

Passed by both Houses



New South Wales

Legal Profession Amendment (National Competition Policy Review) Bill 2002

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Legal Profession Act 1987 No 109	2
Schedule 1 Amendments	3

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, , 2002*



New South Wales

Legal Profession Amendment (National Competition Policy Review) Bill 2002

Act No , 2002

An Act to amend the *Legal Profession Act 1987* to make further provision with respect to the practice of barristers and solicitors; 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.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Legal Profession Amendment (National Competition Policy Review) Act 2002*.

2 Commencement

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

3 Amendment of Legal Profession Act 1987 No 109

The *Legal Profession Act 1987* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 3 Definitions

Omit the definitions of *home State* and *participating State* from section 3 (1).

[2] Section 3 (1)

Insert in alphabetical order:

practising certificate fee means the fee payable for the issue of a practising certificate under section 29A or 29B.

[3] Section 25 Requirement for practising certificate

Omit “a participating State” wherever occurring in section 25 (3A), (3B) and (3C).

Insert instead “another State or a Territory”.

[4] Section 29 Fees

Omit the section.

[5] Sections 29A–29E

Insert before section 30:

29A Fee for practising certificate—barristers

- (1) A fee is payable for the issue of a practising certificate authorising a legal practitioner to practise as a barrister of such amount as is determined by the Bar Council and approved by the Attorney General.
- (2) The Bar 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) The Bar Council may waive payment of the practising certificate fee or any part of the fee.

- (4) Subject to the regulations (if any), the Bar 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 Bar Council or Bar Association.
- (5) The *regulatory functions* of the Bar Council or Bar Association are the functions of the Bar Council or Bar Association under this Act, and any other functions the Bar Council or Bar Association 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 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 barristers become entitled as members of the Bar Association.
Note. Section 57M provides for membership of the Bar Association. It is not compulsory for barristers to be members of the Bar Association.
- (7) In addition, in determining the practising certificate fee, the Bar Council must exclude costs that are otherwise recoverable under this Act (for example, costs payable from the Public Purpose Fund under Division 2 of Part 6).
- (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.

29B Fee for practising certificate—solicitors

- (1) A fee is payable for the issue of a practising certificate authorising a legal practitioner to practise as a solicitor of such amount as is determined by the Law Society Council and approved by the Attorney General.
- (2) The Law Society Council may determine different practising certificate fees according to such different factors as are specified in the determination and approved by the Attorney General.

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- (3) The Law Society Council may waive payment of the practising certificate fee or any part of the fee.
 - (4) Subject to the regulations (if any), the Law Society 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 Law Society Council or Law Society.
 - (5) The *regulatory functions* of the Law Society Council or Law Society are the functions of the Law Society Council or Law Society under this Act, and any other functions the Law Society Council or Law Society 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 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 solicitors become entitled as members of the Law Society.
Note. Section 57MA provides for membership of the Law Society. It is not compulsory for solicitors to be members of the Law Society.
 - (7) In addition, in determining the practising certificate fee, the Law Society Council must exclude any costs that are otherwise recoverable under this Act (for example, costs payable from the Public Purpose Fund under Division 2 of Part 6).
 - (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.

29C Late fee

If an application for a practising certificate is accepted by a Council after the end of the period prescribed by the regulations 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.

29D 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 29A or 29B if the relevant Council has failed to submit a budget as required under this section.
- (4) In this section:
costs includes expenses.

29E 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.

[6] Section 30 Refusal of application for practising certificate as barrister or solicitor

Insert “(unless payment of the fee has been waived by the Council)” after “appropriate fee” in section 30 (1) (a).

[7] Section 38J Advertising

Insert after section 38J (2):

(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.

[8] Section 38K Specialisation

Insert “or approved” after “conducted” in section 38K (b).

[9] Section 38K (2)

Insert at the end of section 38K:

(2) The Bar Council or Law Society Council is required to approve an accreditation scheme if directed to do so by the Attorney General.

[10] Section 48B Unqualified person acting as barrister or solicitor and barrister

Omit “a participating State” from section 48B (6).

Insert instead “another State or a Territory”.

[11] Section 48G Multidisciplinary partnerships

Omit section 48G (1). Insert instead:

- (1) A barrister or solicitor (other than a barrister or solicitor who is an interstate legal practitioner) may be in partnership with a person who is not a barrister or solicitor.

[12] Section 48G (4)

Insert “or anything to the contrary in the solicitors rules” after “48K”.

[13] Section 48G (5) and (6)

Insert after section 48G (4):

- (5) However, in the case of barristers, this section has effect except to the extent (if any) that the barristers rules otherwise provide.
- (6) The regulations may make provision for or with respect to the business of a partnership in which a barrister or solicitor is authorised by this section to be a member.

[14] Section 48N Definitions

Omit the definition of *corresponding law*. Insert instead:

corresponding law means a law of another State or a Territory relating to regulation of legal practice.

[15] Section 48N, definitions of “home State”, “participating State” and “State”

Omit the definitions.

[16] Section 48N, definition of “interstate legal practitioner”

Omit “a participating State” and “that State” wherever occurring.

Insert instead “another State or a Territory” and “that State or Territory” respectively.

[17] Section 48N, definition of “regulatory authority”

Omit “a participating State” and “that State”.
Insert instead “another State or a Territory” and “that State or Territory”
respectively.

[18] Section 48O Corresponding law

Omit the section.

[19] Part 3B, Division 2, heading

Omit the heading. Insert instead:

**Division 2 Entitlement of interstate practitioners to
practise in this State**

[20] Section 48P

Omit the section. Insert instead:

48P Object of Division

The object of this Division is to enable any individual who is
authorised to practise law in another State or a Territory and
who holds an interstate practising certificate to practise law in
an equivalent way in this State.

**[21] Section 48Q Entitlement of interstate legal practitioners to practise in
this State**

Omit “any participating State” from section 48Q (1).
Insert instead “any other State or a Territory”.

[22] Section 48Q (1) (b)

Omit “the participating State”.
Insert instead “the other State or the Territory”.

[23] Section 48Q (2) (b) and (4)

Omit “this or any other participating State” wherever occurring.
Insert instead “this State or any other State or a Territory”.

[24] Section 48V Disputes about the practice of local legal practitioners in other States or Territories

Omit “a participating State” wherever occurring in section 48V (1), (2) and (3).
Insert instead “another State or a Territory”.

[25] Section 48V (1), (2) and (3)

Omit “the participating State” and “that State” wherever occurring.
Insert instead “the other State or the Territory” and “that State or Territory” respectively.

[26] Section 48V (4)

Omit “another participating State”.
Insert instead “another State or a Territory”.

[27] Section 48W Referral of disputes and disciplinary matters to other regulatory authorities

Omit “a participating State” wherever occurring in section 48W (1), (2) and (3).
Insert instead “another State or a Territory”.

[28] Section 48W (1), (2) and (3)

Omit “that State” wherever occurring.
Insert instead “that State or Territory”.

[29] Sections 48X, 48Y, 48Z, 48ZA and 48ZC

Omit “a participating State” wherever occurring.
Insert instead “another State or a Territory”.

[30] Section 48Z (3) and (5)

Omit “that State” wherever occurring.
Insert instead “that State or Territory”.

[31] Section 57CC

Insert after section 57CB:

57CC Councils to give public notice of proposed rules

- (1) Before a barristers rule, solicitors rule or joint rule is made, the Council or Councils proposing to make the rule are required to ensure that a notice is published in the Gazette and in a daily newspaper circulating throughout New South Wales:
 - (a) explaining the object of the proposed rule, and
 - (b) advising where a copy of the proposed rule may be obtained or inspected, and
 - (c) inviting comments and submissions within a specified period, being a period of not less than 21 days from the date of 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 the making of comments and submissions and must ensure that any comments and submissions received within that period are appropriately considered.
- (4) The Council or Councils may make the rule without waiting for the end of the period specified in the notice for the making of comments and submissions if the Council or Councils consider that the urgency of the case warrants immediate action. However, in those circumstances the Council or Councils must indicate in the notice that the case is urgent and that the Council or Councils intend to act immediately.
- (5) Section 75 of the *Interpretation Act 1987* does not apply to notices required to be published under this section.

[32] Sections 57M and 57MA

Omit section 57M. Insert instead:

57M Membership of Bar Association

- (1) The Bar Council may charge a fee for membership of the Bar Association.
- (2) Membership of the Bar Association is not compulsory for barristers.

57MA Membership of Law Society

- (1) The Law Society Council may charge a fee for membership of the Law Society.
- (2) Membership of the Law Society is not compulsory for solicitors.

[33] Section 78 Failure to pay contribution or levy

Omit “the interstate legal practitioner’s home State” from section 78 (b).
Insert instead “the State or Territory in which the practitioner has his or her sole or principal place of legal practice”.

[34] Section 80 Claims against Fidelity Fund

Omit “a participating State” wherever occurring in section 80 (1A) (b), (c), (d) and (e).
Insert instead “another State or a Territory”.

[35] Section 92 Supreme Court may appoint receiver

Omit “a participating State” from section 92 (3) (b1).
Insert instead “another State or a Territory”.

[36] Section 148 Investigation of complaints by Council

Omit “a participating State” from section 148 (2B).
Insert instead “another State or a Territory”.

[37] Section 171C Determinations of Tribunal

Omit “a participating State” wherever occurring from section 171C (1) (a1) and (c1) and (2) (h).

Insert instead “another State or a Territory”.

[38] Section 171C (1) (a1)

Omit “that State”. Insert instead “that State or Territory”.

[39] Section 171C (2) (h)

Omit “that participating State”. Insert instead “that State or Territory”.

[40] Part 10, Division 9A

Insert after Division 9 of Part 10:

Division 9A Publicising disciplinary action

171LA Definitions

In this Division:

barrister includes a former barrister.

disciplinary action means any of the following actions, whether or not taken under this Part:

- (a) the suspension or cancellation of the practising certificate of a legal practitioner,
- (b) the refusal to issue a practising certificate to a qualified person,
- (c) the removal of the name of a legal practitioner from the roll of legal practitioners,
- (d) any order made by a regulatory authority in respect of a legal practitioner following a finding of professional misconduct or unsatisfactory professional conduct by the legal practitioner,
- (e) the appointment of a receiver of all or any property of a solicitor,

(f) the appointment of a manager of a solicitor's practice.

Note. *Legal practitioner* includes an interstate legal practitioner (see section 126).

solicitor includes a former solicitor.

171LB Publicising disciplinary action

- (1) A Council may publicise disciplinary action taken against a legal practitioner in any manner the Council thinks fit.
- (2) However:
 - (a) the Bar Council must publicise disciplinary action taken against a barrister (including the name and other identifying particulars of the person against whom the disciplinary action was taken), and
 - (b) the Law Society Council must publicise disciplinary action taken against a solicitor (including the name and other identifying particulars of the person against whom the disciplinary action was taken).
- (3) Without limiting subsection (1), it is sufficient compliance with subsection (2) if a Council provides to the Commissioner sufficient information to enable the Commissioner to exercise the Commissioner's functions in respect of the register of disciplinary action required to be kept under this Division.
- (4) The requirement to publicise disciplinary action applies only to disciplinary action taken after the commencement of this section. However, a Council may publicise disciplinary action taken before the commencement of this section in accordance with this Division.
- (5) This section extends to disciplinary action taken outside this State, to the extent that the particulars of that disciplinary action are known to a Council.

171LC Register of disciplinary action

- (1) The Commissioner must keep a register of disciplinary action taken against barristers and solicitors.

- (2) The register is to include the following:
 - (a) the name and other identifying particulars of the person against whom the disciplinary action was taken,
 - (b) particulars of the disciplinary action taken.
- (3) The register is to be made available for public inspection on the internet site of the Commissioner.
- (4) The Commissioner may, on request, provide information recorded in the register to members of the public in any other manner.
- (5) The Commissioner may correct any error in or omission from the register.
- (6) In addition to keeping the register, the Commissioner may publicise disciplinary action taken against any legal practitioner in any other manner the Commissioner thinks fit.
- (7) The requirement to keep a register of disciplinary action applies only to disciplinary action taken after the commencement of this section. However, the Commissioner may include in the register disciplinary action taken before the commencement of this section, or publicise such action in any other manner, in accordance with this Division.
- (8) This section extends to disciplinary action taken outside this State, to the extent that the particulars of that disciplinary action are known to the Commissioner.

171LD Quashing of disciplinary action

- (1) If disciplinary action is quashed on appeal or review after the action was publicised by a Council or the Commissioner under this Division, the result of the appeal or review is to be publicised with equal prominence by the Council or Commissioner.
- (2) If a Council publicised the disciplinary action by providing information about it to the Commissioner, the Council must provide information about the result of the appeal or review to the Commissioner.

- (3) If the disciplinary action was recorded in the register kept by the Commissioner under this Division, any reference to that disciplinary action is to be removed from the register.

171LE Liability for publicising disciplinary action

- (1) No liability is incurred by the State, the Commissioner, a Council or any person acting at the direction of the Commissioner or a Council in respect of anything done in good faith for the purpose of:
- (a) publicising disciplinary action under this Division, or
 - (b) exercising the functions of the Commissioner or a Council under this Division.
- (2) No liability is incurred by a person publishing in good faith disciplinary action, or a fair report or summary of disciplinary action, recorded in a register kept by the Commissioner, or otherwise publicised by the Commissioner or a Council, under this Division.
- (3) In this section:
liability includes liability in defamation.

171LF General

- (1) The provisions of this Division are subject to section 56 (Secrecy), but apply despite section 171P (Offence: improper disclosure of information).
- (2) The provisions of this Division are subject to any order made by the Tribunal under section 75 of the *Administrative Decisions Tribunal Act 1997*.
- Note.** Section 75 of the *Administrative Decisions Tribunal Act 1997* allows the Tribunal to make an order prohibiting or restricting the disclosure of information.
- (3) If disciplinary action involves a suspension or cancellation of the practising certificate of a person, or a refusal to issue a practising certificate to a person, because of the infirmity, injury or mental or physical illness of the person, the reason for the suspension, cancellation or refusal, and any other information

relating to the infirmity, injury or mental or physical illness of the person, is not to be recorded in the register kept under this Division or otherwise publicised.

- (4) Despite subsections (2) and (3), 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 publicised, and recorded in the register kept under this Division, in accordance with the requirements set out in this Division.

[41] Section 171OA Disclosure of information about disciplinary and other proceedings against legal practitioners

Omit the section.

[42] Section 213A Evidentiary certificates

Omit “a participating State” from section 213A (3).
Insert instead “another State or a Territory”.

[43] Schedule 8 Savings, transitional and other provisions

Insert at the end of clause 1A (1):

Legal Profession Amendment (National Competition Policy Review) Act 2002

[44] Schedule 8

Insert at the end of the Schedule, with appropriate Part and clause numbers:

Part Provisions consequent on enactment of Legal Profession Amendment (National Competition Policy Review) Act 2002

Practising certificate fees

- (1) Section 29, as in force immediately before its repeal by the *Legal Profession Amendment (National Competition Policy Review) Act 2002*, continues to apply in respect of practising

certificates issued by the Bar Council before the commencement of section 29A, as inserted by that Act.

- (2) Section 29, as in force immediately before its repeal by the *Legal Profession Amendment (National Competition Policy Review) Act 2002*, continues to apply in respect of practising certificates issued by the Law Society Council before the commencement of section 29B, as inserted by that Act.

Advertising

Section 38J (3), as inserted by the *Legal Profession Amendment (National Competition Policy Review) Act 2002*, applies only in respect of contraventions of section 38J (2) that occur after the commencement of section 38J (3).

Disclosure of information under section 171OA

Section 171OA (4) and (5), as in force immediately before the repeal of section 171OA by the *Legal Profession Amendment (National Competition Policy Review) Act 2002*, continues to apply in respect of anything done before the repeal of section 171OA.