Association of Corporate Counsel

Headquarters
1001 G Street, NW, Suite 300W
Washington, DC 20001 USA
tel +1 202.293.4103
fax +1 202.293.4701
www.acc.com

Melbourne Office
P.O. Box 422
Collins Street West
Melbourne, VIC 8007
tel +61.3.9248.5500
fax +61.3.9670.7727

Charleston Office
c/o Womble Bond Dickinson
5 Exchange Street
Charleston, SC 29401
tel +1 202.285.4183
fax +1 202.293.4701

April 11, 2019

Megan Pitt
Chief Executive Officer
Legal Services Council
Commissioner for Uniform Legal Services Regulation

Dear Commissioner Pitt,

Via electronic submission

Re: Definition of 'related entity' and 'corporate legal practitioner' in the Legal Profession Uniform Law

Thank you for your letter dated 12 March 2019 in relation to the definition of "related entity" and "corporate legal practitioner" in the *Legal Profession Uniform Law ("Uniform Law").* We have considered carefully the alternative, preliminary proposal (based on the approach adopted by the New Zealand Law Society) which the Legal Services Council ("LSC") has referred to in its letter.

While it is commendable that the New Zealand Law Society (NZ) has recognised and sought to address nearly three years ago the same issue facing corporate legal practitioners in Australia, it is our view that the NZ approach does not go far enough to address the particular situations that Australian corporate legal practitioners experience and have to deal with in their everyday practice.

ACC Australia submits that the main drawback with the NZ approach, insofar as the Australian context is concerned, is the fact that it does not include entities which are controlled by a corporate legal practitioner's employer organisation even though the employer organisation holds less than a 50% shareholding or interest in the controlled entity.

A number of our members have identified that the statutory condition imposed on corporate legal practitioners under the Uniform Law is unnecessarily restrictive, with the consequence that they are, in the ordinary course of their employment, unable to provide legal services to their employer's controlled or associated entities where those entities do not meet the definition of "related bodies corporate". Many of our members have obtained a principal practising certificate to overcome this restriction, resulting in their employers incurring the additional costs and administrative burden associated with that process, without providing any incremental benefits to the administration of legal practice in their jurisdictions.

In addition, there is an issue specific to corporate legal practitioners who are employed by statutory entities. These types of entities include universities, government business enterprises and Commonwealth and State/Territory entities that are incorporated by statute. Under s.6 of the *Uniform Law* a "corporate legal practitioner is defined as follows:

> ***"corporate legal practitioner*** means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or a related entity, but does not include a government legal practitioner"

In turn, "related entity" is defined in s.6 as follows:

> ***"related entity***, in relation to a person, means—
> (a) if the person is a company within the meaning of the Corporations Act—a related body corporate within the meaning of section 50 of that Act; or
> (b) if the person is not a company within the meaning of that Act—a person specified or described in the Uniform Rules for the purposes of this definition"

Under the first limb of the definition of "related entity", a corporate legal practitioner employed by a subsidiary company (formed under the *Corporations Act 2001*) of a statutory entity can provide legal services to any subsidiary company as well as to the statutory entity which owns or controls the subsidiary company. However, as a result of definitional issues, we have the somewhat absurd situation where the converse does not apply in the situation where the corporate legal practitioner is employed directly by the statutory entity i.e. the corporate legal practitioner is prohibited from providing legal services to any subsidiary company of the statutory entity. This is because a statutory entity "is not a company with the meaning of that Act" (i.e. the *Corporations Act 2001*) which means that the second limb of the definition of "related entity" applies. As a result, only if the entity is "specified or described in the Uniform Rules" can a corporate legal practitioner then provide legal services to a subsidiary company of the statutory entity. However, as no related entities have to date been specified or described in the Uniform Rules, this means that a corporate legal practitioner can, strictly speaking, only provide legal services to the statutory entity that employs them but not to any of the subsidiaries of the statutory entity. This restriction, whether an unintended consequence of the definitions in the *Uniform Law* or otherwise, makes no sense and should be rectified.

We suspect, but cannot confirm, that some government lawyers may also face similar challenges arising from definitional issues in the legislation and submit that the definition of "government authority", by including the term "public authority" (which is not defined in the Uniform Law), creates additional confusion for in-house lawyers employed by statutory entities as to whether they ought to be practising as a "government lawyer" or "corporate legal practitioner" (as defined in the Uniform Law).

As detailed in ACLA's (now ACC Australia's) submission to the LSC in February 2015, we maintain that the broader concept of "associated entity" (as defined in s.50AAA of the *Corporations Act 2001 ("Corps Act"))*, be substituted for the term "related entity" as defined in s.6 of the *Uniform Law,* which in turn is based on the definition of "related body corporate" in sections 9 and 50 of the *Corps Act*.

ACC Australia maintains that the term "associated entity" used in the *Corps Act* is the better approach to take in the Australian context. "Associated entity" encompasses both "related entities" and entities "controlled" by another entity, and the concept of "control" is clearly defined in s.50AA of the *Corps Act* and provides as follows:

> "For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies."

Adopting the NZ approach would not, for instance, address the situation where a corporate legal practitioner is prevented from providing legal services to a company in which the corporate legal practitioner's employer company holds less than a 50% shareholding but nevertheless still "controls" that other company. Control can be exercised in many situations where one company holds 50% or less of the shares in another company because of the shareholding structure of the controlled company. The NZ approach only deals with entities in which there is control of 50% or more of the entity.

There can be no denying that the provision of legal services by a corporate legal practitioner to an associated entity may at times involve a conflict of interest. But in the same way, so can the provision of legal services to a "related entity" in a corporate group. In NSW the provision of legal services to a "related entity" has been permitted by law at least since the introduction of the *Legal Profession Act 2004* (see s.14(3)) – long before the introduction of the *Uniform Law* – without any apparent difficulty. Lawyers, whether in private, corporate or government practice, are skilled at managing conflicts of interest should a conflict present itself. Law societies are also available to provide guidance in relation to conflicts of interest situations.

In your letter, you alluded to the question of professional indemnity insurance in situations where a corporate legal practitioner is providing legal services to a party other than their immediate employer organisation. Many organisations already cover their lawyers with some form of indemnity insurance, corporate legal practitioners who hold a principal practising certificate must hold approved professional indemnity insurance and some professional associations (such as ACC Australia) cover their members with professional indemnity insurance. As with conflicts of interest, the question of insurance has been around since the introduction in NSW of the *Legal Profession Act 2004,* as well as post 1 July 2015 under the *Uniform Law,* in relation to the provision of legal services to "related entities" – again without any apparent difficulty. At the end of the day, the question of insurance ought to be left to the judgement of the individual corporate legal practitioner concerned based on his or her current circumstances.

There is an on-going need to remove the unnecessary, and often impractical, limitations placed on the provision of legal services by corporate legal practitioners. The changes we suggested to the Uniform Law in 2015 remain necessary to reflect the realities of Australian business organisations and their legal needs and we see little reason not to legitimise a broader scope of work for corporate legal practitioners under the Uniform Law.

An alternative option may be to consider dispensing with the concept of "related entity" and instead define in-house lawyers expansively in line with the modern practice of in-house

lawyers, recognising the wide array of corporate structures in today's business world, while supporting the consumer protection policy objectives of the Uniform Law by including appropriate restrictions on conducting a law practice.

Finally, we appreciate the LSC's consideration of these issues and welcome the opportunity to further consult as required.

If you would like to discuss this submission further, please contact Tanya Khan, Vice President & Managing Director, at t.khan@acc.com.

Sincerely,

Susanna McDonald
Vice President and Chief Legal Officer
Association of Corporate Counsel

Karen Grumley
National President
Association of Corporate Counsel Australia

Mary Blatch
Associate General Counsel and Senior Director of Advocacy
Association of Corporate Counsel

Tanya Khan
Vice President & Managing Director
Australia and Asia Pacific
Association of Corporate Counsel