

10 January 2018

Mr Mitch Hillier
Executive Director
Law Firms Australia
GPO Box 9806
Sydney NSW 2001

Via email: [REDACTED]

Dear Mr Hillier

Practising Certificate Fees Review: Response to Submission

Thank you for your email of 30 November 2017 enclosing Law Firms Australia's (LFA) submission to the formal public consultation stage of the Practising Certificate Fees Review (the review) and the Regulatory Impact Statement (RIS) process.

As you are aware, the Board has put forward its preferred option of a stratified fee structure, where fees are differentiated based on existing practising certificate classes. Under this efficient proposal, classes that carry a low regulatory burden receive fee reductions, while those that carry higher risk profiles and regulatory demands see only modest fee increases – the largest increase being \$7.50 per month for principals with trust accounts. There is also no cross-subsidisation between practitioner classes.

This preferred option is a simple and minimalist model that aligns with the government's policy principles for setting new fees. The overall level of cost recovery from fees rises by only 1.6 per cent, with 60 per cent of regulatory costs funded by the interest stream from trust accounts.

On behalf of the Victorian Legal Services Board (the Board), I wish to thank LFA for its contribution to the review. The Board's responses to the issues raised by LFA in its submission are outlined below.

Description of Option 2

The Board does not agree with the comment made in the LFA submission that the description of Option 2 is misleading. Option 2 proposes that the full cost of regulation of the legal profession should be recovered from legal practitioners using a stratified fee structure that sets higher fees for those practising certificate classes that generate a larger share of the regulatory costs.

In its submission, LFA cites page 65 of the RIS where Option 2 is discussed in the context of the multi-criteria analysis of the options. Option 2 scores highest of all the options with respect to efficiency as practitioner fees in this option cover the full cost of regulation and therefore only those who give rise to the need for regulation are contributing to the costs. Therefore, it sends the clearest signal to practitioners about the costs involved in regulating their practising certificate class. This distinguishes Option 2 from the other options presented in the RIS which attribute varying portions of the cost to a key beneficiary of regulation, the sub-set of consumers of legal services who place money in solicitors' trust accounts.

40-60 split between fees and interest

LFA contends that the review of the fees should start from a position that determines the most appropriate split between the fee and interest streams and then consider any cross-subsidies between the practising certificate classes as a secondary issue. The Board has not adopted this approach as there is no available data to indicate that legal practitioners as a group giving rise to the need for regulation or consumers who place money in trust accounts as a group benefitting from regulation should contribute to a greater or lesser degree than the other to the costs of regulating the legal profession.

Instead, in line with the Government's Cost Recovery Guidelines, the Board has sought to understand where its regulatory costs are being generated and identify which classes of practising certificates are giving rise to those costs. The independent Activity-Based Costing (ABC) exercise commissioned by the Board has demonstrated that there has been some cross-subsidisation between the practising certificate classes. The ABC exercise also demonstrated that practitioners who are authorised to receive trust money generate the highest level of regulatory cost. However, those consumers who contribute to the interest stream also receive substantial benefits from the regulation of the legal profession and as a result, the preferred option results in the interest stream contributing towards the costs of regulation.

LFA has stated that there is no detailed justification for the 40-60 split. The Board considered it a priority to recover 40 per cent of the costs of regulation from fees after considering stakeholder feedback. The Board does not have sufficient data to quantify the benefits received by consumers of legal services who place their money in trust. Therefore, the Board has committed through the evaluation stage of the review to collect and assess data to determine whether the 40-60 split is the most equitable. In particular, it is proposed to collect data to calculate the benefits of regulation to consumers who place their money in trust. It should be noted that the Board was happy to consider any supporting information provided by stakeholders through the consultation period. However, in the absence of such information, the Board has decided that an overall split of 40-60 remains appropriate.

It should be noted that the fee increases proposed under the preferred option for principals and employees are not funding the corresponding decrease in fees for barristers, corporate and government practitioners. Nor are these increases funding the subsidies for community practitioners. Barristers, corporate and government practitioners are paying for 100 per cent of the costs of regulating those classes. Community practitioners are being subsidised by the interest stream on the basis that these practitioners are contributing to the public good.

Fees for principals with trust authorisation, principals without trust authorisation and employee practising certificate classes have increased as the ABC exercise demonstrates these classes of practising certificate generate the highest levels of regulatory cost. However, under the preferred option, the Board is not proposing that these classes will be required to meet the full cost. Instead, it is proposed that employees will pay 78 per cent of the cost it takes to regulate that class of practitioner; principals without trust authorisation will pay 48 per cent; and principals with trust authorisation will pay 18 per cent. Consumers who place money in solicitors' trust accounts will subsidise the remaining costs.

Therefore, it is incorrect to assume that these practising certificate classes are bearing the cost of decreased fees for other practising certificate classes or the subsidies for community sector practitioners. Rather, the Board's preferred option seeks to remove cross-subsidies between the practising certificate classes while being mindful of the potential impacts on private law firms.

To that end, the economic analysis produced for the RIS concludes that the fees under the Board's preferred option are likely to represent between 0.44 per cent and 0.61 percent of revenue and as such are unlikely to constitute a significant portion of business costs. Therefore, while the Board notes LFA's concerns, in the absence of any supporting information to the contrary, it does not agree that one-off increases in practising certificate fees ranging from \$46 to \$90 per annum will lead to significant adverse impacts across the profession.

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The Board notes the LFA's suggestion that the contribution from the interest stream should be further increased to retain the status quo for employees, principals without trust authorisation and principals with trust authorisation. However, there is no evidence to support further subsidies to these practitioner classes.

Cross-subsidies within practising certificate classes

LFA suggests the Board should consider the potential for cross-subsidies within practising certificate classes and in particular should consider a practitioner's regulatory record in setting fees. For example, those practitioners who have been subject to regulatory action within the last three years would pay a higher fee than other practitioners.

Consideration of a practitioner's regulatory record was not included as a factor in any of the fee options as it could lead to inequities and would be administratively complex. This is because all complaints incur some level of cost. However, some complaints are dismissed and other complaints while investigated may not lead to any sanctions being imposed. Such a system would also need to consider whether the fee was retrospectively applied following sanctions being imposed or applied while investigations were on foot with practitioners potentially seeking refunds if a prosecution is unsuccessful.

Whatever the final parameters, to set fees on the basis of regulatory record would introduce a level of administrative complexity that would have cost implications for the administration of the scheme and for individual practitioners who may be required to provide additional information to the Board at grant or renewal to determine what fee was applicable. Given the analysis in the RIS shows the overall impacts of the fees are not significant, the creation of an administratively complex system that sets different fees based on factors other than practising certificate class is not warranted.

Broader efficiency review of legal regulation in Victoria

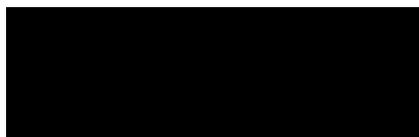
The Board notes the LFA's support for a broader review of the efficiency of regulation in Victoria. This issue is outside the scope of the review. In addition, it is not appropriate for the Board to make any comment on the regulatory arrangements in Victoria as this is a matter for the Victorian Government and the Attorney-General.

In closing, the Board notes LFA's support for the preferred option, while noting LFA's preference for further consideration of the proportions contributed by fees and interest to funding the costs of regulating the legal profession. As noted above, the Board has committed through the evaluation stage of the review to collect and assess data to determine whether the 40-60 split is the most equitable.

The Board has now had the opportunity to consider all of the submissions received and is not proposing to make any adjustments to the proposed fee settings in Option 3 in light of those submissions.

The Board has decided to formally recommend new fees for practising certificates for the 2018-19 financial year and beyond, in line with Option 3 as outlined in the RIS, to the Attorney-General and the Governor-in-Council. It is intended that new regulations prescribing those fees will be in place to replace the current regulations which are due to expire in late February 2018. Once again I would like to thank you for contributing to the formal consultation stage of the review. Your submission and our response will be published, together with all other submissions and responses, on our website.

Yours sincerely



Fiona R Bennett
Chairperson