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National Legal Profession Reform

In February 2009, COAG determined that additional reform was needed to nationalise the regulation of the legal profession in Australia. A Taskforce was set up to prepare draft legislation to facilitate this reform.

While the proposed reform will encompass all aspects of legal profession regulation, this e-Research Brief focuses on two components that have created considerable interest during the consultation process. These are the establishment of (1) the "National Legal Services Board"; and (2) the "National Legal Services Commissioner" (or the "National Legal Services Ombudsman" as it was originally labelled in the first draft of the proposed legislation).

Kelli Longworth

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Inquiries should be addressed to:

Ms Karen Sampford
Team Leader, General Distribution Research Team
Research and Information Service
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000

Tel: (07) 3406 7116
Email: Karen.Sampford@parliament.qld.gov.au

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Like Rome, a truly national legal services market was never going to be built in a day. But while the Colosseum was built in 10 years, the building of a national regime for lawyers has been akin to a hobby project of adding a deck to the holiday house – there have been bursts of activity but the project never gets finished.

With the intervention of the Council of Australian Governments (COAG), this might be about to change…[1]

THE AUSTRALIAN LEGAL PROFESSION

The Australian legal profession contributes significantly to the Australian economy, as evidenced by figures released by the Australian Bureau of Statistics in June 2009. These figures indicate that the "*Australian legal services contributed $11 billion to the Australian economy and generated $18 billion in income in 2007/2008*". In 2008, the number of persons involved in the provision of legal services totalled 104,170 comprising 99,696 persons employed in the legal services industry and 4,474 volunteers.[2] In terms of Queensland, the total number of legal professionals currently represented by the Queensland Law Society (QLS) is more than 8,500.[3]

Currently, the legal profession is primarily regulated at the state and territory level, with the key areas of regulation involving:

- admission to the legal profession;
- practising entitlements and conditions;
- the form and manner in which legal practice is conducted;
- complaints handling and disciplinary matters; and
- consumer protections and remedies.[4]

While, in the past, the legal profession was primarily regulated by the courts and the legal profession itslef, there has been a more recent shift towards co-regulation (where regulation of the profession is shared between the courts, professional associations and (in many jurisdictions) independent statutory regulatory bodies).[5]

For close to 20 years, there has been an active dialogue between the government and the legal profession concerning proposals to regulate the legal profession on a national basis. This e-Research Brief discusses the background to these proposed reforms and then focuses on the current COAG National Legal Profession Reform Project which is poised to achieve national regulation of the legal profession.

Information in this e-Research Brief is current to 7 June 2011.

NATIONAL LEGAL PROFESSION REFORM

BACKGROUND

The highlights of progress to date on the national reform of the legal profession are discussed below:

1991-1992

Action towards the creation of a national legal profession at the governmental level can be traced to a July 1991 meeting of the Standing Committee of Attorney-Generals (SCAG).[6] At this meeting, it was proposed that the state and territory governments would work with the legal professional bodies in each jurisdiction to:[7]

- facilitate the reciprocal admission of lawyers in each state and territory;
- remove impediments to reciprocal admission to practice between the states and territories; and
- harmonise the educational and practical training requirements.

The first of these points regarding mutual recognition of entitlement to practice in each state and territory was implemented in 1992 when the Commonwealth Government passed the *Mutual Recognition Act 1992* (Cth) aimed at creating an integrated national mutual recognition scheme for the provision of goods and services. Complementary legislation was passed in other jurisdictions. The purpose of this law, in terms of the legal profession, was to allow a lawyer registered in one Australian jurisdiction to practise in another jurisdiction by seeking registration in that second jurisdiction and paying any fees required to do so.[9]

1993–1994

On 25 August 1993, the National Competition Policy Report was released by the Chairman of the National Competition Policy Review, Professor Frederick G Hilmer ("Hilmer Report"). The Hilmer Report noted that:

> Restrictive practices in the legal profession have also been a matter of increasing concern to the community, as evidenced by the level of recent scrutiny at State, Territory and Federal levels. Many of these issues could be addressed in a uniform national way by removing any gaps or uncertainty in the application of competitive conduct rules.[10]

On 25 February 1994, COAG adopted the principles of competition policy reform set out in the Hilmer Report, including those relating to the delivery of legal services.[11] COAG also requested that its Working Group on Micro-economic Reform prepare a detailed proposal for the reform of "*the legal profession, with the objective of removing constraints on the development of a national market in legal services, and developing other efficiency enhancing reforms*".[12]

On 2 May 1994, the Access to Justice Advisory Committee presented its report titled "*Access to Justice: An Action Plan*" to the then Australian Attorney-General, the Hon Michael Lavarch MP.[13] This report found that the separate regulatory regimes governing the legal profession throughout Australia had "*hindered the mobility of legal practitioners within Australia, impeded interstate competitiveness, and inconvenienced clients with interstate or national interests*".[14] The Committee noted that, despite mutual recognition having assisted in progressing towards a national market for legal services, considerable barriers remained.[15] It also observed that all Australian governments were addressing the creation of a national legal profession in the context of national competition policy reform and that COAG had, as noted earlier, established a Working Group regarding the application of the Hilmer Report principles to, among other sectors, the legal profession.[16]

In response to COAG's request for proposals on how best to reform the legal profession, in July 1994, the Law Council of Australia (LCA) prepared the Blueprint for the Structure of the Legal Profession: A National Market for Legal Services ("Blueprint"). The Blueprint sought to ensure a number of general principles and objectives for the profession which included the following:[17]

1. national competition policy principles apply to the legal profession;
2. lawyers admitted in any State or Territory of Australia are able to practise law throughout Australia;
3. existing constraints which prevent a lawyer's right to practise without restriction throughout Australia are removed in order to facilitate the development of a national market in legal services;
4. recognition that the independence of the legal profession is dependant (sic) upon the profession's right to self regulation;
5. the system of regulation of the legal profession is implemented by uniform State and Territory legislation;
6. the self regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of the professional bodies are not inconsistent with national competition policy principles;
7. the protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care; and
8. proper information is available for consumers of legal services as to quality and cost of legal services.

2001–2002

In July 2001, SCAG noted the need for a more uniform approach to the regulation of the legal profession and agreed that a proposal for model laws should be prepared. Consequently, in March 2002, the National Practice Model Laws Project was initiated by SCAG.[19] Parallel to this activity, in September 2001, another document key to the development of the national regulation framework, the "*2010: A Discussion Paper – Challenges for the Legal Profession*", was released by the LCA. This discussion paper outlined the issues facing the legal profession over the next decade. It concluded that the process for achieving a "*national profession*" would take some time but that most interviewees (senior practitioners from various backgrounds) felt that it would be achievable by 2010. The LCA commented, however, that "[i]*f the profession is to reach this stage by 2010, it will be necessary to begin moving towards this goal at a speed that will be acceptable across the profession*".[20]

2004–2009

The first major milestone for the National Practice Model Laws Project was the release of the draft Legal Profession – Model Bill (2004) in 2004 which aimed to harmonise the laws for legal practice across jurisdictions.[21] This model bill was revised and released in August 2006.[22] Between 2004 and 2009, most

jurisdictions across Australia, apart from South Australia, had agreed to the implementation of the Model Bill by enacting a *Legal Profession Act* based on the model legislation template.[23] While South Australia has drafted its version of the Model Bill, known as the Legal Profession Bill 2007, the Bill has not been enacted due to a deadlock in the South Australian Legislative Council which prevented passage of the Bill. The Bill eventually lapsed as a consequence of prorogation of the South Australian Parliament.[24]

2009–Present

At the 5 February 2009 COAG meeting, it was determined that, in line with its National Partnership Agreement to Deliver a Seamless National Economy, additional reform was still needed to nationalise the regulation of the legal profession in Australia.[25] Accordingly, on 30 April 2010, at the request of COAG, the Commonwealth Attorney-General, the Hon Robert McClelland MP established:

- a National Legal Profession Reform Taskforce ("Taskforce") to make recommendations for a national regulatory framework and to prepare draft uniform legislation dealing with the national regulation of the legal profession; and
- a Consultative Group to advise and assist the Taskforce in its work.[26]

The objective is to "*establish uniform laws regulating the legal profession to enable legal practitioners and practices to operate in multiple Australian jurisdictions without having to meet multiple professional registration requirements*".[27]

THE NATIONAL LEGAL PROFESSION REFORM TASKFORCE

The Taskforce was made up of five members, three of whom were senior government executives from New South Wales, the Australian Capital Territory and Victoria, and another was the Secretary-General of the LCA. The Chair was Mr Roger Wilkins AO, Secretary, Commonwealth Attorney-General's Department.[28]

The goal of the Taskforce was "*complete, substantive and enduring uniformity that eliminates unnecessary regulatory burden, compliance costs and other barriers to providing affordable, quality legal services and which enhances consumer protection*". The Taskforce was expected to achieve this through legislation aimed not only at unifying the legal profession on a national basis but also simplifying and increasing the effectiveness of the regulation of the legal profession.[29]

To assist in achieving these ends, the Taskforce issued a number of papers for comment between September and December 2009 on the following topics:[30]

- Fidelity Cover;
- Trust Accounting;
- Professional Indemnity Insurance;
- Business Structures;
- Legal Costs;
- National Legal Services Ombudsman; and
- Regulatory Framework.

Submissions were received by the Taskforce from the Consultative Group and the public on each of these papers.

THE CONSULTATIVE GROUP

The Consultative Group was established to advise and assist the Taskforce in its work. The COAG website notes:[31]

> The Group represents a wealth of experience across a range of key areas including regulators, the courts, consumers, the legal profession and legal educators. Members of the Group also come from each State and Territory in Australia.

Comprising 19 members from across Australia, the Consultative Group is chaired by Professor the Hon Michael Lavarch (Executive Dean, Queensland University of Technology, former Commonwealth Attorney-General and former Secretary-General of the LCA). [32]

2010 CONSULTATION DOCUMENTS

At its 19-20 April 2010 meeting, COAG agreed to the Taskforce releasing a package of the following documents for consultation (on 14 May 2010) ("**2010 Consultation Documents**"):[33]

1. the consultation draft Legal Profession National Law ("Consultation Draft Law");

2. the consultation draft Legal Profession National Rules ("Consultation Draft Rules");
3. the Consultation Regulation Impact Statement and Consultation Report (including Attachments A-C) and (Attachment D); and
4. the Consultation Report.[34]

Towards the end of the three month consultation period, which closed on 13 August 2010, the LCA released draft Solicitors' Rules and the Australian Bar Association (ABA) released draft Barristers' Rules on the COAG website for public consultation.[35] The Taskforce sought public input on the proposals set out in all of these documents.

The Taskforce also co-ordinated a consumer survey which ran for six weeks during this consultation period. The responses to the survey were summarised in the Consumer Report published by ARTD Consultants on 20 August 2010 for submission to the Taskforce for its consideration.[36] In total, 148 surveys were submitted. Of those responding, 77 were consumers (whose views were the main focus of the consultation) while the remainder were or had been legal practitioners.[37] A number of consumers and consumer advocates felt that it was:[38]

> a laudable goal to try to create a more consumer oriented legal profession through the reforms and commended the role of the Commonwealth Attorney-General in bringing about the reform process.

However there were concerns that "*there were shortcomings in the draft National Law that would jeopardise the goal of enhancing consumer protection*". For example, some consumers were concerned that the proposed "*additional layer of bureaucracy*" would not translate to an improvement for consumers.[40] Additionally:

> many consumers were disappointed that they had not been consulted earlier in the consultation process as they felt this would have been appropriate and produced a more consumer focussed draft Legal Profession National Law.[41]

THE FIVE KEY INITIATIVES OF THE TASKFORCE

The Taskforce proposed the following five key initiatives:[42]

Key Initiative	Brief Description
1. Creation of a new national regulatory framework	Two new national bodies to oversee the regulation of the legal profession (in conjunction with the State and Territory Supreme Courts) and to develop uniform national rules. These bodies are: • the National Legal Services Board; and • the National Legal Services Ombudsman.[43]
2. Establishment of an Australian legal profession	The admission of lawyers in one jurisdiction resulting in a lawyer becoming an officer of all Supreme Courts. The creation of the Australian practising certificate and a publicly-accessible Australian Legal Profession Register. Government lawyers (other than those engaging only in legal policy work) and in-house counsel will be required to hold practising certificates. Continuing professional development rules will be uniform across jurisdictions.
3. Reduction in regulatory burden	Introducing uniformity of the regulatory requirements on a national basis is anticipated to reduce the regulatory burden. For example, the option of establishing a single general trust account for multi-jurisdictional law practices.
4. Enhanced consumer protection	Consumer protection is sought to be enhanced by, among other things: • disputes between lawyers and clients concerning the provision of legal services being resolved by the National Legal Services Ombudsman;

	• the proposed requirement that law practices charge no more than "fair and reasonable" legal costs;[44] and • fidelity fund claims being determined at "arms-length" from the profession.
5. Maintenance of the independence of the legal profession	Through the adoption of a co-regulatory model involving: • the National Legal Services Board and its supporting advisory committees; and • State and Territory professional associations.

This e-Research Brief focuses on the **first** of these key initiatives relating to the **creation of a new national regulatory framework** and how this aspect has been addressed in:

- the 2010 Consultation Documents released on 14 May 2010, including the Consultation Draft Legal Profession National Law) and the Consultation Draft Legal Profession National Rules (the "Consultation Draft Law" and the "Consultation Draft Rules");
- the Interim Report on Key Issues and Funding (Interim Report) issued by the Taskforce on 8 November 2010; and
- the revised draft of the National Law and the revised draft National Rules released in December 2010 (the "Revised Draft Law" and the "Revised Draft Rules").

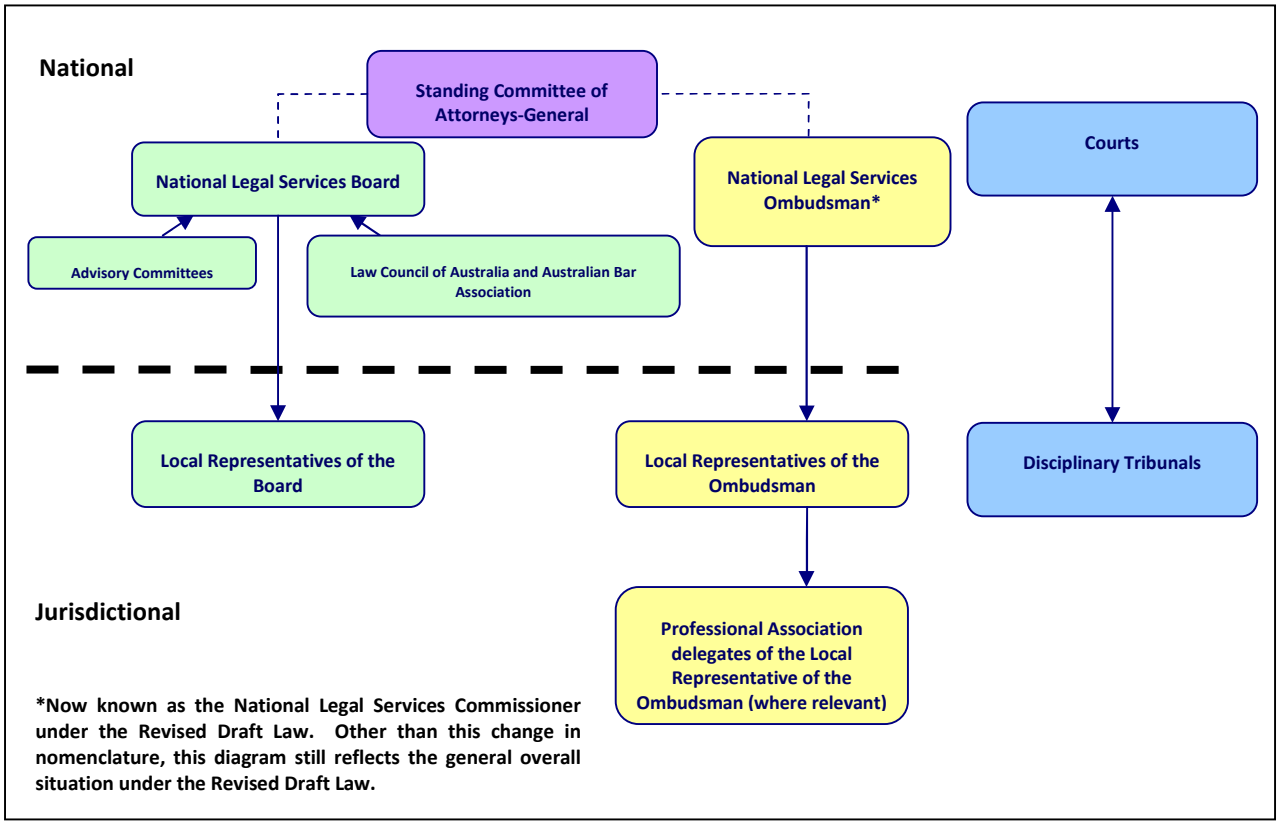
A NATIONAL REGULATORY FRAMEWORK

The two aspects of the draft national regulatory framework proposed by the Taskforce that created some controversy during consultation on the national legal profession reforms were the establishment of:

- the National Legal Services Board (as a national regulator); and
- the National Legal Services Ombudsman (the title later changing to the 'National Legal Services Commissioner') (compliance and complaints handling).

Accordingly, the proposals concerning the national regulatory framework are the focus of this e-Research Brief.

The regulatory framework as originally proposed under the Consultation Draft Law was summarised in the Consultation Report in the following diagram:[45]



NATIONAL LEGAL SERVICES BOARD

Overview

In Queensland, prior to 2004, most complaints against solicitors and barristers were handled by the Queensland Law Society (QLS) and the Queensland Bar Association. Then, in 2004, the *Legal Profession Act 2004* (Qld) (LPA) was passed which "*substantially altered the structure and focus of lawyer discipline in Queensland*". The effect of the LPA was to shift a large proportion of the responsibility for lawyer discipline to a newly introduced and independent body known as the Legal Services Commissioner, who was to take a much more consumer-oriented approach to lawyer discipline.[46]

Under the current proposed national legal profession reforms, part 8.2 of the Revised Draft Law provides for a new national regulator, the National Legal Services Board (Board), which has the following objectives:

(a) to ensure the efficient, targeted and effective regulation of the legal profession and the maintenance of professional standards; and

(b) to address the concerns of clients of law practices through the regulatory system and provide for the protection of clients of law practices; and

(c) to promote national consistency in the regulation of the Australian legal profession;[47] and

(d) to ensure the Australian system is at the forefront of regulation of legal professionals.

The proposed Board "*will be a small body of between five and seven members, generally appointed on the basis of range of skills and experience, and will include representation from the legal profession*".[48] The proposed responsibilities of the Board are set out in the Revised Draft Law and include the general administration of the National Law and the National Rules (the Rules being a subordinate instrument to the National Law, covering a range of issues such as practising entitlements and business practice. The National Rules include Legal Professional Conduct Rules, Legal Practice Rules and Continuing Professional Development Rules),[49] issuing compliance certificates recommending to the Supreme Court that the person be admitted to the legal profession,[50] the granting and renewing of Australian practising certificates;[51] the registration of foreign lawyers[52] and maintaining the Australian Legal Profession Register (the Register containing information such as admissions, practising certificates etc.).[53]

Issues

Two issues surrounding the Board that appear to have generated the most controversy are:[54]

1. the composition of the Board and the role of SCAG in such; and

2. the operational independence of the Board from the Executive Government.

Issue 1 Composition of the Board

Original Draft Model Board

The establishment, objectives and functions of the Board, as originally drafted, are set out in **part 8.2** of the Consultation Draft Law. The originally proposed constitution of the Board, as set out in **schedule 1** of the Consultation Draft Law, was as follows:

- one member appointed by the host Attorney-General[55] on the recommendation of SCAG from a panel of three persons nominated by the Council of Chief Justices;
- one member appointed by the host Attorney-General on the recommendation of SCAG from a panel of three persons nominated by the LCA;
- no more than five members appointed by the host Attorney-General on the recommendation of SCAG on the basis of their expertise in one or more of the following areas: the practice of law, the protection of consumers and/or the regulation of the legal profession; and
- one of the members was to be appointed as Chairperson of the Board by the host Attorney-General on the recommendation of SCAG (whether at the time of the person's appointment or afterwards).[56]

Controversy Over Draft Model Board

In response to, and even before, the 2010 Consultation Documents (including the Consultation Draft Law) were released, concern was raised by a number of high profile lawyers and judges about the extent of SCAG's involvement in the appointment process for Board members. The main issue raised by some lawyers and judges was that SCAG, being the executive arm of government, "*control*[ed] *the appointment of the members of the Board*", which in turn, meant that the Board would be "*subjugated to the political will*".[57]

In December 2009, prior to the release of the Consultation Draft Law, the Queensland Chief Justice Paul de Jersey launched "*a blistering attack"* on the federal government's proposal to create a national regulatory structure for lawyers.[58] Chief Justice de Jersey was particularly concerned that there may be "*a refashioning of the profession to the point where it lost its independence and would be regarded as controlled by executive government*".[59] The then proposed structure, according to His Honour:

> would signal a seismic shift in the dynamics of the legal profession in this nation, a shift which would, I suggest, be inimical to the maintenance of public confidence in the independent administration of justice.[60]

Similar concerns about the impact of the proposed reforms on the independence of the legal profession (and alternative suggestions) were expressed by other senior judges, including, the High Court Chief Justice, Robert French, the then New South Wales Chief Justice, James Spigelman and South Australian Chief Justice, John Doyle.[61] For example:

- The Council of Chief Justices submitted that the majority of the Board members should be members of the legal profession and appointed independently of government and of SCAG, and that the Chair of the Board should be appointed by the Council of Chief Justices.[62]
- The Australian Bar Association (ABA) endorsed the Council of Chief Justices' proposal that the Chair of the Board should be appointed by the Council of Chief Justices and that the majority of Board members should be appointed by the profession. The ABA also noted that to have more than seven members on the Board "*would be unwieldy*". The ABA believed that at least one member of the Board should be appointed by the ABA.[63]

This issue regarding the appointment and constitution of the Board continued to attract controversy after the 2010 Consultation Documents were released for consultation, with a significant proportion of the public submissions canvassing the issue of the composition of the Board. A variety of suggestions for alternative compositions were put forward in the public submissions. For example:

- The LCA submitted that the Board should consist of three representatives of the legal profession, three members nominated by SCAG and, one member, who is also the Chair, should be nominated by the Council of Chief Justices.[64]
- Chief Justice Ewan Crawford of the Supreme Court of Tasmania was concerned that "*the profession, through the Law Council of Australia, will have only one nominee on the seven member Board. Even then, it will be required to nominate three persons out of which SCAG will select one".* In his view, the proposal was "*an insult to the profession and confirms an intention to reject a need to maintain its independence*". His Honour suggested instead "*that the majority of*

the Board should be members of the profession and over half of them should be appointed by the profession…".[65]

- From a differing consumer perspective, the Consumer Law Action Centre suggested that the Board should be constituted by an "*equal number of consumer/community representatives as legal profession representatives*" and a Chair who is independent of the profession. The Consumer Law Action Centre further advocated for "*a balanced Board to appoint its own chair*" as it had concerns about the Chair being a nominee of the Council of Chief Justices.[66]

Supplementary Discussion Paper

Due to the "*very high levels of interest*" concerning the proposed composition and appointment of the Board in the Consultation Draft Law, the Taskforce issued a supplementary Discussion Paper on the Composition and Appointment of the National Legal Services Board (Supplementary Discussion Paper) dated July 2010, seeking views on a range of models.[67]

The Supplementary Discussion Paper identified the following as major issues arising from consultation:

1. *Who should appoint the members of the Board?*

   The Taskforce addressed the concern raised by the LCA, several Chief Justices, some legal practitioners and other commentators regarding the independence of the legal profession and the need for it to be protected from the risk of interference by the government.[68] The main concern, under the original draft model, appeared to hinge on the majority of the Board appointments being able to be made by the Executive. In the Supplementary Discussion Paper, the Taskforce acknowledged this concern and "*recognise*[d] *that there may be other views as to which bodies or persons should be responsible for the appointment of National Board members*".[69] The Taskforce also set out, as Attachment A to the Supplementary Discussion Paper, a number of alternative models, including one (Model B – as described above) proposed by the LCA.

2. *What skills, experience and qualifications should be reflected in the Board's membership?*

   The original proposal was "*that SCAG's nominees would be appointed on the basis of their expertise in the practice of law, the protection of consumers, or the regulation of the legal profession*".[70] The suggestion was made in some submissions that a majority of the Board members should be from the legal profession. However, there were also others who strongly preferred that the Board be a majority of non-lawyers and others still who proposed the Board comprise half lawyers and half non-lawyers. The Taskforce noted these views and stated that the Board "*should account for a range of interests and have sufficient capacity to acquit its functions effectively*". It was also noted that it might be appropriate for other skill sets (e.g., financial expertise) to be represented.[71]

3. *Which body or person should have the power to nominate the Chair of the Board?*

   The Taskforce noted the suggestions in various submissions that the Council of Chief Justices or SCAG should have the power to nominate the Chair of the Board.[72] The Taskforce also noted other alternative suggestions, such as the Board appointing the Chair from its own membership or recruiting its own Chair.[73]

Interim Report Model Board

After taking into account the public submissions, the Taskforce released an Interim Report on Key Issues and Funding (Interim Report) on 8 November 2010 proposing various changes to the composition of the seven member Board which were subsequently reflected in the Revised Draft Law (see below). In relation to the Chair of the Board, it was proposed that while such appointment would still be on the recommendation of SCAG, SCAG would first have to consult with the Presidents of the LCA and the ABA and a specified member of the Council of Chief Justices and enable each to have the opportunity to nominate candidates for the Chair. It was also proposed that the necessary consultations between SCAG and the LCA and ABA be set out in a memorandum of understanding.[74]

Law Council of Australia Response to Interim Report

In its media statement, released on 30 November 2010 following the meeting of the Directors of the LCA, the LCA reiterated its general support for the COAG national legal profession reform proposal provided that the changes result in "*an effective reform regime that will truly deliver to the profession the ability to conduct legal practice on a national basis and a simplified regulatory regime*".[75]

In the context of the composition of the Board, the LCA accepted, as its preferred position, the method of selecting the Chair that had been proposed by the Council of Chief Justices (i.e. that the Chair of the Board be appointed by the Council of Chief Justices) together with two members nominated by the LCA and one by the ABA. However, the LCA did indicate that it could accept the Taskforce's "*compromise position for filling the position of the Chair of the Board*", as described above. In concluding, the LCA pointed out that it (p 2):

considers it essential that any new regulatory scheme for the regulation of the legal profession should be supported by Chief Justices and strongly urges Attorneys-General to work with the Council of Chief Justices to find an appropriate solution.

Board Model Proposed under the Revised National Law

The Revised Draft Law amended the Consultation Draft Law to bring the proposal for the membership of the Board into line with that set out in the Interim Report. Under this proposal, the Board is to consist of 7 members as follows:[76]

- 2 members appointed by the host Attorney-General on the recommendation of the LCA;
- 1 member appointed by the host Attorney-General on the recommendation of the ABA;
- 3 members appointed by the host Attorney-General on the recommendation of SCAG on the basis of their expertise in one or more of the following areas:
  - the practice of law;
  - the protection of consumers;
  - the regulation of the legal profession;
  - financial management;
- 1 member appointed as the Chair by the host Attorney-General on the recommendation of SCAG. SCAG must first ensure that:
  - it has consulted with the President of the LCA, the President of the ABA and a member of the Council of Chief Justices nominated by the Council for this purpose; and
  - the President of the LCA, the President of the ABA and a member of the Council of Chief Justices nominated by the Council for this purpose have had an opportunity to nominate candidates for appointment as the Chair; and
  - it does not recommend a person without the concurrence of the President of the LCA, the concurrence of the President of the ABA and the concurrence of a member of the Council of Chief Justices nominated by the Council for this purpose.

It was also required under the Revised Draft Law that:

- SCAG must ensure that the members are appointed so that, as far as practicable, the members reflect a balance of jurisdictions and a balance of expertise; and
  - a member does not have a representational role in relation to any particular area of expertise or in relation to any particular organisation or jurisdiction.[77]

Issue 2 Independence of Board from Executive Government

Original Draft Model

In the Consultation Draft Law, SCAG's powers in respect of the Board[78] were originally proposed to include the following:

- a general supervisory role in relation to the Board to ensure that it is fulfilling its duties under the National Law consistently with the objectives of the National Law (**section 8.1.2(1)** of the Consultation Draft Law);
- giving directions on policy matters that are relevant to the operations of the Board and that are consistent with the objectives of the National Law and the Board must comply with any applicable policy directions (**section 8.1.2(3)** & **(5)** of the Consultation Draft Law);
- requesting reports from the Board regarding specified aspects of its operations and the Board must provide SCAG with any requested reports (**section 8.1.2(2)** & **(5)** of the Consultation Draft Law); and
- vetoing any proposed National Rule submitted by the Board to SCAG for approval within the specified 30-day period. Under **sections 9.1.1** and **9.1.2**, the Board may make Legal Profession National Rules for or with respect to any matter that by the National Law is required or permitted to be, or is necessary or convenient to be, prescribed or specified. Under **section 9.1.3** National Rules for legal practice, conduct and continuing professional development can be developed by the LCA and ABA and approved by the Board. Those proposed Rules are then submitted to SCAG for approval. If approved within 30 days of submission or it is not vetoed within that time,

the National Rule can be made. However, if SCAG does veto the proposed National Rule, the Board must not make the National Rule as submitted to SCAG, but it may be resubmitted to SCAG with amendments (**section 9.1.4(1)** and **(2)** of the Consultation Draft Law).

Controversy Concerning Independence of Board

The Consultation Draft Law proposals regarding SCAG's powers in relation to the Board caused considerable controversy, particularly within the judiciary and the legal profession. The concerns are especially apparent from the letters and public statements made by various Chief Justices, as discussed below.[79]

The Judicial Conference of Australia, which has a membership of over 600 judicial officers (including both serving and retired judges), noted in its submission to the Taskforce that the Board will:[80]

> be susceptible to SCAG's control through that body's ability to give the Board policy directions with which the Board is required to comply. The clear intention that the Board should be subjugated to the political will is seen in the proposal that SCAG be the body which controls the appointment of the members of the Board.

The Judicial Conference of Australia concluded by urging "*the Taskforce to consider the issues raised in this submission. They go to the heart of the continuation of the independent system of law for which Australia is renowned*".[81]

A number of other submissions also objected to the Board being subject to policy directions from SCAG. For example, while the LCA submission (p 6) supported the proposal for SCAG to have a general supervisory role, it opposed SCAG being able to give policy directions to the Board regarding this as having the "*potential for policy interference*". Chief Justice Crawford's submission (pp 1-2) was that, in addition to SCAG's involvement in appointing Board members, the giving of policy directions represented a threat to the "*independence of the legal profession*".

Interim Report Model

After taking the public submissions into account, the Taskforce released its Interim Report which proposed the following changes:

- removing the power of SCAG to give policy directions to the Board as the Taskforce believed that "*this role is adequately accommodated in the National Law*". It commented that SCAG's role should be to oversee the legislative and administrative framework;
- imposing a fetter on SCAG's powers to veto proposed National Rules made by the Board such that in relation to the Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules, it may do so only on public interest grounds; and
- requiring that SCAG give reasons for any disallowance of proposed National Rules.[82]

Law Council of Australia Response to Interim Report

In its media statement, released on 30 November 2010 following the meeting of the Directors of the LCA, the LCA accepted the proposals outlined in the Interim Report in relation to the removal of SCAG's power to give policy directions (p 1).

Current Proposal under the Revised National Law

The ability of SCAG to give directions on policy has been removed from the Revised Draft Law which was released in December, 2010 (see **section 8.1.1**).

In relation to SCAG's role in the making of the National Law Rules, although the Revised Draft Law retained SCAG's power to veto any new National Rules proposed by the Board, as foreshadowed in the Interim Report, the Revised Draft includes a fetter on SCAG's powers to veto a proposed Legal Practice Rule, Legal Profession Conduct Rule or Continuing Professional Development Rule (see **section 9.1.7(2)** of the Revised Draft Law). SCAG may veto such rules only where it considers that the rule, or part thereof, would:

- impose restrictive or anti-competitive practices that are not in the public interest; or
- otherwise not be in the public interest because it conflicts with the objectives of the National Law; or
- impact on the public funding of the scheme for regulating the legal profession.

SCAG must publish a notice setting out the reasons for vetoing the rule, as soon as practicable.[83]

NATIONAL LEGAL SERVICES OMBUDSMAN/COMMISSIONER

The Taskforce's Consultation Draft Law also included a proposal to introduce a new national regulatory body (originally referred to as the "National Legal Services Ombudsman" (Ombudsman) in the Consultation Draft Law but later called the "National Legal Services Commissioner") in the Revised Draft Law charged with handling complaints, dealing with disputes, making binding determinations in certain circumstances about costs disputes where the total amount in dispute is less than $10,000 ensuring compliance, and educating the community about legal issues (see **Parts 5.3** and **8.3** of the Consultation Draft Law and Revised Draft Law). The role of this separate body, as originally proposed in the Consultation Draft Law, involved performing complaints handling and compliance functions, as well as overseeing its local representatives in doing so.[84]

Issues

The two issues surrounding the Ombudsman that appear to have generated the most controversy are:[85]

1. the role of the Ombudsman, including the Ombudsman's power to conduct compliance audits and issue management system directions; and
2. the title of the Ombudsman.

Issue 1 Role of the Legal Services Ombudsman/Commissioner

Original Draft Proposal

Under the Consultation Draft Law, the roles and responsibilities of the Ombudsman included the following:

- to ensure that complaints about a consumer matter (a dispute or issue arising from the provision of legal services by a lawyer or law practice, including a dispute about legal costs) or a disciplinary matter (unsatisfactory professional conduct or professional misconduct) against Australian legal practitioners, Australian registered foreign lawyers or law practices, and disputes and other issues involving law practices are dealt with in a fair, timely and effective manner (see **section 5.1.6-5.1.7** and **section 8.3.3(a)** of the Consultation Draft Law);
- the power to conduct compliance audits to ensure compliance with the requirements of the National Law and the National Rules by Australian legal practitioners, Australian registered foreign lawyers and law practices (see **sections 4.6.1, 8.3.3(b)** and **Chapter 7** of the Consultation Draft Law);
- to educate the legal profession about issues of concern to the legal profession and to clients of law practices (see **section 8.3.3(c)** of the Consultation Draft Law);
- to educate the community about legal issues and the rights and obligations that flow from the client-practitioner relationship (see **section 8.3.3(d)** of the Consultation Draft Law);
- the power to issue management system directions to a law practice if it considers it necessary to do so (see **section 4.6.2** of the Consultation Draft Law);[86]
- the power to initiate an external intervention into a law practice where the circumstances warrant doing so (e.g., where a legal practitioner ceases to hold a practising certificate; is involved in serious trust account irregularities or record keeping breaches)(see **Chapter 6** of the Consultation Draft Law. See also **Part 4.2** in relation to the Ombudsman's role regarding trust money and accounts); and
- the power to seek a pecuniary penalty from a designated tribunal where there is a breach of a civil penalty provision (see **section 9.6.3** of the Consultation Draft Law).

Section 8.3.5 of the Consultation Draft Law provided for the independence of the Ombudsman, stating that he or she is not subject to the control and direction of SCAG, the host Attorney-General or the Board in relation to dealing with any particular Australian legal practitioner, Australian-registered foreign lawyer, law practice, complainant or any person. The Ombudsman was, however, subject to the National Law, National Rules, and applicable guidelines.

Additionally, the Ombudsman was to exercise his or her "special functions" through the local representative for the jurisdiction, not by the Ombudsman himself or herself (see **section 1.3.4** of the Consultation Draft Law). Such "special functions" were in relation to investigations, external interventions, dispute resolution, professional disciplinary matters, and in relation to trust money and trust accounts, and business management and control (e.g. management system directions). Apart from the Ombudsman's special functions and certain other stated functions, the Ombudsman was able to delegate any of his or her functions to a committee; or a

member of the staff of the Ombudsman; or an entity specified in the National Rules (**section 8.3.7**).

Submissions to the Taskforce

The proposed role of the Ombudsman drew criticism in a number of the submissions to the Taskforce. The main concerns are discussed below.

Lack of Independence From the Executive and the Legal Profession

A number of submissions expressed concern about the perceived lack of independence of the proposed Ombudsman's role.

In Schedule 2 of the Consultation Draft Law, the appointment of the Ombudsman was by the host Attorney-General on the recommendation of SCAG after consultation with the Board. The power of termination was vested in the host Attorney-General (after consultation with SCAG) on the basis of specified grounds.

In this regard, the Rule of Law Institute of Australia (RoLIA) submitted that: [87]

> [w]hilst the proposed legislation states that the Ombudsman is independent of the Attorneys-General, RoLIA believes that the vesting of appointment and termination powers in the Attorneys-General means that the independence is in name only.

The RoLIA proposed that, instead, the termination powers should be in the hands of Parliament rather than the executive.[88]

The ARTD Consultants Consumer Report commissioned by the Taskforce and the joint submission from a number of consumer organisations, including the Consumer Action Law Centre and CHOICE, submitted that the Ombudsman should be completely independent of the legal profession.[89] It was noted in the Consumer Report that:[90]

> Consumers and advocates were strongly of the view that the National Ombudsman should be completely independent of the legal profession. … In particular, consumers strongly believed that the professional associations such as Law Societies and Bar Associations should not be involved in handling consumer complaints.

The ARTD Consultants Consumer Report also referred to the examples of the independent Legal Ombudsman in the UK and the national ombudsman schemes in other service industries in Australia, such as the Financial Services Ombudsman and the Telecommunications Industry Ombudsman.[91]

The Legal Profession Complaints Committee of Western Australia (LPCC) (the independent statutory authority in Western Australia which supervises the conduct of, and handles complaints against, legal practitioners) submitted:[92]

> The LPCC is independent of the LPB in the operation of its functions … and its role in supervising the conduct of legal practitioners is conferred directly on it under the present statute. That direct conferral is in recognition of the need to ensure the complete independence of the regulatory function which the LPCC performs. Public confidence requires complete independence of the complaints handling and disciplinary role and functions ancillary to that.

Concern About the Delegation of the Ombudsman's Functions and its Proposed Oversight Role

A number of submissions to the Taskforce raised concerns about the proposal for the delegation of the Ombudsman's functions and his or her oversight role. For example, in the Joint Consumer Submission by the Consumer Action Law Centre, CHOICE and others, it was noted that: [93]

> The current system is complex and practitioners as well as the public are confused about the distinct roles of the various regulatory bodies, for example the Board (in Victoria), the Commissioners and the professional associations in all states.
>
> The reforms do not address this issue and arguably expand the complexity as they add a new institutional layer, though we accept this may be a necessary evolutionary step.
>
> However, the new system is excessively complex with layers of delegations in both the consumer disputes and regulatory functions. The processes will be inefficient, probably ineffective, and highly confusing to both consumers and practitioners. For example, consumer complaints will be made to a national body, but the complaint will be dealt with by a state body and in some cases will be delegated again to a professional association.

Similarly, the ARTD Consultants Consumer Report also noted that:[94]

> Consumers and advocates were very concerned about the proposal to have many of the powers of the National Ombudsman exercised by local representatives – mainly because, if the local representatives were the bodies currently handling consumer complaints, there would be no improvements in complaints handling for consumers, and complaints handling would not be at arm's length from the legal profession.

The ARTD reported that contributors had proposed that the requirement in the proposed reforms that the Ombudsman "must delegate" should be changed to "may delegate" so that the Ombudsman is "*able to take back the delegation if necessary in the future*".[95]

A different viewpoint was put forward by the submission of the Attorney-General of Western Australia and the Minister for Corrective Services, the Hon Christian Porter MLA, who opposed the creation of the Ombudsman role, as proposed, for the following reasons:[96]

> A structure where the National Ombudsman delegates some powers to State bodies to deal with complaints against legal practitioners but retains overall responsibility and control would not be acceptable, especially if it was detrimental to appropriate State-based regulation of local lawyers, which system has operated without incident now since self government in Western Australia.

The LCA suggested, in its letter of 10 March 2010 to the Commonwealth Attorney-General, that the Ombudsman should be a small office with an oversight role that is allowed to delegate functions to a local regulatory body.[97]

Concern Regarding the Proposed Dual Roles of Complaints Handling and Discipline

Concern was also raised in a number of submissions about the Ombudsman having both complaints handling and disciplinary roles. For example, the ARTD Consultants Consumer Report noted that: [98]

> [A]n area of concern for consumer advocates in particular, was that the Ombudsman had both complaints-handling and disciplinary roles. It was proposed that this could reduce transparency about the role of the Ombudsman for both consumers and lawyers. … Consumers agreed that the Ombudsman should finalise consumer disputes before any disciplinary process was commenced and it was suggested that the law should include that a lawyer cannot take legal action against a consumer (for example to recover unpaid fees) while the complaint is with the Ombudsman.

Cost and Impracticality

A number of submissions indicated concern about the costs and impracticality of the proposed Ombudsman. For example, the ABA indicated concern about the overall cost of the system. The ABA submitted:[101]

> [T]he creation of an additional federal complaint handling tier would inevitably result in unnecessary duplication, additional costs and delays for no benefit to either the complainants … or members of the legal profession.

As an alternative, the ABA was:[102]

> … strongly of the opinion that the involvement of professional bodies throughout the course of the complaints process, with the oversight of an independent commissioner, provides the most efficient and cost effective means of meeting the needs of consumers and practitioners.

The Australian Lawyers Alliance (ALA) also submitted that the Ombudsman added an unnecessary level of cost and bureaucracy to the complaints handling framework.[103] The ALA said:[104]

> There are two aspects to the costing, the cost of imposing a national structure and the cost of complying with what will be an increased amount of regulation upon practitioners. It is inevitable, as with any business entity that any increased cost will eventually be passed on to the consumer. This will have the deleterious effect of decreasing access to justice quite possibly for a number of consumers.

The ALA also noted that:[105]

> State agencies regulating the profession have not been criticised. There appears to be little empirical evidence of State agencies not dealing adequately with complaints and disciplinary issues.

The then QLS President, Mr Peter Eardley, was also concerned about the costs of the new bodies, as seen in his submission of 10 August 2010 (p 1):

> The overall costing of the proposed scheme continues to be of deep concern, because there:
> - has been no adequate costing or the proposed new bodies.
> - is no plan for the new National bodies to reduce the oft quoted, but never evidenced "55" current regulatory bodies, and presumably thereby save costs.

Seabeach Costing Pty Ltd, a legal costing consultancy, also submitted that the Ombudsman's role would be impractical due to the high number of complaints and inquiries that it would have to handle and the amount of staffing that would be required.[106]

Interim Report Revised Proposal

After taking into account the public submissions, the Taskforce released the Interim Report which proposed a number of changes to the role of the Ombudsman. It also renamed the "Ombudsman" the "National Legal Services Commissioner" (see discussion below). The Taskforce's revised proposal was for each jurisdiction to have an independent statutory body or officer holder to oversee the exercise of complaints and compliance

functions meaning that the national oversight role, proposed to be performed by the Commissioner, could be limited to monitoring and reporting on the independent local representatives.

The Taskforce's proposals in the Interim Report include the following:[107]

- the Commissioner will be appointed with the concurrence of the Board;
- in order to promote national consistency, the Commissioner will monitor and report on his or her local representatives, and will have the power to issue guidelines and directions to local representatives;
- the Commissioner's local representative in each jurisdiction must be an independent statutory body (not being a professional legal association) or office holder;
- where there is no independent statutory body or office holder in a jurisdiction, consideration could be given to nominating existing independent statutory bodies or office holders to undertake this function, or make use of a body or office holder established in another jurisdiction; and
- local representatives will be able to delegate any functions to professional associations and will have call in and monitoring functions in relation to their delegates.

The Commissioner's power to issue management system directions remains intact and predominantly unchanged by the Interim Report. However, the Interim Report stipulated that the Commissioner must first conduct a compliance audit whereas, under the Consultation Draft Law, this was not stipulated.[108] This point is discussed further below.

Current Proposal under the National Law (Revised Draft)

Subsequent to the Interim Report, the Revised Draft Law, released in December 2010 made a number of changes to the Commissioner's role. Many of the proposals set out in the Interim Report were taken up in the Revised Draft Law with certain modifications.

The objectives of the Commissioner under the Revised Draft Law are similar to the objectives originally specified for the Ombudsman under the Consultation Draft Law. However, the promotion of "*national consistency in the application of this Law and the National Rules to the Australian legal profession*" was included as an additional objective in the Revised Draft Law.[109]

The Revised Draft Law also included a new provision to deal with the concept of the Commissioner having two kinds of functions; these being: (1) independent functions; and (2) special functions.[110] The Commissioner's "independent functions" are essentially the functions of the Commissioner under Chapter 8 and Schedules 1 & 2, functions as chief executive of the Board, the function of making guidelines and giving directions, the function of approving forms and other functions specified as such in the Revised Draft Law and the Revised Draft Rules.[111] "Special functions" are functions of the Commissioner other than independent functions.[112]

Under the Revised Draft Law, the Commissioner may exercise the "independent functions" directly or by delegation, unless provided otherwise.[113] The special functions of the Commissioner are to be exercised on behalf of the Commissioner by the local representatives (not by the Commissioner himself or herself) subject to specified conditions. Under the new proposals, the Commissioner's local representative in each jurisdiction must be an independent statutory body (not being a professional legal association) or office holder (see **section 8.3.5(4)**). The key proposal in the Interim Report for the Commissioner to perform a national oversight role limited to monitoring and reporting on the exercise of special functions by his or her local representatives (with the power to issue guidelines and directions to local representatives) was taken up in **sections 8.3.6(1)(b)** and **8.3.5(3)**. The provisions also addressed concerns raised by various submissions, as discussed above.

The proposal in the Interim Report that the Commissioner first conduct a compliance audit prior to issuing management directions was taken up in the Revised Draft, as discussed earlier. However, the Commissioner's power to conduct the compliance audit is proposed to be more confined. Under **section 4.6.1(1)** of the Revised Draft Law, the Commissioner may conduct a compliance audit where he or she considers there are reasonable grounds to do so, based on: (a) the conduct of the law practice or one or more of its associates; or (b) a complaint. Further, under **section 4.6.2,** the Commissioner can only issue a management system direction if the Commissioner considers it reasonable to do so after the conduct of a trust records examination or investigation, a complaint investigation or a compliance audit. Under the Consultation Draft Law this was not stipulated.

Issue 2 Title

Original Draft Proposal

Under the Consultation Draft Law, the title of "National Legal Services Ombudsman" was given to the regulatory body established to perform the role outlined above.

Submissions to the Taskforce

A number of public submissions focussed on the appropriateness of the title "Ombudsman".

For example, the Australian and New Zealand Ombudsman Association (ANZOA) submitted a "strong view" that the term "Ombudsman" is inappropriate because the proposal under the Consultation Draft Law involves (see ANZOA submission, 30 June 2010, p 1):

- the office being able to delegate certain functions to local professional associations which is inconsistent with the required independence of an Ombudsman; and
- a range and type of regulatory functions being exercised by the ombudsman which are not consistent with the role of an Ombudsman.

In relation to the second point, the ANZOA said (p 2):

> Importantly, while an Ombudsman may exercise recommendatory or determinative powers leading to regulatory change, an Ombudsman is not a Regulator.

The ANZOA suggested that "*the role proposed by the Taskforce may be better described as one of a National Legal Services Commissioner*" (see ANZOA submission, p 3).

A number of other submissions to the Taskforce also preferred the title "National Legal Services Commissioner" or "Legal Services Commissioner" to the term "Ombudsman" if, and, as favoured by some submitters, the body was to have a proactive role merely than just responding to complaints.[115]

There were, however, a number of submissions that supported the title of "Ombudsman". For example, the Legal Services Commissioner of Victoria noted that "[v]*isibility of the office is essential for effective consumer protection purposes*" and that "*the title 'Ombudsman' is "more readily identifiable and recognisable by the public than, say, "Legal Services Commissioner""*" (e.g., see Legal Services Commissioner of Victoria submission, p 1).

Interim Report Revised Proposal

After taking into account the submissions regarding the use of the title "Ombudsman", the Taskforce released its Interim Report which proposed that this title be replaced by the title "National Legal Services Commissioner".[116]

Current Proposal under the National Law (Revised Draft)

Under the Revised Draft Law, all references to the "National Legal Services Ombudsman" have been replaced with the term "National Legal Services Commissioner". The key provisions relating to the National Legal Services Commissioner are set out in **Part 8.3** and **Schedule 2** of the Revised Draft Law.

SCAG MEETING OF 10 DECEMBER 2010

The Revised Draft Law and the Revised Draft Rules were presented by the Taskforce at the SCAG meeting held on 10 December 2010 in Canberra with a view to having them endorsed at the next COAG meeting. The COAG meeting was subsequently held on 13 February 2011. Upon presenting this revised draft legislation, the Taskforce was then disbanded having fulfilled the functions required of it by COAG.[117]

The Communiqué for the SCAG meeting and a news report by the *Australian Financial Review* on 28 January 2011[118] acknowledge that four states had reserved their position in relation to the proposed scheme. These states being:

- Western Australia: The Attorney-General of Western Australia and the Minister for Corrective Services, the Hon Mr Christian Porter MLA, indicated that Western Australia would not support the current scheme unless "*further detailed modelling and cost implications*" were provided;
- South Australia: The South Australian Attorney-General, the Hon John Rau MP, indicated that there were potential 'deal-breaker' concerns that may prompt South Australia to pull out of the scheme and enact separate but compatible reforms;
- Victoria: The Victorian Government indicated that it supported in principle the desirability of a national legal profession but reserved its position on the details of the model to go to COAG,

given the new National/Liberal Coalition government had only recently been elected at the time of the meeting; and

- Queensland: The Queensland Government indicated to SCAG, at the 10 December 2010 meeting, that it had concerns about the funding arrangements.

The Ministers at this December 2010 SCAG meeting agreed that it would be necessary for the potential cost savings in each jurisdiction to be examined. The Ministers also agreed to request COAG to "*release the Legal Profession National Law Bill and National Rules publicly after consideration by the COAG Business Regulation and Competition Working Group*".[119] However, as at the date of this e-Research Brief, COAG has not publicly released the next version of the draft legislation.

COAG MEETING OF 13 FEBRUARY 2011

At its 13 February 2011 meeting, COAG "*agreed in principle to settle reforms to legal profession regulation by May 2011 (with the exception of Western Australia and South Australia)*".[120]

At this meeting, COAG considered the COAG Reform Council Competition and Regulation National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-2010 which had been submitted to COAG by the COAG Reform Council on 23 December 2010. This report, which was made available to the public on 11 February 2011, is a progress assessment and risk assessment of the performance of the governments in relation to the regulatory reforms and milestones set out in:

- the National Partnership Agreement to Deliver a Seamless National Economy (NPA) which had been entered into by the Commonwealth, States and Territories in February 2009, and certain additional reforms which fall outside the scope of the NPA, of which the regulatory reform of the legal profession is one; and
- the Implementation Plan for COAG deregulation reforms outside the scope of the NPA.

In terms of the risk assessment, the COAG Reform Council notes:[121]

> The differing views of key stakeholders on the appointment and composition of the proposed National Legal Services Board, and the South Australian Government's concerns with a number of aspects of the proposed national scheme, pose a significant risk to the achievement of the milestones and output of this reform.
>
> For this reform to be achieved, institutional concerns will need to be resolved and a funding model agreed by all governments.

CONCLUDING REMARKS

While the various State Governments and the State law societies have indicated general support for the reform process, concerns have emerged over a number of key issues, with four states expressly reserving their decision on joining the proposed scheme.

Concerns have also been raised, for example by Robert Milliner, head of a group representing nine national law firms, that errors in the package are not being appropriately addressed prior to implementation. Problems include the treatment of costs, complaints against lawyers and discipline.[122]

As noted above, COAG intended to settle the national regulation of the legal profession by May 2011, despite the lack of agreement from Western Australia and South Australia. It has since been reported that Western Australia will not adopt the new national laws but intended to enact legislation taking on some aspects of them.[123] The Commonwealth Attorney-General, the Hon Mr Robert McClelland MP was reported in the *Australian Financial Review* on 25 February 2011 as stating that Queensland was expected to be the first government to pass uniform national laws for the regulation of lawyers and law firms. Mr McClelland MP did note that a decision on how interest payments from a national trust account are to be allocated will be deferred until the first meeting of a national legal services board. The Commonwealth Attorney-General said:

> Some states, in particular Queensland, were concerned that that hasn't been worked through to sufficient detail.[124]

In relation to this issue, the Queensland Deputy Premier and Attorney General, the Hon Paul Lucas MP, reportedly indicated that the impact of extreme weather in Queensland has meant legislative priorities had changed to assist affected communities, but that the government "*remains committed to the national legal profession, as this will be in the best interests of all consumers of legal services*".[125]

More recently in early May this year, a spokesman for the Hon Mr Robert McClelland MP revealed that the National Justice CEOs Group (NJCEOs), which is comprised of the chief executives of the Attorney-General and Justice Departments from the nine jurisdictions across Australia, is preparing a report on the reforms to be presented to COAG. It was anticipated that COAG was going to then issue a revised package before the end

of May, 2011.[126] However, as at the date of this e-Research Brief, this revised package has not yet been issued.

Given the outstanding issues and competing legislative priorities both at the national and state level, it remains to be seen whether this project will come to fruition this year.

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LINKS TO FURTHER READING

CONSULTATION DRAFT LAW AND ACCOMPANYING MATERIALS

The following materials can be found at the COAG National Legal Profession Reform website:

- Legal Profession National Law (Consultation Draft Law, 14 May 2010)
- Legal Profession National Rules (Consultation Draft Rules, 14 May 2010)
- Consultation Regulation Impact Statement (including Attachments A-C) (14 May 2010)
- Attachment D to the Consultation Regulation Impact Statement (Cost Benefit Analysis of Proposed Reforms to National Legal Profession Regulation prepared by ACIL Tasman) (March 2010)
- Consultation Report (14 May 2010)
- Interim Report on Key Issues and Funding (November 2010)
- Start up cost of National Bodies (November 2010)
- Annual operating cost of National Bodies (November 2010)
- Legal Profession National Law (Revised Draft Law, December 2010)
- Legal Profession National Rules (Revised Draft Rules, December 2010)

MEDIA STATEMENTS

- Commonwealth Government Ministerial Media Statements:
  - The Hon Robert McClelland MP, Commonwealth Attorney-General, *National Legal Profession Reform Bill*, 21 April 2010.
  - The Hon Robert McClelland MP, *Final National Legal Profession Reform Discussion Paper*, 16 December 2009.
  - The Hon Robert McClelland MP, *National Legal Profession Reform Consultative Group*, 1 July 2009.
  - The then Prime Minister, Hon Kevin Rudd MP (currently the Minister for Foreign Affairs) and the Hon Robert McClelland MP, *National Legal Profession Reform*, 30 April 2009.
  - The Hon Robert McClelland MP, *Legal Profession Reform to Strengthen Australian Economy*, 3 February 2009.
- COAG Reform Council Media Statements:
  - COAG Reform Council, COAG urged to address 10 "at risk" reforms, 11 February 2010.

RELATED GOVERNMENT INFORMATION

- The Commonwealth Government's Attorney-General's website on the National Legal Profession Reform.
- Council of Australian Governments' Meetings (includes all COAG Communiqués)

RELATED COMMONWEALTH GOVERNMENT AGREEMENTS

- National Partnership Agreement to Deliver a Seamless National Economy, Council of Australian Governments, February 2009.

RELEVANT STUDIES AND ANALYSES

- National Legal Profession Reform Project – Consumer Consultation: Consumer Report, a Report to the National Legal Profession Reform Taskforce by ARTD Consultants dated 20 August 2010.

LEGAL PROFESSION GROUPS

- Law Council of Australia (website)
- Queensland Law Society (National Legal Profession Reform) (website)

NEWSPAPER ARTICLES

- Samantha Bowers, Lawyers push back on shake-up, *Australian Financial Review*, 14 June 2011, p 1
- Lawyers wrestle with the niceties of nationalism, *Australian Financial Review*, 20 May 2011
- A-G's bid for state to back reforms, *Australian*, 20 May 2011
- Reform soon to be endorsed, *Australian Financial Review*, 6 May 2011
- Changes likely with new crop of A-Gs, *Australian Financial Review*, 25 February 2011
- Reform date set despite naysayers*, Australian Financial Review*, 18 February 2011
- Confining reform to the east coast, *Australian Financial Review***,** 18 February 2011
- Red tape of bygone era is all but cut*, Australian,* 18 February 2011
- Moving beyond Groundhog Day, *Australian*, 4 February 2011
- LCA concerned over regulation proposals, *Australian Financial Review*, 4 February 2011
- Widespread objections to national reform scheme, *Australian Financial Review*, 28 January 2011
- LCA wants oversight, *Australian Financial Review*, 3 December 2010
- McClelland backs blueprint, *Australian,* 12 November 2010
- Blow to national legal regulation, *Australian,* 9 November 2010
- Lawyers win say on board, *Australian Financial Review*, 9 November 2010
- Reform questions remain, *Australian Financial Review*, 17 September 2010
- National ombudsman next hurdle for taskforce, *Australian Financial Review*, 16 July 2010
- Six ways to appoint new board, *Australian Financial Review*, 16 July 2010
- Lawyers to dominate legal standards board, *Sydney Morning Herald*, 2 July 2010
- Watchdog may oversee legal costs, *Sydney Morning Herald*, 14 May 2010
- Lawyers fret about independence, *Australian Financial Review*, 17 April 2010
- Public spat exposes flaws in regulation plan, *Australian*, 5 February, 2010, p 30

JOURNAL ARTICLES

- States give verdict on legal professional reforms, *The New Lawyer*, 13 December 2010
- COAG should let others see reform laws, *Lawyers' Weekly*, no 515, 10 December 2010, p 8
- Update on national legal profession reform, *Proctor*, v.30, no. 8, September 2010, pp 8-9
- Australia: national legal profession reform, LAWASIA Update, August 2010, pp 11
- Winds of change: National legal profession reform, *Proctor*, v.30, no. 5, June 2010, pp 16-18
- COAG reform puts presidents to work, *Lawyers' Weekly*, no. 461, 6 November 2009, pp 14-17
- National legal regulation: What happens next, *Proctor*, v.29, no. 5 June 2009, pp 17-18
- Consensus reached on national legal reform, *Lawyers' Weekly*, no. 435, 8 May 2009, p 6
- Attorney-General speaks out to calm industry nerves, *Lawyers' Weekly*, no. 475, 5 March 2009, p 8
- National legal landscape unfolds, *Proctor*, v 79, no. 9, September 2005, pp 24-25

ENDNOTES

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1 Professor M Lavarch, National legal regulation: What happens next, *Proctor*, v 29, no 5, June 2009, pp 17-18, p 17.

2 Australian Bureau of Statistics, Legal Services contribute $11 billion to Australian Economy - Media Release, 24 June 2009.

3 See the Queensland Law Society website: "About QLS".

4 National Legal Profession Reform Project – Consultation Regulation Impact Statement, May 2010, p 5.

5 National Legal Profession Reform Project – Consultation Regulation Impact Statement, p 4.

6 See SCAG, "Major Legal Reforms Announced" (Media Release), July 1991. The media release does not have an exact date but refers to a meeting of SCAG that had taken place the same day as the media release.

7 See SCAG, "Major Legal Reforms Announced" (Media Release), July 1991, p 1.

9 See also "Lawyer Regulation in Australia" on the NSW Government LawLink website.

10 Professor Frederick G Hilmer (Chair), Mr Mark Rayner, Mr Geoffrey Taperell, National Competition Policy Report, 25 August 1993, AGPS, Canberra, p 135.

11 COAG Communiqué, 25 February 1994.

12 COAG Communiqué, 25 February 1994.

13 The then Attorney-General had asked the Committee to consider ways to reform the legal system to enhance access to justice and make the legal system fairer, more efficient and more effective: Access to Justice Advisory Committee, "Access to Justice: An Action Plan", Report, Commonwealth of Australia, 1994, p v. The Committee also noted (p 125) the then ongoing work to harmonise admission and entry requirements between jurisdictions.

14 Access to Justice Advisory Committee, p 124. See also the G Lee, Research Note on the "Access to Justice – An Action Plan, Parliamentary Research Service, Number 30, 9 May 1995.

15 Access to Justice Advisory Committee, p 126.

16 Access to Justice Advisory Committee, p 127.

17 Law Council of Australia, Blueprint for the Structure of the Legal Profession: A National Market for Legal Services – A National Market for Legal Services, July 1994, pp 3-4. The Blueprint also separately considered Admission to Practice processes; Regulation of Practice and Client/Consumer Protection.

19 National Legal Profession Reform Project – Consultation Regulation Impact Statement, p 3.

20 Law Council of Australia, 2010: A Discussion Paper – Challenges for the Legal Profession, September, 2001, p 168.

21 National Legal Profession Reform Project – Consultation Regulation Impact Statement, p 3.

22 This model law was released again in February 2007 after minor corrections were made (see the Legal Profession - Model Bill (2007)). The first edition of the Legal Profession Model Regulations were released in February 2006, followed by the second in June 2007.

23 See:

- *Legal Profession Act 2004* (NSW), which commenced on 1 October 2005;

- *Legal Profession Act 2004* (Vic), most of which commenced on 12 December 2005;
- *Legal Profession Act 2006* (ACT), most of which commenced on 1 July 2006;
- *Legal Profession Act 2006* (NT), most of which commenced on 31 March 2007;
- *Legal Profession Act 2007* (Qld), most of which commenced on 1 July 2007;
- *Legal Profession Act 2007* (Tas), which commenced on 9 April 2008; and
- *Legal Profession Act 2008* (WA), most of which commenced on 1 February 2009.

24 National Legal Profession Reform Project – Consultation Regulation Impact Statement, p 3.

25 COAG Communiqué, 5 February 2009, p 10.

26 See COAG website: Background to the COAG National Legal Profession Reform – COAG's decision.

27 See "Output" column in the Implementation Plan for COAG deregulation reforms outside the scope of the *National Partnership Agreement to Deliver a Seamless National Economy*.

28 The five members of the Taskforce were: Mr Roger Wilkins AO (Chair) (Secretary, Commonwealth Attorney-General's Department); Mr Bill Grant (Secretary-General, LCA); Mr Laurie Glanville AM (Director General, NSW Department of Justice and Attorney-General); Mr Stephen Goggs (Deputy Chief Executive, ACT Department of Justice and Community Safety); and Ms Louise Glanville (Executive Director, Victorian Department of Justice).

29 National Legal Profession Reform Project – Consultation Regulation Impact Statement, p 4.

30 See COAG website: Background to the COAG National Legal Profession Reform – Taskforce papers.

31 See COAG website: Background to the COAG National Legal Profession Reform – Consultative group.

32 See COAG website: Background to the COAG National Legal Profession Reform – Consultative group. See below for a full list of the members of the Consultative Group:

Mr Tony Abbott	Chairman at Piper Alderman and past President of the Law Council of Australia
Ms Carolyn Bond	Co-Chief Executive Officer of the Consumer Action Law Centre Victoria, and member of the Board of the Legal Service Board of Victoria
Ms Barbara Bradshaw	Chief Executive Officer, Northern Territory Law Society
Mr John Briton	Legal Services Commissioner of Queensland and former Queensland Anti-Discrimination Commissioner and State Director of the Human Rights and Equal Opportunity Commission
Mr Joseph Catanzariti	President, Law Society of New South Wales, and partner at Clayton Utz
Mr Robert Cornall AO	Former Secretary of the Australian Attorney-General's Department, former Managing Director of Victoria Legal Aid, Executive Director and Secretary of the Law Institute of Victoria, and a partner and managing partner in a private legal firm
Ms Ro Coroneos	President of the NSW Division and a Director of the Australian Corporate Lawyers Association
Mr Harold Cottee	General Manager, Professional Standards, Law Institute of Victoria

Mr Andrew Grech	Managing Director, Slater & Gordon, Melbourne
Mr Martyn Hagan	Executive Director, Law Society of Tasmania
Ms Noela L'Estrange	Chief Executive Officer, Queensland Law Society and former Director of Legal Practice Support, Australian Government Solicitor
Mr Robert Milliner	Chief Executive Partner, Mallesons Stephen Jaques, Chairman of the Large Law Firm Group Limited and member of the Board of the Business Council of Australia.
Mr Steven Penglis	Member of the Legal Practice Board of Western Australia
Mr Andrew Phelan	Chief Executive and Principal Registrar, High Court of Australia, and Secretary, Chief Justices Council.
Mr Philip Selth OAM	Executive Director, New South Wales Bar Association
Professor Peta Spender	Presidential Member ACT Civil and Administrative Tribunal, and Professor of Law, Australian National University
Mr Dudley Stow	President, The Law Society of Western Australia
The Hon Justice Murray Tobias AM RFD	Supreme Court of New South Wales and presiding member of the New South Wales Legal Profession Admission Board

33 COAG Communiqué, 19 and 20 April 2010, p 14.

34 See COAG website: COAG National Legal Profession Reform – consultation package.

35 See COAG website: COAG National Legal Profession Reform – consultation package.

36 ARTD Consultants Consumer Report, pp 7-25.

37 ARTD Consultants Consumer Report, p 5.

38 ARTD Consultants Consumer Report, p 7.

40 ARTD Consultants Consumer Report, p 7.

41 ARTD Consultants Consumer Report, p 7.

42 COAG National Legal Profession Reform Consultation Report, p 2.

43 The "National Legal Services Ombudsman" was the original term used in the Consultation Draft Law. However, in the Interim Report and the Revised Draft Law, the term was changed to the "National Legal Services Commissioner" (see **section 8.3.1** of the Revised Draft Law).

44 The proposal that lawyers charge "fair and reasonable" fees is reportedly opposed by lawyers who argue that the requirement is vague and subjective whereas consumer advocates support the requirement as providing some protection against "nasty surprises" in legal bills: Samantha Bowers, Lawyers push back on shake-up, *Australian Financial Review*, 14 June 2011, p 1.

[45] COAG National Legal Profession Reform Consultation Report, p 4.

[46] Leslie Levin, *Building a Better Lawyer Discipline System: the Queensland Experience*, Legal Ethics, Volume 9, No 2, Winter 2006, p 187.

[47] This objective was a new addition as it was not included in the Consultation Draft Law (compare **section 8.2.3** of the Consultation Draft Law and sub-paragraph (c) of **section 8.2.1** of the Revised Draft Law).

[48] COAG National Legal Profession Reform Consultation Report, p 5.

[49] See **section 9.1.1** of the Consultation Draft Law and the Revised Draft Law.

[50] See **section 2.2.4** of the Consultation Draft Law and **section 2.2.5** of the Revised Draft Law.

[51] See **section 3.3.3** of the Consultation Draft Law and the Revised Draft Law.

[52] See **section 3.4.5** of the Consultation Draft Law and the Revised Draft Law.

[53] See **section 9.2.1** of the Consultation Draft Law and the Revised Draft Law.

[54] This is the writer's assessment after reviewing the public submissions.

[55] The "host Attorney General" is defined in **section 1.2.1** of the Consultation Draft Law as "the Attorney-General of the host jurisdiction". The term "host jurisdiction" is also defined in **section 1.2.1** as "the principal enacting jurisdiction".

[56] See **Clause 2(1)** and **(4), Part 2** of **Schedule 1** of the Consultation Draft Law.

[57] See, for example, the submission by the Judicial Conference of Australia, 4 August 2010, p 6 (paragraph 22).

[58] James Eyers, National rules threat: de Jersey, *Australian Financial Review*, 17 December 2009, p 9.

[59] James Eyers, 'National rules threat: de Jersey'.

[60] James Eyers, Lawyers fret about independence, *Australian Financial Review*, 17 April 2010, p 31.

[61] James Eyers, 'Lawyers fret about independence'. (Note that James Spigelman retired as Chief Justice of the New South Wales Supreme Court on 31 May 2011.)

[62] See the letter by French CJ (on behalf of the Council of Chief Justices) to the Taskforce, 9 November 2009.

[63] See the letter from the ABA to the Attorney-General, the Hon R McClelland, 'National Legal Services Board', 3 December 2009, pp 1, 2.

[64] See the submission by the Law Council of Australia, 13 August 2010, p 6.

[65] See the submission by Chief Justice Crawford of the Supreme Court of Tasmania, 14 May 2010, p 2.

[66] See the submission by the Consumer Action Law Centre, 7 July 2010, p 2.

[67] National Legal Profession Reform Taskforce, Discussion Paper on the Composition and Appointment of the National Legal Services Board (Supplementary Discussion Paper), July 2010, p 1.

[68] Supplementary Discussion Paper, p 2.

[69] Supplementary Discussion Paper, p 2.

[70] Supplementary Discussion Paper, p 3.

[71] Supplementary Discussion Paper, p 3.

[72] Supplementary Discussion Paper, p 3.

[73] Supplementary Discussion Paper, p 3.

[74] National Legal Profession Reform Taskforce, Interim Report on Key Issues and Funding, 8 November 2010, pp 1-2.

[75] See Mr Glenn Ferguson, President, Law Council of Australia, "Law Council response to COAG Interim Report", Media Statement, 30 November 2010, p 1. The LCA also emphasised that it was "*absolutely vital that the profession see and comment*" on the revised Draft National Law and Rules.

[76] See **Clause 2(1), (2), Part 2** of **Schedule 1** of the Revised Draft Law.

[77] See **Clause 2(3), (4), Part 2** of **Schedule 1** of the Revised Draft Law.

[78] These powers were provided also in respect of the Legal Services Ombudsman.

[79] See James Eyers, Lawyers fret about independence.

[80] See the submission by the Judicial Conference of Australia, 4 August 2010, p 6, para 22.

[81] See the submission by the Judicial Conference of Australia, 4 August 2010, p 8, para 31.

[82] Interim Report, p 3.

[83] See **section 9.1.7(3)** and **(4)** of the Revised Draft Law.

[84] Interim Report, p 2.

[85] In the writer's assessment after reviewing the public submissions.

[86] Management system directions are directions to law practices or classes of law practices to implement and maintain management systems that enable the provision of legal services in accordance with regulatory obligations. Law practices that have been issued with a management system direction by the Ombudsman will be required to provide reports to the Ombudsman outlining their systems and how they are complying with their systems (see **section 4.6.2** of the Consultation Draft Law and **section 4.6.2** of the Revised Draft Law, the latter now premising the giving of the direction on the Commissioner considering that this is reasonable after the conduct of a Chapter 7 trust records examination or trust records investigation, compliance audit or complaints investigation).

[87] See the submission from the RoLIA, p 3.

[88] See the submission from the RoLIA, p 3.

[89] See the Consumer Report by ARTD Consultants, p 12 and the Joint Consumer Submission, 13 August 2010, from the Consumer Action Law Centre, CHOICE and other consumer organisations, pp 28-29.

[90] See the Consumer Report prepared by ARTD Consultants, p 12.

[91] See the Consumer Report prepared by ARTD Consultants, p 12.

[92] See the draft submission from the Legal Profession Complaints Committee (W.A.), p 3.

[93] See the Joint Consumer Submission, pp 11-12.

[94] See the Consumer Report prepared by ARTD Consultants, p 13.

[95] See the Consumer Report prepared by ARTD Consultants, p 12.

[96] See the submission from, the Hon Christian Porter, Attorney-General of Western Australia and the Minister for Corrective Services, p 4.

97 See the letter from the Law Council of Australia to Hon R McClelland MP, 10 March 2010, p 2.

98 See the Consumer Report prepared by ARTD Consultants, pp 13-14.

101 See the submission from the ABA, pp 1-2. See also the submission from the Australian Corporate Lawyers Association, 23 June 2010, para 4.

102 See the submission from the ABA, p 4.

103 See the submission from the Australian Lawyers Alliance, 13 August 2010, p 3. See also the submission from the Australian Corporate Lawyers Association, 23 June 2010, p 1.

104 Australian Lawyers Alliance, submission, p 3.

105 See the submission from the Australian Lawyers Alliance, p 5.

106 See the submission from Seabeach Costing Pty Ltd, p 1.

107 Interim Report, pp 2-3.

108 Interim Report, p 5.

109 See **section 8.3.2(e)** of the Revised Draft Law.

110 See **section 8.3.3(1)** of the Revised Draft Law. Note that under section 1.3.3 of the Consultation Draft Law, the Commissioner did have "special functions" but the term was given a different meaning under the original draft of the law. The term "special functions" was also not contrasted with "independent functions" as is the case under the Revised Draft Law.

111 See **section 8.3.3(2)** of the Revised Draft Law.

112 See **section 8.3.3(3)** of the Revised Draft Law.

113 See **section 8.3.4(1)** and **section 8.3.4(3)** (the latter stating what functions cannot be delegated) of the Revised Draft Law.

115 For example, see the draft submission on behalf of the Legal Profession Complaints Committee of Western Australia, 14 May 2010, p 4; the submission by Associate Professor Christine Parker, representing a group of 9 legal academics, 22 June 2010, p 3 and the submission by the Peninsula Community Legal Centre, 10 August 2010, p 3.

116 Interim Report, p 2.

117 See COAG website: COAG National Legal Profession Reform (Introduction Page).

118 Alex Boxsell, Widespread objections to national reform scheme, *Australian Financial Review*, 28 January 2011, p 47

119 SCAG, Communiqué, 10 December 2011, p 3.

120 COAG, Communiqué, 13 February 2011, p 3.

121 COAG Reform Council Competition and Regulation National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-2010, p 319.

122 Alex Boxsell, Reform soon to be endorsed, *Australian Financial Review*, 6 May 2011, p 46.

123 Samantha Bowers, Lawyers push back on shake-up.

124 Alex Boxsell, Changes likely with new crop of A-Gs, *Australian Financial Review*, 25 February 2011, p 25.

125 Alex Boxsell, Changes likely with new crop of A-Gs.

[126] Alex Boxsell, Reform soon to be endorsed.