

COAG NATIONAL LEGAL PROFESSION REFORMS

Report on key issues and amendments made to the National Law since December 2010

Background

In February 2011, COAG tasked its senior officials, advised by the National Justice CEOs Group (**NJCEOs**), with finalising amendments to the Legal Profession National Law. The Secretary of the NJCEOs, supported by NSW, Victorian and Commonwealth Government officials, consulted with key stakeholders to develop amendments to address remaining concerns about the operation of the National Law. A number of submissions from key stakeholders were received and considered during this process.

The NJCEOs did not support all of the changes proposed by stakeholders, including calls to return to a more prescriptive, formal approach to costs disclosure. The key issues raised by stakeholders, and the amendments made in response, are described in further detail below.

Appointments to the National Legal Services Board

The National Law achieves the right balance for appointing members to the National Legal Services Board (**Board**), which includes a strong role for the legal profession in recognition. The approach taken under the National Law recognises the longstanding co-regulatory model of legal profession regulation, and ensures that no one stakeholder group will control the nomination of the majority of the Board.

The Attorneys General of participating jurisdictions will nominate three of the seven members of the Board. The Law Council of Australia (**LCA**) and the Australian Bar Association (**ABA**) will also nominate three members. The remaining member, the Chair, will be appointed only with the concurrence of the LCA and ABA. The National Law requires the Attorneys General of participating jurisdictions to consult with the LCA and ABA to reach agreement on the appointment of the Chair. This effectively gives the profession a veto power unless it is satisfied with the proposed nominee for the Chair.

Under previous proposals, the Council of Chief Justices was also to be included in these consultation and concurrence arrangements. However, the Council indicated in late 2010 that it did not wish to participate in the proposed arrangements.

Liability of principals

Section 3.2.5 of the National Law has been amended so that it targets the “defaulting principal” in relation to a contravention of the National Law or National Rules by a law practice. It now provides that, if a law practice contravenes a provision of the National Law or National Rules imposing an obligation on the law practice, a principal of the law practice is taken to have contravened the same provision only if one of the following grounds is made out:

- the principal knowingly authorised or permitted the contravention; or

- the principal:
 - was in, or ought reasonably to have been in, a position to influence the conduct of the law practice in relation to its contravention of the provision; and
 - failed to take reasonable steps to prevent the contravention by the law practice.

Costs disclosure reforms - informed consent

Concerns were raised about the clarity of the requirement in section 4.3.6(4) of the National Law for a law practice to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs. This new approach to costs disclosure is an important reform, designed to focus on the substance rather than the form of disclosure. This will require legal practitioners to exercise their professional judgment in the circumstances of each matter. Lawyers are well placed to apply a standard of “reasonableness” in disclosing costs to clients.

The National Board, as the national standard-setter, will have the power to make National Rules providing guidance on how to satisfy the requirement if it considers it appropriate to do so.

Costs disclosure threshold

Submissions were received that the costs disclosure threshold of \$750 in the National Rules did not reflect the current threshold under legal profession legislation in some jurisdictions. In response, the costs disclosure threshold has been raised in the National Rules from \$750 to \$1,500. As the threshold is specified in the National Rules, it may be amended by the Board once the national scheme is in operation.

Professional indemnity insurance (PII)

Section 4.4.8 of the National Law now provides that, where a multi-jurisdictional law practice has taken out PII in one jurisdiction but intends to change the jurisdiction in which it holds PII, it must notify the relevant PII provider of that intention before the date specified in the applying legislation of the relevant jurisdiction, or as soon as practicable thereafter. The amendment is designed to ensure that PII providers in each jurisdiction (particularly smaller jurisdictions) are able to plan for the possible movement of multi-jurisdictional law practices in and out of their schemes.

Lodgement of disputed costs with the National Legal Services Commissioner

In response to concerns about potential hardship to law practices as well as complainants, the provisions enabling the Commissioner to require either party to a complaint to lodge the whole or a specified part of the disputed amount of legal costs have been deleted from the National Law.

Local representatives of the Commissioner

Section 8.3.5(4) The National Law provides that local representatives of the Commissioner must be independent statutory bodies or office holders (not being professional legal associations). The independent local representative may then

delegate its complaints handling functions to professional legal associations. This ensures that complaints handling will be subject to independent oversight in each jurisdiction. However, the National Law has been amended so that the requirement for the local representative of the Commissioner to be an independent statutory body is confined to the Commissioner's complaint-handling functions, not its compliance functions.

The amended approach allows a professional association to be designated as a local representative of the Commissioner in respect of any 'special functions' of the Commissioner other than its complaints handling functions. The compliance functions of the Commissioner are generally matters traditionally undertaken by Law Societies and Bar Associations (e.g. trust account oversight, external intervention and compliance auditing). Under these changes to the National Law, the existing arrangements at the State and Territory level in relation to these functions will continue.

National Rules generally

Previous advice to COAG indicated that the endorsed Rules developed by the Taskforce would be made simultaneously with the passage of the National Law, subject to a unique arrangement for 'initial National Rules'.

It has since been agreed that the National Rules not be made until immediately prior to the commencement of the National Law, and that they should be subject to the conventional process for making Rules as set out in Chapter 9 of the National Law.

The National Legal Services Board would be established in the host jurisdiction with sufficient lead-time prior to the commencement of the scheme to allow the Board to review and make the first set of National Rules. A number of submissions were received on specific matters in the National Rules that will be considered by the Board in making the first set of National Rules.