

## LEGAL PRACTICE BILL 2002

### EXPLANATORY MEMORANDUM

This Bill reforms the regulation of the legal profession in Western Australia. The reforms will enable legal firms to incorporate and to form multi-disciplinary partnerships. The Bill also introduces national practising certificates for lawyers in Western Australia and recognises those issued in other Australian jurisdictions, and it establishes the regulation of foreign lawyers advising Western Australian clients on matters of foreign law. In addition, the Bill strengthens the disciplinary powers of the regulatory bodies (the Legal Practice Board, the Complaints Committee and the Disciplinary Tribunal), redresses some anomalies relating to these bodies and provides a greater role for non-lawyers in the regulatory framework. There are also new provisions that clearly prohibit unqualified persons from practising law.

This Bill is a complete replacement for the *Legal Practitioners Act 1893* which is to be repealed through the Acts Amendment and Repeal (Legal Practice Bill) 2002. Consequently, large parts of the Legal Practice Bill simply replicate existing provisions. These notes, therefore, are structured so as to comment only on the new provisions that introduce substantive change.

#### **PART 1 – Preliminary**

##### **1. Short title**

Citation of the Act

##### **2. Commencement**

Clause 2 makes provision for the commencement of the Act, on a date or dates to be set by proclamation.

##### **3. Interpretation**

Clause 3 defines the terms used in the Bill. Of particular note are the following terms:

**“bank”** - a bank can be a financial institution which complies with either the definition of an authorised deposit-taking institution (ADI) contained in the *Banking Act 1959* (Cth) or one that is established through some other State or Commonwealth law. An ADI is a body corporate, not necessarily a “bank”, which is authorised by the Australian Prudential Regulation Authority to operate as a banking institution. This provides greater flexibility in the types of financial institutions in which trust funds can be deposited beyond the traditional banks.

**“certificated practitioner”** - which includes interstate practitioners as well as local practitioners.

**“corporation”** – the definition of a corporation is defined by reference to Commonwealth and State corporations law and corporations prescribed by regulation.

**“director”** – this definition is derived from that in the *Corporations Act 2001* (Cth).

**“foreign law”** – law that applies in places other than Australia.

**“foreign lawyer”** – a lawyer registered in a jurisdiction outside Australia.

**“foreign registration authority”** – a legal profession regulatory body in a jurisdiction outside Australia.

**“home registration authority”** – the foreign registration authority cited in a foreign lawyers registration notice

**“incorporated legal practice”** – a legal firm that operates as a corporation as distinct from a partnership or a sole practitioner.

**“interstate practice certificate”** – a practice certificate issued by the relevant regulatory authority of another State or Territory

**“interstate practitioner”** – a lawyer registered in another State or Territory where they also have their principal place of practice.

**“legal practitioner director”** – a certified legal practitioner holding the position of director in an incorporated legal practice.

**“legal practitioner partner”** – a certified legal practitioner who is a partner in a multi-disciplinary partnership.

**“local practitioner”** – a certificated legal practitioner whose principal place of practice is in Western Australia.

**“multi-disciplinary partnership”** – a partnership comprising a legal practitioner and other professional(s) and providing legal (and other) services.

**“practise foreign law”** – providing legal services in Western Australia that pertain to foreign law; these services being of a nature that would be required to be undertaken by a certificated practitioner if they related to Western Australian law.

**“prohibited person”** – someone who is disqualified from legal practice, someone who is a current or past employee of a legal practitioner and who has been convicted of fraud in relation to that employment, or someone subject to a Supreme Court order under clause 135.

**“registered foreign lawyer”** – a foreign lawyer who is registered by the Western Australian regulatory authorities as such.

**“regulatory authority”** – one of the existing Western Australian regulatory authorities (the Supreme Court, the Legal Practice Board, the Disciplinary Tribunal or the Complaints Committee) or a legislatively authorised regulatory body in another State.

**“related entity”** – draws on the definition contained in the *Corporations Act 2001* (Cth).

**“trust moneys”** – expands the current definition to also apply to incorporated legal practices, multi-disciplinary partnerships and foreign lawyers.

**“unsatisfactory conduct”** – the definition of unsatisfactory conduct is given in full in clause 160. It includes the existing grounds of unprofessional conduct, illegal conduct, neglect or undue delay, plus the new grounds of contravention of the *Legal Practice Act 2002*, and conduct that fails the test of the level of competence and diligence that could reasonably be expected. This last grounds draws on the definition developed through the national legal professional model laws project and brings the Western Australian definition more closely in line with that used in other jurisdictions.

#### **4. Meaning of “engage in legal practice”**

Clause 4 consolidates the existing definition which in the previous Act was described in two separate sections.

### **PART 2 – THE LEGAL PRACTICE BOARD**

#### **7. Members of the Board**

Membership of the Board has been expanded to include Senior Counsel as well as Queen’s Counsel, and increased the number of elected members to 12. The term of office of the elected members has been increased to two years. The Acts Amendment and Repeal (Courts and Legal Practice) Bill 2002 sets out the transitional arrangements which will result in twelve members being elected at the first election at the commencement of the new Act, with the six receiving the most votes receiving 2-year terms with the next six receiving 1-year terms.

#### **12. Powers of the Board**

The Board has been given additional powers to give it the capacity to enter into commercial arrangements such as owning and managing property, entering into leases and employing staff.

#### **18. Protection from liability**

This clause provides immunity to the Board, members of the Board and its officers in the course of carrying out in good faith any functions for or on behalf of the Board.

### **PART 3 – Articled clerks**

#### **20. Who may have an articled clerk**

Sub-clause 19(1)(b) enables individual practitioners with the addition of legal practitioner directors of incorporated legal practices to have articled clerks.

Sub-clause 19(2) introduces a power by which the Legal Practice Board can revoke a practitioner’s approval to have an articled clerk.

Sub-clause 19(4) specifically empowers the Director of Public Prosecutions and clarifies the power of the Western Australian Director of the Australian Government Solicitor to have articled clerks. This will remove any ambiguity surrounding the status of articled clerks in the offices of these position holders.

Sub-clause 19(5) provides for legal practitioners to have more than two articulated clerks subject to the approval of the Board. The current provision is inflexible in this regard except with respect to public office holders.

## **PART 5 – Practice certificates**

### **27. Qualifications for admission of legal practitioners**

The current provision which recognises tertiary qualifications for the purpose of admitting someone to legal practice, refers specifically to the University of Western Australia and there is no reference to either Murdoch University or the University of Notre Dame (Australia) both of which offer law degrees. Sub-clauses 27(2)(a)(i) and (ii) remove this reference and instead provide for the rules to prescribe universities whose qualifications are recognised or for the Legal Practice Board to accept a qualification which it considers to be equivalent to those which are prescribed. This provides a more flexible approach to this issue.

### **39. Unfit, incapable or insolvent practitioners**

This clause empowers the Board to make application to the Disciplinary Tribunal for refusal to grant or renew, or to suspend, or to place conditions on a practising certificate where a practitioner is incapable, insolvent or unfit to practice.

The clause defines “incapable” as a practitioner with an impairment caused by mental disability, injury, physical illness, dependence on alcohol or addiction to a deleterious drug or substance, to the extent that it adversely affects the person’s ability to practise.

Insolvency is defined in accordance with the *Corporations Act 2001* (Cth).

An unfit practitioner is one who is not a fit and proper person, has not complied with a condition placed on their practice certificate, has contravened an order of the Complaints Committee or Disciplinary Tribunal, has contravened the Act, is in prison or is otherwise unfit to be a legal practitioner.

Under clause 44, a practitioner can lodge an appeal against a decision taken under clause 39 with the Supreme Court.

### **40. Conditions may be imposed upon practice certificates**

Clause 40 empowers the Board to impose a condition upon a practice certificate either on its own volition or at the direction of the Disciplinary Tribunal or a Judge. Examples of restrictions include the area(s) of law in which a practitioner may practise, requiring the practitioner to undertake additional training, and requiring the practitioner to work under supervision. Sub-clause 40(5) also makes it clear that a practitioner must abide with any condition placed on her or his practice certificate.

Clause 44 enables a practitioner to appeal to the Supreme Court with respect to condition imposed on her or his practice certificate.

### **41. Board’s powers of inquiry**

This clause gives the Board the powers it requires in order to determine whether it should take action under clauses 39 or 40. In addition to current powers, this clause gives the Board the power to require a practitioner to undergo a medical examination.

If the practitioner refuses to do so, then the Board can deem the practitioner to be incapable.

## **PART 6 – Business structures**

### **Division 1 - General**

#### **45. Practitioner may practise under any business structure**

Under this clause a practitioner can adopt any form of business structure including a sole practice, a partnership or a corporation. Previously a legal practice could not be in the form of a corporation.

#### **46. Obligations of individual legal practitioners not affected**

This clause stipulates that an individual legal practitioner is still required to comply with the Act regardless of the business structure under which she or he practises. This maintains the focus of legal profession regulation on the practitioner with regulation of the business being an addition not a replacement for individual accountability.

#### **47. Nature of incorporated legal practice**

This clause provides that by virtue of providing legal services, a corporation is deemed to be an incorporated legal practice. The only exceptions are where the legal services are all provided on a no-fee basis or where the legal services are of an in-house nature within a corporation or if they prescribed in the regulations (currently, there are no such prescribed legal services). It does not matter if an incorporated legal practice provides services in addition to legal services, it is the legal services which determines its status as an incorporated legal practice.

#### **48. Services and businesses of incorporated legal practices**

As well as providing legal services, an incorporated legal practice may provide other types of services, although it can be prohibited by regulation from engaging in a specified service or type of business (no such regulation has yet been made). Non-compliance with this Act results in the corporation no longer being deemed an incorporated legal practice.

#### **49. Corporations eligible to be incorporated legal practices**

There is no restriction on which corporations may become incorporated legal practices unless it they prohibited from doing so by some other law. As provided for in clause 47, a corporation which provides legal services is by definition an incorporated legal practice.

#### **50. Notice by corporation**

The Legal Practice Board is to be notified if a corporation intends to provide legal services. A penalty of \$50,000 is attached should this provision not be complied with. This ensures that the regulatory authorities are fully aware of which corporations are engaged in providing legal services and are thus subject to this Act.

#### **51. Responsibilities of legal practitioner director**

A key role in the governance of the provision of legal services by an incorporated legal practice is that of legal practitioner director which is a required position in any incorporated legal practice under clause 51. This individual assumes responsibility for managing the legal services functions and for ensuring that this is done in accordance with professional and legislative obligations. The legal practitioner

director must also ensure that their own ethical and professional duties are not interfered with by other directors of the corporation. Should the legal practitioner director become aware of any potential or real breaches of these obligations then she or he must vacate the role of director.

#### **52. Obligations of legal practitioner director relating to unsatisfactory conduct**

Clause 52 effectively imposes vicarious liability obligations on legal practitioner directors with respect to misconduct by legal practitioners working in the incorporated legal practice or those directors of the practice who are not legal practitioners in relation to the provision of legal services. Appropriate action is required on the part of the legal practitioner director should she or he become aware of any such unsatisfactory conduct. The legal practitioner director can also be held accountable if one of the non-legal practitioner directors is an inappropriate person to be associated with a business that provides legal services.

#### **53. Absence of legal practitioner director**

Due to the inherent importance of the role of the legal practitioner director, an incorporated legal practice must not leave this position vacant for more than seven days and must notify the Board if the position does become vacant. Failure to comply with these requirements incurs penalties of \$25,000 and \$10,000 respectively. Additionally, failure to appoint a legal practitioner after seven days means that the corporation would no longer be deemed an incorporated legal practice (and thus not able to provide legal services).

To further reinforce the need to have a legal practitioner director, sub-clause 53(3) empowers the Board to appoint a certificated practitioner from within the incorporated legal practice or some other person nominated by the Board to perform the functions of the position of legal practitioner director (although this does not make them a director of the corporation).

#### **54. Obligations of legal practitioners who are officers or employees**

Similar to clause 46, this clause clearly states that even within an incorporated legal practice, a legal practitioner is required to comply with the professional obligations that apply to any legal practitioner regardless of the type of practice in which they are engaged.

Additionally, sub-clause 54(2) maintains the lawyer-client relationship as being based on the individual legal practitioner, that is, the client remains the client of a particular practitioner even within an incorporated legal practice.

#### **55. Professional privileges**

Legal professional privilege is at the core of the lawyer-client relationship. Clause 55 maintains this by stipulating that legal practitioners in incorporated legal practices retain their individual legal professional privilege. As with clause 54, the client is the client of the actual practitioner and this is not affected by the act of incorporation.

#### **56. Pro bono services**

Where an incorporated legal practice provides services on a pro bono basis, the directors are still required to fulfil their responsibilities as directors.

**57. Conflicts of interest**

In dealing with conflicts of interest involving the conduct of legal practitioner directors or legal practitioners in an incorporated legal practice, clause 57 specifies that the interests of these individuals and the incorporated legal practice itself are the same. Furthermore, the professional obligation requirements under clause 54 impose the same obligations on practitioners in an incorporated legal practice as those applying to any other legal practitioner.

**58. Disclosure obligations**

In the interest of ensuring that clients of incorporated legal practices are properly informed about the nature of the service delivery, the incorporated legal practice is required to disclose to the client a description of the legal and any other services to be provided, that the Act only applies to the legal services, and whether there is any commission associated with the services provided.

**59. Application of duty of care to non-legal services**

Because incorporated legal practices may provide services other than legal services, it is important that clients' business receives the appropriate duty of care. A non-legal service could be provided by either a legal practitioner or some other professional. Where a non-lawyer is to provide the service this must be disclosed to the client, otherwise the standard of care that would normally apply to a legal service will apply to the service in question.

**60. Application of rules to incorporated legal practice**

Sub-clause 60(1) is another which applies the same standards to legal practitioners in incorporated legal practices as apply to any legal practitioner, this time in respect to rules. However, non-legal services and conduct associated with the provision of non-legal services cannot be regulated by legal profession rules.

**61. Requirements relating to professional indemnity insurance**

This clause required both an incorporated legal practice and individual legal practitioners within it to comply with professional indemnity insurance obligations. Failure on the part of an incorporated legal practice to comply with this clause can result in the Board referring the matter to the Disciplinary Tribunal. An individual practitioner would not be eligible to practise without professional indemnity insurance.

**62. Requirements relating to advertising**

Clause 62 applies the same restrictions on advertising to incorporated legal practices as apply to individual practitioners. This will provide consistency between legal service providers.

**63. Requirements relating to legal fees and costs**

As with other clauses, clause 63 imposes the same legislative requirements on incorporated legal practitioners as apply to all legal practitioners. On this occasion the requirements relate to costs and remuneration of practitioners and external administrators of incorporated legal practices. These provisions can be changed by regulation.

**64. Requirements relating to trust accounts**

Under this clause, an incorporated legal practice, as with legal practitioners, is required to operate trust accounts in a manner that complies with this Act but only in relation to moneys derived from the provision of legal services. However, clause 144 allows for the inclusion of all affairs and documents of an incorporated legal practice (including those relating to non-legal services) in the course of an examination of a trust account. The Complaints Committee and the Disciplinary Tribunal can take action against the legal practitioner director should either the incorporated legal practice or an officer of the practice be in breach of the trust account requirements. These provisions can be changed by regulation.

**65. Part 11 (except section 152) does not apply to incorporated legal practice**

Part 11 deals with legal practices where there are perceived irregularities with respect to trust accounts or action regarding trust accounts is needed because a legal practitioner has died. Sub-clause 152(c) includes defunct incorporated legal practices as one of the circumstances where the Board can apply to a Judge to order the Legal Contribution Trust to take action with respect to the trust accounts associated with that practice.

**66. Extension of vicarious liability of incorporated legal practice**

This clause clearly sets out that an incorporated legal practice is also liable should anyone holding office in or employed by the practice be subject to a claim that they have been, in the course of providing legal services, improper in managing clients' money or property, or incurred a debt or damages payable to a client due to dishonesty.

**67. Prohibition on association with prohibited persons**

A person who is prohibited from being a legal practitioner can in no way be associated with an incorporated legal practice or a related entity either as legal practitioner director, officer, employee or partner of the practice, or someone who derives income from the provision of legal services by the practice. This is to ensure that a prohibited person cannot overcome this prohibition by establishing some form of relationship with an incorporated legal practice. The importance of this prohibition is demonstrated by the imposition of a \$25,000 penalty should clause 67 be breached.

**68. Investigation of incorporated legal practice**

An incorporated legal practice can be investigated. The exact form of the investigatory powers is to be determined by regulation. However, they can be based on the relevant powers of the Australian Securities and Investment Commission (ASIC) as stipulated in the *Corporations Act 2001* (Cth). The regulations will also allow for the Board, Complaints Committee and/or Disciplinary Tribunal to demand copies of any documents lodged with the ASIC.

**69. Audit of incorporated legal practice**

The powers conferred on the Board in clause 68 can be used by it to audit incorporated legal practices for compliance with the Act and its management of legal services. It is not necessary that a complaint has been lodged before the Board can commence an audit although the results of the audit can be referred to the Complaints Committee or used in disciplinary proceedings. In the interests of natural justice, the Board is to give an audited incorporated legal practice a copy of the audit report.

### **70. Banning of incorporated legal practice**

The maintenance of appropriate standards of professional conduct by and management of incorporated legal practices, their officers and employees requires strong and clear regulatory provisions. Therefore, allowance is made for the banning of incorporated legal practices which is the equivalent of striking off an individual practitioner.

Clause 70 sets out the grounds for banning an incorporated practice, that is, unsatisfactory conduct, failure to implement satisfactory management and supervision of legal services, an association with a prohibited person, a disqualified practitioner being involved in managing the practice and disqualification of the corporation from providing legal services.

For an incorporated legal practice to be banned on one or more of the above grounds, the Board is required to make application to the Supreme Court who then makes a decision. Should a banned incorporated legal practice continue to provide legal services it faces a penalty of \$50,000.

A disqualified corporation ceases to be an incorporated legal practice which means that it can no longer offer legal services which would be expected to adversely affect the business of the corporation.

### **71. Disqualification from managing incorporated legal practice**

A similar standard as imposed by clause 70 is to be found in clause 71. Again, the Board may make application to the Supreme Court, to take action, this time with respect to disqualifying a particular person from being involved in managing an incorporated legal practice. The standard that is applied is that found in section 206E of the *Corporations Act 2001* (Cth). Should a incorporated legal practice continue to engage a disqualified person as a director or other officer of the corporation, then it ceases to be an incorporated legal practice (and thus not able to provide legal services).

### **72. Disclosure of information to ASIC**

This clause empowers the regulatory authorities to provide the Australian Securities and Investment Commission with information about an incorporated legal practice, even information of a secret or confidential nature.

### **73. Relationship to Corporations legislation and certain other instruments**

Sub-clause 73(1) establishes that the Act takes primacy over the constitution or constituent documents of an incorporated legal practice.

Sub-clause 73(2)

### **74. Undue influence**

Clause 74 protects a legal practitioner director or legal practitioner of an incorporated legal practice against others in the practice (an officer or employee) trying to get her or him to act in a manner that contravenes the Act or is in breach of her or his professional obligations. The exertion of undue influence is regarded as serious and attracts a \$25,000 penalty.

### **Division 3 – Multi-disciplinary partnerships**

#### **75. Nature of multi-disciplinary partnerships**

This clause enables legal practitioners to establish partnerships with persons from other professions, and for the partnership to provide legal services. However, the actual legal services can only be provided by a certificated legal practitioner.

#### **76. Conduct of multi-disciplinary partnerships**

An interstate practitioner cannot become a partner in a multi-disciplinary partnership. This is so that, for example, a multi-disciplinary partnership cannot be established where the only legal practitioner would be an interstate practitioner. A Western Australian multi-disciplinary partnership would require the legal practitioner partner(s) to be from this State.

The regulations can prevent a legal practitioner from forming a partnership with someone engaged in the provision of such services. The regulations do not yet specify any such services, however, it is anticipated that any such services would be those whose nature might be in conflict with the provision of legal services.

#### **77. Responsibilities of legal practitioner partner**

Where a multi-disciplinary partnership provides legal services, it is the legal practitioner partner who is responsible for the management of these services through appropriate management systems and in accordance with the usual professional obligations that apply to legal practitioners. The legal practitioner partner must also ensure that her or his own professional obligations are not compromised by their partners or employees.

#### **78. Obligations of legal practitioner partner related to unsatisfactory conduct**

Clause 78 effectively imposes vicarious liability obligations on legal practitioner partners with respect to the conduct of legal practitioners, the conduct of non-legal practitioner partners in connection with legal services, and the suitability of other non-legal practitioner partners as members of a partnership that provides legal services. Appropriate action is required by the legal practitioner partner should she or he become aware of any such concerns.

#### **79. Actions that may be taken by a non-legal partner**

Partners of multi-disciplinary partnerships, but who are not legal practitioners, are still allowed to benefit from the legal services provided by the partnership. They may receive relevant fees etc and receipts derived from the business and they can let it be known that they are part of a multi-disciplinary partnership whose services include legal services.

#### **80. Professional obligations and privileges of legal practitioners who are partners or employees**

Just because a legal practitioner is in partnership with a person who is not a legal practitioner or is employed by such a partnership, does not mean that she or he does not continue to be subject to the same professional obligations and professional privileges that normally apply to a legal practitioner. Clause 80 specifies that these obligations and privileges remain in force.

#### **81. Conflicts of interest**

In dealing with conflicts of interest involving the conduct of legal practitioner partners of or legal practitioners employed in an multi-disciplinary, clause 81 specifies that the interests of these individuals and the partnership itself are the same. Furthermore, the professional obligation requirements under clause 80 impose the same obligations on practitioners in multi-disciplinary partnerships as those applying to any other legal practitioner.

### **82. Disclosure obligations**

In the interest of ensuring that clients of multi-disciplinary partnerships are properly informed about the nature of the service delivery, the partnership is required to disclose to the client a description of the legal and any other services to be provided, that the Act only applies to the legal services, and whether there is any commission associated with the services provided.

### **83. Application of duty of care to non-legal services**

Because multi-disciplinary partnerships may provide services other than legal services, it is important that clients' business receives the appropriate duty of care. A non-legal service could be provided by either a legal practitioner or some other professional. Where a non-lawyer is to provide the service this must be disclosed to the client, otherwise the standard of care that would normally apply to a legal service will apply to the service in question.

### **84. Application of rules to incorporated legal practice**

This clause stipulates that the rules that normally apply to legal practitioners apply to those who are partners in or employees of a multi-disciplinary partnership. However, non-legal services and conduct associated with the provision of non-legal services cannot be regulated by legal profession rules.

### **85. Requirements relating to advertising**

This clause applies the same restrictions on advertising to multi-disciplinary partnerships as normally apply to legal practitioners. This will provide consistency between legal service providers.

### **86. Requirements relating to legal fees and costs**

As with other clauses, clause 86 imposes the same legislative requirements on multi-disciplinary partnerships as apply to all legal practitioners. On this occasion the requirements relate to costs and remuneration of legal practitioner partners and employee legal practitioners. This provision can be changed by regulation.

### **87. Requirements relating to trust accounts**

Under this clause, the legal practitioner partners and employees of a multi-disciplinary partnership are required to operate trust accounts in a manner that complies with this Act but only in relation to moneys derived from the provision of legal services. However, clause 144 allows for the inclusion of all affairs and documents of an a multi-disciplinary partnership (including those relating to non-legal services) in the course of an examination of a trust account. The Complaints Committee and the Disciplinary Tribunal can take action against the a legal practitioner partner should either the partnership, a partner or an employee be in breach of the trust account requirements. These provisions can be changed by regulation.

**88. Disqualified person must not act as employee or partner**

This clause bars a prohibited person from any role as partner or employee of a multi-disciplinary partnership regardless of whether she or he engages in legal practice. The onus is on the legal practitioner partner to ensure that the other partner(s) and employees are not prohibited persons. This prohibition is aimed at maintaining appropriate professional standards and conduct.

**89. Prohibition on partnerships with certain non-legal partners**

This clause is directed towards maintaining appropriate standards with respect to who, from outside the legal profession, can and cannot be a partner of a multi-disciplinary partnership. The Board is empowered to make application to the Supreme Court to have a specific individual (who is not a legal practitioner) prohibited from entering into a partnership with a legal practitioner. The grounds for granting such a prohibition is that the individual is not a fit and proper person, the person is guilty of conduct which equates to unsatisfactory conduct by a legal practitioner, or (if a corporation) the corporation is disqualified from providing legal services or there are grounds for their disqualification.

Sub-clause 89(3) enables such a prohibition to be revoked by the Supreme Court upon application by either the Board or the individual concerned.

Should the legal practitioner partner die, action against the other partner can still continue.

**90. Undue influence**

Clause 90 protects a legal practitioner partner of or legal practitioner employed by a multi-disciplinary partnership against others in the practice (partner or employee) trying to get her or him to act in a manner that contravenes the Act or is in breach of her or his professional obligations. The exertion of undue influence is regarded as serious and attracts a \$25,000 penalty.

**PART 7 – Interstate legal practitioners****Division 1 – Preliminary****91. When an interstate practitioner establishes an office**

There are two ways in which an interstate practitioner can be deemed to have established an office in Western Australia.

The first is when the interstate legal practitioner maintains an office her- or himself and offers legal services from this office. Alternatively, the services may be provided by the interstate practitioner from an office in this State which is maintained by the employer or legal practitioner partner of the interstate practitioner.

**Division 2 – Legal practice by interstate practitioners****92. Status of interstate practitioners**

Clause 92 confers on an interstate practitioner the status of having been admitted and deemed entitled to practise as a barrister and solicitor of the Supreme Court.

**93. Interstate practitioner may practise in this State**

Sub-clause 93(1) recognises practice certificates issued in other States. Sub-clause 93(2) brings interstate practitioners under the coverage of this Act and makes them subject to the regulatory authorities of Western Australia and any other State.

However, the Western Australian regulatory authorities, should they attach some restriction, condition etc to an interstate practitioner's entitlement to practice, cannot deal with the practitioner more harshly than they would if they were dealing with a local practitioner.

#### **94. Notification of establishment of office required**

It is important for the Western Australian regulatory authorities to be aware of exactly who is engaging in legal practice in this State. Therefore, under clause 94 an interstate practitioner is required to notify the Board that they have established an office here and must do so within 28 days. This requirement is sufficiently important to attract a penalty of \$2,500 for non-compliance.

Sub-clause 94(2) specifies the detail that is to be included in the notification, that is: the practitioner's residential address; the address from which the practitioner will operate their practice; where they practice outside Western Australia; and the names of any partners with whom the practitioner practises. Additional requirements can be added through the rules.

#### **95. Requirements relating to professional indemnity insurance**

Professional indemnity insurance is a requirement for all practitioners certificated in Western Australia. This clause requires interstate practitioners to take out professional indemnity insurance to cover their Western Australian practice.

#### **96. Requirements relating to Guarantee Fund**

As with locally certificated practitioners, interstate legal practitioners are required to contribute to the Guarantee Fund for a total of five years upon commencing to practice in Western Australia.

### **Division 3 – Complaints and discipline**

#### **97. Local Practitioners**

This clause establishes that the Western Australian regulatory authorities can deal with disputes and complaints concerning a Western Australian practitioner's practice in another State. This includes seeking to resolve a matter through dispute conciliation (sub-clause 97(1)), by dealing with the matter as a complaint (sub-clause 97(2)), through conducting an inquiry (sub-clause 97(3)), or by referring the matter to the Disciplinary Tribunal (sub-clause 97(4)).

#### **98. Referral of complaints and disciplinary matters to regulatory authorities in other States**

Clauses 98 to 103 empower the Western Australian regulatory authorities to work co-operatively with the regulatory authorities in other States to ensure that matters of conduct are appropriately dealt with across jurisdictions.

Clause 98 empowers the Complaints Committee to refer a complaint to or request another State regulatory body to conduct an investigation. This applies to matters concerning either a local or interstate practitioner.

Once an interstate regulatory authority has dealt with a matter, the Complaints Committee can take no further action unless it is required by the other authority to do so in order to impose a penalty as determined under clause 101. This means that a practitioner is subject to the formal procedures of only one jurisdiction on any given matter, but provides for the practitioner's home jurisdiction, in this case Western Australia, to apply the penalty. Should an interstate regulatory authority decide to not deal with a matter referred to it by the Western Australian Complaints Committee, then the Complaints Committee can deal with the matter itself.

### **99. Dealing with matters referred by regulatory authorities in other States**

Clause 99 is the corollary to clause 98 in that it empowers the Complaints Committee to deal with a matter referred to it by a regulatory authority from another State. It can resolve a dispute or undertake an investigation. These powers apply to both local and interstate practitioners and can involve actions that occurred either in Western Australia or in another State.

### **100. Furnishing information**

Because national practising certificates make it easier for practitioners to practice across jurisdictions, information sharing between regulatory authorities takes on added importance.

Clause 100 deals with information sharing. It places an obligation on the Western Australian regulatory authorities to co-operate with their counterparts in other jurisdictions by providing information that may assist in the dealing with disciplinary matters. The importance of the free flow of information between regulatory authorities is such that sub-clause 100(2) allows otherwise secret or confidential information to be provided.

Under sub-clause 100(4), Western Australian regulatory authorities are required to inform the authorities of other States should any disciplinary action against a practitioner (either local or interstate) result in the some form of condition, restriction, limitation or prohibition on the practitioner.

## **Division 4 – Miscellaneous**

### **101. Local practitioners are subject to interstate regulatory authorities**

This clause empowers regulatory authorities in other States to discipline and impose an order on Western Australian practitioners practising in their jurisdictions. Should an order (eg suspension, cancellation or imposition of conditions on a practice certificate) be imposed by an interstate regulatory authority, the Western Australian Legal Practice Board must comply with the order. This reciprocity extends to the striking off of practitioners so that on the order of an interstate regulatory authority, a practitioner can have her or his name removed from the Roll of Practitioners.

These provisions effectively mean that for legal practitioners to benefit from ease of practising across jurisdictions, they must equally be prepared to be regulated across jurisdictions. This will also help prevent “jurisdiction hopping” by practitioners whose conduct results in disciplinary action.

### **102. Local practitioner receiving trust moneys interstate**

A Western Australian legal practitioner who has an office in another State is required to deal with any trust moneys received in that other State through the trust account arrangements in that State. However, if the practitioner does not have an office in the other State, then trust moneys are to be dealt through the Western Australian system.

**103. Regulatory authority may exercise powers conferred by law of another State**

This clause relates specifically to the regulation of interstate practitioners and means that it may act on behalf of another State's regulatory authority.

**PART 8 – Foreign lawyers**

**Division 1- Preliminary**

**104. Practice of foreign law defined**

This clause defines foreign law and establishes a link between the practice of foreign law with what constitutes legal practice in a domestic context. Foreign law involves the provision of legal services that are associated with foreign rather than domestic law. If the service that is provided in relation to foreign law, is one that would be defined as a legal service if it related to domestic law, then the service constitutes the practice of foreign law. This applies even if the service entails only one action on the part of the practitioner.

**105. Who may practise foreign law**

Three different groups of practitioners can practise foreign law. An Australian certificated practitioner can do so; a registered foreign lawyer can do so; and a lawyer who is a foreign national and temporary entrant to the country and who does not operate a business locally can do so (a temporary entrant is someone who is subject to a migration restriction which places a time limit on how long they can remain in Australia in connection with the legal work). Anyone else who practises foreign law is subject to a \$10,000 penalty, cannot be paid for the work and must repay any moneys received for the work or be subject to a debtor action.

**Division 2 – Registration of foreign lawyers**

**106. Applying for registration**

A foreign lawyer can operate a business in Western Australia for the purpose of practising foreign law provided they are registered to do so. The Legal Practice Board is the registering authority and in making application to the Board, foreign lawyers must provide a range of information.

This information includes simple details such as their qualifications and their address in Western Australia. However, in order to protect clients from disreputable practitioners, they are also required to give details of where and by whom they are registered to practise law overseas; whether they are subject to any disciplinary proceedings; whether they are party to a criminal or civil proceeding that could result in disciplinary action; whether their registration is cancelled or suspended due to disciplinary action; whether there are any restrictions applying to their practice; and any other information the Board requires. Consistent with the provisions relating to interstate practitioners, foreign lawyers are also required to consent to the Western Australian regulatory authorities making enquiries of or exchanging information with their home registration authority.

The foreign lawyer must be able to verify the above information by the provision of relevant documentation from their home registration authority or by way of a statutory declaration. Documentation in languages other than English must be accompanied by an authenticated English translation.

#### **107. Registration fee**

In order to be registered a foreign lawyer must pay both an application and registration fee, with the total cost being no more than that of a practice certificate as applies to locally certificated legal practitioners.

#### **108. Registration**

In fulfilling its role of registering foreign lawyers the Legal Practice Board is required to satisfy itself that certain requirements have been met. These are in the interest of ensuring that only bona fide practitioners who genuinely intend to practice in Western Australia are registered. The specific matters which the Board must satisfy itself of are that the person is actually a registered lawyer, that the country where she or he is registered has an effective regulatory system, that there are no current or pending conditions that affect the appropriateness of the person to be registered, and that the person really does intend to establish a business in Western Australia. In satisfying itself the Board can draw on the information provided by the lawyer, make further investigations or draw on investigations of other foreign lawyers for information.

It is not necessary for a foreign lawyer to live in Western Australia in order to be registered.

Clause 188 refers to disciplinary action involving the foreign lawyer that the Disciplinary Tribunal may be dealing with. If, under clause 188(4) the Disciplinary Tribunal has imposed a time period during which the lawyer cannot be registered, then the Board cannot effect the lawyer's registration.

#### **109. Conditions may be imposed on registration**

This clause gives the Legal Practice Board the same type of powers concerning foreign lawyers' registration as it has with respect to the certification of local practitioners. The Board may impose a condition on a foreign lawyer's registration and can vary or revoke this at any time. However, to ensure even-handedness in the treatment of foreign and local lawyers, a condition imposed on a foreign lawyer cannot be more harsh than a condition that would apply to a local practitioner in the same circumstances.

#### **110. Applicant to be notified of decision**

This clause requires the Legal Practice Board to notify the foreign lawyer of the outcome of her or his application to be registered. However, if the Board fails to do so within 45 days of the application being lodged, the application is deemed to have been refused.

#### **111. Fees to be paid by registered foreign lawyers**

Registered foreign lawyers are to pay an annual registration fee which is to be no greater than the maximum fee payable by local practitioners for a practice certificate.

**112. Register**

This clause ensures that people have ready access to information about whether or not a foreign lawyer is registered to practice foreign law in Western Australia. It requires the Board to keep a register of registered foreign lawyers and stipulates that the register is available for public inspection.

**113. Suspending registration**

The Legal Practice Board can suspend the registration of a foreign lawyer. The grounds for suspension include: the lawyer's home registration lapsing, being suspended or cancelled; failure to establish an office or business presence in Western Australia; failure to comply with the Act or a condition imposed by the Act; or the lawyer becoming insolvent (as defined by the *Corporations Act 2002* (Cth)).

Normally, suspension would take effect 28 days after the Board gives notice to the lawyer that this is its intention. However, if the Board considers it necessary for reasons of protecting clients' interests or the integrity of the legal profession or administration of justice, the suspension can take effect immediately.

Sub-clause 113(3) allows safeguards for the foreign lawyer in that if her or his home registration lapses for reasons other than criminal, civil or disciplinary proceedings, but rather from circumstances beyond her or his control, she or he cannot be suspended by the Board.

**114. Effect of suspension**

Once suspended, a foreign lawyer's registration is no longer valid. However, a suspension cannot continue if the reasons for it cease to exist. Therefore, if the Board becomes satisfied that there are no longer grounds for a suspension, then it must lift the suspension immediately by giving written notice to the foreign lawyer.

**115. Cancelling registration**

A foreign lawyer's registration can also be cancelled for a number of reasons. Firstly, the grounds that result in a suspension (clause 113) are also grounds for cancellation, and the lawyer has the same rights should a lapsed home registration be due to circumstances beyond the lawyer's control. However, should a foreign lawyer become a certificated practitioner under Australian legislation then her or his registration as a foreign lawyer is automatically cancelled. Automatic cancellation also occurs if the lawyer so requests it. Requesting cancellation does not protect the lawyer from any potential or actual disciplinary proceedings.

As with suspension, a cancellation normally takes effect 28 days after the lawyer has been notified. Again, if the Board considers it necessary for reasons of protecting clients' interests or the integrity of the legal profession or administration of justice, cancellation can take effect immediately.

The Board has the discretion to refund all or part of the registration fee of a foreign lawyer whose registration is cancelled.

**116. Appeals**

A foreign lawyer may appeal to the Supreme Court if the Legal Practice Board refuses an application for registration, places or varies a condition on a registration or cancels a registration.

### **Division 3 – Practising foreign law**

#### **117. Scope of practice allowed**

The effect of clause 117 is that a foreign lawyer can only practice law in relation to foreign law. The types of foreign law in which they can work must relate to at least one of the following: any legal work concerning the law of the country in which the foreign lawyer is admitted to practice; in connection with arbitration, conciliation, mediation and other forms of consensual dispute resolution proceedings as prescribed by regulation; an appearance in a Western Australian court which requires a knowledge of the foreign law but is not required to apply the rules of evidence; or advising on Australian law if it is required in the course of advising on foreign law (and only then when the advice on Australian law is given by an independent Australian lawyer).

#### **118. Form of practice**

Clause 118 enables a foreign lawyer to operate in a variety of business structures as are locally certificated legal practitioners. The options open to a foreign lawyer are: on her or his own account (as per a sole practitioner); in partnership with other foreign lawyers and/or locally certificated lawyers; as a director of an incorporated legal practice or a partner of a multi-disciplinary practice; or as an employee of a local practice in any form of business structure.

#### **119. Letterhead and other identifying documents**

It must be clear to clients and business associates that they are dealing with a foreign lawyer. Clause 119 requires a foreign lawyer to disclose, in official documents such as business letters and invoices, that she or he is a foreign lawyer restricted to practising only foreign law. There are also restrictions on how foreign lawyers can describe their relationship to a partnership or body corporate with which they are associated. These restrictions are detailed in clause 120.

#### **120. Designation**

Under clause 120, registered foreign lawyers have a number of options for their business name. They can, for example, simply use their own names. They can also use the business name used in her or his home country of practice (including partnerships and body corporates in which case they would be required to show evidence that they are members of the practice in question). If they are associated with a local practice (either a partnership or incorporated legal practice) the business name may include a reference to the practice of foreign law.

#### **121. Employment of certificated practitioners by registered foreign lawyers**

Clause 121 enables a registered foreign lawyer to employ locally certificated practitioners but it also places limits on the scope of practice in which either can work. Employing a locally certificated practitioner does not result in the foreign lawyer being able to practice local law, and the certificated practitioner is also restricted to the practice of foreign law. However, if the foreign lawyer is a member of a partnership where one of the other partners is a locally certificated practitioner,

then the local practitioner employed by the foreign lawyer may engage in local legal practice (however, the foreign lawyer is still prohibited from doing so).

At times, a local practitioner may be required to practice under the supervision of another legal practitioner. However, a local practitioner who is an employee of a foreign lawyer cannot include this service towards the completion of a period of supervised practice.

**122. Employment of registered foreign lawyers by certificated practitioners etc.**

Registered foreign lawyers can also be employees of local practitioners whether the employing practice be a sole practitioner, partnership (including multi-disciplinary partnerships) or incorporated legal practice. Under these circumstances the registered foreign lawyer is still restricted to the practice of foreign law only.

**123. Professional indemnity insurance**

It is a requirement that a foreign lawyer in Western Australia has appropriate professional indemnity insurance and that this must be to the satisfaction of the Legal Practice Board.

**124. Trust accounts**

Parts 10 and 11 of the Act contain provisions relating to trust accounts. Clause 124 stipulates that these provisions apply equally to registered foreign lawyers as they do to locally certificated practitioners.

**125. Exemption may be granted by the Board**

Clause 125 empowers the Legal Practice Board to exempt registered foreign lawyers from a provision (or part of a provision) of the Act.

**PART 9 – Unqualified and prohibited practice**

*Part 9 brings together a number of related provisions which largely already exist in the Legal Practitioners Act 1893. Where there have been changes these are largely in the form of new provisions that deal specifically with incorporated legal practices so as to ensure that there is consistency between the regulation of these practices and certificated practitioners. In other cases the change is in the form of having a penalty specified for a breach of the provision. Where a clause simply reproduces an existing provision without any such addition it is not included in these notes.*

**126. Prohibition on unqualified legal practice**

This clause prohibits anyone other than a certificated legal practitioner from engaging in legal practice with the following exceptions: where a person is representing her- or himself in court; where a person is permitted to address the court under section 29 of the *Local Courts Act 1904*; or where some other law entitles a non-lawyer to appear in court.

The need to protect the community from unqualified persons practicing law is of high importance and thus a breach of this clause can result in a penalty of \$10,000.

**127. No liability in certain cases**

Clause 127 establishes what is meant by legal work, qualifies the prohibition contained in clause 126 and sets out the connection between being paid for legal work and the existence of liability for the work.

Legal work has a broad definition that encompasses the administration of law, and the preparation of documents relating to real estate, personal estate, civil or criminal proceedings, or equity.

In addition to the exceptions to legal practice contained in clause 126, the following categories of people can undertake legal work: a public officer doing so in the course of her or his duties; a person who is working under the supervision of a legal practitioner, or is a paid employee in a legal practice of any form; as an articled clerk; or someone drawing or preparing a transfer under the *Transfer of Land Act 1893*.

Furthermore, if a person has not been and does not expect to be financially rewarded for the provision of legal work (thus the work is deemed to be “unpaid work”) they can use this as a defence if accused of breaching clause 126 (which attracts a substantial penalty). However, this defence cannot be used if a financial reward is received or anticipated as a result of other work which is in some way related to the unpaid work. In short, this provision allows for any person to undertake legal work that is unpaid, but once payment is involved, either directly or indirectly, then the restrictions on who can and cannot undertake this work come into play.

### **128. Offence by corporation**

Just as an individual cannot engage in legal practice or purport to be able to do so unless she or he is a certificated legal practitioner, a corporation (with exceptions) cannot do so. The exceptions are where the corporation is in fact an incorporated legal practice, where there is not payment involved in the provision of the legal work, or where a corporation has been exempted by regulation from this clause. Furthermore, a corporation can provide in-house legal services, that is, where the corporation or a related body corporate is a party to the matter in question. In this instance, the corporation is still prohibited in holding itself out as a provider of legal services to others.

The penalty for a corporation unlawfully holding itself out to be a provider of legal services is \$25,000.

### **129. Certificated legal practitioner acting as agent for unqualified person**

Clause 129 prohibits legal practitioners acting as an agent for someone other than another certificated practitioner or an incorporated legal practice regarding work that is restricted to legal practitioners. It also prohibits legal practitioners from allowing the names of their practices (in whatever form of business structure) to be used by someone else other than another legal practitioner in relation to this form of work. A breach of either of these prohibitions attracts a penalty of \$2,500.

Similarly, an incorporated practice is prohibited from letting its name be used in this manner (subject to a penalty of \$10,000).

### **130. Allowing unqualified person to act as practitioner**

This clause makes it unlawful for a legal practitioner to in any way be involved in allowing a person who is not a legal practitioner to engage legal practice. This is a serious matter and consequently a penalty of \$10,000 is attached to this provision.

**131. Unqualified person making false representation to be practitioner**

Should a person who is not a certificated legal practitioner in anyway pretend that she or he is, they are in breach of clause 131 and subject to a penalty of \$2,500. This is aimed at protecting clients and the integrity of the justice system.

**132. Practitioner making false representation to be certificated**

Even though a person may be a legal practitioner, they cannot engage in the practice of law unless she or he holds a practice certificate issued by the Legal Practice Board (with the exceptions listed under clauses 126 and 127). An uncertificated legal practitioner who pretends to be certificated is in breach of clause 132 and subject to a penalty of \$2,500. As with clause 131, the purpose of this clause is to protect clients and the integrity of the justice system.

**133. Sharing receipts**

This clause enables legal practitioners to share their business receipts with others including incorporated legal practices, partners (including those in multi-disciplinary partnerships), employees and people who are not legal practitioners. The exceptions are that receipts cannot be shared with a prohibited person (see clause 67) or someone specified in regulations or rules.

**134. Employment or engagement of practitioner without practice certificate**

Clause 134 makes it unlawful for a certificated practitioner or incorporated legal practice to knowingly employ, as a certificated practitioner, someone who does not actually hold a practice certificate. To do so would result in a \$10,000 penalty.

**135. Prohibition on employment or engagement of certain non-legal persons**

Clause 135 allows for specific individuals (other than legal practitioners) being prohibited from employment by a legal practitioner. The mechanism for this is an application from the Legal Practice Board to the Supreme Court. The permitted grounds are that the person is not “fit and proper” or that the person has committed some action which would be deemed to be unsatisfactory conduct if she or he were a legal practitioner. Such an order can be revoked by the Supreme Court on application by the person. Should a legal practitioner who is involved in this matter die whilst application is being made or an order is in force, the application and order can continue.

**136. Associates who are prohibited persons**

Clause 67 defines a “prohibited person”. Such a person cannot be an associate of a legal practitioner.

Clause 136 defines an associate as someone employed or engaged by the legal practitioner, a partner of the practitioner, someone who shares the receipts of the practitioner’s business or is otherwise paid in connection with the practitioner’s practice.

A legal practitioner who does have a prohibited person as an associate is subject to a penalty of \$25,000. Likewise, if a prohibited person seeks to become an associate of a legal practitioner without informing the practitioner they face a penalty of \$10,000. The severity of these penalties reflects the intent of the clause which is to preserve the integrity of the legal profession and the justice system.

However, if the Legal Practice Board approves someone to be an associate then neither the prohibition nor the penalty apply, although such an approval may be limited or conditional.

**137. Part 9 does not affect operation of *Fair Trading Act***

The *Fair Trading Act* deals with the making of false representations as to qualifications with section 12(1)(f) applying a maximum penalty of \$6,000 as a summary offence or \$20,000 as an indictable offence for a such a breach. The *Fair Trading Act* applies to legal practitioners, and clause 137 of the Legal Practice Bill will ensure that the provisions of both the *Fair Trading Act* and the Legal Practice Bill will apply to legal practitioners.

**138. Appeal**

Under this clause a person whom the Legal Practice Board either does not approve as an associate or places restrictions on their approval as an associate may appeal to the Supreme Court.

**PART 10 – Trust accounts**

*Part 10 includes existing and new provisions relating to trust accounts. The interpretation has been changed in order to accommodate incorporated legal practices, multi-disciplinary partnerships, interstate practitioners and registered foreign lawyers, and some penalties have been introduced. Where a clause simply reproduces an existing provision without substantive change it is not included in these notes.*

**139. Interpretation**

Clause 139 defines those who are covered by the provisions of Part 10. Sub-clause 139(1) extends the definition of legal practitioner to include former legal practitioners, firms of legal practitioners and the personal representative of a deceased legal practitioner. This extension of the definition applies only to Part 10.

Incorporated legal practices, multi-disciplinary practices, interstate practitioners and registered foreign lawyers are also covered by Part 10 by virtue of clauses 64, 87, 93 and 124 respectively.

Trust moneys received by a partner, officer, employee, agent or other person with whom the legal practitioner shares business receipts, are treated in Part 10 as trust moneys received by the legal practitioner.

**146. Examiner may require production of books and documents**

An accountant who has been appointed under clause 145 to audit the trust accounts of a legal practitioner can, under clause 146, request that she or he be provided with books and other relevant documents. This is an existing power. However, clause 146

has also added a penalty of \$2,500 should a person refuse to comply with an examiner's requirement or hinder an examiner.

#### **147. Accountant's certificate**

This clause requires legal practitioners who maintain trust accounts to provide the Legal Practice Board with a certificate from an accountant that the trust accounts are in order before the legal practitioner can be issued with her or his annual practice certificate.

Under sub-clause 147(6), should a legal practitioner cease to practice, she or he is required to provide such a certificate to the Board for the period during which she or he practised, or satisfy the Board that no trust accounts were maintained during that period. The same requirements must be satisfied in relation to the situation where a legal practitioner dies, with the person administering her or his estate taking on this responsibility. A breach of this sub-clause results in a penalty of \$2,500.

### **PART 11 – Supervisors and managers**

*Part 11 includes existing and new provisions. Where a clause simply reproduces an existing provision without substantive change it is not included in these notes.*

#### **151. Interpretation**

Definition (b) of "practice" has been expanded to include a "former incorporated legal practice" whereas it previously only referred to a deceased legal practitioner. This means that when a legal practice ceases to exist due to the death of an individual practitioner or the cessation of a body corporate, the provisions apply regardless of the circumstance under which the practice has become defunct.

#### **153. Control of trust moneys by Legal Contribution Trust**

There are existing provisions which empower the Legal Practice Board to make application to a Judge for an order to the Legal Contribution Trust to take over control of a legal practitioner's trust accounts. The grounds for such an application and subsequent order have been a perceived deficiency in a trust account or the death of a sole practitioner. Clause 153 contains these provisions and adds to the grounds for an application and order the deregistration or dissolution of an incorporated legal practice.

#### **154. Special powers of the Board**

The Legal Practice Board currently has the power to appoint a supervising solicitor where an order is in force with respect to the operation of the bank accounts, trust accounts or other restrictions imposed on a legal practice. These powers are retained under clause 154, and under sub-clause 154(1)(a) now also provide for a registered foreign lawyer to be appointed the supervising solicitor if the practice concerned is that of a registered foreign lawyer.

#### **157. Power of Board to appoint legal practitioner to inquire into and report on practice**

This clause reproduces existing powers for the Legal Practice Board to appoint a legal practitioner to undertake an inquiry as to the capacity of another legal practitioner to properly conduct their practice. Sub-clause 157(1)(b) now also specifies that either a

locally certificated practitioner or a registered foreign lawyer can be appointed to conduct such an inquiry into the practice of a registered foreign lawyer. Under sub-clause 157(5) the penalty for obstructing an inquiry has been increased from \$2,000 to \$2,500.

### **159. Power of Judge**

Clause 159 deals with the powers of a Judge to take action against a legal practitioner who is believed to be incapable of properly conducting her or his practice. The provisions have been expanded to take into account registered foreign lawyers by empowering a judge to apply the same actions to them as to locally certificated legal practitioners.

### **161. Offence**

This clause makes it an offence to fail to comply with or to hinder or obstruct a supervising solicitor. The penalty for this offence has been increased from \$2,000 to \$2,500.

## **PART 12 – Complaints and discipline**

*Note: the ground for invoking the complaints and disciplinary provisions is “unprofessional conduct”. As already noted under clause 3, this is the new term that encompasses and expands on the previous grounds. Changes which simply constitute the adoption of this new term in place of the old terminology have not been included in these notes.*

### **Division 1 – General**

#### **163. Application**

Clause 163 stipulates that Part 12 (and hence the complaints and discipline mechanisms) apply to locally certificated legal practitioners, interstate practitioners and registered foreign lawyers. It also applies to those who are legal practitioners but not holding a practice certificate, those who have ceased to practise (but only in relation to matters occurring during the time they practised), and those who can do the work of a barrister or solicitor through Commonwealth legislation.

### **Division 2 – Disciplinary bodies**

#### **Subdivision 1 – Complaints Committee**

##### **167. Functions of the Complaints Committee**

This clause sets out the functions of the Complaints Committee which remain unchanged. However, the power of the Attorney General to appoint a community member of the Complaints Committee to report on a matter has been brought into the main body of the Act whereas it previously appeared in the Schedule.

##### **168. Constitution and procedures of Complaints Committee**

This clause gives effect to the provisions of Schedule 2 which deals with the constitution and procedures of the Complaints Committee.

#### **Subdivision 2 – The Disciplinary Tribunal**

##### **172. Composition of Disciplinary Tribunal**

This clause continues the practice of a chairperson being appointed to the Disciplinary Tribunal together with the members of the Legal Practice Board (apart from those

sitting on the Complaints Committee) and community representatives. However, sub-clause 172(1)(c) also allows the Board to appoint to the Disciplinary Tribunal any certificated practitioner who has practiced for a minimum of eight years

### **173. Chairperson of the Disciplinary Tribunal**

Clause 173 retains the requirement that the chairperson of the Disciplinary Tribunal be appointed by the Governor. However, it adds Judges and former Judges of the District Court to those eligible to be appointed to this position. Previously only Judges of the Supreme Court and former Judges of the Supreme Court, Federal Court of Australia or High Court of Australia were eligible from the judiciary.

### **174. Constitution and procedure of Disciplinary Tribunal**

In addition to the current provisions governing the constitution and procedures of the Disciplinary Tribunal, this clause (through sub-clause 174(3)), empowers the chairperson of the Disciplinary Tribunal to sit alone when dealing with interlocutory matters. This will streamline disciplinary proceedings. Sub-clauses (4) and (5) give effect to Schedule 3 which deals with the constitution and procedures of the Disciplinary Tribunal.

### **175. Functions of the Disciplinary Tribunal**

This clause sets out the functions of the Complaints Committee which remain unchanged. However, the power of the Attorney General to appoint a community member of the Disciplinary Tribunal to report on a matter has been brought into the main body of the Act whereas it previously appeared in the Schedule.

## **Division 4 – Conciliation and disciplinary proceedings – Complaints Committee**

### **180. Summary professional disciplinary jurisdiction**

This clause reproduces existing powers held by the Complaints Committee to make summary judgements with respect to a complaint. Sub-clause 180(2)(a) increases the penalty which the Complaints Committee can summarily impose from \$500 to \$2,500.

### **182. Disciplinary action against foreign lawyer**

As noted under clause 163, the complaints and discipline provisions apply to foreign lawyers. When considering disciplinary action with respect to a registered foreign lawyer, the Complaints Committee can take into account the professional conduct standards that apply in the home jurisdiction of the foreign lawyer. In making a finding against a registered foreign lawyer, the Complaints Committee can impose a penalty under clause 180 or make an order to impose on the lawyer's registration a condition of the type specified in clause 109.

## **Division 5 – Disciplinary proceedings before Disciplinary Tribunal**

### **189. Disciplinary action against foreign lawyer**

As noted under clause 162, the complaints and discipline provisions apply to foreign lawyers. When considering disciplinary action with respect to a registered foreign lawyer, the Disciplinary Tribunal can take into account the professional conduct standards that apply in the home jurisdiction of the foreign lawyer. In making a finding against a registered foreign lawyer, the Disciplinary Tribunal can impose a penalty under clause 180, make an order to impose on the lawyer's registration a condition of the type specified in clause 109, or suspend or cancel the lawyer's

registration to practice foreign law. During a period of suspension, an otherwise registered foreign lawyer is deemed to not be registered.

### **190. Orders of the Tribunal**

Clause 189 restates the existing findings and penalties that may be made or imposed by the Disciplinary Tribunal with some changes.

Sub-clause (d) increases the maximum fine which may be imposed from \$10,000 to \$25,000.

Sub-clause (f) requires a practice to make arrangements for the client's work to be undertaken by the practice itself at no cost or a cost set by the Legal Practice Board, or arrange for another practice undertake the further work either fully or partly at its own expense, or reduce the fees etc payable by the client by an amount determined by the Disciplinary Tribunal or Legal Practice Board. Sub-clause (f) has been amended to bring incorporated legal practices into the scope of practices which can either be so ordered or be a practice to complete the work of a practice which is under such an order.

### **191. Other powers of Tribunal in relation to insolvent, incapable and unfit practitioners**

Clause 39 empowers the Legal Practice Board to make application to the Disciplinary Tribunal if it is concerned that a legal practitioner is insolvent, incapable or unfit to practice. Clause 191 specifies how the Disciplinary Tribunal is to deal with such an application.

In making a decision to refuse, suspend, cancel or impose conditions on a practitioner's practice certificate, the Disciplinary Tribunal must be satisfied that it is in the interest of either the public or the practitioner's client(s) to do, or is necessary in order to protect the integrity of the legal profession or the justice system.

Other powers that the Disciplinary Tribunal has are that to impose an interim suspension whilst the matter is being determined. The Disciplinary Tribunal can also require the legal practitioner in question to undergo a medical examination, and should the practitioner refuse to do so, the Tribunal may take this as evidence of the person's inability to practice. The Tribunal is also empowered to consider this aspect of a practitioner's capacity to practice notwithstanding that there may be a disciplinary matter already before the Complaints Committee or the Disciplinary Tribunal itself.

### **192. Powers of Tribunal in relation to legal practitioner director where practice has not complied with insurance obligations**

Clause 61 requires an incorporated legal practice to hold professional indemnity insurance in addition to the professional indemnity insurance held by the individual legal practitioners within the incorporated legal practice. Sub-clause 61(3) provides for failure to comply with this requirement to be referred to the Disciplinary Tribunal for determination. If, under clause 192, the Disciplinary Tribunal finds that an incorporated legal practice has indeed failed to comply with clause 61, it can suspend the practice's legal practitioner director from practice.

**201. Powers of disciplinary bodies**

Clause 201 includes the existing powers of the Complaints Committee, Law Complaints Officer and the Disciplinary Tribunal with the addition of further powers.

Sub-clauses 201(1)(c) and (d) empower the disciplinary bodies to compel a legal practitioner, firm of practitioners, multi-disciplinary partnership or incorporated legal practice to provide it with written information (verified by statutory declaration) or records as required by the disciplinary body. Such a requirement must be complied with even if to do so is self-incriminating and could result in a penalty being applied. However, this information can only be used in connection with an offence that is either against this Act or is in relation to trust accounts and trust moneys, or in the case of perjury.

Refusal to comply with any of the powers sub-clause 201(1) or hindering anyone in exercising these powers is an offence subject to a penalty of \$2,500.

**204. Claims of privilege**

This clause gives the Complaints Committee and the Disciplinary Tribunal access to information that would otherwise be protected by privilege. This is an important new power.

Information which may be required by these bodies under sub-clauses 201(1)(c) and (d) must be provided by the legal practitioner or practice in question. However, in doing so legal professional privilege is not considered to have been waived. Furthermore, any subsequent information flowing from this cannot be used in any other proceedings or be reported.

**PART 13 – Costs****Division 2 – Entitlement to remuneration****223. Interpretation**

This Division deals with a legal practitioner's entitlement to be remunerated in return for her or his services. The interpretation has the effect of including an incorporated legal practice in the definition of "legal practitioner" for the purposes of this Division.

**Division 3 – Taxation and recovery of costs****231. Interpretation**

As with clause 223, the interpretation now includes incorporated legal practitioners in the definition of "legal practitioner".

**Part 14 – Professional indemnity insurance****250. Regulations as to professional indemnity insurance**

This Part sets out the requirements for legal practitioners to hold professional indemnity insurance. Sub-clause 250(1) expressly includes incorporated legal practices and former incorporated legal practices in the definition of "legal practitioner" for the purposes of this Part. This means that an incorporated legal practice itself is required to hold professional indemnity insurance and comply with the provisions of this part as is the case with the individual legal practitioners who are either officers or employees of the incorporated legal practice (or former incorporated

legal practice as the case may be). Sub-clause 250(4)(d)(ii) makes it clear that an individual legal practitioner who works in a partnership (including a multi-disciplinary partnership) or an incorporated legal practice is required to hold professional indemnity insurance.

## **PART 15 – Miscellaneous**

### **251. Evidentiary material**

This clause states that documents such as practice certificates can be admitted as evidence in complaints and disciplinary proceedings. Sub-clause 251(1) has been expanded to include certification of a practitioner being a registered foreign practitioner or of a condition applying to the registration of a registered foreign lawyer. Sub-clause 251(2) has the same effect with respect to interstate practitioners. This brings these two categories of practitioners into line with locally certificated legal practitioners for the purposes of this clause and the application of Part 12 which deals with complaints and discipline.

### **254. Laying documents before House of Parliament that is not sitting**

Sub-clauses 17(2), 169(2) and 177(2) require the Attorney General to table in Parliament the annual reports of the Legal Practice Board, Complaints Committee and Disciplinary Tribunal respectively within 14 days of receiving them. However, this could occur during a time when Parliament is not sitting. Clause 254 requires the reports to be provided to the Clerk of the House in such a circumstance.

### **255. Rules**

This clause brings together all the existing powers of the Legal Practice Board to make rules with some amendment.

There is a current provision which allows a person to complete part of her or his articles whilst a law student. This provision refers specifically to the University of Western Australia and there is no reference to either Murdoch University or the University of Notre Dame (Australia) both of which offer law degrees. Sub-clause 255(1)(d) removes this reference and instead provides for the rules to prescribe universities where articles can be served in this manner without a specific reference. This provides a more flexible approach to this issue.

Sub-clause 255(1)(j) allows the Legal Practice Board to make rules regarding the handling of trust accounts and trust moneys. This includes the capacity to rule on matters such as the electronic transfer of trust funds which can result in a much more administratively efficient way to manage these funds.

### **256. Regulations**

This clause provides for the Governor to make regulations in relation to this Act. Sub-clause 256(2) gives the Governor specific powers to make regulations with respect to incorporated legal practices, multi-disciplinary partnerships or registered foreign lawyers.

## **Schedule 2 – Provisions as to the constitution and procedure of the Complaints Committee**

### **Division 2 - Procedure**

**13. Voting**

The previous prohibition on community representatives having a deliberative vote on a complaint has been removed so that these representatives have the same voting powers as other members of the Complaints Committee. This will enhance the power and status of community representatives.

**Schedule 3 – Provisions as to the constitution and procedure of the Disciplinary Tribunal****Division 2 - Procedure**

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