Queensland Law Society

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Office of the President

12 February 2021

Deregulation Taskforce
Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

Your ref PMC:Occupational Mobility Consultation

Our ref ES:MD

Dear Deregulation Taskforce

Occupational Mobility Consultation

Thank you for the opportunity to provide comments on the Occupational Mobility Consultation, the concept of automatic mutual recognition (AMR) of occupational registrations and the exposure draft of the Mutual Recognition Amendment Bill 2020.

The Society is broadly supportive of facilitating appropriate occupational mobility generally between the States and Territories subject to appropriate public protection requirements inherent in existing licensing schemes.

In providing this response, we have had the benefit of working with our colleagues in regulatory bodies and legal professional associations in Queensland, New South Wales and other jurisdictions.

Application to Australian legal profession

The Society notes the expressed intention for the existing regulatory arrangements for the Australian legal profession to be exempted from the operation of the AMR regime. We understand the language of section 42(D)(3)(e) is intended to effect this exemption.

The Society is highly supportive of the intention to exempt existing regulatory arrangements from the operation of the AMR scheme.

The relevant provisions of the *Legal Profession Act 2007* (Qld)[1] and its equivalents in other jurisdictions, as well as the provisions of the *Legal Profession Uniform Law* currently operating in New South Wales and Victoria, have regulatory equivalence with the AMR scheme in our view. It is therefore unnecessary and would be undesirable to add an additional layer of regulation on the legal profession through this deregulation initiative.

[1] See sections 24, 74 to 78

Drafting of section 42(D)(3)(e)

While the Society supports the intention to exempt the Australian legal profession from the AMR scheme, we are concerned that the drafting of the relevant section is not expressed in a sufficiently clear and unambiguous way to be understood by the lay reader or to avoid the potential for jurisdictional arguments to be put in litigation relating to relevant disciplinary actions.

The section relevantly states:

> *(3) A person is not taken to be registered to carry on an activity in the second State if:*
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> > *(e) a law of the second State provides for persons to be, or to be taken to be, registered in that State to carry on the activity because, in another State, the person has a substantive registration for an occupation that covers the activity.*

The generalised nature of the drafting in this section appears to be directed as a catch–all for existing regulatory schemes with consistent mutual recognition features and as insurance against the potential for those schemes to restrict mutual recognition sometime in the future (whereby AMR becomes immediately operative in that State).

This generalised approach requires a person wishing to know whether their right to engage in legal practice outside their home state is conferred by jurisdictional law or the Commonwealth AMR scheme must undertake an analysis of both regimes and to make a subjective judgement about the applicability of the AMR regime.

It requires legal professional associations and regulators to make that assessment too, and potentially be subject to challenge or litigation, if an individual takes a differing view.

For the avoidance of doubt and to obviate unnecessary disputes, it would be expeditious for the legislation to state clearly that the legal profession regulatory regimes are exempted. This could be achieved by:

- express amendment of the relevant section,
- augmentation of the drafting note immediately below the section, or
- publication of a statutory instrument by the Minister which provides a non-exhaustive list of schemes exempt under section 42(D)(3)(e).

References in explanatory material to the Bill would be a less certain way to provide the needed clarification.

We would be pleased to engage in any further consultation on this point.

Clarification of AMR applicability in Queensland to licenced conveyancers

The Society also submits that legislative clarification is required whether AMR is available where a registered occupation exists in one Australian jurisdiction and not in another.

The occupation of conveyancer exists in some Australian jurisdictions pursuant to statutory licensing schemes permitting licensed individuals to perform certain limited types of legal work to facilitate the conveyancing of real property in their jurisdiction.

The occupation of conveyancer, however, does not exist in Queensland and no local regulatory schemes exists to facilitate it. In litigation relating to the position of the occupation of conveyancer and its applicability to Queensland under Mutual Recognition legislation, the

Administrative Appeals Tribunal, led by the then President, Her Honour Justice Jane Mathews found:

> *Even assuming, contrary to Fryberg J's findings, that there was once an "occupation" of conveyancer in Queensland which was able to be practised by virtue of section 42 of the 1867 Act, the material before us indicates that this occupation no longer exists and indeed had ceased to exist before the enactment of the Mutual Recognition legislation.*[2]

The AMR scheme is not clear on how it applies in a second State when an occupation does not exist in that second State. There is no licensing authority in Queensland which can register or licence a conveyancer to engage in legal practice in this jurisdiction.

The Society is concerned that:

- the current drafting in the Exposure Draft Bill needs to be clarified to ensure that it does not create new occupations contrary to State law for the duration of AMR operation,
- the current drafting of AMR in the Exposure Draft Bill may lead to the mistaken belief that there is an equivalent conveyancer occupation in Queensland, and
- protections for the Queensland public are maintained given conveyancers may be engaging in unregulated legal practice in this jurisdiction if they operate here under AMR provisions.

The Society sees it as undesirable should the AMR regime permit, or be seen to permit, unregulated legal practice in this jurisdiction. For the currency of AMR, any such behaviour would be without the benefit of a local equivalent to the strong consumer protection framework which presently exists for the legal profession, including:

- high standards of required professional responsibility and oversight by the independent Legal Services Commission
- mandatory professional indemnity insurance coverage of $2 million policy coverage, with run off cover
- fidelity fund coverage and professional obligations to contribute to make good in the case of any fraud or trust account deficiencies
- client disclosure and fee regulation, including cost assessment of bills over seen by the Courts
- Admission requirements to ensure practitioners are fit, proper and highly trained before commencing practice
- Ongoing disclosure and registration requirements to ensure practitioners remain fit and proper individuals to practice law and be placed in a position of public trust, and
- Oversight by the Courts of professional conduct and standards.

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[2] *Sande and Registrar Supreme Court of Queensland* [1995] AATA 593 (15 August 1995) at 42

For the avoidance of doubt, it would be desirable that any legislation makes it clear that AMR does not operate in the second State where there is no equivalent occupation in existence or a regulatory structure established to oversight the conduct of that occupation in the second State.

We would be pleased to engage in any further consultation on this point.

Drafting Issue in relation to exception to entitlement to AMR

We note that proposed section 42D(3)(a) provides that:

> (3) A person is not taken to be registered to carry on an activity in the second State if:
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> (a) the person is the subject of criminal, civil or disciplinary proceedings in any State (including any preliminary investigations or action that might lead to disciplinary proceedings) in relation to the activity; or

The inclusion of the commencement of preliminary investigations in any State in relation to the activities of an individual as a threshold to except a person from AMR is problematic. It is unlikely that a local regulator in a second State will become aware that preliminary investigations have commenced in any other State and accordingly know that that individual's AMR has ceased. This may lead to individuals engaging in unlicensed operation in the second State without the knowledge of the local jurisdictional regulator and without relevant consumer protections.

If you wish to discuss any aspect of this submission, please contact our General Manager of Advocacy, Guidance and Governance, Mr Matt Dunn, on [redacted]

Yours faithfully

[redacted]

Elizabeth Shearer
President

Copy to:

- Queensland Treasury – [redacted]
- Queensland Department of Justice and Attorney-General:
  - Strategic Policy – [redacted]
  - Office of Liquor and Gaming Regulation – [redacted]