Law Council
OF AUSTRALIA

Reducing the Regulatory Burden on Business

Regulation Taskforce

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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.