

[Act 1996 No 113]



New South Wales

Legal Profession Amendment (National Practising Certificates) Bill 1996

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Legal Profession Act 1987* so as:

- (a) to allow lawyers who are entitled to practise in other Australian jurisdictions to practise in New South Wales without having to be admitted in New South Wales or to obtain New South Wales practising certificates, and
 - (b) to recognise disciplinary action taken against New South Wales lawyers by interstate regulatory authorities, and
 - (c) to rename the practising certificate for a “solicitor” as a practising certificate for a “solicitor and barrister”, and
 - (d) to repeal certain inoperative provisions of the Act relating to the application of the *Trade Practices Act 1974* of the Commonwealth, and
-

- (e) to clarify the operation of the fees disclosure provisions of the Act, and
- (f) to provide for the mediation of costs disputes in certain minor matters, and
- (g) to enable application fees for costs assessments to be waived in cases of hardship, and
- (h) to make provision for the recovery of the costs of the proper officer of the Supreme Court in costs assessments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the proposed Act to commence on a day or days to be proclaimed.

Clause 3 gives effect to the Schedules of amendments to the *Legal Profession Act 1987*.

National practising certificates

Schedule 1 [28] inserts proposed Part 3B (sections 48N—48ZD) into the Act. The Part will enable New South Wales to participate in a scheme applying throughout Australia providing for the legislative conferral of reciprocal rights to practise on the lawyers of participating States (defined in the proposed Part to include Territories). Each participating State will legislate to confer an automatic right to practise in the participating State on any lawyer entitled to practise in any other participating State. The scheme will not affect the ability of lawyers of one jurisdiction to seek registration as a lawyer in another under the *Mutual Recognition Act 1992* of the Commonwealth but differs from the scheme under that Act in that the right to practise is conferred simply by the lawyer being the holder of a current practising certificate (or a comparable authority) in a participating jurisdiction.

The right to practise will be subject to any conditions imposed on the lawyer by the practising certificate concerned and any conditions imposed in any participating jurisdiction as a result of disciplinary action. For example, if the practising certificate of a lawyer from another State permits the lawyer to practise in that State only under supervision, the lawyer will be required to practise in this State subject to the same limitation. A lawyer from another jurisdiction practising in this State will be subject to the same statutory

requirements and rules of practice and regulatory action by the Supreme Court, the Bar Council, the Law Society Council, the Legal Services Tribunal and the Legal Services Commissioner as that to which a local lawyer is subject. If the lawyer establishes an office in this State he or she will be required to comply with additional obligations that are the same or comparable to those with which local lawyers must comply relating to trust money, fidelity fund contributions and maintenance of indemnity insurance.

Part 3B contains the following provisions:

Proposed section 48N defines various terms for the purposes of the Part.

Proposed section 48O enables the Attorney General, by order published in the Gazette, to declare a law of another State to be a corresponding law for the purposes of Part 3B. A State in which a corresponding law is in force is a participating State for the purposes of the Part.

Proposed section 48P states the object of the scheme, which is to enable any individual who is authorised to practise law in one State to practise law in an equivalent way in all other States participating in the scheme.

Proposed section 48Q sets out the right to practise in this State described above that derives from the holding of a practising certificate in another jurisdiction.

Proposed section 48R enables a regulatory authority in this State (for example, the Bar Council or Law Society Council) to attach certain conditions to the practising certificate from which a right to practise is derived that it might attach to the practising certificate of a local lawyer.

Proposed section 48S describes the circumstances in which a lawyer from another jurisdiction will be taken to have established an office in this State.

Proposed section 48T requires a lawyer from another jurisdiction who establishes an office in this State to notify the Bar Council or the Law Society Council, as appropriate, of having done so.

Proposed section 48U requires a lawyer from another jurisdiction who establishes an office in this State to maintain comparable indemnity insurance to that which local lawyers are required to maintain.

Proposed sections 48V–48Z enable the regulatory authorities in this State and in other participating States to deal with disputes and complaints and to discipline lawyers practising in their jurisdictions under the scheme. It also enables such matters to be referred by a regulatory authority in one participating State to another and enables regulatory authorities in

participating States to furnish information to each other relating to disciplinary action against lawyers practising in participating States under the scheme.

Proposed section 48ZA requires a local lawyer who has not established an office in a participating State who receives trust money in the course of practising in that State to deal with it in accordance with Part 6.

Proposed section 48ZB enables a regulatory authority of this State to exercise functions conferred on it by a corresponding law.

Proposed section 48ZC enables a regulatory authority of this State to make various agreements and arrangements with regulatory authorities of other participating States.

Proposed section 48ZD requires a lawyer from another jurisdiction who does not establish an office in this State and whose indemnity under a policy of indemnity insurance is less than he or she would be required to maintain under section 48ZD if he or she had established such an office to disclose the difference to a client before he or she is retained.

Schedule 1 [1]–[3], [4], [7], [8], [10], [16], [20], [23]–[27], [29]–[46], [49]–[73] and [76]–[78] make related and consequential amendments. These include provisions to make it clear that a lawyer from another jurisdiction practising in this State under the scheme is an officer of the Supreme Court (**Schedule 1 [3]**), to make it an offence for such a lawyer to practise in this State unless holding a practising certificate (**Schedule 1 [7]**) and to apply provisions relating to trust accounts and fidelity fund contributions to such lawyers who open offices in this State (**Schedule 1 [30] and [34]**). Provision is also made to except such lawyers from some provisions of the Act (for example, only a local lawyer can be a barrister or solicitor member of the Legal Services Tribunal) (**Schedule 1 [59]**). Provision is also made to set out the circumstances in which a claim will lie against the Fidelity Fund in respect of pecuniary loss occurring as a result of failure to account or a dishonest default by lawyers practising under the scheme (**Schedule 1 [40]**).

Schedule 2 [10] inserts proposed clause 55 into Schedule 8 of the Act to make it clear that the entitlement conferred by proposed Part 3B arises even if the practising certificate from which the entitlement is derived was issued before the commencement of the Part.

Nomenclature of solicitors' practising certificates

Schedule 1 [12] renames the practising certificate for a “solicitor” as a practising certificate for a “solicitor and barrister” and **Schedule 1 [5], [6], [9], [11]–[15], [17]–[19], [21], [22], [47], [48], [74] and [75]** make consequential amendments flowing from this change.

Application of Trade Practices Act 1974

Schedule 2 [1] repeals Division 1AA of Part 3 of the Act, which is inoperative. Division 1AA applies the *Trade Practices Act 1974* of the Commonwealth to the legal profession, subject to corresponding Commonwealth laws.

The Division has been superseded by the *Competition Policy Reform (New South Wales) Act 1995*, which applies to the legal profession. Under the *Competition Code*, the rules made by the Law Society Council and Bar Council are subject to scrutiny by the Australian Competition and Consumer Commission which may seek to have a rule set aside if it imposes a restrictive or anti-competitive policy practice contrary to the provisions of the *Competition Code*.

Clarification of disclosure provisions

Schedule 2 [2] clarifies section 180 (which currently states that a disclosure of matters relating to costs is not required to be made if in the circumstances it is not reasonably practicable to do so) so that instead disclosure is not required when it would not be reasonable to be required to do so. The section in its current form has been interpreted as not permitting disclosure to be waived if, for example, a very low fee is involved. **Schedule 2 [3]** amends section 181 to enable the circumstances when disclosure is not required to be made to be specified in regulations or rules made with the approval of the Attorney General.

Mediation of costs disputes

Schedule 2 [4] inserts Division 5A into Part 11 of the Act. The proposed Division will enable the Legal Services Commissioner or the Bar Council or Law Society Council to mediate disputes about bills of costs on an informal basis if the amount in dispute is less than \$2,500.

Waiver of application fees for costs assessments

Schedule 2 [5] and **[6]** enable the proper officer of the Supreme Court to waive payment (in whole or in part) of the application fee for a costs assessment in cases of serious hardship to the applicant or his or her dependants.

Recovery of costs of costs assessments

Schedule 2 [7] and **[8]** make provision for the recovery of the costs of the proper officer of the Supreme Court in costs assessments. **Schedule 2 [10]** inserts proposed clause 56 into Schedule 8 to the Act to apply the provisions to costs assessments for which application is made before the commencement of the amendments.

Savings, transitional other provisions

Schedule 2 [9] enables regulations of a savings or transitional nature that are consequent on the enactment of the proposed Act to be made.