



26 August 2015

The Hon. P D Cummins AM
Chair
Victorian Law Reform Commission
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Dear Chair

Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries

Thank you for inviting the Law Council of Australia (Law Council) to offer views on the consultation topic. Your letter mentions the Law Institute of Victoria and Victorian Bar have also been invited to respond.

The Law Council strongly opposes financial criminality and is committed to raising awareness within the Australian legal community of the risks of unwitting involvement in money laundering and other criminal conduct. The ability of the legal profession to implement appropriate risk management processes depends, at least in part, on lawyers' gaining access to information about actual risks as well as timely guidance on how to manage those risks. In the Law Council's view, such measures provide the appropriate and fitting tools by which law practices can fortify themselves against the risks while adhering to their existing ethical and professional responsibilities.

The first part of this submission provides a general overview of the legal profession regulatory regime which the Law Council submits, militates against the need for any further regulation of the profession. The second part of the submission addresses Questions 2 and 3 of the Consultation paper.

The Law Council would be delighted to further assist the Commission or provide it with supplementary details as required.

General observations; legal profession uniform regime

The legal profession in Australia is already subject to a very significant level of regulation and independent oversight. On 1 July 2015, a 'new' legal profession regulatory regime commenced in Victoria and New South Wales, creating a common legal services market under a shared framework consisting of the Legal Profession Uniform Law ('Uniform law') and the Legal Profession Uniform Rules ('Uniform Rules').

The Uniform Law is a note to the *Legal Profession Uniform Law Application Act 2014* (NSW) and a schedule to the *Legal Profession Uniform Law Application Act 2014* (Vic). The system aims to harmonise regulatory obligations while retaining local performance of regulatory functions for the estimated 70% of Australian lawyers that belong to the two participating jurisdictions.

The Uniform Law replaces the *Legal Profession Act 2004* (NSW) and *Legal Profession Act 2004* (Vic) and establishes a comprehensive regulatory scheme overseen by two additional inter-jurisdictional authorities, the Legal Services Council and the Commissioner for Uniform Legal Services Regulation (who also acts as CEO of the Legal Services Council).

The uniform legal profession regulatory regime is self contained and governs every aspect of legal practice, including for example, admission requirements, practising certificates, trust account obligations, billing arrangements, continuing professional development requirements, complaints handling and professional discipline processes.

As a practical matter, in order to infiltrate the legal profession a criminal would first have to gain access to the profession. Entry into the legal profession begins with undertaking approved academic qualifications (typically a four year Bachelor of Laws degree), followed by an approved practical legal training program (PLT) (typically over 6 months) and satisfaction of the suitability requirements by way of evidence of the *fit and proper* person criteria.

That is, in order to become eligible for admission, an applicant will need to provide:

- a police report of the applicant's criminal record (if any) by the Chief Commissioner of Police that is no more than 6 months old;
- a report by the approved academic institution (ie University) and any PLT provider as to any disciplinary action arising out of the applicant's conduct in attaining the qualification (also no more than 6 months old); and
- affidavits as to character in the required form.

Once admitted, an applicant may be eligible to apply for a licence to practise, subject to a two year period of supervised practice.

Many of the 'principles' that underpin regulatory tools proposed by Chapter 4 of the Consultation Paper are part of the Uniform Law regulatory framework, including:

- Registers and rolls - the Supreme Court of Victoria maintains a roll of Australian lawyers admitted by the Court to legal practice and can order the removal of a person's name from the roll of lawyers.¹ The Victorian Legal Services Board maintains a register of Australian legal practitioners² whose home jurisdiction is Victoria³ and the Legal Services Council maintains the Australian Legal Profession Register with information which may or must be added to the publicly available registers;⁴
- Licensing- eligibility to apply for a practising certificate pursuant to entry into the roll of lawyers and satisfaction of admission requirements involving academic, practical legal training, and suitability criteria;⁵
- Informing the public - up to 1 July 2015 applicants for admission to the legal profession were required to cause notices of their intention to seek admission to be published in a newspaper circulating in Victoria as well as in the notices published by the Supreme Court. Under the updated admission requirements of the Uniform Legal Profession Law, notices are now placed
- on the Victorian Legal Admission Board (VLAB) website setting out that the application has been made and that any person may object to the VLAB by a specified date;⁶

¹ See for example sections 22, 23 and Section 461(2) of the *Legal Profession Uniform Law 2014* (NSW) which applies in Victoria under the *Legal Profession Uniform Law Application Act 2014*(Vic). Similar rolls are maintained by the Supreme Court of every Australian jurisdiction and a person whose name is removed from the roll in any Australian jurisdiction or whose grant/renewal of a practising certificate is refused, suspended or cancelled is a *disqualified person* as defined under LPUL.

² This includes information about locally registered foreign lawyers and law practices that engage in legal practice in Victoria as well as legal practitioners who hold a current Victorian practising certificate.;

³ See for example, section 150 and for the Australian Legal Profession Register see for example section 432 of the *Legal Profession Uniform Law 2014* (NSW) which applies in Victoria under the *Legal Profession Uniform Law Application Act 2014*(Vic).

⁴ See for example section 432 of the *Legal Profession Uniform Law 2014* (NSW) which applies in Victoria under the *Legal Profession Uniform Law Application Act 2014*(Vic) and Part 9.3 of the *Legal Profession Uniform General Rules 2015*.

⁵ See the Legal Profession Admission Rules 2015 under the *Legal Profession Uniform Law 2014* (NSW) which applies in Victoria under the *Legal Profession Uniform Law Application Act 2014*(Vic).

⁶ See for example the Legal Profession Uniform Admission requirements for Notices of Applicants Seeking Admission as Lawyers at Item 3 on the website of the Victorian Legal Admissions Board available at <http://www.lawadmissions.vic.gov.au/home/admission+process/>

- Rules relating to supervised legal practice and the provision of legal services;⁷
- Detection of unauthorised participants- the Victorian Legal Services Board maintains a Register of Disciplinary Action against legal practitioners⁸, Disciplinary Action against Non Lawyers⁹ and information on Prohibited Lay Associates;¹⁰
- Rules creating restrictions as to who may be an authorised principal¹¹ or an associate (as defined) of a law practice¹² involved in the management of law practices;
- Rules or conditions relating to re - entry following suspension/ cancellation or imposition of conditions of a practising certificate¹³; and
- Independent regulatory monitoring:
 - of compliance based on both complaints- based¹⁴ and inspection- based¹⁵ models of oversight;
 - substantial investigative powers;¹⁶
 - strict enforcement of record keeping obligations;¹⁷
 - continuous disclosure obligations;¹⁸ and
 - a comprehensive suite of enforcement options including civil and criminal sanctions including imprisonment or both¹⁹.

Is there a regulatory gap to be addressed?

The Consultation Paper notes that lawyers are not regulated as *reporting entities* under the *Anti-Money Laundering and Counter - Terrorism Act 2006* (Cth) (AML Act). This appears to be the sole criterion the paper relies upon in turning to the question of the nature of additional regulatory measures to be deployed as the mechanism by which to halt the subversion of the legal profession.

Before turning to the substantive issues raised by the paper, the Law Council notes that little if any evidence of lawyer involvement in money laundering (deliberate or unwitting) is available to suggest the nature and extent of a possible regulatory gap. In this regard, the Law Council agrees with the observation made by the Consultation Paper that serious and organised criminal activity is intrinsically associated with money laundering.

⁷ See for example section 6 definitions such as **authorised principal** and other provisions at 47(6) of the *Legal Profession Uniform Law 2014* (NSW) which applies in Victoria under the *Legal Profession Uniform Law Application Act 2014*(Vic) and paragraph 7 of *Legal Profession Uniform General Rules 2015*.

⁸ See for example the publicly 'searchable' register at the website of the Victorian Legal Services Board available at http://lsbc.vic.gov.au/?page_id=285

⁹ See for example information and Register of Disqualified Persons on the website of the Victorian Legal Services Board available at http://lsbc.vic.gov.au/?page_id=2521

¹⁰ See for example section 121 *Legal Profession Uniform Law Application Act 2014*(Vic) which creates a contravention by law practice in relation to disqualified or convicted persons as lay associate and see also the Register of Disqualified information and guidelines in relation to the employment in law practices of prohibited lay associates, on the website of the Victorian Legal Services Board available at http://lsbc.vic.gov.au/?page_id=1969

¹¹ See for example section 47(6) the *Legal Profession Uniform Law Application Act 2014*(Vic).

¹² See for example definitions at section 6 of **disqualified person** and prohibitions contained at sections 121to 124 of the *Legal Profession Uniform Law 2014* (NSW) which applies in Victoria under the *Legal Profession Uniform Law Application Act 2014*(Vic) concerning disqualified or convicted persons as lay associates of a law practice.

¹³ See Part 3.5 of the *Legal Profession Uniform Law Application Act 2014*(Vic).

¹⁴ See Part 5.2 of the *Legal Profession Uniform Law Application Act 2014*(Vic).

¹⁵ See for example provisions on audits of compliance with the law at section 256;

¹⁶ See for example Chapter 7 of the *Legal Profession Uniform Law Application Act 2014*(Vic).

¹⁷ There are many strictly enforced record keeping obligations. See for example section 147 in relation to the keeping of trust records subject to several penalties up to 100 penalty Units and section 139(5) obligations to keep written directions for controlled money for seven years subject to 50 Penalty Units;

¹⁸ There are many requirements relation to ongoing disclosure obligations to regulators by legal practitioners see for example section 151 *Legal Profession Uniform Law Application Act 2014*(Vic) Disclosure of each account maintained at an ADI in which the law practice holds money whether or not it is trust money.

¹⁹ See for example section 148 *Legal Profession Uniform Law Application Act 2014*(Vic) deficiency in trust account punishable by 500 Penalty Units or imprisonment for 5 years, or both; see also section 459 *Legal Profession Uniform Law Application Act 2014*(Vic) whereby criminal proceedings may be instituted against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a pecuniary penalty order has been made against the person of the *Legal Profession Uniform Law Application Act 2014*(Vic).

Evidence of involvement in serious and organised crime

In April 2015, the Financial Action Task Force (FATF) released its Mutual Evaluation Report into Australia's AML/CTF regime (MER). The MER reiterates the FATF's long standing position that lawyers (and others) should be fully regulated as *reporting entities* under the AML Act. This was also the position taken by the FATF's in Australia's 2005 MER, prior to the commencement of Australia's dedicated AML regime²⁰ (which includes the AML Act and other legislation) in 2006.

While not subject to all of the regulatory obligations as *reporting entities* under the AML regime, lawyers are subject to some of them, such as for example, *significant transaction* reporting under the *Financial Transaction Reports Act 1988* (Cth). Further, like every other citizen, lawyers are subject to the full force and scope of the criminal law (at both the state and federal levels) for offences of money laundering whether such conduct is intentional, reckless (in failing to make proper enquiries) or negligent (in turning a blind eye).²¹

For example, sections 400.3 to 400.8 of the *Criminal Code Act 1995* (Cth) establishes 18 money laundering offences that are 'banded' according to the value of money/ property and differentiated on the basis of to the offender's level of knowledge as intentional, reckless or negligent. Other offences used in prosecuting money laundering are contained in the AML Act itself, such as for example, structuring offences at sections 142-143, or the movement of physical currency both in and out of Australia pursuant to sections 53, 55 amongst others.

Yet there is a dearth of empirical evidence available to support the contention that lawyers in Australia are systemically involved in money laundering as there have been few if any investigations, prosecutions or convictions of Australian lawyers for money laundering offences. Further, the absence of actual evidence about the involvement of lawyers in organised crime is consistent with experience in other jurisdictions.

It is the Law Council's observation that there is a need to critically and properly assess the quality and cogency of information that might be assumed to suggest a regulatory gap. In this regard, the Law Council notes that in June 2015 the Australian Transaction Reports and Analysis Centre released a Strategic Brief Analysis entitled *Money Laundering Through Legal Practitioners* (AUSTRAC Report)²². The AUSTRAC Report mentions a number of 'cases' that purport to illustrate the involvement of lawyers as professional facilitators in sophisticated money laundering operations. However, on closer examination the 'cases' mentioned did not, in the Law Council's view, support the professional facilitator contention.

For example, though reported in the Asia Pacific Group Typologies 2010, the fact scenario described at Case 1 relates to a New Zealand lawyer's actions in 2002 - 2003. Case 2 relates to a matter raised anecdotally by the (then) New South Wales Legal Services Commissioner in a paper he presented in March 2007.²³ While it did involve an Australian lawyer, the facts of the matter arose in 2003 which was subsequently referred to the Commissioner in later years. Similarly the further two 'cases' mentioned in the AUSTRAC Report arose from acts that occurred across 2002 and 2003 though they were subsequently reported in AUSTRAC Typology reports in 2007 and 2008.

²⁰ The AML/CTF Regime includes the *Anti- Money Laundering and Counter- Terrorism Act 2006* (Cth) the *Anti- Money Laundering and Counter- Terrorism Rules 2008* (Cth) the *Financial Transaction Reports Act 1988* (Cth), *Proceeds of Crime Act 2002* (Cth) and other legislation.

²¹ See Division 400 offences of the *Criminal Code Act 1995* (Cth)

²² Australian Transaction Reports and Analysis Centre, *Money Laundering Through Legal Practitioners* June 2015 available at <http://www.austrac.gov.au/money-laundering-through-legal-practitioners>

²³ S Mark, *Money Laundering and Trust- What Role for Lawyers?* Paper presented at Marcus Evans Anti – Money Laundering Conference Sydney 6- 7 March 2007 available 3 June 2015 at http://www.olsc.nsw.gov.au/Documents/money_laundering_trust_what_role_lawyers.pdf

No reference to primary source case material appears to be available in relation to these matters, suggesting these ‘cases’ did not proceed to investigation or prosecution. One reason why this may be so is that all of the matters raised by the 2015 AUSTRAC Report pre-date the implementation of Australia’s AML/CTF regime in December 2006 and the present framing of offences at Division 400 of the Criminal Code in early 2003.

Overall, it is difficult to see how case examples that are over a decade old can contribute to understanding about sophisticated criminal methodologies that are described as rapidly evolving. Outdated fact scenarios, particularly where they do not involve Australian lawyers which pre-date the regulatory legislative scheme do not support a view that suggests systemic, complicit and ongoing conduct on the part of the lawyers involved.

The dearth of evidence about lawyer involvement in money laundering and reliance upon allegations of such involvement that are outdated, overstated or that emanate from sources that rely either on lightly analysed lists of cases in multiple jurisdictions²⁴ or assertions citing closed source material²⁵ cannot be tested.

AML regulation at a cross roads

While it might be queried whether this phenomena is peculiar to Australia because of the unique approach to the regulation of the legal profession it is also appropriate to note that globally the future of AML regulation may be at a cross roads.

In 2014 the Centre on Law and Globalization released the first independent assessment of the global AML system.²⁶ The study entitled *Global Surveillance of Dirty Money* (the Report) was conducted with the assistance of the International Monetary Fund (IMF) and the FATF.

The Report made several key findings, some of the more relevant of which for present purposes are in relation to cost, effectiveness in lessening money laundering and proportionality, as follows.

AML regulation; Cost

The ‘fight against money laundering is costly...consumes extensive government resources in participating countries and makes heavy demands on the private sector. The report finds that the struggle to control money laundering is at a turning point’²⁷. ...

AML regulation; Effectiveness

... ‘Major international banks in the UK, US and Europe have admitted to massive violations of money laundering controls over long periods, indicating that highly developed anti-money laundering systems have not worked well’²⁸. ...

... “no credible scientific evidence has yet been presented that there is a direct relationship between installation of effective AML/CFT regimes and the IMF mandates to produce domestic and international financial stability.” ... ‘Neither is there convincing evidence...’ that proceeds of crime are reduced or crime itself is better controlled with anti-money laundering measures.’²⁹ ...

²⁴ See for example Financial Action Task Force *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals 2013* available 24 May 2015 at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>

²⁵ For example, in Australia, the Australian Transaction Reports and Analysis Centre develops two classified reports being the National Threat Assessment on Money Laundering and the National Risk Assessment on Terrorist Financing.

²⁶ T Halliday, M Levi and P Reuter, *Global Surveillance of Dirty Money*, Centre on Law and Globalisation, January 2014 available at http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf

²⁷ T Halliday, M Levi and P Reuter, *Report Questions Global Fight Against Money Laundering and Terrorism*, American Bar Foundation, January 2014 available at <http://www.americanbarfoundation.org/news/475>

²⁸ Ibid

²⁹ Ibid

AML regulation; Cost benefit analysis; proportionality

... 'no cost-benefit analysis has ever been undertaken of anti-money laundering efforts globally or even regionally... The report states that "the FATF system has proceeded as if it produces only public and private 'goods,' not public or private 'bads.'"... 'There is no evidence that any governments have made rigorous efforts to weigh costs against benefits.'...³⁰

... 'Anti-money laundering systems can produce political harms. Humanitarian harms may be inflicted...' ³¹

Because of these and the reasons that follow, the Law Council does not agree with the Consultation Paper's premise that a 'regulatory gap' results from not bringing lawyers more fully within the regulatory scope of the AML Act.

AML regulation and the legal profession

It is matter of record that the Law Council is concerned that certain AML regulatory obligations, for example, requiring lawyers to form and report suspicions about clients, are inconsistent with lawyers' duties of confidentiality, independence and loyalty.³² In many parts of the world, the legal profession has expressed similar concerns for the implications of anti money laundering obligations on the role of lawyers within democratic systems of justice.

By virtue of its membership of the European Union and as a result of the binding nature of European Union Directives on the Parliament of the United Kingdom, the UK legal sector has been regulated for AML since 2001. This should be contrasted with the position in Australia, the United States of America, Japan, Canada and several other jurisdictions in which lawyers have objected to becoming regulated for AML.

On 13 February 2015 in a landmark decision, Canada's highest appellate court³³ acknowledged the critical importance of confidentiality to the lawyer - client relationship and to a lawyer's broader "commitment to the client's cause,"³⁴ striking down portions of Canada's Proceeds of Crime (money laundering) and Terrorist Financing Act that the government had sought to impose on Canadian lawyers.

Question 2 of the Consultation Paper; Assessing risk and the concept of under regulation [3.76]

Certain features of the existing legal profession regulatory regime that are relevant to the present enquiry include for example, the treatment of funds that come into a law practice and the obligations on law practice personnel to report irregularities.

Flows of Funds through Law Practice Bank Accounts

Money entrusted to law practices on behalf of clients (or third party payers) in the course of legal practice or in connection with the provision of legal services is trust money.³⁵ Trust money can only be deposited into particular accounts and dealt with in accordance with strict accounting rules. Such money might include funds to settle property purchases, to pay stamp duty, for distributions in deceased estates, for debts recovered, for settlement of claims or funds required to pay legal expenses or funds required to pay legal expenses.

³⁰ Ibid

³¹ Ibid

³² Law Council of Australia, Submission to the Statutory Review of Australia's AML/CTF Regime, 2014 available at <http://www.ag.gov.au/Consultations/Documents/StatutoryReviewAnti-MoneyLaunderingAndCounter-TerrorismFinancingActCth200/law-council-of-australia-30april2014.pdf>

³³ *Attorney General of Canada v. Federation of Law Societies of Canada* (2015) SCC 7 available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14639/index.do>

³⁴ This duty is known as the duty of commitment or loyalty in Australia.

³⁵ See for example the definition of *trust money* in the *Legal Profession Act 2007* (Qld) at section 237, similarly in every Australian jurisdiction's legal profession regulatory counterpart.

The regulation relating to trust accounts under the legal profession legislation is procedurally detailed and comprehensive³⁶ prescribing, for example, processes for approval of authorised deposit taking institutions, day to day management, investigations, external examinations and many other matters. Independent oversight that provides for supervision, investigation and audit of accounts is a key focus of the regime.

External examination of trust accounts is not only conducted annually but also by way of periodic random audits by external examiners and auditors who are empowered to check transactions through the trust account, practice accounts and any other documents to ensure compliance with the regulations and to prevent fraud.

Investigators may be appointed to conduct either or both routine investigations on a regular basis or investigations of particular allegations or suspicions regarding trust money/property/accounts or any other aspect of the affairs of a law practice. Investigators and external examiners enjoy very wide powers of investigation and examination. For example investigators have powers of entry and search, examination of persons and power to inspect any records or documents. Further, where the law practice is structured as an Incorporated Legal Practice, Australian Securities and Investments Commission powers apply.

External intervention is the appointment of a supervisor, manager or receiver to a law practice and the exercise of powers and functions of those persons in relation to a practice. The legislation specifies certain circumstances that may trigger the need for external intervention. Specified circumstances include, for example, when there are reasonable grounds to believe the laws and proper procedures regarding trust money are not being followed or when the law practice has failed to comply with any requirement of an investigation or external examiner. More generally, this disciplinary action is available and can be taken when any proper cause exists.

To encourage understanding of this complex area, a range of practical resources have been developed and mandatory education programs are conducted. Further professional organisations offer advice to lawyers and legal support staff to assist law practices to comply with their stringent accounting obligations.³⁷

Obligation to report irregularities and suspected irregularities

The legal profession legislation provides that if a lawyer, associate of a law practice, approved clerk, external examiner or approved deposit-taking institution identifies a potential trust irregularity in a trust account or trust ledger account, as soon as practicable written notice of the irregularity must be given to the regulatory authority (in Victoria the Legal Services Board) and a corresponding authority (if a corresponding authority is responsible for the regulation of the account concerned).

Question 3 of the Consultation Paper; Key Characteristic the occupation is perceived as protected from regulation. [3.80]

The Consultation Paper raises concerns that communications with lawyers may be protected by client legal privilege or perceived to be protected such that it could provide a party seeking to further a criminal intent with an advantage. However, it should be noted that at common law, no privilege arises in respect of a communication made for a purpose that is contrary to the public interest; that is, where the communication is made in furtherance of an illegal or improper purpose, whether or not the legal adviser knows of that purpose.³⁸

³⁶ For example the *Legal Profession Act 2007* (Qld) contains dedicated trust accounting provisions that span from sections 236 to 298 and in the *Legal Profession Act 2007* (Qld) from regulations 26 to 78.

³⁷ The *legal profession legislation* of every Australian jurisdiction is very similar with regards the obligations that arise for the receipt, holding and disbursement of all client funds.

³⁸ *Baker v Campbell* (1983) 153 CLR at 409–410; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 147, 156, 159, 161; *Attorney General (NT) v Kearney* (1985) 158 CLR 500 at 514-515; Propend C at 514

The illegal or improper purpose principle covers all forms of fraud and dishonesty, including fraudulent breach of trust, fraudulent conspiracy, trickery and 'sham' contrivances as well as cases of fraud by third parties.³⁹

The privilege is not displaced by the mere allegation of an illegal or improper purpose.⁴⁰ However, those seeking to exclude the privilege do not have to prove that the communication was in furtherance of an illegal or improper purpose. Rather, the party seeking to resist the assertion of privilege must adduce *prima facie* admissible evidence that the allegation has some foundation in fact.⁴¹

Conclusion

Good policy design requires links between causation, instrumentation and evaluation

Targeted objectives are necessary for effective implementation and assessment of regimes to combat serious and organised crime. The simple idea that more regulation will address concerns about sophisticated and organised criminal activity is appealing to many academics, politicians, and to regulators themselves. Unfortunately there is no magic bullet when it comes to well organised, highly motivated and determined criminals. New regulatory hoops are amenable to misuse and subvert constructive debate about incisive analysis and thoughtful approaches to address actual issues.

This submission is not necessarily an argument for the status quo. It is however a cautionary tale that any increase, however well intentioned, in the regulatory burden imposed on law practices may affect the cost of legal services, potentially making them even less affordable to the Australian community. The trade-off between the need to address a perceived regulatory gap (if any) and the impact of further regulation must be judiciously and even-handedly considered.

Recommendations

It is the Law Council's submission that:

- **the strength of the evidence that signals lawyers' involvement in money laundering and organised crime be critically assessed to determine whether there is a genuine regulatory gap to be addressed;**
- **the existing legal profession regulatory framework offers significant safeguards against lawyers' unwitting involvement in money laundering or other serious criminality;**
- **a thorough audit of the features of the existing regulatory framework and analysis of their performance should be undertaken to inform regulatory policy development and in particular the scope and degree of the regulatory gap (if any) that ought to be addressed; and**
- **any proposed increase/extension of the regulation must be demonstrably justifiable by way of comprehensive cost benefit analysis, at the very least it must contain measures that ensure costs are minimised and that the benefits outweigh the costs.**

Yours sincerely

MARTYN HAGAN
SECRETARY-GENERAL

³⁹ *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 188 ALR 515 (Clements) at [220]

⁴⁰ *Propend Ltd v Commissioner of the Australian Federal Police* (1995) 79 A Crim R 453 at 559, 579, 587

⁴¹ *Propend* at 553, 559, 579, 587; *AWB v Cole* (No. 5) (2006) 155 FCR 30. at 89; *In the matter of ACN 005408 Pty Ltd (formerly TEAC Australia Pty Ltd)* [2008] FCA 964 at [2]