

Legal Profession Amendment Bill 2006

Explanatory note

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

Overview of Bill

The objects of this Bill are:

(a) to amend the *Legal Profession Act 2004* (the **Principal Act**) in a number of respects, including the following:

- (i) to extend the prohibition on engaging in unqualified legal practice,
 - (ii) to extend the class of Australian lawyers to whom practising certificates may be granted,
 - (iii) to increase the maximum penalty that may be prescribed by regulations for offences relating to advertising by or for law practices,
 - (iv) to ensure that the Legal Services Commissioner is able to investigate and prosecute offences relating to advertising by or for law practices,
 - (v) to ensure that the Bar Council and Law Society Council are able to investigate and prosecute offences under the Principal Act whether committed by barristers or solicitors or by other persons,
 - (vi) to enable disclosure of the rate of interest payable on unpaid legal costs to be made by reference to a benchmark rate of interest,
 - (vii) to narrow the restriction on entering costs agreements containing provision for uplift fees,
 - (viii) to remove the restriction on recovering certain costs where prohibited uplift fees are involved, so that the rest of the costs can be recovered,
 - (ix) to expand the categories of clients who are exempted from initial costs disclosure and some other requirements relating to costs,
 - (x) to enable a client who has received a lump sum bill of costs from a law practice to request the practice to provide an itemised bill,
 - (xi) to ensure that provisions relating to trust money and trust accounts extend to foreign lawyers,
 - (xii) to provide for the summary conclusion of the complaint procedure, in suitable cases, by the imposition of a condition on the practitioner's practising certificate,
 - (xiii) to enable complainants under the disciplinary provisions of the Principal Act to apply for compensation for loss suffered by clients of the law practices involved,
 - (xiv) to provide that legal profession rules can apply to interstate-registered foreign lawyers,
 - (xv) to provide that the Bar Association or Law Society cannot be required to divulge information received in connection with applications for pro bono legal services,
 - (xvi) to make other amendments of a minor, consequential or ancillary nature, including amendments by way of statute law revision, and
- (b) to amend the *Legal Profession Regulation 2005* to make associated amendments, and
- (c) to amend a number of other Acts consequentially on the enactment of the Principal Act, and
- (d) to make other amendments of a minor, consequential or ancillary nature.

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Legal*

Profession Act 2004 set out in Schedules 1–8.

Clause 4 is a formal provision giving effect to the amendments to the Acts set out in Schedule 9.

Clause 5 is a formal provision giving effect to the amendments to the *Legal Profession Regulation 2005* set out in Schedule 10.

Clause 6 provides for the repeal of the proposed Act after all the amendments have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Chapter 1 of Legal Profession Act 2004

Schedule 1 amends Chapter 1, which contains introductory matters, including definitions of defined terms.

Section 4 is amended to recognise that the word “issue” is used in some contexts (including legislation of other States or Territories) instead of the word “grant” when referring to practising certificates. Sections 66, 485, 688 and 689 are correspondingly amended for this purpose.

Section 4 is amended to insert a definition of **show cause event**, which is transferred from section 65, so that the one definition applies wherever the term is used in the Principal Act. Section 184 is accordingly amended to omit the definition of the term in that section.

Schedule 2 Amendment of Chapter 2 of Legal Profession Act 2004

Schedule 2 amends Chapter 2, which contains provisions dealing with general requirements for engaging in legal practice, including provisions for the reservation of legal work and legal titles, for the admission of local lawyers, and for engaging in legal practice. Amendments include the following:

Prohibition on engaging in legal practice

Section 14 is amended to remove the reference to fee, gain or reward, so that it will be an offence to engage in legal practice without being an Australian legal practitioner, whether or not for fee, gain or reward. This amendment will ensure consistency with other jurisdictions.

Practising certificates

Section 45 is amended to extend the class of Australian lawyers to whom the Bar Council or Law Society Council may grant practising certificates so as to include persons whose principal place of legal practice is in a foreign country but who otherwise satisfy the requirements of the section. Provision is also made for the discretionary grant of local practising certificates to persons of a class or description prescribed by the regulations.

Legal practice by barristers

Section 54 is amended to provide that the statutory condition limiting the manner in which barristers may engage in legal practice (for example, as a sole practitioner) does not apply to barristers specified by the Bar Council or prescribed by the regulations.

Section 102 is amended to provide that the requirements for interstate legal practitioners regarding a period of supervised legal practice before engaging in unsupervised legal practice apply only to solicitors and therefore not to barristers.

Advertising offences

Section 85 (2) is amended to increase the maximum penalty (from 100 to 200 penalty units) that may be imposed under the regulations for an offence relating to advertising by barristers or solicitors or in connection with the provision of legal services or services connected with personal injury.

Section 85 (8) is amended to increase the maximum penalty (from 100 to 200 penalty units) for a contravention of a direction of the Administrative Decisions

Tribunal that a barrister or solicitor not engage in conduct that contravenes the regulations under the *Workplace Injury Management and Workers Compensation Act 1998* concerning advertising work injury services.

These penalty levels are the same as those that were applicable under the *Legal Profession Act 1987*.

Section 85 (12) currently deals with payment from the Public Purpose Fund of costs and expenses of the Bar Council, Law Society Council or Legal Services Commissioner in exercising functions relating to advertising offences. The subsection is omitted and substantially re-enacted as section 290 (1) (p).

Foreign lawyers

Section 195 is amended:

- to ensure that any provision of the Principal Act, regulations or legal profession rules that is expressed in terms of “Australian legal practitioners” will apply to Australian-registered foreign lawyers by virtue of section 195
- to ensure that the regulations may adapt, for Australian-registered foreign lawyers, relevant provisions of the regulations and legal profession rules (as well as the Principal Act) that apply to law practices, so far as those provisions relate to trust money and trust accounts.

Schedule 3 Amendment of Chapter 3 of Legal Profession Act 2004

Schedule 3 amends Chapter 3, which contains provisions about the conduct of legal practice, including provisions regarding trust money, legal costs, professional indemnity insurance, fidelity cover and mortgage practices. Amendments include the following:

Public Purpose Fund

Section 290 (1) (k) is amended to ensure that the costs of the Legal Services Commissioner (as well as those of the Bar Council or Law Society Council) in relation to professional discipline are met from the Public Purpose Fund.

Proposed section 290 (1) (p) provides that the costs of the Bar Council, Law Society Council and Legal Services Commissioner in exercising functions under section 85 (including the prosecution of advertising offences under the section or regulations under the section) are met from the Public Purpose Fund. The provision is in effect a re-enactment of section 85 (12).

Costs

Section 309 is amended to provide that an initial costs disclosure relating to the rate of interest on overdue legal costs can be made by reference to a benchmark interest rate, rather than a specific percentage.

Section 312 is amended to expand the categories of clients exempted from initial costs disclosure, so as to include large proprietary companies, liquidators, administrators, receivers, large partnerships and participants in certain joint ventures.

Section 321 is amended to replace a reference to the *Supreme Court Act 1970* with a reference to the *Civil Procedure Act 2005*, as the latter Act now deals with interest on unpaid judgments. Proposed section 321 (5) makes it clear that interest can be charged on unpaid legal costs after 30 days after a lump sum bill was given to the client, even if the client afterwards requests or is given an itemised bill.

Section 323 is amended to exempt conditional costs agreement from requirements as to their form and contents if the clients (such as public companies) were exempted from initial costs disclosure or the costs are subject to a tender process. The requirements include those relating to the need for the client’s signature, notification of the right to seek independent legal advice and a mandatory cooling-off period.

Section 324 is amended to provide that the maximum 25% for uplift fees applies only to litigious matters.

Section 327 is amended to provide that a costs agreement entered into in breach of the uplift fees restrictions in section 324 (2)–(5) disentitles the law practice from recovering just the uplift fee instead of all costs.

Section 328 provides for costs agreements that are not fair or reasonable to be set aside. The section is amended to provide that a provision of a costs agreement can be also set aside instead of the whole agreement. The section is also amended to provide a right of appeal against a determination to make or not make an order setting aside a costs agreement or provision of a costs agreement. Consequential amendments (referring to the setting aside of a provision of a costs agreement) are made to sections 309 (1) (i), 317 (2), 333 (a) (ii) and 373 (1).

Proposed section 332A confers a right on a person who receives a lump sum bill to request an itemised bill for the same costs. The law practice will not be able to commence proceedings to recover the costs until at least 30 days after the person has been given the itemised bill. A consequential amendment is made to section 331.

Section 333 is amended to exempt bills of costs having to include or be accompanied by a written statement if the clients (such as public companies) were exempted from initial costs disclosure or the costs are subject to a tender process. The written statement would set out the avenues open to the client in the event of a dispute as the costs.

Section 361 is amended to ensure that the duty of a costs assessor to assess costs in accordance with a complying costs agreement is subject to the provisions of section 328 that provide for the setting aside of costs agreements and for making associated orders for payment of costs.

Proposed section 369 (2A) is inserted to provide that a costs assessor may determine by whom and to what extent the costs of assessment in respect of party/party costs are payable.

Sections 352, 368, 369 (5), 373 (1) and 485 are amended to clarify the arrangements regarding costs determinations, to reflect the arrangements under which certain costs determinations are issued by the costs assessors but forwarded to the parties by the Manager, Costs Assessment.

Schedule 4 Amendment of Chapter 4 of Legal Profession Act 2004

Schedule 4 amends Chapter 4, which contains provisions relating to complaints about and discipline of Australian legal practitioners. Amendments include the following:

Referral of matters to costs assessors

Section 533 is amended to provide that no application fee is payable when an application for costs assessment is made by the Legal Services Commissioner, Bar Council or Law Society Council in connection with the investigation of a complaint under the Principal Act.

Summary conclusion of complaint procedure

Section 540 is amended to enable a complaint against an Australian legal practitioner to be dealt with summarily by the imposition of a condition on the practitioner's practising certificate. This process will be available in addition to the current power to proceed by way of caution, reprimand or compensation order.

Compensation

Sections 570–575 are amended to enable complainants to apply for compensation for other persons who are clients of the legal practice concerned.

Sections 571 (5) and 573 are amended to include references to section 539, which also provides for the making of compensation orders.

Other amendments

Section 508 is amended to improve the structure of subsection (3).

Section 511 is amended to ensure that the Legal Services Commissioner, Bar

Council and Law Society Council are referred to, and to cover the possibility that an Australian legal practitioner may be enrolled in more than one interstate roll in some circumstances.

Schedule 5 Amendment of Chapter 5 of Legal Profession Act 2004

Schedule 5 amends Chapter 5, which contains provisions relating to external intervention in respect of law practices, by the appointment of supervisors, managers or receivers.

Sections 615 and 653 are amended to ensure consistency of expression.

Schedule 6 Amendment of Chapter 7 of Legal Profession Act 2004

Schedule 6 amends Chapter 7, which contains provisions relating to regulatory authorities and legal profession rules. Amendments include the following:

Advertising offences

Proposed section 689A ensures that the Legal Services Commissioner is able to investigate and prosecute advertising offences in regulations under section 85.

Legal profession rules

Sections 702 (2) and 703 (2) are amended to enable legal profession rules to be made for interstate-registered foreign lawyers, as well as locally registered foreign lawyers, consistently with local and interstate barristers and solicitors.

Other powers of Bar Council and Law Society Council

Sections 696 (2) and 699 (3) are amended to enable the Councils to delegate functions to their employees as well as to officers.

Sections 696 (3) and 699 (4) are amended to ensure that the Councils' powers may be exercised with respect to persons to whom the disciplinary provisions of Chapter 4 of the Principal Act apply and not just barristers or solicitors.

Proposed sections 696 (4) and 699 (5) ensure that the Bar Council and Law Society Council can investigate and prosecute offences committed by any person (including lay persons) under Part 2.2 of the Principal Act, which deals with unqualified legal practice.

Schedule 7 Amendment of Chapter 8 of Legal Profession Act 2004

Schedule 7 amends Chapter 8, which contains provisions of a general and miscellaneous nature. Amendments include the following:

Disclosure of information

Section 721 is amended to enable regulations to be made authorising additional disclosure of information relating to or arising under the Principal Act or a corresponding (interstate) law.

Proposed section 722A provides that the Bar Association or Law Society are not required to divulge information received in connection with an application for pro bono legal services.

Duty to report offences

Section 730A is amended to make it clear that the duty of the Legal Services Commissioner, Bar Council and Law Society Council to report suspected offences to law enforcement or prosecution authorities does not extend to offences under the Principal Act or other prescribed offences, as the Principal Act provides the mechanisms to deal with them.

Penalties under regulations

Section 738 is amended as a consequence of the insertion by the proposed Act of powers to make regulations for advertising offences carrying maximum penalties exceeding those available for other offences.

Schedule 8 Amendment of Schedule 9 to Legal Profession Act 2004

Schedule 8 to the proposed Act amends Schedule 9 to the Principal Act, which

contains provisions of a savings, transitional or other nature. Amendments include the following:

Clause 1 is amended to enable regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Proposed clause 17A covers disciplinary proceedings that were commenced on or after 1 October 2005 (the date of commencement of the *Legal Profession Act 2004*) in the Administrative Decisions Tribunal. The proceedings are to be dealt with in accordance with the Principal Act unless a direction of the President of the Tribunal otherwise provides. Decisions and directions already given are validated. Further information is contained in the note to the clause.

Proposed clause 22 covers appeal or review proceedings that were pending before 1 October 2005 in the Supreme Court or Administrative Decisions Tribunal. The proceedings are to be dealt with in accordance with the *Legal Profession Act 1987* unless a direction of the Supreme Court or President of the Tribunal otherwise provides. Decisions and directions already given are validated.

Proposed clause 22A covers appeal or review proceedings that were commenced on or after 1 October 2005 in the Supreme Court or Administrative Decisions Tribunal. The proceedings may be commenced under either the *Legal Profession Act 1987* or the Principal Act, and are to be dealt with in accordance with the Principal Act unless a direction of the Supreme Court or President of the Tribunal otherwise provides. Decisions and directions already given are validated.

Proposed clause 28 covers any existing solicitor corporations formed under the *Legal Profession Act 1987*. The clause substantially re-enacts clause 81 of Schedule 8 to that Act.

Proposed clause 29 provides that if a solicitor corporation becomes registered as a company under the *Corporations Act 2001* of the Commonwealth, the corporation ceases to be a solicitor corporation and becomes an incorporated legal practice under the Principal Act.

Proposed clause 30 covers costs that may be awarded in criminal cases, where rules of court were made under the *Criminal Procedure Act 1986* for that purpose.

Clause 30 (1) ensures that such rules are not affected by section 353 (3) of the Principal Act, which provides that party/party costs may not be the subject of costs assessment. Clause 30 (2) validates certain rules already made for the Land and Environment Court, and clause 30 (3) provides that references in those rules to provisions of the *Legal Profession Act 1987* are taken to include references to the corresponding provisions of the Principal Act.

Schedule 9 Amendment of other Acts

A number of Acts are amended to update references to barristers, solicitors and legal practitioners to terms used in the Principal Act.

The *Administrative Decisions Tribunal Act 1997* is amended to repeal clause 41 (2) of Schedule 5, which deals with disciplinary proceedings commenced on or after 1 October 2005 in the Administrative Decisions Tribunal. Transitional provisions relating to the repeal are included in new clause 17A of Schedule 9 to the Principal Act.

Schedule 10 Amendment of Legal Profession

Regulation 2005

Advertising offences

Clauses 24 and 34 are amended to increase the penalty for offences against regulations made under section 85 of the Principal Act, in line with increases effected by amendments made to that section by Schedule 2 to the proposed Act.

Maximum interest rate for unpaid legal costs

Proposed clause 110A provides that the maximum rate of interest payable on unpaid legal costs will be the Reserve Bank's Cash Rate Target increased by 2 percentage points.