Reducing the Regulatory Burden on Business

Regulation Taskforce

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Executive Summary

The Law Council of Australia would like to thank the Regulation Taskforce for the opportunity to contribute to this very important initiative. A review of the effectiveness of Government regulation and its effect on business is long overdue. It is hoped that the work of the Regulation Taskforce will assist governments in identifying specific instances of inefficient or unnecessary regulation and to develop standards to ensure appropriate regulation is adopted in the future.

This submission concerns the following:

1. dual regulation of migration lawyers;

2. the role of ASIC as a regulator and administrator of the Financial Services Regulations; and

3. legislative standards.

The legal profession is subject to extensive regulation and oversight, under State and Federal legislation and under the general jurisdiction of the courts. Much of this regulation is important to the continued trust and confidence of the public in the legal profession. However, there are respects in which some regulation only contributes to the cost and uncertainty involved with practicing the law.

This submission outlines the Law Council's specific concerns over clear examples of unjustifiable and oppressive regulation, such as in the case of migration lawyers. The submission also raises concerns over the behaviour of regulators such as ASIC and the need for a review of the roles and functions of regulators in ensuring the proper objectives of legislative instruments are met. Finally, the submission will discuss the need for clear guidelines for allowing proper public consultation and debate over new regulatory options and consider the need for uniform legislative standards to eliminate overlap and inconsistency in legislative responses across jurisdictional borders.

The Law Council would be pleased to comment further on any of the matters raised in this submission and welcomes the opportunity to make further submissions, should the need arise.

DUAL–REGULATION OF MIGRATION LAWYERS

1. Migration lawyers are subject to 2 separate schemes of regulation, the extensive regulatory scheme applicable to the legal profession generally, and that applicable to the migration advice industry. The Law Council has long held concerns over the inclusion of lawyers in the migration agents regulatory framework and has made repeated submissions to the Commonwealth Government to have lawyers removed from that sphere of regulation.

2. The following briefly summarises the situation migration lawyers are presently faced with.

The Migration Agents Registration Authority (MARA)

3. The Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) appointed the Migration Industry Association (MIA) , the representative body for migration agents, as the industry self-regulating body in 1998. Subsequently, MIA established MARA to register and oversee the migration advice industry.

4. Persons wishing to register with MARA must complete a short course and a multiple-choice exam or hold tertiary legal qualifications. It is an offence under the *Migration Act 1958* (Cth) to provide migration advice unless registered with MARA.

5. Over time the powers of MARA have steadily increased. Under the *Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004* (the MAIM Act), MARA is required to take action against agents or lawyers who have submitted a high number of unsuccessful applications. DIMIA will refer agents to MARA for automatic sanctioning if:

   (a) they submit more than 10 applications in a particular visa class over a 6 month period; and

   (b) 75 per cent or more of those applications are refused (90 per cent in the case of temporary protection visas).

6. Complaints against migration advisers may be made with MARA and a list of individual migration agents against whom sanctions have been recorded is maintained on MARA's website. Lawyers are also subject to the complaints systems administered by the State and Territory professional conduct bodies.

Different regulatory standards for agents and lawyers

7. The standards imposed by MARA are much less onerous than those applicable to the legal profession under state and territory laws.

8. Lawyers are subject to continuing professional development (CPD) requirements under state and territory legislation, which conflicts with CPD

requirements imposed by MARA. Lawyers in most states are required to complete 10 hours of approved study or CPD activity in each year they are admitted to practice, while MARA requires 10 hours CPD in migration law as a requirement of registration. Lawyers generally distribute 10 hours over their various areas of practice. The additional requirement imposed by MARA results in migration lawyers having to complete 10 hours of CPD in migration law in addition to any CPD they complete in their other areas of practice.

9. Lawyers have completed years of legal education, post-graduate courses and vocational legal training in order to practice law. Migration agents are permitted to effectively provide legal advice and are given a competitive advantage to lawyers, despite a lack of any formal legal training. The relative cost to non-lawyers of becoming a migration agent is substantially smaller than for lawyers. The Law Council is not aware of any other case in which lawyers are required to compete directly against others who are almost wholly unqualified and who are subject to fewer regulatory burdens.

Inappropriate regulation of lawyers by MARA

10. The role and function of lawyers is fundamentally different to that of non-lawyer migration agents, many of whom have little understanding of the ethical standards required of legal advisers. Lawyers have a duty of care to their clients imposed under common law, statute law, contract and in equity. This duty requires a lawyer to act in their clients' best interests at all times.

11. Lawyers also have an overriding duty to the courts and no conflict of interest in performance of this duty can be permitted. Any association or membership maintained by a lawyer will be invalid, insofar as it may conflict with the lawyer's primary duty to the court. Indeed, in Canada and other jurisdictions, lawyers admitted to the Bar are not permitted to be members of any other association, to prevent any conflicts of interest occurring.

12. MARA is both the industry regulator and the industry lobby group, creating a substantial conflict of interest for MARA. MARA does not represent the legal profession, it represents non-lawyer agents and accordingly provides services and representation suitable to the interests of non-lawyers.

13. Indeed, there are a number of requirements imposed by MARA that conflict with central rights and immunities maintained by lawyers on behalf of their clients. For example, section 303C of the *Migration Act 1958* allows MARA to threaten lawyers and their clients with heavy fines or administrative penalties for failure to provide documents or information when requested, which almost certainly will be subject to legal professional privilege.

14. A further example is the effect of the thresholds imposed under the MAIM Act, as described above, for submission of high numbers of unsuccessful

applications. These thresholds have the potential to impact upon a lawyer's capacity to provide frank and fearless legal advice to a client. A lawyer who has had a number of applications refused by DIMIA may be influenced by fear or concern over penalties imposed by MARA if he or she advises a client to lodge an application in a particular visa class. This clearly interferes with the lawyer's duty to act in his or her client's best interests.

Inclusion of lawyers undermines aims of the regulatory scheme

15. Regulating lawyers under the same scheme as non-lawyers allows "unscrupulous agents" to hold themselves out as migration law advisers or "specialists" in migration services. This behaviour is misleading to consumers, many of who have poor English language and literacy skills and are therefore unlikely to understand the difference between an accredited practicing migration lawyer and a self-titled "migration specialist" with no legal skills or training.

16. Australia is the only country in the world to regulate migration lawyers in this way.

    - The United Kingdom allows solicitors, who are members of a designated professional body, to provide legal advice without registering and has appointed an independent statutory Office of the Immigration Services Commissioner.

    - The United States does not allow persons without legal qualifications to practice law.

    - Canada requires agents to register with the Canadian Society of Immigration Consultants. Lawyers are not required to register.

    - New Zealand recently considered the regulation of migration agents and the New Zealand Government has advised that any proposed regulation, if it proceeds, will only affect non-lawyers.

    - South Africa maintains a scheme of self-regulation and does not require lawyers to register.

Disincentive for lawyers practicing as migration agents

17. The Law Council objects to the regulation of immigration lawyers under the migration agents registration scheme as unnecessary and cumbersome. Inclusion of lawyers in the scheme adds nothing in terms of consumer protection to the existing regulatory schemes in each state and territory and creates a strong disincentive for lawyers considering practicing migration law.

18. On 1 January 2004 there were 3,260 registered migration agents, of whom only 777 held current legal practicing certificates – out of approximately

50,000 lawyers currently members of their local Law Society or Bar Association.

19. As lawyers cannot give advice on migration law matters, major difficulties can arise for both lawyers and clients when advising on other matters. These issues can arise, for example, in the context of family law, where clients often develop a strong relationship of trust and confidence with their solicitor. If an immigration law issue arises while giving more general advice on family law matters, unless the lawyer is registered as a migration agent, the client will be unable to obtain the comprehensive and strategic advice they require.

20. Another area where this problem can arise in the context of employment law, for in-house lawyers explaining employment contracts to foreign employees or employers considering sponsoring a worker for residence. As the lawyer will have to refer their client to another lawyer who is registered, this will usually result in clients suffering greater expense.

21. It is submitted that regulation of migration lawyers by MARA is a key example of excessive regulation, which is poorly targeted and undermines the stated objectives of the law makers.

THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

22. Regulatory bodies, such as ASIC, have an important role to play in reducing the burden of regulation on business. Regulators are empowered to ensure industry participants comply with the law, that they understand their legal obligations and that the law is upheld in accordance with the spirit of the regulations.

ASIC's role as regulator

23. The Law Council is concerned about ASIC's behaviour in administering the Financial Services Regulations (FSR).

24. The FSR were implemented in 2002 requiring all financial service providers to obtain a license or apply for an exemption. Financial services include, among other things, fidelity funds, professional indemnity schemes, statutory deposit accounts and public purpose funds. Accordingly, the Law Council's constituent bodies are affected by FSR, insofar as they operate fidelity funds and professional indemnity schemes on behalf of their members.

25. Since the introduction of FSR, the Law Council has, on behalf of its constituent bodies, sought permanent relief from the requirement to hold a financial services licence. ASIC released a temporary class order relief in December 2003, which expired in June 2005, at which time a second application for permanent relief was made. ASIC has again issued temporary relief by way of class order, which will expire next year.

26. In each instance, ASIC has required payment from *each constituent body* a sum of $2,080 in lieu of the relief sought. Further, ASIC has advised that it is unable to grant permanent relief as it has not yet determined its approach to mutual funds. This justification has been made, despite that a number of the Law Council's constituent bodies do not maintain mutual funds.

27. The uncertainty and ongoing cost to the Law Council's members caused by ASIC's failure to determine its approach to mutual funds in this instance appears to defeat the purpose for which the regulations were enacted. In his address to ASIC on 9 February 2005, the Hon Chris Pearce MP stated that FSR aimed to:

    (a) provide the financial services industry with a uniform and consistent regulatory framework;

    (b) provide industry participants with greater flexibility through the adoption of a more principles based approach to regulation across services and products; and

    (c) enhance consumer protection by improving standards of conduct and disclosure across the financial services industry.

28. At the time FSR was enacted it was not intended that Law Societies and Bar Associations providing services for the benefit of consumers would be caught. Fidelity funds and professional indemnity services enhance consumer confidence in the legal profession generally and allow those who suffer loss as a result of a lawyer's defalcation of trust funds or negligent conduct to recover those losses. Therefore, from a public policy perspective, there would be no loss of consumer protection as a result of ASIC granting permanent relief, so there does not appear to be any rational basis for ASIC's inordinate delay in determining its approach to mutual funds and thereby improving certainty for the Law Council's constituent bodies.

29. The Law Council submits that the present situation is undesirable and is representative of a concerning feature of ASIC's behaviour as regulator.

ASIC's role in administering FSR

30. ASIC has extensive powers at its disposal under the financial services regulations and is capable of issuing significant penalties to parties in breach of their obligations under the Act. However, it is often unclear whether the regulations apply to certain entities or transactions on an ordinary interpretation of the regulations.

31. For example, litigation funding companies agree to pay the legal costs of a potential litigant for a share of the court awarded damages if the action is successful. It is unclear whether this amounts to a financial service and, *prima facie*, lending money or guaranteeing a person against potential losses is not considered to be a financial product on any reading of the

information published by ASIC on its website. However, when asked to resolve this issue, ASIC responded that:

(a) ASIC does not provide legal advice to external parties and therefore requests for determinations of this nature are generally treated as inquiries;

(b) ASIC considers litigation funding to be a "derivative", which is a financial product for the purposes of the regulations; and

(c) ASIC has granted case-by-case individual relief in the past to certain types of litigation funding arrangements.

32. The Law Council has been advised that this information is contrary to legal advice received by the Standing Committee of Attorneys-General, which is considering how best to regulate litigation funding in Australia. According to that advice, litigation funding companies are not subject to the financial service regulations. The Law Council is aware of one funder that has voluntarily obtained a financial services license to remove any uncertainty, while 4 other major funders are operating without having ever held a license or certificate of exemption from the regulations.

33. The apparent uncertainty as to how the regulations will be interpreted is a cause for serious concern among companies considering entering into the litigation funding market, which is an important industry for improving access to justice and facilitating actions that would normally be precluded for reasons of cost. The Law Council notes that this uncertainty is not limited to litigation funders or lawyers, but extends to many other areas affected by the financial service regulations.

34. To address this uncertainty, industries dealing with financial services would benefit if ASIC were to establish a public ruling system, similar to that conducted by the Australian Tax Office on GST issues.

35. As a general statement of principle, an industry regulator such as ASIC should have the capacity to provide binding advice as to how it will interpret and apply its regulations if it receives a formal request to do so.

LEGISLATIVE STANDARDS

36. The Law Council is also concerned about a clear reduction in the level of scrutiny of new legislation and a failure by governments to adopt uniform national legislative standards to ensure consistency across jurisdictions. This has led to a patchwork of legislative schemes setting down different requirements for legal services and other industries, depending on the jurisdiction of choice. This problem has been exacerbated by what seems to be a policy of government and public service departments providing only short consultation periods and limiting the time available for proper

comment on the appropriateness of the new laws to deal with the particular problem at hand.

Inadequate consultation and debate

37. The Law Council is aware of an emerging trend of governments and public service agencies providing unjustifiably short consultation periods and failing to consult or properly brief relevant stakeholders.

38. Consultation and public debate is necessary in every case where regulation is to be imposed or removed and the time allowed for consultation should be commensurate with the complexity of the legislative instrument and the nature of the rights affected by the change. Clearly, a full and proper discussion is warranted where fundamental democratic rights are affected, such as civil, political, social, cultural and economic rights.

39. The passage of the Work Choices legislation is a topical example of a failure to allow proper scrutiny and assessment of the benefits of major reforms that substantially affect the rights of Australian workers. The Bill was introduced into the House of Representatives on 2 November 2005, and the Senate was permitted 1 week from that time to consider more than 6000 submissions received in relation to the Bill and to consider the provisions of a Bill totalling nearly 700 pages (and over 500 pages of explanatory memoranda). The Law Council was not consulted prior to that time and has since learned that private briefings were given to certain business stakeholders to the exclusion of others. The Law Council agrees with a number of public comments made in recent weeks that the process of law making in these circumstances demonstrates a gross breach of the appropriate standards of good-government.

40. Numerous other examples exist to illustrate the departure by governments from proper standards of legislative scrutiny. Short reporting periods for a number of recent legislative reviews, such as the ALRC review of Sentencing of Federal Offenders and the Native Title Claims Resolution Review, have allowed government agencies just 1 month to receive comments and submissions from interested stakeholders. This is grossly inadequate and results in a substantial prejudice to organisations, such as the Law Council, which must draw upon the views of its members and experts in the profession to formulate a reasonable response.

41. In the context of business regulation, the consequences of limited consultation and debate may be that laws are enacted with which businesses are either unable to comply, or will face substantial hardship in doing so. It is submitted that the only means by which legislators are able to develop regulatory responses appropriate to industry is by allowing for full and proper consideration of the options, the views of industry participants and stakeholders and the likely impact of the laws.

Absence of uniform legislative standards

42. In drafting terms, the failure to adopt uniform national legislative standards is also a matter that bedevils all those engaged in matters, whether social, cultural, political or commercial, across the borders of the Australian States and Territories. Reform of legislative standards is long overdue and should be put on the national reform agenda.

43. A key example of the need for reform is in the national profession project, which aims to harmonise the regulatory environment for the legal profession and facilitate a national market for legal services. Model legislation has been settled for national adoption but uniform numbering, an elementary requirement, has not been mandated and the difficulties of implementing identical, but differently numbered, provisions in State and Territory versions of the model legislation are both costly and confusing. In addition, some provisions that are supposed to be literally uniform are being varied due to differing drafting styles and legislative standards policies.

44. The absence of uniform legislative standards has a deleterious impact on industry in all business sectors, due to the onerous task of complying with varying legislative schemes in different States and Territories. The failure by Governments to address this issue has resulted in a confusing network of laws that lawyers and other professions must navigate in order to carry out business across State borders.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.