

Legal Profession Amendment (Practice of Foreign Law) Bill 1998

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 to regulate the practice of foreign law in New South Wales by foreign lawyers. The Bill inserts a new Part 3C into the Act. The new Part will require foreign lawyers (who are not also legal practitioners who are barristers or solicitors within the meaning of that Act) who are engaging in the practice of foreign law in New South Wales otherwise than on a temporary basis to register with either the Bar Council or the Law Society Council. While registered foreign lawyers will be prohibited from practising in matters governed by Australian law they will be permitted to provide various equivalent services in matters that specifically relate to or are governed by the law of their country. Foreign lawyers will be subject to similar requirements relating to handling of disputes, complaints and trust accounts as those governing New South Wales legal practitioners. Foreign lawyers will be allowed to go into partnership with or be employed by New South Wales legal practitioners. They may (if practising in partnership with or as an employee of a domestic lawyer or firm of domestic lawyers) also be required to make contributions to the Fidelity Fund and will be required to obtain professional indemnity insurance.

Outline of provisions

Part 1 Preliminary

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

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

Clause 3 is a formal provision giving effect to the amendments to the *Legal Profession Act 1987* as set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [1] inserts definitions into section 3 of the Principal Act for the purposes of proposed Part 3C.

Schedule 1 [2] inserts section 5A into the Principal Act to make it clear that a locally registered foreign lawyer who practises foreign law in this State is not an officer of the Supreme Court.

Schedule 1 [3] amends section 48E of the Principal Act so that a locally registered foreign lawyer who does legal work that the lawyer is permitted to do under proposed Part 3C does not commit the offence contained in section 48E of directly or indirectly doing any general legal work, or any probate work for a fee, when not a barrister or solicitor.

Schedule 1 [4] inserts a new Part 3C (sections 48ZE–48ZAE) into the Principal Act. It contains provisions regulating the practice of foreign law in New South Wales by foreign lawyers. Foreign lawyers who are engaging in the practice of law other than on a temporary basis will be required to

obtain registration from either the Bar Council or the Law Society Council. The new Part contains the following provisions:

Division 1 Preliminary

Section 48ZE sets out definitions of terms and expressions used in the new Part. *Practise foreign law* is defined to mean doing work, or transacting business, in New South Wales concerning foreign law, being work or business of a kind that, if it concerned the law of New South Wales, would ordinarily be done or transacted by a domestic lawyer. A *domestic lawyer* is defined as a person (including a foreign lawyer) who is a barrister or solicitor (within the meaning of the Principal Act). A *foreign lawyer* is defined as a person who is duly registered to practise law in a place outside Australia by a foreign registration authority.

Section 48ZF states that the principal purpose of the new 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 the State by foreign-registered lawyers as a recognised aspect of legal practice in the State.

Section 48ZG makes it clear that the new Part applies to any individual (other than a person who is a domestic lawyer) who practises foreign law in the State and states that nothing in the Part requires a domestic lawyer (including a foreign lawyer who is also a domestic lawyer) to be registered as a foreign lawyer under the Part in order to practise foreign law in the State.

Division 2 Local registration of foreign lawyer

Section 48ZH makes it an offence for a person to practise foreign law in the State unless the person is a domestic lawyer (or a person employed by a domestic lawyer to provide advice on foreign law to, and for use by, the domestic lawyer) or a foreign lawyer who is either registered in accordance with the new Part or is only practising in the State on a temporary basis.

Section 48ZI enables a foreign lawyer to apply to the Bar Council or the Law Society Council (the **domestic registration authorities**) for registration and sets out the information and documents that must be provided with the application. The domestic registration authority is not required to carry out any independent investigations of its own in deciding whether or not to grant registration but may require the applicant to verify the information by statutory declaration or other proof acceptable to it or by provision of evidence from the authority that registered the foreign lawyer to practise law in a place outside Australia.

Section 48ZJ requires an applicant for registration as a foreign lawyer to pay such an application fee as is determined by the domestic registration authority and approved by the Attorney General. The fee cannot include any component for compulsory membership of a professional association such as the Bar Association or the Law Society.

Section 48ZK requires the domestic registration authority to grant registration if the requirements for registration set out in the section are satisfied. The foreign lawyer is not required to reside in the State in order to obtain registration.

Section 48ZL enables the domestic registration authority to impose certain conditions on the practice of foreign law in the State of a foreign lawyer registered by the authority. The conditions may reflect New South Wales practice requirements. However, the domestic registration authority must not impose a condition that is more onerous than a condition that it would impose on a domestic lawyer in analogous circumstances.

Section 48ZM requires the domestic registration authority to give the applicant written notice of its decision in relation to registration. For the purposes of any appeal under proposed section 48ZR, if notice is not given within the prescribed period after the application is lodged the application is taken to have been refused.

Section 48ZN provides for the duration of registration and enables a foreign lawyer to apply for renewal of registration on payment of an annual fee.

Section 48ZO enables the domestic registration authority to refuse to register, or renew the registration of, a foreign lawyer under the new Part in specified circumstances.

Section 48ZP enables the domestic registration authority to publish the names of, and relevant

particulars concerning, foreign lawyers registered by it.

Section 48ZQ enables the domestic registration authority to cancel the registration of a foreign lawyer on grounds set out in the section. Grounds listed include failure to comply with any condition imposed on the lawyer's registration under the new Part or with any requirements of the new Part. Registration may be cancelled if the foreign lawyer's registration to practise as a lawyer in his or her own country is cancelled as a result of criminal, civil or disciplinary proceedings. It may also be cancelled if the lawyer's registration to practise as a lawyer in his or her own country lapses. However, registration is not to be cancelled on this ground if the lapse results from circumstances beyond the lawyer's control (for example, civil war in the lawyer's own country).

Section 48ZR enables a foreign lawyer to appeal to the Supreme Court against a refusal to register or renew the registration of the lawyer under the new Part, a cancellation of registration or any action taken against the lawyer under section 55 of the Principal Act.

Division 3 Legal practice

Section 48ZS restricts the legal services that may be provided by a locally registered foreign lawyer. Legal services that may be provided are those that consist of doing work, or transacting business, concerning the relevant foreign law, those that relate to arbitration proceedings of a kind prescribed by the regulations and those that relate to proceedings where knowledge of the relevant foreign law is essential.

Section 48ZT allows a locally registered foreign lawyer (subject to any conditions to the contrary imposed under proposed section 48ZL) to practise as a sole practitioner or as a partner or employee of a New South Wales firm. The partnership may be with any combination of domestic lawyers or with other registered foreign lawyers.

Section 48ZU prohibits a locally registered foreign lawyer from engaging in any conduct in practising foreign law that would, if the conduct were engaged in by a domestic lawyer practising Australian law in New South Wales, constitute professional misconduct or unsatisfactory professional conduct.

Section 48ZV provides for disciplinary action to be taken against locally registered foreign lawyers under Part 10 of the Principal Act. In assessing whether disciplinary action should be taken, the domestic registration authority may take into account whether the conduct concerned was consistent with the standards of professional conduct of the legal profession in the foreign lawyer's own country.

Sections 48ZW and **48ZX** set out the designations that locally registered foreign lawyers may use to describe themselves. Apart from the foreign lawyer's own name, the foreign lawyer may use the title or business name the lawyer uses in his or her own country. The lawyer may also use the name of any foreign partnership or body corporate with which the lawyer is associated so long as the lawyer has provided the domestic registration authority with proof of membership and that use of the name complies with the laws of New South Wales about business names and will not lead to confusion with any local firm. A locally registered foreign lawyer is not required to describe himself or herself as a legal practitioner and may continue to use the titles (for example, "barrister", "lawyer" or "solicitor" used by the lawyer in his or her own country). Foreign lawyers may similarly include in the description of any Australian partnership of which they are a member, and which contains both domestic lawyers and locally registered foreign lawyers, a combination of the distinguishing titles that the domestic and foreign lawyers are each entitled to use in their respective jurisdictions (for example, "Australian Solicitors and US Attorneys").

Section 48ZY requires locally registered foreign lawyers to comply with any relevant advertising restrictions imposed by the domestic registration authority or by law and prohibits them from using any advertising suggesting that they are domestic lawyers.

Section 48ZZ allows a locally registered foreign lawyer to employ one or more domestic lawyers. This does not entitle the foreign lawyer to engage in legal practice (other than practice of foreign law) in New South Wales. Generally, a domestic lawyer employed by a foreign lawyer may not engage in legal practice or provide advice on the law of New South Wales or another Australian jurisdiction to or for the use of a foreign lawyer.

Section 48ZAA requires locally registered foreign lawyers to maintain professional indemnity

insurance that is broadly equivalent to the coverage required to be held by domestic lawyers.

Section 48ZAB requires locally registered foreign lawyers who receive money on behalf of other persons in the course of practising as foreign lawyers in New South Wales to maintain trust accounts and provides for the application of Part 6 to such lawyers and prevents locally registered foreign lawyers from practising unless any Fidelity Fund requirements imposed by regulations under proposed section 78A are complied with.

Section 48ZAC gives the domestic registration authority the power to exempt locally registered foreign lawyers, whether individually or in classes, from having to comply with specified provisions of the Principal Act or regulations or from compliance with any rule.

Division 4 Miscellaneous

Sections 48ZAD and **48ZAE** make provision for certain miscellaneous matters relating to membership of professional associations and the rules to which the practice of a locally registered foreign lawyer is subject.

Schedule 1 [5]–[16] make consequential amendments to sections 54 and 55 of the Principal Act relating to the conferral on the Law Society Council of functions as a domestic registration authority under proposed Part 3C. The amendments to section 55 enable the Law Society Council to investigate the affairs of a locally registered foreign lawyer in certain circumstances.

Schedule 1 [17]–[19] amend sections 57A–57C of the Principal Act to enable the Bar Council and the Law Society Council to make rules for or with respect to practice as a locally registered foreign lawyer.

Schedule 1 [20] inserts a new section 57CA into the Principal Act to enable the Bar Council and the Law Society Council to make joint rules for or with respect to practice as a locally registered foreign lawyer.

Schedule 1 [21]–[25] make consequential amendments to provisions of Parts 6 and 7 relating to the requirements imposed on locally registered foreign lawyers under new Part 3C to keep trust accounts and make Fidelity Fund contributions. A locally registered foreign lawyer who practises in partnership with, or as an employee of, a domestic lawyer or firm of domestic lawyers may be required by the regulations to make Fidelity Fund contributions.

Schedule 1 [26] inserts a new section 91A into the Principal Act to apply the provisions of Part 8 (Receivers) of the Principal Act to locally registered foreign lawyers.

Schedule 1 [27]–[31] make consequential amendments to various provisions of Part 10 of the Principal Act required because of the application of that Part to locally registered foreign lawyers under proposed Part 3C.

Schedule 1 [32] inserts a new section 174B into the Principal Act to apply Part 11 (Legal fees and other costs) to locally registered foreign lawyers.

Schedule 1 [33] extends section 213A (Evidentiary certificates) of the Principal Act to locally registered foreign lawyers.

Schedule 1 [34] amends section 216 of the Principal Act to enable certain regulations to be made with respect to locally registered foreign lawyers.