

MAKINSON d'APICE

L A W Y E R S

16 January 2015

Partner: Bill d'Apice
Direct Line: 9233 9013
Direct Facsimile: 9233 9113
Email: wdapice@makdap.com.au

Our Ref: 111789:Wd'A

BY EMAIL: submissions@legalservicescouncil.org.au

Legal Services Council
Level 11, 170 Phillip Street
SYDNEY NSW 2000

Dear Sir/Madam,

Legal Profession Uniform General Rules 2014 Catholic Commission for Employment Relations

We act for the Catholic Commission for Employment Relations (**CCER**).

We note that the *Legal Profession Uniform Law Application Act 2014* has been passed by Parliament and has been given royal assent. We note that the Legal Profession Uniform Law (**Uniform Law**) will come into effect shortly.

We note that a consultation draft has been issued for the Legal Profession Uniform General Rules (**General Rules**) to be established under Part 9.2 of the Uniform Law and we have been instructed to make a submission concerning the General Rules on behalf of CCER.

Structure of CCER

CCER has been established by the Bishops of New South Wales and the Australian Capital Territory to act in accordance with the Charter adopted by those Bishops. CCER is a voluntary unincorporated association.

In accordance with its Charter, CCER provides advice to dioceses, parishes, religious institutes, educational systems, welfare organisations and other bodies within the Catholic Church (**Clients**).

CCER has its own ABN and is endorsed as a charitable institution entitling CCER to income tax exemption, GST concessions and FBT rebates. CCER is a member of the Catholic GST Religious Group. CCER is not registered or recognised as an industrial organisation.



CCER employs staff who provide advice to Clients.

1270492_4:WDA:BET

ABN 83 586 046 478

Level 10, 135 King Street, Sydney NSW 2000
GPO Box 495, Sydney NSW 2001
DX 296 Sydney

T +61 (0)2 9233 7788
F +61 (0)2 9233 1550
mail@makdap.com.au
www.makdap.com.au



Each of the Clients is connected as a member of the Catholic Church and is subject to the Code of Canon Law promulgated by His Holiness John Paul II on 25 January 1983. Each of the Clients is allied by nature and origin being part of the Catholic Church. Each of the Clients is connected as a member of the Catholic Church GST Religious Group established under the *A New Tax System (Goods and Services) Act 1999 (Cth)* and each of the Clients is, in our opinion, "associated" and "connected" and satisfies the ordinary meaning of the word "related" as defined in the Macquarie Dictionary.

These CCER staff could be described as "in-house" advisors and they undertake various services, both for their employer and Clients, including the following:

- employment relations advice work;
- representation in proceedings before Fair Work Commission, NSW Industrial Relations Commission, Administrative Decisions Tribunal, Australian Human Rights Commission and Federal Magistrates Court;
- mediation and other dispute resolution services; and
- conducting criminal history checks.

Many Clients of CCER pay a set fee which entitles the Client to receive services which may include legal services upon certain conditions. Other Clients pay CCER on a fee for service basis.

CCER and the Legal Profession Act 2004

CCER made representations to the NSW Attorney-General on 27 July 2012 (copy enclosed) to highlight an issue that may impact on a number of unincorporated Not-For-Profit entities where employees provide advice to other entities within that group.

This was considered by the Attorney-General and we received a response from the Attorney-General dated 15 January 2013. We are **enclosing** a copy of that response.

CCER and representatives of our office had a subsequent meeting with the Attorney-General on 14 May 2013 during which we received favourable consideration from the Attorney-General about the possibility of a regulation which might make the position of CCER unambiguous under the LP Act.

However, discussions did not proceed any further at that point because the Uniform Law was in the process of being developed.

Uniform Law

We note that section 10(1) of the Uniform Law provides:

"An entity must not engage in legal practice in this jurisdiction unless it is a qualified entity."

Section 6 of the Uniform Law defines "entity" to include "an unincorporated body or other organisation". As such CCER is an "entity".



Section 10(3) provides:

"Subsection (1) does not apply to an entity or class of entities declared by the Uniform Rules to be exempt from the operation of subsection (1), but only to the extent (if any) specified in the declaration."

We consider exemption for CCER by a declaration under section 10(3) in the Uniform Rules to be an appropriate way to ensure that any aspect of CCER's operations does not breach the Uniform Law.

CCER's Submission

We submit that an intention of the Uniform Law is to allow for *"in-house legal services for an unincorporated body or group"* to be provided by organisations such as CCER without being in breach of the provisions of the Uniform Law, provided their services are limited in that manner.

In support of this position, we note that the definition of "unincorporated legal practice" in section 3 of the Uniform Law specifically excludes from that definition *"in-house legal services for the unincorporated body or group"*.

In further support of our submission, we note:

- services have been provided by CCER to organisations of the Catholic Church for many decades;
- the services provided by CCER are limited to organisations within the Catholic Church and do not involve external consumers of legal services;
- CCER provides assistance in a cost effective manner to assist charitable organisations within the Catholic Church to carry on their charitable activities (and thereby maximising funds available to the charities for their purposes);
- CCER has built up a deep knowledge of the operations of entities within the Catholic Church and is able to provide focussed and targeted advice to its Church clients;
- the Church clients are protected by way of professional indemnity insurances taken out by CCER;
- CCER does not operate a trust account; and
- the granting of exemption to CCER will not impact upon external consumers of legal services.

On behalf of CCER we request that CCER be exempt from the provisions of section 10(1) of the Uniform Law and that this exemption be embodied as an additional exemption listed in rule 11(1) of the General Rules.

We are **attaching** a copy of a draft to be included as a subclause in rule 11(1) of the General Rules for consideration. We are also **attaching** an alternative draft rule in the event that it is felt preferable that the rule should not be specific to a particular religion or organisation.



Should you require any further information please do not hesitate to contact Mr Bill d'Apice of our office. We would welcome the opportunity of discussing this submission with you.

Yours faithfully



Makinson d'Apice

Encl

MAKINSON & d'APICE
LAWYERS

27 July 2012

Partner: Bill d'Apice
Direct Line: 9233 9013
Direct Facsimile: 9233 9113
Email: wdapice@makdap.com.au

Our Ref: 111789:WDA

The Hon Greg Smith SCMP
Attorney General of New South Wales
Level 31
Governor Phillip Tower
No 1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General

Submission to the Attorney-General of NSW for the inclusion of a definition of "Related Entity" in the Regulation to the Legal Profession Act

Executive Summary

In NSW, the Law Society of New South Wales ("**Law Society**") issues qualifying legal practitioners working "*in-house*" with a Corporate & Non Lawyer Entity ("**NLE**") Practising Certificate ("**Certificate**") type. This Certificate type authorises the holder to provide legal services to their employer or to a related entity of their employer in the course of their employment subject to the provisions of the *Legal Profession Act 2004* (NSW) ("**LP Act**").

We act for many charities and not for profit groups many of which employ in-house legal practitioners to provide legal services to both their employer and to parties related or otherwise connected to their employer. These in-house practitioners hold a Corporate & NLE Certificate type and their employers in many instances are entities such as unincorporated associations which do not meet the definition of a "*company*" for the purposes of the *Corporations Act 2001* (Cwlth) ("**Corporations Act**").

Having considered the provisions of the LP Act when read in conjunction with the conditions imposed on the holder of a Corporate & NLE Certificate type, it is not clear whether practitioners issued with such a Certificate type are entitled to provide legal services to a party that is not their employer in circumstances where they are employed by an entity which does not meet the definition of a company for the purposes of the Corporations Act. As such, there is some risk that a number of in-house practitioners employed by an entity which is not a company may be inadvertently breaching the conditions of their Certificates.

The purpose of this submission is to highlight the definitional limitation of "*related entity*" contained in the LP Act and respectfully submit that a definition of "*related entity*" be included in the regulation of LP Act, specifically for the purposes of Section 14(3)(b) of that Act in order to alleviate any potential Certificate breach by in-house lawyers working for entities that are not companies.

LAWORLD

Member of Laworld
International Network of
Independent Law Firms

Level 12 135 King Street Sydney NSW 2000
GPO Box 495 Sydney 2001 • DX 296 Sydney
Telephone 02 9233 7788 • Facsimile 02 9233 1550
Email mail@makdap.com.au • www.makdap.com.au

688371_1:CFC:AJM



Liability limited by a
scheme approved under
Professional Standards
Legislation

Practising Law in NSW

All persons in NSW are prohibited from engaging in legal practice unless permitted to do so by the LP Act¹. The LP Act further specifies that those permitted to engage in legal practice in NSW must hold a current local Certificate or a current interstate Practising Certificate². The Law Society is the appropriate Council which is empowered under Section 48 of the LP Act to grant and renew the Practising Certificate of a NSW legal practitioner.

It is the current practice of the Law Society to issue local legal practitioners with Certificates permitting the holder to engage in a particular type of legal practice. The Law Society can further impose conditions on a local legal practitioner in accordance with Section 50 of the LP Act.

Other than pro bono work through a law practice or under an arrangement approved by the Law Society the current types of legal practice the Law Society permits a local legal practitioner to engage in are:

- Principal;
- Non-Principal;
- Corporate & Non Lawyer Entity ("NLE"); and
- Government.

As detailed in current Certificates for 2012-2013 the Law Society defines these types of legal practice as follows:

Principal	The holder is entitled to engage in legal practice on his or her own account and may engage in legal practice for: <ul style="list-style-type: none">• a law practice; and/or• a corporation or a non-lawyer entity; and/or• the New South Wales or Commonwealth government or a prescribed corporation.
Non-Principal	The holder is entitled to engage in legal practice as a solicitor in the course of employment by: <ul style="list-style-type: none">• a law practice; and/or• a corporation or a non-lawyer entity; and/or• the New South Wales or Commonwealth government or a prescribed corporation.
Corporate & Non-Lawyer Entity	The holder is entitled to engage in legal practice as a solicitor in the course of employment by: <ul style="list-style-type: none">• a corporation (other than an incorporated legal practice) or a non-lawyer entity; and/or• the New South Wales or Commonwealth government or a prescribed corporation.
Government	The holder is entitled to engage in legal practice as a solicitor in the course of employment by: <ul style="list-style-type: none">• the New South Wales or Commonwealth government or a prescribed corporation.

¹ Section 14(1) of the LP Act states "A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner."

² Section 6(a) of the LP Act.



"In-house" Practitioners

Many local legal practitioners are employed in roles that can be described as *"in house"* legal roles. These are roles where legal practitioners are employed to provide legal services as directed by their employer and that employer is not a law practice or Government body. A wide variety of organisations employ in-house practitioners to provide various legal services which typically include all or some of the following:

- The provision of legal advice;
- Litigation management;
- Court appearances;
- Compliance with the Law and liaising with regulatory bodies; and
- Internal employee training etc.

The Law Society recognises the role of the in-house legal practitioner and issues those employed in such roles with a "Corporate & NLE" Certificate type. As described above, the Law Society imposes the following condition on this Certificate type:

"The holder is entitled to engage in legal practice as a solicitor in the course of employment by:

- *a corporation (other than an incorporated legal practice) or a non-lawyer entity; and/or*
- *the New South Wales or Commonwealth government or a prescribed corporation."*

It is not clear as to whether the condition described above authorises the holder of a Corporate and NLE type Certificate to provide legal services to their employer only in the course of their employment or whether the Certificate holder may provide legal services to parties other than their employer in the course of their employment. This is a critical issue which must be addressed to provide certainty to in house practitioners to ensure that they are complying with the conditions of their Certificates.

Our firm regularly works with, and is instructed by, in-house practitioners who are practising law subject to the conditions of Corporate & NLE Certificate type. In particular, we work with many practitioners who are employed by unincorporated associations and companies which are limited by guarantee, an operating structure common in the charities and not for profit space.

We have noted from our experience that these practitioners are employed to satisfy a legal role for their employer which will often require the practitioner to provide services to persons or entities that are not their employer but are otherwise related or connected to their employer. In many instances the employer (but not the practitioner) may be paid a fee for the provision of these services to the third party by their employed practitioner.

If the holder of a Corporate & NLE Certificate is restricted by the conditions of that Certificate to providing legal services to their employer only in the course of their employment, there is a potential risk that these in-house practitioners are not complying with the conditions upon which their Certificates are issued.

Providing Legal Services to a Related Entity

We have given consideration to whether there are any other relevant provisions of the LP Act may address the potential risk described above.

Section 14(3) of the LP Act provides a relevant exception to the prohibition on engaging in legal practice under section 14(1) which prohibits a person engaging in legal practice in NSW unless that person is entitled to do so. Section 14(3) relevantly provides that the prohibition on unqualified practice in subsection 14(1) does not apply to:

- "(a) *a person who as an employee provides legal services to his or her employer or a related entity if he or she:*
 - (i) *so acts in the ordinary course of his or her employment; and*
 - (ii) *receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee, or*
- (b) *a person or class of persons declared by the regulations to be exempt from the operations of subsection (1)."*

There are no relevant exemptions in the regulations.

The expression "*related entity*" is in turn defined in section 4 of the LP Act as follows:

"related entity", in relation to a person, means:

- (a) *if the person is a company within the meaning of the Corporations Act 2001 (Cwlth) – a related body corporate within the meaning of section 50 of the Act; or*
- (b) *if the person is not a company with (sic) the meaning of that Act – a person specified or described in the regulations."*

Section 9 of the Corporations Act defines a company to mean "*a company registered under this Act*".

We note that there are no persons "*specified or described in the regulations*" under subsection (b) above.

As there are no persons specified or described in the regulations as "*related entities*" where the person is not a company, then there is no definition in the Act for what constitutes a "*related entity*" where the relevant entity is not a company.

An Example – Catholic Commission for Employment Relations

We act for the Catholic Commission for Employment Relations ("**CCER**").

CCER has been established by the Bishops of New South Wales and the Australian Capital Territory to act in accordance with the Charter adopted by those Bishops. CCER has no independent legal status but is an activity of the unincorporated association known as the Roman Catholic Province of Sydney and the Archdiocese of Canberra and Goulburn ("**Province**") and, where a legal entity is necessary, acts through the Trustees of the Province of Sydney and Archdiocese of Canberra and Goulburn ("**CCER Trustees**") which is

a corporate body established under the provisions of the *Roman Catholic Church Communities Lands Act (NSW) 1942*.

The "*Province of Sydney as Trustee for Catholic Commission for Employment Relations*" has its own ABN and is endorsed as a charitable institution entitling CCER to income tax exemption, GST concessions and FBT rebates. CCER is a member of the Catholic GST Religious Group, as are all of its Clients. CCER is not registered as an employer association under the *Industrial Relations Act (NSW) 1996* or the *Fair Work Act (C'wth) 2009* and is not a member of any employer associations.

In accordance with its Charter, CCER provides legal advice and other non-legal advice to dioceses, parishes, religious institutes, educational systems, welfare organisations and other bodies within the Catholic Church ("**Clients**"). CCER employs a number of lawyers ("**CCER Lawyers**") who provide legal and other advice to Clients.

These CCER Lawyers would be categorised as "in house" lawyers and they undertake the various legal services, both for their employer and third parties, including the following:

- Advice work;
- Representation in proceedings before Fair Work Australia, Administrative Decisions Tribunal, Australian Human Rights Commission and Federal Magistrates Court; and
- Conducting Working with Children Checks.

Each CCER Lawyer holds a Certificate issued by the Law Society entitling the holder to engage in legal practice upon conditions contained in the Certificate. All CCER Lawyers hold a Corporate & NLE Certificate type. Some are unrestricted and some are restricted. Many Clients are members of CCER and pay a membership fee which entitles that Client member to receive legal services upon certain conditions. Other Clients pay CCER on a fee for service basis.

We note that each of the Clients is connected as a member of the Catholic Church and is subject to the Code of Canon Law promulgated by His Holiness John Paul II on 25 January 1983. Each of the Clients is allied by nature and origin being part of the Catholic Church. Each of the Clients is connected as a member of the Catholic Church GST Religious Group established under the *A New Tax System (Goods & Services) Act 1999* (Cwlth) and each of the Clients is, in our opinion, "*associated*" and "*connected*" and satisfies the ordinary meaning of the word "*related*" as defined in the Macquarie Dictionary.

Having regard however to the definition of "*related entity*" in the context of Section 14(3) of the LP Act, as the employer of CCER Lawyers, the Province, is an unincorporated association and not a company within the meaning of the Corporations Act. It does not meet the definition of a "*company*" as it is not a company registered under that Act.

As such, sub-paragraph (a) of the definition of "*related entity*" does not apply to the Province.

As there is no relevant definition of "*related entity*" related to unincorporated associations, we have applied the usual meaning of those words and we have considered the position of CCER Lawyers in light of the relationship that exists between the Province and the Catholic Church Clients to which CCER Lawyers provide advice on behalf of the Province. We have been able to confidently conclude that CCER Lawyers do provide advice to "*related entities*" where they do so to other Catholic bodies such as the Clients and CCER Lawyers are therefore entitled to provide legal advice to Clients on behalf of the Province and to satisfy the exemption contained in section 14(3)(a) of the LP Act.

Whilst we are confident of our client's position, it is apparent that the lack of a definition of "related entity" with regards to unincorporated associations contains some uncertainty and risk to other lawyers where their employer is not a "company" for the purposes of the Corporations Act and provides advice to other entities.

Proposed definition of "related entity" for the Purpose of the Regulations

We respectfully submit that the potential risk described in this paper may be sufficiently addressed by the inclusion of an appropriate definition of "*related entity*" for the purposes of the Legal Profession Act Regulations.

We have spent time reviewing examples of the definition of "*related entity*" in its legislative context to determine what, in our opinion, would be appropriate of inclusion as a definition in the regulation of the LP Act of the purposes of Section 14(3)(b) and we **enclose** a definition to this submission which we consider appropriate.

We would be happy to discuss this definition with you and provide you with reasons as to why we consider it would be appropriate.

Conclusion

The fact that there is no helpful definition of "related entity" particularly affects lawyers working in the Not-For-Profit sector which often conduct activities via entities which are not classified as a company for the purposes of the Corporations Act 2001 and as such do not receive the benefit of the related party entity exemption pursuant to section 14(3) of the LP Act.

There is some risk as a result that some in-house legal practitioners may be engaging in legal practice in breach of the Conditions of their Certificates.

It is our submission that a definition of "*related entity*" should be included in the regulations so that it captures persons that are not a company within the meaning of the Corporations Act and that the inclusion of an appropriate definition in the regulations of the LP Act will effectively remedy this potential risk. The **enclosed** proposed definition would be of assistance to the sector.

We look forward to hearing from you in response to this submission and we would be happy to discuss this submission with you in further detail.

Yours faithfully



Makinson & d'Apice

Encl.

DRAFT REGULATION TO BE INCLUDED IN LEGAL PROFESSION REGULATION 2005

Definition of "Related Entity" -- Section 4 of the Act

The following persons are specified or described for the purposes of subclause (b) of the definition of "related entity" in section 4(1) of the Act:

- (a) members of a group pursuant to section 67 of the *Payroll Tax Act 2007* (NSW);;
- (b) related persons within the meaning in the dictionary in the *Duties Act 1997* (NSW);;
- (c) associated persons within the meaning in the dictionary of the *Duties Act 1997* (NSW);
- (d) members of the same GST Group pursuant to Part 4-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- (e) religious bodies or religious organisations specified in section 7 of the *Charitable Fundraising Act 1991* (NSW);
- (f) related parties under Accounting Standard AASB 124.



The Hon. Greg Smith SC MP
Attorney General
Minister for Justice

Mr Bill d'Apice
Makinson & d'Apice Lawyers
GPO Box 495
SYDNEY NSW 2001

RECEIVED
17 JAN 2013

BY:.....

Dear Mr ~~Mr~~ d'Apice *Bill*

Thank you for your letter dated 27 July 2012 requesting an amendment to the Legal Profession Regulation 2005 to amend the definition of "related entity" in the *Legal Profession Act 2004* (LPA).

I apologise for the delay in responding. The proposal contained in your letter differs significantly from that originally proposed by the Catholic Commission for Employment (CCER). Due to the breadth of the new proposal, a significant amount of analysis was required by my Department to evaluate its regulatory impact. Additionally, it was necessary to consider the interaction of the proposed regulation with the National Legal Profession reforms in which NSW is currently engaged.

I note that you provided a proposed draft regulation to be included in the Legal Profession Regulation defining a variety of unincorporated entities as "related entities" for the purposes of the LPA. The proposed regulation is extremely broad.

The extent to which the proposed regulation would allow employees of organisations to provide legal services to other unincorporated organisations is unclear. This is particularly the case given that where the "related entity" exception applied, practitioners who held corporate and non-lawyer entity practising certificates are not covered by professional indemnity insurance. This potentially creates a significant consumer protection issue. Clients receiving legal services – in some cases services provided for-profit – may not be protected by professional indemnity insurance.

I would be willing to consider a regulation allowing employees of the CCER holding "Corporate and Non-lawyer Entity" practising certificates to provide legal services to certain related organisations within the Catholic Church. However, to do so, I would have to be satisfied that the organisations to which CCER was providing legal services, were either protected by an insurance policy held by CCER or, if no such insurance policy applies, are aware that they will not be protected by lawyers' professional indemnity insurance when receiving legal advice or services from CCER or its employees. As such, I would require written confirmation that the organisations to which CCER provides legal services are aware of the fact that those legal services are provided in the absence of professional indemnity insurance.

In addition, it is not clear from your description of the legal services provided by CCER whether CCER is dealing with money that would currently be considered trust money under Part 3.1 of the LPA. I also request that you provide information about whether CCER does currently deal with such money, and what procedures it has for handling such money. Before recommending any regulation to the Governor, I would also need to be satisfied that CCER lawyers will not

handle any trust money or that there are appropriate safeguards in place and that contributions to the Fidelity Fund will be paid.

Alternatively, I draw your attention to the legal practice established by the Salvation Army, Salvos Legal. This practice operates on a commercial basis, which funds a pro bono legal service. CCER could consider establishing a similar legal practice. This would allow it to provide the legal services it currently does to other organisations within the Catholic Church in a way that does not raise any questions about the scope of what is authorised under CCER's employees' current in-house practising certificates. CCER may also wish to seek advice from the Law Society of NSW about potential alternative business models that would fit within existing regulatory arrangements.

Yours sincerely


Greg Smith
15/1/13

Draft Regulation to be Included in the Legal Profession Uniform General Rules 2014

11. Exemption from prohibition on engaging in legal practice

- (1) The following ~~persons~~ entities or classes of entities are declared to be exempt from the operation of section 10(1) of the Uniform Law:

...

- (h) Catholic Commission for Employment Relations (**CCER**) but only to the extent that the legal services concerned are provided to a religious body or an organisation or office within, or affiliated with and approved by, the Roman Catholic Church¹ upon the following conditions:
- (i) CCER at all relevant times holds professional indemnity insurance in respect of the provision of legal services with an insurer authorised under the *Insurance Act 1973* (Cth) to provide such insurances for an amount not less than the amount required under rule 73(6) of the General Rules; and
 - (ii) CCER may not hold, disburse or account for trust money.

¹ This formula is adapted from section 7(1) of the *Charitable Fundraising Act 1991* (NSW). It also is consistent with section 72 of the *Payroll Tax Act 2007* (NSW). Should this be considered to be imprecise then we suggest substitution of the words: "registered members of the Catholic Church GST Religious Group established under subsection 49-05 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth)".

Draft Regulation to be Included in the Legal Profession Uniform General Rules 2014

11. Exemption from prohibition on engaging in legal practice

- (1) The following ~~persons~~entities or classes of entities are declared to be exempt from the operation of section 10(1) of the Uniform Law:

...

- (h) an entity within a denomination in respect of which a proclamation is in force under section 26 of the *Marriage Act 1961* of the Commonwealth¹ but only to the extent that the legal services concerned are provided to a religious body or an organisation or office within, or affiliated with and approved by, that denomination upon the following conditions:
- (i) the entity at all relevant times holds professional indemnity insurance in respect of the provision of legal services with an insurer authorised under the *Insurance Act 1973* (Cth) to provide such insurances for an amount not less than the amount required under rule 73(6) of the General Rules; and
 - (ii) the entity may not hold, disburse or account for trust money.

¹ This formula of words is adopted from section 7(1) of the *Charitable Fundraising Act 1991* (NSW)