

Legal Profession Uniform Law
Draft Uniform General Rules & Admission
Rules

Submission by Australian Corporate Lawyers Association

Legal Services Council and Admissions Committee
Level 11, 170 Phillip Street
Sydney NSW 2000

Dear Legal Services Council and Admissions Committee,

Thank you for the opportunity to present this submission in response to the Legal Profession Uniform Law ("**Uniform Law**") draft Uniform General Rules and Admission Rules.

ACLA is the peak national association representing the interests of lawyers working for corporations and government in Australia ("**in-house lawyers**"). As a membership association ACLA provides support, tools and resources for in-house lawyers, catering for all members including those new to in-house through to general counsel working in ASX 200 companies and government departments. ACLA plays an important role advocating on matters of interest to the in-house profession to shape our nation's corporate legal environment and promote the understanding of the law within the business and legal communities.

The new requirement under the Uniform Law for most Australian legal practitioners to hold an Australian practising certificate creates some unique transitional issues for in-house lawyers, and we appreciate the opportunity to draw these to your attention. As a number of the issues overlap, we have combined our response to the draft Uniform General Rules and Admission Rules.

Should you have any questions about our submission please contact Tanya Khan, Chief Legal Officer, on 03 9248 5500 or tanyakhan@acla.com.au.

Kind regards



Trish Hyde
Chief Executive Officer
16 January 2015

INTRODUCTION

With the commencement of the *Legal Profession Uniform Law* ("**Uniform Law**"), every "Australian legal practitioner", which by definition under section 6 of the Uniform Law includes "corporate legal practitioners" and "government legal practitioners", will be required to take out and maintain an "Australian practising certificate" unless specifically exempted by rules made under the Uniform Law (**the "Rules"**).

By virtue of subsection 14(3) of the *Legal Profession Act 2004 NSW* ("**NSW LPA**"), it is not at present necessary for an in-house lawyer (corporate or government) to hold a practising certificate provided such person provides legal services in the capacity of an employee to his or her employer (or a related entity) "in the ordinary course of his or her employment" and "receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee." Accordingly, some in-house corporate lawyers in NSW do not hold a practising certificate, and many government lawyers¹, not just in NSW but across Australia, also do not hold practising certificates.

This creates some unique transitional issues for in-house lawyers under the Uniform Law in respect of:

- meeting admission requirements (including the academic qualifications and practical legal training pre-requisites);
- meeting supervised legal practice requirements; and
- the licensing of foreign lawyers.

While the Uniform Law includes some broad powers for designated local regulatory authorities to grant some exemptions in relation to these requirements, how and in what circumstances those discretions will be exercised is not clear from the Uniform Law itself. The Uniform Law contemplates that further provisions and requirements may be set out in the Rules, and ACLA had anticipated that the Uniform General Rules and Admission Rules would clarify some of these issues and, in particular, how some of the statutory discretions/exemptions would be exercised. It appears, however, that many of these issues remain largely unresolved in the draft Rules. This creates uncertainty for those in-house lawyers, some who have been practising for a substantial period of time, who will now be required to obtain, and whose jobs may be dependant on obtaining, a practising certificate under the new law. From an in-house perspective, it is preferable that these issues are dealt with in the Rules rather than requiring individual practitioners to make individual applications to jurisdictional authorities, which will increase the uncertainty and risk of potentially inconsistent outcomes for practitioners, and create a substantial administrative burden on all parties.

SUPERVISED LEGAL PRACTICE REQUIREMENTS

Section 49 of the Uniform Law contains a statutory condition for Australian legal practitioners granted practising certificates under the Uniform Law to engage in supervised legal practice for a period of up to two years. As a general point, this condition may be problematic for one person or small legal departments where supervision by an approved person may not be possible, and we seek some guidance on whether such practitioners will be required to meet the section 49 statutory condition and, if so, how. It is also likely that most of the currently practising in-house lawyers who are particularly affected by this new requirement will have significantly more than two years practice.

We note that there is a broad discretion granted to the designated local regulatory authority under section 49 to exempt a person or class of persons from meeting the supervised legal practice requirements. As the Uniform General Rules do not address how or in what circumstances these discretions would be exercised, it would be helpful to the in-house profession if guidance could be provided ahead of the commencement of the Uniform Law. Additionally, ACLA's preference is that a class exemption be granted for those in-house lawyers who have been practising for two or more years before applying for a practising certificate. In that respect we note that section 169(4) of the *Legal Profession Uniform Law Application Act (Vic)* provides that government lawyers who, before the commencement of the Uniform Law, did anything in the course of their employment with the Crown or a public authority or in the performance of duties under an appointment by the Governor in Council, will get credit for any period of legal practice engaged in by that person, whether supervised or not, as 'supervised legal practice'. This is not replicated in NSW Application Act, and it is not clear why this exemption

¹ In Victoria there are at present three exceptions to the requirement for government lawyers to hold a practising certificate (these are replicated under section 6 of the Uniform Law and section 169 of the Uniform Law Application Act (Vic))

only applies to government lawyers in Victoria and why a similar exemption based on past experience is not extended to all in-house lawyers.

Recommendation:

- *The Rules should clarify how and in what circumstances the discretions under section 49 of the Uniform Law are to be exercised*
- *A similar exemption as that for government lawyers under section 169(4) of the Uniform Law Application Act (Vic) should be granted under section 49 of the Uniform Law to all in-house lawyers who have been practising for two or more years before applying for a practising certificate*
- *That guidance be provided on whether in-house lawyers who are sole lawyers or in small legal teams, where supervision by an approved person may not be possible, will be required to meet the section 49 statutory condition and, if so, how*

PRACTICE MANAGEMENT COURSE REQUIREMENTS

We understand that it is sometimes made a condition of obtaining a principal practising certificate that the practitioner undertake a practice management course, and we query whether this is to be a condition imposed under section 16 of the Uniform General Rules. From an in-house perspective, attending one of these courses may be problematic, particularly where the practitioner is the sole lawyer in their company. It would be preferable if attending such a course within a reasonable timeframe was made a condition subsequent to the grant of a practising certificate, rather than precluding the practitioner from obtaining a practising certificate until the condition is met.

Recommendation: *If completing a practice management course is to be a condition imposed under section 16 of the General Rules, it should be made a condition subsequent (with a reasonable timeframe for compliance) to the practising certificate being granted, rather than precluding the practitioner from obtaining a practising certificate until the condition is met.*

FOREIGN ADMITTED/QUALIFIED LAWYERS

Under section 6 of the Uniform Law an “Australian legal practitioner” means “an Australian lawyer who holds a current Australian practising certificate.” Under the same section, an “Australian lawyer” means “a person admitted to the Australian legal profession in this jurisdiction or any other jurisdiction”. “Jurisdiction” means “a State of the Commonwealth, the Australian Capital Territory or the Northern Territory of Australia” and so does not include foreign jurisdictions.

There are a number of foreign admitted or foreign legally qualified lawyers who work as corporate counsel in company legal departments without holding a current practising certificate as presently permitted under the NSW LPA. Many, if not all, will not have satisfied the educational requirements and practical legal training (“PLT”) requirements for admission as a solicitor in NSW and for that reason do not hold a current practising certificate. Accordingly, the requirement to hold a practising certificate in the future is of significant concern to those foreign lawyers whose continued employment in Australia might depend on holding such a practising certificate.

Our understanding is that sections 18-20 of the Uniform Law provide a broad discretion for a “designated local regulatory authority” to assist foreign lawyers with both admission to practice and the issue of an Australian practising certificate. The exemption available under section 18 seems to apply to all lawyers – whether foreign or not – and, accordingly, a “compliance certificate” may be available to foreign lawyers under section 19(3)(a) if the requisite exemptions have been afforded under section 18. Under section 20, which applies specifically to “foreign lawyers” (as defined), a “compliance certificate” issued by a designated local regulatory authority under section 19 may contain one or more of the conditions prescribed by section 20.

As the Uniform General Rules do not address how or when these discretions would be exercised, or under what circumstances a compliance certificate would contain one or more of the conditions prescribed by section 20, it would be helpful to the in-house profession if some guidance could be provided ahead of the commencement of the Uniform Law.

Recommendation:

- *The Rules should clarify how and in what circumstances the discretions under sections 18-20 of the Uniform Law are to be exercised, and the circumstances in which a compliance certificate would contain one or more of the conditions prescribed by section 20*
- *Any conditions imposed should be made conditions subsequent (with reasonable timeframes for compliance where a timeframe is relevant) to the practising certificate being granted, rather than the practitioner being precluded from obtaining a practising certificate until the conditions are met*

PROFESSIONAL INDEMNITY INSURANCE REQUIREMENTS

Under section 76 of the Uniform General Rules, government and corporate legal practitioners and holders of a statutory office of the Commonwealth or of a jurisdiction are exempted from the requirement to take out professional indemnity insurance (unless it is needed to cover volunteer work at a community legal service or other pro bono work). ACLA endorses this approach.

Recommendation: *No changes recommended*

DRAFT ADMISSION RULES

Sections 17 and 20 of the Uniform Law specify academic and PLT pre-requisites to admission which could be problematic for certain categories of in-house counsel who had previously not been admitted or been required to hold a practising certificate, in particular foreign lawyers in NSW. While we note that exemptions may be granted under section 18 of the Uniform Law and, under section 10 of the draft Admission Rules, foreign lawyers can apply to the Board for a direction on how to meet these requirements, there is no guidance or clarity on these processes or how the discretions will be exercised. Such guidance will be critical for those in-house lawyers who have been practising for a substantial period of time, who will now be required to obtain, and whose jobs may be dependant on obtaining, a practising certificate under the new law.

While under section 5 of the draft Admission Rules, the PLT requirement can be met through supervised legal training, this is likely neither appropriate nor practical for most experienced in-house lawyers, nor is the requirement under section 5(4) that if PLT has been completed more than 5 years ago the Board may require the applicant to undertake further PLT.

We note that the dispensing power in section 26 of the draft Admission Rules is possibly broader than that in section 18 of the Uniform Law in that the Board may “generally” or, in a particular case, dispense with any requirements if it will not materially detract from any of the pre-requisites for the issue of a compliance certificate set out in section 17 of the Uniform Law. ACLA queries whether it would be possible to rely on this section for a class exemption for PLT and academic qualification requirements in relation to foreign lawyers who have been practising for five or more years and NSW practitioners and all government lawyers who have been practising for two or more years before the commencement of the Uniform Law.

Recommendation:

- *The Admissions Committee should clarify how exemptions under section 18 of the Uniform Law will be granted*
- *The Admissions Committee should clarify the process for practitioners to obtain assistance under section 10 of the draft Admission Rules*
- *That a class exemption be granted under section 26 of the Admission Rules to foreign lawyers who have been practising for five or more years before the commencement of the Uniform Law in relation to the practical legal training and academic qualification requirements under section 17 of the Uniform Law*
- *That a class exemption be granted under section 26 of the Admission Rules to NSW practitioners and all government lawyers who have been practising for two or more years before the*

commencement of the Uniform Law in relation to the practical legal training and academic qualification requirements under section 17 of the Uniform Law

- *In the absence of exemptions being granted, that a reasonable period of grace be extended to those in-house lawyers who are practising in Australia at the time of applying for admission to enable them to continue practising while undertaking the necessary actions to meet the practical legal training and academic qualification requirements under section 17 of the Uniform Law*