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Presented by the Law Council of Australia

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Introduction

The Law Council of Australia is privileged to have been invited to participate in the Forum on Transnational Practice for the Legal Profession in Paris on 9 and 10 November 1998. The American Bar Association (ABA), the Council of the Bars and Law Societies of the European Community (CCBE) and the Japan Federation of Bar Associations (JFBA) should be commended for organising such an important initiative.

The Law Council of Australia is the national representative body of the legal profession in Australia. The Council's constituent bodies are the twelve State and Territory Bar Associations and Law Societies. Through the membership of the constituent bodies, the Law Council effectively represents 35,000 lawyers throughout Australia.

The Law Council's Mission Statement encapsulates the Council's objects which are specified in the Council's Constitution:

"The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and the general improvement of the law."

The Law Council has noted the discussion papers prepared by the ABA, the CCBE and the JFBA. The papers are most informative and will make a significant contribution to the discussions at the Forum. Having regard to these papers and the topics to be discussed at the Forum, the Law Council would like to report on developments in Australia on:

- the regulation of foreign lawyers; and
- multidisciplinary practices (MDPs).

The Law Council does not propose to discuss in any detail in its written contribution to the Forum the question of the ethical issues presented by transnational legal practice. These issues are already covered extensively in the discussion papers circulated by the ABA, the CCBE and the JFBA. The Law Council agrees with the observation in the discussion paper submitted by the ABA "that ethical codes and practices throughout the world cover largely the same ground and contain largely the same prescriptions for lawyer conduct."
Regulation of Foreign Lawyers

Australia has a federal system of government. The regulation of the legal profession is primarily the responsibility of the State and Territory governments.

In order to practise local law, including appearances in the courts, it is necessary for a lawyer to be admitted as a legal practitioner by a State or Territory Supreme Court. Each Supreme Court has now adopted Model Uniform Admission Rules. The approach adopted under the Uniform Admission Rules is that the only essential requirement for admission is a satisfactory standard of competence in the local law and practice. There is no citizenship or residency requirement for admission to practise law in Australia.

The regulation of foreign lawyers in relation to the practice of foreign law and third country law is also the responsibility of the States and Territories. After a meeting of the Standing Committee of Attorneys-General in March 1997, the Law Council was advised by the Attorneys-General representing each State and Territory Government and the Federal Government of their commitment to ensuring access to Australia for foreign lawyers. The Standing Committee unanimously agreed that there should, at the very least, be a clear statutory indication that there is no barrier to the practice of foreign law in Australia.

Some jurisdictions, notably New South Wales, Queensland, Victoria, the Australian Capital Territory and the Northern Territory have agreed to go further and implement a comprehensive system of regulation as provided in the Model Practice of Foreign Law Bill. So far, the Australian Capital Territory and Victoria have enacted legislation based on the Model Practice of Foreign Law Bill and the New South Wales Government has recently introduced legislation into the New South Wales Parliament.

The Law Council has fully supported the approach adopted in the Model Practice of Foreign Law Bill as it largely reflects the principles adopted by the Law Council in its Policy Statement on International Legal Practice which it released in 1992.

The Model Practice of Foreign Law Bill is consistent with the resolution adopted by the International Bar Association on 6 June 1998 on the General Principles for the Establishment and Regulation of Foreign Lawyers. The Model Practice of Foreign Law Bill also complies with GATS principles in that there is no reciprocity requirement in the legislation.
The principal purpose of the Model Practice of Foreign Law Bill is:

"to encourage and facilitate the internationalisation of legal services and the legal services sector by providing a framework for the regulation of the practice of foreign law in Australia by foreign qualified lawyers as a recognised aspect of Australian legal practice."

A copy of the Model Practice of Foreign Law Bill is attached (Attachment A) for the information of Forum participants. In practical terms, the Practice of Foreign Law Bill will define the specific scope of practice for a foreign lawyer and will achieve the following outcomes:

- formal recognition, under a transparent regime, of the right of a foreign lawyer to practise the law of his or her home jurisdiction;
- formal recognition, under a transparent regime, of the right of a foreign lawyer, where appropriately qualified, to practise the law of another foreign country;
- express provision that a foreign lawyer who practises foreign law in Australia on a 'fly-in, fly-out' basis is not required to register as a foreign lawyer;
- the right of a foreign lawyer to provide legal services (including appearances) in relation to international commercial arbitration);
- the right to practise the law of the foreign lawyer's home jurisdiction or the law of another foreign country in partnership with other foreign lawyers or with local Australian lawyers.

Multidisciplinary Practices (MDPs)

The subject of MDPs is high on the list of priorities of governments and regulatory authorities in Australia. Discussion on the topic of MDPs is usually undertaken in the context of the broader question of lawyers' business structures.

The Trade Practices Commission (which is now called the Australian Competition and Consumer Commission) made the following recommendations in relation to MDPs in its Final Report on the Study of the Legal Profession in March 1994:

"In all jurisdictions, rules preventing lawyers from sharing profits from legal practice with non-lawyers and from
incorporating their practices (where they apply) should be repealed to permit the formation of MDP and incorporated practices, including practices involving non-lawyer equity holders or partners, subject to the adoption of appropriate rules of ethical and professional conduct to protect the interests of clients and the system of justice.”

The Council of Australian Governments (“COAG”) in 1996 endorsed the recommendation of its Legal Profession Reform Working Group that flexible business arrangements are an important feature of a more responsive legal services market and considered, in particular, that combined practices such as multi-disciplinary partnerships may reduce transaction costs, particularly in the corporate sector where commercial requirements include a sophisticated mix of professional skills. COAG decided to refer this matter for further study to the National Competition Council (“NCC”). A formal referral has not yet been made to the NCC.

The Legal Ombudsman in the State of Victoria is currently undertaking an inquiry into MDPs. The Victorian Attorney-General said, in her second-reading speech, when introducing the Legal Practice Bill 1996 into the Victorian Parliament, that the Victorian Government had a commitment to permit the formation of MDPs some time in the future when a number of complex regulatory issues had been resolved.

The Access to Justice Advisory Committee - which was appointed by the Federal Government in 1993 to consider ways in which the legal system could be reformed in order to enhance access to justice and make the legal system fairer, more efficient and more effective - while acknowledging difficulties to be addressed concerning the ethical regulation of MDPs, nevertheless concluded in its 1994 final report that “we consider that the increased choice and convenience for clients and the potential for flexibility for lawyers justify the removal of the legal barriers to multi-disciplinary practices, subject to the development of a suitable ethical and regulatory regime”.

At the present time, no State or Territory in Australia permits lawyers to practise in MDPs except New South Wales. The main statutory restraint upon solicitors entering into partnership with non-lawyers is in the relevant provision in each jurisdiction, except NSW, which prohibits the sharing of profits from a law practice with non-lawyers.

The Professional Regulation Task Force of the Law Society of New South Wales recommended in its report of May 1997 that
significant reforms should be introduced in relation to the regulation of the legal profession. The underlying philosophy of the Task Force's Report is that, provided ethical standards and requirements are imposed on individual lawyers, restrictions on the structure or form of lawyers' business undertakings could be significantly relaxed.

In late 1997, the Law Council established a high level Working Group (known as the National Cooperation Project Working Group) to research and report on a wide range of reform issues relating to the structure and practices of the legal profession in Australia, including MDPs. On the question of MDPs the Working Group favoured the general approach adopted in the 1997 Task Force Report to the Law Society of New South Wales.

As a result of the Working Group's recommendations, the Law Council adopted at its meeting on 20 June 1998 the following principles as the basis of a Law Council Policy Statement on MDPs which the Working Group was requested to develop:

(a) that the regulatory regime should be directed to the individual lawyer who is bound by ethical obligations and professional responsibilities;
(b) that regulation of business structures should no longer be regarded as critical or necessary to the maintenance of professional standards; and
(c) that individual lawyers should be free to choose the manner and style in which they wish to practise law, including the right to choose to practise at an independent Bar, which requires practise as a sole practitioner, so long as their choices do not threaten harm to the paramount public interest in the administration of justice.

The Council also agreed that the Working Group should develop explicit statements of principle for inclusion in Model Codes of Practice that no partnership deed or employment contract relating to MDPs should require a lawyer to act unlawfully.

The underlying philosophy of the Working Group's approach is to remove existing restraints on the capacity of the legal profession to compete with other service providers, while continuing to place paramountcy on the maintenance of lawyers' ethical obligations and professional responsibilities. Lawyers are individually bound by the professional conduct rules of the profession. The Working Group adopted the same positive approach that was endorsed in a report on MDPs to the Law
Society of New South Wales in 1992 viz, why shouldn’t the profession be free to adopt the structure it chooses in association with such related services as it chooses, so long as the public interest is protected.

The Law Council’s Working Group addressed the concern that permitting lawyers to share profits or receipts with non-lawyers would compromise a lawyer’s duty to the Court or their independent judgment. The Working Group argued that concerns about independence are answered by the following considerations:

(a) the recognition in the proposed Law Council policy that individual lawyers, in whatever style they choose to practice, must comply with their ethical obligations of integrity and fidelity and above all, their individual commitment to the administration of justice; and

(b) concerns raised about independence appear to fly in the face of the reality of modern day legal practice in Australia. The very large legal firms already have to address and resolve on a daily basis core ethical issues including conflicts of interest. Furthermore, the Working Group noted that the legal profession in Australia accepts without question, the employment of lawyers by non-lawyers - such as the case of the in-house corporate counsel or the public servant government lawyer. The Working Group posed the question that if the employment relationship does not detract from the professional responsibility of individual lawyers, why should a less subservient role such as a lawyer being in partnership with a member of another profession, such as an accountant, give rise to concerns about independence?

The Working Group also noted and expressly endorsed the following conclusions adopted by the 1992 report to the Law Society of New South Wales on the important issues of confidentiality and legal professional privilege:

Confidentiality: The lawyer’s duty of confidentiality in respect of information received in acting for a client is vital. As other partners and staff of an MDP will have access to that information, they must carry the same obligations of confidentiality as the lawyer, notwithstanding that the requirements of their own profession may not be as stringent. It should be the obligation of the lawyer partners to ensure that their non-lawyer partners abide by that requirement, and
it should desirably be a requirement of any MDP that the non-lawyer partners irrevocably contract to observe that confidentiality as well as other relevant restraints such as avoidance of conflict.

Legal professional privilege: The question is whether MDPs would in any way erode the client's right to legal professional privilege in respect of documents and communications brought into existence for the purpose of litigation or advising a client. While non-lawyer partners should not affect the issues any more than non-lawyer employees, it may be said that in an MDP the reason for the creation of documents might be less clear. However, in most cases it should be possible to determine whether the document or communication was brought into existence for the purpose of litigation or advising a client, even though it may in itself be non-legal. In each case it will be a question of fact. If the privilege attaches to the document or communication, then that should protect it even although the non-lawyer partner may be subpoenaed to produce them.

The Law Council will be holding a major debate on the issue of MDPs at its next meeting on 5 December 1998. The Law Council's constituent bodies are presently considering a draft Law Council Policy Statement on MDPs which has been prepared by the Working Group for debate at the 5 December Council meeting. The Forum in Paris is thus being held at a most opportune time for the Law Council, as its delegation to the Forum will be able to report back to the Law Council the views of other Bars and Law Societies on MDPs.

A copy of the draft Law Council Policy Statement on MDPs is attached for information of Forum participants (Attachment B). It should be emphasised that the draft Policy Statement has not, at this stage, been adopted by the Law Council.
ATTACHMENT A

Practice of Foreign Law Bill 1996

A. Model Provisions for Restricted Practice

A BILL FOR
An Act to make provision in respect of the practice of foreign law by foreign lawyers in the State [Territory]
[enacting formula]

I. Preliminary

1. Name of Act

This Act is the Practice of Foreign Law Act 1996.

2. Commencement

This Act commences on

3. Principal Purpose

The principal purpose of this Act is to encourage and facilitate the internationalisation of legal services and the legal services sector by providing a framework for the regulation of the practice of foreign law in Australia by foreign-qualified lawyers as a recognised aspect of Australian legal practice.

4. Definitions

In this Act:

- "Australia" includes the external Territories;
- "Australian law" means law of the Commonwealth, a State or a Territories;
- "commercial legal presence" means an interest in a law firm practise foreign law;
- "domestic lawyer" means a person (including a foreign lawyer) who is duly registered to practice law in the State [Territory] by the domestic registration authority;
• "domestic registration authority" means [each jurisdiction to insert the appropriate authority. In jurisdictions where an individual is subject to more than one system of registration to practise law the appropriate authority may need to be inserted throughout the draft in place of a general definition];

• "foreign law" means law of a place outside Australia;

• "foreign lawyer" means a person who is duly registered to practise law in a place outside Australia by a foreign registration authority;

• "foreign registration authority" means the person or authority in a place outside Australia having the function conferred by law of registering persons to practise law in that place;

• "home registration authority" of a foreign lawyer means the foreign registration authority stated in the lawyer’s registration notice under section 7;

• "law firm" means:

  (a) a person practising as a lawyer on the person’s own account; or

  (b) a partnership of two or more persons practising as lawyers; or

  (c) an incorporated legal practice that is permitted by a law of the state [Territory];

• "locally registered foreign lawyer” means a person who is registered as a foreign lawyer under this Act;

• "practise foreign law" means doing work, or transacting business, in the State [Territory] concerning foreign law, being work or business of a kind that, if it concerned the law of the State [Territory], would ordinarily be done or transacted by a domestic lawyer;

• "registered”:

  (a) on when used in connection with a place outside Australia, means having all necessary licences, approvals, admissions, certifications, or other forms of authorisation (including practising certificates), required by or under legislation for the carrying of the practice of law in that place; or
(b) when used in connection with the exercise of a function by a domestic registration authority by or under a law other than this Act, means [each jurisdiction to insert appropriate description].

5. Operation of this Act

(1) This Act applies to any individual (other than a domestic lawyer) who practises foreign law in the State [Territory].
(2) Nothing in this Act requires a domestic lawyer (including a foreign lawyer who is also a domestic lawyer) to be registered as a foreign lawyer under this Act in order to practise foreign law in the State [Territory].

II. Local registration of foreign lawyers

6. Registration requirement

(1) A person must not practise foreign law in the State [Territory] unless the person:

(a) is a locally registered foreign lawyer and practises foreign law in the State [Territory] in accordance with this Act; or
(b) is a foreign lawyer who practises foreign law in the State [Territory] on a temporary basis or is subject to a migration restriction and who:

(i) does not maintain an office for the purpose of practising as a lawyer in the State [Territory]; or
(ii) does not have a commercial legal presence in the State [Territory]; or

(c) is a domestic lawyer, or is a person employed by a domestic lawyer to provide advice on foreign law to, and for use by, the domestic lawyer.

Penalty: [equivalent in State [Territory] of penalty applicable to a person who practises as a domestic lawyer without the appropriate practising certificate]
(1) In this section:

"migration restriction" means a restriction imposed on a person who is not an Australian citizen under the *Migration Act 1958* of the Commonwealth that has the effect of limiting the period during which work may be done, or business transacted, in Australia by the person.

[Note: Under the Mutual Recognition (State [Territory]) Act a person will be entitled to be registered as a foreign lawyer in the State [Territory] if the person is registered as a foreign lawyer in another State or Territory once the person lodges a notice under section 19 of that Act]

7. Registration notice

(1) A foreign lawyer may lodge a written notice with the domestic registration authority seeking registration as a foreign lawyer under this Act.

The notice must:

(a) state the lawyer’s educational and professional qualifications; and

(b) state that the lawyer is registered to practise law by a specified foreign registration authority ("the home registration authority") in a place outside Australia; and

(c) state that the lawyer is not the subject of any disciplinary proceeding in that place (including any preliminary investigations or action that might lead to disciplinary proceedings) in relation to that registration; and

(d) state that the lawyer is not a party in any pending criminal or civil proceedings that is likely to result in disciplinary action being taken against the lawyer, and

(e) state that the lawyer’s registration in that place is not cancelled or currently suspended as a result of any disciplinary action; and

(f) state that the lawyer is not otherwise personally prohibited from carrying on the practice of law in that place or bound by any undertaking not to carry out the practice of law in that place, and is not subject to any special conditions in carrying on that practice as a result of criminal, civil or disciplinary proceedings in that place; and
(g) specify any special conditions imposed as a restriction on the practice of law by the lawyer or any undertaking given by the lawyer restricting the lawyer's practice of law; and

(h) give consent to the making of inquiries of, and the exchange of information with, the home registration authority regarding the lawyer's activities in practising law in that place or otherwise regarding matters relevant to the notice.

The notice must be accompanied by an original instrument, or a copy of an original instrument, from the home registration authority:

(a) verifying the lawyer's educational and professional qualifications; and

(b) verifying the lawyer's registration by the authority to practice law in the place concerned, and the date of registration; and

(c) describing anything done by the lawyer in practising law in that place of which the authority is aware that, in the opinion of the authority, has had or is likely to have had an adverse effect on the lawyer's professional standing within the legal profession of that place.

The lawyer must certify in the notice that the accompanying instrument is the original or a complete and accurate copy of the original.

The domestic registration authority may require the lawyer to verify the statements in the notice by statutory declaration or by other proof acceptable to the authority.

If the accompanying instrument is not in English it must be accompanied by a certified translation in English.

8. Fee for registration

The notice is to be accompanied by such fee as the domestic registration authority may determine.

(1) The fee is not to be greater than the fee paid by domestic lawyers for registration by the domestic registration authority to carry on the practice of law in the State
[Territory], less [in those jurisdictions where applicable] any component of the fee paid by domestic lawyers for fidelity insurance or for compulsory membership of any professional association.

9. Entitlement to registration

(1) A person is entitled to be registered under this Act as a foreign lawyer if:

(a) the person lodges a notice in accordance with section 7; and

(b) the domestic registration authority is satisfied that the person is registered to practice law in a place outside Australia; and

(c) the domestic registration authority considers that an effective system exists in that place for the regulation of the practice of law in that place; and

(d) the domestic registration authority considers that the person is not, as a result of criminal, civil or disciplinary proceedings, subject to any special conditions in carrying on the practice of law in that place or any undertakings concerning the person’s practice of law in that place that would make it inappropriate to register the person; and

(e) the person demonstrates an intention to practise foreign law in the State [Territory] and to establish an office or a commercial legal presence in the State [Territory] within a reasonable period after grant of registration for the purpose of so practising.

(2) Residence or domicile in the State [Territory] is not a prerequisite for, or a factor in determining entitlement to, registration as a foreign lawyer under this Act.

10. Conditions

(1) The domestic registration authority may at any time impose any condition on the registration of a foreign lawyer under this Act that is equivalent to any special condition of carrying on practice imposed on the lawyer by the lawyer’s home registration authority and may at
any time by notice in writing revoke or vary such a condition.

(2) The domestic registration authority may not impose any other conditions on registration of a foreign lawyer under this Act.

11. Notification of decision

(1) The domestic registration authority must give the foreign lawyer who lodges a notice in accordance with section 7 written notice of its decision to grant registration under this Act, to refuse registration, or to impose conditions on registration.

(2) The domestic registration authority is taken to have refused registration if registration is not granted within [each jurisdiction to insert appropriate number of days] after a notice is duly lodged under section 7.

12. Duration of registration and annual fee

(1) When granted, registration under this Act takes effect as from the date on which the notice under section 7 was lodged.

[each jurisdiction to insert appropriate date for that jurisdiction eg the date for renewal of practising certificates of domestic lawyers]

(2) Registration remains in force, unless sooner cancelled, for the period of one year from the day on which it takes effect.

(3) Registration may be renewed by payment of an annual fee determined by the domestic registration authority.

(4) Payment must be made on or before a date notified in writing to the locally registered foreign lawyer by the domestic registration authority.

[each jurisdiction to insert an appropriate provision to ensure the practice will respect to the giving of notice is consistent with that applying to domestic lawyers]
(5) The annual fee is not to be greater than any annual fee paid by domestic lawyers in respect of registration by the domestic registration authority to carry on the practice of law in the State [Territory], less [in those jurisdictions where applicable] any component of the fee paid by domestic lawyers for fidelity insurance or for compulsory membership of any professional association.

13. Register

(1) The domestic registration authority is required to keep, in such form as it thinks fit, a register of persons registered as foreign lawyers under this Act.

(2) The register is to be made available for public inspection during office hours.

14. Cancellation of registration

(1) The domestic registration authority may, by in writing to a locally registered foreign lawyer, cancel the lawyer's registration under this Act if it is of the opinion that there is sufficient reason for doing so.

(2) Without limiting the grounds for cancellation, registration may be cancelled if:

(a) the foreign lawyer's home registration authority cancels registration of the foreign lawyer as a result of criminal, civil or disciplinary proceedings; or

(b) the foreign lawyer fails to comply with any requirements of this Act; or

(c) the registration of the foreign lawyer by the lawyer's home registration authority has lapsed; or

(d) the foreign lawyer has not established an office to practise foreign law or a commercial legal presence in the State [Territory] within a reasonable period after being granted registration; or

(e) the foreign lawyer fails to comply with any condition imposed on the lawyer's registration under this Act.
(3) Registration is not to be cancelled on any of the above grounds unless the foreign lawyer is given reasonable opportunity to make written submissions to the domestic registration authority.

(4) Registration is not to be cancelled on the ground that the lawyer's registration has lapsed as referred to in subsection (2) (c) if the lawyer demonstrates that the lapse did not result from any criminal, civil or disciplinary proceedings against the lawyer but from circumstances beyond the lawyer's control.

(5) Registration as a foreign lawyer under this Act is automatically cancelled if the lawyer concerned:

   (a) is registered as a domestic lawyer, or
   (b) requests cancellation.

(6) Cancellation of registration at the request of a lawyer does not affect the exercise by the domestic registration authority of any power relating to disciplinary proceedings brought against the lawyer before the cancellation.

15. Appeals

(1) If the domestic registration authority:

   (a) refuses to register (or renew the registration of) a foreign lawyer under this Act; or
   (b) cancels the registration of a foreign lawyer under this Act, or
   (c) takes any disciplinary action against a foreign lawyer under this Act, the foreign lawyer may appeal to the [the appropriate court or other body to be inserted in each jurisdiction].

(2) The [appropriate court or body] may make any order in relation to the refusal or cancellation or disciplinary action that might be made in relation to an appeal by:

   (a) an applicant for registration as a domestic lawyer who is refused registration; or
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(b) a domestic lawyer whose registration is cancelled by the domestic registration authority; or
(c) a domestic lawyer against whom disciplinary action has been taken by the domestic registration authority

III. Legal Practice

16. Scope of practice

(1) A locally registered foreign lawyer may provide only the following legal services:

(a) doing any work, or transacting any business, in the State [Territory] concerning the law of the place in which the lawyer is registered by the lawyer’s home registration authority;
(b) legal services (including appearances) in relation to arbitration proceedings in the State [Territory] of a kind prescribed by the regulations;
(c) legal services (including appearances) in relation to proceedings before bodies other than courts, being proceedings in which the body concerned is not required to apply the rules of evidence and in which knowledge of the foreign law of the place referred to in paragraph (a) is essential;
(d) legal services in relation with conciliation, mediation and other forms of consensual dispute resolution in the State [Territory] of a kind prescribed by the regulations.

(2) Nothing in this Act authorises a locally registered foreign lawyer may advice on the effect of an Australian law if the giving of advice on Australian law is necessarily incidental to the practise of foreign law and the advice is expressly based on advice given on the Australian law by a domestic lawyer who is not an employee of the foreign lawyer.

17. Form of practice

(1) A locally registered foreign lawyer may practise:

(a) as a foreign lawyer on the lawyer’s own account; or
(b) in partnership with other locally registered foreign lawyers or with domestic lawyers (or both); or
(c) as a member of an incorporated legal practice that is permitted by a law of the State [ Territory].

(2) Any such affiliation does not entitle the locally registered foreign lawyer to practise domestic law in the State [ Territory].

18. Application of Australian professional ethical and practice standards

A locally registered foreign lawyer must not engage in any conduct in practising foreign law that would, if the conduct were engaged in by a domestic lawyer in practising Australian law in the State [ Territory] constitute professional misconduct or unprofessional conduct [ each jurisdiction will need to use appropriate terminology to define the relevant conduct so as to fit in with local requirements concerning professional standards e.g. see the definitions of “professional misconduct” in section 127 of the Legal Profession Act 1987 (NSW); the definition of “misconduct” in section 2A of the Legal Profession Practice Act 1958 (Vic); the definition of “unprofessional conduct” in section 5 of the Legal Practitioners Act 1981 (SA); the description of disciplinary powers in section 28A and 29A of the Legal Practitioners Act 1893 (WA); the definitions of “professional misconduct” and “unprofessional conduct” in section 56 of the Legal Profession Act 1993 (Tas)].

19. Disciplinary action for breach of Australian professional ethical and practice standards

(1) A locally registered foreign lawyer who contravenes section 18 is subject to the disciplinary provisions and arrangements that are applicable to domestic lawyers whose conduct constitutes or is alleged to constitute professional misconduct or unprofessional conduct.

(2) In determining whether a locally registered foreign lawyer should be disciplined for a contravention of section 18, the domestic registration authority must take into account:

(a) whether the conduct of the lawyer was consistent with the standards of professional conduct of the
legal profession in the lawyer’s foreign place of registration; and
(b) whether the lawyer contravened the section wilfully or without reasonable excuse.

(3) The regulations may exempt any foreign lawyer or class of foreign lawyers from compliance with all or specified disciplinary provisions or arrangements.

20. Letterhead and other identifying documents

(1) A locally registered foreign lawyer may describe himself or herself and any law firm with which the foreign lawyer is associated in any of the ways designated in section 21.

(2) A locally registered foreign lawyer is required to indicate on the lawyer’s letterhead and any other document used when practising foreign law in the State [Territory] to identify the lawyer as a lawyer the fact that the lawyer is a locally registered foreign lawyer.

(3) A locally registered foreign lawyer may (but need not) indicate all States or Territories in which the lawyer (and any of the lawyer’s partners) are registered as foreign lawyers or any document referred to in this section.

(4) A locally registered foreign lawyer may (but need not) indicate all places outside Australia in which the lawyer is registered to practise law on any document referred to in this section.

21. Designation

(1) A locally registered foreign lawyer may use the following designation:

(a) the lawyer’s own name;
(b) the title the lawyer is authorised by law to use in the place outside Australia in which the lawyer is registered by the home registration authority;
(c) subject to subsection (2), the name of any law firm outside Australian with which the lawyer is affiliated (whether as a partner or otherwise);
(e) if the foreign lawyer is a member of any law firm in Australia that includes both locally registered foreign lawyers and domestic lawyers, a description of the firm that includes reference to both domestic lawyers and registered foreign lawyers for example, "Solicitors and locally registered foreign lawyers" or "Australia Solicitors and US Attorneys").

(2) A locally registered foreign lawyer who is a partner of a law firm outside Australia may use the name of the firm in practising foreign law in the State [Territory], or use the name in connection with the practice, only if:

(a) the lawyer indicates on the lawyer's letterhead and any other document used in the State [Territory] to identify the lawyer as a lawyer that the law firm practises only foreign law in the State [Territory]; and

(b) the lawyer has provided the domestic registration authority with a copy of the partnership agreement or other acceptable evidence that the lawyer is a partner of the law firm; and

(c) use of the name complies with any requirements of the law of the State [Territory] concerning use of business names and will not lead to any confusion with the name of any established domestic or foreign law firm in the State [Territory].

(3) A locally registered foreign lawyer who is a partner of a law firm may use the name of a firm as referred to in this section whether or not other partners in the firm are locally registered foreign lawyers.

22. Advertising

(1) A locally registered foreign lawyer is required to comply with any advertising restrictions imposed by [the domestic registration authority] or by law on the practice of law by a domestic lawyer that are relevant to the practice of foreign law in the State [Territory].

(2) Without limiting subsection (1), a locally registered foreign lawyer must not advertise (or use any description
on the lawyer’s letterhead or any other document used in the State [Territory] to identify the lawyer as a lawyer) in any way that might reasonably be regarded as:

(a) false, misleading or deceptive; or
(b) as suggesting that the locally registered foreign lawyer is a domestic lawyer, or that contravenes any requirements of the regulations.

23. Employment of domestic lawyers by foreign lawyers

(1) A locally registered foreign lawyer may employ one or more domestic lawyers.

(2) Employment of a domestic lawyer does not entitle a locally registered foreign lawyer to practise Australian law in the State [Territory].

(3) A domestic lawyer employed by a locally registered foreign lawyer may practise foreign law but must not provide advice on Australian law to, or for use by, the foreign lawyer or otherwise practise Australian law in the State [Territory] in the course of that employment.

(4) A period of employment by a locally registered foreign lawyer may not be used by a domestic lawyer to satisfy any requirements concerning a period of supervised practice imposed on the domestic lawyer by the domestic registration authority.

24. Indemnity insurance

A locally registered foreign lawyer who practises foreign law in the State [Territory] must have professional indemnity insurance coverage that is broadly equivalent to the coverage required by or under law to be had by domestic lawyers.

25. Trust accounts [controlled money accounts] and fidelity fund contributions

(1) A locally registered foreign lawyer who receives money on behalf of another person in the course of practising as a foreign lawyer in the State [Territory] is to comply with any applicable provisions of the law of the State
[Territory] that require a domestic lawyer receiving money on behalf of another person in the course of practising as a domestic lawyer to maintain a trust account [or controlled money account].

(2) A locally registered foreign lawyer who maintains a trust account [or controlled money account] must not practise foreign law in the State [Territory] without complying with any requirement made by the domestic registration authority concerning contributions to any fidelity fund that is equivalent to any such requirement made in respect of domestic lawyers and that is designed to protect the public, clients or others. [Each jurisdiction to modify as appropriate to fit in with local requirements concerning contributions to fidelity fund]

(3) In this section, a reference to money is not limited to a reference to money in the State [Territory].

(4) In this section:

"controlled money account" means [appropriate definition to be inserted by those jurisdictions including a reference to controlled money in this clause]

IV. Miscellaneous

26. Membership of professional association

A locally registered foreign lawyer is not required to join (but may, if eligible, join) any professional association.

27. Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

[Note: Each jurisdiction to insert appropriate machinery provisions for enforcement penalties]
B. Model Provision for Unrestricted Practice

(1) In this section:

"foreign law" means law of a place outside Australia;
"practise foreign law" means doing work, or transacting business, in the State [Territory] concerning foreign law, being work or business of a kind that is ordinarily transacted by a lawyer in the State [Territory].

(2) A person does not commit an offence under, or breach, any law regulating admission as a lawyer or the practice of law in the State [Territory] by practising foreign law in the State [Territory].
ATTACHMENT B

LAW COUNCIL OF AUSTRALIA

Policy Statement on Multi-disciplinary Practices

1. The foundation of the Law Council's policy on MDPs rests on two fundamental objectives:

   (a) paramountcy must be placed on the maintenance of lawyers' ethical obligations and professional responsibilities; and
   (b) there should not be any restrictions on the manner in which lawyers choose to practise unless that restriction is in the public interest.

2. These objectives are consistent with national competition principles, protect the interest of consumers and will remove existing restraints on the capacity of the legal profession to compete with other service providers.

3. A fundamental tenet of the Law Council's approach is that the regulation of MDPs should focus on compliance by individual lawyers with their ethical standards and professional duties rather than on the regulation of the business entity.

4. The Law Council's policy is enshrined in the following simple principles:

   (a) that the regulatory regime should be directed to the individual lawyer who is bound by ethical obligations and professional responsibilities;
   (b) that regulation of business structures should no longer be regarded as critical or necessary to the maintenance of professional standards; and
   (c) that individual lawyers should be free to choose the manner and style in which they wish to practise law including the right to choose to practise at an independent Bar, which requires practice as a sole practitioner, so long as their choices do not threaten harm to the paramount public interest in the administration of justice.
5. To reinforce the paramountcy of a lawyer's ethical obligations and professional responsibilities and in recognition of the unique role that lawyers' fulfil in relation to the administration of justice, the Law Council recommends that the following measures be adopted:

(a) Model Rules of Professional Conduct and Practice

The Model Rules should contain the following explicit statements:

(i) a lawyer practising within an MDP, whether as a partner, director, employee or in any other capacity, shall ensure that any legal services provided by the lawyer are delivered in accordance with his or her obligations under the applicable Legal Practice legislation and professional conduct rules; and

(ii) no commercial or other dealing relating to the sharing of profits shall diminish in any respect the ethical and professional responsibilities of a lawyer.

(a) Legal Practice Legislation
The Legal Practice legislation in each State and Territory should prohibit an MDP, by way of partnership deed, employment contract or in any other manner, from requiring a lawyer practising within the MDP to act in breach of the lawyer's obligations under the legal practice legislation or the professional conduct rules.

6. The Law Council's policy requires the removal of existing restrictions on lawyers' business structures in the various statutes governing the legal profession. This is a relatively simple exercise involving, in the main, repeal of regulation rather than replacement. A list of existing statutory restraints in each State and Territory requiring amendment or repeal is set out in Attachment 'A'.
### NOTE:
Several members of the Working Group consider that in order to make meaningful the enforceability of the lawyer's ethical obligations and professional responsibilities which are recognised to be paramount, an MDP which delivers legal services to the public ought to have at least one partner or director who is a licensed lawyer.

The Council should consider whether they agree with this rider which will require consequential amendment to the policy statement.
ATTACHMENT ‘A’

Provisions for Deletion or Amendment on Implementation of MDP’s Policy

Legal Practitioners Act 1970 (ACT)

s.196 Solicitors not to share receipts with persons not practising as solicitors

Legal Practitioners Act (Northern Territory)

s.136 Legal Practitioner not to share receipts with persons not practising as legal practitioners.

Legal Practitioners (Incorporation) Act (Northern Territory)

The Act provides for incorporation but the directors must be practitioners, or their immediate family, and have unlimited personal liability for the company’s liabilities. The voting shares must be held by the directors; non-voting shares must be held by directors or their immediate families.

Legal Profession Act 1987 (NSW)

s.28(5) reference to solicitor corporation
s.32(4) reference to solicitor corporation
s.48D offence by corporation or officers
s.48F sharing receipts
s.48G multi-disciplinary partnerships
Part 10A solicitor corporations

Legal Practitioners Act 1995 (Queensland)
Queensland Law Society Act 1952 (Queensland)

Neither the Legal Practitioners Act nor the Queensland Law Society Act contain any provisions bearing on MDPs. Rule 78 of the Queensland Law Society Rules 1987 prohibits practitioners sharing receipts except with retired partners or the legal representatives of deceased partners.

The definition of “solicitor” in s.3 of the Queensland Law Society Act 1952 and Part 4 of that Act relating to practising certificates
does not contemplate practising certificates being issued to companies.

Legal Practitioners Act 1981 (South Australia)

s.16 Practising certificates
s.16(2) permits a company to be granted a practising certificate provided specified criteria are met eg sole object of the company must be to practise the profession of the law.

s.23 Unlawful representation
s.23(3)(b) prohibits profit-sharing with unqualified persons otherwise than as permitted by this Act or as authorised by the Law Society. Rule 8.1 of the Law Society's Professional Conduct Rules prohibits profit sharing with non-practitioners other than as permitted by the Act.

Legal Profession Act 1993 (Tasmania)

Part 13 Legal Practitioner Corporations, Sections 148-162

[Note: The Legal Profession Act 1993 is silent about profit-sharing but Rule 79(1) of the Rules of Practice of the Law Society of Tasmania prohibits profit-cost sharing without the Society's approval.]

Legal Practice Act 1996 (Victoria)

Part 10 Incorporated Practitioners (sections 289-297)

s.317 Sharing income with unqualified persons

Legal Practitioners Act 1993 (Western Australia)

s.79 Prohibition of certain acts by practitioner
s.79(4) prohibits the sharing of costs with non-practitioners, subject to rules made by the Legal Practice Board. Rule 103 of the Board's Rules restricts cost-sharing to arrangements between certified practitioners, between certified practitioners and their families, between solicitor-companies and between practitioners and their employers and further restricts such arrangements so that they do not result in more than 50% of the net income going to any non-certified practitioners.