NEW ZEALAND BUSINESS ROUNDTABLE

SUBMISSION ON THE LAWYERS AND CONVEYANCERS BILL

OCTOBER 2003

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1 Introduction

1.1 This submission is made by the New Zealand Business Roundtable (NZBR), an organisation comprising primarily chief executives of major New Zealand businesses. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests. Occupational regulation has been a matter of interest to the NZBR as part of its wider interest in improving regulation of the labour market, one of the most important markets in the economy.

1.2 The NZBR and its members have a major stake in the performance of the legal profession and the legal system. Large businesses are major users of legal services, both for advice and litigation. By paying for these services, businesses generate important public goods by way of standard forms, which reduce transaction costs for smaller businesses and individuals, and rules generated by litigation. From a public policy standpoint, the NZBR regards the legal system as an important institution for upholding individual autonomy and protecting property rights. It thus facilitates the creation of jobs and wealth and expands the tax base for the provision of public services. We are therefore concerned to see that legal services of the desired quality are delivered at least cost.

1.3 The NZBR is also concerned with regulation of business in general, and with the regulation of professional services in particular, as the effect of such regulation is often to increase direct and indirect costs to business. Such regulation therefore needs to be shown to be of net benefit to the welfare of all New Zealanders.

1.4 In 2000, the NZBR published a paper it had commissioned by Dr Ian McEwin, former Director of the Centre for Law and Economics at the Australian National University. This paper, *Regulation of the Legal Profession*, considered many of the matters covered in the Bill and a copy is attached to this submission.

2 Why regulate the legal and related professions?

2.1 The benefits of specific regulation of the legal profession inevitably involve costs. The costs arise from restricted entry into the practice of law, barriers to innovation such as inhibiting the development of multi-disciplinary professional firms and the formation of international law firms, restrictions on the use of organisational forms other than sole traders and partnerships, and administration and compliance costs. Significant benefits are necessary to justify the costs of occupation-specific regulation of the legal profession.

2.2 The legal profession is subject to a form of regulation known as licensing. That is to say, one cannot do certain work without being licensed as a lawyer. This is in contrast with a certification scheme whereby no work is restricted but one cannot describe oneself as, say, a chartered accountant, without having certain qualifications.

2.3 Licensing schemes are usually only found amongst professions that have a significant impact on health and safety, such as the medical and dental professions and pharmacists. The question therefore is why lawyers are subject to such regulation. The answers typically given are twofold. First, there is said to be a public interest since:

- the quality and ability of lawyers will impact upon the integrity and efficiency of the judicial and land registry systems;
- lawyers are the pool from which judges are chosen; and
- lawyers have a public role in maintaining the rule of law and standing between the state and the citizenry.

Second, there is said to be a need for consumer protection. This is because:

- some clients may have difficulty in assessing the quality of the services they are offered, even after they have received them; and

- the services may be critical to clients, relating to some of the most important decisions and crises they will ever deal with, for example buying a house, having a dispute with an employer, or being accused of a criminal offence and perhaps being liable to imprisonment.

2.4 The nature and extent of regulation should be tested by reference to the justifications given for it. It has to be said that the argument that consumer protection justifies regulation would be more convincing if it came from consumer groups rather than from the producers of legal services. Consumer protection grounds cannot justify restrictions on the supply of most classes of legal services. Such restrictions are neither necessary nor sufficient to protect the public from incompetent and dishonest practitioners.

2.5 The main protection afforded consumers of legal and other services is provided by competition. Competition encourages suppliers to provide services of a desired quality at a price that consumers are willing to pay. Suppliers of professional services must maintain quality standards or their reputations will be tarnished and they will lose business to competitors. The penalty imposed by the market on Arthur Andersen – insolvency – for wrongdoing in relation to the Enron affair was far swifter and more devastating than any handed out by a regulatory body.

2.6 Consumers are not as ill-equipped to judge the quality of legal services as the explanatory note to the Bill and the regulatory impact and compliance cost statement seem to imply. Many firms and individuals needing legal services are well placed to judge the quality of services on offer. For instance, some firms employ in-house lawyers partly for this purpose. Consumers may also use a variety of mechanisms to judge the quality of legal advisers. They may take advice from friends, their bank or accountant, rely on the reputation of the firm, or seek a second opinion if in doubt. While these market safeguards are not foolproof, neither is regulation. Government failure should therefore also be taken into account in evaluating the efficacy of regulation. For these reasons, we submit that consumer protection or market failure arguments do not provide compelling

grounds for reserving legal work and for regulating lawyers and conveyancers as suggested in the explanatory note.

2.7 If government intervention were justified on consumer protection grounds, a certification scheme should be sufficient. Under such a scheme certain practitioners are certified as meeting prescribed standards but competition from other suppliers is not prohibited. Such a regime applies to accounting work (other than certain audits and a limited range of other work that is required by statute to be undertaken by a chartered accountant). Even where a licensing scheme is required, it is not necessarily required for all activities and it need not be the responsibility of a single monopoly regulator. For example, if the reason for regulation is to protect the integrity of the property register for which the Land Registrar is statutorily responsible, alternative methods, such as differential fees to compensate for work carried out by Registry staff, might be worth considering.

2.8 It must also be remembered that the courts have always had and will retain the right to regulate who appears before them. In recent times they appear largely to have abdicated this role to the New Zealand Law Society. For better or worse, this means that counsel are allowed to appear in New Zealand courts who would not be allowed to appear in other common law countries. An example is solicitors who are employed full time by banks and other institutions. This is not necessarily inappropriate. However, the Law Society has issued such solicitors practising certificates apparently without much debate as to whether they can comply with the Rules of Professional Conduct, and the courts have then allowed them to appear for their employers. If regulation is justified by the need to protect the judicial process, then arguably the courts should carry out this role as they did historically.

2.9 These basic issues underlying regulation of the legal profession were not widely canvassed before the Bill was prepared. There were no consultations with the NZBR despite its known interest in the subject as manifested in its commissioned study. The lack of principled analysis and consultation is regrettable. In our view

the select committee should not be expected to grapple with unarticulated policy issues and major drafting errors.

3 The Law Society model

3.1 The model adopted by the Bill is essentially what was known during the limited consultative process as the 'Law Society model'. The president of the New Zealand Law Society has advised its members that the model adopted is basically its proposal but that it will be suggesting detailed amendments. Acceptance of this model therefore entails acceptance of the idea that an organisation representing the producers of legal services has proposed the model most likely to provide protection for consumers. It also implies that the government and its officials have proposed the model most likely to enable lawyers to perform their independent role of standing between citizens and the state.

3.2 In our view there has been insufficient consideration of other approaches to regulation of the legal profession. In particular, there has been insufficient consideration of what is called the 'Victorian model'. In the Australian state of Victoria, a State Legal Practice Board licenses Registered Professional Associations (RPAs). A lawyer may practise provided that he or she is a member of an RPA. There is no limit on the number of RPAs. In practice, the system has not worked well, but this is because there is a substantial level of unnecessary regulation and duplication in the statutory system. For example, the legislation mandates a fidelity fund and creates an ombudsman. Both are matters which should be left to the competing RPAs to decide whether to implement. If they offer genuine advantages to clients, then clients will tend to favour lawyers who are members of RPAs offering such safeguards.

3.3 There are good reasons to suppose that a monopoly regulator, in the form of the New Zealand Law Society, as is the case at present and as is proposed under the Bill, will not produce results that are as good as a system which allows competing RPAs. This is discussed in *Regulation of the Legal Profession* at pp 45 - 47. A monopoly regulator implies a very crude system in which people are either

registered lawyers or they are not. This gives little guidance to clients. For example, the Bill proposes that the New Zealand Law Society has power to make rules about continuing legal education. While this may sound like a good idea, experience in other jurisdictions suggests that it results in a formalistic approach under which training requirements are limited to junior lawyers, although older lawyers often need bringing up to date. Providers of courses in other jurisdictions also know that the bulk of them must be provided in the last two months of the year, and that lawyers will attend almost any course provided in that period in order to obtain the required level of training. Meanwhile, large firms in New Zealand run regular training courses. This suggests that in a competitive environment some RPAs would impose far more stringent continuing education requirements than a monopoly provider ever will.

3.4 Likewise, it is unlikely that RPAs whose members wished to compete on quality would readmit lawyers of the kind which the current Law Practitioners Disciplinary Tribunal failed to strike off in the last twelve months, such as a practitioner who was convicted under the Serious Fraud Office Act of destroying evidence or another who was unable to give competent advice on a straightforward matter of statutory interpretation.

3.5 We therefore consider that the continuation of a monopoly system owes more to intellectual inertia and the pursuit by the New Zealand Law Society of its own interests than to any rigorous comparison of other possible models. While there may be limits to the scope for competing professional bodies in the New Zealand environment, even the threat of alternatives emerging would reduce the risk of monopolistic behaviour and better protect consumers. There are also severe disadvantages in the New Zealand Law Society being the monopoly regulator, as not all lawyers need be members of the society. This means that the New Zealand Law Society will regulate those who might like to compete with its members and offer services in different ways. This will reduce the greatest advantage of competition, which is experimentation with new ways of doing things.

3.6 It can also be expected that marginal disputes will arise as to whether a particular activity, such as maintaining a newspaper or running continuing education seminars, is within the regulatory or representational function. These problems would not arise if the regulator were not a 'members society' that carried out other functions.

4 Major problems with the Bill

Lawyers' monopolies – conveyancing

4.1 A major driver for reform has been to break the monopolies held by lawyers over certain sorts of work. One target has been conveyancing, with a focus on residential housing. Lawyers respond that conveyancing fees are low today and are far less significant than real estate agents' fees. The conveyancing issue is discussed in *Regulation of the Legal Profession* at pp 37 - 40.

4.2 However, the definition of conveyancing in the Bill is far wider than the conveyancing of residential accommodation and includes all legal work carried out for the purposes of "a sale or purchase of a business". This definition is in some senses narrower than the current definition which catches all transfers by deed, but in other ways wider.

4.3 The problem is that the expression "for the purposes of a sale or purchase of a business" is unclear in its limits. If a car repair shop owner retires and sells the machinery to a purchaser who also obtains the lease from the landowner, is this the sale of a "business"? Does the mere addition of goodwill turn it into the sale of a business? Previous definitions referred to the sale of shares which was required to be by deed. It is also unclear when legal work becomes work for the purposes of a sale. Will work only be for the purposes of a sale when there are actual negotiations with a particular party? Or when a business owner starts to explore the feasibility of a sale? On some interpretations, this definition restricts to lawyers much work currently done by accountants and other business consultants. This would fly in the face of an intention to deregulate and reduce lawyers' monopolies. If there is an intention to restrict to lawyers work currently done by accountants

and others, there has been no discussion of this and there is no sign in the explanatory note that this is the intention. If it is not the intention, the current wording is unacceptably unclear.

4.4 When a select committee considered Mr Goff's Member's Bill to create a conveyancing profession, the NZBR argued that the grounds for licensing of conveyancers were weak. So far as businesses are concerned, the clients will be well-informed parties able to assess risks for themselves, and hence there is no consumer protection argument for regulation. So far as land is concerned, the Land Registrar is statutorily responsible for the integrity of the Register. Owners are protected against negligent entries in the Register by a government compensation scheme. In other words, the issue is not about protecting property owners' interests so much as protecting the government from having to pay compensation. This can be done by permitting the Registrar to charge different levels of fees for registrations handled by people with varying levels of qualification. At present, people can choose to do their own conveyancing and effectively receive a subsidy from the Registry in the form of the additional work done by registry staff to ensure that all is in order with the conveyances.

4.5 If it is necessary, however, to regulate those who provide conveyancing for a fee, then the proposed system does not achieve the desired end. To take a concrete example, a prominent member of the legal profession, after qualifying as a lawyer, followed a distinguished career as a diplomat, including representing New Zealand on the Security Council of the United Nations. He then became Secretary of Justice and is now a partner in a law firm. Immediately upon taking out a practising certificate he became eligible to carry out conveyancing for a fee, although he may well have forgotten all he ever knew about land law and conveyancing. Doubtless a person of such standing would not be so unwise as to provide a service in which they were not expert, but others might not be so wise and a regulatory scheme is presumably intended precisely to prevent practice by those who think they are able to carry out a service but are not. If conveyancing requires regulation, the specific regulatory requirements should apply to lawyers

as well as to the new profession of conveyancers. Separate sets of regulations applying to the provision of the same services by lawyers and conveyancers are inappropriate.

4.6 The elaborate and expensive structure proposed in the Bill for regulating conveyancing therefore appears to be unnecessary and potentially ineffective.

Lawyers' monopolies – other areas of work

4.7 The ambit of the definition of reserved areas of work is again at least unclear and at worst far too wide. Currently, as a result of the decision of Blanchard J in *Auckland District Law Society v Dempster*, the work protected under the Law Practitioners Act 1952 includes all work "ordinarily done by a solicitor" (see *Regulation of the Legal Profession* pp 40 - 42). The narrowest possible definition would have been the signing of court documents and appearances in court.

4.8 The reserved areas of work are defined to include giving legal advice in relation to the conduct of any proceedings that the client is considering bringing, or has decided to bring, or may be a party to. It is unclear when this provision cuts in. To take a concrete example, a taxpayer receives an assessment from the Commissioner of Inland Revenue and consults an accountant about the possibilities of disputing the assessment. It could be argued that from this point on the taxpayer is considering bringing a proceeding and that the advice given should, in terms of the Bill, be by a lawyer and not by an accountant.

4.9 We understand that the Institute of Chartered Accountants of New Zealand and others will be making submissions that are critical of the wording of this provision in the Bill. Judith Collins MP, former president of the Auckland District Law Society, has also written to this effect in *The New Zealand Law Journal*. It is no response therefore for the Ministry of Justice to argue that these interpretations are misconceived. The mere fact that they are regarded as possible interpretations by interested parties shows that the Bill is badly drafted and that the definition of the reserved areas of work requires reconsideration. The definition should ensure that only the final stages of filing court documents and appearances in court are

reserved for lawyers because it is this work alone which is important for the proper functioning of the judicial system and therefore warrants protection on that basis.

Multi-disciplinary practices (MDPs)

4.10 Although the possibility of MDPs was widely discussed at earlier stages of the process (and in *Regulation of the Legal Profession* at pp 56 - 60), the Bill as it stands does not allow lawyers to share income for legal services with non-lawyers. This is said to be a response to the collapse of Enron and other high-profile business scandals in which the involvement of accountants and lawyers is alleged to be part of the problem. However, the response – to prevent MDPs – is misconceived. If MDPs are a bad idea, they will be eliminated in a competitive market and the collapse of Enron and other companies can be seen as the market penalising misjudgments and wrongdoing.

4.11 There are arguably two different kinds of MDP. In one, professionals provide services at different stages of a process and pass the client from one to another. This is said to raise risks of conflicts of interest when, for example, audits are carried out by partners of those who advised on the financial structure of the client. It may also mean that when a professional recommends services provided by another professional, a desire to keep the business within the firm may override attention to the client's own best interests. This argument may prove too much. What is a 'discipline' and therefore what is an MDP is essentially arbitrary. A law firm could be described as an MDP consisting of legal advisers and of litigators. A client whose transaction has been carried out by a commercial member of a firm is likely to be referred to a litigator in that firm if a dispute arises. This may be said to give rise to the same dangers as having audits carried out by the partners of advisers, and is one of the justifications for the historical requirement in England to use a barrister for the final stages of litigation. The argument for banning MDPs of this nature therefore requires, if followed to its logical conclusion, a ban on partnership between legal advisers and litigators. However, where the divisions should fall between the various types of professional is a matter that in our view

should be determined by trial and error and the market, rather than being set in an ossified structure by regulation.

4.12 There is arguably a second type of MDP. This is a firm that carries on a specialist activity such as tax advice, employment dispute work or patent registration. This work may be done by lawyers or by accountants, employment advocates and patent attorneys respectively. There seems no good reason why tax accountants and tax lawyers or employment advocates and employment lawyers or patent attorneys and intellectual property lawyers should not be allowed to practise together, as indeed they can under current arrangements as long as one is the employee of the other. Concern has been expressed by firms of patent attorneys that an effect of the Bill will be to ban for no good reason arrangements of the sort that currently exist within intellectual property firms. Again, the mere fact that such fears are expressed indicates that the Bill is badly drafted and/or that the underlying policy should perhaps be reconsidered.

Incorporation

4.13 The strategy of the Bill being considered in 2000 was that lawyers would be regulated as to personal standards only, and not as to business form. That strategy appears to have changed. Under the Bill, lawyers and law firms are to be permitted to incorporate but the shareholders and directors will have to be lawyers currently active in the firm. A main benefit to lawyers of incorporation will be limited liability, but this effectively already exists since lawyers often shelter their assets behind family trusts or similar structures and many law firms create limited companies to rent their office buildings, provide support services, employ their staff and so on. The corporate form may also provide a more efficient management structure than a large partnership. However, the usual benefits of a company structure, access to capital and to advice and expertise from other sources, will not be captured. Instead, a company will be created with non-alienable shares attached to other activities, similar to dairy cooperatives and Maori incorporations. These do not always provide happy precedents in terms of business efficiency. In our view limited liability companies subject to the usual rules of the companies

regime should be able to provide legal services. Lawyers employed by such companies would continue to be subject to regulation as to their conduct and would be no more liable to improper pressures than solicitors employed by banks and government departments who are currently allowed to practise.

Regulation of conduct

4.14 The Bill proposes to create disciplinary procedures to deal not only with misconduct but with failures to reach a reasonable standard of competence or diligence. Standards of competence are matters which should be regulated by competition, reputation, liability for negligence and general consumer protection legislation such as the Fair Trading Act and the Consumer Guarantees Act. Instead, the cumbersome and over-elaborate disciplinary process created by the Bill will be brought to bear on questions of competence. The outcome may not be of much use to the complainant. Either the practitioner will be found to have been of a reasonable standard of competence or not. If the outcome is affirmative, that will presumably be the end of the matter. If not, then a remedy may be agreed or imposed but the practitioner will probably be allowed to continue as a member of the regulated profession. With a monopoly regulator, expulsion could mean loss of livelihood and is likely to be seldom used for that reason. In a less regulated system firms and voluntary associations with an interest in maintaining their reputations would be more inclined to expel practitioners who do not come up to much higher levels of competence. The less competent practitioner would therefore migrate to professional associations with less stringent standards. This would provide signalling as to competence which would be of far greater use to the potential client than the current and proposed systems.

Law societies

4.15 District law societies are to be allowed to incorporate. If they do not, their assets will be transferred to the New Zealand Law Society for its representational functions. This is objectionable. These assets have been created by compulsory levy under the current regulatory regime. They should therefore be used for the

benefit of all lawyers, not merely those who elect to join the New Zealand Law Society as a representational organisation. The district law society assets should be transferred to the New Zealand Law Society for its regulatory functions only, or members should be given a voucher which can be 'cashed' with any representative legal body. It may be, for example, that function-based societies such as the Family Law Section and Criminal Bar Association will prove more popular than district law societies.

4.16 The rules made by the New Zealand Law Society are to be subject to approval by the minister. This is also objectionable. The Ministry of Justice will supposedly be the guardian of the public interest. But one of the most important reasons for a public interest in the conduct of lawyers is that they are supposed to have a role in upholding the rule of law, which will mean standing between the citizen and the state. It is therefore unacceptable that there should be a mechanism by which the minister exercises power over the Law Society and which brings the society into constant contact and negotiation with government officials. If it is desired to have some outside oversight of the rules made by the New Zealand Law Society, this should be the responsibility of the presiding judge of the High Court (who presumably will not be the Chief Justice if the Supreme Court comes into being), just as in England such oversight is exercised by the Master of the Rolls. Lawyers are, after all, admitted as 'Barristers and Solicitors of the High Court of New Zealand'.

Council of Legal Education

4.17 Provision is specifically made in the Bill for the Council of Legal Education to be both a provider of services through the Institute of Professional Legal Studies and the regulator of professional legal training able to regulate the IPLS's competitors. This is not a proper position. The Council has in fact licensed the College of Law to provide a professional legal course in competition with the IPLS. Rather than making provision for the Council to be able to hive the IPLS off if it wishes, it should be made to do so.

5 Conclusions and summary

5.1 A number of other issues are covered in the NZBR report *Regulation of the Legal Profession* such as the position of barristers and Queen's Counsel. The NZBR is content to leave these matters to submissions by those more directly concerned. In general, however, we think the Bill is over-prescriptive, as can be judged simply from its length, and unlikely to materially capture the benefits of any supposed relaxation of regulation. We see it as largely favouring the interests of the New Zealand Law Society, both in centralising functions away from district law societies to the New Zealand Law Society and in maintaining and perhaps strengthening lawyers' monopolies.

5.2 We submit that the Bill's general structure needs to be rethought. A situation in which there is a monopoly regulator that also functions as a members' organisation and can regulate other non-member lawyers is inappropriate.

5.3 There are several other features of the Bill which in our view require reconsideration. We submit that:

- the provisions for regulation of conveyancing should be amended and the primary responsibility for recognising conveyancers' qualifications be given to the Registrar of the Land Registry. The Registrar should apply the same rules to lawyers and conveyancers;

- the definition of reserved areas of work should be drastically narrowed so as to protect only the filing of documents in court and appearances in court, although this requirement should itself be left to the courts to decide;

- the Bill should not restrict the business forms in which lawyers choose to organise themselves;

- the statutory disciplinary system should not be involved in standards of competence and other matters on which lawyers should compete;

- the assets of district law societies must be made available to all lawyers and not merely to those who choose to join the New Zealand Law Society or district law societies;

- the minister should have no role in approving the rules of the New Zealand Law Society. If external oversight is required this should be by a senior judge or judges, such as the presiding judge of the High Court; and

- the Council of Legal Education should be required to divest itself of the Institute of Professional Legal Studies.