application must:
  - (a) be made in accordance with the regulations (if any), and
  - (b) be accompanied by the fee prescribed by the regulations.
- (3) The Manager, Costs Assessment may waive or postpone payment of the fee either wholly or in part if satisfied that the applicant is in such circumstances that payment of the fee would result in serious hardship to the applicant or his or her dependants.
- (4) The Manager, Costs Assessment may refund the fee paid under this section either wholly or in part if satisfied that it is appropriate because the application is not proceeded with.
- (5) A party who applies for a review under this Subdivision must ensure that notice of the application is given to the other parties to the assessment not less than 7 days before the application is made or as prescribed by the regulations.

#### **374 Referral of application to panel**

- (1) If an application for an assessment under this Subdivision is duly made, the Manager, Costs Assessment is to refer the application to a panel.
- (2) The panel is to be constituted by 2 costs assessors.
- (3) A costs assessor whose determination is the subject of an application for an assessment under this Subdivision may not be a member of a panel to which the application has been referred.
- (4) A member of a panel who has an interest in an application must, as soon as practicable after becoming aware of that fact, inform the Manager, Costs Assessment of that interest.
- (5) If the Manager, Costs Assessment is satisfied that a member of a panel has an interest in the application, the Manager must refer the application to a differently constituted panel that does not include that member.

#### **375 General functions of panel in relation to review application**

- (1) A panel constituted under this Subdivision may review the determination of the costs assessor and may:
  - (a) affirm the costs assessor's determination, or

- (b) set aside the costs assessor's determination and substitute such determination in relation to the costs assessment as, in their opinion, should have been made by the costs assessor who made the determination that is the subject of the review.
- (2) For the purposes of subsection (1), the panel has, in relation to the application for assessment, all the functions of a costs assessor under this Part and is to determine the application, subject to this Subdivision and the regulations, in the manner that a costs assessor would be required to determine an application for costs assessment.
- (3) However, the assessment is to be conducted on the evidence that was received by the costs assessor who made the determination that is the subject of the assessment and, unless the panel determines otherwise, the panel is not:
  - (a) to receive submissions from the parties to the assessment, or
  - (b) to receive any fresh evidence or evidence in addition to or in substitution for the evidence received by the costs assessor.
- (4) If the costs assessors who constitute the panel are unable to agree on a determination in relation to an application, the panel is to affirm the determination of the costs assessor who made the determination that is the subject of the assessment.

**376 Relevant documents to be produced to panel**

- (1) A panel constituted under this Subdivision may, by notice in writing, require a costs assessor, a law practice or any other person (such as an applicant or an associate of a law practice) to produce to the panel any document in his or her possession relating to an assessment of costs by a costs assessor.
- (2) If a person fails, without reasonable excuse, to comply with a notice under this section, the panel may decline to deal with an application for review or may continue to deal with it on the basis of the information provided.
- (3) A costs assessor is to retain in his or her possession any document relating to a costs assessment (other than a document that is returned to a party to the assessment) until:
  - (a) the period of 2 months has elapsed since the issue of a certificate under section 368 (Certificate as to determination) setting out the determination of the costs assessor, or

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- (b) the costs assessor receives a notice under subsection (1) in relation to the document,  
whichever happens first.
- (4) A law practice or an associate of a law practice is to retain in his or her possession any document relating to a costs assessment that is returned to the practice or associate by the costs assessor until:
  - (a) the period of 2 months has elapsed since the issue of a certificate under section 368 setting out the determination of the costs assessor, or
  - (b) the practice or associate receives a notice under subsection (1) in relation to the document,  
whichever happens first.
- (5) A contravention of this section by an Australian legal practitioner is capable of being professional misconduct.

**377 Effect of review on costs assessor's determination**

- (1) If the Manager, Costs Assessment refers a determination of a costs assessor to a panel for review under this Subdivision, the operation of that determination is suspended.
- (2) The panel may end such a suspension:
  - (a) if it affirms the determination of the costs assessor, or
  - (b) in such other circumstances as it considers appropriate.

**378 Certificate as to determination of panel**

- (1) On making a determination in relation to an application for review of a costs assessment under this Subdivision, a panel is to issue each party with a certificate that sets out the determination.
- (2) However, any such certificate may not set out the costs of the review within the meaning of section 379.

**Note.** Section 379 requires a panel to issue a separate certificate setting out the costs of the review. That section also makes provision for the effect of such a certificate.

- (3) If the panel sets aside the determination of the costs assessor, the following provisions apply:
  - (a) if the amount of costs has already been paid, the amount (if any) by which the amount paid exceeds the amount specified in

- the determination of the panel may be recovered as a debt in a court of competent jurisdiction,
- (b) if the amount of the costs has not been paid, a certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs, and the rate of any interest payable in respect of that amount of costs is the rate of interest in the court in which the certificate is filed,
  - (c) if the costs assessor issued a certificate in relation to his or her determination under section 368 (Certificate as to determination) or 369 (Recovery of costs of costs assessment):
    - (i) the certificate ceases to have effect, and
    - (ii) any judgment that is taken to have been effected in relation to that certificate also ceases to have effect, and
    - (iii) any enforcement action taken in respect of that judgment is to be reversed.
- (4) If the panel sets aside the costs assessor's determination, any amount substituted by the panel may include an allowance for any fee paid or payable for the application for review by the applicant or for any amount paid or payable for the costs of the costs assessor by a party to the assessment.
- (5) If the costs of the panel are payable by a person (as required by section 379 (Recovery of costs of review)), the panel may refuse to issue a certificate relating to its determination under this section until those costs have been paid.
- (6) Subsection (5) does not apply in such circumstances as may be prescribed by the regulations.

**379 Recovery of costs of review**

- (1) A panel that conducts a review of a costs assessor's determination under this Subdivision is to determine the costs of the review and may, subject to this section, determine by whom and to what extent those costs are to be paid.
- (2) If the panel affirms the determination of the costs assessor, the panel is to require the party who applied for the review to pay the costs of the review.

- (3) If the panel sets aside the determination of the costs assessor, and makes a determination in favour of the party who applied for review, the panel is to require the party who applied for the review to pay the costs of the review if the determination of the panel increases or decreases the total costs payable (as assessed by the costs assessor) by an amount that is less than 15 per cent (or such other percentage as may be prescribed by the regulations) of the total costs payable as assessed by the costs assessor.
- (4) Subject to subsections (2) and (3), the panel may require any party to the assessment that is reviewed to pay the costs of the review or may determine that the costs of the review are to be shared between the parties in any manner that the panel considers appropriate.
- (5) The panel is to issue to each party a certificate that sets out the panel's determination under this section.
- (6) The certificate is, on filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs of the review.
- (7) The costs of the review are to be paid to the Manager, Costs Assessment.
- (8) The Manager, Costs Assessment may take action to recover the costs of a review.
- (9) Regulations may be made with respect to determinations of a panel under this section.
- (10) In this section:  
*costs of a review* means the costs incurred by the panel or the Manager, Costs Assessment in the course of a review under this Subdivision, and includes the costs related to the remuneration of the costs assessors who constitute the panel.

### **380 Reasons for determination**

- (1) The panel must ensure that a certificate issued under section 378 (Certificate as to determination of panel) or 379 (Recovery of costs of review) that sets out the determination of the panel is accompanied by:
  - (a) a statement of the reasons for the panel's determination, and
  - (b) such supplementary information as may be required by the regulations.

- (2) The statement of reasons must be given in accordance with the regulations.

**381 Correction of error in determination**

- (1) At any time after making a determination, a panel that conducts a review may, for the purpose of correcting an inadvertent error in the determination:
  - (a) make a new determination in substitution for the previous determination, and
  - (b) issue a certificate under section 378 (Certificate as to determination of panel) or 379 (Recovery of costs of review) that sets out the new determination of the panel.
- (2) Such a certificate replaces any certificate setting out the previous determination of the panel that has already been issued by the panel and, on the filing of the replacement certificate in the office or registry of a court having jurisdiction to order the payment of the amount of the new determination, any judgment that is taken to have been effected by the filing of that previously issued certificate is varied accordingly.

**382 Appeal against determination of panel**

- (1) Subdivision 6 (Appeals) applies in relation to a decision or determination of a panel under this Subdivision as if references in Subdivision 6 to a costs assessor were references to the panel.
- (2) Subject to subsection (1), the panel's determination of an application for review of a costs assessor's determination is binding on all parties to the assessment that is the subject of a review and no appeal or other review lies in respect of the determination.

**383 Regulations**

The regulations may make provision for or with respect to reviews under this Subdivision, including the constitution and membership of a panel and the procedure for conducting reviews.

**Subdivision 6 Appeals**

**384 Appeal against decision of costs assessor as to matter of law**

- (1) A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the



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proceedings to determine the application may, in accordance with the rules of the Supreme Court, appeal to the Court against the decision.

- (2) After deciding the question the subject of the appeal, the Supreme Court may, unless it affirms the costs assessor's decision:
  - (a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or
  - (b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.
- (3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.

#### **385 Appeal against decision of costs assessor by leave**

- (1) A party to an application for a costs assessment relating to a bill may, in accordance with the rules of the Supreme Court, seek leave of the Court to appeal to the Court against the determination of the application made by a costs assessor.
- (2) A party to an application for a costs assessment relating to costs payable as a result of an order made by a court or a tribunal may, in accordance with the rules of the court or tribunal, seek leave of the court or tribunal to appeal to the court or tribunal against the determination of the application made by a costs assessor.
- (3) The Supreme Court or court or tribunal may, in accordance with its rules, grant leave to appeal and may hear and determine the appeal.
- (4) An appeal is to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given.
- (5) After deciding the questions the subject of the appeal, the Supreme Court or court or tribunal may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor.

#### **386 Effect of appeal on application**

- (1) If a party to an application for a costs assessment has appealed against a determination or decision of a costs assessor, either the costs assessor or the court or tribunal to which the appeal is made may suspend, until

the appeal is determined, the operation of the determination or decision.

- (2) The costs assessor or the court or tribunal may end a suspension made by the costs assessor. The court or tribunal may end a suspension made by the court or tribunal.

**387 Assessor can be a party to appeal**

A costs assessor can be made a party to any appeal against a determination or decision of the costs assessor only by the Supreme Court.

**388 Notices of appeal**

A copy of every notice of appeal against a determination or decision of a costs assessor must be served on the Manager, Costs Assessment by the party making the appeal.

**389 Court may refer unreviewed determination to review panel**

- (1) If an appeal is made under section 385 (Appeal against decision of costs assessor by leave) against a determination of a costs assessor and the determination to which the appeal relates has not been reviewed by a panel in accordance with Subdivision 5 (Review of determination by panel), the court or tribunal to which the appeal is made may refer the appeal to the Manager, Costs Assessment for a review by a panel under that Subdivision.
- (2) For the purposes of Subdivision 5 (Review of determination by panel), the referral of an appeal by a court or tribunal under subsection (1) to the Manager, Costs Assessment is taken to be a duly made application for a review under that Subdivision.

**Subdivision 7 General**

**390 Costs assessors**

- (1) The Chief Justice of New South Wales may appoint persons to be costs assessors under this Act.
- (2) A costs assessor has the functions that are conferred on the costs assessor by or under this or any other Act.
- (3) Schedule 5 has effect with respect to costs assessors.

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- (4) A costs assessor is not an officer of the Supreme Court when acting as a costs assessor.
- (5) Proceedings relating to anything done or omitted to be done by the Chief Justice of New South Wales in respect of the appointment or removal of a costs assessor (including terms of appointment and any other incidental matters) may not be instituted against the Chief Justice of New South Wales but may be instituted against “The Manager, Costs Assessment” as nominal defendant.

### **391 Protection from liability**

A matter or thing done or omitted to be done by the Chief Justice of New South Wales, the Manager, Costs Assessment or a costs assessor (including a costs assessor acting as a member of a panel constituted under this Division) does not, if the matter or thing was done or omitted to be done in good faith for the purpose of the administration of this Part, subject the Chief Justice of New South Wales, the Manager, Costs Assessment or any costs assessor personally to any action, liability, claim or demand.

### **392 Confidentiality**

A costs assessor must not disclose any information obtained in connection with the exercise of the costs assessor’s functions (including any functions as a member of a panel constituted under this Division) unless the disclosure is made:

- (a) in connection with the exercise of those functions or the administration or execution of this Act, or
- (b) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or
- (c) in the case of information relating to an Australian legal practitioner or other person—with the consent of the practitioner or other person, or
- (d) with other lawful excuse.

Maximum penalty: 20 penalty units.

### **393 Referral for disciplinary action**

- (1) If, on a costs assessment, the costs assessor considers that the legal costs charged by a law practice are excessive, the costs assessor must refer the matter to the Commissioner to consider whether disciplinary

action should be taken against any Australian legal practitioner or Australian-registered foreign lawyer involved.

- (2) If the costs assessor considers that a costs assessment raises any other matter that may amount to unsatisfactory professional conduct or professional misconduct on the part of an Australian legal practitioner or Australian-registered foreign lawyer, the costs assessor must refer the matter to the Commissioner to consider whether disciplinary action should be taken against an Australian legal practitioner or Australian-registered foreign lawyer.

#### **394 Rules of procedure for applications**

- (1) There is to be a costs assessors' rules committee consisting of those costs assessors appointed to the committee by the Chief Justice of New South Wales.
- (2) The committee is to regulate its own proceedings for the calling of meetings and the conduct of its business.
- (3) The committee may make rules, not inconsistent with this Part, governing the practice and procedure of the assessment of costs, including matters relating to the appointment of costs assessors to particular matters and the interests of costs assessors in particular matters.
- (4) The committee has any other functions conferred on the committee by or under this or any other Act.
- (5) Any amount payable from the Public Purpose Fund for the purpose of meeting the costs of the committee is to be paid, in accordance with section 290 (Payment of certain costs and expenses from Fund), to the Treasurer for credit of the Consolidated Fund.
- (6) Part 6 of the *Interpretation Act 1987* applies to a rule made under this section in the same way as it applies to a statutory rule within the meaning of that Act.

**Note.** Part 6 of the *Interpretation Act 1987* contains provisions relating to the publication and Parliamentary disallowance of statutory rules and other standard provisions relating to the making, amendment and repeal of statutory rules.

#### **395 Division not to apply to interest on judgment debt**

This Division does not apply to an amount of interest ordered on a judgment debt (being an order for the payment of costs) under section 85 (4) of the *District Court Act 1973* or section 95 (4) of the *Supreme Court Act 1970*.

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## **Division 12      Miscellaneous**

### **396    Application of Part to cross-vested matters**

- (1) The regulations may make provisions modifying the application of this Part to matters commenced in another jurisdiction and transferred to the Supreme Court under cross-vesting legislation of the Commonwealth or another State or Territory.
- (2) Without limiting subsection (1), the regulations may modify the application of this Part by removing an obligation that a local legal practitioner or interstate legal practitioner would otherwise have (in relation to such matters) under this Part.

### **397    Application of Part to incorporated legal practices and multi-disciplinary partnerships**

The regulations may provide that specified provisions of this Part do not apply to incorporated legal practices or multi-disciplinary partnerships or both or apply to them with specified modifications.

### **398    Application of Part to Australian-registered foreign lawyers**

- (1) This Part applies to Australian-registered foreign lawyers as if a reference in this Part to a law practice or an Australian legal practitioner were a reference to an Australian-registered foreign lawyer.
- (2) The regulations may make provisions modifying the application of this Part to Australian-registered foreign lawyers.

### **399    Imputed acts, omissions or knowledge**

For the purposes of this Part:

- (a) anything done or omitted by, to or in relation to:
  - (i) an Australian legal practitioner, or
  - (ii) an Australian-registered foreign lawyer (except for the purposes of any provision of this Part prescribed by the regulations for the purposes of this section),
 in the course of acting on behalf of a law practice is taken to have been done or omitted by, to or in relation to the law practice, and

- (b) without limiting paragraph (a), the law practice is taken to become or be aware of, or to have a belief as to, any matter if:
  - (i) an Australian legal practitioner, or
  - (ii) an Australian-registered foreign lawyer (except for the purposes of any provision of this Part prescribed by the regulations for the purposes of this section),becomes or is aware of, or has a belief as to, the matter in the course of acting on behalf of the law practice.

#### **400 Costs of administering Part**

- (1) All costs related to the administration of this Part (other than the costs referred to in section 394 (5)) (Rules of procedure for applications), are to be paid out of money to be provided from a working account established for the Attorney General's Department by the Treasurer under section 13A of the *Public Finance and Audit Act 1983* for the purposes of this Part.
- (2) The following amounts received by the Manager, Costs Assessment are to be paid to the credit of that working account:
  - (a) an application fee for an assessment,
  - (b) an application fee for a review of an assessment,
  - (c) a payment for the costs of a costs assessor,
  - (d) a payment for the costs of a review of an assessment.

## **Part 3.3 Professional indemnity insurance**

### **Division 1 Preliminary**

#### **401 Purpose**

The purpose of this Part is to continue the scheme for professional indemnity insurance to protect clients of law practices from professional negligence.

## **402    Definitions**

(1) In this Part:

***insurable barrister*** means a barrister who holds a local practising certificate that entitles the holder to practise as a barrister on his or her own account, other than a barrister:

- (a) who is exempted, or who is a member of a class of barristers that is exempted, by the Bar Council from the requirement to be insured under this Part, or
- (b) who is engaged in practice referred to in section 111 (Government and other lawyers—exemption from certain conditions).

***insurable solicitor*** means a solicitor who holds a local practising certificate that entitles the holder to practise as a solicitor on his or her own account, other than a solicitor:

- (a) who has given a written undertaking to the Law Society Council that the solicitor will not practise during the period to which the practising certificate relates otherwise than in the course of the solicitor's employment by a body or person specified in the undertaking (not being employment by an incorporated legal practice), or
  - (b) who is exempted, or who is a member of a class of solicitors that is exempted, by the Law Society Council from the requirement to be insured under this Part.
- (2) The Bar Council may exempt barristers or classes of barristers from the requirement to be insured under this Part on such grounds as the Council considers sufficient.
- (3) The Law Society Council may exempt solicitors or classes of solicitors from the requirement to be insured under this Part on such grounds as the Council considers sufficient.

## **Division 2        Barristers**

### **403    Professional indemnity insurance for barristers**

- (1) The Bar Council must not grant or renew a local practising certificate to an insurable barrister unless it is satisfied that there is, or will be, in force with respect to the barrister an approved indemnity insurance policy.

- (2) A policy of indemnity insurance is approved if:
- (a) the policy is not to expire before the expiration of the local practising certificate of the barrister to whom the policy relates, and
  - (b) the Attorney General has, by order in writing given to the Bar Council, approved the type of policy and the level of insurance provided by the policy, and has approved of the terms of the policy as complying with agreed national standards for professional indemnity insurance for barristers, and
  - (c) any conditions imposed by the order are complied with.
- (3) The Bar Council is entitled to accept as evidence that there is, or will be, in force with respect to an insurable barrister an approved indemnity insurance policy:
- (a) evidence in the form of written advice from an insurer or insurance broker to the effect that an insurer has agreed to issue the policy, or
  - (b) evidence that the premium for the policy has been received and accepted by the insurer for the purposes of the issue of the policy, or
  - (c) evidence that the regulations provide is acceptable evidence for the purposes of this section.

### **Division 3      Solicitors**

#### **404    Definitions**

In this Division:

***approved insurance policy*** means a policy of indemnity insurance that is an approved insurance policy as provided by section 406 (Solicitor to be insured and to make contributions).

***Company*** means the company that, immediately before the commencement of this Act, was managing the Solicitors' Mutual Indemnity Fund established by the *Legal Practitioners Act 1898*.

***Indemnity Fund*** means the Solicitors Mutual Indemnity Fund managed by the Company.



**405 Solicitors Mutual Indemnity Fund**

- (1) The Solicitors Mutual Indemnity Fund managed by the Company consists of the following:
  - (a) the Solicitors' Mutual Indemnity Fund established by the *Legal Practitioners Act 1898*,
  - (b) the money paid on account of the Indemnity Fund by insurable solicitors either as annual contributions or as levies under this Division,
  - (c) the interest or other income accruing from investment of the money in the Indemnity Fund,
  - (d) any other money lawfully paid into the Indemnity Fund,
  - (e) investments made under section 408 (Investment of Indemnity Fund),
  - (f) such other assets as are acquired as part of the Indemnity Fund.
- (2) The Company may arrange with an insurer for insurance of the Indemnity Fund or any part of it.
- (3) The Indemnity Fund is the property of the Law Society and may be used only for the purposes of this Division.

**406 Solicitor to be insured and to make contributions**

- (1) The Law Society Council must not grant or renew a local practising certificate to an insurable solicitor unless it is satisfied:
  - (a) that there is, or will be, in force with respect to the solicitor an approved insurance policy, and
  - (b) that any contribution or levy, or instalment of a contribution, that is payable by the solicitor under section 411 (Contributions) or 412 (Levies) or under Schedule 7 has been paid to the Company.
- (2) A policy of indemnity insurance is an approved insurance policy if:
  - (a) the policy is not to expire before the expiration of the local practising certificate of the solicitor to whom the policy relates, and
  - (b) the Attorney General has, by order in writing given to the Law Society, approved of the insurer and of the terms of the policy as complying with agreed national standards for professional indemnity insurance for solicitors, and

- (c) any conditions imposed by the order are complied with.
- (3) The Law Society may negotiate with insurers and other persons in relation to the provision of indemnity insurance to any solicitor or former solicitor with respect to civil liability that may arise in connection with:
- (a) the solicitor's or former solicitor's practice or former practice, or
  - (b) the solicitor's or former solicitor's administration of any trust or deceased estate of which the solicitor or former solicitor is or was a trustee or executor,
- and may do any other thing necessary for or in connection with the Law Society Council's functions under this section.
- (4) The Law Society is entitled to accept as evidence that there is, or will be, in force with respect to an insurable solicitor an approved indemnity insurance policy:
- (a) evidence in the form of written advice from an insurer or insurance broker to the effect that an insurer has agreed to issue the policy, or
  - (b) evidence that the premium for the policy has been received and accepted by the insurer for the purposes of the issue of the policy, or
  - (c) evidence that the solicitor is employed by a law practice that has an approved indemnity insurance policy in force that covers the solicitor,
  - (d) evidence that the regulations provide is acceptable evidence for the purposes of this section.

**407 Separate account**

The Company is to maintain with an ADI in New South Wales a separate account with the name "Solicitors Mutual Indemnity Fund".

**408 Investment of Indemnity Fund**

Money in the Indemnity Fund that is not immediately required for the purposes of the Fund may be invested:

- (a) in accordance with Division 2 of Part 2 of the *Trustee Act 1925* as if the money were trust funds, or
- (b) on deposit with the Treasurer, or

Clause 408	Legal Profession Bill 2004
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- (c) in the purchase of securities or shares listed for quotation on a prescribed financial market (within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth), or
- (d) in the acquisition of an interest in real estate in Australia, or
- (e) in bills of exchange drawn, accepted or endorsed by an ADI.

#### **409 Payments from Indemnity Fund**

- (1) There is payable from the Indemnity Fund in such order as the Company decides:
  - (a) the expenses incurred by the Company in carrying on its business, and
  - (b) premiums in respect of any approved insurance policy required by section 406 (Solicitor to be insured and to make contributions), and
  - (c) such amount as the Company determines towards meeting any difference between the indemnity provided by the approved insurance policy required by section 406 and the liability of a person insured under the policy, and
  - (d) such other amounts as the Company determines.
- (2) The Company is required to pay from the Indemnity Fund the costs of an investigation of the Indemnity Fund, as referred to in section 414 (Investigation of Indemnity Fund), in accordance with a direction given by the Attorney General under that section.
- (3) The Company may make determinations under subsection (1):
  - (a) that differ according to different circumstances, or
  - (b) that are subject to compliance with conditions imposed by the Company,
 or that do both.
- (4) The Company may:
  - (a) divide solicitors into classes approved by the Law Society Council, and
  - (b) under subsection (1) (c), make a different determination for each of the classes.

#### **410 Payments relating to defaulting insurers**

- (1) Payments may be made by the Company from the Indemnity Fund for the purpose of indemnifying any person who is insured under an approved insurance policy that was issued or renewed by a defaulting insurer, in accordance with arrangements approved from time to time by the Attorney General.
- (2) The Law Society and the Company may enter into an agreement with a defaulting insurer (including a provisional liquidator or liquidator of a defaulting insurer), or with any insured person, in connection with the payment of amounts from the Indemnity Fund under this section.
- (3) In particular, any such agreement may provide for the following:
  - (a) the assignment or subrogation to the Company of the rights and remedies of a defaulting insurer or the insured person (or both) under or in connection with the approved insurance policy,
  - (b) the recovery by the Company from a defaulting insurer of any amount paid from the Indemnity Fund under this section.
- (4) Any payment made from the Indemnity Fund under this section, and any agreement entered into with an insured person under this section, does not prevent the recovery by the Company from a defaulting insurer of any amount that would have been recoverable by the insured person under or in connection with the approved insurance policy had the payment not been made or the agreement not been entered into.
- (5) Any amount recovered by the Company as a result of the exercise of its functions under this section (including its functions under an agreement referred to in this section) is to be paid into the Indemnity Fund. This does not apply to any amount that is payable to another person:
  - (a) under any other Act or law, or
  - (b) under any agreement referred to in this section, or
  - (c) under the regulations.
- (6) Payments may be made from the Indemnity Fund for the purpose of meeting any reasonable costs and expenses incurred by the Company in exercising its functions under this section, including its functions under an agreement referred to in this section.
- (7) For the purposes of this section, an insurer under an approved insurance policy is a *defaulting insurer* if the Company is satisfied that:

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- (a) the insurer is unwilling or unable to meet any claims or other liabilities under the approved insurance policy, or
- (b) a liquidator or provisional liquidator has been appointed in respect of the insurer, or
- (c) the insurer has been dissolved.

#### **411 Contributions**

- (1) An insurable solicitor is liable to pay to the Indemnity Fund an annual contribution of an amount determined by the Company and approved by the Law Society Council. An insurable solicitor is also liable to pay to the Indemnity Fund such further amounts in respect of the annual contribution as may be determined by the Company and approved by the Law Society Council.
- (2) The Company may make a different determination under subsection (1) for a particular solicitor or class of solicitors.
- (3) If a solicitor applies for a practising certificate that will be in force for part only of a year commencing on 1 July, the contribution is such proportion of the total amount determined for the solicitor under subsection (1) as is borne to 1 year by the number of days for which the practising certificate will be in force.
- (4) A contribution required to be paid under this section must be paid to the Company on account of the Indemnity Fund.
- (5) The Company may permit a contribution to be paid by instalments under an arrangement approved by the Law Society Council.

#### **412 Levies**

- (1) If the Company is at any time of the opinion that the assets of the Indemnity Fund may be insufficient to meet its liabilities, the Company may impose on each insurable solicitor a levy payable to the Company on account of the Indemnity Fund.
- (2) A levy is to be of such amount as the Company determines and may differ according to the different factors in relation to which contributions under this Division have been determined.
- (3) A levy is payable at the time, and in the manner, fixed by the Company which may, in a special case, allow time for payment.

#### **413 Failure to pay contribution or levy**

If, after being given written notice, an insurable solicitor fails to pay a contribution, instalment of a contribution, or levy in accordance with section 411 (Contributions) or 412 (Levies) or Schedule 7 (Professional indemnity insurance—provisions relating to HIH insurance) the Company must report the failure to the Law Society Council.

**Note.** Part 2.4 provides for the suspension or cancellation of a local practising certificate for a failure to pay such a contribution, instalment of a contribution, or levy.

#### **414 Investigation of Indemnity Fund**

- (1) The Attorney General may at any time appoint an appropriately qualified person to conduct an investigation in relation to the Indemnity Fund, including in relation to any of the following:
  - (a) the state and sufficiency of the Indemnity Fund,
  - (b) the adequacy of the amount or rate of any contributions or levies paid or payable under this Division,
  - (c) the management of the Indemnity Fund by the Company, and the adequacy of the investment strategies being adopted by the Company,
  - (d) such other matters relating to the Indemnity Fund as the Attorney General determines.
- (2) The Company is to provide all reasonable assistance to the person appointed to conduct the investigation.
- (3) The person appointed to conduct the investigation is to report to the Attorney General on the result of the investigation.
- (4) The Attorney General may, by notice in writing served on the Company, require the Company to pay from the Indemnity Fund the costs of the investigation.
- (5) For the purposes of subsection (4), the *costs of the investigation* means:
  - (a) the reasonable costs and expenses incurred in connection with the investigation by the person appointed to conduct the investigation, and
  - (b) the reasonable cost of any remuneration paid to that person in connection with the investigation.

#### **415 Powers of investigators**

- (1) For the purpose of conducting an investigation under section 414 (Investigation of Indemnity Fund), an investigator may, by notice in writing served on any person, require the person to provide to the investigator such information or records relating to the Indemnity Fund or the Company's management of the Indemnity Fund as the investigator specifies in the notice.
- (2) The notice must specify the manner in which information or records are required to be provided and a reasonable time by which the information or records are required to be provided.
- (3) A person who, without reasonable excuse, neglects or fails to comply with a requirement made of the person under this section is guilty of an offence.

Maximum penalty: 100 penalty units.

- (4) A person who provides any information in purported compliance with a requirement made under this section, knowing that it is false or misleading in a material particular, is guilty of an offence.

Maximum penalty: 100 penalty units.

- (5) In this section:

*investigator* means a person appointed by the Attorney General under section 414 (Investigation of Indemnity Fund) to conduct an investigation in relation to the Indemnity Fund.

#### **416 Application of Division to other persons**

The Company may apply this Division (sections 406 (Solicitor to be insured and to make contributions) and 413 (Failure to pay contribution or levy) and Schedule 7 excepted) to persons who:

- (a) are not insurable solicitors, and
- (b) are within a class of persons approved by the Law Society Council for the purposes of this section, and
- (c) are insured under a policy of insurance that, if the persons were insurable solicitors, would be an approved policy of indemnity insurance for the purposes of section 406 (Solicitor to be insured and to make contributions), and
- (d) pay to the Indemnity Fund such contributions and levies as the Company determines and the Law Society Council approves.

#### **417 Provisions relating to HIH insurance**

Schedule 7 has effect.

### **Part 3.4 Fidelity cover**

#### **Division 1 Preliminary**

##### **418 Purpose**

The purpose of this Part is to establish and maintain a fund to provide a source of compensation for defaults by law practices arising from acts or omissions of associates.

##### **419 Definitions**

In this Part:

***allow*** a claim includes compromise or settle the claim.

***capping and sufficiency provisions*** of:

- (a) this jurisdiction—means section 456 (Caps on payments) and section 457 (Sufficiency of Fidelity Fund), or
- (b) another jurisdiction—means the provisions of the corresponding law of that jurisdiction that correspond to those sections.

***claim*** means a claim under this Part.

***claimant*** means a person who makes a claim under this Part.

***concerted interstate default*** means a default of a law practice that arises from an act or omission:

- (a) that was committed jointly by 2 or more associates of the practice, or
- (b) parts of which were committed by different associates of the practice or different combinations of associates of the practice,

where this jurisdiction is the relevant jurisdiction for at least one of the associates and another jurisdiction is the relevant jurisdiction for at least one of the associates.



**default**, in relation to a law practice, means:

- (a) a failure of the practice to pay or deliver trust money or trust property that was received by the practice or an associate of the practice in the course of legal practice by the practice or an associate, where the failure arises from or is constituted by an act or omission of an associate that involves dishonesty, or
- (b) a fraudulent dealing with trust property that was received by the practice or an associate of the practice in the course of legal practice by the practice or an associate, where the fraudulent dealing is constituted by or arises from an act or omission of an associate that involves dishonesty.

**dishonesty** includes fraud.

**pecuniary loss**, in relation to a default, means:

- (a) the amount of trust money, or the value of trust property, that is not paid or delivered, or
- (b) the amount of money that a person loses or is deprived of, or the loss of value of trust property, as a result of a fraudulent dealing.

**relevant jurisdiction**—see section 433 (Meaning of “relevant jurisdiction”).

#### **420 Time of default**

- (1) This section applies for the purpose of determining which jurisdiction’s law applies in relation to a default.
- (2) The default is taken to have occurred when the act or omission giving rise to or constituting the default occurred.
- (3) An omission is taken to have occurred on the day on or by which the act not performed ought reasonably to have been performed or on such other day as is determined in accordance with the regulations.

#### **421 Application of this Part**

This Part does not apply to a default of a law practice consisting of a barrister.

## **Division 2      Fidelity Fund**

### **422    Establishment of Legal Practitioners Fidelity Fund**

- (1) The Law Society must establish and maintain a Legal Practitioners Fidelity Fund consisting of:
  - (a) the money (including invested money) that, immediately before the commencement of this section, made up the Solicitors' Fidelity Fund maintained under the *Legal Profession Act 1987*,
  - (b) the money paid on account of the Fidelity Fund either as annual contributions or levies under this Part,
  - (c) the money paid in accordance with the regulations under section 197 (Fidelity cover) on account of the Fidelity Fund by locally registered foreign lawyers,
  - (d) the interest or other income accruing from investment of the money in the Fidelity Fund,
  - (e) money paid to the Fidelity Fund from the Public Purpose Fund, and
  - (f) any other money lawfully paid to the Fidelity Fund.
- (2) The Fidelity Fund is the property of the Law Society, is to be administered by the Law Society Council and is to be applied in accordance with this Part.

### **423    Establishment of separate Legal Practitioners Fidelity Fund Account**

- (1) The Law Society must maintain with an ADI in New South Wales a separate account with the name "Legal Practitioners Fidelity Fund Account" and must pay to the credit of the account all money received on account of the Fidelity Fund.
- (2) The account is to be operated in the manner determined by the Law Society Council.

### **424    Investment of Fidelity Fund**

Money in the Fidelity Fund that is not immediately required for the purposes of the Fund may be invested:

- (a) in accordance with Division 2 of Part 2 of the *Trustee Act 1925* as if the money were trust funds, or
- (b) on deposit with the Treasurer.

Clause 425	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.4	Fidelity cover

#### **425 Payments from Fidelity Fund**

There is to be paid from the Fidelity Fund in such order as the Law Society Council decides:

- (a) premiums for insurance of the Fidelity Fund,
- (b) legal expenses incurred in investigating or defending claims made against the Fidelity Fund, or against the Law Society in relation to the Fidelity Fund, or otherwise incurred in relation to the Fidelity Fund,
- (c) the amount of a claim (including interest and costs) allowed or established against the Law Society in respect of the Fidelity Fund,
- (d) the expenses of administering the Fidelity Fund, including allowances and travelling expenses for members of the Law Society Council and the Fidelity Fund Management Committee in connection with the exercise of their functions in relation to the Fidelity Fund,
- (e) the costs of the Law Society Council in exercising its function under section 699 (2) (Functions of Law Society), and
- (f) any other money payable from the Fidelity Fund under this Part or in respect of amounts paid or payable for the purposes of Chapter 5 (External intervention) or under rules or regulations made under this Act.

#### **426 Management Committee**

- (1) The Law Society Council may by resolution delegate all or any of its functions in relation to the Fidelity Fund to a Management Committee consisting of:
  - (a) 3 or more persons who are members of the Council, and
  - (b) not more than 8 persons who are not members of the Council but are members of the Law Society.
- (2) The Law Society Council may by resolution rescind or vary a resolution made under subsection (1).
- (3) The Law Society Council may terminate a person's membership of the Committee and may fill the subsequent or any other vacancy.
- (4) At a meeting of the Committee, 3 members, including at least 1 member of the Law Society Council, constitute a quorum.

- (5) At a meeting of the Committee:
  - (a) a member of the Committee appointed for the purpose by the Law Society Council is to preside, or
  - (b) if he or she is absent from the meeting, another member of the Committee elected for the purpose by those present at the meeting is to preside.
- (6) The decision of a majority of the members present and voting at a meeting of the Committee is a decision of the Committee and, in the event of an equality of votes, the member presiding at the meeting is entitled to an additional vote as a casting vote.
- (7) The Committee may call, adjourn, and regulate the conduct of, its meetings as it thinks fit.

#### **427 Audit**

The Law Society Council must cause the accounts relating to the Fidelity Fund to be audited annually by a firm of accountants approved by the Attorney General.

#### **428 Insurance**

- (1) The Law Society Council may arrange with an insurer for the insurance of the Fidelity Fund.
- (2) Without limiting subsection (1), the Law Society Council may arrange for the insurance of the Fidelity Fund against particular claims or particular classes of claims.
- (3) The proceeds paid under a policy of insurance against particular claims or particular classes of claims are to be paid into the Fidelity Fund, and a claimant is not entitled to have direct recourse to the proceeds or any part of them.
- (4) No liability (including liability in defamation) is incurred by a protected person in respect of anything done or omitted to be done in good faith for the purpose of arranging for the insurance of the Fidelity Fund.
- (5) In this section:

***protected person*** means:

  - (a) the Law Society or a member of the Law Society Council or the Fidelity Fund Management Committee, or

Clause 428	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.4	Fidelity cover

- (b) a member of staff of or a person acting at the direction of the Law Society, Law Society Council or Fidelity Fund Management Committee.

#### **429 Borrowing**

The Law Society cannot borrow money for the purposes of the Fidelity Fund.

### **Division 3 Contributions and levies**

#### **430 Contributions**

- (1) An Australian lawyer must, when applying for the grant or renewal of a local practising certificate as a solicitor, pay to the Law Society on account of the Fidelity Fund the appropriate contribution to the Fidelity Fund for the year ending on 30 June during which the practising certificate would be in force.
- (2) A solicitor who is an interstate legal practitioner and who (whether alone or with a co-signatory) becomes authorised to withdraw money from a local trust account must pay to the Law Society on account of the Fidelity Fund the appropriate contribution to the Fidelity Fund for the year ending on 30 June during which the authorisation commenced or continues, as required by the regulations under section 472 (Interstate legal practitioner becoming authorised to withdraw from local trust account).
- (3) The amount of a contribution to the Fidelity Fund is an amount determined by the Law Society Council and approved by the Attorney General (subject to regulations under section 472 in the case of a contribution under subsection (2)).
- (4) The Law Society Council may determine different contributions for different classes of solicitors and may permit a contribution to be paid by instalments under an arrangement approved by the Council.
- (5) The amount of the contribution that would otherwise be payable for a year ending on 30 June is reduced by one-half if:
  - (a) (in the case of a contribution under subsection (1)) the application for a practising certificate is made after 31 December in that year, or

- (b) (in the case of a contribution under subsection (2)) the solicitor becomes authorised to withdraw money from the local trust account after 31 December in that year.
- (6) The Law Society may refund, at a rate determined by the Law Society Council, a part of a contribution paid by a solicitor for a year ending on 30 June if:
  - (a) (in the case of a contribution under subsection (1)) the solicitor ceases to practise as a solicitor at any time before 30 June in that year, or
  - (b) (in the case of a contribution under subsection (2)) the solicitor ceases before 30 June in that year to be authorised to withdraw money from the local trust account.
- (7) This section does not apply to the Crown Solicitor or any other solicitor who:
  - (a) is employed by the Crown or by a corporation prescribed for the purposes of this section, and
  - (b) practises as a solicitor only in the course of that employment.

#### **431 Levies**

- (1) If the Law Society Council is at any time of the opinion that the Fidelity Fund is likely to be insufficient to meet the liabilities to which it is subject, the Council may, by resolution, impose on each solicitor liable to contribute to the Fidelity Fund a levy payable to the Council on account of the Fidelity Fund.
- (2) A levy is to be of such amount as the Law Society Council determines and may differ according to whether the solicitor is an interstate legal practitioner and to whether a solicitor is practising:
  - (a) on his or her own account or in partnership, or
  - (b) as an employee of another solicitor, or
  - (c) as an employee of a person who is not a solicitor, or of a corporation.
- (3) A levy is payable at the time, and in the manner, fixed by the Law Society Council, which may, in a special case, allow time for payment.

Clause 432	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.4	Fidelity cover

#### **432 Failure to pay contribution or levy**

If a solicitor fails to pay a contribution required under section 430 or, after being given the prescribed notice, fails to pay a levy in accordance with this Part, the Law Society Council may:

- (a) in the case of a local legal practitioner—suspend the solicitor’s practising certificate while the failure continues, or
- (b) in the case of an interstate legal practitioner—suspend that practitioner’s entitlement under Part 2.4 to practise in this State while the failure continues and request the corresponding authority in the jurisdiction in which the practitioner has his or her sole or principal place of legal practice to suspend the solicitor’s interstate practising certificate until the Law Society Council notifies the regulatory authority that the contribution or levy has been paid.

### **Division 4 Defaults to which this Part applies**

#### **433 Meaning of “relevant jurisdiction”**

- (1) The relevant jurisdiction for an associate of a law practice whose act or omission (whether alone or with one or more other associates of the practice) gives rise to a default of the practice is to be determined under this section.

**Note.** The concept of an associate’s “relevant jurisdiction” is used to determine the jurisdiction whose Fidelity Fund is liable for a default of a law practice arising from an act or omission committed by the associate. The relevant jurisdiction for an associate is in some cases the associate’s home jurisdiction.

- (2) In the case of a default involving trust money received in Australia (whether or not it was paid into an Australian trust account), the relevant jurisdiction for the associate is:
  - (a) if the trust money was paid into an Australian trust account and if the associate (whether alone or with a co-signatory) was authorised to withdraw any or all of the trust money from the only or last Australian trust account in which the trust money was held before the default—the jurisdiction under whose law that trust account was maintained, or
  - (b) in any other case—the associate’s home jurisdiction.

- (3) In the case of a default involving trust money received outside Australia and paid into an Australian trust account, the relevant jurisdiction for the associate is:
  - (a) if the associate (whether alone or with a co-signatory) was authorised to withdraw any or all of the trust money from the only or last Australian trust account in which the trust money was held before the default—the jurisdiction under whose law that trust account was maintained, or
  - (b) in any other case—the associate’s home jurisdiction.
- (4) In the case of a default involving trust property received in Australia, or received outside Australia and brought to Australia, the relevant jurisdiction for the associate is the associate’s home jurisdiction.

**Note.** Section 461 (Defaults involving interstate elements where committed by one associate only) provides that the Law Society Council may treat the default as consisting of 2 or more defaults for the purpose of determining the liability of the Fidelity Fund.

#### **434 Defaults to which this Part applies**

- (1) This Part applies to a default of a law practice arising from an act or omission of one or more associates of the practice, where this jurisdiction is the relevant jurisdiction for the only associate or one or more of associates involved.
- (2) It is immaterial where the default occurs.
- (3) It is immaterial that the act or omission giving rise to a default does not constitute a crime or other offence under the law of this or any other jurisdiction or of the Commonwealth or that proceedings have not been commenced or concluded in relation to a crime or other offence of that kind.

#### **435 Defaults relating to financial services or investments**

- (1) This Part does not apply to a default of a law practice to the extent that the default occurs in relation to money or property that is entrusted to or held by the practice for or in connection with:
  - (a) a financial service provided by the practice or an associate of the practice in circumstances where the practice or associate is required to hold an Australian financial services licence covering the provision of the service (whether not such a licence is held at any relevant time), or



- (b) a financial service provided by the practice or an associate of the practice in circumstances where the practice or associate provides the service as a representative of another person who carries on a financial services business (whether or not the practice or associate is an authorised representative at any relevant time).
- (2) Without limiting subsection (1), this Part does not apply to a default of a law practice to the extent that the default occurs in relation to money or property that is entrusted to or held by the practice for or in connection with:
- (a) a managed investment scheme, or
  - (b) mortgage financing,
- undertaken by the practice.
- (3) Without limiting subsections (1) and (2), this Part does not apply to a default of a law practice to the extent that the default occurs in relation to money or property that is entrusted to or held by the practice for investment purposes, whether on its own account or as agent, unless:
- (a) the money or property was entrusted to or held by the practice:
    - (i) in the ordinary course of legal practice, and
    - (ii) primarily in connection with the provision of legal services to or at the direction of the client, and
  - (b) the investment is or is to be made:
    - (i) in the ordinary course of legal practice, and
    - (ii) for the ancillary purpose of maintaining or enhancing the value of the money or property pending completion of the matter or further stages of the matter or pending payment or delivery of the money or property to or at the direction of the client.
- (4) In this section:
- Australian financial services licence, authorised representative, financial service* and *financial services business* have the same meanings as in Chapter 7 of the *Corporations Act 2001* of the Commonwealth.

## **Division 5      Claims about defaults**

### **436      Claims about defaults**

- (1) A person who suffers pecuniary loss because of a default to which this Part applies may make a claim against the Fidelity Fund to the Law Society about the default.
- (2) A claim is to be made in writing in a form approved by the Law Society Council.
- (3) The Law Society Council may require the person who makes a claim to do either or both of the following:
  - (a) to give further information about the claim or any dispute to which the claim relates,
  - (b) to verify the claim or any further information, by statutory declaration.
- (4) The Law Society Council must investigate a claim made to it, including the default to which it relates, and may do so in any manner it considers appropriate.

### **437      Time limit for making claims**

- (1) Subject to section 439 (Time limit for making claims following advertisement), a claim does not lie against the Fidelity Fund unless the prospective claimant notifies the Law Society of the default concerned:
  - (a) within the period of 6 months after the prospective claimant becomes aware of the default, or
  - (b) within a further period allowed by the Law Society Council, or
  - (c) if the Supreme Court allows further time after the Law Society Council refuses to do so—within a period allowed by the Supreme Court.
- (2) The Supreme Court or Law Society Council may allow a further period referred to in subsection (1) if satisfied that it would be appropriate to do so in a particular case having regard to matters the Supreme Court or Law Society Council considers relevant.

**438 Advertisements**

- (1) If the Law Society Council considers that there has been, or may have been, a default by a law practice, it may publish either or both of the following:
  - (a) a notice that seeks information about the default,
  - (b) a notice that invites claims about the default and fixes a final date after which claims relating to the default cannot be made.
- (2) The final date fixed by a notice must be a date that is:
  - (a) at least 3 months later than the date of the first or only publication of the notice, and
  - (b) not more than 12 months after the date of that first or only publication.
- (3) A notice must be published:
  - (a) in a newspaper circulating generally throughout Australia, and
  - (b) in a newspaper circulating generally in each jurisdiction where the law practice:
    - (i) has an office, or
    - (ii) at any relevant time had an office,if known to the Law Society Council, and
  - (c) on the internet site (if any) of the Law Society.
- (4) The Law Society Council may provide information to persons making inquiries in response to a notice published under this section.
- (5) Apart from extending the period during which claims can be made under this Part (where relevant), publication of a notice under this section does not confer any entitlements in relation to any claim or the default to which it relates or provide any grounds affecting the determination of any claim.
- (6) Neither the publication in good faith of a notice under this section, nor the provision of information in good faith under this section, subjects a protected person to any liability (including liability in defamation).
- (7) In this section:

***protected person*** means:

  - (a) the Law Society or a member of the Law Society Council or the Fidelity Fund Management Committee, or
  - (b) the proprietor, editor or publisher of the newspaper, or

- (c) an internet service provider or internet content host, or
- (d) a member of staff of or a person acting at the direction of any person or entity referred to in this definition.

**439 Time limit for making claims following advertisement**

- (1) This section applies if the Law Society Council publishes a notice under section 438 (Advertisements) fixing a final date after which claims relating to a default cannot be made.
- (2) A claim may be made:
  - (a) up to and including the final date fixed under the notice, or
  - (b) within a further period allowed by the Law Society Council, or
  - (c) if the Supreme Court allows further time after the Law Society Council refuses to do so—within a period allowed by the Supreme Court,even though it would have been barred under section 437 (Time limit for making claims) had the notice not been published.

**440 Claims not affected by certain matters**

- (1) A claim may be made about a law practice's default despite a change in the status of the practice or the associate concerned after the occurrence of the act or omission from which the default arose.
- (2) A claim that has been made is not affected by a later change in the status of the practice or associate.
- (3) For the purposes of this section, a *change in status* includes:
  - (a) a change in the membership or staffing or the dissolution of the practice (in the case of a partnership), and
  - (b) a change in the directorship or staffing or the winding up or dissolution of the practice (in the case of an incorporated legal practice), and
  - (c) the fact that the associate has ceased to practise or to hold an Australian practising certificate (in the case of an associate who was an Australian legal practitioner), and
  - (d) the death of the associate (in the case of a natural person).

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#### **441 Advance payments**

- (1) The Law Society Council may, at its absolute discretion, make payments to a claimant in advance of the determination of a claim if satisfied that:
  - (a) the claim is likely to be allowed, and
  - (b) payment is warranted to alleviate hardship.
- (2) Any payments made in advance are to be taken into account when the claim is determined.
- (3) Payments under this section are to be made from the Fidelity Fund.
- (4) If the claim is disallowed, the amounts paid under this section are recoverable by the Law Society as a debt due to the Fidelity Fund.
- (5) If the claim is allowed but the amount payable is less than the amount paid under this section, the excess paid under this section is recoverable by the Law Society as a debt due to the Fidelity Fund.

### **Division 6 Determination of claims**

#### **442 Determination of claims**

- (1) The Law Society Council must determine a claim by wholly or partly allowing or disallowing it.
- (2) The Law Society Council must disallow a claim to the extent that the claim does not relate to a default for which the Fidelity Fund is liable.
- (3) The Law Society Council may wholly or partly disallow a claim, or reduce a claim, to the extent that:
  - (a) the claimant knowingly assisted in or contributed towards, or was a party or accessory to, the act or omission giving rise to the claim, or
  - (b) the negligence of the claimant contributed to the loss, or
  - (c) the conduct of the transaction with the law practice in relation to which the claim is made was illegal, and the claimant knew or ought reasonably to have known of that illegality, or
  - (d) proper and usual records were not brought into existence during the conduct of the transaction, or were destroyed, and the claimant knew or ought reasonably to have known that records of that kind would not be kept or would be destroyed, or

- (e) the claimant has unreasonably refused to disclose information or documents to or co-operate with:
  - (i) the Law Society Council, or
  - (ii) any other authority (including, for example, an investigative or prosecuting authority),  
in the investigation of the claim.
- (4) Subsections (2) and (3) do not limit the Law Society Council's power to disallow a claim on any other ground.
- (5) Without limiting subsection (2) or (3), the Law Society Council may reduce the amount otherwise payable on a claim to the extent the Council considers appropriate:
  - (a) if satisfied that the claimant assisted in or contributed towards, or was a party or accessory to, the act or omission giving rise to the claim, or
  - (b) if satisfied that the claimant unreasonably failed to mitigate losses arising from the act or omission giving rise to the claim, or
  - (c) if satisfied that the claimant has unreasonably hindered the investigation of the claim.
- (6) If the amount of a claim does not exceed \$2,500 or such other amount as may be prescribed by the regulations, the Law Society Council may allow the claim after waiving compliance with such of the provisions of this Part as it thinks fit.
- (7) The Law Society Council must, in allowing a claim, specify the amount payable.

**443 Claimant required to pursue claims etc**

- (1) The Law Society Council may give a claimant not less than 21 days' written notice requiring the claimant to do such of the following as are specified in the notice:
  - (a) take specified steps for the purpose of pursuing the claim,
  - (b) supply the Law Society Council with specified particulars in relation to the claim,
  - (c) produce or deliver to the Law Society Council any securities or documents necessary or available to support the claim or to enable the Law Society Council to establish any rights of the Law Society against the law practice,

Clause 443	Legal Profession Bill 2004
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- (d) do specified things in connection with the claim.
- (2) If the claimant fails to comply with the notice, the Law Society Council may:
  - (a) wholly or partly disallow the claim, or
  - (b) direct that the whole, or a specified part of, any interest otherwise payable under section 446 not be paid.

**444 Maximum amount allowable**

- (1) The amount payable in respect of a default must not exceed the pecuniary loss resulting from the default.
- (2) This section does not apply to costs payable under section 445 (Costs) or to interest payable under section 446 (Interest).

**445 Costs**

- (1) If the Law Society Council wholly or partly allows a claim, the Council must order payment of the claimant's reasonable legal costs involved in making and proving the claim, unless the Council considers that special circumstances exist warranting a reduction in the amount of costs or warranting a determination that no amount should be paid for costs.
- (2) If the Law Society Council wholly disallows a claim, the Council may order payment of the whole or part of the claimant's reasonable legal costs involved in making and attempting to prove the claim, where the Council considers it is appropriate to make the order.
- (3) The costs are payable from the Fidelity Fund.

**446 Interest**

- (1) In determining the amount of pecuniary loss resulting from a default, the Law Society Council is to add interest on the amount payable (excluding interest), unless the Council considers that special circumstances exist warranting a reduction in the amount of interest or warranting a determination that no amount should be paid by way of interest.
- (2) The interest is to be calculated from the date on which the claim was made, to the date the Law Society Council notifies the claimant that the claim has been allowed, at the rate specified in or determined under the regulations.

- (3) To the extent that regulations are not in force for the purposes of subsection (2), interest is to be calculated at the rate of 5 per cent per annum.
- (4) The interest is payable from the Fidelity Fund.

**447 Reduction of claim because of other benefits**

- (1) A person is not entitled to recover from the Fidelity Fund any amount equal to amounts or to the value of other benefits:
  - (a) that have already been paid to or received by the person, or
  - (b) that have already been determined and are payable to or receivable by the person, or
  - (c) that (in the opinion of the Law Society Council) are likely to be paid to or received by the person, or
  - (d) that (in the opinion of the Law Society Council) might, but for neglect or failure on the person's part, have been paid or payable to or received or receivable by the person,from other sources in respect of the pecuniary loss to which a claim relates.
- (2) The Law Society Council may, at its absolute discretion, pay to a person the whole or part of an amount referred to in subsection (1) (c) if satisfied that payment is warranted to alleviate hardship, but nothing in this subsection affects section 449 (Repayment of certain amounts).

**448 Subrogation**

- (1) On payment of a claim from the Fidelity Fund, the Law Society Council is subrogated to the rights and remedies of the claimant against any person in relation to the default to which the claim relates.
- (2) Without limiting subsection (1), that subsection extends to a right or remedy against:
  - (a) the associate in respect of whom the claim is made, or
  - (b) the person authorised to administer the estate of the associate in respect of whom the claim is made and who is deceased or an insolvent under administration.
- (3) Subsection (1) does not apply to a right or remedy against an associate if, had the associate been a claimant in respect of the default, the claim would not be disallowable on any of the grounds set out in section 442 (3) (Determination of claims).



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- (4) The Law Society Council may exercise its rights and remedies under this section in its own name or in the name of the claimant.
- (5) If the Law Society Council brings proceedings under this section in the name of the claimant, it must indemnify the claimant against any costs awarded against the claimant in the proceedings.
- (6) The Law Society Council must pay into the Fidelity Fund any money recovered in exercising its rights and remedies under this section.

**449 Repayment of certain amounts**

- (1) If a claimant:
  - (a) receives a payment from the Fidelity Fund in respect of the claim, and
  - (b) receives or recovers from another source or sources a payment on account of the pecuniary loss, and
  - (c) there is a surplus after deducting the amount of the pecuniary loss from the total amount received or recovered by the claimant from both or all sources,

the amount of the surplus is a debt payable by the claimant to the Fund.
- (2) However, the amount payable by the claimant cannot exceed the amount the claimant received from the Fidelity Fund in respect of the claim.

**450 Notification of delay in making decision**

- (1) If the Law Society Council considers that a claim is not likely to be determined within 12 months after the claim was made, the Council must notify the claimant in writing that the claim is not likely to be determined within that period.
- (2) The notification must contain a brief statement of reasons for the delay and an indication of the period within which the claim is likely to be determined.

**451 Notification of decision**

- (1) The Law Society Council must, as soon as practicable, notify the claimant in writing about any decision it makes about the claim.
- (2) The notification must include an information notice about:

- (a) a decision of the Law Society Council to wholly or partly disallow a claim, or
- (b) a decision of the Law Society Council to reduce the amount allowed in respect of a claim.

**452 Appeal against decision on claim**

- (1) A claimant may appeal to the Supreme Court against:
  - (a) a decision of the Law Society Council to wholly or partly disallow a claim, or
  - (b) a decision of the Law Society Council to reduce the amount allowed in respect of a claim,but an appeal does not lie against a decision of the Council to limit the amount payable, or to decline to pay an amount, under the capping and sufficiency provisions of this jurisdiction.
- (2) An appeal against a decision must be lodged within 30 days of receiving the information notice about the decision.
- (3) On an appeal under this section:
  - (a) the appellant must establish that the whole or part of the amount sought to be recovered from the Fidelity Fund is not reasonably available from other sources, unless the Law Society Council waives that requirement, and
  - (b) the Supreme Court may, on application by the Law Society Council, stay the appeal pending further action being taken to seek recovery of the whole or part of that amount from other sources.
- (4) The Supreme Court may review the merits of the Law Society Council's decision.
- (5) The Supreme Court may:
  - (a) affirm the decision, or
  - (b) if satisfied that the reasons for varying or setting aside the Law Society Council's decision are sufficiently cogent to warrant doing so:
    - (i) vary the decision, or
    - (ii) set aside the decision and make a decision in substitution for the decision set aside, or
    - (iii) set aside the decision and remit the matter for reconsideration by the Law Society Council in

accordance with any directions or recommendations of  
the Court,

and may make other orders as it thinks fit.

- (6) No order for costs is to be made on an appeal under this section unless the Supreme Court is satisfied that an order for costs should be made in the interests of justice.

**453 Appeal against failure to determine claim**

- (1) A claimant may appeal to the Supreme Court against a failure of the Law Society Council to determine a claim after 12 months after the claim was made.
- (2) An appeal against a failure to determine a claim may be made at any time after the period of 12 months after the claim was made and while the failure continues.
- (3) On an appeal under this section:
- (a) the appellant must establish that the whole or part of the amount sought to be recovered from the Fidelity Fund is not reasonably available from other sources, unless the Law Society Council waives that requirement, and
  - (b) the Supreme Court may, on application by the Law Society Council, stay the appeal pending further action being taken to seek recovery of the whole or part of that amount from other sources.
- (4) The Supreme Court may determine the appeal:
- (a) by:
    - (i) giving directions to the Law Society Council for the expeditious determination of the matter, and
    - (ii) if the Court is satisfied that there has been unreasonable delay—ordering that interest be paid at a specified rate that is higher than the rate applicable under section 446 (Interest), until further order or the determination of the claim, and
    - (iii) if the Court is satisfied that there has not been unreasonable delay—ordering that, if delay continues in circumstances of a specified kind, interest be paid for a specified period at a specified rate that is higher than the rate applicable under section 446 (Interest), until further order or the determination of the claim, or

- (b) by deciding not to give directions or make orders under paragraph (a).
- (5) No order for costs is to be made on an appeal under this section unless the Supreme Court is satisfied that an order for costs should be made in the interests of justice.

#### **454 Court proceedings**

In any proceedings brought in a court under section 448 (Subrogation) or section 452 (Appeal against decision on claim):

- (a) evidence of any admission or confession by, or other evidence that would be admissible against, an Australian legal practitioner or other person with respect to an act or omission giving rise to a claim is admissible to prove the act or omission despite the fact that the practitioner or other person is not a defendant in, or a party to, the proceedings, and
- (b) any defence that would have been available to the practitioner or other person is available to the Law Society Council.

### **Division 7 Payments from Fidelity Fund for defaults**

#### **455 Payments for defaults**

- (1) The Fidelity Fund is to be applied by the Law Society Council for the purpose of compensating claimants in respect of claims allowed under this Part in respect of defaults to which this Part applies.
- (2) An amount payable from the Fidelity Fund in respect of a claim is payable to the claimant or to another person at the claimant's direction.

#### **456 Caps on payments**

- (1) The Law Society Council may fix either or both of the following:
  - (a) the maximum amounts, or the method of calculating maximum amounts, that may be paid from the Fidelity Fund in respect of individual claims or classes of individual claims,
  - (b) the maximum aggregate amount, or the method of calculating maximum aggregate amount, that may be paid from the Fidelity Fund in respect of all claims made in relation to individual law practices or classes of law practices.

Clause 456	Legal Profession Bill 2004
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- (2) Amounts must not be paid from the Fidelity Fund that exceed the amounts fixed, or calculated by a method fixed, under subsection (1).
- (3) Payments from the Fidelity Fund in accordance with the requirements of subsection (2) are made in full and final settlement of the claims concerned.
- (4) Despite subsection (2), the Law Society Council may authorise payment of a larger amount if satisfied that it would be reasonable to do so after taking into account the position of the Fidelity Fund and the circumstances of the particular case.
- (5) No proceedings can be brought, by way of appeal or otherwise, to require the payment of a larger amount or to require the Law Society Council to consider payment of a larger amount.

#### **457 Sufficiency of Fidelity Fund**

- (1) If the Law Society Council is of the opinion that the Fidelity Fund is likely to be insufficient to meet the Fund's ascertained and contingent liabilities, the Council may do any or all of the following:
  - (a) postpone all payments relating to all or any class of claims out of the Fund,
  - (b) impose a levy under section 431 (Levies),
  - (c) make partial payments of the amounts of one or more allowed claims out of the Fund with payment of the balance being a charge on the Fund,
  - (d) make partial payments of the amounts of 2 or more allowed claims out of the Fund on a pro rata basis, with payment of the balance ceasing to be a liability of the Fund.
- (2) In deciding whether to do any or all of the things mentioned in subsection (1), the Law Society Council:
  - (a) must have regard to hardship where relevant information is known to the Council, and
  - (b) must endeavour to treat outstanding claims equally and equitably, but may make special adjustments in cases of hardship.
- (3) If the Law Society Council declares that a decision is made under subsection (1) (d):
  - (a) the balance specified in the declaration ceases to be a liability of the Fidelity Fund, and

- (b) the Council may (but need not) at any time revoke the declaration in relation to either the whole or a specified part of the balance, and the balance or that part of the balance again becomes a liability of the Fund.
- (4) A decision of the Law Society Council made under this section is final and not subject to appeal or review.

## **Division 8      Claims by law practices or associates**

### **458      Claims by law practices or associates about defaults**

- (1) This section applies to a default of a law practice arising from an act or omission of an associate of the practice.
- (2) A claim may be made under section 436 (Claims about defaults) by another associate of the law practice, if the associate suffers pecuniary loss because of the default.
- (3) A claim may be made under section 436 by the law practice, if the practice is an incorporated legal practice and it suffers pecuniary loss because of the default.

### **459      Claims by law practices or associates about notional defaults**

- (1) If, in respect of a default arising from an act or omission of an associate of a law practice (the *first associate*):
  - (a) another associate (the *other associate*) of the practice, or the practice itself, has paid compensation for pecuniary loss resulting from the default, and
  - (b) the other associate or the practice has, in the opinion of the Law Society Council, at all times acted honestly and reasonably in relation to the default,the other associate or the practice may make a claim as if the compensation paid by the other associate or practice were a pecuniary loss suffered as a result of the default.
- (2) The other associate or the practice may not claim under this section more than the amount paid by the other associate or practice as compensation for pecuniary loss resulting from the default as referred to in subsection (1) (a).

Clause 459	Legal Profession Bill 2004
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- (3) A reference in this section to another associate of the law practice includes a reference to:
- (a) a former associate of the practice, and
  - (b) in relation to the payment of compensation and the making of a claim—the personal representative of a deceased associate of the practice or a deceased former associate of the practice.

## **Division 9 Defaults involving interstate elements**

### **460 Concerted interstate defaults**

- (1) The Law Society Council may treat a concerted interstate default as if the default consisted of 2 or more separate defaults:
- (a) one of which is a default to which this Part applies, where this jurisdiction is the relevant jurisdiction for one or more of the associates involved, and
  - (b) the other or others of which are defaults to which this Part does not apply, where another jurisdiction or jurisdictions are the relevant jurisdictions for one or more of the associates involved.
- (2) The Law Society Council may treat a claim about a concerted interstate default as if the claim consisted of:
- (a) one or more claims made under this Part, and
  - (b) one or more claims made under a corresponding law or laws.
- (3) A claim about a concerted interstate default is to be assessed on the basis that the fidelity funds of the relevant jurisdictions involved are to contribute:
- (a) in equal shares in respect of the default, regardless of the number of associates involved in each of those jurisdictions, and disregarding the capping and sufficiency provisions of those jurisdictions, or
  - (b) in other shares as agreed by the Law Society Council and the corresponding authority or authorities involved.
- (4) Subsection (3) does not affect the application of the capping and sufficiency requirements of this jurisdiction in respect of the amount payable from the Fidelity Fund after the claim has been assessed.

**461 Defaults involving interstate elements where committed by one associate only**

- (1) This section applies to a default of a law practice that arises from an act or omission that was committed by only one associate of the practice, where the default involves more than one of the cases referred to in section 433 (2)–(4) (Meaning of “relevant jurisdiction”).
- (2) The Law Society Council may treat the default to which this section applies as if the default consisted of 2 or more separate defaults:
  - (a) one of which is a default to which this Part applies, where this jurisdiction is the relevant jurisdiction, and
  - (b) the other or others of which are defaults to which this Part does not apply, where another jurisdiction or jurisdictions are the relevant jurisdictions.
- (3) The Law Society Council may treat a claim about the default to which this section applies as if the claim consisted of:
  - (a) one or more claims made under this Part, and
  - (b) one or more claims made under a corresponding law or laws.
- (4) A claim about a default to which this section applies is to be assessed on the basis that the fidelity funds of the relevant jurisdictions involved are to contribute:
  - (a) in equal shares in respect of the default, and disregarding the capping and sufficiency provisions of those jurisdictions, or
  - (b) in other shares as agreed by the Law Society Council and the corresponding authority or authorities involved.
- (5) Subsection (4) does not affect the application of the capping and sufficiency requirements of this jurisdiction in respect of the amount payable from the Fidelity Fund after the claim has been assessed.

**Division 10 Inter-jurisdictional provisions**

**462 Protocols**

- (1) The regulations may authorise the Law Society Council to enter into arrangements (referred to in this Part as *protocols*) with corresponding authorities for or with respect to matters to which this Part relates.



Clause 462	Legal Profession Bill 2004
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- (2) Without limiting subsection (1), the regulations may authorise the making of a protocol that provides that the Law Society Council is taken to have:
  - (a) requested a corresponding authority to act as agent of the Council in specified classes of cases, or
  - (b) agreed to act as agent of a corresponding authority in specified classes of cases.
- (3) The regulations may:
  - (a) provide for the amendment, revocation or replacement of protocols, and
  - (b) provide that protocols or specified classes of protocols do not have effect in this jurisdiction unless approved by or in accordance with the regulations.

#### **463 Forwarding of claims**

- (1) If a claim is made to the Law Society Council about a default that appears to be a default to which a corresponding law applies, the Council must forward the claim or a copy of it to a corresponding authority of the jurisdiction concerned.
- (2) If a claim is made to a corresponding authority about a default that appears to be a default to which this Part applies and the claim or a copy of it is forwarded under a corresponding law to the Law Society Council by the corresponding authority, the claim is taken:
  - (a) to have been made under this Part, and
  - (b) to have been so made when the claim was received by the corresponding authority.

#### **464 Investigation of defaults to which this Part applies**

- (1) This section applies if a default appears to be a default to which this Part applies and to have:
  - (a) occurred solely in another jurisdiction, or
  - (b) occurred in more than one jurisdiction, or
  - (c) occurred in circumstances in which it cannot be determined precisely in which jurisdiction the default occurred.
- (2) The Law Society Council may request a corresponding authority or corresponding authorities to act as agent or agents for the Council, for

the purpose of processing or investigating a claim about the default or aspects of the claim.

**465 Investigation of defaults to which a corresponding law applies**

- (1) This section applies if a default appears to be a default to which a corresponding law applies and to have:
  - (a) occurred solely in this jurisdiction, or
  - (b) occurred in more than one jurisdiction (including this jurisdiction), or
  - (c) occurred in circumstances in which it cannot be determined precisely in which jurisdiction the default occurred.
- (2) The Law Society Council may act as agent of a corresponding authority, if requested to do so by the corresponding authority, for the purpose of processing or investigating a claim about the default or aspects of the claim.
- (3) If the Law Society Council agrees to act as agent of a corresponding authority under subsection (2), the Council may exercise any of its powers or functions in relation to processing or investigating the claim or aspects of the claim as if the claim had been made under this Part.

**466 Investigation of concerted interstate defaults and other defaults involving interstate elements**

- (1) This section applies if:
  - (a) a concerted interstate default, or
  - (b) a default to which section 461 (Defaults involving interstate elements where committed by one associate only) applies,appears to have occurred.
- (2) The Law Society Council may request a corresponding authority or corresponding authorities to act as agent or agents for the Council, for the purpose of processing or investigating a claim about the default or aspects of the claim.
- (3) The Law Society Council may act as agent of a corresponding authority, if requested to do so by the corresponding authority, for the purpose of processing or investigating a claim about the default or aspects of the claim.
- (4) If the Law Society Council agrees to act as agent of a corresponding authority under subsection (3), the Council may exercise any of its

Clause 466	Legal Profession Bill 2004
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powers or functions in relation to processing or investigating the claim or aspects of the claim as if the claim had been made entirely under this Part.

**467 Recommendations by Law Society Council to corresponding authorities**

If the Law Society Council is acting as agent of a corresponding authority in relation to a claim made under a corresponding law, the Council may make recommendations about the decision the corresponding authority might make about the claim.

**468 Recommendations to and decisions by Law Society Council after receiving recommendations from corresponding authorities**

- (1) If a corresponding authority makes recommendations about the decision the Law Society Council might make about a claim in relation to which the corresponding authority was acting as agent of the Council, the Council may:
  - (a) make its decision about the claim in conformity with the recommendations, whether with or without further consideration, investigation or inquiry, or
  - (b) disregard the recommendations.
- (2) A corresponding authority cannot, as agent of the Law Society Council, make a decision about the claim under Division 6 (Determination of claims).

**469 Request to another jurisdiction to investigate aspects of claim**

- (1) The Law Society Council may request a corresponding authority to arrange for the investigation of any aspect of a claim being dealt with by the Council and to provide a report on the result of the investigation.
- (2) A report on the result of the investigation received from:
  - (a) the corresponding authority, or
  - (b) a person or entity authorised by the corresponding authority to conduct the investigation,

may be used and taken into consideration by the Law Society Council in the course of dealing with the claim under this Part.

**470 Request from another jurisdiction to investigate aspects of claim**

- (1) This section applies in relation to a request received by the Law Society Council from a corresponding authority to arrange for the investigation of any aspect of a claim being dealt with under a corresponding law.
- (2) The Law Society Council may conduct the investigation.
- (3) The provisions of this Part relating to the investigation of a claim apply, with any necessary adaptations, in relation to the investigation of the relevant aspect of the claim that is the subject of the request.
- (4) The Law Society Council must provide a report on the result of the investigation to the corresponding authority.

**471 Co-operation with other authorities**

- (1) When dealing with a claim under this Part involving a law practice or an Australian legal practitioner, the Law Society Council may consult and co-operate with another person or body who or which has powers under the corresponding law of another jurisdiction in relation to the practice or practitioner.
- (2) For the purposes of subsection (1), the Law Society Council and the other person or body may exchange information concerning the claim.

**Division 11 Miscellaneous**

**472 Interstate legal practitioner becoming authorised to withdraw from local trust account**

- (1) An interstate legal practitioner who (whether alone or with a co-signatory) becomes authorised to withdraw money from a local trust account must:
  - (a) notify the Law Society Council of the authorisation in accordance with the regulations, and
  - (b) make contributions to the Fidelity Fund in accordance with the regulations.
- (2) Without limiting subsection (1), the regulations may determine or provide for the determination of any or all of the following:

Clause 472	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.4	Fidelity cover

- (a) the manner in which the notification is to be made and the information or material that is to be included in or to accompany the notification,
  - (b) the amount of the contributions, their frequency and the manner in which they are to be made.
- (3) A contravention of a requirement under this section is capable of being unsatisfactory professional conduct or professional misconduct.

#### **473 Application of Part to incorporated legal practices**

- (1) The regulations may provide that specified provisions of this Part, and any other provisions of this Act or any legal profession rule relating to the Fidelity Fund, do not apply to incorporated legal practices or apply to them with specified modifications.
- (2) For the purposes of the application of the provisions of this Part, and any other provisions of this Act or any legal profession rule relating to the Fidelity Fund, to an incorporated legal practice, a reference in those provisions to a default of a law practice extends to a default of an incorporated legal practice, but only if it occurs in connection with the provision of legal services.
- (3) Nothing in this section affects any obligation of an Australian legal practitioner who is an officer or employee of an incorporated legal practice to comply with the provisions of this Act or any legal profession rule relating to the Fidelity Fund.

#### **474 Application of Part to multi-disciplinary partnerships**

- (1) The regulations may provide that specified provisions of this Part, and any other provisions of this Act or any legal profession rule relating to the Fidelity Fund, do not apply to multi-disciplinary partnerships or apply to them with specified modifications.
- (2) For the purposes of the application of the provisions of this Part, and any other provisions of this Act or any legal profession rule relating to the Fidelity Fund, to a multi-disciplinary partnership, a reference in those provisions to a default of a law practice extends to a default of a multi-disciplinary partnership or a partner or employee of a multi-disciplinary partnership, whether or not any person involved is an Australian legal practitioner, but only if it occurs in connection with the provision of legal services.

- (3) Nothing in this section affects any obligation of an Australian legal practitioner who is a partner or employee of a multi-disciplinary partnership to comply with the provisions of this Act or any legal profession rule relating to the Fidelity Fund.

**475 Application of Part to Australian lawyers whose practising certificates have lapsed**

- (1) This section applies if an Australian lawyer is not an Australian legal practitioner because his or her Australian practising certificate has lapsed, but does not apply where:
- (a) the certificate has been suspended or cancelled under this Act or a corresponding law, or
  - (b) the lawyer's application for the grant or renewal of an Australian practising certificate has been refused under this Act or a corresponding law and the lawyer would be an Australian legal practitioner had it been granted.
- (2) For the purposes of other provisions of this Part, the practising certificate is taken not to have lapsed, and accordingly the lawyer is taken to continue to be an Australian legal practitioner.
- (3) Subsection (2) ceases to apply:
- (a) when the period of 6 months after the practising certificate actually lapsed expires, or
  - (b) if the lawyer's application for the grant or renewal of an Australian practising certificate is refused under this Act or a corresponding law,
- whichever first occurs.

**476 Availability of property of Law Society**

The Fidelity Fund is the only property of the Law Society available for the satisfaction of a successful claim.

## Part 3.5 Mortgage practices and managed investment schemes

### Division 1            Preliminary

#### 477    Definitions

(1) In this Part:

**ASIC exemption** means an exemption from the *Corporations Act 2001* of the Commonwealth given by the Australian Securities and Investments Commission under that Act.

**associate** of a solicitor—see subsection (2).

**borrower** means a person who borrows from a lender or contributor money that is secured by a mortgage.

**client** of a solicitor means a person who:

- (a) receives the solicitor's advice about investment in a regulated mortgage or managed investment scheme, or
- (b) gives the solicitor instructions to use money for a regulated mortgage or managed investment scheme.

**contributor** means a person who lends, or proposes to lend, money that is secured by a contributory mortgage arranged by a solicitor.

**contributory mortgage** means a mortgage to secure money lent by 2 or more contributors as tenants in common or joint tenants, whether or not the mortgagee is a person who holds the mortgage in trust for or on behalf of those contributors.

**financial institution** means:

- (a) an ADI, or
- (b) a body that, immediately before 1 July 1999, was a society within the meaning of the *Friendly Societies (NSW) Code* or a body that is a friendly society for the purposes of the *Life Insurance Act 1995* of the Commonwealth, or
- (c) a trustee company within the meaning of the *Trustee Companies Act 1964*, or
- (d) a property trust or other body corporate established by or in respect of a church that may invest money in accordance with an Act, or

- (e) a corporation or other body, or a corporation or body of a class, prescribed by the regulations for the purpose of this definition.

**lender** means a person who lends, or proposes to lend, a borrower money that is secured by a mortgage.

**member** of a managed investment scheme has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

**regulated mortgage** means a mortgage (including a contributory mortgage) other than:

- (a) a mortgage under which the lender is a financial institution, or
- (b) a mortgage under which the lender or contributors nominate the borrower, but only if the borrower is not a person introduced to the lender or contributors by the solicitor who acts for the lender or contributors or by:
- (i) an associate of the solicitor, or
  - (ii) an agent of the solicitor, or
  - (iii) a person engaged by the solicitor for the purpose of introducing the borrower to the lender or contributors, or
- (c) a mortgage, or a mortgage of a class, that the regulations prescribe as exempt from this definition.

**responsible entity** has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

**run-out mortgage** means a regulated mortgage that was entered into before 7 September 2001 (the date of commencement of section 117 of the *Legal Profession Act 1987*, as inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000*), which is not:

- (a) a State regulated mortgage, or
- (b) a mortgage that forms part of a managed investment scheme that is required to be operated by a responsible entity under the *Corporations Act 2001* of the Commonwealth (as modified by any ASIC exemption or the regulations under that Act).

**State regulated mortgage** is defined in section 478 (State regulated mortgage—meaning).

**State regulated mortgage practice** means a solicitor's practice in respect of which a nomination made in accordance with section 480 (Nomination of practice as State regulated mortgage practice) is in force.



- (2) In this Part, a reference to an associate of a solicitor is a reference to:
- (a) a partner of the solicitor, whether or not the partner is a solicitor, or
  - (b) an employee or agent of the solicitor, or
  - (c) a corporation, or a member of a corporation, partnership, syndicate or joint venture, in which the solicitor or a person referred to in paragraph (a), (b) or (e) has a beneficial interest, or
  - (d) a co-trustee of the solicitor, or
  - (e) a person who bears a prescribed relationship to the solicitor or to a person referred to in paragraphs (a)–(d), or
  - (f) a corporation that (if the solicitor or a person referred to in paragraphs (a)–(e) were, or is, a corporation) would be, or is, a subsidiary of the solicitor or person within the meaning of the *Corporations Act 2001* of the Commonwealth, or
  - (g) a person prescribed by the regulations as an associate of the solicitor.
- (3) For the purposes of subsection (2) (e), a person bears a prescribed relationship to a solicitor or other person if the relationship is that of:
- (a) a spouse, or
  - (b) a de facto partner, being a person who has a de facto relationship (within the meaning of the *Property (Relationships) Act 1984*) with the solicitor or other person, or
  - (c) a child, grandchild, sibling, parent or grandparent, whether derived through paragraph (a) or (b) or otherwise, or
  - (d) a kind prescribed by the regulations for the purposes of this section.

**478 State regulated mortgage—meaning**

For the purposes of this Part, a regulated mortgage is a State regulated mortgage, in relation to a solicitor, if:

- (a) the solicitor’s practice is a State regulated mortgage practice, and
- (b) the regulated mortgage does not form part of a managed investment scheme or, if it does form part of a managed investment scheme, the managed investment scheme is not

required to be operated by a responsible entity under the *Corporations Act 2001* of the Commonwealth (as modified by any ASIC exemption or the regulations under the *Corporations Act 2001* of the Commonwealth).

## **Division 2      Mortgage practices**

### **479    Conduct of mortgage practices**

- (1) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor, negotiate the making of or act in respect of a regulated mortgage unless:
  - (a) the mortgage is a State regulated mortgage, or
  - (b) the mortgage is a run-out mortgage, or
  - (c) the mortgage forms part of a managed investment scheme that is operated by a responsible entity.
- (2) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor, negotiate the making of or act in respect of a regulated mortgage except in accordance with:
  - (a) the *Corporations Act 2001* of the Commonwealth, or that Act as modified by any ASIC exemption or the regulations under that Act, and
  - (b) this Act, the regulations and the legal profession rules.
- (3) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor, negotiate the making of or act in respect of a regulated mortgage that forms part of a managed investment scheme unless the solicitor complies with any ASIC exemption that applies to managed investment schemes that:
  - (a) have more than 20 members, and
  - (b) are operated under the supervision of the Law Society in accordance with that exemption.

This subsection applies even if the regulated mortgage forms part of a managed investment scheme that has no more than 20 members.
- (4) Subsection (3) does not apply if the managed investment scheme is operated by a responsible entity.

Clause 479	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.5	Mortgage practices and managed investment schemes

- (5) A solicitor who knows that an associate has contravened a requirement referred to in subsection (1), (2) or (3) must notify the Law Society Council of that fact in writing within 21 days after becoming aware of the contravention.
- (6) A contravention of this section is capable of being professional misconduct.

#### **480 Nomination of practice as State regulated mortgage practice**

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a regulated mortgage, or who proposes to do so, may, by notice in writing given to the Law Society Council, nominate the solicitor's practice as a State regulated mortgage practice.
- (2) A nomination may, with the approval of the Law Society Council, be made for a solicitor by another solicitor (for example, by a solicitor on behalf of members of a firm of solicitors).
- (3) A nomination of a solicitor's practice as a State regulated mortgage practice takes effect on the date the notice of the nomination is given to the Law Society Council.
- (4) A nomination ceases to be in force, in respect of a solicitor, if:
  - (a) the solicitor revokes the nomination by notice in writing given to the Law Society Council, or
  - (b) the solicitor ceases to be an Australian legal practitioner, or
  - (c) the Law Society Council, by notice in writing served on the solicitor, rejects the nomination of the solicitor's practice.
- (5) A nomination under this section is to include such information as may be required by the regulations or the legal profession rules.

#### **481 Requirement to notify Law Society of State regulated mortgages**

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a State regulated mortgage must give the Law Society Council notice in writing of that fact in accordance with the regulations or legal profession rules.  
Maximum penalty: 50 penalty units.
- (2) A contravention of this section is capable of being professional misconduct.

**482 Solicitor to have fidelity cover in respect of regulated mortgages**

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a regulated mortgage must ensure that an approved policy of fidelity insurance is in force in respect of the solicitor for the purpose of compensating persons who suffer pecuniary loss because of any dishonest failure to pay money payable under the mortgage.
- (2) A policy of fidelity insurance is an approved policy of fidelity insurance if:
  - (a) the Law Society Council is of the opinion that the terms of the policy comply with agreed national standards for fidelity insurance for solicitors, and
  - (b) the policy is not to expire before the expiration of the local practising certificate or interstate practising certificate of the solicitor to whom the policy relates, and
  - (c) the insurer and the terms of the policy have been approved by the Attorney General by order in writing given to the Law Society, and
  - (d) any conditions imposed by the order are complied with.
- (3) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, negotiates the making of or acts in respect of a regulated mortgage without ensuring that an approved policy of fidelity insurance is in force in respect of the solicitor in accordance with this section is guilty of an offence.  
Maximum penalty: 50 penalty units.
- (4) A contravention of this section is capable of being professional misconduct.
- (5) A contravention of this section does not limit the operation of section 483 (Bar on claims against Fidelity Fund relating to regulated mortgages).
- (6) This section does not apply in respect of any regulated mortgage that forms part of a managed investment scheme that is operated by a responsible entity.

**483 Bar on claims against Fidelity Fund relating to regulated mortgages**

A person who is a lender or contributor under a regulated mortgage is not entitled to make a claim against the Fidelity Fund for the purpose

Clause 483	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
Part 3.5	Mortgage practices and managed investment schemes

of obtaining compensation for a pecuniary loss if the claim relates to a regulated mortgage in respect of which a solicitor is required to have fidelity insurance under section 482 (Solicitor to have fidelity cover in respect of regulated mortgages).

#### **484 Notification of insurance arrangements for regulated mortgage**

- (1) If a client entrusts money to a solicitor and the money, or part of the money, is proposed to be advanced to a borrower for a regulated mortgage, the solicitor must, within 7 days after the money is entrusted to the solicitor, give the client a notice in writing that:
  - (a) advises the client of the effect of section 483 (Bar on claims against Fidelity Fund relating to regulated mortgages), and
  - (b) includes details of the policy of fidelity insurance referred to in section 482 (1) (Solicitor to have fidelity cover in respect of regulated mortgages).
- (2) The solicitor must not advance any of the money to a borrower for a regulated mortgage unless:
  - (a) the client has been given the notice referred to in subsection (1), and
  - (b) after having been given that notice, the client has given the solicitor a specific authority in writing to advance the money for that mortgage.
- (3) A contravention of this section is capable of being professional misconduct.
- (4) A contravention of this section does not limit the operation of section 483 (Bar on claims against Fidelity Fund relating to regulated mortgages).
- (5) This section does not apply in respect of a regulated mortgage that forms part of a managed investment scheme that is operated by a responsible entity.

#### **485 Failure to obtain fidelity insurance for regulated mortgage**

- (1) The Law Society Council must not issue a practising certificate to an Australian lawyer who is or will be required to comply with section 482 (Solicitor to have fidelity cover in respect of regulated mortgages) unless it is satisfied that:

- (a) there is, or will be, in force with respect to the Australian lawyer an approved policy of fidelity insurance within the meaning of section 482, and
  - (b) the policy is, or will be, in force with respect to the Australian lawyer during the currency of the lawyer's practising certificate.
- (2) The Law Society Council must suspend the local practising certificate of a solicitor who is required to comply with section 482 if it is not satisfied that:
- (a) there is in force with respect to the solicitor an approved policy of fidelity insurance within the meaning of section 482, and
  - (b) the policy is in force with respect to the solicitor during the currency of the solicitor's practising certificate.
- (3) If an interstate legal practitioner is required to comply with section 482 and the Law Society Council is not satisfied that there is in force with respect to the practitioner an approved policy of fidelity insurance within the meaning of section 482, the Council must suspend that practitioner's entitlement under Part 2.4 to practise in this State while the failure continues and request the corresponding authority in the jurisdiction in which the practitioner has his or her sole or principal place of legal practice to suspend the solicitor's interstate practising certificate until the Law Society Council notifies the corresponding authority that the practitioner is complying with section 482.

### **Division 3      Managed investment schemes**

#### **486    Involvement of solicitors in managed investment schemes**

- (1) This Part does not prevent a solicitor from carrying out any legal services in connection with a managed investment scheme that is operated by a responsible entity, or from having an interest in such a managed investment scheme or in the responsible entity for such a managed investment scheme.
- (2) However, if a client entrusts, or proposes to entrust, money to a solicitor to be invested in a managed investment scheme that is operated by a responsible entity, and the solicitor has a prescribed interest in the managed investment scheme, the solicitor must give the client a notice in writing that advises the client that:

- (a) the solicitor has an interest in the managed investment scheme, and
  - (b) the operation of the managed investment scheme does not form part of the solicitor's practice, and
  - (c) there is no claim against the Fidelity Fund for a pecuniary loss arising from an investment in the managed investment scheme.
- (3) The notice is to include such other matters as may be required by the regulations or the legal profession rules.
- (4) The solicitor must not advance the money entrusted to the solicitor to the responsible entity for the managed investment scheme or to any other person unless the client has been given the notice.
- (5) A solicitor who knows that an associate has contravened a requirement referred to in this section must notify the Law Society Council in writing of that fact within 21 days after becoming aware of the contravention.
- (6) A contravention of this section is capable of being professional misconduct.
- (7) A contravention of this section does not limit the operation of section 487 (Claims against Fidelity Fund relating to managed investment schemes connected with solicitors).
- (8) For the purposes of this section, a solicitor has a prescribed interest in a managed investment scheme if:
- (a) the solicitor, or an associate of the solicitor, is a director of or concerned in the management of the responsible entity for the managed investment scheme, or
  - (b) the solicitor, or an associate of the solicitor, is a shareholder in the responsible entity for the managed investment scheme, or
  - (c) the solicitor, or an associate of the solicitor, is taken to be an agent of the responsible entity under Chapter 5C of the *Corporations Act 2001* of the Commonwealth, or
  - (d) the solicitor, or an associate of the solicitor, receives any pecuniary benefit from the managed investment scheme or the responsible entity for the managed investment scheme if a client of the solicitor invests in the managed investment scheme, or

- (e) the solicitor, or an associate of the solicitor, has an interest of a kind prescribed by the regulations or solicitors rules in the managed investment scheme or the responsible entity for the managed investment scheme.

**487 Claims against Fidelity Fund relating to managed investment schemes connected with solicitors**

A person who entrusts money to a solicitor to be invested in a managed investment scheme that is operated by a responsible entity is not entitled to make a claim against the Fidelity Fund for the purpose of obtaining compensation for any pecuniary loss arising from that investment.

**488 Transfer of mortgages to responsible entity**

- (1) A solicitor who, in the solicitor's capacity as solicitor for a lender or contributor, is responsible for the administration of a regulated mortgage must not transfer that mortgage to a responsible entity for a managed investment scheme unless the lender or contributor has given the solicitor authority in writing to transfer the regulated mortgage to the responsible entity.
- (2) A contravention of this section is capable of being professional misconduct.
- (3) For the purposes of this section, a solicitor transfers a regulated mortgage to a responsible entity when the solicitor does anything that results in:
  - (a) a responsible entity for a managed investment scheme becoming the holder or custodian of the regulated mortgage, or
  - (b) any advances of money made in respect of the mortgage, or the property that is charged or encumbered by the mortgage, becoming scheme property (within the meaning of the *Corporations Act 2001* of the Commonwealth) of a managed investment scheme.

**489 Regulations and rules relating to managed investment schemes**

Without limiting section 493 (Regulations and rules relating to Part), the regulations and legal profession rules may include provisions for the purpose of:



Clause 489	Legal Profession Bill 2004
Chapter 3	Conduct of legal practice
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- (a) ensuring that the operation of a managed investment scheme by a responsible entity is kept separate from a solicitor's practice, and
- (b) ensuring that clients of a solicitor are aware that the operation of such a managed investment scheme does not form part of the solicitor's practice.

#### **Division 4 Transitional arrangements—pre-existing mortgages**

##### **490 Part extends to pre-existing mortgages**

Schedule 8 contains provisions of a savings and transitional nature in connection with the operation of this Part.

#### **Division 5 Miscellaneous**

##### **491 Law Society may require information about mortgage practices**

- (1) The Law Society Council may, by notice in writing, require a solicitor to provide information to the Law Society Council about any of the following:
  - (a) whether the solicitor, an associate of the solicitor or a person engaged by the solicitor negotiates the making of or acts in respect of regulated mortgages or has done so in the past,
  - (b) details of regulated mortgages that continue to have effect,
  - (c) whether the solicitor proposes:
    - (i) to nominate the solicitor's practice as a State regulated mortgage practice, or
    - (ii) to transfer responsibility for any regulated mortgage, or
    - (iii) to take no further action in respect of any regulated mortgage,
  - (d) such other information, relating to regulated mortgages, as the regulations or the legal profession rules may require to be provided.
- (2) A contravention of this section is capable of being professional misconduct.

**492 Indemnity insurance**

Nothing in this Part affects the terms of any policy of indemnity insurance approved under section 406 (Solicitor to be insured and to make contributions).

**493 Regulations and rules relating to Part**

- (1) The regulations and, subject to the regulations, the legal profession rules may make provision for or with respect to:
  - (a) regulated mortgages, including run-out mortgages, and
  - (b) the involvement of solicitors in managed investment schemes.
- (2) In particular, the regulations and the legal profession rules may make provision for or with respect to the following:
  - (a) the negotiation of the making of or acting in respect of regulated mortgages by solicitors,
  - (b) the manner in which the Law Society Council is to be given any notice or other information under this Part,
  - (c) the form of notices and authorities for the purposes of this Part,
  - (d) the manner in which notices are to be given in accordance with this Part.
- (3) If the regulations or the legal profession rules prescribe a form of notice or authority for the purposes of this Part, the notice or authority is to be given in the prescribed form.

## Chapter 4    Complaints and discipline

### Part 4.1 Preliminary and application

#### Division 1        Preliminary

##### 494    Purposes and objects

- (1) The purposes of this Chapter are as follows:
  - (a) to provide a nationally consistent scheme for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of clients of law practices and the public generally,
  - (b) to promote and enforce the professional standards, competence and honesty of the legal profession,
  - (c) to provide a means of redress for complaints about lawyers,
  - (d) to enable lay persons to participate in complaints and disciplinary processes involving lawyers to ensure that community interests and perspectives are recognised,  
**Note.** Sections 695 and 698 provide for lay representation on committees of the Bar Association, Bar Council, Law Society and Law Society Council.
  - (e) to give complainants, lawyers and other participants in the system immunity from civil liability for communications made by them in good faith in connection with the complaints and disciplinary system.
- (2) The objects of this Chapter relating to lay persons and the clients of law practices are as follows:
  - (a) to give every person the right to complain about the conduct of lawyers,
  - (b) to ensure that information is readily available to lay persons about the means of redress that are available under the scheme,
  - (c) to give clients of law practices access to sufficient advice and assistance in order to make complaints in accordance with their rights and responsibilities under this Chapter,

- (d) to promote transparency and openness for lay persons at all levels of the operation of the scheme, subject to the need to preserve confidentiality in appropriate circumstances,
  - (e) to provide an opportunity for mediation of consumer disputes relating to legal services,
  - (f) to provide complainants with a reasonable opportunity to comment on statements of the lawyer against whom the complaint is made before the complaint is disposed of,
  - (g) to ensure that complainants receive adequate notice of the commencement and status of the disciplinary process at relevant stages of the process (including notice of the dismissal of complaints and the reasons for the dismissal),
  - (h) to give complainants the right to seek an independent review of decisions of Councils to dismiss complaints or reprimand Australian legal practitioners.
- (3) The objects of this Chapter relating to the providers of legal services are as follows:
- (a) to ensure that information is readily available to lawyers about the means of redress that are available under the scheme,
  - (b) to ensure that the rules of natural justice (being rules for procedural fairness) are applied to any disciplinary proceedings taken against lawyers,
  - (c) to ensure that lawyers are aware of the standards of honesty, competence and diligence expected of them.
- (4) The Commissioner is to keep under review the provisions and operation of this Chapter for the purpose of:
- (a) ascertaining whether the scheme established by this Chapter meets the purposes and objects of this Chapter, and
  - (b) identifying modifications that may ensure that those purposes and objects are better met,

but this subsection does not affect the making or carrying out of other arrangements for reviewing the provisions or operation of the provisions of this Act or of this Act generally.

#### 495 Definitions

In this Chapter:

**compensation order** means an order under Part 4.9 (Compensation).

**complaint** means a complaint under this Chapter.

**conduct** means conduct whether consisting of an act or omission.

**disciplinary application** means an application made to the Tribunal under section 551 (Commencement of proceedings) with respect to a complaint against an Australian legal practitioner.

**investigation** means an investigation under this Chapter by the Commissioner or a Council into a complaint, and includes an independent investigation under section 532 (Independent investigation of certain complaints).

**loss** means loss of a pecuniary nature, but does not include non-economic loss within the meaning of the *Civil Liability Act 2002*.

**official complaint** means a complaint made by the Commissioner or a Council.

**relevant Council** means:

- (a) in relation to a complaint concerning a person who was a barrister when the conduct the subject of the complaint allegedly occurred—the Bar Council, or
- (b) in relation to a complaint concerning a person who was a solicitor when the conduct the subject of the complaint allegedly occurred—the Law Society Council, or
- (c) in relation to a complaint concerning a person who was neither a barrister nor a solicitor when the conduct the subject of the complaint allegedly occurred—the Bar Council or the Law Society Council, whichever the Commissioner nominates for the purposes of the complaint.

#### 496 Unsatisfactory professional conduct

For the purposes of this Act:

**unsatisfactory professional conduct** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

**497 Professional misconduct**

(1) For the purposes of this Act:

*professional misconduct* includes:

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and
  - (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the matters that would be considered under section 25 or 42 if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate and any other relevant matters.

**498 Conduct capable of being unsatisfactory professional conduct or professional misconduct**

Without limiting section 496 or 497, the following conduct is capable of being unsatisfactory professional conduct or professional misconduct:

- (a) conduct consisting of a contravention of this Act, the regulations or the legal profession rules,
- (b) charging of excessive legal costs in connection with the practice of law,
- (c) conduct in respect of which there is a conviction for:
  - (i) a serious offence, or
  - (ii) a tax offence, or
  - (iii) an offence involving dishonesty,
- (d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration,
- (e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the *Corporations Act 2001* of the Commonwealth.

## **Division 2            Application**

### **499 Practitioners to whom this Chapter applies**

- (1) This Chapter applies to an Australian legal practitioner in respect of conduct to which this Chapter applies, and so applies:
  - (a) whether or not the practitioner is a local lawyer, and
  - (b) whether or not the practitioner holds a local practising certificate, and
  - (c) whether or not the practitioner holds an interstate practising certificate, and
  - (d) whether or not the practitioner resides or has an office in this jurisdiction, and
  - (e) whether or not the person making a complaint about the conduct resides, works or has an office in this jurisdiction.
- (2) However, this Chapter does not apply to a person while the person holds office as:
  - (a) a judicial officer within the meaning of the *Judicial Officers Act 1986*, or
  - (b) a Justice of the High Court, or
  - (c) a judge of a court created by the Parliament of the Commonwealth, or
  - (d) a judge of a court, or a judicial member of a tribunal, of another State or a Territory,regardless of whether the unsatisfactory professional conduct or professional misconduct the subject of a complaint allegedly occurred before or after the person's appointment to the office concerned.
- (3) A provision of this or any other Act that protects a person from any action, liability, claim or demand in connection with any act or omission of the person does not affect the application of this Chapter to the person in respect of the act or omission.
- (4) For the purposes of this Chapter, conduct of an Australian legal practitioner in the exercise of official functions as an arbitrator or costs assessor constitutes conduct occurring in connection with the practice

of law. However, conduct concerned with the justiciable aspects of decision making by an arbitrator or costs assessor does not constitute conduct occurring in connection with the practice of law for the purposes of this Chapter.

- (5) For the purposes of this Chapter, conduct of an Australian legal practitioner does not constitute conduct occurring in connection with the practice of law to the extent that it is conduct engaged in in the exercise of executive or administrative functions under an Act or statutory rule as:
- (a) any officer or employee in the service of the Crown (including the Public Service), or
  - (b) a person appointed to an office by the Governor, or
  - (c) any member, officer or employee of a Council, the Bar Association or the Law Society.

**500 Application of Chapter to lawyers, former lawyers and former practitioners**

- (1) This Chapter applies to Australian lawyers and former Australian lawyers in relation to conduct occurring while they were Australian lawyers, but not Australian legal practitioners, in the same way as it applies to Australian legal practitioners and former Australian legal practitioners, and so applies with any necessary modifications.
- (2) This Chapter applies to former Australian legal practitioners in relation to conduct occurring while they were Australian legal practitioners in the same way as it applies to persons who are Australian legal practitioners, and so applies with any necessary modifications.

**Note.** This Chapter also applies to Australian-registered foreign lawyers. See section 190 (Application of Australian professional ethical and practice standards).

**501 Conduct to which this Chapter applies—generally**

- (1) Subject to subsection (3), this Chapter applies to conduct of an Australian legal practitioner occurring in this jurisdiction.
- (2) This Chapter also applies to an Australian legal practitioner's conduct occurring outside this jurisdiction, but only:
- (a) if it is part of a course of conduct that has occurred partly in this jurisdiction and partly in another jurisdiction, and either:
    - (i) the Commissioner and the corresponding authority of each other jurisdiction in which the conduct has



- occurred consent to its being dealt with under this Act,  
or
- (ii) the complainant and the practitioner consent to its being dealt with under this Act, or
- (b) if it occurs in Australia but wholly outside this jurisdiction and the practitioner is a local lawyer or a local legal practitioner, and either:
- (i) the Commissioner and the corresponding authority of each jurisdiction in which the conduct has occurred consent to its being dealt with under this Act, or
  - (ii) the complainant and the practitioner consent to its being dealt with under this Act, or
- (c) if:
- (i) it occurs wholly or partly outside Australia, and
  - (ii) the practitioner is a local lawyer or a local legal practitioner.

**Note.** If consent is not given, the matter will be dealt with in each jurisdiction under subsection (1) or its equivalent.

- (3) This Chapter does not apply to conduct occurring in this jurisdiction if:
- (a) the Commissioner consents to its being dealt with under a corresponding law, or
  - (b) the complainant and the Australian legal practitioner consent to its being dealt with under a corresponding law.
- (4) Subsection (3) does not apply if the conduct is not capable of being dealt with under the corresponding law.
- (5) The Commissioner may give consent for the purposes of subsection (3) (a), and may do so conditionally or unconditionally.

**502 Conduct to which this Chapter applies—insolvency, serious offences and tax offences**

- (1) This Chapter applies to the following conduct of a local legal practitioner whether occurring in Australia or elsewhere:
- (a) conduct of the practitioner in respect of which there is a conviction for:
    - (i) a serious offence, or
    - (ii) a tax offence, or
    - (iii) an offence involving dishonesty,

- (b) conduct of the practitioner as or in becoming an insolvent under administration,
  - (c) conduct of the practitioner in becoming disqualified from managing or being involved in the management of any corporation under the *Corporations Act 2001* of the Commonwealth.
- (2) This section has effect despite anything in section 501 (Conduct to which this Chapter applies—generally).

## **Part 4.2 Complaints about Australian legal practitioners**

### **503 Complaints**

- (1) A complaint may be made under this Part about an Australian legal practitioner's conduct.
- (2) A complaint may be made under this Part about the conduct of an Australian legal practitioner occurring outside this jurisdiction, but the complaint must not be dealt with under this Part unless this Part is or becomes applicable to it.
- (3) A complaint that is duly made is to be dealt with in accordance with this Part.

### **504 Making of complaints**

- (1) A complaint about an Australian legal practitioner may be made by:
  - (a) a client of the practitioner, or
  - (b) a Council, or
  - (c) the Commissioner, or
  - (d) any other person.
- (2) A complaint must be in writing.
- (3) A complaint must:
  - (a) identify the complainant, and
  - (b) if possible, identify the Australian legal practitioner about whom the complaint is made, and
  - (c) describe the alleged conduct the subject of the complaint.

Clause 504	Legal Profession Bill 2004
Chapter 4	Complaints and discipline
Part 4.2	Complaints about Australian legal practitioners

- (4) This section does not affect any other right of a person to complain about the conduct of an Australian legal practitioner.
- (5) The Commissioner, or the Council to which a complaint is referred, is to ensure that the complainant is notified in writing of receipt of a complaint (other than an official complaint).

**505 To whom complaint made**

- (1) A complaint is to be made to the Commissioner, unless it is made by the Commissioner or by a Council.
- (2) A complaint that is made to a Council instead of the Commissioner is to be forwarded as soon as practicable to the Commissioner by the Council, and is taken to have been made to the Commissioner when received by the Council.
- (3) A copy of a complaint made by a Council is to be forwarded as soon as possible to the Commissioner by the Council.

**506 Complaints made over 3 years after conduct concerned**

- (1) A complaint may be made about conduct of an Australian legal practitioner irrespective of when the conduct is alleged to have occurred.
- (2) However, a complaint cannot be dealt with (otherwise than to dismiss it or refer it to mediation) if the complaint is made more than 3 years after the conduct is alleged to have occurred, unless a determination is made under this section that:
  - (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay, or
  - (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.
- (3) A determination under this section:
  - (a) in the case of a complaint made to or by the Commissioner—is to be made by the Commissioner, or
  - (b) in the case of a complaint made by a Council—is to be made by the Council.
- (4) A determination made under this section is final and cannot be challenged in any proceedings by the complainant or the Australian legal practitioner concerned.

**507 Further information and verification**

The Commissioner, or the Council to which a complaint is referred for investigation, may require the complainant to do either or both of the following:

- (a) to give further information about the complaint,
- (b) to verify the complaint, or any further information, by statutory declaration.

**508 Practitioner to be notified of complaint**

- (1) The Commissioner, or the Council by which a complaint is made or to which a complaint is referred for investigation, is to ensure that as soon as practicable after the complaint is made the Australian legal practitioner about whom the complaint is made is given:
  - (a) a copy of the complaint, and
  - (b) a notice in writing informing the practitioner of the practitioner's right to make submissions to the Commissioner or Council and specifying the period within which submissions must be made, unless the Commissioner or Council advises the practitioner that the Commissioner or Council has dismissed or intends to dismiss the complaint.
- (2) Subsection (1) does not apply if the complaint is dismissed under section 511 (Summary dismissal of complaints).
- (3) Subsection (1) does not apply if the Commissioner, after such consultation with the relevant Council as the Commissioner thinks appropriate in the circumstances, is of the opinion that the giving of the notice will or is likely:
  - (a) to prejudice the investigation of the complaint, or
  - (b) to prejudice an investigation by the police or other investigatory or law enforcement body of any matter with which the complaint is concerned, or
  - (c) to place the complainant or another person at risk of intimidation or harassment, or
  - (d) to prejudice pending court proceedings.
- (4) In a case in which subsection (3) applies, the Commissioner, or the Council by which a complaint is made or to which a complaint is referred for investigation:

- (a) may postpone giving the practitioner a copy of the complaint and notice about making submissions, until of the opinion that it is appropriate to do so, or
- (b) may at their discretion:
  - (i) notify the practitioner of the general nature of the complaint, and
  - (ii) inform the practitioner of the practitioner's right to make submissions to the Commissioner or Council, specifying the period within which submissions must be made, if of the opinion that the practitioner has sufficient information to make submissions.

**509 Submissions by practitioner**

- (1) The Australian legal practitioner about whom a complaint is made may, within a period specified by the Commissioner, or by the Council by which a complaint is made or to which a complaint is referred for investigation, make submissions to the Commissioner or Council about the complaint or its subject-matter or both.
- (2) The Commissioner or Council may at their discretion extend the period in which submissions may be made.
- (3) The Commissioner or Council must consider the submissions made within the permitted period before deciding what action is to be taken in relation to the complaint.

**510 Preliminary assessment**

- (1) When the Commissioner, or the Council to which a complaint is referred for investigation, is deciding whether or not to dismiss a complaint under section 511 (Summary dismissal of complaints), they may conduct a preliminary assessment of the complaint for the purpose of assessing the substance of the complaint.
- (2) The Commissioner or Council may, in writing, appoint a suitably qualified person as an investigator to conduct the preliminary assessment of the complaint as agent of the Commissioner or Council. Such an appointment may be made generally (to apply for all complaints or for all complaints of a specified class) or for a specified complaint.
- (3) The investigator is not bound by rules of evidence and may inform himself or herself on any matter in such manner as he or she thinks fit.

- (4) Chapter 6 (Provisions relating to investigations), except Part 6.3 (Entry and search of premises), applies to a preliminary assessment under this section as if the assessment were a complaint investigation and the investigator conducting the assessment were an investigator conducting a complaint investigation.
- (5) The investigator may terminate the preliminary assessment at any time and may make any recommendations the investigator considers appropriate.
- (6) Any evidence or information obtained by the Commissioner or Council, or by the investigator, in the course of conducting the preliminary assessment may be used by the Commissioner or Council, or by an investigator appointed by them, in or in relation to any later investigation or consideration of the complaint.

#### **511 Summary dismissal of complaints**

- (1) The Commissioner, or the Council by which a complaint is made or to which a complaint is referred for investigation, may dismiss a complaint if:
  - (a) further information is not given, or the complaint or further information is not verified, as required by the authority under section 507 (Further information and verification), or
  - (b) the complaint is vexatious, misconceived, frivolous or lacking in substance, or
  - (c) the complaint was made more than 3 years after the conduct complained of is alleged to have occurred, unless a determination is made under section 506 (Complaints made over 3 years after conduct concerned) in relation to the complaint, or
  - (d) the conduct complained about has been the subject of a previous complaint that has been dismissed, or
  - (e) the conduct complained about is the subject of another complaint, or
  - (f) it is not in the public interest to deal with the complaint having regard to the fact that the name of the Australian legal practitioner to whom the complaint relates has already been removed from an Australian roll in which he or she was enrolled, or

- (g) the Commissioner or Council is satisfied that it is otherwise in the public interest to dismiss the complaint, or
  - (h) the complaint is not one that the authority has power to deal with.
- (2) A complaint may be dismissed under this section without any investigation or without completing an investigation.

**512 Withdrawal of complaints**

- (1) A complaint may, subject to this section, be withdrawn by the person who made it unless proceedings with respect to the complaint have been commenced in the Tribunal.
- (2) If the complaint was made to the Commissioner, the withdrawal of the complaint is not effective unless notice in writing of the withdrawal is given by the complainant to the Commissioner or to the Council to which the complaint has been referred for investigation.
- (3) The Commissioner or the Council to which the complaint has been referred may reject the withdrawal of the complaint if satisfied that it may involve unsatisfactory professional conduct or professional misconduct.
- (4) If a complaint is duly withdrawn, no further action is to be taken under this Chapter with respect to the complaint.
- (5) The withdrawal of a complaint does not prevent:
  - (a) a further complaint being made under this Part, by the same or any other person, with respect to the matter the subject of the withdrawn complaint, or
  - (b) action being taken on any other complaint made with respect to that matter.
- (6) This section extends to the withdrawal of a complaint so far as it relates to some only or part only of the matters that form the subject of the complaint.

**513 Referral of complaints to Council**

- (1) The Commissioner may refer a complaint made to or by the Commissioner to the relevant Council if the complaint is not to be investigated by the Commissioner under Part 4.4 (Investigation of complaints).

- (2) When referring a complaint to a Council, the Commissioner may recommend that the Council investigate the complaint or refer it to mediation, or both.
- (3) A decision to refer a complaint to a Council is to be made, as far as practicable, within 21 days after the complaint is made or, if further information or verification is required, within 21 days after the further information or verification is given or provided. A Council is not excused from dealing with a complaint because it is referred to the Council after the time prescribed by this subsection.
- (4) The Commissioner may refer a complaint to a Council even though the Commissioner commenced but did not complete an investigation into the complaint.
- (5) This section does not apply to a complaint that is dismissed by the Commissioner under this Part.

## Part 4.3 Mediation

### 514 Definition

In this Part:

*consumer dispute* is a dispute between a person and an Australian legal practitioner about conduct of the practitioner to the extent that the dispute does not involve an issue of unsatisfactory professional conduct or professional misconduct.

### 515 Mediation of complaint involving consumer dispute solely

- (1) This section applies to a complaint that involves a consumer dispute but does not involve an issue of unsatisfactory professional conduct or professional misconduct.
- (2) If the Commissioner, or the Council by which a complaint is made or to which a complaint is referred for investigation, considers that the whole or a part of the matter that is the subject of the complaint is capable of resolution by mediation, the Commissioner or Council may suggest to the complainant and the Australian legal practitioner to whom the complaint relates that they enter into a process of mediation.
- (3) If the complainant and the practitioner agree to enter into a process of mediation in connection with the complaint:



- (a) the Commissioner or Council may refer the complaint to mediation, and
- (b) no further action is required on the complaint to the extent that it is referred to mediation, except as provided by section 518 (Facilitation of mediation).

**Note.** The complaint may be withdrawn under section 512 (Withdrawal of complaints) if the matter is resolved by mediation.

#### **516 Mediation of hybrid complaint**

- (1) This section applies to a complaint that involves both a consumer dispute and an issue of unsatisfactory professional conduct or professional misconduct.
- (2) If the Commissioner, or the Council by which a complaint is made or to which a complaint is referred for investigation, considers that the whole or a part of the consumer dispute is capable of resolution by mediation, the Commissioner or Council may suggest to the complainant and the Australian legal practitioner to whom the complaint relates that they enter into a process of mediation.
- (3) If the complainant and the practitioner agree to enter into a process of mediation in connection with the consumer dispute:
  - (a) the Commissioner or Council may refer the complaint to mediation, and
  - (b) so far as it involves an issue of unsatisfactory professional conduct or professional misconduct, the complaint is to continue to be dealt with under this Chapter, and
  - (c) no further action is required on the consumer dispute to the extent that it is referred to mediation, except as provided by section 518 (Facilitation of mediation) and except so far as the consumer dispute is relevant to determination of the complaint.

**Note.** The complaint may be withdrawn under section 512 (Withdrawal of complaints) if the matter is resolved by mediation.

#### **517 Compulsory mediation of consumer dispute**

- (1) Despite any other provision of this Part, the Commissioner may, by notice in writing, require the complainant and the Australian legal practitioner concerned to enter into a process of mediation under this Part in connection with a consumer dispute that comprises or is involved in a complaint.

- (2) After the notice is given:
- (a) the Commissioner may refer the complaint to mediation, and
  - (b) if and so far as it involves an issue of unsatisfactory professional conduct or professional misconduct, the complaint is to continue to be dealt with under this Chapter after or during the mediation or attempt at mediation, and
  - (c) no further action is required on the consumer dispute to the extent that it is referred to mediation, except as provided by section 518 (Facilitation of mediation) and except so far as the consumer dispute is relevant to determination of the complaint.
- Note.** The complaint may be withdrawn under section 512 (Withdrawal of complaints) if the matter is resolved by mediation.
- (3) Failure on the part of the practitioner to comply with the terms of a notice under this section is capable of being unsatisfactory professional conduct or professional misconduct.

**518 Facilitation of mediation**

If the complainant and the Australian legal practitioner concerned agree or are required to enter into a process of mediation under this Part in connection with a complaint, the Commissioner or Council, as the case may require, may facilitate the mediation to the extent they consider appropriate.

**519 Nature of mediation**

Mediation of a consumer dispute is not limited to formal mediation procedures and extends to encompass preliminary assistance in dispute resolution, such as the giving of informal advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.

**520 Mediators**

- (1) The Commissioner is to maintain a list of mediators who are available to attempt a mediation of a consumer dispute.
- (2) The Commissioner is to consult the Councils and may consult any other relevant body about the selection and training of mediators.

**521 Certificate of failure of mediation**

- (1) If a mediation is not successful, the mediator is to provide the complainant and the Australian legal practitioner concerned with a certificate certifying that the mediation has been attempted but was not successful.
- (2) The certificate is evidence of the matters certified and is admissible in any proceedings where consideration of those matters or any of them are or may be relevant.

**522 Confidentiality of mediation process**

- (1) The following are not admissible in any proceedings in a court or the Tribunal or before a person or body authorised to hear and receive evidence:
  - (a) evidence of anything said or admitted during a mediation or attempted mediation under this Part of the whole or a part of the matter that is the subject of a complaint, and
  - (b) a document prepared for the purposes of the mediation or attempted mediation.
- (2) Subsection (1) does not apply to an agreement reached during mediation.

**523 Recommendation for investigation**

A mediator may recommend to the Commissioner or a Council that a complaint should be investigated, without disclosing any evidence, admission or document referred to in section 522 (Confidentiality of mediation process).

**524 Protection from liability**

No matter or thing done or omitted to be done by a mediator subjects the mediator to any action, liability, claim or demand if the matter or thing was done or omitted in good faith for the purposes of mediation under this Part.

## **Part 4.4 Investigation of complaints**

### **525 Complaints to be investigated**

- (1) Each complaint must be investigated under this Part.
- (2) This section does not apply to:
  - (a) a complaint that is dismissed or withdrawn under this Chapter (to the extent that it is dismissed or withdrawn), or
  - (b) a complaint to the extent that it is a consumer dispute after it has been referred to mediation under this Chapter, or
  - (c) a complaint that is a separate complaint under section 534 (Conduct that may be investigated) and that under subsection (7) of that section need not be the subject of a separate or further investigation, or
  - (d) a complaint that is a modified complaint under section 535 (Modified complaints) and that under subsection (4) of that section need not be the subject of a separate or further investigation, or
  - (e) a complaint to which section 538 (Decision of Commissioner or Council without investigation) applies.
- (3) This section has effect subject to section 564 (Consent orders) in relation to a complaint to the extent that the relevant Australian legal practitioner, the Commissioner and (if applicable) the relevant Council have agreed on the terms of an instrument of consent filed or to be filed with the Tribunal under that section.

### **526 Investigation of complaints by Commissioner**

- (1) The Commissioner may conduct an investigation into a complaint instead of referring it to a Council for investigation, or may take over the investigation of a complaint from a Council, if the Commissioner considers it appropriate.
- (2) The Commissioner may, with the consent of a Council, refer a complaint to the Council after the Commissioner has completed an investigation into the complaint (including after proceedings with respect to the complaint have been commenced in the Tribunal by the Commissioner).
- (3) A Council is to provide any assistance required by the Commissioner to conduct an investigation into a complaint (including copies of or

access to all documents held by the Council that relate to the complaint or are required for the purpose of investigating the complaint).

**527 Investigation of complaints by Council**

- (1) A Council must, subject to this section, conduct an investigation into each complaint referred to it by the Commissioner or made by the Council.
- (2) This section does not apply to:
  - (a) a complaint taken over by the Commissioner or referred to an independent investigator under this Part, or
  - (b) a complaint that is not required to be investigated under this Part.

**528 Consultation and cooperation on complaints**

- (1) The Law Society Council and the Bar Council may consult and cooperate when dealing with a complaint against an Australian legal practitioner arising from the same, or related, facts as a complaint against another Australian legal practitioner for which the other Council is the relevant Council. For the purposes of this subsection, the Councils may exchange information concerning the complaints.
- (2) The Law Society Council or Bar Council may consult and cooperate with the corresponding authority of another jurisdiction when dealing with a complaint against an interstate legal practitioner under this Act or under a corresponding law. For the purposes of this subsection, the Councils and corresponding authority may exchange information concerning the complaint.

**529 Monitoring by Commissioner of conduct of investigation**

- (1) The Commissioner is to monitor investigations by a Council into complaints.
- (2) A Council investigating a complaint is to report to the Commissioner on the progress of the investigation if required to do so by the Commissioner.
- (3) A Council is required to provide any assistance required by the Commissioner to monitor investigations by the Council (including access to or a copy of all documents held by the Council that relate to the complaint or are required for the purpose of monitoring the investigation).

**530 Directions by Commissioner about conduct of investigation**

- (1) The Commissioner may give a Council directions on the handling of a complaint being investigated by the Council if the Commissioner considers that it is in the public interest to do so having regard to the seriousness of the complaint.
- (2) The directions may include, for example, directions to pursue a particular line of inquiry or directions concerning the time for completing the investigation.
- (3) Directions may not be given on the decision to be taken by a Council following the investigation.
- (4) If the directions of the Commissioner about the investigation of a complaint are not complied with, the Commissioner may, under section 526 (Investigation of complaints by Commissioner), take over the investigation of the complaint.
- (5) The Commissioner may also issue general guidelines to a Council about the investigation of complaints.

**531 Appointment of investigator**

- (1) The Commissioner or a Council investigating or required to investigate a complaint may, in writing, appoint a suitably qualified person as an investigator to investigate the complaint as agent of the Commissioner or Council.
- (2) Such an appointment may be made generally (to apply for all complaints or for all complaints of a specified class) or for a specified complaint.

**532 Independent investigation of certain complaints**

- (1) The Commissioner is to arrange for a complaint to be investigated by an independent investigator if the Commissioner decides not to conduct the investigation into the complaint under section 526 (Investigation of complaints by Commissioner) and:
  - (a) the Commissioner is satisfied that investigation by an independent investigator is in the interests of justice or in the public interest, or
  - (b) the relevant Council is satisfied that investigation by an independent investigator is in the interests of justice or in the public interest and requests the Commissioner to arrange for the investigation.

- (2) The independent investigator is to report to the Commissioner on his or her investigation of the complaint.
- (3) This Part applies to any such investigation as if it were conducted by the Council (except that the decision on the complaint is to be made by the Commissioner after consideration of the report of the independent investigator).
- (4) The Commissioner and each Council are to provide any assistance required by the independent investigator to conduct an investigation into a complaint (including copies of or access to all documents held by the Commissioner or Council that relate to the complaint or are required for the purpose of investigating the complaint).
- (5) The independent investigator is to provide a copy of his or her report on the investigation to the relevant Council.

**533 Referral of matters to costs assessors**

- (1) The Commissioner or a Council may at their discretion, for the purpose of investigating a complaint, apply under Division 11 of Part 3.2 for an assessment of costs claimed by an Australian legal practitioner.
- (2) Any such application may be made outside the 60-day period referred to in section 350 (Application by clients for costs assessment).
- (3) In exercising their discretion under subsection (1), the Commissioner or a Council must consider whether the client was aware of his or her right to apply for a review of the costs within that 60-day period and, if the client was aware, whether the application may cause significant injustice to the practitioner.
- (4) Subject to this section, Division 11 of Part 3.2 applies to any such application as if the Commissioner or Council were a client of the practitioner.

**534 Conduct that may be investigated**

- (1) An investigation may extend to conduct of the Australian legal practitioner concerned revealed during the investigation where:
  - (a) the conduct is related to the subject-matter of the complaint and involves the complainant but is not within an allegation contained in the complaint, or

- (b) the conduct is not related to the subject-matter of the complaint but involves the complainant, or
  - (c) the conduct is related to the subject-matter of the complaint but does not involve the complainant, or
  - (d) the conduct is not related to the subject-matter of the complaint and does not involve the complainant.
- (2) The Australian legal practitioner must be informed in writing of the extended investigation as soon as practicable after the investigation is extended and must be given a reasonable opportunity to make submissions regarding the additional matters.
- (3) Subsection (2) does not apply if, under section 508 (Practitioner to be notified of complaint), notice of the complaint was not given to the Australian legal practitioner.
- (4) Matters arising in connection with subsection (1) (a) may be made the subject of a separate complaint under section 503 (Complaints) or of modification of a complaint under section 535 (Modified complaints).
- (5) Matters arising in connection with subsection (1) (b), (c) or (d) may be made the subject of a separate complaint under section 503 (Complaints).
- (6) The making of the separate complaint or the modification of the complaint as referred to in subsection (4) or (5) need not occur until the extended investigation has been completed.
- (7) If matters arising in connection with subsection (1) (a)–(d) are made the subject of a separate complaint under section 503 (Complaints), the separate complaint need not be the subject of a separate or further investigation if the Commissioner or Council investigating the original complaint is satisfied that the matter has already been sufficiently investigated during the investigation of the original complaint.

#### **535 Modified complaints**

- (1) The Commissioner or Council investigating a complaint may, during or after completion of the investigation, by instrument in writing, modify the complaint by doing either or both of the following:
- (a) omitting or altering any allegations or details in the complaint,
  - (b) adding additional allegations or details to the complaint.



- (2) A modification of a complaint:
  - (a) must relate to the subject-matter of the original complaint, and
  - (b) may be made even though the conduct to which the modification relates occurred more than 3 years before the date of the modification.
- (3) Before taking action under subsection (1), the Commissioner or Council is to consult the original complainant (except where the Commissioner or Council proposing to take the action is the complainant).
- (4) A modified complaint need not be the subject of a separate or further investigation if the Commissioner or Council investigating the original complaint is satisfied that the matter has already been sufficiently investigated during the investigation of the original complaint.
- (5) Sections 508 (Practitioner to be notified of complaint), 509 (Submissions by practitioner) and 512 (Withdrawal of complaints) apply, with any necessary adaptations, to a modification of a complaint under this section in the same way as they apply to a complaint made under section 503 (Complaints).

**536 Application of Part 15**

Chapter 6 (Provisions relating to investigations) applies to an investigation under this Part.

## **Part 4.5 Decision of Commissioner or Council**

**537 Decision of Commissioner or Council after investigation**

- (1) After completion of an investigation of a complaint against an Australian legal practitioner, the Commissioner or a Council must:
  - (a) commence proceedings in the Tribunal under this Chapter, or
  - (b) dismiss the complaint under this Part, or
  - (c) take action under section 540 (Summary conclusion of complaint procedure by caution, reprimand or compensation order).
- (2) Unless section 540 (Summary conclusion of complaint procedure by caution, reprimand or compensation order) applies, the Council or the Commissioner must commence proceedings in the Tribunal with

respect to a complaint against an Australian legal practitioner if satisfied that there is a reasonable likelihood that the practitioner will be found by the Tribunal to have engaged in unsatisfactory professional conduct or professional misconduct.

- (3) Nothing in this section affects section 512 (Withdrawal of complaints).

**538 Decision of Commissioner or Council without investigation**

- (1) This section applies to a complaint against an Australian legal practitioner, where the Commissioner or relevant Council is satisfied that, having regard to the nature of the subject-matter of the complaint and the reasonable likelihood that the Tribunal will find that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, action should be taken under this section.
- (2) The Commissioner or Council may commence proceedings in the Tribunal under this Chapter in relation to a complaint to which this section applies without the need to commence or complete an investigation.
- (3) A Council is not to commence proceedings pursuant to this section unless the Commissioner concurs.

**539 Dismissal of complaint**

After completion of an investigation of a complaint against an Australian legal practitioner, the Commissioner or a Council may dismiss the complaint in whole or in part if satisfied that:

- (a) there is no reasonable likelihood that the practitioner will be found by the Tribunal to have engaged in either unsatisfactory professional conduct or professional misconduct, or
- (b) it is in the public interest to do so.

**540 Summary conclusion of complaint procedure by caution, reprimand or compensation order**

- (1) This section applies if:
- (a) either:
- (i) the Commissioner or a Council completes an investigation of a complaint against an Australian legal practitioner, or

- (ii) the report of an independent investigator is given to the Commissioner, and
- (b) the Commissioner or Council (as the case requires):
  - (i) is satisfied that there is a reasonable likelihood that the practitioner would be found by the Tribunal to have engaged in unsatisfactory professional conduct (but not professional misconduct), and
  - (ii) is satisfied that the practitioner is generally competent and diligent, and
  - (iii) is satisfied that the taking of action under this section is justified having regard to all the circumstances of the case (including the seriousness of the conduct concerned) and to whether any other substantiated complaints have been made against the practitioner.
- (2) The Commissioner or Council may do any or all of the following:
  - (a) caution the practitioner,
  - (b) reprimand the practitioner,
  - (c) make a compensation order under Part 4.9 if the complainant requested a compensation order in respect of the complaint.
- (3) Failure to attend as required by the Commissioner or Council to receive a caution or reprimand is capable of being professional misconduct.
- (4) If action is taken under subsection (2), no further action is to be taken under this Chapter with respect to the complaint.
- (5) If the Commissioner or Council decides to reprimand or make a compensation order against an Australian legal practitioner under this section, the practitioner may apply to the Tribunal for a review of the decision.

**541 Record of decision**

The Commissioner or a Council must cause a record of their decision with respect to a complaint, together with reasons for the decision, to be kept in respect of each complaint dealt with under this Part.

**542 Reasons to be provided to complainant and practitioner**

- (1) If a complaint has been made about an Australian legal practitioner, the complainant and the practitioner are entitled to receive a statement of

reasons from the Commissioner or Council, as the case requires, in relation to:

- (a) a decision to dismiss the complaint, or
  - (b) a decision to commence proceedings in the Tribunal with respect to the complaint, or
  - (c) a decision to take action under section 540 (Summary conclusion of complaint procedure by caution, reprimand or compensation order), or
  - (d) a decision to omit, from the allegations particularised in a disciplinary application made to the Tribunal in respect of the complaint, matter that was originally part of the complaint.
- (2) The right of the complainant to apply to the Commissioner for a review of the decision must be included in the statement under this section, except in the case of a decision to commence proceedings in the Tribunal.
- (3) A statement to a complainant is not required under this section in the case of an official complaint.

## **Part 4.6 Review of Councils' decisions**

### **543 Application for review**

- (1) A complainant may apply to the Commissioner for a review of any of the following decisions made by a Council:
- (a) a decision to dismiss a complaint made by the complainant,
  - (b) a decision to caution or reprimand the Australian legal practitioner concerned, or make a compensation order against the practitioner, because of the complaint,
  - (c) a decision to omit, from the allegations particularised in a disciplinary application made to the Tribunal in respect of a complaint, matter that was originally part of the complaint.
- (2) The application for review is to be in writing.
- (3) The application for review may be made at any time within 2 months after the decision is notified to the complainant.
- (4) If the Council does not notify the complainant of its decision with respect to the complaint within 6 months after the complaint was

referred to the Council, the matter may be reviewed under this Part. In that case, the Council is taken to have dismissed the complaint for the purposes of this Part.

- (5) The Commissioner may postpone a review referred to in subsection (4) for a specified period if satisfied that there is good reason for the Council's delay in making a decision with respect to the complaint. In that case, the Council is taken to have dismissed the complaint for the purposes of this Part if it does not notify the complainant of its decision within that further specified period.

#### **544    Reviews**

- (1) The Commissioner is to review each decision of a Council that is the subject of an application for review under this Part.
- (2) The Commissioner may also review a Council's decision (of a type referred to in section 543 (1) (Application for review)) at the request of the Council or on the Commissioner's own initiative.
- (3) The Commissioner may conduct a review in such manner as the Commissioner thinks fit and is not limited to considering those matters considered by the Council in making the decision that is the subject of review.
- (4) The Commissioner must consult with a Council before completing a review of the Council's decision.
- (5) The Commissioner has the same powers when reviewing a decision of the Council as the Commissioner has under this Act when investigating a complaint.
- (6) The Commissioner is not to review a decision of a Council that is the subject of an application by the Australian legal practitioner concerned to the Tribunal for a review of the decision, unless the Tribunal orders that the review by the Commissioner may proceed.

#### **545    Decision of Commissioner on review**

- (1) When the Commissioner has completed the review of a Council's decision, the Commissioner must do any one or more of the following:
  - (a) confirm the decision of the Council in whole or in part,
  - (b) refer the matter to mediation,
  - (c) re-investigate the complaint or direct the relevant Council to do so,

- (d) investigate any part of the complaint that was omitted by the Council from the allegations particularised in the disciplinary application made by the Council,
  - (e) direct the Council to investigate, or re-investigate, any part of the complaint that was omitted by the Council from the allegations particularised in the disciplinary application made by the Council,
  - (f) caution or reprimand the Australian legal practitioner,
  - (g) make a compensation order under Part 4.9 (Compensation) if the complainant requested a compensation order in respect of the complaint, whether or not in substitution for a compensation order made by the Council,
  - (h) commence proceedings in the Tribunal against the Australian legal practitioner,
  - (i) apply to the Tribunal for the variation of a disciplinary application to include matter that was omitted from the disciplinary application by the Council and that was originally part of the complaint.
- (2) If the Commissioner decides to re-investigate a complaint, or to investigate part of a complaint, the provisions of this Chapter, and any other relevant provisions of this Act, apply as if the Commissioner had taken over the investigation of the complaint.
- (3) A Council is required to comply with a direction of the Commissioner under this section. The Commissioner may take further action under this section if the Council fails to comply with the direction.
- (4) If the Commissioner decides to reprimand or make a compensation order against an Australian legal practitioner under this section, the practitioner may apply to the Tribunal for a review of the decision.

**546 Notification about review of Council decisions**

- (1) The Commissioner must cause his or her decision on a review of a Council's decision with respect to a complaint, together with his or her reasons for the decision, to be notified in writing to the complainant, the Australian legal practitioner against whom the complaint was made and the Council.
- (2) The complainant is to be notified under this section even if the complainant did not apply for the review.

**547 Assistance by Council**

A Council is required to provide any assistance required by the Commissioner to conduct a review or re-investigation (including access to or a copy of all documents held by the Council that relate to the complaint or are required for the purpose of the review or re-investigation).

**Part 4.7 Immediate suspension of local practising certificate**

**548 Immediate suspension of local practising certificate**

- (1) This section applies if the Commissioner or the relevant Council considers it necessary in the public interest to immediately suspend a local practising certificate on the ground of the seriousness of the conduct in respect of which a complaint has been made in relation to the holder of the certificate.
- (2) The Council may immediately suspend the practising certificate. The Commissioner may direct the Council to immediately suspend the practising certificate, and, if so directed, the Council must immediately suspend the practising certificate.
- (3) The suspension operates until the earliest of the following:
  - (a) the complaint is withdrawn or dismissed,
  - (b) the suspension is revoked,
  - (c) the subject-matter of the complaint is finally dealt with by the Tribunal,
  - (d) the suspension is successfully appealed.
- (4) The Council must give written notice of the suspension to the holder of the practising certificate and that notice must:
  - (a) include an information notice about the suspension, and
  - (b) indicate the period of operation of the suspension as provided by subsection (3), and
  - (c) state that the practitioner may make representations about the suspension.
- (5) The suspension takes effect on the day that notice of the suspension is given to the holder.

- (6) The holder may make written representations to the Commissioner or the Council about the suspension, and the Commissioner or the Council must consider the representations.
- (7) The Council may revoke the suspension at any time (unless the suspension was directed by the Commissioner). The Commissioner may at any time direct the Council to revoke the suspension (even if the suspension was not at the direction of the Commissioner).
- (8) A decision to revoke a suspension need not be in response to any written representations made by the holder.

**Note.** Section 80 (Return of local practising certificate) provides for the Council to require the return of a local practising certificate that has been suspended.

#### **549 Appeal**

- (1) A person may appeal to the Supreme Court against a decision of the Commissioner or a Council under this Part to suspend or direct the suspension of a local practising certificate.
- (2) The Supreme Court may make any order it considers appropriate on the appeal.

#### **550 Other powers to suspend not affected**

Nothing in this Part affects any other power under this Act to suspend a local practising certificate, and any such power may be exercised despite the existence of a power to suspend the certificate under this Part.

## **Part 4.8 Proceedings in Tribunal**

#### **551 Commencement of proceedings**

- (1) Proceedings may be commenced in the Tribunal with respect to the whole or part of a complaint against an Australian legal practitioner by an application (a *disciplinary application*) made by the Commissioner or a Council in accordance with this Chapter and containing one or more allegations of unsatisfactory professional conduct or professional misconduct.
- (2) An allegation in the disciplinary application must relate to the subject-matter of the complaint but need not be an allegation made in the original complaint or have been the subject of separate or further investigation under this Chapter.



**552 Time for commencing proceedings**

- (1) A disciplinary application may be made to the Tribunal at any time within 6 months after the Council or Commissioner decides that proceedings be commenced in the Tribunal with respect to the complaint concerned.
- (2) Despite subsection (1), the Tribunal may, on application in writing by the Council or Commissioner, as the case may require, extend the time for making a disciplinary application.
- (3) In exercising the power to extend the time for making a disciplinary application, the Tribunal is to have regard to all the circumstances of the case, and (without affecting the generality of the foregoing) the Tribunal is to have regard to the following:
  - (a) the public interest,
  - (b) the extent to which, having regard to the delay, there is or may be prejudice to the legal practitioner concerned by reason that evidence that would have been available if the application had been made within the 6-month period is no longer available,
  - (c) the reasonableness of the applicant's explanation for the delay in making the application.
- (4) The time for making a disciplinary application may be extended under subsection (2) although that time has expired.
- (5) This section has effect despite anything in section 44 of the *Administrative Decisions Tribunal Act 1997* or the rules or regulations under that Act.
- (6) For the purposes of subsection (1), a decision that proceedings be commenced is made when:
  - (a) the Council or Commissioner decides that there is a reasonable likelihood that the legal practitioner concerned will be found by the Tribunal to have engaged in unsatisfactory professional conduct or professional misconduct, as referred to in section 537 (2) (Decision of Commissioner or Council after investigation) or 538 (1) (Decision of Commissioner or Council without investigation), or
  - (b) the Commissioner decides to commence proceedings in the Tribunal against the legal practitioner concerned under section 545 (1) (h) (Decision of Commissioner on review).

- (7) An official record or notification of a decision referred to in subsection (6) (a) or (b) and stating the date the decision was made is evidence that the decision was made and of the date the decision was made.

**553 Hearings**

The Tribunal is to conduct a hearing into each allegation particularised in a disciplinary application made to the Tribunal.

**554 Joinder**

The Tribunal may, subject to its rules and the rules of procedural fairness, order the joinder of more than one disciplinary application against the same or different Australian legal practitioners.

**555 Variation of disciplinary application**

- (1) The Tribunal may vary a disciplinary application, on the application of the person who made the disciplinary application or on its own motion, so as to omit allegations or to include additional allegations, if satisfied that it is reasonable to do so having regard to all the circumstances.
- (2) The Commissioner is to be regarded as the applicant in connection with a disciplinary application for the purposes of an application by the Commissioner under section 545 (1) (i) (Decision of Commissioner on review).
- (3) Without limiting subsection (1), when considering whether or not it is reasonable to vary a disciplinary application, the Tribunal is to have regard to whether varying the disciplinary application will affect the fairness of the proceedings.
- (4) The inclusion of an additional allegation is not precluded because the additional allegation has not been the subject of a complaint or an investigation.
- (5) The variation of a disciplinary application by the Tribunal to include an additional allegation is not precluded because the alleged conduct concerned occurred more than 3 years before the variation is made.

**556 Nature of allegations**

- (1) A disciplinary application in respect of a complaint cannot be challenged on the ground that the allegations contained in the application do not deal with all of the matters raised in the complaint

or deal differently with matters raised in the complaint or deal with additional matters.

- (2) This section applies whether the allegations were included in the disciplinary application as made to the Tribunal or were included by way of variation of the application.

**557 Substitution of applicant**

- (1) If the Commissioner or a Council takes over a complaint after a disciplinary application has been made in respect of the complaint, the Tribunal may, on the application of the Commissioner or Council, direct that the Commissioner or Council, whichever has taken over the complaint, is to be regarded as the applicant in connection with the disciplinary application.
- (2) This section has effect even if a hearing of the matter has commenced before the Tribunal.

**558 Rules of evidence**

- (1) For the purpose of conducting a hearing into a question of professional misconduct, the Tribunal is to observe the rules of law governing the admission of evidence despite any contrary provisions of section 73 (Procedure of the Tribunal generally) of the *Administrative Decisions Tribunal Act 1997*.
- (2) In relation to the conduct of any other hearing of a matter allocated to the Legal Services Division of the Tribunal by the *Administrative Decisions Tribunal Act 1997*, section 73 of that Act applies to the determination of that matter.

**559 Parties**

- (1) The following persons are entitled to appear at a hearing conducted by the Tribunal:
  - (a) the Australian legal practitioner against whom the complaint has been made,
  - (b) the relevant Council,
  - (c) the Commissioner,
  - (d) the Attorney General.

- (2) The complainant is entitled to appear at the hearing in respect of the following aspects:
  - (a) those aspects of the hearing that relate to a request by the complainant for a compensation order,
  - (b) without limiting paragraph (a), those aspects of the hearing that relate to a review of decision made under section 540 (Summary conclusion of complaint procedure by caution, reprimand or compensation order) to reprimand or make a compensation order against the practitioner,
  - (c) other aspects of the hearing, but only if the Tribunal grants leave to the complainant to appear in respect of them.
- (3) The Tribunal may grant leave to any other person to appear at the hearing if satisfied that it is appropriate for that person to appear at the hearing.
- (4) Despite section 71 of the *Administrative Decisions Tribunal Act 1997*, a person who is entitled to appear at the hearing or who is granted leave to appear at the hearing may appear personally or be represented by an Australian legal practitioner or (with the leave of the Tribunal) by any other person.
- (5) Any person who appears at a hearing (otherwise than as a witness) is taken to be a party to the proceedings concerned.

**560 Hearings to be conducted in public**

- (1) All hearings conducted by the Tribunal into allegations of unsatisfactory professional conduct or professional misconduct are to be open to the public, unless the Tribunal decides to make an order under section 75 of the *Administrative Decisions Tribunal Act 1997*.
- (2) In deciding whether to make an order under section 75 of the *Administrative Decisions Tribunal Act 1997* and without affecting the generality of that section, the Tribunal is to have regard to the desirability of protecting from disclosure any material that is the subject of client legal privilege or any duty of confidentiality.
- (3) Without limiting the generality of section 75 of the *Administrative Decisions Tribunal Act 1997*:
  - (a) the Tribunal may, at any stage of the proceedings, make orders regarding non-disclosure of information obtained under or for the purposes of this Part from or about a client of an Australian

legal practitioner where the information is the subject of client legal privilege or any duty of confidentiality, and

- (b) the orders may apply to persons generally or to specified persons.
- (4) This section has effect whether or not the client has waived the client legal privilege or the benefit of the duty of confidentiality, and whether or not the information was obtained before or after the proceedings were commenced.
- (5) The Tribunal may under section 131 (Contempt of Tribunal) of the *Administrative Decisions Tribunal Act 1997* report to the Supreme Court a contravention by a person of an order under this section as a matter under subsection (1) (j) of that section.

#### **561 Procedural lapses and defects in appointments**

- (1) The Tribunal may order that a failure by the Commissioner or a Council, or a person acting for them or under their direction, to observe a procedural requirement in relation to a complaint (including the making, investigation or referral of a complaint, the giving of notice in connection with a complaint, or the making of a decision in connection with a complaint) is to be disregarded, if satisfied that:
  - (a) the failure has not caused substantial injustice to the parties to the hearing, or
  - (b) any substantial injustice caused by the failure is outweighed by the public interest in having the complaint dealt with by the Tribunal, or
  - (c) any substantial injustice caused by the failure can be remedied by an order of the Tribunal.
- (2) Subsection (1) applies to a failure occurring before proceedings were commenced in the Tribunal in relation to the complaint as well as to a failure occurring afterwards.
- (3) A defect or irregularity in the appointment of any person exercising, or purporting to exercise, a power or function under this Chapter does not invalidate an act done or omitted by the person in good faith.

#### **562 Determinations of Tribunal**

- (1) **Orders generally**  
If, after it has completed a hearing under this Part in relation to a complaint against an Australian legal practitioner, the Tribunal is

satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the Tribunal may make such orders as it thinks fit, including any one or more of the orders specified in this section.

(2) **Orders requiring official implementation in this jurisdiction**

The Tribunal may make the following orders under this subsection:

- (a) an order that the name of the practitioner be removed from the local roll,
- (b) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled,
- (c) an order that a local practising certificate not be issued to the practitioner before the end of a specified period,
- (d) an order that:
  - (i) specified conditions be imposed on the practitioner's practising certificate issued or to be issued under this Act, and
  - (ii) the conditions be imposed for a specified period, and
  - (iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed,
- (e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner.

(3) **Orders requiring official implementation in another jurisdiction**

The Tribunal may make the following orders under this subsection:

- (a) an order recommending that the name of the practitioner be removed from an interstate roll,
- (b) an order recommending that the practitioner's interstate practising certificate be suspended for a specified period or cancelled,
- (c) an order recommending that an interstate practising certificate not be granted to the practitioner before the end of a specified period,
- (d) an order recommending that:
  - (i) specified conditions be imposed on the practitioner's interstate practising certificate, and
  - (ii) the conditions be imposed for a specified period, and

- (iii) the conditions specify the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed.

(4) **Orders requiring compliance by practitioner**

The Tribunal may make the following orders under this subsection:

- (a) an order that the practitioner pay a fine of a specified amount,
- (b) an order that the practitioner undertake and complete a specified course of further legal education,
- (c) an order that the practitioner undertake a specified period of practice under supervision,
- (d) an order that the practitioner do or refrain from doing something in connection with the practice of law,
- (e) an order that the practitioner cease to accept instructions as a public notary in relation to notarial services,
- (f) an order that the practitioner's practice, or the financial affairs of the practitioner or of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions,
- (g) an order that the practitioner's practice be subject to periodic inspection for a specified period,
- (h) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner,
- (i) an order that the practitioner use the services of an accountant or other financial specialist in connection with the practitioner's practice,
- (j) an order that the practitioner not apply for a local practising certificate before the end of a specified period.

(5) **Ancillary or other orders**

The Tribunal may make ancillary or other orders, including an order for payment by the practitioner of expenses associated with orders under subsection (4), as assessed or reviewed in or in accordance with the order or as agreed.

(6) **Alternative finding**

The Tribunal may find that a person has engaged in unsatisfactory professional conduct even though the complaint or disciplinary application alleged professional misconduct or may find that a person

has engaged in professional misconduct even though the complaint or disciplinary application alleged unsatisfactory professional conduct.

(7) **Maximum fine**

The amount ordered by the Tribunal under this section to be paid by way of fines by any one Australian legal practitioner in connection with the Tribunal's findings about a complaint must not exceed in total:

- (a) \$10,000 in the case of unsatisfactory professional conduct not amounting to professional misconduct, or
- (b) \$75,000 in the case of professional misconduct.

If the Tribunal finds that the practitioner has engaged in both professional misconduct and unsatisfactory professional conduct not amounting to professional misconduct, the amount must not exceed \$75,000 in total.

(8) **Public reprimands**

If the Tribunal makes an order publicly reprimanding the practitioner, the Tribunal is to publish the order and a statement of its reasons for making the order.

- (9) It is sufficient compliance with the requirement to publish an order under subsection (8) if the Tribunal provides to the Commissioner sufficient information to enable the Commissioner to exercise the Commissioner's powers or functions in respect of the Register of Disciplinary Action required to be kept under Part 4.10 (Publicising disciplinary action).

(10) **Private reprimands**

If the Tribunal makes an order privately reprimanding the practitioner, the Tribunal is to provide the relevant Council and the Commissioner with a copy of the order and a statement of its reasons for making the order.

**563 Interlocutory and interim orders**

- (1) The Tribunal may make interlocutory or interim orders as it thinks fit before making its final decision about a complaint against an Australian legal practitioner.
- (2) Without limiting subsection (1), orders of the kinds referred to in section 562 (Determinations of Tribunal) may be made as interlocutory or interim orders.



**564    Consent orders**

- (1) The Tribunal may, with the consent of the Australian legal practitioner concerned contained in a written instrument, make orders under this Part without conducting or completing a hearing in relation to the complaint.
- (2) Consent may be given before or after the proceedings were commenced in the Tribunal with respect to the complaint.
- (3) If consent is given before the proceedings were commenced, the requirement to conduct an investigation of the complaint (whether commenced or not) may be dispensed with, and any investigation of the complaint already being conducted may be suspended or terminated.
- (4) This section does not apply to consent given by the practitioner unless the practitioner, the Commissioner and (if applicable) the relevant Council have agreed on the terms of an instrument of consent.
- (5) Without limiting what may be included in the instrument of consent, the instrument is to contain an agreed statement of facts (including as to the grounds of complaint) and may contain undertakings on the part of the practitioner.
- (6) The instrument of consent must be filed with the Tribunal.
- (7) Nothing in this section affects the procedures regarding the commencement of proceedings in the Tribunal where consent was given before the proceedings are commenced.
- (8) If consent was given before the proceedings are commenced, the proceedings are nevertheless to be commenced with respect to the complaint in the same way as if the consent had not yet been given.
- (9) The Tribunal is to be constituted in the same way as for the conduct of a hearing into the complaint.
- (10) In deciding whether to make orders under this Part pursuant to an instrument of consent, the Tribunal may make such inquiries of the parties as it thinks fit and may, despite any such consent, conduct or complete a hearing in relation to the complaint if it considers it to be in the public interest to do so.

**565    Compliance with determinations and orders**

- (1) Persons and bodies having relevant powers or functions under this Act must:

- (a) give effect to any order of the Tribunal made under section 562 (Determinations of Tribunal), 563 (Interlocutory and interim orders) or 564 (Consent orders) that requires official implementation in this jurisdiction, and
- (b) enforce any order of the Tribunal made under any of those sections that requires compliance by an Australian legal practitioner (except to the extent that the order relates to the practitioner's practice of law in another jurisdiction).

**Note.** Section 588 (Compliance with orders made under corresponding laws) contains provisions relating to compliance in this jurisdiction with orders made under corresponding laws.

- (2) The applicant that made the disciplinary application concerned must ensure that persons and bodies having relevant powers or functions under a corresponding law of another jurisdiction are notified of the making and contents of:
  - (a) any order of the Tribunal made under section 562 (Determinations of Tribunal), 563 (Interlocutory and interim orders) or 564 (Consent orders) that requires official implementation in the other jurisdiction, and
  - (b) any order of the Tribunal made under any of those sections that requires compliance by an Australian legal practitioner (to the extent that the order relates to the practitioner's practice of law in the other jurisdiction).
- (3) If the Tribunal makes an order that the name of an Australian legal practitioner who is a local lawyer be removed from the local roll, the Supreme Court is to order the removal of the name from the roll.
- (4) If the Tribunal makes an order that an Australian legal practitioner pay a fine, a copy of the order may be filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount of the fine and the order may be enforced as if it were an order of the court.
- (5) Any fine imposed on a legal practitioner by the Tribunal must be paid in the manner and within the period specified by the Tribunal and is to be paid to the Public Purpose Fund.

#### **566 Costs**

- (1) The Tribunal must make orders requiring an Australian legal practitioner whom it has found to have engaged in unsatisfactory professional conduct or professional misconduct to pay costs

(including costs of the Commissioner, a Council and the complainant), unless the Tribunal is satisfied that exceptional circumstances exist.

- (2) The Tribunal may make orders requiring an Australian legal practitioner whom it has not found to have engaged in unsatisfactory professional conduct or professional misconduct to pay costs (including costs of the Commissioner, a Council and the complainant), if satisfied that:
  - (a) the sole or principal reason why the proceedings were commenced in the Tribunal was a failure of the practitioner to co-operate with the Commissioner or a Council, or
  - (b) the practitioner has contravened an order of the Tribunal made in the course of proceedings concerned, or
  - (c) there is some other reason warranting the making of an order in the particular circumstances.
- (3) The Tribunal may make orders requiring payment of an Australian legal practitioner's costs from the Public Purpose Fund, but may do so only if satisfied that the practitioner did not engage in unsatisfactory professional conduct or professional misconduct and the Tribunal considers that special circumstances warrant the making of the orders. The Tribunal is to have regard to the length and complexity of the proceedings when making a determination under this subsection.
- (4) The Tribunal may make orders requiring an Australian legal practitioner in respect of whom proceedings are pending before the Tribunal to pay costs on a interlocutory or interim basis.
- (5) The Tribunal may make orders requiring a person to pay costs (including, as appropriate, the costs of the Commissioner, a Council, the complainant and the Australian legal practitioner against whom the complaint was made), if satisfied that:
  - (a) the person, whether before or during the proceedings, failed to produce or delayed in producing any document required or requested to be produced, and
  - (b) the failure or delay contributed to delay in commencing, conducting or concluding the proceedings in such a way as to warrant the making of the orders.
- (6) The Tribunal may fix the amount of costs itself or order that the amount of costs be assessed by a costs assessor under Part 3.2.

- (7) An order for costs may specify the terms on which costs must be paid.

**Note.** Section 82 of the *Administrative Decisions Tribunal Act 1997* makes provision for the recovery of costs.

**567 Notification of progress and result of proceedings before Tribunal**

- (1) The applicant in connection with a disciplinary application made to the Tribunal must cause the complainant to be notified in writing of the determination of the Tribunal.
- (2) This section does not apply in relation to an official complaint.

**568 Early termination of proceedings before Tribunal**

- (1) Proceedings before the Tribunal with respect to a complaint cannot be terminated, whether by withdrawal of the disciplinary application or otherwise, before the Tribunal makes its final decision about the complaint, without the leave of the Tribunal.
- (2) The Tribunal may give leave for the purposes of this section if it is satisfied that continuation of the proceedings is not warranted in the public interest.

**569 Other remedies not affected**

This Part does not affect any other remedy available to a complainant.

## Part 4.9 Compensation

**570 Request by complainant for compensation order**

- (1) A complainant who has suffered loss because of the conduct the subject of the complaint may request a compensation order.
- (2) A complainant who makes such a request must describe the loss suffered by the complainant and the relevant circumstances.
- (3) Such a request may be made in the complaint. The request may also be made, by notice in writing to the Commissioner or the relevant Council, at any time after the making and before the disposal of the complaint.
- (4) However, such a request may not be made after proceedings have been commenced in the Tribunal with respect to the complaint unless the Tribunal grants the complainant leave to make the request.

- (5) Such a request may only be made within 6 years after the conduct that caused the loss is alleged to have occurred.

**571 Compensation orders**

- (1) A compensation order is an order, made in respect of a complaint against an Australian legal practitioner, to compensate the complainant for loss suffered because of conduct that is the subject of the complaint.
- (2) A compensation order consists of one or more of the following:
- (a) an order that the practitioner cannot recover or must repay the whole or a specified part of the amount charged to the complainant by the practitioner in respect of specified legal services,
  - (b) an order discharging a lien possessed by the practitioner in respect of a specified document or class of documents,
  - (c) an order that the practitioner pay to the complainant, by way of monetary compensation for the loss, a specified amount.
- (3) A compensation order under subsection (2) (a) preventing recovery of an amount is effective even if proceedings to recover the amount (or any part of it) have been commenced by or on behalf of the practitioner.
- (4) A compensation order under subsection (2) (a) requiring repayment of an amount is effective even if a court has ordered payment of the amount (or an amount of which it is part) in proceedings brought by or on behalf of the practitioner.
- (5) A compensation order under subsection (2) (c) requiring payment of an amount exceeding:
- (a) \$25,000, except where paragraph (b) applies, or
  - (b) \$10,000, where the order is made by:
    - (i) the Commissioner or a Council under section 540 (Summary conclusion of complaint procedure by caution, reprimand or compensation order) or section 573 (3) (Making of compensation orders), or
    - (ii) the Commissioner under section 545 (Decision of Commissioner on review),

is not to be made unless the complainant and the practitioner both consent to the order.

**572 Prerequisites to making of compensation orders**

- (1) Unless the complainant and the Australian legal practitioner concerned agree, a compensation order is not to be made unless the person or body making it is satisfied:
  - (a) that the complainant has suffered loss because of the conduct concerned, and
  - (b) that it is in the interests of justice that the order be made.
- (2) A compensation order is not to be made in respect of any loss for which the complainant has received or is entitled to receive:
  - (a) compensation received or receivable under an order that has been made by a court, or
  - (b) compensation paid or payable from a Fidelity Fund of any jurisdiction, where a relevant claim for payment from the Fund has been made or determined.

**573 Making of compensation orders**

- (1) If the Tribunal has found that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct in relation to a complaint, the Tribunal may:
  - (a) make a compensation order, or
  - (b) refer the matter to the Commissioner for the making of a compensation order.
- (2) The Commissioner may make a compensation order if the Tribunal has referred the matter to the Commissioner for the making of a compensation order. A compensation order made under this subsection is taken to have been made by the Tribunal for the purposes of section 606 (Appeals against orders and decisions of Tribunal).
- (3) The Commissioner or relevant Council may make a compensation order before commencing proceedings in the Tribunal in relation to a complaint, if satisfied that the Australian legal practitioner against whom the complaint is made is likely to be found to have engaged in unsatisfactory professional conduct or professional misconduct. The Tribunal may make a further order under subsection (1), but the order, if requiring payment of an amount (when added to the amount of the original order) exceeding \$25,000, is not to be made unless the complainant and the practitioner both consent to the order.

Clause 573	Legal Profession Bill 2004
Chapter 4	Complaints and discipline
Part 4.9	Compensation

- (4) If the Commissioner or relevant Council decides to make a compensation order against an Australian legal practitioner under subsection (3), the practitioner may apply to the Tribunal for a review of the decision.
- (5) The Commissioner or relevant Council may make a compensation order in a case to which section 540 (Summary conclusion of complaint procedure by caution, reprimand or compensation order) or section 545 (Decision of Commissioner on review) applies.

#### **574 Enforcement of compensation orders**

- (1) A copy of a compensation order made by the Commissioner or a Council may be filed in a Local Court and the order (so far as it relates to any amount payable under the order) may be enforced as if it were an order of the court.

**Note.** A compensation order made by the Tribunal is enforceable under section 82 of the *Administrative Decisions Tribunal Act 1997*.

- (2) Failure to comply with a compensation order is capable of being unsatisfactory professional conduct or professional misconduct.

#### **575 Other remedies not affected**

The recovery of compensation awarded under this Part does not affect any other remedy available to a complainant, but any compensation so awarded is to be taken into account in any other proceedings by or on behalf of the complainant in respect of the same loss.

## **Part 4.10 Publicising disciplinary action**

### **576 Definitions**

In this Division:

***disciplinary action*** against an Australian legal practitioner means any of the following actions taken under a law of this or another jurisdiction, whether or not taken under this Chapter or under provisions of a corresponding law that correspond to this Chapter:

- (a) the suspension or cancellation of the Australian practising certificate of the practitioner,
- (b) the refusal to grant or renew an Australian practising certificate applied for by the practitioner (other than a refusal on the

- ground that the practitioner is not eligible to apply for the grant or renewal),
- (c) the removal of the name of the practitioner from an Australian roll,
  - (d) the making of an order by a court or tribunal, or by another person or body, for or following a finding of unsatisfactory professional conduct or professional misconduct by the practitioner, other than an order cautioning or privately reprimanding the practitioner,
  - (e) the reprimanding of the practitioner, or the making of a compensation order against the practitioner, by a person or body without a formal finding of unsatisfactory professional conduct or professional misconduct,
  - (f) the appointment of a manager or receiver for a legal practice of which the practitioner is a legal practitioner associate, where the associate is specified or referred to in the notice of appointment served on the law practice.

**Note.** Sections 625 and 632 (Effect of service of notice of appointment) refer to service of such a notice.

#### **577 Register of Disciplinary Action**

- (1) The Commissioner is to keep a register (in this Act referred to as the *Register of Disciplinary Action*) of:
  - (a) disciplinary action taken under this Act against Australian legal practitioners, and
  - (b) disciplinary action taken under a corresponding law against Australian legal practitioners who are or were enrolled or practising in this jurisdiction when the conduct that is the subject of the disciplinary action occurred, and
  - (c) disciplinary action taken under a corresponding law against Australian legal practitioners who are enrolled or practising in this jurisdiction if the disciplinary action was recorded on a register of disciplinary action kept under the corresponding law when the practitioner became enrolled or commenced to practise in this jurisdiction.
- (2) The Register is to include:
  - (a) the full name of the person against whom the disciplinary action was taken (including any name by which the person was



- previously known and any name by which the person becomes known after the disciplinary action is taken), and
- (b) the person's business address or former business address, and
  - (c) the person's home jurisdiction or most recent home jurisdiction, and
  - (d) particulars of the disciplinary action taken, and
  - (e) other particulars prescribed by the regulations,
- and may include the date and jurisdiction of the person's first and any later admission to the legal profession.
- (3) The Register may be kept in a form determined or identified by the Commissioner and may form part of other registers.
  - (4) The Register is to be made available for public inspection on:
    - (a) the internet site of the Commissioner, or
    - (b) an internet site identified on the internet site of the Commissioner.
  - (5) Information recorded in the Register may be provided to members of the public in any other manner approved by the Commissioner.
  - (6) The Commissioner may cause any error in or omission from the Register to be corrected.
  - (7) The requirement to keep the Register applies only in relation to disciplinary action taken after the commencement of this section, but details relating to earlier disciplinary action may be included in the Register.
  - (8) A Council or the Tribunal must provide to the Commissioner sufficient information to enable the Commissioner to exercise the Commissioner's functions in respect of the Register.

**578 Other means of publicising disciplinary action**

- (1) The Commissioner or Council may publicise disciplinary action taken against an Australian legal practitioner in any manner the Commissioner or Council thinks fit.
- (2) Nothing in this section affects the provisions of this Part relating to the Register.

**579 Quashing of disciplinary action**

- (1) If disciplinary action is quashed on appeal or review, any reference to that disciplinary action must be removed from the Register.
- (2) If disciplinary action is quashed on appeal or review after the action was publicised by the Commissioner or a Council under section 578 (Other means of publicising disciplinary action), the result of the appeal or review must be publicised with equal prominence by the Commissioner or Council.

**580 Liability for publicising disciplinary action**

- (1) No liability is incurred by a protected person in respect of anything done or omitted to be done in good faith for the purpose of:
  - (a) publicising disciplinary action taken against an Australian legal practitioner, or
  - (b) exercising the powers or functions of the Commissioner or a Council under this Part, or
  - (c) keeping, publishing or enabling access to the Register.
- (2) Without limiting subsection (1), no liability (including liability in defamation) is incurred by a person publishing in good faith:
  - (a) information about disciplinary action:
    - (i) recorded in the Register, or
    - (ii) otherwise publicised by the Commissioner or a Council under this Part,or matter purporting to contain information of that kind where the matter is incorrect in any respect, or
  - (b) a fair report or summary of that information.
- (3) In this section:

***protected person*** means:

  - (a) the State, or
  - (b) the Commissioner, or
  - (c) a Council, or
  - (d) a person responsible for keeping the whole or any part of the Register, or
  - (e) an internet service provider or internet content host, or

- (f) a member of staff of or a person acting at the direction of an authority of the State or any person or body referred to in this definition.

**581 Disciplinary action taken where infirmity, injury or illness is involved**

- (1) Disciplinary action taken against a person is not to be recorded in the Register or otherwise publicised under this Part if the action was taken because of the person's inability properly to carry out the requirements of legal practice and the inability arises wholly or principally from infirmity, injury or mental or physical illness.
- (2) Subsection (1) does not apply where the disciplinary action involves:
  - (a) the suspension or cancellation of the person's Australian practising certificate, or
  - (b) a refusal to grant or renew an Australian practising certificate applied for by the person, or
  - (c) a restriction or prohibition on the person's right to engage in legal practice,

but in that case the reason for the disciplinary action, and any other information relating to the infirmity, injury or mental or physical illness, is not to be recorded in the Register or otherwise publicised under this Division without the person's consent.

**582 Effect of secrecy provisions and non-disclosure orders**

- (1) The provisions of this Part apply despite any confidentiality or secrecy provisions of this Act.
- (2) The provisions of this Part are subject to any order made by:
  - (a) the Tribunal in relation to disciplinary action taken under this Chapter, or
  - (b) a corresponding disciplinary body in relation to disciplinary action taken under provisions of a corresponding law that correspond to this Chapter, or
  - (c) a court or tribunal of this or another jurisdiction,so far as the order prohibits or restricts the disclosure of information.
- (3) Despite subsection (2), the name and other identifying particulars of the person against whom the disciplinary action was taken, and the kind of disciplinary action taken, must be recorded in the Register in

accordance with the requirements of this Part and may be otherwise publicised under this Part.

## **Part 4.11 Inter-jurisdictional provisions**

### **583 Protocols**

- (1) The Commissioner may, after consultation with the Councils, enter into arrangements (referred to in this Part as *protocols*) with corresponding authorities for or with respect to investigating and dealing with conduct that appears to have occurred in more than one jurisdiction.
- (2) In particular, the protocols may make provision for or with respect to:
  - (a) providing principles to assist in determining where conduct occurs, either generally or in specified classes of cases, and
  - (b) giving and receiving consent for conduct occurring in a jurisdiction to be dealt with under a law of another jurisdiction, and
  - (c) the procedures to be adopted for requesting and conducting the investigation of any aspect of complaints under this Chapter.

### **584 Request to another jurisdiction to investigate complaint**

- (1) The Commissioner or a Council may request a corresponding authority to arrange for the investigation of any aspect of a complaint being dealt with by the Commissioner or Council and to provide a report on the result of the investigation.
- (2) A report on the result of the investigation received from:
  - (a) the corresponding authority, or
  - (b) a person or body authorised by the corresponding authority to conduct the investigation,may be used and taken into consideration by the Commissioner or Council and the Tribunal in the course of dealing with the complaint under this Chapter.

### **585 Request from another jurisdiction to investigate complaint**

- (1) This section applies in relation to a request received by the Commissioner or a Council from a corresponding authority to arrange

for the investigation of any aspect of a complaint being dealt with under a corresponding law.

- (2) The Commissioner or Council may conduct the investigation or authorise another regulatory authority of this jurisdiction to conduct it.
- (3) The provisions of this Chapter relating to the investigation of a complaint apply, with any necessary adaptations, in relation to the investigation of the relevant aspect of the complaint that is the subject of the request.
- (4) The Commissioner or Council or other regulatory authority of this jurisdiction must provide a report on the result of the investigation to the corresponding authority.

**586 Sharing of information with corresponding authorities**

The Commissioner and the Councils may separately or jointly enter into arrangements with a corresponding authority for providing information to the corresponding authority about:

- (a) complaints and investigations under this Chapter, and
- (b) any action taken with respect to any complaints made or investigations conducted under this Chapter, including determinations of the Tribunal under this Chapter.

**587 Co-operation with other authorities**

- (1) When dealing with a complaint or conducting an investigation, the Commissioner and the Councils may separately or jointly consult and co-operate with another person or body (whether in or of Australia or a foreign country) who or which has or may have relevant information or powers in relation to the person against whom the complaint was made or the person under investigation.
- (2) For the purposes of subsection (1), the Commissioner and Councils and the other person or body may exchange information concerning the complaint or investigation.

**588 Compliance with orders made under corresponding laws**

- (1) Persons and bodies having relevant powers or functions under this Act must:
  - (a) give effect to or enforce any recommendation or order of a corresponding disciplinary body or other corresponding

authority made under a corresponding law in relation to powers exercisable under this Act, and

- (b) give effect to or enforce any recommendation or order of a corresponding disciplinary body or other corresponding authority made under a corresponding law so far as the recommendation or order relates to the practice of law by the Australian legal practitioner concerned in this jurisdiction.
- (2) If a corresponding disciplinary body makes a recommendation or order that a person's name be removed from the roll of lawyers under this Act, the Supreme Court must order the removal of the name from the local roll kept under section 32 (Roll of local lawyers).
- (3) If a corresponding disciplinary body makes a recommendation or order that an Australian legal practitioner pay a fine, a copy of the recommendation or order may be filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount of the fine and the recommendation or order may be enforced as if it were an order of the court.

**589 Other powers or functions not affected**

Nothing in this Part affects any powers or functions that a person or body has apart from this Part.

## **Part 4.12 Miscellaneous**

**590 Jurisdiction of Supreme Court**

The inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of local lawyers are not affected by anything in this Chapter, and extend to:

- (a) local legal practitioners, and
- (b) interstate legal practitioners engaged in legal practice in this jurisdiction.

**591 Rules of procedural fairness**

The rules of procedural fairness, to the extent that they are not inconsistent with the provisions of this Act or the regulations, apply in relation to the investigation of complaints and the procedures of the Commissioner and the Councils under this Chapter.

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**592 Duty to deal with complaints efficiently and expeditiously**

It is the duty of the Commissioner and the Councils to deal with complaints (including any investigations) as efficiently and expeditiously as is practicable.

**593 Information about complaints procedure**

- (1) Each Council and the Commissioner must ensure that information appropriate to the interests and needs of lay persons and relating to the scheme established by this Chapter, including information about:
  - (a) the complaints system, including the manner of making complaints, and
  - (b) the procedure for dealing with complaints,is readily available to members of the public.
- (2) Each Council and Commissioner must provide assistance to members of the public in making complaints.
- (3) Each Council and the Commissioner must ensure that information appropriate to the interests and needs of legal practitioners and relating to the scheme established by this Chapter, including information about:
  - (a) the operation of the scheme, and
  - (b) the procedures adopted in relation to the scheme,is readily available to legal practitioners.

**594 Co-operation and information sharing between Commissioner and Councils**

The Commissioner and the Councils must consult and co-operate with each other when dealing with a complaint or conducting an investigation under this Chapter and for that purpose may exchange information about:

- (a) complaints and investigations under this Chapter, and
- (b) any action taken with respect to any complaints made or investigations conducted under this Chapter.

**595 Pre-complaint powers where client is denied access to documents**

- (1) The Commissioner or a Council may exercise powers under this section for the purpose of assisting a client of an Australian legal

practitioner to decide whether to make a complaint in relation to an Australian legal practitioner.

- (2) The Commissioner or Council may, by notice in writing served on the practitioner, require the practitioner to produce, at a specified time and place and to a specified person, any specified document (or a copy of the document), if:
  - (a) the document relates to a matter conducted or being conducted for the client, and
  - (b) the practitioner refuses to give the document to the client or to give the client access to the document, whether because of a lien claimed by the practitioner or otherwise.
- (3) The place specified in the notice at which the document is to be produced must be:
  - (a) an office of the Commissioner or Council, unless paragraph (b) applies, or
  - (b) if the office of the practitioner is in an area prescribed by the regulations—a place within a prescribed distance from that office.
- (4) The person specified in the notice to whom the document is to be produced must be:
  - (a) in the case of a notice given by the Commissioner—a person (whether or not an Australian legal practitioner) nominated by the Commissioner and acting as agent of the Commissioner, or
  - (b) in the case of a notice given by a Council—an Australian legal practitioner acting as agent of the Council.
- (5) The Commissioner or Council may:
  - (a) inspect and make notes from the document, and
  - (b) retain the document for a period the Commissioner or Council thinks necessary for the purpose referred to in subsection (1).
- (6) The client may inspect and take notes from the document under the supervision of the specified person at the specified place for a reasonable period.
- (7) The practitioner is entitled to the return of any document following an inspection under this section.
- (8) Section 672 (General provisions relating to requirements under this Division) (other than section 672 (4)) applies to the requirement



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specified in a notice under this section in the same way as it applies to a requirement imposed on a person under section 659 (Requirement to provide access to documents and information relating to affairs of law practice).

- (9) If a complaint is made in relation to the practitioner while the document is in the custody of the Commissioner or Council and the document is relevant to the complaint, an investigator under this Chapter may take custody of and retain the document as if it had been produced under section 659 (Requirement to provide access to documents and information relating to affairs of law practice).
- (10) Nothing in this section prevents the Commissioner or Council making a complaint arising wholly or partly in connection with the document or the matter to which the document relates.
- (11) This section does not authorise the Commissioner or Council to copy the whole or a part of the document (otherwise than by making notes from the document) or require a copy of the whole or a part of the document to be made, but the Commissioner or Council may accept such a copy if it is voluntarily offered.

#### **596 Failure to comply with orders**

- (1) A failure by a person to comply with an order of the Tribunal under this Act or an order of a corresponding disciplinary body under a corresponding law is capable of being unsatisfactory professional conduct or professional misconduct.
- (2) A person who fails to comply with an order of the Tribunal under this Act or an order of a corresponding disciplinary body under a corresponding law is not entitled to apply for the grant or renewal of a local practising certificate while the failure continues.

#### **597 Performance criteria**

- (1) The Councils and the Commissioner must jointly develop performance criteria relating to the handling of complaints under this Chapter.
- (2) Each Council is to include the relevant criteria in its annual report under this Act, together with an assessment of its performance against the criteria in the period to which the report relates.
- (3) The Commissioner is to include the relevant criteria in the Commissioner's annual report under this Act, together with an

assessment of the Commissioner's performance against the criteria in the period to which the report relates.

- (4) The Councils and the Commissioner are to ensure that the assessments referred to in subsections (2) and (3) are done in the same or a consistent manner, so as to facilitate assessment of the performance of the complaint handling system.

**598 Reports to Attorney General**

- (1) The Commissioner and each Council must submit to the Attorney General, at the times and in respect of the periods required by the Attorney General, reports on their respective handling of complaints.
- (2) A report is to deal with matters specified by the Attorney General and other matters the Commissioner or Council considers appropriate to include in the report.
- (3) The obligations under this section are in addition to any obligations to provide an annual or other report under this or any other Act.

**599 Duty to report suspected offences**

- (1) This section applies if the Commissioner or a Council suspects on reasonable grounds, after investigation or otherwise, that a person has committed an offence against any Act or law.
- (2) The Commissioner or Council must:
  - (a) report the suspected offence to any relevant law enforcement or prosecution authority, and
  - (b) make available to the authority the information and documents relevant to the suspected offence in its possession or under its control.
- (3) The obligation under subsection (2) (b) to make available the information and documents continues while the Commissioner or Council holds the relevant suspicion.

**600 Effect of other proceedings**

A complaint may be made and dealt with even though the Australian legal practitioner concerned is the subject of proposed or current criminal or civil proceedings relating to the subject-matter of the complaint.

**601 Protection from liability**

- (1) A matter or thing done or omitted to be done by:
- (a) the Commissioner, or
  - (b) the Bar Association or Law Society, or
  - (c) a Council or any member of a Council, or
  - (d) a committee or subcommittee of a Council or any member of a committee or subcommittee, or
  - (e) any person involved in the conduct of an investigation under this Part, or
  - (f) the Tribunal or any member of the Tribunal, or
  - (g) the Registrar of the Tribunal, or
  - (h) a mediator to whom a matter is referred under this Chapter, or
  - (i) any other person exercising a power or function under this Chapter, or
  - (j) any member of the staff of any of the above,

does not, if the matter or thing was done or omitted to be done in good faith for the purpose of the administration of this Chapter, subject a protected person personally to any action, liability, claim or demand.

- (2) In this section:

*protected person* means any of the following natural persons:

- (a) the Commissioner,
- (b) a member of a Council or committee or subcommittee of a Council,
- (c) a person involved in the conduct of an investigation under this Chapter,
- (d) a member or the Registrar of the Tribunal,
- (e) a mediator to whom a matter is referred under this Chapter,
- (f) a member of the staff of the Commissioner, the Bar Association, the Law Society or the Tribunal.

**602 Non-compellability of certain witnesses**

- (1) A person referred to in section 601 (Protection from liability) is not compellable in any legal proceedings (including proceedings before the Tribunal) to give evidence or produce documents in respect of any

matter in which the person was involved in the course of the administration of this Part.

- (2) This section does not apply to:
- (a) proceedings under Part 3 of the *Royal Commissions Act 1923*, or
  - (b) proceedings before the Independent Commission Against Corruption, or
  - (c) proceedings under Part 3 of the *Special Commissions of Inquiry Act 1983*, or
  - (d) an inquiry under the *Ombudsman Act 1974*.

**603 Confidentiality of client communications**

An Australian legal practitioner must comply with a requirement under this Chapter to answer a question or to produce information or a document, despite any duty of confidentiality in respect of a communication between the practitioner and a client.

**604 Waiver of privilege or duty of confidentiality**

- (1) If a client of an Australian legal practitioner makes a complaint about the practitioner, the complainant is taken to have waived client legal privilege, or the benefit of any duty of confidentiality, to enable the practitioner to disclose to the appropriate authorities any information necessary for investigating and dealing with the complaint.
- (2) Without limiting subsection (1), any information so disclosed may be used in or in connection with any procedures or proceedings relating to the complaint.

**605 Undertakings by Commissioner or Council regarding privileged or confidential information**

- (1) The Commissioner or a Council may give undertakings regarding non-disclosure of information obtained under or for the purposes of this Chapter from or about a client of an Australian legal practitioner where the information is the subject of client legal privilege or any duty of confidentiality.
- (2) An undertaking cannot be inconsistent with any duty of the Commissioner or Council under this or any other Act to disclose information.

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- (3) This section has effect whether or not the client has waived the client legal privilege or the benefit of the duty of confidentiality.

**606 Appeals against orders and decisions of Tribunal**

- (1) An order or other decision made by the Tribunal under this Chapter may be appealed to the Supreme Court by a party to the proceedings in which the order or decision was made.
- (2) Section 75A of the *Supreme Court Act 1970* accordingly applies to an appeal under this section, and the appeal is to be:
- by way of rehearing, and
  - not by way of a new hearing (a de novo hearing).
- (3) Subsection (2) does not affect the provisions of section 75A of the *Supreme Court Act 1970* relating to the receipt of evidence by the Supreme Court.
- (4) Despite subsection (1), an appeal does not lie to the Supreme Court under this section against any of the following decisions of the Tribunal except by leave of the Supreme Court:
- an interlocutory decision,
  - a decision made with the consent of the parties,
  - a decision as to costs.
- (5) No appeals lie under Chapter 7 of the *Administrative Decisions Tribunal Act 1997* to an Appeal Panel against an order or other decision of the Tribunal under this Chapter.

**607 Costs of administering Chapter**

Any amount payable from the Public Purpose Fund for the purpose of meeting the costs of the Commissioner or the Tribunal is to be paid, in accordance with section 290, to the Treasurer for credit of the Consolidated Fund.

**608 Undertakings by practitioner**

- (1) This section applies if an Australian legal practitioner gives an undertaking to the Commissioner, a Council or the Tribunal in the course of:
- the Commissioner or a Council investigating or dealing with a complaint against the practitioner, or

- (b) a mediation conducted in connection with a complaint against or a consumer dispute with the practitioner, or
  - (c) proceedings before the Tribunal.
- (2) A breach of the undertaking is capable of being unsatisfactory professional conduct or professional misconduct.
- (3) Nothing in this section implies that breaches of other undertakings are not capable of being unsatisfactory professional conduct or professional misconduct.

**609 Investigations not related to complaints under this Chapter**

This Chapter does not affect the power of a Council to conduct an investigation into the affairs of an Australian legal practitioner or law practice under the provisions of any other Part of this Act or under any other Act.

Clause 610	Legal Profession Bill 2004
Chapter 5	External intervention
Part 5.1	Preliminary

## Chapter 5 External intervention

### Part 5.1 Preliminary

#### 610 Purpose

- (1) The purpose of this Chapter is to ensure that an appropriate range of options is available for intervention in the business and professional affairs of law practices and Australian-registered foreign lawyers for the purpose of protecting the interests of:
  - (a) the general public, and
  - (b) clients, and
  - (c) lawyers, including the owners and employees of law practices, so far as their interests are not inconsistent with those of the general public and clients.
- (2) It is intended that interventions occur consistently with:
  - (a) similar interventions in other jurisdictions, especially where a law practice operates in this jurisdiction and one or more other jurisdictions, and
  - (b) other provisions of this Act.

#### Note. This Chapter:

- (a) applies to all law practices, regardless of whether they are incorporated under the *Corporations Act 2001* of the Commonwealth, and
- (b) is intended to apply so that it, rather than the *Corporations Act 2001* of the Commonwealth or the *Bankruptcy Act 1966* of the Commonwealth applies in respect of the winding up of trust property and in respect of the carrying on of a law practice by external intervention.

#### 611 Definitions

- (1) In this Chapter:

***external intervener*** means a supervisor, manager or receiver under this Chapter.

***external intervention*** means the appointment of, and the exercise of the powers and functions of, a supervisor, manager or receiver under this Chapter.

***regulated property***, in relation to a law practice, means the following:

- (a) trust money or trust property received, receivable or held by the practice,

- (b) interest, dividends or other income or anything else derived from or acquired with money or property referred to in paragraph (a),
  - (c) documents or records of any description relating to anything referred to in paragraph (a) or (b),
  - (d) any means by which any records that are referred to in paragraph (c) and not written may be reproduced in writing.
- (2) Other expressions used in this Part have the same meaning as in Part 3.1 (Trust money and trust accounts).

**612 Application of Chapter to barristers**

This Chapter applies in respect of the law practice of a barrister subject to the following modifications:

- (a) a reference to the Law Society Council is to be read as a reference to the Bar Council,
- (b) Parts 5.3 (Supervisors) and 5.5 (Receivers) do not apply in respect of a law practice of a barrister,
- (c) the powers of the manager for a law practice of a barrister include power to reallocate or return briefs.

**613 Application of Chapter to Australian-registered foreign lawyers**

This Chapter applies, with any necessary adaptations, to Australian-registered foreign lawyers and former Australian-registered foreign lawyers in the same way as it applies to law practices.

**614 Application of Chapter to other persons**

This Chapter applies, with any necessary adaptations, to:

- (a) a former law practice or former Australian legal practitioner, and
- (b) the executor (original or by representation) or administrator for the time being of a deceased Australian legal practitioner or of his or her estate, and
- (c) the administrator or receiver, or receiver and manager, or official manager, of the property of an incorporated legal practice, and



- (d) the liquidator of an incorporated legal practice that is being or has been wound up,

in the same way as it applies to law practices.

## **Part 5.2 Initiation of external intervention**

### **615 Circumstances warranting external intervention**

External intervention may take place in relation to a law practice in any of the following circumstances:

- (a) where a legal practitioner associate involved in the practice:
  - (i) has died, or
  - (ii) ceases to be an Australian legal practitioner, or
  - (iii) has become an insolvent under administration, or
  - (iv) is in prison,
- (b) in the case of a firm—where the partnership has been wound up or dissolved,
- (c) in the case of an incorporated legal practice—where the corporation concerned:
  - (i) ceases to be an incorporated legal practice, or
  - (ii) is being or has been wound up, or
  - (iii) has been deregistered or dissolved,
- (d) in any case—where the Law Society Council forms a belief on reasonable grounds that the practice or an associate of the law practice:
  - (i) is not dealing adequately with trust money or trust property or is not properly attending to the affairs of the practice, or
  - (ii) has committed a serious irregularity, or a serious irregularity has occurred, in relation to trust money or trust property or the affairs of the practice, or
  - (iii) has failed properly to account in a timely manner to any person for trust money or trust property received by the practice for or on behalf of that person, or
  - (iv) has failed properly to make a payment of trust money or a transfer of trust property when required to do so by a person entitled to that money or property or entitled to give a direction for payment or transfer, or

- (v) is in breach of the regulations or legal profession rules with the result that the record-keeping for the practice's trust account is inadequate, or
  - (vi) has been or is likely to be convicted of an offence relating to trust money or trust property, or
  - (vii) is the subject of a complaint relating to trust money or trust property received by the practice, or
  - (viii) has failed to comply with any requirement of an investigator or external examiner appointed under this Act, or
  - (ix) has ceased to be engaged in legal practice without making provision for properly dealing with trust money or trust property received by the practice or for properly winding up the affairs of the practice, or
- (e) where any other proper cause exists in relation to the practice.

**616 Determination regarding external intervention**

- (1) This section applies when the Law Society Council becomes aware that one or more of the circumstances referred to in section 615 (Circumstances warranting external intervention) exist in relation to a law practice and decides that, having regard to the interests of the clients, owners and employees of the practice and to other matters that it considers appropriate, external intervention is warranted.
- (2) The Law Society Council may determine:
- (a) to appoint a supervisor of trust money received by the law practice, if the Council is of the opinion:
    - (i) that external intervention is required because of issues relating to the practice's trust accounts, and
    - (ii) that it is not appropriate that the provision of legal services by the practice be wound up and terminated because of those issues, or
  - (b) to appoint a manager for the law practice, if the Council is of the opinion:
    - (i) that the practice is or may be a viable business concern, and
    - (ii) that, for this to occur, there is a need for an independent person to be appointed to take over professional and operational responsibility for the practice, or

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- (c) to apply for the appointment of a receiver for the law practice, if the Council is of the opinion:
  - (i) that the appointment is necessary to protect the interests of clients in relation to trust money or trust property, or
  - (ii) that it may be appropriate that the provision of legal services by the practice be wound up and terminated.
- (3) The Law Society Council may, from time to time, make further determinations in relation to the law practice and for that purpose may revoke a previous determination with effect from a date or event specified by the Council. Revocation of a determination does not itself affect the appointment of a receiver already made.
- (4) A further determination may be made under subsection (3) whether or not there has been any change in the circumstances in consequence of which the original determination was made and whether or not any further circumstances have come into existence in relation to the law practice after the original determination was made.
- (5) An appointment of a supervisor or manager for a law practice may be made in respect of the practice generally or may be limited in any way the Law Society Council considers appropriate, including for example to matters connected with a particular legal practitioner associate or to matters connected with a particular office or a particular subject-matter.

## Part 5.3 Supervisors

### 617 Appointment of supervisor

- (1) This section applies if the Law Society Council determines to appoint a supervisor of trust money for a law practice.
- (2) The Law Society Council may, by instrument in writing, appoint a person as supervisor.
- (3) The appointee must be either:
  - (a) an Australian legal practitioner, or
  - (b) a person holding accounting qualifications with experience in law practices' trust accounts,
 and may (but need not) be an employee of the Law Society.
- (4) The instrument of appointment must:
  - (a) identify the practice and the supervisor, and

- (b) indicate that the external intervention is by way of appointment of a supervisor, and
  - (c) specify the term of the appointment, and
  - (d) specify any conditions imposed by the Law Society Council when the appointment is made, and
  - (e) specify any fees payable by way of remuneration to the supervisor specifically for carrying out his or her duties in relation to the external intervention, and
- Note.** Paragraph (e) is intended to exclude remuneration payable generally, eg as an employee of the Law Society Council.
- (f) provide for the legal costs and the expenses that may be incurred by the supervisor in relation to the external intervention.
- (5) The instrument of appointment may specify any reporting requirements to be observed by the supervisor.

**618 Notice of appointment**

- (1) As soon as possible after an appointment of a supervisor of trust money for a law practice is made, the Law Society Council must serve a notice of the appointment on:
- (a) the practice, and
  - (b) any other person authorised to operate any trust account of the practice, and
  - (c) any external examiner appointed to examine the practice's trust records, and
  - (d) the ADI with which any trust account of the practice is maintained, and
  - (e) any person whom the Council reasonably believes should be served with the notice.
- (2) The notice must:
- (a) identify the law practice and the supervisor, and
  - (b) indicate that the external intervention is by way of appointment of a supervisor, and
  - (c) specify the term of the appointment, and
  - (d) specify any reporting requirements to be observed by the supervisor, and

- (e) specify any conditions imposed by the Law Society Council when the appointment is made, and
- (f) include a statement that the law practice may appeal against the appointment of the supervisor under section 649 (Appeal against appointment), and
- (g) contain or be accompanied by other information or material prescribed by the regulations.

**619 Effect of service of notice of appointment**

- (1) After service on an ADI of a notice of the appointment of a supervisor of trust money for a law practice and until the appointment is terminated, the ADI must ensure that no funds are withdrawn or transferred from a trust account of the practice unless:
  - (a) the withdrawal or transfer is made by cheque or other instrument drawn on that account signed by the supervisor, or
  - (b) the withdrawal or transfer is made by the supervisor by means of electronic or internet banking facilities, or
  - (c) the withdrawal or transfer is made in accordance with an authority to withdraw or transfer funds from the account signed by the supervisor.
- (2) After service on a person (other than the supervisor or an ADI) of a notice of the appointment of a supervisor of trust money for a law practice and until the appointment is terminated, the person must not:
  - (a) deal with any of the practice's trust money, or
  - (b) sign any cheque or other instrument drawn on a trust account of the practice, or
  - (c) authorise the withdrawal or transfer of funds from a trust account of the practice.

Maximum penalty: 100 penalty units.
- (3) A supervisor may, for the purposes of subsection (1) (b), enter into arrangements with an ADI for withdrawing money from a trust account of the law practice concerned by means of electronic or internet banking facilities.
- (4) Any money that is withdrawn or transferred in contravention of subsection (1) may be recovered from the ADI concerned by the supervisor as a debt in any court of competent jurisdiction, and any

amount recovered is to be paid into a trust account of the law practice or another account nominated by the supervisor.

**620 Role of supervisor**

- (1) A supervisor of trust money for a law practice has the powers and duties of the practice in relation to the trust money, including powers:
  - (a) to receive trust money on behalf of the practice, and
  - (b) to open and close trust accounts.
- (2) For the purpose of exercising or performing his or her powers or duties under subsection (1), the supervisor may exercise any or all of the following powers:
  - (a) to enter and remain on premises used by the law practice for or in connection with its engaging in legal practice,
  - (b) to require the practice or an associate or former associate of the practice or any other person who has or had control of documents relating to trust money received by the practice to give the supervisor:
    - (i) access to the documents the supervisor reasonably requires, and
    - (ii) information relating to the trust money the supervisor reasonably requires,
  - (c) to operate equipment or facilities on the premises, or to require any person on the premises to operate equipment or facilities on the premises, for a purpose relevant to his or her appointment,
  - (d) to take possession of any relevant material and retain it for as long as may be necessary,
  - (e) to secure any relevant material found on the premises against interference, if the material cannot be conveniently removed,
  - (f) to take possession of any computer equipment or computer program reasonably required for a purpose relevant to his or her appointment.
- (3) If the supervisor takes anything from the premises, the supervisor must issue a receipt in a form approved by the Law Society Council and:
  - (a) if the occupier or a person apparently responsible to the occupier is present at or near the premises, give it to him or her, or

- (b) otherwise, leave it at the premises in an envelope addressed to the occupier.
- (4) If the supervisor is refused access to the premises or the premises are unoccupied, the supervisor may use whatever appropriate force is necessary to enter the premises and may be accompanied by a member of the police force to assist entry.
- (5) This section applies to trust money held by the practice before the supervisor is appointed, as well as to trust money received afterwards.
- (6) The supervisor does not have a role in the management of the affairs of the law practice except in so far as the affairs relate to a trust account of the practice.

**Note.** There may be jurisdictional variations in connection with the conferral of powers under this section.

**621 Records of and dealing with trust money of law practice under supervision**

- (1) A supervisor of trust money for a law practice must maintain the records of his or her dealings with the trust money:
  - (a) separately from records relating to dealings with trust money before his or her appointment as supervisor, and
  - (b) separately from the affairs of any other law practice for which he or she is supervisor, and
  - (c) in the manner prescribed by the regulations.
- (2) Subject to subsection (1), a supervisor of trust money for a law practice must deal with the trust money in the same way as a law practice must deal with trust money.

**622 Termination of supervisor's appointment**

- (1) The appointment of a supervisor of trust money for a law practice terminates in the following circumstances:
  - (a) the term of the appointment comes to an end,
  - (b) the appointment of a manager for the practice takes effect,
  - (c) the appointment of a receiver for the practice takes effect,
  - (d) the supervisor has distributed all trust money received by the practice and wound up all trust accounts,
  - (e) a determination of the Law Society Council that the appointment be terminated has taken effect.

- (2) The Law Society Council may determine in writing that the appointment be terminated immediately or with effect from a specified date.
- (3) The Law Society Council must serve a written notice of the termination on all persons originally served with notice of the appointment.

## Part 5.4 Managers

### 623 Appointment of manager

- (1) This section applies if the Law Society Council determines to appoint a manager for a law practice.
- (2) The Law Society Council may, by instrument in writing, appoint a person as manager.
- (3) The appointee must be an Australian legal practitioner who holds an unrestricted practising certificate, and may (but need not) be an employee of the Law Society Council.
- (4) The instrument of appointment must:
  - (a) identify the law practice and the manager, and
  - (b) indicate that the external intervention is by way of appointment of a manager, and
  - (c) specify the term of the appointment, and
  - (d) specify any conditions imposed by the Law Society Council when the appointment is made, and
  - (e) specify any fees payable by way of remuneration to the manager specifically for carrying out his or her duties in relation to the external intervention, and  
**Note.** Paragraph (e) is intended to exclude remuneration payable generally, eg as an employee of the Law Society Council.
  - (f) provide for the legal costs and the expenses that may be incurred by the manager in relation to the external intervention.
- (5) The instrument of appointment may specify any reporting requirements to be observed by the manager.



**624 Notice of appointment**

- (1) As soon as possible after an appointment of a manager for a law practice is made, the Law Society Council must serve a notice of the appointment on:
- (a) the practice, and
  - (b) any other person authorised to operate any trust account of the practice, and
  - (c) any external examiner appointed to examine the practice's trust records, and
  - (d) the ADI with which any trust account of the practice is maintained, and
  - (e) any person whom the Council reasonably believes should be served with the notice.
- (2) The notice must:
- (a) identify the law practice and the manager, and
  - (b) indicate that the external intervention is by way of appointment of a manager, and
  - (c) specify the term of the appointment, and
  - (d) specify any reporting requirements to be observed by the manager, and
  - (e) specify any conditions imposed by the Law Society Council when the appointment is made, and
  - (f) include a statement that the law practice may appeal against the appointment of the manager under section 649 (Appeal against appointment), and
  - (g) contain or be accompanied by other information or material prescribed by the regulations.

**625 Effect of service of notice of appointment**

- (1) After service on a law practice of a notice of the appointment of a manager for the practice and until the appointment is terminated, a legal practitioner associate of the practice who is specified or referred to in the notice must not participate in the affairs of the practice except under the direct supervision of the manager.

Maximum penalty: 100 penalty units.

- (2) After service on an ADI of a notice of the appointment of a manager for a law practice and until the appointment is terminated, the ADI must ensure that no funds are withdrawn or transferred from a trust account of the practice unless:
- (a) the withdrawal or transfer is made by cheque or other instrument drawn on that account signed by the manager or by a receiver appointed for the practice, or
  - (b) the withdrawal or transfer is made by the manager, or by a receiver appointed for the practice, by means of electronic or internet banking facilities, or
  - (c) the withdrawal or transfer is made in accordance with an authority to withdraw or transfer funds from the account signed by the manager or by a receiver appointed for the practice.
- (3) After service on a person of a notice of the appointment of a manager for a law practice and until the appointment is terminated, the person must not:
- (a) deal with any of the practice's trust money, or
  - (b) sign any cheque or other instrument drawn on a trust account of the practice, or
  - (c) authorise the withdrawal or transfer of funds from a trust account of the practice,
- but this subsection does not apply to a legal practitioner associate referred to in subsection (1), an ADI or the manager or receiver for the practice.
- Maximum penalty: 100 penalty units.
- (4) A manager may, for the purposes of subsection (2) (b), enter into arrangements with an ADI for withdrawing money from a trust account of the law practice concerned by means of electronic or internet banking facilities.
- (5) Any money that is withdrawn or transferred in contravention of subsection (2) may be recovered from the ADI concerned by the manager, or a receiver for the law practice, as a debt in any court of competent jurisdiction, and any amount recovered is to be paid into a trust account of the practice or another account nominated by the manager.

**626 Role of manager**

- (1) A manager for a law practice may carry on the practice and may do all things that the practice or a legal practitioner associate of the practice might lawfully have done, including but not limited to the following:
  - (a) transacting any urgent business of the practice,
  - (b) transacting, with the approval of any or all of the existing clients of the practice, any business on their behalf, including:
    - (i) commencing, continuing, defending or settling any proceedings, and
    - (ii) receiving, retaining and disposing of property,
  - (c) accepting instructions from new clients and transacting any business on their behalf, including:
    - (i) commencing, continuing, defending or settling any proceedings, and
    - (ii) receiving, retaining and disposing of regulated property,
  - (d) charging and recovering legal costs, including legal costs for work in progress at the time of the appointment of the manager,
  - (e) entering into, executing or performing any agreement,
  - (f) dealing with trust money in accordance with this Act and the regulations,
  - (g) winding up the affairs of the practice.
- (2) For the purpose of exercising his or her powers under subsection (1), the manager may exercise any or all of the following powers:
  - (a) to enter and remain on premises used by the law practice for or in connection with its engaging in legal practice,
  - (b) to require the practice, an associate or former associate of the practice or any other person who has or had control of client files and associated documents (including documents relating to trust money received by the practice) to give the manager:
    - (i) access to the files and documents the manager reasonably requires, and
    - (ii) information relating to client matters the manager reasonably requires,
  - (c) to operate equipment or facilities on the premises, or to require any person on the premises to operate equipment or facilities on the premises, for a purpose relevant to his or her appointment,

- (d) to take possession of any relevant material and retain it for as long as may be necessary,
  - (e) to secure any relevant material found on the premises against interference, if the material cannot be conveniently removed,
  - (f) to take possession of any computer equipment or computer program reasonably required for a purpose relevant to his or her appointment.
- (3) If the manager takes anything from the premises, the manager must issue a receipt in a form approved by the Law Society Council and:
- (a) if the occupier or a person apparently responsible to the occupier is present at or near the premises, give it to him or her, or
  - (b) otherwise, leave it at the premises in an envelope addressed to the occupier.
- (4) If the manager is refused access to the premises or the premises are unoccupied, the manager may use whatever appropriate force is necessary to enter the premises and may be accompanied by a member of the police force to assist entry.

**627 Records and accounts of law practice under management and dealings with trust money**

- (1) The manager for a law practice must maintain the records and accounts of the practice that he or she manages:
- (a) separately from the management of the affairs of the practice before his or her appointment as manager, and
  - (b) separately from the affairs of any other law practice for which he or she is manager, and
  - (c) in the manner prescribed by the regulations.
- (2) Subject to subsection (1), the manager for a law practice must deal with trust money of the practice in the same way as a law practice must deal with trust money.

**628 Deceased estates**

- (1) It is the duty of the manager for a law practice to co-operate with the legal personal representative of a deceased legal practitioner associate of the practice for the orderly winding up of the estate.

- (2) The manager is not, in the exercise or performance of powers and duties as manager, a legal personal representative of the deceased legal practitioner associate, but nothing in this subsection prevents the manager from exercising or performing powers or duties as a legal personal representative if otherwise appointed as representative.
- (3) Subject to subsections (1) and (2) and to the terms of the manager's appointment, if the manager was appointed before the death of the legal practitioner associate, the manager's appointment, powers and duties are not affected by the death.

**629 Termination of manager's appointment**

- (1) The appointment of a manager for a law practice terminates in the following circumstances:
  - (a) the term of the appointment comes to an end,
  - (b) the appointment of a receiver for the practice takes effect, where the terms of the appointment indicate that the receiver is authorised to exercise the powers and duties of a manager,
  - (c) the manager has wound up the affairs of the practice,
  - (d) a determination of the Law Society Council that the appointment be terminated has taken effect.
- (2) The Law Society Council may determine in writing that the appointment be terminated immediately or with effect from a specified date.
- (3) If the appointment terminates in the circumstances referred to in subsection (1) (a), (b) or (d), the former manager must, as soon as practicable after the termination, transfer and deliver the regulated property and client files of the law practice to:
  - (a) another external intervener appointed for the practice, or
  - (b) the practice, if another external intervener is not appointed for the practice.
- (4) The former manager need not transfer regulated property and files to the law practice in compliance with subsection (3) unless the manager's expenses have been paid to the Law Society Council.
- (5) The Law Society Council must serve a written notice of the termination on all persons originally served with notice of the appointment.

## Part 5.5 Receivers

### 630 Appointment of receiver

- (1) This section applies if the Law Society Council determines to apply to the Supreme Court for the appointment of a receiver for a law practice.
- (2) The Supreme Court may, on the application of the Law Society Council, appoint a person as receiver for the law practice.
- (3) The Supreme Court may make the appointment whether or not the law practice or a principal of the practice concerned has been notified of the application and whether or not the practice or principal is a party to the proceedings.
- (4) Before commencing to hear an application for appointment of a receiver, the Supreme Court must order from the precincts of the Court any person who is not:
  - (a) an officer of the Court, or
  - (b) a party, a legal representative of a party, or a clerk of a legal representative of a party, or
  - (c) a principal of the law practice concerned, or
  - (d) a person who is about to or is in the course of giving evidence, or
  - (e) a person permitted by the Court to be present in the interests of justice.
- (5) The appointee must be:
  - (a) an Australian legal practitioner, or
  - (b) a person holding accounting qualifications with experience in law practices' trust accounts,and may (but need not) be an employee of the Law Society Council.
- (6) The instrument of appointment must:
  - (a) identify the law practice and the receiver, and
  - (b) indicate that the external intervention is by way of appointment of a receiver, and
  - (c) specify any conditions imposed by the Supreme Court when the appointment is made, and

- (d) specify any fees payable by way of remuneration to the receiver specifically for carrying out his or her duties in relation to the external intervention, and  
**Note.** Paragraph (d) is intended to exclude remuneration payable generally, for example as an employee of the Law Society Council.
  - (e) provide for the legal costs and the expenses that may be incurred by the receiver in relation to the external intervention.
- (7) The instrument of appointment may:
- (a) specify the term (if any) of the appointment, and
  - (b) specify any reporting requirements to be observed by the receiver.
- (8) An appointment of a receiver for a law practice may be made in respect of the practice generally or may be limited in any way the Supreme Court considers appropriate, including for example to matters connected with a particular legal practitioner associate or to matters connected with a particular office or a particular subject-matter.

**631 Notice of appointment**

- (1) As soon as possible after an appointment of a receiver for a law practice is made, the Law Society Council must serve a notice of the appointment on:
- (a) the practice, and
  - (b) any person authorised to operate any trust account of the practice, and
  - (c) any external examiner appointed to examine the practice's trust records, and
  - (d) the ADI with which any trust account of the practice is maintained, and
  - (e) any person who the Supreme Court directs should be served with the notice, and
  - (f) any person whom the Council reasonably believes should be served with the notice.
- (2) The notice must:
- (a) identify the law practice and the receiver, and
  - (b) indicate that the external intervention is by way of appointment of a receiver, and

- (c) specify the term (if any) of the appointment, and
- (d) specify any reporting requirements to be observed by the receiver, and
- (e) specify any conditions imposed by the Supreme Court when the appointment is made, and
- (f) contain or be accompanied by other information or material prescribed by the regulations.

**632 Effect of service of notice of appointment**

- (1) After service on a law practice of a notice of the appointment of a receiver for the practice and until the appointment is terminated, a legal practitioner associate of the practice who is specified or referred to in the notice must not participate in the affairs of the practice.

Maximum penalty: 100 penalty units.

- (2) After service on an ADI of a notice of the appointment of a receiver for a law practice and until the appointment is terminated, the ADI must ensure that no funds are withdrawn or transferred from a trust account of the practice unless:
- (a) the withdrawal or transfer is made by cheque or other instrument drawn on that account signed by the receiver or by a manager appointed for the practice, or
  - (b) the withdrawal or transfer is made by the receiver, or by a manager appointed for the practice, by means of electronic or internet banking facilities, or
  - (c) the withdrawal or transfer is made in accordance with an authority to withdraw or transfer funds from the account signed by the receiver or by a manager appointed for the practice.
- (3) After service on a person of a notice of the appointment of a receiver for a law practice and until the appointment is terminated, the person must not:
- (a) deal with any of the practice's trust money, or
  - (b) sign any cheque or other instrument drawn on a trust account of the practice, or



- (c) authorise the withdrawal or transfer of funds from a trust account of the practice,

but this subsection does not apply to an ADI or the receiver or manager for the practice.

Maximum penalty: 100 penalty units.

- (4) A receiver may, for the purposes of subsection (2) (b), enter into arrangements with an ADI for withdrawing money from a trust account of the law practice concerned by means of electronic or internet banking facilities.
- (5) Any money that is withdrawn or transferred in contravention of subsection (2) may be recovered from the ADI concerned by the receiver or a manager for the practice, as a debt in any court of competent jurisdiction, and any amount recovered is to be paid into a trust account of the law practice or another account nominated by the receiver.

### **633 Role of receiver**

- (1) The role of a receiver for a law practice is:
- (a) to be the receiver of regulated property of the practice, and
- (b) to wind up and terminate the affairs of the practice.
- (2) For the purpose of winding up the affairs of the law practice and in the interests of the practice's clients, the Supreme Court may, by order, authorise:
- (a) the receiver to carry on the legal practice engaged in by the law practice, if the receiver is an Australian legal practitioner who holds an unrestricted practising certificate, or
- (b) authorise an Australian legal practitioner who holds an unrestricted practising certificate, or a law practice whose principals are or include one or more Australian legal practitioners who hold unrestricted practising certificates, specified in the instrument to carry on the legal practice on behalf of the receiver.
- (3) Subject to any directions given by the Supreme Court, the person authorised to carry on the legal practice engaged in by a law practice has all the powers of a manager under this Part and is taken to have been appointed as manager for the law practice.

- (4) The Supreme Court may, by order, terminate an authorisation to carry on a legal practice granted under this section.

**634 Records and accounts of law practice under receivership and dealings with trust money**

- (1) The receiver for a law practice must maintain the records and accounts of the practice that he or she manages:
  - (a) separately from the management of the affairs of the practice before his or her appointment as receiver, and
  - (b) separately from the affairs of any other law practice that the receiver is managing, and
  - (c) in the manner prescribed by the regulations.
- (2) Subject to subsection (1), the receiver for a law practice must deal with trust money of the practice in the same way as a law practice must deal with trust money.

**635 Power of receiver to take possession of regulated property**

- (1) A receiver for a law practice may take possession of regulated property of the practice.
- (2) A person in possession or having control of regulated property of the law practice must permit the receiver to take possession of the regulated property if required by the receiver to do so.
- (3) If a person contravenes subsection (2), the Supreme Court may, on application by the receiver, order the person to deliver the regulated property to the receiver.
- (4) If, on application made by the receiver, the Supreme Court is satisfied that an order made under subsection (3) has not been complied with, the Court may order the seizure of any regulated property of the law practice that is located on the premises specified in the order and make any further orders it thinks fit.
- (5) An order under subsection (4) operates to authorise:
  - (a) any member of the police force, or
  - (b) the receiver or a person authorised by the receiver, together with any member of the police force,to enter the premises specified in the order and search for, seize and remove anything that appears to be regulated property of the law practice.

- (6) The receiver must, as soon as possible, return anything seized under this section if it transpires that it is not regulated property of the law practice.

**636 Power of receiver to take delivery of regulated property**

- (1) If a receiver for a law practice believes on reasonable grounds that another person is under an obligation, or will later be under an obligation, to deliver regulated property to the practice, the receiver may, by notice in writing, require that other person to deliver the property to the receiver.
- (2) If a person has notice that a receiver has been appointed for a law practice and the person is under an obligation to deliver regulated property to the practice, the person must deliver the property to the receiver.

Maximum penalty: 50 penalty units.

- (3) A document signed by a receiver acknowledging the receipt of regulated property delivered to the receiver is as valid and effectual as if it had been given by the law practice.

**637 Power of receiver to deal with regulated property**

- (1) This section applies if a receiver for a law practice acquires or takes possession of regulated property of the practice.
- (2) The receiver may deal with the regulated property in any manner in which the law practice might lawfully have dealt with the property.

**638 Power of receiver to require documents or information**

- (1) A receiver for a law practice may require a person who is:
- (a) an associate or former associate of the practice, or
  - (b) any person having control of documents relating to the practice,
- to give the receiver either or both of the following:
- (c) access to documents the receiver reasonably requires,
  - (d) information the receiver reasonably requires.
- (2) A person who is subject to a requirement under subsection (1) must comply with the requirement.

Maximum penalty: 100 penalty units.

- (3) The person is not subject to any liability, claim or demand merely because of compliance with the requirement.

**639 Examinations**

- (1) The Supreme Court may, on the application of a receiver for a law practice, make an order directing that an associate or former associate of the practice or any other person appear before the Court for examination on oath or affirmation in relation to the regulated property of the practice.
- (2) On an examination of a person under this section, the person must answer all questions that the Court allows to be put to the person.  
Maximum penalty: 50 penalty units.
- (3) The person is not excused from answering a question on the ground that the answer might tend to incriminate the person.
- (4) If, before answering the question, the person objects on the ground that it may tend to incriminate the person, the answer is not admissible in evidence against the person in any proceedings for an offence, other than:
  - (a) an offence against this Act, or
  - (b) an offence relating to the falsity of the answer.

**640 Lien for costs on regulated property**

- (1) This section applies if:
  - (a) a receiver has been appointed for a law practice, and
  - (b) a legal practitioner associate of the practice claims a lien for legal costs on regulated property of the practice.
- (2) The receiver may serve on the legal practitioner associate a written notice requiring the associate to give the receiver within a specified period of not less than one month:
  - (a) particulars sufficient to identify the regulated property, and
  - (b) a detailed bill.
- (3) If the legal practitioner associate requests the receiver in writing to give access to the regulated property that is reasonably necessary to enable the associate to prepare a bill in compliance with subsection (2), the time allowed does not begin to run until the access is provided.

- (4) If a requirement of a notice under this section is not complied with, the receiver may, in dealing with the regulated property claimed to be subject to the lien, disregard the claim.

**641 Regulated property not to be attached**

Regulated property of a law practice for which a receiver has been appointed (including regulated property held by the receiver) is not liable to be taken, levied on or attached under any judgment, order or process of any court or any other process.

**642 Recovery of regulated property where there has been a breach of trust etc**

- (1) This section applies if regulated property of or under the control of a law practice has, before or after the appointment of a receiver for the practice, been taken by, or transferred to, a person (*the transferee*) in breach of trust, improperly or unlawfully and the transferee:
- (a) knew or believed at the time of the taking, payment or transfer that it was done in breach of trust, improperly or unlawfully, or
  - (b) did not provide to the practice or any other person any or any adequate consideration for the taking, payment or transfer, or
  - (c) because of the taking, payment or transfer, became indebted or otherwise liable to the practice or to a client of the practice in the amount of the payment or in another amount.
- (2) The receiver is entitled to recover from the transferee:
- (a) if subsection (1) (a) applies—the amount of the payment or the value of the regulated property taken or transferred, or
  - (b) if subsection (1) (b) applies—the amount of the inadequacy of the consideration or, if there was no consideration, the amount of the payment or the value of the regulated property taken or transferred, or
  - (c) if subsection (1) (c) applies—the amount of the debt or liability,
- and, on the recovery of that amount from the transferee, the transferee ceases to be liable for it to any other person.
- (3) If any money of or under the control of a law practice has, before or after the appointment of a receiver for the practice, been paid in breach of trust, improperly or unlawfully to a person (*the prospective*

*plaintiff*) in respect of a cause of action that the prospective plaintiff had, or claimed to have, against a third party:

- (a) the receiver may prosecute the cause of action against the third party in the name of the prospective plaintiff, or
  - (b) if the prospective plaintiff did not have at the time the payment was made a cause of action against the third party, the receiver may recover the money from the prospective plaintiff.
- (4) If any regulated property of or under the control of a law practice has, before or after the appointment of a receiver for the practice, been used in breach of trust, improperly or unlawfully so as to discharge a debt or liability of a person (*the debtor*), the receiver may recover from the debtor the amount of the debt or liability so discharged less the consideration (if any) provided by the debtor for the discharge.
- (5) A person authorised by the Law Society Council to do so may give a certificate with respect to all or any of the following facts:
- (a) the receipt of regulated property by the law practice concerned from any person, the nature and value of the property, the date of receipt, and the identity of the person from whom it was received,
  - (b) the taking, payment or transfer of regulated property, the nature and value of the property, the date of the taking, payment or transfer, and the identity of the person by whom it was taken or to whom it was paid or transferred,
  - (c) the entries made in the trust account and in any other ledgers, books of account, vouchers or records of the practice and the truth or falsity of those entries,
  - (d) the money and securities held by the practice at the specified time.
- (6) If the receiver brings a proceeding under subsection (2), (3) or (4), a certificate given under subsection (5) is evidence and, in the absence of evidence to the contrary, is proof of the facts specified in it.

### **643 Improperly destroying property etc**

A person must not, with intent to defeat the purpose of this Part, and whether before or after appointment of a receiver, destroy, conceal,

remove from one place to another or deliver into the possession, or place under the control, of another person any regulated property of a law practice for which a receiver has been or is likely to be appointed.

Maximum penalty on indictment: imprisonment for 5 years.

#### **644 Deceased estates**

- (1) It is the duty of the receiver for a law practice to co-operate with the legal personal representative of a deceased legal practitioner associate of the practice for the orderly winding up of the estate.
- (2) The receiver is not, in the exercise or performance of powers and duties as receiver, a legal personal representative of the deceased legal practitioner associate, but nothing in this subsection prevents the receiver from exercising or performing powers or duties as a legal personal representative if otherwise appointed as representative.
- (3) Subject to subsections (1) and (2) and to the terms of the receiver's appointment, if the receiver was appointed before the death of the legal practitioner associate, the receiver's appointment, powers and duties are not affected by the death.

#### **645 Termination of receiver's appointment**

- (1) The appointment of a receiver for a law practice terminates in the following circumstances:
  - (a) the term (if any) of the appointment comes to an end,
  - (b) a determination of the Supreme Court that the appointment be terminated has taken effect.
- (2) The Supreme Court may determine that the appointment be terminated immediately or with effect from a specified date.
- (3) The former receiver must, as soon as practicable, transfer and deliver the regulated property of the law practice to:
  - (a) another external intervener appointed for the practice within the period of 14 days beginning with the day after the date of the termination, or
  - (b) the practice, if another external intervener is not appointed for the practice within that period and if paragraph (c) does not apply, or

- (c) another person in accordance with arrangements approved by the Supreme Court, if it is not practicable to transfer and deliver the regulated property to the practice.
- (4) The former receiver need not transfer and deliver regulated property to the law practice in compliance with subsection (3) unless the expenses of receivership have been paid.
- (5) The Law Society Council must serve a written notice of the termination on all persons originally served with notice of the appointment.

## Part 5.6 General

### 646 Conditions on appointment of external intervener

- (1) An appointment of an external intervener is subject to:
  - (a) any conditions imposed by the appropriate authority, and
  - (b) any conditions imposed by or under the regulations.
- (2) The appropriate authority may impose conditions:
  - (a) when the appointment is made, or
  - (b) during the term of the appointment.
- (3) The appropriate authority may revoke or vary conditions imposed under subsection (2).
- (4) In this section:  
*appropriate authority* means:
  - (a) the Law Society Council for appointments made by the Council, or
  - (b) the Supreme Court for appointments made by the Court.

### 647 Status of acts of external intervener

- (1) An act done or omitted to be done by an external intervener for a law practice is, for the purposes of:
  - (a) any proceeding, or
  - (b) any transaction that relies on that act or omission,taken to have been done or omitted to be done by the practice.



- (2) Nothing in this section subjects an associate of the law practice to any personal liability.

**648 Eligibility for reappointment or authorisation**

A person who has been appointed as an external intervener for a law practice is eligible for re-appointment as an external intervener for the practice, whether the later appointment is made in respect of the same type of external intervention or is of a different type.

**649 Appeal against appointment**

- (1) The following persons may appeal against the appointment of a supervisor or manager in relation to a law practice:
- (a) the practice,
  - (b) an associate of the practice,
  - (c) any person authorised to operate a trust account of the practice,
  - (d) any other person whose interests may be adversely affected by the appointment.
- (2) The appeal is to be lodged within 7 days after notice of the appointment is served on:
- (a) the person who proposes to appeal, or
  - (b) the law practice, if a notice is not required to be served on the person who proposes to appeal.
- (3) The Supreme Court may make any order it considers appropriate on the appeal.

**Note.** Appeals about the appointment of receivers lie if and as provided under the *Supreme Court Act 1970*.

**650 Directions of Supreme Court**

The Supreme Court may, on application by:

- (a) an external intervener for a law practice, or
- (b) a principal of the practice, or
- (c) any other person affected by the external intervention,

give directions in relation to any matter affecting the intervention or the intervener's powers, duties or functions under this Act.

**651 Requirement for ADI to disclose and permit access to accounts**

Despite any rule of law to the contrary, an external intervener for a law practice may require an ADI in which the practice has or has had an account:

- (a) to disclose every account of the practice that, in the opinion of the intervener, may be relevant to the affairs of the practice, and
- (b) to permit the making of a copy or the taking of extracts from any account of that kind.

**652 Fees, legal costs and expenses**

- (1) An external intervener is entitled to be paid:
  - (a) fees by way of remuneration, and
  - (b) the legal costs and the expenses incurred in relation to the external intervention,in accordance with the instrument of appointment.
- (2) An account of the external intervener for fees, costs and expenses may, on the application of the Law Society, be assessed under Part 3.2 (Costs disclosure and assessment).
- (3) The fees, costs and expenses are payable by and recoverable from the law practice.
- (4) Fees, costs and expenses not paid to the external intervener by the law practice are payable from the Public Purpose Fund.
- (5) The Law Society Council may recover any unpaid fees, costs and expenses from the law practice.
- (6) Fees, costs and expenses paid by or recovered from the law practice after they have been paid from the Public Purpose Fund are to be paid to the Fund.

**653 Reports by external intervener**

- (1) An external intervener must provide written reports in accordance with any reporting requirements to be observed by the intervener as specified in the instrument of appointment.
- (2) If the instrument of appointment does not specify any reporting requirements, an external intervener must provide:
  - (a) written reports as required from time to time by the Law Society Council, and

- (b) a written report to the Law Society Council at the termination of the appointment.
- (3) An external intervener must also keep the Law Society Council informed of the progress of the external intervention, including reports to the authority about any significant events occurring or state of affairs existing in connection with the intervention or with any of the matters to which the intervention relates.
- (4) Nothing in this section affects any other reporting obligations that may exist in respect of the law practice concerned.

**654 Report to Commissioner of disciplinary matters**

If an external intervener becomes aware of any matter in the course of an external intervention that the external intervener thinks may be unsatisfactory professional conduct or professional misconduct on the part of an Australian legal practitioner or Australian-registered foreign lawyer, the external intervener must (unless the matter is or has already been the subject of a complaint under Chapter 4) refer the matter to the Commissioner to consider whether disciplinary action should be taken against an Australian legal practitioner or Australian-registered foreign lawyer.

**655 Confidentiality**

- (1) An external intervener must not disclose information obtained as a result of his or her appointment except:
  - (a) so far as is necessary for exercising his or her powers or functions,
  - (b) as provided in subsection (2).
- (2) An external intervener may disclose information to any of the following:
  - (a) any court, tribunal or other person acting judicially,
  - (b) a regulatory authority of any jurisdiction,
  - (c) any officer of or Australian legal practitioner instructed by:
    - (i) a regulatory authority of any jurisdiction, or
    - (ii) the Commonwealth or a State or Territory of the Commonwealth, or

- (iii) an authority of the Commonwealth or of a State or Territory of the Commonwealth,  
in relation to any proceedings, inquiry or other matter pending or contemplated arising out of the investigation or examination,
- (d) a member of the police force of any jurisdiction if the external intervener believes on reasonable grounds that the information relates to an offence that may have been committed by the law practice concerned or by an associate of the law practice,
- (e) the law practice concerned or a principal of the law practice or, if the practice is an incorporated legal practice, a shareholder in the practice,
- (f) a client of the law practice concerned if the information relates to the client,
- (g) another external intervener appointed (or formerly appointed) in relation to the law practice or carrying out (or who formerly carried out) an external examination of the trust records of the law practice concerned,
- (h) any Australian legal practitioner or accountant employed by the external intervener or by another external intervener referred to in paragraph (g).

**656 Protection from liability**

No liability attaches to the Law Society or Law Society Council or a person appointed as an external intervener for a law practice for any act or omission by the external intervener done in good faith and in the exercise or purported exercise of the external intervener's powers or duties under this Act.

## Chapter 6    Provisions relating to investigations

### Part 6.1 Preliminary

#### 657    Primary purpose of Chapter

- (1) The primary purpose of this Chapter is to provide powers that are exercisable in connection with:
- (a) trust account investigations—the investigation of the affairs of law practices under Division 3 of Part 3.1 (Trust money and trust accounts), and
  - (b) trust account examinations—the external examination of the trust records of law practices under Division 4 of Part 3.1, and
  - (c) complaint investigations—the investigation of complaints under Chapter 4 (Complaints and discipline), and
  - (d) compliance audits—the conduct of audits under section 670 in relation to law practices.

**Note.** This Chapter also applies in relation to matters under Division 7 of Part 2.4 (see section 77) and matters under Division 7 of Part 2.7 (see section 217).

- (2) Subsection (1) does not limit the operation of any other provision of this Chapter.

#### 658    Definitions

In this Chapter:

**complaint investigation**—see section 657 (1) (c).

**compliance audit**—see section 657 (1) (d).

**investigator** means:

- (a) an investigator under Division 3 of Part 3.1, or
- (b) an external examiner under Division 4 of Part 3.1, or
- (c) an investigator or independent investigator under Chapter 4, or
- (d) in relation to a compliance audit—the person appointed by the Law Society Council or the Commissioner under section 670 to conduct the audit.

**trust account examination**—see section 657 (1) (b).

**trust account investigation**—see section 657 (1) (a).

## **Part 6.2 Requirements relating to documents, information and other assistance**

### **659 Requirement to provide access to documents and information relating to affairs of law practice**

- (1) This section applies to the following activities:
  - (a) trust account investigations,
  - (b) trust account examinations,
  - (c) complaint investigations,
  - (d) compliance audits.
- (2) For the purpose of carrying out an activity to which this section applies in relation to a law practice, an investigator may, on production of evidence of his or her appointment, require the practice or an associate or former associate of the practice or any other person (including, for example, an ADI, auditor or liquidator) who has or has had control of documents relating to the affairs of the practice to give the investigator:
  - (a) access to the documents relating to the practice's affairs that the investigator reasonably requires, and
  - (b) information relating to the practice's affairs that the investigator reasonably requires (verified by statutory declaration if the requirement so states).
- (3) A person who is subject to a requirement under subsection (2) must comply with the requirement.

Maximum penalty: 50 penalty units.
- (4) A person who is subject to a requirement under subsection (2) is not entitled to charge the investigator for giving any such access or information.

### **660 Requirements in relation to complaint investigations**

- (1) For the purpose of carrying out a complaint investigation in relation to an Australian lawyer, an investigator may, by notice served on the lawyer, require the lawyer to do any one or more of the following:
  - (a) to produce, at a specified time and place, any specified document (or a copy of the document),
  - (b) to provide written information on or before a specified date (verified by statutory declaration if the requirement so states),

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- (c) to otherwise assist in, or co-operate with, the investigation of the complaint in a specified manner.
- (2) For the purpose of carrying out a complaint investigation in relation to an Australian lawyer, the investigator may, on production of evidence of his or her appointment, require any associate or former associate of the lawyer or any other person (including, for example, an ADI, auditor or liquidator but not including the lawyer) who has or has had control of documents relating to the affairs of the lawyer to give the investigator:
  - (a) access to the documents relating to the lawyer's affairs the investigator reasonably requires, and
  - (b) information relating to the lawyer's affairs the investigator reasonably requires (verified by statutory declaration if the requirement so states).
- (3) A person who is subject to a requirement under subsection (1) or (2) must comply with the requirement.  
Maximum penalty: 50 penalty units.
- (4) A requirement imposed on a person under this section is to be notified in writing to the person and is to specify a reasonable time for compliance.

## Part 6.3 Entry and search of premises

### 661 Application of Part and interpretation

- (1) This Part applies to the following investigations:
  - (a) trust account investigations,
  - (b) complaint investigations.
- (2) In this Part:
 

*relevant material*, in relation to an investigation to which this Part applies, means any information, document or other material that:

  - (a) an investigator reasonably requires for the purposes of the investigation, and
  - (b) relates, or may relate, to the subject matter of the investigation.

**662 Investigator's power to enter premises**

- (1) For the purpose of carrying out an investigation to which this Part applies, an investigator may enter and remain on any premises to exercise the powers referred to in section 664.
- (2) In the case of a trust account investigation, the investigator:
  - (a) may enter any premises, other than residential premises, without the need for consent or a search warrant, and
  - (b) may enter residential premises:
    - (i) at any time with the consent of the occupier, or
    - (ii) under the authority of a search warrant issued under this Part, or
    - (iii) at any time without the consent of the occupier and without a warrant, but only if the investigator believes, on reasonable grounds, that it is urgently necessary to do so in order to prevent the destruction of or interference with any relevant material.
- (3) In the case of a complaint investigation, the investigator may enter any premises:
  - (a) at any time with the consent of the occupier, or
  - (b) under the authority of a search warrant issued under this Part.
- (4) The investigator must not exercise the power referred to in subsection (2) (b) (iii) unless the appropriate Council or the Commissioner has authorised the investigator (orally or in writing) to do so.
- (5) The investigator must, at the reasonable request of a person apparently in charge of the premises or any other person on the premises, produce evidence of his or her appointment.

**663 Search warrant**

- (1) An investigator may apply to an authorised justice for the issue of a search warrant for premises if the investigator believes on reasonable grounds that any relevant material is located at the premises.
- (2) An authorised justice to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an investigator named in the warrant:
  - (a) to enter and inspect the premises, and
  - (b) to exercise on the premises the powers referred to in section 664 (Powers of investigator while on premises).



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- (3) Part 3 of the *Search Warrants Act 1985* applies to a search warrant issued under this section.
- (4) In this section:  
*authorised justice* has the same meaning as in the *Search Warrants Act 1985*.

#### **664 Powers of investigator while on premises**

- (1) An investigator who enters premises under this Part may exercise any or all of the following powers:
  - (a) search the premises and examine anything on the premises,
  - (b) search for any relevant material,
  - (c) operate equipment or facilities on the premises for a purpose relevant to the investigation,
  - (d) take possession of any relevant material and retain it for as long as may be necessary to examine it to determine its evidentiary value,
  - (e) make copies of any relevant material or any part of any relevant material,
  - (f) seize and take away any relevant material or any part of any relevant material,
  - (g) use (free of charge) photocopying equipment on the premises for the purpose of copying any relevant material,
  - (h) with respect to any computer or other equipment that the investigator suspects on reasonable grounds may contain any relevant material:
    - (i) inspect and gain access to a computer or equipment,
    - (ii) download or otherwise obtain any documents or information,
    - (iii) make copies of any documents or information held in it,
    - (iv) seize and take away any computer or equipment or any part of it,
  - (i) if any relevant material found on the premises cannot be conveniently removed, secure it against interference,
  - (j) request any person who is on the premises to do any of the following:
    - (i) to state his or her full name, date of birth and address,

- (ii) to answer (orally or in writing) questions asked by the investigator relevant to the investigation,
  - (iii) to produce relevant material,
  - (iv) to operate equipment or facilities on the premises for a purpose relevant to the investigation,
  - (v) to provide access (free of charge) to photocopying equipment on the premises the investigator reasonably requires to enable the copying of any relevant material,
  - (vi) to give other assistance the investigator reasonably requires to carry out the investigation,
- (k) do anything else reasonably necessary to obtain information or evidence for the purposes of the investigation.
- (2) Any documents, information or anything else obtained by the investigator may be used for the purposes of the investigation.
- (3) If an investigator takes anything away from the premises, the investigator must issue a receipt in a form approved by the appropriate Council or the Commissioner and:
- (a) if the occupier or a person apparently responsible to the occupier is present, give it to him or her, or
  - (b) otherwise, leave it on the premises in an envelope addressed to the occupier.
- (4) An investigator may be accompanied by any assistants the investigator requires, including persons with accounting expertise and persons to assist in finding and gaining access to electronically stored information.
- (5) A person requested to do anything under subsection (1) (j) must not, without reasonable excuse, fail to comply with the request.

Maximum penalty: 50 penalty units.

## **Part 6.4 Additional powers in relation to incorporated legal practices**

### **665 Application of Part**

This Part applies to:

- (a) a trust account investigation, or
- (b) a complaint investigation, or

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- (c) a compliance audit,  
that is conducted in relation to an incorporated legal practice.

**666 Powers relating to investigations and audits to which this Part applies**

An investigator conducting an investigation or audit to which this Part applies may exercise the powers set out in this Part.

**667 Examination of persons**

- (1) The investigator, by force of this section, has and may exercise the same powers as those conferred on the Australian Securities and Investments Commission by Division 2 of Part 3 of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth.
- (2) Division 2 of Part 3 of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth applies to the exercise of those powers, with the following modifications (and any other necessary modifications):
  - (a) a reference to the Australian Securities and Investments Commission (however expressed) is taken to be a reference to the investigator,
  - (b) a reference to a matter that is being or is to be investigated under Division 1 of Part 3 of that Act is taken to be a reference to a matter that is being or is to be investigated, examined or audited by the investigator,
  - (c) a reference in section 19 of that Act to a person is taken to be a reference to an Australian legal practitioner or an incorporated legal practice,
  - (d) a reference to a prescribed form is taken to be a reference to a form approved by the Law Society Council and the Commissioner,
  - (e) any modifications prescribed by the regulations.
- (3) Sections 22 (2) and (3), 25 (2) and (2A), 26 and 27 of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth do not apply in respect of the exercise of the powers conferred by this section.

**668 Inspection of books**

- (1) The investigator, by force of this section, has and may exercise the same powers as those conferred on the Australian Securities and Investments Commission by sections 30 (1), 34 and 37–39 of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth.
- (2) Those provisions apply to the exercise of those powers, with the following modifications (and any other necessary modifications):
  - (a) a reference to the Australian Securities and Investments Commission (however expressed) is taken to be a reference to the investigator,
  - (b) a reference to a body corporate (including a body corporate that is not an exempt public authority) is taken to be a reference to an incorporated legal practice,
  - (c) a reference to an eligible person in relation to an incorporated legal practice is taken to be a reference to an officer or employee of the incorporated legal practice,
  - (d) a reference to a member or staff member is taken to be a reference to:
    - (i) the Law Society Council or a person appointed by the Council who is an officer or employee of the Council, or
    - (ii) the Commissioner or a person appointed by the Commissioner who is a member of staff of the Commissioner,
  - (e) a reference in section 37 of that Act to a proceeding is taken to be a reference to an investigation, examination or audit to which this Part applies,
  - (f) any modifications prescribed by the regulations.

**669 Power to hold hearings**

- (1) The investigator may hold hearings for the purposes of an investigation or audit to which this Part applies.
- (2) Sections 52, 56 (1), 58, 59 (1), (2), (5), (6) and (8) and 60 (paragraph (b) excepted) of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth apply to a hearing, with the following modifications (and any other necessary modifications):

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- (a) a reference to the Australian Securities and Investments Commission (however expressed) is taken to be a reference to the investigator,
- (b) a reference to a member or staff member is taken to be a reference to:
  - (i) the Law Society Council or a person appointed by the Council who is an officer or employee of the Council, or
  - (ii) the Commissioner or a person appointed by the Commissioner who is a member of staff of the Commissioner,
- (c) a reference to a prescribed form is taken to be a reference to a form approved by the Law Society Council and the Commissioner,
- (d) any modifications prescribed by the regulations.

## Part 6.5 Miscellaneous

### 670 Compliance audit of law practice

- (1) The Law Society Council or the Commissioner may cause an audit to be conducted of the compliance of a law practice (and of its officers and employees) with the requirements of this Act, the regulations or the legal profession rules.
- (2) Without limiting subsection (1), an audit conducted in relation to an incorporated legal practice may include an audit of:
  - (a) the compliance of the incorporated legal practice with the requirements of Part 2.6, and
  - (b) the management of the provision of legal services by the incorporated legal practice (including the supervision of officers and employees providing the services).

**Note.** Section 140 (3) (Incorporated legal practice must have legal practitioner director) requires legal practitioner directors to ensure that appropriate management systems are implemented and maintained.
- (3) The Law Society Council or the Commissioner may, in writing, appoint a suitably qualified person to conduct an audit under this section.

- (4) The appointment may be made generally or for the audit of a law practice specified in the instrument of appointment.
- (5) An audit under this section may be conducted whether or not a complaint has been made against an Australian lawyer.
- (6) A report of an audit under this section:
  - (a) is to be provided to the law practice concerned, and
  - (b) is to be provided by the Law Society Council to the Commissioner or by the Commissioner to the Law Society Council (as the case may be), and
  - (c) may be provided by the Law Society Council or the Commissioner to any regulatory authority in another jurisdiction, and
  - (d) may be taken into account in connection with any disciplinary proceedings taken against a legal practitioner or other persons or in connection with the grant, amendment, suspension or cancellation of Australian practising certificates.
- (7) Nothing in this section authorises the conduct of an audit in relation to a barrister.

**671 Failure to comply with investigatory powers etc**

- (1) The failure of an Australian legal practitioner to comply with any requirement made by an investigator in the exercise of powers conferred by this Chapter is capable of being professional misconduct.
- (2) The contravention by an Australian legal practitioner of any condition imposed by an investigator in the exercise of powers conferred by this Chapter is capable of being professional misconduct.
- (3) The failure of a legal practitioner director of an incorporated legal practice to ensure that the incorporated legal practice, or any officer or employee of the incorporated legal practice, complies with:
  - (a) any requirement made by an investigator in the exercise of powers conferred by this Chapter, or
  - (b) any condition imposed by an investigator in the exercise of powers conferred by this Chapter,is capable of being professional misconduct.

**672    General provisions relating to requirements imposed under this Chapter**

- (1) This section applies to any requirement imposed on a person under this Chapter.
- (2) The validity of the requirement is not affected, and the person is not excused from compliance with the requirement, on the ground that a law practice or Australian legal practitioner has a lien over a particular document or class of documents.
- (3) The investigator imposing the requirement may:
  - (a) inspect any document provided pursuant to the requirement, and
  - (b) make copies of the document or any part of the document, and
  - (c) retain the document for a period the investigator thinks necessary for the purposes of the investigation in relation to which it was produced.
- (4) The person is not subject to any liability, claim or demand merely because of compliance with the requirement.
- (5) The appropriate Council:
  - (a) may on its own initiative, or
  - (b) must if directed to do so by the Commissioner,suspend a local legal practitioner's practising certificate while a failure by the practitioner to comply with the requirement continues.
- (6) If a document:
  - (a) is not in writing, or
  - (b) is not written in the English language, or
  - (c) is not decipherable on sight,a requirement under this Chapter to provide access to the document is not complied with unless access is provided to a statement, written in the English language and decipherable on sight, that contains all the information in the document.
- (7) A Council may retain any copy of a document or part of a document made by an investigator under this Chapter and provided to the Council under this Chapter.

**673 Report to Commissioner of disciplinary matters**

If an investigator becomes aware of any matter in the course of a trust account investigation, trust account examination, complaint investigation or compliance audit that the investigator thinks may be unsatisfactory professional conduct or professional misconduct on the part of an Australian legal practitioner or Australian-registered foreign lawyer, the investigator must, unless the matter is or has already been the subject of a complaint under Chapter 4, refer the matter to the Commissioner to consider whether disciplinary action should be taken against an Australian legal practitioner or Australian-registered foreign lawyer.

**674 Obstruction of investigator**

- (1) A person must not, without reasonable excuse, obstruct an investigator exercising a power under this Act.

Maximum penalty: 100 penalty units.

- (2) In this section:

*obstruct* includes hinder, delay, resist and attempt to obstruct.

**675 Destruction of evidence**

A person must not, with intent to prevent, hinder or otherwise interfere with the carrying out of a trust account investigation, trust account examination, complaint investigation or compliance audit, and whether before or after the appointment of an investigator, destroy, conceal, remove from one place to another or deliver into the possession, or place under the control, of another person any information or document that may provide evidence of a contravention of this Act, the regulations or the legal profession rules.

Maximum penalty on indictment: imprisonment for 5 years.

**676 Obligation of Australian lawyers**

- (1) The duties imposed on an Australian lawyer by this section are additional to obligations imposed under other provisions of this Chapter, whether or not the lawyer is the subject of the investigation, examination or audit concerned.

- (2) An Australian lawyer must not mislead an investigator or a Council in the exercise of:

- (a) any power or function under this Chapter, or



- (b) any power or function under a provision of a corresponding law that corresponds to this Chapter.
- (3) An Australian lawyer who is subject to:
  - (a) a requirement under section 660 (Requirements in relation to complaint investigations), or
  - (b) a requirement under provisions of a corresponding law that correspond to that section,must not, without reasonable excuse, fail to comply with the requirement.
- (4) An Australian lawyer who contravenes subsection (2) or (3) is guilty of professional misconduct.

**677 Permitted disclosure of confidential information obtained in course of investigation, examination or audit**

- (1) A Council, the Commissioner or an investigator may disclose information obtained in the course of a trust account investigation, trust account examination, complaint investigation or compliance audit to any of the following:
  - (a) any court, tribunal or other person acting judicially,
  - (b) the Attorney General,
  - (c) any authority regulating legal practitioners in any jurisdiction,
  - (d) any officer of or Australian legal practitioner instructed by:
    - (i) any authority regulating legal practitioners in any jurisdiction, or
    - (ii) the Commonwealth or a State or Territory of the Commonwealth, or
    - (iii) an authority of the Commonwealth or of a State or Territory of the Commonwealth,in relation to any proceedings, inquiry or other matter pending or contemplated arising out of the investigation, examination or audit,
  - (e) an investigative or prosecuting authority established by or under legislation (for example, the Australian Securities and Investments Commission),
  - (f) a police officer—if the Council, the Commissioner or the investigator suspects on reasonable grounds that the information relates to an offence that may have been committed by:

- (i) if a law practice is the subject of the investigation, examination or audit—the law practice or an associate or former associate of the law practice, or
- (ii) if an Australian lawyer is the subject of the investigation, examination or audit—the lawyer or an associate or former associate of the law practice of which the lawyer is or was an associate,

**Note.** Section 599 requires a Council to report suspected offences to the relevant law enforcement or prosecution authority.

- (g) if the subject of the investigation, examination or audit is or was:
    - (i) a law practice—a principal of the law practice, or
    - (ii) an incorporated legal practice—a director or shareholder in the practice, or
    - (iii) an Australian lawyer—the lawyer or a principal of the law practice of which the lawyer is or was an associate,
  - (h) if the subject of the investigation, examination or audit is or was:
    - (i) a law practice—a client of the practice, or
    - (ii) an Australian lawyer—a client of the law practice of which the lawyer is or was an associate,but only if the information relates to the client,
  - (i) if the subject of the investigation, examination or audit is or was:
    - (i) a law practice—a supervisor, manager or receiver appointed in relation to the law practice, or
    - (ii) an Australian lawyer—a supervisor, manager or receiver appointed in relation to the law practice of which the lawyer is or was an associate,or an Australian legal practitioner or accountant employed by the supervisor, manager or receiver,
  - (j) an investigator carrying out another investigation, examination or audit in relation to the law practice or Australian lawyer who is or was the subject of the investigation, examination or audit,
  - (k) any other person to the extent that it is necessary for the purposes of properly conducting the investigation, examination or audit and making a report on the matter.
- (2) A reference in subsection (1) to information obtained in connection with any such investigation, examination or audit includes a reference

Clause 677	Legal Profession Bill 2004
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to any finding, opinion or recommendation of the investigator in relation to the investigation, examination or audit.

- (3) No liability (including liability in defamation) is incurred by a protected person in respect of anything done or omitted to be done in good faith for the purpose of disclosing information under this section.
- (4) For the purposes of subsection (3):
 

***protected person*** means any of the following:

  - (a) the Law Society or Bar Association,
  - (b) a Council or a member of a Council,
  - (c) the Commissioner,
  - (d) an investigator,
  - (e) a member of staff of or a person acting at the direction of any person or entity referred to in this definition.

#### **678 Secrecy of appointment of investigators**

- (1) An investigator must not make an unauthorised disclosure of his or her appointment as an investigator.  
Maximum penalty: 20 penalty units.
- (2) Subsection (1) is not contravened if the investigator is making a requirement under Part 6.2 or is complying with a request under section 662 (5).
- (3) A member of the Law Society Council or an employee or agent of the Law Society must not make an unauthorised disclosure of the appointment of an investigator.  
Maximum penalty: 20 penalty units.
- (4) For the purposes of this section, a disclosure of the appointment of an investigator is ***unauthorised*** if it is made to a person other than a person to whom the disclosure of information obtained in the course of the investigation, examination or audit to which the appointment relates is authorised under section 677.

## **Chapter 7 Regulatory authorities**

### **Part 7.1 Legal Profession Admission Board**

#### **679 Constitution of Admission Board**

- (1) There is constituted by this Act a corporation with the corporate name of the Legal Profession Admission Board.
- (2) The Admission Board is not and does not represent the Crown.

#### **680 Membership of Admission Board**

- (1) The Admission Board is to consist of 11 members, being:
  - (a) the Chief Justice of New South Wales, and
  - (b) 3 Judges of the Supreme Court for the time being nominated by the Chief Justice of New South Wales, and
  - (c) the Attorney General or a person for the time being nominated by the Attorney General, and
  - (d) 2 persons for the time being nominated by the Committee of NSW Law Deans, and
  - (e) 2 barristers for the time being nominated by the Bar Council, and
  - (f) 2 solicitors for the time being nominated by the Law Society Council.
- (2) A member of the Admission Board who holds office on the nomination of a person or body ceases to hold office if the person or body by whom the member was nominated withdraws the nomination.
- (3) Schedule 2 has effect with respect to the members and procedure of the Admission Board.

#### **681 Functions of Admission Board**

The Admission Board has and may exercise the functions conferred or imposed on it by or under this or any other Act.

## **Part 7.2 Legal Profession Advisory Council**

### **682 Establishment of Advisory Council**

There is established by this Act a Legal Profession Advisory Council.

### **683 Membership of Advisory Council**

- (1) The Advisory Council is to consist of 11 members appointed by the Attorney General.
- (2) Of the members:
  - (a) 1 is to be appointed as the Chairperson of the Advisory Council, and
  - (b) 2 are to be local legal practitioners who are barristers, of whom 1 is to be selected from a panel of at least 5 persons nominated by the Bar Council, and
  - (c) 3 are to be local legal practitioners who are solicitors, of whom 2 are to be selected from a panel of at least 5 persons nominated by the Law Society Council, and
  - (d) 5 are to be lay persons appointed to represent the community.
- (3) Schedule 3 has effect with respect to the members and procedure of the Advisory Council.

### **684 Functions of Advisory Council**

- (1) The functions of the Advisory Council are as follows:
  - (a) to keep under constant review the structure and functions of the legal profession,
  - (b) to make reports and recommendations to the Attorney General on:
    - (i) any matter relating to the legal profession that is referred to it by the Attorney General, and
    - (ii) any matter relating to the legal profession that the Advisory Council considers should be brought to the notice of the Attorney General, including any matter relating to professional standards, advertising and the general regulation of the legal profession, and
    - (iii) any proposed regulations referred to it by the Attorney General.

- (2) The Advisory Council is to furnish a report to the Attorney General if it considers any regulation made under section 738 (2), or any regulation proposed to be made under that provision and referred to it by the Attorney General, imposes restrictive or anti-competitive practices that are not in the public interest or is otherwise not in the public interest. The Attorney General must make any such report public within 28 days after it is received by the Attorney General.
- (3) The Advisory Council may consult with representatives of the Bar Association, the Law Society or any other relevant organisation.
- (4) The Advisory Council has and may exercise such other functions as may be conferred or imposed on it by or under this or any other Act.

**685 Payment of costs of Advisory Council**

Any amount payable from the Public Purpose Fund for the purpose of meeting the costs of the Advisory Council (including remuneration payable under Schedule 3) is to be paid, in accordance with section 290, to the Treasurer for the credit of the Consolidated Fund.

## **Part 7.3 Legal Services Commissioner**

**686 Appointment of Commissioner**

- (1) The Governor may, on the recommendation of the Attorney General, appoint a person to be Legal Services Commissioner.
- (2) The person so appointed is to be a person who, in the opinion of the Attorney General:
  - (a) is familiar with the nature of the legal system and legal practice (but need not be an Australian legal practitioner), and
  - (b) possesses sufficient qualities of independence, fairness and integrity.
- (3) The employment of the Commissioner is subject to Part 3.1 of the *Public Sector Employment and Management Act 2002*, but is not subject to Chapter 2 or 5 of that Act.
- (4) The Commissioner may be appointed for a period of up to 7 years, despite anything to the contrary in section 68 of the *Public Sector Employment and Management Act 2002*.

- (5) The Governor may remove the Commissioner from office only for misbehaviour, incapacity or incompetence, despite anything to the contrary in section 77 of the *Public Sector Employment and Management Act 2002*.

**687    Acting Commissioner**

- (1) The Attorney General may, from time to time, appoint a person to act in the office of the Commissioner during the illness or absence of the Commissioner (or during a vacancy in the office of Commissioner) and a person, while so acting, has all the functions of the Commissioner.
- (2) The Attorney General may, at any time, remove a person from the office of acting Commissioner.
- (3) The acting Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Attorney General may from time to time determine.

**688    Functions of Commissioner**

- (1) The Commissioner has, in accordance with this Act, the following functions:
- (a) to receive complaints about unsatisfactory professional conduct or professional misconduct of Australian lawyers or Australian-registered foreign lawyers,
  - (b) to assist and advise complainants and potential complainants in making and pursuing complaints (including assisting complainants to clarify their complaints and to put their complaints in writing),
  - (c) to initiate a complaint against an Australian lawyer or an Australian-registered foreign lawyer,
  - (d) to investigate, or take over the investigation of, a complaint if the Commissioner considers it appropriate,
  - (e) to refer complaints to the appropriate Council for investigation or mediation in appropriate cases,
  - (f) to monitor investigations and give directions and assistance to Councils in connection with the investigation of complaints,
  - (g) to review the decisions of Councils to dismiss complaints or to reprimand Australian lawyers or Australian-registered foreign lawyers in connection with complaints,

- (h) to take over investigations or to institute proceedings in the Tribunal against Australian lawyers or Australian-registered foreign lawyers following a review by the Commissioner,
  - (i) to conduct regular surveys of, and report on, the views and levels of satisfaction of complainants and respondent Australian lawyers with the complaints handling and disciplinary system,
  - (j) to monitor the refusal to issue, cancellation and suspension of practising certificates under Part 2.4 on grounds relating to fitness to practise (for example, in connection with acts of bankruptcy, the commission of indictable offences or tax offences or failures to give required notifications),
  - (k) functions conferred on the Commissioner under Division 7 of Part 2.4 and Part 4.7 of Chapter 4,
  - (l) to review the provisions and operations of Chapter 4 in accordance with section 494 (4),
  - (m) to monitor generally the exercise of regulatory functions by the Councils (other than the imposition of conditions on practising certificates),
  - (n) to review legal profession rules,
  - (o) to assist the Councils to promote community education about the regulation and discipline of the legal profession,
  - (p) to assist the Councils in the enhancement of professional ethics and standards, for example, through liaison with legal educators or directly through research, publications or educational seminars,
  - (q) to report on the Commissioner's activities under this Act.
- (2) The Commissioner may appear by barrister or solicitor before, and be heard by, the Supreme Court in the exercise of the functions of the Supreme Court under this Act or otherwise in relation to Australian lawyers.
- (3) The Commissioner has such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.
- (4) A reference in this section and in section 689 (1) (c) and 691 (5):
- (a) to an Australian lawyer is a reference to an Australian lawyer to whom Chapter 4 applies, or



- (b) to an Australian-registered foreign lawyer is a reference to an Australian-registered foreign lawyer to whom Chapter 4 applies.

**689 Commissioner may require Councils to provide information**

- (1) The Commissioner may, for the purpose of exercising the Commissioner's functions, do any of the following:
  - (a) require a Council to provide information received by the Council that gives the Council reason to believe that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct,
  - (b) require a Council to provide information relating to an application for a local practising certificate,
  - (c) require a Council to provide information relating to a notification made by an Australian lawyer or an Australian-registered foreign lawyer for the purpose of complying with this Act or the regulations,
  - (d) require a Council to notify the Commissioner of the Council's intention to issue, refuse to issue, cancel or suspend a local practising certificate.
- (2) A requirement by the Commissioner under this section may relate to a specific case or may be made in general terms so as to relate to all cases or to a class of cases.
- (3) A Council must take into account any representations made by the Commissioner on a matter under this section.

**690 Protocols relating to monitoring of regulatory functions**

The Commissioner may, in consultation with each of the Councils, develop protocols relating to the exercise of the Commissioner's functions under section 688 (1) (j) and (l).

**691 Annual report of Commissioner**

- (1) As soon as practicable after 30 June (but before 31 December) in each year, the Commissioner is to prepare and forward to the Attorney General a report on his or her activities for the 12 months ending on 30 June in that year.

- (2) The Attorney General is to lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after receiving the report.
- (3) The Commissioner is to include the following information in the annual report:
- (a) the number and type of complaints made during the year (including the number and type made by the Commissioner and the number and type made by each Council),
  - (b) the sources of those complaints,
  - (c) the number of consumer disputes referred to mediation during the year and the results of mediation,
  - (d) the number and type of complaints investigated during the year by each Council, the Commissioner and an independent investigator under section 532,
  - (e) the number and type of complaints dismissed during the year by each Council and by the Commissioner,
  - (f) the number and type of complaints in respect of which an Australian lawyer was reprimanded or cautioned during the year by each Council and by the Commissioner,
  - (g) the number and type of complaints in respect of which proceedings were instituted in the Tribunal during the year by each Council and by the Commissioner,
  - (h) the number of matters referred to mediation under section 336 or Part 4.3 during the year and the outcome of those matters,
  - (i) the number of compensation orders made under Part 4.9 during the year,
  - (j) a summary of the results of proceedings in the Tribunal completed during the year,
  - (k) the number of complaints not finally dealt with at the end of the year (including the number at each stage of proceedings),
  - (l) the age of complaints not finally dealt with at the end of the year (that is, the number of those complaints made respectively in that year and in each previous year),
  - (m) time intervals involved in the complaints process, including:
    - (i) the time between the receipt of a complaint and the decision of the Commissioner or a Council under Part 4.5 in respect of the complaint, and

- (ii) the time between the receipt of a complaint and the decision of the Commissioner on completion of a review under Part 4.6,
  - (n) information about any review of a legal profession rule requested by the Commissioner during the year under this Act,
  - (o) information on the operation of the complaints process during the year and any recommendations for legislative or other improvements to the complaints process,
  - (p) information about the costs incurred by the Commissioner during the year, certified by the Auditor-General,
  - (q) such other information as the Commissioner considers appropriate to be included or as the Attorney General directs to be included.
- (4) The Commissioner may include in the annual report a report on the exercise of functions by the Commissioner referred to in section 688 (1) (j), (k) and (l).
- (5) Matters included in a report must not identify individual clients, Australian lawyers or Australian-registered foreign lawyers unless their names have already lawfully been made public under Part 4.10 (Publishing disciplinary action).

**692 Staff of Commissioner**

- (1) The staff of the Commissioner is (subject to this section) to be employed under Chapter 2 of the *Public Sector Employment and Management Act 2002*.
- (2) The Commissioner may employ other staff with the approval of the Attorney General. Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to the employment of any such staff.
- (3) The Commissioner may arrange for the use of the services of any staff (by secondment or otherwise) or facilities of a government agency or other public authority. Any staff of whose services the Commissioner makes use is taken to be staff of the Commissioner for the purposes of this Act.
- (4) The Commissioner may, with the approval of the Attorney General, engage consultants or other persons for the purpose of getting assistance.

**693 Delegation of functions**

The Commissioner may delegate any of his or her functions (other than this power of delegation) to any member of the staff of the Commissioner or to a person of a class prescribed by the regulations.

## **Part 7.4 Professional bodies**

### **Division 1 Bar Association**

**694 Report on committees**

- (1) The Bar Council is, at least once in each year, and at such times as the Attorney General directs, required to report to the Attorney General on the committees of the Bar Association and the Bar Council.
- (2) The report is:
  - (a) to list the committees that existed at any time during the last preceding 12 months or the period since the last report (whichever is the shorter period), and
  - (b) to specify the functions and membership of each committee, and
  - (c) to include such other information relating to the committees as the Attorney General directs.
- (3) The report need not refer to any committee of a kind that the Attorney General for the time being exempts from the operation of this section.

**695 Lay representation on committees**

- (1) The Attorney General may, after consultation with the Bar Council, direct, by written order, that any specified committees or kinds of committees of the Bar Association or Bar Council must include in their membership a specified or determinable number of lay members.
- (2) Except as provided by subsection (3), a direction has no effect to the extent that it would require the membership of a committee to have more than one-quarter of its membership composed of lay members.
- (3) The membership of any professional conduct committee must include at least 3 lay members.

- (4) A lay member has such voting and other rights and such obligations as are provided in the constitution of the committee or as are provided by the regulations, and the regulations prevail to the extent of any inconsistency.
- (5) For the purposes of this section, a lay member is a person who is not an Australian lawyer.

**696 Functions of Bar Council**

- (1) In addition to its other functions, the Bar Council may:
  - (a) take such steps as in the opinion of the Bar Council may be necessary or proper for or with respect to the investigation in accordance with this Act of any question:
    - (i) as to the conduct of a barrister, or
    - (ii) as to the conduct of a person who is or was a clerk to a barrister or who is or was employed or paid by a barrister in connection with the barrister's practice as a barrister, or
    - (iii) as to conduct that is, or may be, a contravention of a provision of Part 2.2, or
    - (iv) as to conduct that is, or may be, a contravention of a provision of Part 2.7 (Legal practice by foreign lawyers), and
  - (b) appear by barrister or solicitor before, and be heard by, the Supreme Court in the exercise of the functions of the Supreme Court under this Act or otherwise in relation to barristers or locally registered foreign lawyers registered by the Bar Council, and
  - (c) institute prosecutions and other proceedings for the breach of any of the provisions of this Act, the regulations or the legal profession rules, and
  - (d) appear by barrister or solicitor before, and be heard by, any court in any matter affecting the Bar Association or its members or in which the Bar Association is concerned or interested, and
  - (e) recover as a debt due to the Bar Association any money payable to the Bar Association under this Act or the regulations.
- (2) The Bar Council may delegate to any of its committees or to an officer of the Bar Council the exercise of any of the Bar Council's functions under this Act, other than this power of delegation.

- (3) A reference in this section to a barrister (except in relation to the appearance by the Bar Council before a court) is a reference to:
- (a) an Australian legal practitioner to whom Chapter 4 applies and who is not, or was not, restricted to practice only as or in the manner of a solicitor, or
  - (b) an Australian-registered foreign lawyer to whom Chapter 4 applies and who is not, or was not, restricted to practice only as or in the manner of a solicitor.

## **Division 2      Law Society**

### **697    Report on committees**

- (1) The Law Society Council is, at least once in each year, and at such times as the Attorney General directs, required to report to the Attorney General on the committees of the Law Society and the Law Society Council.
- (2) The report is:
- (a) to list the committees that existed at any time during the last preceding 12 months or the period since the last report (whichever is the shorter period),
  - (b) to specify the functions and membership of each committee, and
  - (c) to include such other information relating to the committees as the Attorney General directs.
- (3) The report need not refer to any committee of a kind that the Attorney General for the time being exempts from the operation of this section.

### **698    Lay representation on committees**

- (1) The Attorney General may, after consultation with the Law Society Council, direct, by written order, that any specified committees or kinds of committees of the Law Society or Law Society Council must include in their membership a specified or determinable number of lay members.
- (2) Except as provided by subsection (3), a direction has no effect to the extent that it would require the membership of a committee to have more than one-quarter of its membership composed of lay members.

- (3) The membership of any professional standards committee must include at least 3 lay members.
- (4) A lay member has such voting and other rights and such obligations as are provided in the constitution of the committee or as are provided by the regulations, and the regulations prevail to the extent of any inconsistency.
- (5) For the purposes of this section, a lay member is a person who is not an Australian lawyer.

**699 Functions of Law Society Council**

- (1) In addition to its other functions, the Law Society Council may:
  - (a) take such steps as in the opinion of the Law Society Council may be necessary or proper for or with respect to the investigation in accordance with this Act of any question:
    - (i) as to the conduct of a solicitor, or
    - (ii) as to the conduct of a person who is or was a clerk to a solicitor or who is or was employed or paid by a solicitor in connection with the solicitor's practice as a solicitor, or
    - (iii) as to conduct that is, or may be, a contravention of a provision of Part 2.2, or
    - (iv) as to conduct that is, or may be, a contravention of a provision of Part 2.7 (Legal practice by foreign lawyers), and
  - (b) appear by barrister or solicitor before, and be heard by, the Supreme Court in the exercise of the functions of the Supreme Court under this Act or otherwise in relation to solicitors or locally registered foreign lawyers registered by the Law Society Council, and
  - (c) institute prosecutions and other proceedings for the breach of any of the provisions of this Act, the regulations or the legal profession rules, and
  - (d) appear by barrister or solicitor before, and be heard by, any court in any matter affecting the Law Society or its members or in which the Law Society is concerned or interested, and
  - (e) recover as a debt due to the Law Society any money payable to the Law Society under this Act or the regulations.

- (2) The Law Society Council also has the function of disseminating information to increase public awareness of the requirements of this Act and the *Corporations Act 2001* of the Commonwealth relating to solicitors who negotiate the making of or act in respect of regulated mortgages (within the meaning of Part 3.5 (Mortgage practices and mortgage investment schemes)) or are involved in managed investment schemes.
- (3) The Law Society Council may delegate to any of its committees or to an officer of the Law Society Council the exercise of any of the Law Society Council's functions under this Act, other than this power of delegation.
- (4) A reference in this section to a solicitor (except in relation to the appearance by the Law Society Council before a court) is a reference to:
  - (a) an Australian legal practitioner to whom Chapter 4 applies and who is not, or was not, restricted to practice only as or in the manner of a barrister, or
  - (b) an Australian-registered foreign lawyer to whom Chapter 4 applies and who is not, or was not, restricted to practice only as or in the manner of a barrister.

### **Division 3      Annual reports**

#### **700    Council to submit annual report**

- (1) As soon as practicable after 30 June, but on or before 31 December, in each year, the Bar Council and the Law Society Council are each required to prepare and forward to the Attorney General a report of its work and activities under this Act for the 12 months ending on 30 June in that year.
- (2) The Attorney General is to lay the report, or cause it to be laid, before both Houses of Parliament as soon as practicable after receiving the report.
- (3) A Council is to include the following information in its annual report:
  - (a) the number and type of complaints made to the Council during the year,
  - (b) the sources of those complaints,



- (c) the number of consumer disputes referred to mediation during the year and the results of mediation,
- (d) the number and type of complaints investigated during the year by the Council and an independent investigator under section 532,
- (e) the number and type of complaints dismissed during the year by the Council,
- (f) the number and type of complaints in respect of which an Australian lawyer was reprimanded or cautioned during the year by the Council,
- (g) the number and type of complaints in respect of which proceedings were instituted in the Tribunal during the year by the Council,
- (h) the number of matters referred to mediation under section 336 or Division 5 of Part 4.3 during the year and the outcome of those matters,
- (i) the number of compensation orders made under section 540 (2) (c),
- (j) a summary of the results of proceedings in the Tribunal completed during the year,
- (k) the number of complaints not finally dealt with at the end of the year (including the number at each stage of proceedings),
- (l) the age of complaints not finally dealt with at the end of the year (that is, the number of those complaints made respectively in that year and in each previous year),
- (m) time intervals involved in the complaints process, including the time between the receipt of a complaint and the decision of the Council under Part 4.5 in respect of the complaint,
- (n) information about the costs incurred by the Council during the reporting year in relation to its regulatory functions, as certified by an auditor,
- (o) in the case of the Law Society Council—the total amount paid from the Public Purpose Fund and the Fidelity Fund during the year,
- (p) such other information as may be prescribed by the regulations or as the Attorney General directs to be included.

- (4) Matters included in a report must not identify individual Australian lawyers unless their names have already lawfully been made public under Part 4.10 (Publishing disciplinary action).
- (5) This section does not affect any other provision of this Act requiring a report to be made to the Attorney General.

## **Part 7.5 Legal profession rules**

### **Division 1 Preliminary**

#### **701 Purpose**

The purpose of this Part is to promote the maintenance of high standards of professional conduct by Australian legal practitioners and locally registered foreign lawyers by providing for the making and enforcement of rules of professional conduct that apply to them when they practise in this jurisdiction.

### **Division 2 Rules**

#### **702 Rules for barristers**

- (1) The Bar Council may make rules for or with respect to practice as a barrister.
- (2) The Bar Council may make rules for or with respect to practice as a locally registered foreign lawyer.

#### **703 Rules for solicitors**

- (1) The Law Society Council may make rules for or with respect to practice as a solicitor.
- (2) The Law Society Council may make rules for or with respect to practice as a locally registered foreign lawyer.

#### **704 Joint rules for Australian legal practitioners**

- (1) The Bar Council and Law Society Council may jointly make rules for or with respect to:

- (a) any matters about which joint rules are authorised to be made, or
  - (b) any matters about which they may separately make rules, in connection with legal practice as an Australian legal practitioner.
- (2) Joint rules may but need not apply in the same way to both barristers and solicitors.
- (3) Joint rules prevail, to the extent of any inconsistency, over legal profession rules made separately by a Council (whether made before or after the joint rules).

**705 Rules for incorporated legal practices and multi-disciplinary partnerships**

- (1) The Law Society Council may make rules for or with respect to the following matters:
- (a) the provision of legal services by or in connection with incorporated legal practices or multi-disciplinary partnerships, and in particular the provision of legal services by:
    - (i) officers or employees of incorporated legal practices, or
    - (ii) partners or employees of multi-disciplinary partnerships,
  - (b) the provision of services that are not legal services by or in connection with incorporated legal practices or multi-disciplinary partnerships, but only if the provision of those services by:
    - (i) officers or employees of incorporated legal practices, or
    - (ii) partners or employees of multi-disciplinary partnerships,may give rise to a conflict of interest relating to the provision of legal services.
- (2) Without limiting subsection (1), rules may be made for or with respect to professional obligations relating to legal services provided by or in connection with incorporated legal practices or multi-disciplinary partnerships.
- (3) However, the rules made under this section cannot:
- (a) regulate any services that an incorporated legal practice may provide or conduct (other than the provision of legal services or other services that may give rise to a conflict of interest relating to the provision of legal services), or

- (b) regulate or prohibit the conduct of officers or employees of an incorporated legal practice (other than in connection with the provision of legal services or other services that may give rise to a conflict of interest relating to the provision of legal services), or
  - (c) regulate any services that a multi-disciplinary partnership or partners or employees of a multi-disciplinary partnership may provide or conduct (other than the provision of legal services or other services that may give rise to a conflict of interest relating to the provision of legal services), or
  - (d) regulate or prohibit the conduct of partners or employees of a multi-disciplinary partnership (other than in connection with the provision of legal services or services that may give rise to a conflict of interest relating to the provision of legal services).
- (4) The regulations may make provision for or with respect to the making of rules under this section.

**706 Subject-matter of legal profession rules**

- (1) Legal profession rules may make provision for or with respect to any aspect of legal practice, including standards of conduct expected of Australian legal practitioners or locally registered foreign lawyers to whom the rules apply.
- (2) The power to make rules is not limited to any matters for which this Act specifically authorises the making of legal profession rules.

**Division 3 Procedure for making rules**

**707 Commissioner and Advisory Council to be notified of proposed rules**

- (1) Each Council must notify the Commissioner and the Advisory Council of its intention to make a legal profession rule.
- (2) The notification must be in writing and must give details of the proposal.
- (3) The Council must wait at least 28 days after giving the notification before making the rule and must take into account any representations on the proposed rule made by the Commissioner or the Advisory Council.

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- (4) However, the Council may make the rule before the end of the 28-day period if:
  - (a) the Council considers that the urgency of the case warrants immediate action, and
  - (b) the notification indicates that the Council is of that view and intends to act immediately.

**708 Public notice of proposed rules**

- (1) The Council or Councils proposing to make a legal profession rule must ensure that a notice is published in the Gazette and in a daily newspaper circulating in this jurisdiction:
  - (a) explaining the object of the proposed rule, and
  - (b) advising where or how a copy of the proposed rule may be accessed, obtained or inspected, and
  - (c) inviting comments and submissions within a specified period of not less than 21 days from the date of first publication of the notice.
- (2) The Council or Councils must ensure that a copy of the proposed rule is given to the Attorney General before the notice is published.
- (3) The Council or Councils must not make the rule before the end of the period specified in the notice for making comments and submissions and must ensure that any comments and submissions received within that period are appropriately considered.
- (4) However, the Council or Councils may make the rule before the end of the period specified in the notice for making comments and submissions if:
  - (a) the Council or Councils consider that the urgency of the case warrants immediate action, and
  - (b) the notice indicates that the Council or Councils are of that view and intend to act immediately.
- (5) Subsections (1)–(4) do not apply to a proposed rule that the Attorney General considers does not warrant publication because of its minor or technical nature.
- (6) Section 75 of the *Interpretation Act 1987* does not apply to notices required to be published under this section.

**709 Publication of rules**

Legal profession rules are to be published in the Gazette and in appropriate professional publications.

**710 Commencement of rules**

- (1) A legal profession rule commences on the date specified in the rule for its commencement.
- (2) The date so specified is not to be earlier than the date of its publication in the Gazette and, unless the Attorney General approves, is not to be earlier than one month after the date of that publication.

**Division 4 General provisions**

**711 Binding nature of legal profession rules**

- (1) Legal profession rules are binding on Australian legal practitioners and locally registered foreign lawyers to whom they apply.
- (2) Failure to comply with legal profession rules is capable of being unsatisfactory professional conduct or professional misconduct.

**712 Legal profession rules inconsistent with Act or regulations**

Legal profession rules do not have effect to the extent that they are inconsistent with this Act or the regulations.

**713 Availability of rules**

The Councils must ensure that the legal profession rules are available for public inspection (including on their internet sites, if any, or on any other specified internet site) and that amendments are incorporated as soon as possible.

**714 Review of rules requested by Commissioner**

- (1) The Commissioner may, at any time, request a Council to review any legal profession rule (including any joint rule) made by it.
- (2) If a Council is requested to review a rule under this section, the Council must furnish a report on the review to the Commissioner within 28 days after the request or within such further period as is agreed on by the Commissioner and the Council.

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- (3) After receiving a report under this section, the Commissioner must give a report to the Attorney General about the request for the review and may include in the report submissions about the rule and a recommendation that the rule be declared inoperative.
- (4) Any such report by the Commissioner must include a copy of the report on the review of the rule concerned provided by the relevant Council.
- (5) The Attorney General may make public any report by the Commissioner under this section (including, if the Attorney General thinks fit, a copy of the relevant review).

#### **715 Review of rules by Advisory Council**

- (1) The Advisory Council may, from time to time, review the legal profession rules. The Advisory Council is required to furnish reports to the Attorney General on any such review of those rules.
- (2) The Advisory Council is required to conduct such a review and furnish a report if requested to do so by the Attorney General.
- (3) The Attorney General must make each report public within 28 days after it is received by the Attorney General.
- (4) Without limiting the matters about which the Advisory Council may report, the Advisory Council must report on whether it considers any rule imposes restrictive or anti-competitive practices which are not in the public interest or is not otherwise in the public interest.

#### **716 Rules may be declared inoperative**

- (1) The Attorney General may, by order published in the Gazette, declare any legal profession rule, or part of any such rule, inoperative, but only if:
  - (a) the Commissioner has reported to the Attorney General that the rule is not in the public interest, or
  - (b) the Advisory Council has reported to the Attorney General 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.
- (2) A rule or part of a rule may be declared inoperative even though it deals with a matter for which this Act specifically authorises the making of rules.

- (3) A declaration is effective to render the rule or the part of the rule inoperative.
- (4) A declaration takes effect on the date of the publication of the order in the Gazette or on a later date specified in the order.

**717 Other provisions as to rules**

Sections 42, 43 and 45 of the *Interpretation Act 1987* apply to legal profession rules in the same way as they apply to statutory rules within the meaning of that Act.

**Note.** The above provisions of the *Interpretation Act 1987* relate to standard provisions authorising the adoption of other publications by reference, the making of differential rules, the amendment or repeal of rules and presumptions as to validity for rules.



## Chapter 8 General provisions

### 718 Delegation

- (1) A person or body having powers or functions under this Act may delegate in writing any or all of those powers and functions to a person or persons.
- (2) Subsection (1) does not apply in respect of:
  - (a) the functions of the Law Society Council referred to in section 426 (Management Committee), or
  - (b) the functions of the Commissioner, Bar Council or Law Society Council under this Act.

**Note.** Sections 693, 696 and 699 provide for the delegation of functions of the Commissioner, Bar Council and Law Society Council.

### 719 Liability of principals

- (1) If a law practice contravenes, whether by act or omission, any provision of this Act or the regulations imposing an obligation on the practice, each principal of the practice is taken to have contravened the same provision, unless the principal establishes that:
  - (a) the practice contravened the provision without the knowledge actual, imputed or constructive of the principal, or
  - (b) the principal was not in a position to influence the conduct of the law practice in relation to its contravention of the provision, or
  - (c) the principal, if in that position, used all due diligence to prevent the contravention by the practice.
- (2) Subsection (1) does not affect the liability of the law practice for the contravention.
- (3) A contravention of a requirement imposed on a law practice by this Act is capable of being unsatisfactory professional conduct or professional misconduct by a principal of the practice.

### 720 Injunctions

- (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
  - (a) a contravention of this Act, or

- (b) attempting to contravene this Act, or
- (c) aiding, abetting, counselling or procuring a person to contravene this Act, or
- (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act, or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act, or
- (f) conspiring with others to contravene this Act,

the Supreme Court may, on the application of the Commissioner or a Council, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

- (2) Where an application for an injunction under subsection (1) has been made, the Supreme Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that that subsection applies.
- (3) Where in the opinion of the Supreme Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (4) The Supreme Court may discharge or vary an injunction granted under subsection (1) or (3).
- (5) The power of the Supreme Court to grant an injunction restraining a person from engaging in conduct may be exercised:
  - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind, and
  - (b) whether or not the person has previously refused or failed to do that act or thing, and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (6) The Supreme Court must not require the Commissioner or Council or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.

- (7) In this section:  
*this Act* includes the regulations and the legal profession rules.

**721 Disclosure of information by local regulatory authorities**

- (1) A regulatory authority of this jurisdiction may disclose information to another regulatory authority of this jurisdiction about any matter relating to or arising under this Act or a corresponding law.
- (2) A regulatory authority of this jurisdiction may disclose information to an interstate regulatory authority or an NZ regulatory authority about any matter relating to or arising under this Act or a corresponding law.
- (3) This section does not limit any other power of disclosure under this Act.

- (4) In this section:

*interstate regulatory authority* means:

- (a) an authority having powers or functions under a corresponding law, or
- (b) a person or body prescribed, or of a class prescribed, by the regulations.

*NZ regulatory authority* means:

- (a) an authority having powers or functions under a law of New Zealand with respect to the regulation of the legal profession, or
- (b) a person or body prescribed, or of a class prescribed, by the regulations.

**722 Confidentiality of personal information**

- (1) A relevant person must not, except to the extent necessary:
- (a) to perform duties or exercise functions under this Act, the regulations or legal profession rules or under any other Act or regulations made under any other Act, or
- (b) to disclose information that the relevant person is expressly authorised, permitted or required to disclose under:
- (i) this Act, or
- (ii) the regulations or legal profession rules, or

(iii) any other Act or regulations made under any other Act, disclose to any other person, whether directly or indirectly, any personal information by reason of being a relevant person.

Maximum penalty: 50 penalty units.

- (2) Subsection (1) does not apply to the disclosure of information:
- (a) with the prior consent in writing of the person to whom the information relates, or
  - (b) to a court or tribunal in the course of legal proceedings, or
  - (c) pursuant to an order of a court or tribunal under another Act or law, or
  - (d) to the extent reasonably required to enable the enforcement or investigation of the criminal law or a disciplinary matter.
- (3) Subsection (1) extends to the disclosure of information that was disclosed under a corresponding law to a local regulatory authority or a relevant person.
- (4) In this section:
- local regulatory authority** means:
- (a) an authority having powers or functions under this Act, or
  - (b) a person or body prescribed, or of a class prescribed, by the regulations.

**personal information** means information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about a natural person whose identity is apparent, or can be reasonably ascertained, from the information or opinion, but does not include information or an opinion of a kind prescribed by the regulations.

**relevant person** means:

- (a) a local regulatory authority, or
- (b) a member or former member of a local regulatory authority, or
- (c) a person currently or previously employed by or acting at the direction of a local regulatory authority.

### 723 Unlawful disclosure of information

A person who discloses any information obtained in the administration of this Act is guilty of an offence unless the disclosure:

(a) is made with the consent of the person to whom the information relates, or

(b) is authorised under a provision of this Act, or

**Note.** Examples of authorised disclosure provisions include Part 4.10 (Publicising disciplinary action) and section 677 (Permitted disclosure of confidential information obtained in course of investigation, examination or audit).

(c) is made in connection with the administration of this Act, or

(d) is made for the purpose of legal proceedings arising out of this Act or of any report of any such proceedings, or

(e) is made with other lawful excuse.

Maximum penalty: 50 penalty units.

**724 Professional privilege or duty of confidence does not affect validity of or compliance with certain requirements**

(1) This section applies to a requirement under:

(a) section 263 (Reporting certain irregularities and suspected irregularities) to give written notice of an irregularity in connection with a trust account, a trust ledger account or trust money, or

(b) section 638 (Power of receiver to require documents or information) to give access to documents or information, or

(c) a provision of Chapter 6 (Provisions relating to investigations) to produce documents, provide information or otherwise assist in, or co-operate with, an investigation.

(2) The validity of the requirement is not affected, and a person is not excused from complying with the requirement, on the ground of:

(a) legal professional privilege, or

(b) privilege against self-incrimination, or

(c) any other duty of confidence.

(3) If, before complying with the requirement, the person objects to the body or person to whom the notice, document or information is required to be given on the ground that giving it may tend to incriminate the person, the notice, document or information is inadmissible in evidence in any proceeding against the person for an offence, other than:

(a) an offence against this Act, or

- (b) any other offence relating to the keeping of trust accounts or the receipt of trust money, or
- (c) an offence relating to the falsity of the answer.

**725 Secrecy provisions do not apply after 30 years**

- (1) A provision of this Act that prohibits the disclosure or divulging of information or matter does not apply to the disclosure or divulging of that information or matter by means of the giving of access under this Act to a record that is at least 30 years old and contains that information or matter.
- (2) A record is taken to be 30 years old when 30 years have elapsed since it came into existence or since the original record of which it is a copy came into existence.
- (3) The regulations can exempt a specified provision of this Act from the operation of this section, either generally or in respect of specified records or a specified class of records.

**726 Privilege of lawyers as officers of Supreme Court**

No privilege from suit in any court or tribunal is to be allowed to any Australian lawyer by reason only that the lawyer is an officer of the Supreme Court.

**727 Service of notices on practitioners**

A notice required to be served on an Australian legal practitioner under this Act is served on the practitioner if:

- (a) it is served personally on the practitioner, or
- (b) it is sent by post to the practitioner's place of practice, business or residence last notified by the practitioner to a Council.

**728 Supreme Court may order delivery up of documents etc**

- (1) On the application of a client of a law practice, the Supreme Court may order the law practice:
  - (a) to give to the client a bill of costs in respect of any legal services provided by the law practice, and
  - (b) to give to the client, on such conditions as the Supreme Court may determine, such of the client's documents as are held by the law practice in relation to those services.

- (2) Subsection (1) does not affect the provisions of Division 11 of Part 3.2 with respect to the assessment of costs.
- (3) This section does not apply to the client of a law practice retained on the client's behalf by another law practice.
- (4) In this section, a reference to a law practice includes a reference to:
  - (a) in the case of a person who was a sole practitioner when the legal services concerned were provided:
    - (i) the former sole practitioner, or
    - (ii) the executor of the will of the former sole practitioner, or
    - (iii) the trustee or administrator of the estate of the former sole practitioner, and
  - (b) subject to any other applicable arrangements:
    - (i) the persons who were the partners of a former law firm or multi-disciplinary partnership when the legal services concerned were provided, and
    - (ii) in the case of a law firm or multi-disciplinary partnership where there has been a change of partners since the legal services concerned were provided—subject to any other applicable arrangements, the firm or partnership as currently constituted, and
    - (iii) the assignee of a law practice or former law practice, and
    - (iv) the receiver of a law practice or former law practice appointed under this Act, and
  - (c) any person of a class prescribed by the regulations for the purposes of this subsection.

**729 Contempt of the Supreme Court**

The imposition of a penalty for a contravention of a provision of this Act does not affect the power of the Supreme Court to punish a contempt of the Court.

**730 Protection from liability**

No liability is incurred by:

- (a) the Bar Association or the Bar Council, or their committees,

- (b) the Law Society or the Law Society Council, or their committees, including a Management Committee to which a function is delegated under section 426 (Management Committee),
- (c) an investigator under Chapter 6, or an investigator's assistant under that Part, or
- (d) the Company referred to in Part 3.3 (Professional indemnity insurance) or its directors,

or an employee or agent of, or a person acting at the direction of, any of them for anything done, suffered or omitted to be done in good faith in the exercise, or purported exercise, of a function under this Act.

#### **731 Offences**

- (1) Proceedings for an offence under this Act (except section 643 or 675) or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.
- (2) Chapter 5 of the *Criminal Procedure Act 1986* (which relates to the summary disposal of certain indictable offences unless an election is made to proceed on indictment) applies to and in respect of an offence under section 643 (Improperly destroying property etc) or 675 (Destruction of evidence).
- (3) Proceedings for an offence against this Act or the regulations may be brought at any time within 12 months after the date of the alleged offence.

#### **732 Proof of certain matters not required**

In any legal proceedings, no proof is required (unless evidence to the contrary is given) of:

- (a) the constitution of any body, incorporated or unincorporated, on which functions are conferred or imposed by or under this Act,
- (b) any resolution of such a body,
- (c) the appointment of, or the holding of office by, a member of such a body, or
- (d) the presence or nature of a quorum at a meeting of such a body.



**733 Evidentiary certificates**

- (1) A certificate that is issued by the Bar Council and that states that, on a date or during a period specified in the certificate:
- (a) a specified person was or was not the holder of a barristers' practising certificate, or
  - (b) a specified barrister's practising certificate was or was not subject to a specified condition,

is admissible in any legal proceedings and is evidence of the fact or facts so stated.

- (2) A certificate that is issued by the Law Society Council and that states that, on a date or during a period specified in the certificate:
- (a) a specified person was or was not the holder of a solicitor's practising certificate, or
  - (b) a specified solicitor's practising certificate was or was not subject to a specified condition,

is admissible in any legal proceedings and is evidence of the fact or facts so stated.

- (3) A certificate issued by a regulatory authority of another State or a Territory and that states that, on a date or during a period specified in the certificate:
- (a) a specified person was or was not the holder of an interstate practising certificate, or
  - (b) that a specified interstate legal practitioner's practising certificate was or was not subject to a specified condition,

is admissible in any legal proceedings and is evidence of the fact or facts so stated.

- (4) A certificate that is issued by the Bar Council or Law Society Council and that states that, on a date or during a period specified in the certificate:
- (a) a specified person was or was not registered as a locally registered foreign lawyer, or
  - (b) a specified locally registered foreign lawyer was or was not subject to a specified condition,

is admissible in any legal proceedings and is evidence of the fact or facts so stated.

- (5) A certificate that is issued by a foreign registration authority (within the meaning of Part 2.7) and that states that, on a date specified in the certificate, specified foreign regulatory action (within the meaning of Part 2.5) was taken in relation to a person is admissible in any legal proceedings and is evidence of the fact or facts so stated.

**734 Approved forms**

An authority having a power or function under this Act may approve application forms and other forms for use in connection with that power or function.

**735 Repeals**

- (1) Each Act specified in Schedule 1 is, to the extent indicated in the Schedule, repealed.
- (2) Different days may be appointed for the commencement of subsection (1) for the purpose of repealing, on different days, different provisions of the Acts specified in Schedule 1.

**736 Amendments**

Each Act specified in Schedule 6 is amended as set out in that Schedule.

**737 Savings, transitional and other provisions**

Schedule 9 has effect.

**738 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Without limiting the generality of subsection (1), the Governor may make regulations for or with respect to matters for or with respect to which legal profession rules have been or may be made.
- (3) A regulation may create an offence punishable by a penalty not exceeding 100 penalty units.
- (4) A regulation may provide for the payment of a prescribed amount instead of a penalty that may otherwise be imposed for an offence against this Act or the regulations.

- (5) A regulation may provide for the service of an infringement notice, in respect of payment of a prescribed amount, on a person alleged to have committed an offence referred to in subsection (3) and the particulars to be included in the notice.
- (6) A regulation may provide that an application may be made to the Tribunal for a review of a specified decision or class of decisions made by a specified person or body in the exercise of functions conferred or imposed by or under this Act or the regulations.

**739 Review of Act**

- (1) The Attorney General is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Legal Profession Bill 2004

Repeals

Schedule 1

## **Schedule 1 Repeals**

(Section 735)

*Legal Profession Act 1987* No 109—Whole Act

*Legal Profession Amendment (Costs Assessment) Act 1998*  
No 83—Whole Act

## **Schedule 2    Legal Profession Admission Board**

(Section 680 (3))

### **1    Reserve members**

- (1) For each member of the Admission Board, one or more reserve members may be nominated to act in the office of the member during the member's illness or absence, and the reserve member, while so acting, has and may exercise all the functions of the member and is taken to be a member of the Admission Board.
- (2) For a member who is the Attorney General or a nominee of the Attorney General, the reserve member or members may be nominated by the Attorney General.
- (3) For any other member, the reserve member or members are to be nominated by the person or body that nominated the member and must be qualified for nomination in the same way as the member.
- (4) A person may be removed, by the nominating person or body, from any office for which the person was nominated under this clause.

### **2    Personal liability**

- (1) Subject to subclause (2), a matter or thing done or omitted to be done by:
  - (a) the Admission Board, or
  - (b) a member of the Admission Board, or
  - (c) any person acting under the direction of the Admission Board,does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing the Admission Board's functions, subject the member or a person so acting personally to any action, liability, claim or demand.
- (2) A judicial member of the Admission Board is, in the exercise of the member's functions under Part 2.3 of this Act, to have the same protection and immunity as a Judge of the Supreme Court.

**3 General procedure**

The procedure for the calling of meetings of the Admission Board and for conduct of business at those meetings is, subject to this Act, to be as determined by the Board.

**4 Quorum**

The quorum for a meeting of the Admission Board is 6 members including the member presiding at the meeting.

**5 Nomination of presiding and deputy presiding member**

The Chief Justice of New South Wales may from time to time nominate one of the judicial members of the Admission Board to be the presiding member of the Board and another of the judicial members of the Board to be the deputy presiding member of the Board.

**6 Presiding member**

- (1) The Chief Justice of New South Wales is to preside at a meeting of the Admission Board if electing to be present and electing to preside.
- (2) Otherwise:
  - (a) the presiding member, or
  - (b) in the absence of the presiding member—the deputy presiding member, or
  - (c) in the absence of both—a member elected by and from the members present and voting,is to preside at the meeting.
- (3) The member presiding at a meeting of the Admission Board has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

**7 Voting**

A decision supported by a majority of the votes cast at a meeting of the Admission Board at which a quorum is present is the decision of the Board.

Legal Profession Bill 2004

Schedule 2      Legal Profession Admission Board

**8 Minutes**

The Admission Board is to cause full and accurate minutes to be kept of the proceedings of each meeting of the Board.

**9 Seal**

The regulations may make provision for or with respect to the custody and use of the seal of the Admission Board.

## **Schedule 3 Legal Profession Advisory Council**

(Section 683 (3))

### **1 Reserve members**

- (1) The Attorney General may, for each appointed member of the Advisory Council, appoint one or more reserve members to act in the office of the appointed member during the illness or absence of the appointed member, and the reserve member, while so acting, has and may exercise all the functions of the appointed member and is taken to be a member of the Advisory Council.
- (2) A person, in order to be appointed as a reserve member of the Advisory Council, must be qualified for appointment in the same way as the appointed member for whom he or she is a reserve member.
- (3) The Attorney General may remove any person from any office to which the person was appointed under this clause.
- (4) A person while acting in the office of a member of the Advisory Council is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Attorney General may from time to time determine in respect of the person.
- (5) For the purposes of this clause, a vacancy (as referred to in clause 5) in the office of a member of the Advisory Council is taken to be an absence from office of the member.

### **2 Terms of office**

Subject to this Schedule, a member of the Advisory Council holds office for such period, not exceeding 7 years, as may be specified in the instrument of appointment of the member, but is eligible (if otherwise qualified) for re-appointment.

### **3 Remuneration**

A member of the Advisory Council is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Attorney General may from time to time determine in respect of the member.



**4 Filling of vacancy**

If the office of any member of the Advisory Council becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

**5 Vacancy in office of member**

- (1) A member of the Advisory Council vacates office if the member:
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) absents himself or herself from 4 consecutive meetings of the Advisory Council of which reasonable notice has been given to the member personally or in the ordinary course of post, except on leave granted by the Attorney General or unless, before the expiration of 4 weeks after the last of those meetings, the member is excused by the Attorney General for being absent from those meetings, or
  - (d) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (e) becomes a mentally incapacitated person, or
  - (f) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
  - (g) resigns the office by instrument in writing addressed to the Attorney General, or
  - (h) ceases to be eligible to be appointed as a member, or
  - (i) is removed from office by the Attorney General under subclause (2).
- (2) The Attorney General may remove a member of the Advisory Council from office for incapacity, incompetence or misbehaviour.

**6 Effect of certain other Acts**

- (1) Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of a member of the Advisory Council.

- (2) If by or under any other Act provision is made:
- (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
  - (b) prohibiting the person from engaging in employment outside the duties of that office,

that provision does not operate to disqualify the person from holding that office and also the office of a member of the Advisory Council or from accepting and retaining any remuneration payable to the person under this Act as a member of the Advisory Council.

#### **7 Personal liability**

A matter or thing done or omitted to be done by:

- (a) the Advisory Council, or
  - (b) a member of the Advisory Council, or
  - (c) any person acting under the direction of the Advisory Council,
- does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing the Advisory Council's functions, subject the member or a person so acting personally to any action, liability, claim or demand.

#### **8 General procedure**

The procedure for the calling of meetings of the Advisory Council and for the conduct of business at those meetings is, subject to this Act, to be as determined by the Advisory Council.

#### **9 Quorum**

The quorum for a meeting of the Advisory Council is 6 members including the member presiding at the meeting.

#### **10 Presiding member**

- (1) The Chairperson of the Advisory Council or, in the absence of the Chairperson, another member of the Advisory Council elected by the members present is to preside at a meeting of the Advisory Council.
- (2) The person presiding at a meeting of the Advisory Council has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

Legal Profession Bill 2004

Schedule 3      Legal Profession Advisory Council

**11    Voting**

A decision supported by a majority of the votes cast at a meeting of the Advisory Council at which a quorum is present is the decision of the Advisory Council.

**12    Minutes**

The Advisory Council is to cause full and accurate minutes to be kept of the proceedings of each meeting of the Advisory Council.

**13    First meeting**

The Attorney General may call the first meeting of the Advisory Council in such manner as the Attorney General thinks fit.

## **Schedule 4 Trustees of Public Purpose Fund**

(Section 286 (3))

### **1 Definitions**

In this Schedule:

*appointed Trustee* means a person appointed under section 286 (2) (a).

*Trustee* means a Trustee of the Public Purpose Fund.

### **2 Terms of office of Trustees**

Subject to this Schedule, an appointed Trustee holds office for such period (not exceeding 3 years) as is specified in the Trustee's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

### **3 Remuneration**

An appointed Trustee is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Attorney General may from time to time determine in respect of the Trustee.

### **4 Deputies**

- (1) The Attorney General may, from time to time, appoint a person to be the deputy of a Trustee, and the Attorney General may revoke any such appointment.
- (2) In the absence of a Trustee, the Trustee's deputy may, if available, act in the place of the Trustee.
- (3) While acting in the place of a Trustee, a person:
  - (a) has all the functions of the Trustee and is taken to be a Trustee, and
  - (b) is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Attorney General may from time to time determine in respect of the person.
- (4) For the purposes of this clause, a vacancy in the office of a Trustee is taken to be an absence of the Trustee.

## **5 Vacancy in office of appointed Trustee**

- (1) The office of an appointed Trustee becomes vacant if the Trustee:
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) resigns the office by instrument in writing addressed to the Attorney General, or
  - (d) is removed from office by the Attorney General under this clause, or
  - (e) is absent from 4 consecutive meetings of the Trustees of which reasonable notice has been given to the Trustee personally or by post, except on leave granted by the Attorney General or unless the Trustee is excused by the Attorney General for having been absent from those meetings, or
  - (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (g) becomes a mentally incapacitated person, or
  - (h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or
  - (i) in the case of a Trustee referred to in section 286 (2) (a) (i), ceases to be a member of the Law Society Council.
- (2) The Attorney General may at any time remove an appointed Trustee from office.

## **6 Filling of vacancy in office of Trustee**

If the office of an appointed Trustee becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

## **7 Chairperson**

- (1) The chairperson of the Trustees is the person elected to the office of chairperson from time to time by the Trustees from among their number.

- (2) The office of chairperson:
  - (a) commences on the day the person elected to the office is declared to be so elected, and
  - (b) becomes vacant when the person's successor is declared to be elected to the office or when the person so elected ceases to hold office as a Trustee (whichever happens first).

**8 Disclosure of pecuniary interests**

- (1) If:
  - (a) a Trustee has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting of the Trustees, and
  - (b) the interest appears to raise a conflict with the proper performance of the Trustee's duties in relation to the consideration of the matter,

the Trustee must, as soon as possible after the relevant facts have come to the Trustee's knowledge, disclose the nature of the interest at a meeting of the Trustees.
- (2) A Trustee is not to be regarded as having a direct or indirect pecuniary interest in a matter merely because he or she is a local legal practitioner or interstate legal practitioner or a member of the Law Society, the Bar Association or a Council.
- (3) A disclosure by a Trustee at a meeting of the Trustees that the Trustee:
  - (a) is a member, or is in the employment, of a specified company or other body, or
  - (b) is a partner, or is in the employment, of a specified person, or
  - (c) has some other specified interest relating to a specified company or other body or to a specified person,

is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person which may arise after the date of the disclosure and which is required to be disclosed under subclause (1).
- (4) Particulars of any disclosure made under this clause must be recorded by the Trustees in a book kept for the purpose and that book must be open at all reasonable hours to inspection by any person on payment of the fee determined by the Trustees.

- (5) After a Trustee has disclosed the nature of an interest in any matter, the Trustee must not, unless the Attorney General or the Trustees otherwise determine, take part in any decision of the Trustees with respect to the matter.
- (6) For the purposes of the making of a determination by the Trustees under subclause (5), a Trustee who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not take part in the making by the Trustees of the determination.
- (7) If a Trustee is prevented from taking part in a decision by virtue of this clause and the determination relates to a matter that requires a unanimous decision of the Trustees under section 292, the decision is unanimous for the purposes of that section if it is supported by all of the Trustees who are entitled to take part in the determination.
- (8) A contravention of this clause does not invalidate any decision of the Trustees.

**9 Effect of certain other Acts**

- (1) Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of a Trustee.
- (2) If by or under any Act provision is made:
  - (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
  - (b) prohibiting the person from engaging in employment outside the duties of that office,

the provision does not operate to disqualify the person from holding that office and also the office of a Trustee or from accepting and retaining any remuneration payable to the person under this Act as a Trustee.

**10 General procedure**

The procedure for the calling of meetings of the Trustees and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Trustees.

**11 Quorum**

The quorum for a meeting of the Trustees is 3 Trustees.

**12 Presiding member**

- (1) The chairperson or, in the absence of the chairperson, a Trustee elected by the Trustees present at the meeting, is to preside at a meeting of the Trustees.
- (2) The person presiding at a meeting of the Trustees has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.
- (3) Subclause (2) does not affect the requirement under section 292 that certain decisions of the Trustees be unanimous.

**13 Voting**

- (1) A decision supported by a majority of the votes cast at a meeting of the Trustees at which a quorum is present is the decision of the Trustees.
- (2) This clause does not apply in respect of a decision that is required to be unanimous by section 292.

**14 Transaction of business outside meetings or by telephone**

- (1) The Trustees may, if they think fit, transact any of their business by the circulation of papers among all the Trustees for the time being and a resolution in writing has effect as a decision of the Trustees if it is approved in writing by a majority of those Trustees and, for the purposes of section 292, has effect as a unanimous decision of the Trustees if it is approved in writing by all the Trustees for the time being.
- (2) The Trustees may, if they think fit, transact any of their business at a meeting at which the Trustees (or some Trustees) participate by telephone, closed-circuit television or other means, but only if any Trustee who speaks on a matter before the meeting can be heard by the other Trustees.
- (3) For the purposes of:
  - (a) the approval of a resolution under subclause (1), or
  - (b) a meeting held in accordance with subclause (2),the chairperson and each Trustee have the same voting rights as they have at an ordinary meeting of the Trustees.
- (4) A resolution approved under subclause (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Trustees.



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- (5) Papers may be circulated among the trustees for the purposes of subclause (1) by facsimile or other transmission of the information in the papers concerned.

**15 Minutes**

The Trustees are to cause full and accurate minutes to be kept of the proceedings of each meeting of the Trustees.

## **Schedule 5 Costs assessors**

(Section 390 (3))

### **1 Eligibility for appointment**

A person is not eligible to be appointed as a costs assessor unless the person is an Australian legal practitioner of at least 5 years' standing.

### **2 Terms of office**

- (1) Subject to this Schedule, a costs assessor holds office for such period (not exceeding 3 years) as may be specified in the instrument of appointment of the costs assessor, but is eligible (if otherwise qualified) for re-appointment.
- (2) A costs assessor may, with the consent of the Chief Justice of New South Wales, continue in office after the expiry of his or her term of office for the purpose of making a determination in respect of, or otherwise completing, any application for costs assessment that was referred to the costs assessor before the expiry of his or her term of office.

### **3 Remuneration**

A costs assessor is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Attorney General may from time to time determine in respect of the costs assessor.

### **4 Vacancy in office of costs assessor**

- (1) A costs assessor vacates office if the costs assessor:
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (d) becomes a mentally incapacitated person, or
  - (e) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence

Schedule 5      Costs assessors

that, if committed in New South Wales, would be an offence so punishable, or

- (f) resigns the office by instrument in writing addressed to the Attorney General, or
  - (g) ceases to be eligible to be a costs assessor, or
  - (h) is removed from office by the Chief Justice of New South Wales, under subclause (2).
- (2) The Chief Justice of New South Wales may remove a costs assessor from office.

**5 Effect of certain other Acts**

- (1) Chapter 2 of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of a costs assessor.
- (2) If by or under any other Act provision is made:
  - (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
  - (b) prohibiting the person from engaging in employment outside the duties of that office,

that provision does not operate to disqualify the person from holding that office and also the office of a costs assessor or from accepting and retaining any remuneration payable to the person under this Act as a costs assessor.

## **Schedule 6 Amendments**

(Section 736)

### **6.1 Administrative Decisions Tribunal Act 1997 No 76**

#### **Schedule 2 Composition and functions of Divisions**

Insert “or Supreme Court” after “District Court” wherever occurring in clause 4 of Part 3 (Legal Services Division).

### **6.2 Consumer Claims Act 1998 No 162**

#### **Section 7 Jurisdiction in respect of consumer claims**

Insert “if the costs can be the subject of a costs assessment under Part 3.2 of the *Legal Profession Act 2004*” after “Tribunal” in section 7 (5).

### **6.3 Criminal Procedure Act 1986 No 209**

#### **Schedule 1 Indictable offences triable summarily**

Insert at the end of Part 4 of Table 1 (Indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise):

#### **25 Legal Profession Act 2004**

An offence under section 643 (Improperly destroying property etc) or 675 (Destruction of evidence) of the *Legal Profession Act 2004*.

**6.4 Law Enforcement (Powers and Responsibilities) Act 2002 No 103**

**[1] Schedule 2 Search warrants under other Acts**

Insert “*Legal Profession Act 2004*” in alphabetical order.

**[2] Schedule 4 Amendment of other Acts and instrument**

Insert after Schedule 4.48:

**4.48A Legal Profession Act 2004**

**[1] Section 663 Search warrant**

Omit “authorised justice” wherever occurring in section 663 (1) and (2).  
Insert instead “authorised officer”.

**[2] Section 663 (3)**

Omit “Part 3 of the *Search Warrants Act 1985*”.  
Insert instead “Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*”.

**[3] Section 663 (4)**

Omit the subsection. Insert instead:

(4) In this section:

*authorised officer* has the same meaning as in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

## **Schedule 7 Professional indemnity insurance— provisions relating to HIH insurance**

(Section 417)

### **1 Interpretation and construction**

- (1) In this Schedule:

***HIH group member*** means:

- (a) HIH Casualty and General Insurance Limited, FAI General Insurance Company Limited or CIC Insurance Limited, or
  - (b) any corporation that is, with respect to one of the corporations referred to in paragraph (a), a related body corporate within the meaning of section 50 of the *Corporations Act 2001* of the Commonwealth.
- (2) Expressions used in this Schedule and defined in Part 3.3 (Professional indemnity insurance) have the same meanings as in that Part.
- (3) Part 3.3 has effect as if it included, and is taken to include, the provisions of this Schedule.

### **2 Payments relating to HIH group insurance policies**

- (1) Payments must be made by the Company from the Indemnity Fund for the purpose of indemnifying any person who is insured under an approved insurance policy that was issued or renewed by an HIH group member, to the extent of the indemnity provided by the approved insurance policy.

**Note.** HIH Casualty and General Insurance Limited (HIH) was the insurer under the approved insurance policy for the period from 1 July 1998 to 1 July 2001. HIH, together with other HIH group members, were also insurers under approved policies that pre-date that period. A provisional liquidator was appointed in respect of the HIH and other HIH group members on 15 March 2001.

- (2) On the making of such a payment from the Indemnity Fund, the company is subrogated to the rights and remedies of the insured person under the approved insurance policy, in connection with the subject matter of the payment, subject to the terms of any agreement entered into under this clause.

- (3) Subclause (2) extends, but is not limited to, a right or remedy against any of the following:
  - (a) an HIH group member,
  - (b) any insurer or re-insurer of an HIH group member,
  - (c) any person who, under any Act or other law, is liable for a failure of an HIH group member to satisfy its obligations under or in connection with an approved insurance policy.
- (4) The Company may exercise its rights and remedies under this clause in its own name or in the name of an insured person.
- (5) If the Company exercises its rights and remedies under this clause in the name of an insured person, the Company is to indemnify the insured person against any liability incurred by the insured person as a result of the exercise of those rights and remedies.
- (6) The Law Society and the Company may enter into an agreement with an HIH group member (including a provisional liquidator or liquidator of an HIH group member), or with any insured person, in connection with the payment of amounts from the Indemnity Fund under this clause.
- (7) In particular, any such agreement may provide for the following:
  - (a) the assignment or subrogation to the Company of the rights and remedies of an HIH group member or the insured person (or both) under or in connection with the approved insurance policy,
  - (b) the recovery by the company from an HIH group member of any amount paid from the Indemnity Fund under this clause.
- (8) Any payment made from the Indemnity Fund under this clause, and any agreement entered into with an insured person under this clause, does not prevent the recovery by the company from an HIH group member of any amount that would have been recoverable by the insured person under or in connection with the approved insurance policy had the payment not been made or the agreement not been entered into.
- (9) Any amount recovered by the Company as a result of the exercise of its functions under this clause (including its functions under a subrogation or agreement referred to in this clause) is to be paid into the Indemnity Fund. This does not apply to any amount that is payable to another person:

- (a) under any other Act or law, or
  - (b) under any agreement referred to in this clause, or
  - (c) under the regulations.
- (10) Payments may be made from the Indemnity Fund for the purpose of meeting any reasonable costs and expenses incurred by the Company in exercising its functions under this clause, including its functions under a subrogation or agreement referred to in this clause.

**3 Special contributions and levies: HIH liabilities**

- (1) The Company may, for the purposes of ensuring that the Indemnity Fund, or any part of the Indemnity Fund, is sufficient to meet the purposes for which it may be used under Division 3 of Part 3.3:
- (a) require any insurable solicitor who is or was insured under an approved insurance policy issued or renewed by an HIH group member to pay a special annual contribution to the Indemnity Fund, or
  - (b) require any solicitor or former solicitor who is or was insured under an approved insurance policy issued or renewed by an HIH group member to pay a special levy to the Indemnity Fund.
- (2) Any such special annual contribution or levy is to be of an amount determined by the Company and approved by the Law Society Council.
- (3) The Company may make a different determination under subclause (2) in relation to particular classes of solicitors or former solicitors.
- (4) The special annual contribution or levy is to be paid within the time and in the manner specified by the Company by notice in writing to the solicitor or former solicitor concerned.
- (5) A special annual contribution or levy that is payable under this clause:
- (a) is to be paid to the Company on account of the Indemnity Fund, and
  - (b) is recoverable by the Company as a debt in a court of competent jurisdiction, and
  - (c) if payable by an insurable solicitor, is payable in addition to any contribution or levy that is payable under section 411 (Contributions) or 412 (Levies).



Schedule 8 Mortgage practices and managed investment schemes—provisions relating to old mortgages

## **Schedule 8 Mortgage practices and managed investment schemes—provisions relating to old mortgages**

(Section 490)

### **Part 1 Preliminary**

#### **1 Interpretation**

Expressions used in this Schedule have the same meanings as in Part 3.5 of this Act.

#### **2 Mortgage practices and management investment schemes**

- (1) Without limiting Part 2 of this Schedule, Part 3.5 (Mortgage practices and managed investment schemes) of this Act extends to mortgages that were entered into before the commencement of that Part.
- (2) Anything done or omitted to be done under Part 9 of the *Legal Profession Act 1987* before the commencement of Part 3.5 of this Act continues to have the same effect as if done or omitted to be done under Part 3.5 of this Act.
- (3) Part 3.5 of this Act has effect and is to be construed as if it included the provisions of this Schedule.

### **Part 2 Special provisions regarding mortgages entered into before 7 September 2001**

**Note.** This Part substantially re-enacts the provisions of Division 4 of Part 9 of the *Legal Profession Act 1987*.

#### **3 Part 3.5 of this Act extends to mortgages entered into before 7 September 2001**

Except as provided by this Part, Part 3.5 (Mortgage practices and managed investment schemes) of this Act extends to mortgages that were entered into before 7 September 2001 (the date of commencement of section 117 of the *Legal Profession Act 1987*, as

inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000*).

**4 Requirement to obtain fidelity insurance in respect of pre-existing mortgages**

- (1) Section 482 (Solicitor to have fidelity cover in respect of regulated mortgages) does not apply in respect of a regulated mortgage that was entered into before the relevant commencement date.
- (2) Despite subclause (1), section 482 applies in respect of a solicitor if money entrusted to the solicitor by a client (whether before, on or after the relevant commencement date) is advanced or proposed to be advanced on or after the relevant commencement date to a borrower for a regulated mortgage entered into before the relevant commencement date. In such a case:
  - (a) the solicitor must ensure that a policy of fidelity insurance is in force in respect of the advance in accordance with section 482, and comply with section 484 (Notification of insurance arrangements for regulated mortgage), and
  - (b) section 483 (Bar on claims against Fidelity Fund relating to regulated mortgages) applies to any claim against the Fidelity Fund in so far as it relates to such an advance.
- (3) For the purpose of applying section 484 (1) (Notification of insurance arrangements for regulated mortgage) in such a case, the date that money is entrusted to the solicitor by a client is taken to be the relevant commencement date, or the date on which the money is entrusted to the solicitor, whichever is the later.
- (4) This clause is subject to clause 6 (Substitution of lender or contributor under run-out mortgage) (which allows solicitors to substitute lenders under a run-out mortgage without obtaining fidelity insurance).
- (5) In this section:

***the relevant commencement date*** means the date of commencement of section 120 of the *Legal Profession Act 1987*, as inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000* (7 September 2001).

**5 No further action to be taken in respect of run-out mortgages**

- (1) A solicitor must not, in the solicitor's capacity as solicitor for a lender or contributor:
  - (a) advance any money entrusted to the solicitor to a borrower for a run-out mortgage, or
  - (b) do any work for the purpose of extending the term of a run-out mortgage, or
  - (c) accept any money from a client for the purpose of advancing that money to a borrower for a run-out mortgage, or
  - (d) do anything else with respect to a run-out mortgage in contravention of the regulations or the solicitors rules relating to run-out mortgages.
- (2) A contravention of this clause is capable of being professional misconduct.

**6 Substitution of lender or contributor under run-out mortgage**

- (1) A solicitor may, despite clause 5 (No further action to be taken in respect of run-out mortgages), accept money from a client, and do any other work that is necessary, solely for the purpose of substituting a lender or contributor under a run-out mortgage.
- (2) Section 482 (Solicitor to have fidelity cover in respect of regulated mortgages) does not apply in respect of such action. Accordingly, the solicitor is not required to obtain fidelity insurance for the purpose of compensating the substitute lender or contributor for any pecuniary loss.
- (3) If a client entrusts or proposes to entrust money to a solicitor for the purpose of substituting a lender or contributor under a run-out mortgage, the solicitor must give the client a notice in writing that advises the client:
  - (a) of the effect of clause 7 (No claims against Fidelity Fund by substitute lenders), and
  - (b) that the solicitor is not required to have fidelity insurance in respect of the run-out mortgage.
- (4) The solicitor must not advance the money to a borrower for a run-out mortgage unless the solicitor has given the client the notice referred to in subclause (3).

- (5) A contravention of this clause is capable of being professional misconduct.

**7 No claims against Fidelity Fund by substitute lenders**

A person who becomes a lender or contributor under a run-out mortgage on or after 7 September 2001 (the commencement of section 117 of the *Legal Profession Act 1987*, as inserted by the *Legal Profession Amendment (Mortgage Practices) Act 2000*), is not entitled to make a claim against the Fidelity Fund for the purpose of obtaining compensation for a pecuniary loss if the claim relates to that mortgage.

**8 Continuation of any existing entitlements against Fidelity Fund**

The provisions of Part 9 of the *Legal Profession Act 1987* continue to apply in respect of a claim against the Fidelity Fund in so far as the claim relates to:

- (a) a pecuniary loss resulting from an act or omission that occurred before the repeal of that Part, or
- (b) money entrusted to a solicitor before the repeal of that Part.

## Schedule 9 Savings, transitional and other provisions

(Section 737)

### Part 1 General

#### 1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:  
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### Part 2 Provisions consequent on enactment of this Act

#### 2 Definitions

In this Part:

**commencement** of a Chapter, Part or Division of this Act means the commencement of all or a majority of the sections of the Chapter, Part or Division.

**commencement day** means:

- (a) the date of commencement of this Act, except as provided by paragraph (b), or
- (b) if this Act commences on different days because of one or more proclamations under section 2:

- (i) the date of commencement of the relevant provision or provisions of this Act, unless subparagraph (ii) applies, or
- (ii) the date specified or referred to in the regulations.

*old Act* means the *Legal Profession Act 1987*.

### **3 General saving and transitional provision**

- (1) If anything of a kind required or permitted to be done under a provision of this Act was done under a corresponding provision of the old Act and still had effect immediately before the commencement day, the thing continues in effect on and after that day as if:
  - (a) this Act had been in force when it was done, and
  - (b) it had been done under this Act.
- (2) If subclause (1) applies in relation to the execution, lodgment, issue or publication of a written instrument, any reference in the instrument to a provision of the old Act is, for the purposes of that subclause, to be read as a reference to the corresponding provision of this Act.
- (3) Without limiting subclauses (1) and (2), if a provision of the old Act that corresponds to a provision of this Act would, but for its repeal by this Act, have applied in relation to anything done or being done or in existence before the commencement day, the provision of the new Act applies in relation to that thing, and so applies with any necessary adaptations.
- (4) This clause does not have effect to the extent that other provision is made by this Schedule or that the context or subject-matter otherwise indicates or requires, and has effect subject to the regulations.

### **4 Savings and transitional regulations**

Regulations under clause 1 relating to this Act have effect despite any provisions of this Part or Schedule 8 (Mortgage practices and managed investment schemes—provisions relating to old mortgages).

### **5 Roll of legal practitioners**

The Roll of Legal Practitioners kept by the Supreme Court before the commencement day is taken to be, or to form part of, the Roll of Local Lawyers under this Act.

## 6 Admission

A person:

- (a) who was admitted by the Supreme Court as a legal practitioner before the commencement day, and
- (b) whose enrolment by the Supreme Court was current or pending immediately before the commencement day,

is taken to have been admitted by the Supreme Court as a lawyer under this Act on the day on which the person was admitted as a legal practitioner.

**Note.** Schedule 8 to the old Act provided that a person who was enrolled by the Supreme Court as a barrister or solicitor at the date of commencement of Schedule 1 (2) to the *Legal Profession Reform Act 1993* (1 July 1994) was taken to be enrolled as a legal practitioner on the day on which the person was first admitted. This clause preserves that day as the date of admission as a lawyer for the purposes of this Act.

## 7 Applications for admission

- (1) An application for admission as a legal practitioner that was pending immediately before the commencement day is taken to be an application for admission as a lawyer under this Act.
- (2) The applicant may be admitted as a lawyer under this Act if the applicant could have been admitted as a legal practitioner under the old Act if this Act had not been enacted, and the admission requirements of this Act are taken to have been satisfied in relation to the applicant.

## 8 Declarations as to suitability

- (1) A declaration made under Division 3 of Part 2 of the old Act and in force immediately before the commencement day is taken to have been made under this Act.
- (2) An application for a declaration under Division 3 of Part 2 of the old Act that was pending immediately before the commencement day is taken to be an application for a declaration under Part 2.3 of this Act.

## 9 Practising certificates

- (1) A practising certificate granted under the old Act and:
  - (a) in force immediately before the commencement day, or

- (b) expressed to take effect on a date that is on or after the commencement day,

is taken to be granted under this Act.

- (2) An application for a practising certificate under the old Act that was pending immediately before the commencement day is taken to be an application for a practising certificate under this Act.

#### **10 New requirement for practising certificate**

- (1) This clause applies if:
  - (a) an Australian lawyer would, but for this subclause, be required to hold an Australian practising certificate in relation to carrying out an activity, and
  - (b) the lawyer would not be required to hold a practising certificate in relation to that activity had this Act not been enacted.
- (2) The lawyer does not commit an offence under Part 2.2 of this Act, and is taken not to have engaged in unsatisfactory professional conduct or professional misconduct under that Part, in relation to the activity.
- (3) Subclause (2) does not apply to an activity when carried out after 12 months after the commencement of Part 2.2 of this Act.

#### **11 Special powers in relation to practising certificates (bankruptcy etc)**

- (1) In this clause:
  - Division 1AA* means Division 1AA of Part 3 of the old Act.
  - new provisions* means Division 7 of Part 2.4 of this Act.
- (2) Division 1AA continues to apply in relation to an application for a practising certificate pending immediately before the commencement of the new provisions.
- (3) Anything commenced or under consideration by the Commissioner or a Council under Division 1AA immediately before the commencement of the new provisions may, subject to any directions of the Commissioner:
  - (a) be continued under Division 1AA as if this Act had not been commenced, or
  - (b) be continued under the new provisions.



- (4) For the purposes of subclause (3) (b), anything done or omitted under Division 1AA may be regarded as having been done or omitted under the new provisions or may be taken into consideration for the purposes of the new provisions, or both.

**12 Incorporated legal practices**

- (1) An incorporated legal practice providing legal services in accordance with the old Act immediately before the commencement day is not required to comply with section 137 (Notice of intention to start providing legal services).
- (2) Section 146 (Disclosure obligations) does not apply in respect of any matter for which services are first provided before the commencement day.
- (3) A disqualification imposed under section 47F of the old Act to have effect as if it were imposed under section 154 and this Act applies accordingly.

**13 Multi-disciplinary partnerships**

- (1) An Australian legal practitioner providing legal services as a member of a multi-disciplinary partnership in accordance with the old Act immediately before the commencement day is not required to comply with section 137 (Notice of intention to start providing legal services).
- (2) Section 173 (Disclosure obligations) does not apply in respect of any matter for which services are first provided before the commencement of that section.

**14 Foreign lawyers**

- (1) Registration as a locally registered foreign lawyer granted under the old Act and:
  - (a) in force immediately before the commencement day, or
  - (b) expressed to take effect on or after the commencement day,is taken to be granted under this Act.
- (2) An application for registration as a locally registered foreign lawyer under the old Act that was pending immediately before the commencement day is taken to be an application for registration as a locally registered foreign lawyer under this Act.

- (3) Nothing in subclause (1) permits a person registered as a foreign lawyer under the old Act immediately before the commencement day to continue to provide any services that are not permitted to be provided under Part 2.7 of this Act.

**15 Pending complaints before Tribunal**

- (1) This clause applies to a complaint that was made under the old Act and in respect of which proceedings instituted under the old Act in the Tribunal were pending immediately before the commencement day.
- (2) The complaint is to be dealt with as if this Act had not been enacted.

**16 Pending complaints but not before Tribunal**

- (1) This clause applies to a complaint that was pending under the old Act immediately before the commencement day, but does not apply to a complaint in respect of which proceedings were instituted in the Tribunal before that day.
- (2) The complaint is to be dealt with as if this Act had not been enacted, except in relation to proceedings in the Tribunal in respect of the complaint.
- (3) Part 4.8 of this Act, and any other relevant provisions of this Act, apply to the commencement of proceedings in the Tribunal in relation to the complaint, and so apply with any necessary adaptations.
- (4) Chapter 4 of this Act, and any other relevant provisions of this Act, apply to those proceedings, and so apply with any necessary adaptations.
- (5) However, the Tribunal may not make any determination or order of a disciplinary nature against the person in respect of whom the complaint was made that is more onerous than could have been made under the old Act.

**17 New complaints about old conduct**

- (1) This clause applies to conduct that occurred or is alleged to have occurred before the commencement day and that could have been the subject of a complaint under the old Act.
- (2) A complaint about the conduct may be made, and dealt with, under this Act, even if the conduct could not be the subject of a complaint if it had occurred after the commencement day.

- (3) Chapter 4 of this Act, and any other relevant provisions of this Act, apply to those proceedings, and so apply with any necessary adaptations.
- (4) However, the Commissioner, a Council or the Tribunal may not make any determination or order of a disciplinary nature against the person in respect of whom the complaint was made that is more onerous than that which could have been made under the old Act.

**18 Client information and legal costs**

- (1) Subject to subclauses (2) and (3), Part 3.2 of this Act applies to a matter if the client first instructs the law practice on or after the commencement day, and Part 11 of the old Act continues to apply to a matter if the client first instructed the law practice in the matter before that day.
- (2) Part 3.2 of this Act does not apply in respect of a law practice that is retained by another law practice on behalf of a client on or after the commencement day in relation to a matter in which the other law practice was retained by the client before that day, and in that case Part 11 of the old Act continues to apply.
- (3) Any assessment commenced under Part 11 of the old Act before the commencement day but not completed by that day may be completed under Part 11 of the old Act as if it had not been repealed.
- (4) Any bill that, immediately before the commencement day, was awaiting commencement of assessment under Part 11 of the old Act may be dealt with under Part 3.2 of this Act.

**19 Legal Practitioners Admission Board**

- (1) The Legal Profession Admission Board constituted under this Act is taken to be a continuation of and the same legal entity as the Legal Practitioners Admission Board constituted under the old Act.
- (2) The persons holding office as nominated members of the Legal Practitioners Admission Board immediately before the commencement day are taken to have been nominated under this Act as members of the Legal Profession Admission Board.

**20 Legal Practitioners Advisory Council**

The persons holding office as members of the Legal Practitioners Advisory Council immediately before the commencement day are

taken to have been appointed under this Act as members of the Legal Profession Advisory Council for the balance of the respective terms for which they were appointed.

**21 Legal Services Commissioner**

The person holding office as Legal Services Commissioner immediately before the commencement day is taken to be appointed under this Act on the same terms and conditions on which, and for the balance of the term for which, the person was appointed.

**22 Appeals or review**

- (1) An appeal or review that was pending under or in relation to any matter under a Part or Division of the old Act immediately before the commencement of a corresponding provision of this Act is taken to be an appeal or review under this Act, and may, subject to any order of the appeal body or review body, continue to be dealt with as if this Act had not been enacted.
- (2) The appeal body or review body may make orders declaring how the decision on the appeal or review is to have effect in relation to the provisions of this Act.

**23 Public Purpose Fund**

- (1) The Public Purpose Fund established under the old Act is taken to be established under this Act.
- (2) If the *Conveyancers Licensing Act 2003* is not in force, the costs of the Commissioner or the Tribunal in relation to the administration of Chapter 4 of this Act as applied by section 82 of the *Conveyancers Licensing Act 1995* are payable from the Public Purpose Fund, and payments may accordingly be made from that Fund.

**24 Legal profession rules**

Any rules made by a Council separately or jointly with the other Council and in force before the commencement day are taken to have been made under Part 7.5.

**25 Conveyancers Licensing Act**

If the *Conveyancers Licensing Act 2003* is not in force, a reference to it in this Act (except this Schedule) is taken to include a reference to the *Conveyancers Licensing Act 1995*.

Legal Profession Bill 2004

Schedule 9 Savings, transitional and other provisions

**26 References to barristers, solicitors or legal practitioners**

Without limiting the power to make regulations under this Schedule, the regulations may provide that a reference in another Act or statutory rule or other document to a barrister, solicitor, legal practitioner, counsel, attorney or similar term is to be read as a reference to an Australian legal practitioner or to an Australian legal practitioner of a class specified in the regulations.