

**Email**

30 November 2017

Practising Certificate Fees RIS  
 Victorian Legal Services Board and Commissioner  
 GPO Box 492  
 Melbourne Vic 3000

[pcfesris@lsbc.vic.gov.au](mailto:pcfesris@lsbc.vic.gov.au)

Dear Sir / Madam

**Regulatory Impact Statement: Legal Profession Uniform Law Application (Practising Certificate Fees) Regulations 2017**

Law Firms Australia (LFA) appreciates the opportunity to provide a submission on the Regulatory Impact Statement ('RIS') in respect of the *Legal Profession Uniform Law Application (Practising Certificate Fees) Regulations 2017*. LFA also appreciates discussions earlier in the year with the staff of the Victorian Legal Services Commissioner on the same issue.

LFA represents Australia's leading multi-jurisdictional law firms, Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison and Norton Rose Fulbright Australia. LFA is also a constituent body of the Law Council of Australia, the peak representative organisation of the Australian legal profession.

Noting the issues in the RIS, our comments are divided below into issues of equity and issues of efficiency.

**1. Equity**

*Interest stream contribution to regulation*

1.1 The RIS analyses four options for increasing practising fees, including the status quo. For ease of reference, the options are set out in the table below. The percentage in parentheses next to fees for Options 2, 3 and 4 are the percentage changes as compared to the status quo.

<b>Class of certificate</b>	<b>Status quo (Option 1)</b>	<b>Option 2 fees</b>	<b>Option 3 fees</b>	<b>Option 4 fees</b>
<i>Employee</i>	\$353	\$515 (46%)	\$399 (13%)	\$512 (45%)
<i>Employee (community)</i>	N/A	N/A	\$220 (-38%)	\$220 (-38%)
<i>Principal with trust authorisation</i>	\$522	\$3,344 (540%)	\$612 (17%)	\$893 (71%)
<i>Principal</i>	\$353	\$897 (154%)	\$427 (21%)	\$893 (153%)
<i>Principal (community)</i>	N/A	N/A	\$220 (-38%)	\$220 (-38%)

<b>Class of certificate</b>	<b>Status quo (Option 1)</b>	<b>Option 2 fees</b>	<b>Option 3 fees</b>	<b>Option 4 fees</b>
Corporate	\$353	\$244 (-31%)	\$240 (-32%)	\$240 (-32%)
Volunteer	\$0	\$0 (0%)	\$0 (0%)	\$0 (0%)
Government	\$353	\$223 (37%)	\$220 (-38%)	\$220 (-38%)
Barrister	\$353	\$349 (-1%)	\$346 (-2%)	\$346 (-2%)

1.2 LFA members will be impacted by changes to three practising certificate class fees, being principals, principals with trust authorisation, and employees. Each of Options 2, 3, and 4 include a significant fee increase for these categories of practitioners, including up to 540 per cent for principals with trust authorisation under Option 2.

1.3 The categorisation in the RIS of Option 2 representing 'full cost recovery fees'<sup>1</sup> is misleading. It is important to note that each of the options, including the status quo, represent a full cost recovery model for regulation, as the regulatory activities under each option would be funded by a combination of practising certificate fees ('the fees stream') and interest from the Public Purpose Fund ('PPF') ('the interest stream'). As the RIS itself notes:<sup>2</sup>

*Under Victoria's Cost Recovery Guidelines, those who benefit from regulation or give rise to it should make an equitable contribution towards the cost of that regulation. The RIS identifies two key groups of beneficiaries and cost recovery streams:*

- *legal practitioners and their clients, who contribute through the fee stream; and*
- *clients with money held in trust (a subset of all clients) who make an additional contribution commensurate with their level of risk through the interest stream (i.e. clients' contribution through foregone interest increases in proportion with the material loss they would suffer if their legal practitioner proved to be dishonest or incompetent).*

1.4 Therefore, the issues to be resolved in determining which option should be adopted are first, the appropriate proportion of funds to be contributed from the fees stream and the interest stream in regulating Victorian practitioners, and secondly, the extent to which there should be any cross-subsidisation between practising certificate classes

1.5 The preferred option of the Victorian Legal Services Board + Commissioner ('VLSB+C') in the RIS is Option 3. Whilst Option 3 contains the smallest fee increases of options other than the status quo, fee increases of between 13 and 21 per cent for principals, principals with trust authorisation, and employees are significant. Indeed, the negative impact of fee increases of greater than 10 per cent annually is recognised in the analysis of Option 4 in the RIS.<sup>3</sup>

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<sup>1</sup> RIS, p 65

<sup>2</sup> RIS, p 4

<sup>3</sup> RIS, pp 60-61



1.6 Reasons for the fee increases under Option 3 appear to include:

- (a) that the total cost of regulating volunteers must be met by the interest stream,<sup>4</sup>
- (b) that no practitioner should pay more in fees than the average cost of regulating a member of their practising certificate class,<sup>5</sup>
- (c) that principals and employees in the community sector should pay the same fees as government employees, and
- (d) that the most appropriate and equitable level of overall revenue received from fees should be 40 per cent of the cost of regulation, with the remaining 60 per cent to be funded by from the interest stream (*'the 40:60 split'*).<sup>6</sup>

1.7 LFA recognises the merit of (a) and (c) above due to the services provided by these practitioners to vulnerable members of the community, and the capacity of such community members to pay for those services. LFA also understands the rationale of (b) above, being that the members of one practising certificate class should not be required to contribute to the regulation of the members of another practising certificate class.

1.8 However, the RIS does not provide a detailed justification for the 40:60 split. Whilst the 40:60 split only represents a minor percentage point change from the 2015/2016 financial year, the increase is proposed to be met entirely by principals, principals with trust authorisation, and employees. This represents percentage point increases of 8, 3, and 9 points respectively.

1.9 Furthermore, the increase in fees for principals, principals with trust authorisation, and employees also covers the increased subsidisation of community sector employees and principals from the interest stream.

1.10 Further justification should be provided for decreasing the contribution of the interest stream to the regulation of principals, principals with trust authorisation, and employees before fees are increased. However, retaining the status quo for principals, principals with trust authorisation, and employees should not affect the reduction in fees for solicitors in community organisations. Rather, the interest stream contribution to the regulation of community lawyers should be further increased. This is appropriate given that an object of the PPF is to fund such organisations.

#### *Risk-based regulation*

1.11 The RIS states that:<sup>7</sup>

*It is important to consider that the regulatory activities being undertaken by the VLSB+C are in relation to minimising the risks arising from some legal practitioners behaving poorly<sup>68</sup> with respect to their clients... Therefore, given the nature of the legal services being provided, and on first principles, those who give rise for the need for risk-based regulatory activities by the VLSB+C or risk exacerbators', should pay for those regulatory activities. Put*

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<sup>4</sup> RIS, p 53

<sup>5</sup> RIS, p 7

<sup>6</sup> RIS, p 53

<sup>7</sup> RIS, pp 52-53



*simply, this means that legal practitioners who give rise to the risks and the need to regulate should pay for these risk-mitigation activities.*

- 1.12 As noted above, LFA understands the rationale of ensuring that the members of one practising certificate class are not required to contribute to the regulation of the members of another practising certificate class. However, the RIS should also consider the issue of cross-subsidisation within practising certificate classes. This is particularly relevant for principals, principals with trust authorisation, and employees who constitute approximately 78 per cent of the profession in Victoria.<sup>8</sup>
- 1.13 To achieve more effective risk-based regulation, the VLSB+C should consider setting fees based on the regulatory record of practitioners. For instance, practitioners that have been subject to penalties or regulatory action in the past three years would pay a greater amount in fees (depending on the severity of the relevant offence/action). Those practitioners that do not attract regulatory action would pay a lesser amount in fees.
- 1.14 There are a number of matters that would need to be addressed in considering a risk-based system, including ensuring that fees are not increased for practitioners who are subject to an investigation by regulators but against whom no adverse findings are made. Broadly however, the approach would have two major benefits. First, it would be a more equitable method to set fees. Secondly, it would act as an incentive to practitioners to continually improve their practices.
- 1.15 It is acknowledged that it is too late to implement a risk-based system for 2018. However, the VLSB+C should include it as an issue for consideration in the next fees review or in the proposed efficiency review discussed below.

## **2. Efficiency**

- 2.1 LFA understands that the Law Institute of Victoria (*LIV*) has proposed that the efficiency of regulation in Victoria be reviewed. The review proposed by the LIV would include consideration of:
- (a) the appropriate regulatory structure for regulation,
  - (b) risk-based fee models,
  - (c) the use of back-office resources, and
  - (d) the role and use of technology.
- 2.2 LFA supports a review of the efficiency of regulation in Victoria, particularly in relation to the consideration of risk-based fee models. LFA would appreciate the opportunity to contribute to the establishment of any such review.

## **3. Summary**

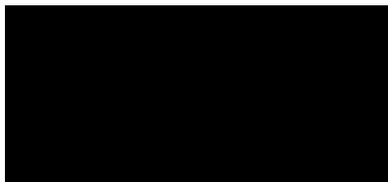
- 3.1 As outlined above, the increase in fees proposed for principals, principals with trust authorisation, and employees in Options 2, 3, 4 are very significant, ranging from a 13 per cent increase to a 540 per cent increase.

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<sup>8</sup> RIS, Table 7.

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- 3.2 Noting that Option 3 is the preferred option of the VLSB+C, further justification should be provided for the 40:60 split, and therefore the reduced contribution of the interest stream to the regulation of principals, principals with trust authorisation, and employees, before fees are increased. The same rationale applies to Options 2 and 4.
- 3.3 However, if fees are to be increased without further consideration as to the proportion of funds to be provided by the fee and interest streams, then Option 3 is LFA's preferred option.
- 3.4 Finally, noting the significance of the increase in fees proposed by the RIS, LFA recommends:
- (a) that a review of the efficiency of regulation in Victoria be undertaken, and
  - (b) that, either as part of an efficiency review or as part of the next fees review, the VLSB+C should consider implementing a risk-based regulatory system.
- 3.5 LFA appreciates the opportunity to provide a submission on the RIS. Please do not hesitate to contact me if the points above require clarification or if LFA can provide further information that will be of assistance.

Yours faithfully



**Mitch Hillier**  
Executive Director  
Law Firms Australia

