8 November, 2019

Ms Megan Pitt

Chief Executive Officer

Legal Services Council

Commissioner for Uniform Legal Services Regulation

Level 3, 19 O'Connell Street

SYDNEY NSW 2000

By mail: megan.pitt@legalservicescouncil.org.au

Dear Commissioner Pitt,

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

Thank you for your letter dated 26 September 2019 in response to our submission dated 11 April 2019. As requested, we provide the following response for consideration by the Council at its November meeting.

The Objective

The simple objective of seeking an amendment to the Legal Profession Uniform Law ("**the Uniform Law**") is to allow corporate legal practitioners (i.e. in-house counsel) to provide legal services to controlled entities within the same corporate group without breaching any of the provisions of the Uniform Law. The amendment proposed would legitimise the broader scope of work that in-house counsel are able to provide to their employer and other entities within a contemporary corporate structure. The changes would recognise the modern corporate practice of in-house counsel and the wide array of corporate structures in today's business world that rely on the provision of legal services by their in-house counsel.

An amendment of the type we are now proposing would also mean that in-house counsel would no longer be forced to take out a Principal Practising Certificate with the concomitant requirement to also take out professional indemnity insurance. At the moment, that is the only

viable work-around which enables in-house counsel to fulfil their employer's legitimate needs for legal services within their particular corporate structure. In this regard, ACC understands that some regulators prefer not to unnecessarily issue Principal Practising Certificates to corporate legal practitioners or to be involved in determining issues relating to the need for professional indemnity insurance. Our proposal alleviates those concerns.

The Issues

We suspect that since the introduction of the Uniform Law some in-house counsel may be inadvertently, or otherwise, breaching certain provisions the Uniform Law by providing legal services to some of the entities within a corporate group by carrying out what might be seen as the reasonable instructions of their employer.

As highlighted in ACLA's (now ACC's) original submission back in February 2015, this problem stems from definitional issues in s.6 of the Uniform Law of 'corporate legal practitioner' and 'related entity'. These are 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;" [emphasis added]
>
> "**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;" [emphasis added]

Under s.50 of the Corporations Act (**"the Act"**), a 'related body corporate' is limited to a subsidiary company or a holding (parent) company in a corporate group. "Corporate legal practitioners" however are often expected, for quite sound reasons, to advise other entities which may not fit neatly within the strict definition of what constitutes a 'related body corporate' in the Act. This might, for instance,

involve advising an associated company (i.e. one in which the parent company holds 50% or less of the voting rights or issued share capital, but still effectively controls that other company), joint venture partners, trusts (including the trustee of a trust), unincorporated bodies and other forms of legal entity associated with an in-house counsel's employer. Section 50 of the Act deals only with 'related bodies corporate' and because of this limitation in-house counsel would normally be precluded from advising any other entities in the corporate group - even if they are effectively controlled by their employer. *Similar definitional issues arise in relation to statutory corporations and their subsidiary companies which would be remedied by the amendment we are now proposing.* By moving away from sole reliance on the term 'related entity' and instead adopting a broader concept of control (as defined in s.50AA of the Act) most of these unnecessary, and often impractical, limitations would be removed. ACC believes that by adopting a concept of controlled entity there will be significant benefit to "corporate legal practitioners" in terms of efficiency of advice to the various types of entities commonly found within a corporate group. This will effectively legitimise a broader scope of legal services that in-house counsel will lawfully be entitled to provide in compliance with the Uniform Law.

Proposed Solution

In April this year, ACC and The Law Society of NSW submitted similar proposals to replace 'related entity' in the definition of 'corporate legal practitioner' (s. 6 Uniform Law). These were based on the definitions of 'associated entity' and 'control' in sections 50AAA and 50AA of the Corporations Act. The two organisations have since been working together to develop a draft proposal for consideration by the Council, which they believe will resolve the issues referred to above.

In summary, the key elements of the proposal by the two organisations are as follows:

- extends to other types of entities, not just bodies corporate
- describes the relationship between entities in a way which does not rely on percentage thresholds
- captures entities in a 'parent', 'subsidiary' or 'sibling' relationship (consistent with the meaning of 'related body corporate' and 'associated entity' in the Corporations Act)

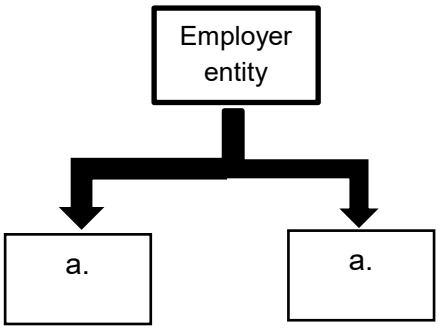
- is not too complicated for regulators or corporate legal practitioners to apply
- is not so dissimilar to the current arrangement that we need to consider new requirements in relation to insurance
- the usual rules in relation to conflict of interest would continue to apply

While we acknowledge that drafting is always the prerogative of parliamentary counsel, the following formulation is provided to assist the Council in understanding the proposal:

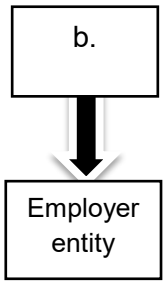
> ***'corporate legal practitioner' means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for:***
>
> ***(a) his or her employer;***
>
> ***(b) any entity which is a related entity in relation to the employer;***
>
> ***(c) any entity which is controlled by the employer;***
>
> ***(d) any entity which controls the employer, and;***
>
> ***(e) any entity controlled by another entity which also controls the employer entity;***
>
> ***but does not include a government legal practitioner.***
>
> ***'control' in relation to the definition of employer has the same meaning as in section 50AA of the Corporations Act except that an entity referred to in that section has the same meaning as under this Law.***

The following diagram illustrates the entities captured by the proposal. In addition to 'related bodies corporate' (already included under the Uniform Law), the following entities would be captured by the proposal:

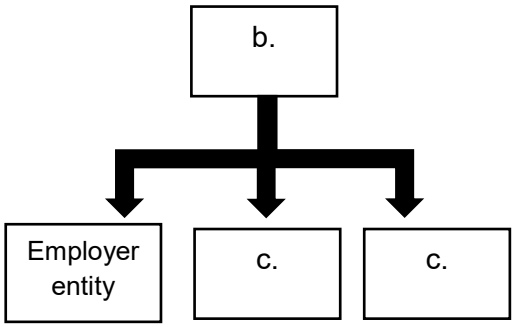
a. any entity (a.) which is controlled by the employer entity



b. any entity (b.) which controls the employer entity



c. any entity (c.) controlled by another entity (b.) which also controls the employer entity



Other Issues

Consumer protection and insurance

Corporate legal practitioners are presently exempt from holding an "approved insurance policy" by virtue of Rule 82 of the Uniform General Rules 2015. We appreciate that the Council is concerned to ensure that in relation to any proposed amendment there is no gap in insurance which might increase risk to consumers. We respond to those concerns as follows:

- the consumers of legal services in the corporate context we are proposing is limited to those which are controlled entities in the same corporate group structure – no advice would be able to be provided by in-house counsel to outside third parties under the proposed amendment
- the ability for in-house counsel to advise 'related entities' (both parent and subsidiary companies) in the same corporate group has been in existence at least since the introduction in NSW of the *Legal Profession Act 2004* and has continued in NSW as well as Victoria since the adoption of the Uniform Law in those States on 1 July 2015. ACC is unaware of any instance where one related entity has pursued legal action against another related entity (or one of the related entity's in-house counsel) in relation to legal services provided by an in-house counsel in the same corporate group
- even by extending the provision of legal services to entities in the same corporate group that are not necessarily 'related entities', ACC strongly maintains that any increased risk is highly unlikely and extremely remote. This is because the entities are all simply part of the same controlled corporate group and, as mentioned above, we can find no evidence of entities in the same corporate group ever having instituted legal proceedings against their in-house counsel
- in-house lawyers are well-placed to consider the need for any insurance cover in a particular circumstance and whether any insurances held by their employer (such as directors' and officers' liability insurance) or provided by virtue of membership of a professional association (as is the case with ACC membership where $2 million in cover is automatically provided) is sufficient.

Conflicts of interest

There can be no denying that the provision of legal services by a corporate legal practitioner to a controlled entity in the same corporate group 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. Rule 11 of the Australian Solicitors Conduct Rules sets out the obligations of *all* solicitors where there is a conflict of duties concerning their clients and corporate legal practitioners must comply with this rule should they be asked to act for two or more related entities.

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 and ACC offers a National Mentoring Program which can be accessed for this purpose if need be.

Accordingly, we submit that in-house counsel are well-equipped to recognise and deal with any conflict situations which may arise in the workplace.

Should you require any further information please do not hesitate to contact Chris Drummer, Director, Policy, Projects and Advocacy c.drummer@acc.com or 0411264734

Yours sincerely,

Tanya Khan
Vice President and Managing Director

Association of Corporate Counsel
Australia and Asia Pacific