LAW FIRMS AUSTRALIA

By email

2 June 2023

Legal Services Council
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Dear all

Consultation paper on costs disclosure thresholds

I write on behalf of Law Firms Australia (**LFA**) in relation to the consultation paper on costs disclosure thresholds published by the Legal Services Council in May 2023. LFA represents Australia's leading multi-jurisdictional law firms, Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison and Norton Rose Fulbright Australia. LFA is also a constituent body of the Law Council of Australia, the peak representative organisation of the Australian legal profession.

LFA appreciates the opportunity to participate in the review of the costs disclosure thresholds and provide comments on the consultation paper. LFA's comments respond to the appropriate level of the thresholds (questions 1 and 2), and on persons or classes of persons to be included in within the commercial and government client definition at s 170 of the Uniform Law (**the s 170 definition**) (question 4) as set out below.

1. Level of costs disclosure thresholds

Questions 1 and 2 in the consultation paper concern the level at which costs disclosure thresholds should be set in Uniform Law jurisdictions. The type of matters in respect of which LFA member firms act, and firms' policies, are typically such that the thresholds are of limited application. This is due to either: estimated costs exceeding the upper disclosure threshold; a disclosure exemption being enlivened, and/or; a firm policy requiring costs estimates to be provided except in limited circumstances.

LFA is, however, generally supportive of amendments to the thresholds that promote interjurisdictional consistency.

2. Commercial and government clients

Question 4 in the consultation paper concerns the persons, or classes of persons, that should be included within the commercial and government client definition at s 170 of the Uniform Law (**the s 170 definition**).

LFA supports each of the categories canvassed in the consultation paper for inclusion in the s 170 definition for the reasons in the table below. The table also sets out changes to the canvassed options that LFA believe should be considered or made.

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Option for inclusion	*Change to option*	*Reasons*
Trustees within the meaning of the *Bankruptcy Act 1966* (Cth).	N/A.	As the consultation paper notes, there is no practical reason to distinguish between a trustee in bankruptcy and a liquidator, administrator or receiver which are commercial or government clients under the s 170 definition. Queensland has adopted the broader position.[1]
Overseas-registered foreign law practices.	The exception should also include foreign lawyers.	It is anomalous that the existing exception is limited to Australian law practices[2] when jurisdiction (whether in Australia or foreign country) is not distinguished for government authorities.[3] The exception should also include foreign lawyers to reflect the position in all Legal Profession Act (**LPA**) jurisdictions other than South Australia,[4] which was also the position in New South Wales, Victoria and Western Australia prior to the implementation of the Uniform Law in those states.[5] It appears they have been excluded from the consultation paper on the basis that they 'do not relate to commercial and government clients.' However, LFA submits that their exclusion does not serve a useful regulatory purpose and should be included within the s 170 definition.

[1] *Legal Profession Act 2007* (Qld), s 311(1)(c)(ix).

[2] Legal Profession Uniform Law, s 170(2)(a).

[3] Legal Profession Uniform Law, s 170(2)(g).

[4] *Legal Profession Regulation 2017* (Qld), r 70(2)(a); *Legal Profession Regulation 2007* (ACT), r 83(1)(a); *Legal Profession Regulations 2007* (NT), r 80C(a); *Legal Profession Regulations 2018* (Tas), r 65(a).

[5] *Legal Profession Regulation 2005* (NSW), r 110(a); *Legal Profession Regulations 2005* (Vic), r 3.4.2(a); *Legal Profession Regulations 2009* (WA), r 81(a).

Option for inclusion	*Change to option*	*Reasons*
Corporations that have a share capital and whose shares, or the majority of whose shares, are held beneficially for the Commonwealth or a State or Territory.	N/A.	This exception, as it relates to the Commonwealth, State and Territory governments exists in all the LPA jurisdictions[6] and did exist in the same form in New South Wales, Victoria, and Western Australia prior to the implementation of the Uniform Law in those states.[7] This, in effect, represents an extension of the government authority exception under s 170(2)(g) of the Legal Profession Uniform Law. There is no practical reason this should not also be extended to local government owned corporations if local governments are permitted to own corporations under their governing legislation.
Licensees under the *National Consumer Credit Protection Act 2009* (Cth)	N/A.	There is no practical reason to distinguish between a person who holds an Australian credit licence financial services and a licensee which is a commercial or government client under section 170(2)(b)(iii) of the Uniform Law.
Large charitable and not-for-profit organisations.	Alternative criteria by which to capture charitable and not-for-profit organisations within the s 170 definition are those that define a medium registered entity and a large registered entity under s 205-25 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).	LFA supports the view that charitable and not-for-profit organisations that satisfy the same conditions as large proprietary companies under the *Corporations Act 2001* (Cth) are arguably of a similar level of sophistication as large proprietary companies. The alternative criteria, set out in the column immediately prior, might also be considered.

[6] *Legal Profession Regulation 2017* (Qld), r 70(2)(b); *Legal Profession Regulation 2007* (ACT), r 83(1)(b); *Legal Profession Regulations 2007* (NT), r 80C(b); *Legal Profession Regulations 2018* (Tas), r 65(b); *Legal Practitioners Regulations 2014* (SA), r 60.

[7] *Legal Profession Regulation 2005* (NSW), r 110(b); *Legal Profession Regulations 2005* (Vic), r 3.4.2(b); *Legal Profession Regulations 2009* (WA), r 81(a).

Option for inclusion	*Change to option*	*Reasons*
High net worth individuals	N/A.	LFA agrees with the view that the failure of the s 170 definition to distinguish between individuals based on assets, income, or sophistication (or some combination of those factors), in contrast to the treatment of companies within such definition, is anomalous. As the consultation paper notes, other legislation has drawn such distinctions; for example, financial product disclosure laws under Chapter 6D and Part 7.9 of the *Corporations Act 2001* (Cth) do not apply to sophisticated investors or wholesale clients,[8] being those with net assets of at least $2.5 million or gross income for each of the last two financial years of at least $250,000. Indeed, one advantage of using the accountant's certificate from the sophisticated investor or wholesale client test from the *Corporations Act 2001* (Cth) would be that clients would not need to source an alternative justification document to the document they obtain for investment purposes under that test. LFA disagrees with the suggestion in the consultation paper that attempting to bring some class of individuals within the s 170 definition, via s 170(2)(h), may be outside of power. The effect of failing within the definition is that captured persons or entities are 'non-disclosure' clients; the relevant question is whether costs disclosure to the person or entity serves a useful regulatory purpose rather than the label given the persons or entities within the group. LPA jurisdictions use the label 'sophisticated client' for this category of persons and entities.

[8] *Corporations Act 2001* (Cth), ss 708(8)(c) and 761G(7)(c).

LFA appreciates the opportunity to comment on the consultation paper. Please let me know if LFA can be of any further assistance in relation to the review.

Yours faithfully

Mitch Hillier
Executive Director
Law Firms Australia