

**1997**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**LEGAL PRACTITIONERS (AMENDMENT) BILL  
(NO. 3) 1997**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of**

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# LEGAL PRACTITIONERS (AMENDMENT) BILL (No. 3) 1997

## Background

The *Legal Practitioners Act 1970* (the Principal Act) provides, among other things, for the regulation of the legal profession.

The Bill will amend the *Legal Practitioners Act* in relation to the practice of foreign law in the ACT. It will, in essence, place foreign lawyers practising foreign law as solicitors on the same regulatory footing as local solicitors practising domestic law as regards such matters as indemnity insurance, trust accounts and discipline. Currently, the practice of foreign law in the Territory is not regulated.

The underlying purpose of the proposal is to facilitate the practice of Australian law in overseas countries because, unless there is reciprocity, Australian lawyers will, in many cases, not be able to practise overseas.

In the ACT the legal profession is a fused profession in that practitioners are admitted by the Supreme Court as barristers and solicitors with practitioners choosing to practise as barristers, as solicitors or as both. This Bill will apply to legal practitioners who practise as solicitors or as both solicitors and barristers.

## Financial considerations

The Bill has no financial implications.

## NOTES ON INDIVIDUAL CLAUSES

### Division 1 - PRELIMINARY

#### Formal provisions

Clause 1 provides for the citation of the Bill as the *Legal Practitioners (Amendment) Act (No. 3) 1997*. Clause 3 defines the term "Principal Act" to mean the *Legal Practitioners Act 1970*.

#### Commencement

Clause 2 provides for the amending Act to commence when it is notified in the *Gazette*.

### PART XVB - FOREIGN LEGAL PRACTITIONERS

Clause 4 will insert a new Part XVB which regulates the practise of foreign law by solicitors in the Territory.

### **Interpretation**

New section 191Q inserts the various new definitions which are necessary to enable the Principal Act to be applied to foreign legal practitioners. In particular, the term "practise foreign law" is comprehensively defined so as to include work concerning foreign law of the type that would ordinarily be done by a solicitor in relation to work concerning a law of the Territory

### **Application**

New subsection 191R(1) makes it clear that this Part will apply to any individual (other than a domestic legal practitioner) who practises foreign law in the Australian Capital Territory

Similarly, new subsection 191R(2) makes it clear that a domestic legal practitioner (including a foreign legal practitioner who is also a domestic legal practitioner) will not require to be registered in order to practise foreign law in the Territory.

## **Division 2 - LOCAL REGISTRATION OF FOREIGN LEGAL PRACTITIONERS**

### **Registration requirement**

New subsection 191S(1) prohibits a person from practising foreign law in the Territory unless the person is registered here as a foreign legal practitioner and practises foreign law in the Territory in accordance with Part XV B.

However, the prohibition does not apply to:

- A foreign legal practitioner who practises foreign law here on a temporary basis or is subject to a migration restriction imposed by the Commonwealth Government under its Migration Act 1958 and who does not maintain an office or have a commercial legal presence in the Territory.
- A domestic legal practitioner or a person employed to provide advice on foreign law to, and for use by, a domestic legal practitioner or a consultant.

New subsection 191S(2) defines the term "migration restriction" to mean a restriction imposed by the Commonwealth under its *Migration Act 1958* that limits the period during which a person can work or transact business in Australia

### **Registration notice**

New subsection 191T(1) allows a foreign legal practitioner to lodge a written notice with the Law Society seeking registration as a foreign legal practitioner.

New subsection 191T(2) sets out the contents of the notice.

New subsection 191T(3) requires that the details relating to the applicant must be supported by verifying material from the applicant's home registration authority.

New subsection 191T(4) requires that the applicant must certify as to the correctness of the documentation.

New subsection 191T(5) empowers the Law Society to require the statements to be verified by means of a statutory declaration or other authenticating procedure.

New subsection 191T(6) requires that accompanying instruments in a foreign language must be accompanied by a certified translation in English.

### **Fee for registration**

New section 191U stipulates that the application must be accompanied by any fee for registration fixed by the domestic registration authority (in the local context, the Law Society), but this fee must not exceed the fee payable by a domestic legal practitioner.

### **Entitlement to registration**

New subsection 191V(1) confers an entitlement to registration as a foreign legal practitioner if the applicant lodges a notice meeting the requirements of section 191T and if the Law Society considers that the applicant is registered to practise law outside Australia and that the local registration authority "...effectively regulates and disciplines the practice of law ..." there - paragraph (c) refers. The Law Society must also be satisfied that the applicant is not subject to any conditions or limitations or criminal, civil or disciplinary proceedings in the overseas country that would make it inappropriate to register the person. The Law Society must also be satisfied that the person has demonstrated an intention to establish an office or a commercial presence in the Territory within a reasonable period following registration.

New subsection 191V(2) makes it clear that residence or domicile in the Territory is not a pre-requisite or relevant factor in determining an applicant's entitlement to registration as a foreign legal practitioner.

### **Conditions**

New subsection 191W(1) empowers the Law Society to impose, at any time, any condition on the registration of a foreign legal practitioner. The condition must be equivalent to any special condition of carrying on practice imposed by the legal practitioner's home registration authority. The Law Society may similarly revoke or vary such a condition.

New subsection 191W(2) makes it clear that the Law Society may not impose any other conditions on a foreign legal practitioner's registration.

### **Notification of decision**

New subsection 191X(1) obliges the Law Society to give an applicant written notice of the outcome of the application.

New subsection 191X(2) provides that the Law Society will be taken to have refused an application for registration made under new section 191T if registration is not granted within 28 days of lodgement of the application.

### **Duration of registration and annual fee**

New subsection 191Y(1) provides that registration, when granted, takes place from the date of lodgement of the application for registration.

New subsection 191Y(2) provides that registration will remain in force, unless sooner cancelled, until 30 June following registration.

New subsection 191Y(3) enables registration to be renewed by payment of an annual fee determined by the Law Society.

New subsection 191Y(4) specifies that payment must be made within the period of time notified by the Law Society to the foreign legal practitioner.

New subsection 191Y(5) specifies that the annual fee must not exceed the registration fee payable to the Law Society by a domestic legal practitioner.

### **Register**

New subsection 191Z provides that the Law Society is to keep a register of foreign legal practitioners which is to be made available for public inspection during office hours.

### **Cancellation of registration**

New subsection 191ZA(1) empowers the Law Society to cancel a locally registered foreign legal practitioner's registration if of the opinion that there is sufficient reason for its doing so.

New subsection 191ZA(2) without limiting the grounds for the Society's cancelling a registration, specifies the following five grounds for taking such action:

- the foreign legal practitioner's registration at home is cancelled because of criminal, civil or disciplinary proceedings;
- the foreign legal practitioner fails to comply with any requirements of the Legal Practitioners Act;
- the foreign legal practitioner's registration at home has lapsed;
- the foreign legal practitioner has failed to establish an office, or a commercial legal presence, in the Territory for the purpose of practising foreign law within a reasonable period of being registered; or
- the foreign legal practitioner fails to comply with any condition imposed on his or her registration.

New subsection 191ZA(3) stipulates that a foreign legal practitioner's registration is not to be cancelled upon any of the above grounds unless the foreign legal practitioner is given a reasonable opportunity to make written submissions to the Law Society.

New subsection 191ZA(4) stipulates that a foreign legal practitioner's registration must not be cancelled on the ground that the foreign legal practitioner's registration at home has lapsed if the legal practitioner demonstrates that the lapse did not result from any criminal, civil or disciplinary proceedings taken against the legal practitioner, but from circumstances beyond the legal practitioner's control.

New subsection 191ZA(5) provides that a foreign legal practitioner's registration will be automatically cancelled if the legal practitioner is registered as a domestic legal practitioner or at the foreign legal practitioner's request.

New subsection 191ZA(6) makes it clear that the cancellation of registration, at the request of a practitioner, does not affect the exercise of the Law Society's powers relating to disciplinary proceedings which had been brought against the legal practitioner before the cancellation.

### **Appeals**

New subsection 191ZB(1) will confer a right of appeal to the Supreme Court upon a foreign legal practitioner whom the Law Society has refused to register, whose registration has been cancelled or against whom disciplinary action has been taken by the Society.

New subsection 191ZB(2) confers upon the Supreme Court the power to make any order in relation to the refusal, cancellation or disciplinary action that might be made in relation to a domestic legal practitioner.

### **Division 3 - LEGAL PRACTICE**

#### **Scope of practice**

New subsection 191ZC(1) delineates the extent of legal services which may be provided by a locally registered foreign legal practitioner. Such a person is only permitted to provide specified services:

- work concerning the law of the foreign legal practitioner's home jurisdiction;
- arbitration proceedings of a kind to be prescribed by regulations;
- legal services relating to bodies other than courts involving proceedings where the body is not required to apply the rules of evidence and in which a knowledge of the law applicable in the foreign (home) jurisdiction is essential;
- conciliation, mediation and other consensual dispute resolution of a kind to be prescribed by regulations.

Subsection 191ZC(2) makes it clear that the amendments do not authorise a locally registered foreign legal practitioner to advise on Australian law or to appear in any court except on the legal practitioner's own behalf.

#### **Form of practice**

New subsection 191ZD(1) provides that a locally registered foreign legal practitioner may practise on his or her own account or in partnership with other similarly registered foreign legal practitioners or with domestic legal practitioners.

New subsection 191ZD(2) makes it clear that any affiliation with a domestic legal practitioner does not entitle the foreign legal practitioner to practise domestic law in the Territory.

#### **Professional conduct**

New subsection 191ZE(1) specifies that a locally registered foreign legal practitioner has the same duties to maintain the standards of professional conduct of the Territory's legal profession as a domestic legal practitioner

New subsection 191ZE(2) contains a proviso that a foreign legal practitioner need not comply with any such standard of conduct if the legal practitioner proves that to do so would subject him or her to disciplinary action by his or her home registration authority if done where he or she is registered.

#### **Discipline**

New subsection 191ZF(1) specifies that a locally registered foreign legal practitioner is subject to the same disciplinary provisions that apply to a domestic legal practitioner.

New subsection 191ZF(2) contains a proviso that a foreign legal practitioner cannot be disciplined for the breach of any disciplinary provision if the legal practitioner can prove that such a breach would not subject the legal practitioner to disciplinary action by the home registration authority if the breach occurred in that foreign country.

In order to confer a degree of flexibility, which is necessary in order to deal with the varying legal systems of countries, new subsection 191ZF(3) will enable a foreign legal practitioner or a class of such legal practitioners to be exempted by regulation from compliance with specified disciplinary requirements.

#### **Letterhead and other identifying documents**

New subsection 191ZG(1) permits a locally registered foreign legal practitioner and a law firm with which that person is associated to be described as provided for in new section 191ZH.

New subsection 191ZG(2) requires a locally registered foreign legal practitioner to indicate on letterhead and other practice documents the fact that the person is a locally registered foreign legal practitioner and include a statement that registration as such does not entitle the legal practitioner to practise domestic law here.

New subsection 191ZG(3) enables a locally registered foreign legal practitioner, if the legal practitioner so wishes, to indicate on letterhead and other practice documents all other Australian jurisdictions in which the legal practitioner (and any partners) are registered as foreign legal practitioners.

New subsection 191ZG(4) enables a locally registered foreign legal practitioner, if the legal practitioner so wishes, to indicate on letterhead and other practice documents all places outside Australia in which the legal practitioner is registered to practise law.

#### **Designation**

New subsection 191ZH(1) sets out the permissible designations which a locally registered foreign legal practitioner may use. These comprise:

- the legal practitioner's own name;
- the title applicable in the legal practitioner's home jurisdiction;
- the name of the any associated overseas law firm;
- a description of an Australian law firm of which the practitioner is a member including a reference to both domestic and registered foreign legal practitioners.

New subsection 191ZH(2) permits a locally registered foreign legal practitioner, who is a partner of an overseas law firm, to use the name of the overseas firm in practising law in the Territory or use the name in connection with the practice only if:

- the legal practitioner's letterhead and other practice documents indicate the purely foreign nature of the law firm;
- the legal practitioner has provided the Law Society with evidence that the legal practitioner is a partner of the overseas law firm; and
- the use of the law firm's name complies with the Territory's law relating to business names and will not lead to any confusion with the name of an existing domestic or foreign law firm in the Territory.

New subsection 121ZH(3) clarifies the application of this provision by permitting a locally registered foreign legal practitioner, who is the partner of a firm, to use the name of the firm whether or not the other partners are locally registered foreign legal practitioners.

### **Advertising**

New subsection 121ZI(1) requires a locally registered foreign legal practitioner to comply with any advertising restrictions imposed by the Law Society or which, by law, apply to domestic legal practitioners and which are relevant to the practice of foreign law in the Territory.

New subsection 121ZI(2) prohibits a locally registered foreign legal practitioner from advertising or using any description which, amongst others, could be false, misleading or deceptive; or suggests that the foreign legal practitioner is a domestic legal practitioner; or breaches any requirements of the regulations

### **Employment**

New subsection 121ZJ(1) permits a domestic legal practitioner to employ, or to be employed by, a locally registered foreign legal practitioner.

New subsection 121ZJ(2) makes it clear that an arrangement under subsection 121ZJ(1) does not entitle the locally registered foreign legal practitioner to practise domestic law in the Territory.

New subsection 121ZJ(3) provides that a period of employment of a domestic legal practitioner by a locally registered foreign legal practitioner does not count towards a period of supervised practice required by the Law Society in relation to a domestic practitioner.

### **Indemnity insurance**

New subsection 121ZK(1) imposes on a locally registered foreign legal practitioner the same requirements concerning indemnity insurance as applies to a local legal practitioner.

New subsection 121ZK(2) provides that a foreign legal practitioner who contravenes new subsection 121ZK(1) is guilty of professional misconduct.

### **Trust accounts, controlled money accounts and fidelity fund contributions**

New subsection 121ZL(1) will impose on a locally registered foreign legal practitioner, who receives money on behalf of another person in the course of practice, an obligation to comply with the provisions of the law applicable to a domestic legal practitioner relating to trust accounts and controlled money accounts.

New subsection 121ZL(2) prohibits a locally registered foreign legal practitioner who maintains a trust account or who is given control over monies of a client, from practising foreign law unless he or she complies with the Law Society's requirements applicable to a domestic legal practitioner relating to contributions to a fidelity fund.

New subsection 121ZL(3) makes it clear that a reference to money is not limited to money held in the Territory.

### **Application of provisions to locally registered foreign legal practitioners**

New section 121ZM provides that specified provisions of the *Legal Practitioners Act 1970* apply to locally registered foreign legal practitioners as they apply to solicitors. These comprise:

- Division 7 of Part XI (investigation of affairs of solicitors)
- Part XIII (appointment of receivers)
- Part XIV (managers appointed to continue a legal practice)
- Part XV (legal costs)
- Section 196 (solicitors not to share receipts with persons not practising as solicitors)
- Section 197 (employment of persons who have ceased to be barristers and solicitors)
- Section 198 (permission for employment of certain persons)

### **Division 4 - MISCELLANEOUS**

#### **Membership of professional association**

New section 191ZN provides that a locally registered foreign legal practitioner is not required to, but may, join a professional association such as the Law Society.