THE VICTORIAN BAR INCORPORATED

SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

INQUIRY INTO ETHICS AND PROFESSIONAL ACCOUNTABILITY: STRUCTURAL CHALLENGES IN THE AUDIT, ASSURANCE AND CONSULTANCY INDUSTRY

INTRODUCTION

1. The Victorian Bar **(the Bar)** welcomes the opportunity to provide submissions to the Parliamentary Joint Committee on Corporations and Financial Services (**the Committee**) in response to its inquiry "*Ethics and Professional Accountability: Structural challenges in the Audit, Assurance and Consultancy Industry*" (**the Inquiry**).

2. The Bar is the professional association representing more than 2,200 barristers in Victoria practising in diverse areas of law.

ACKNOWLEDGEMENT

3. The Bar acknowledges the contributions of Georgina Schoff KC, James Barber KC, Joseph Carney, Lachlan Molesworth and Daniel Kinsey in the preparation of this submission.

COMMENTS IN RESPONSE

Summary

4. The Inquiry's terms of reference are broad. They arise against a background where PricewaterhouseCoopers (**PwC**), a "multi-disciplinary" firm of professional advisors which includes accountants, consultants and lawyers, is understood to have misused confidential information of the Commonwealth in order to further its commercial activities with other clients (as recorded in the Senate Finance and Public Administration References Committee Report "*PwC: A calculated breach of trust*" (the **Senate Committee Report**)).

5. A central concern raised by the Inquiry's terms of reference involves the governance of professional services firms in the context of conflicts of interest and misuse of confidential information, and accountability of consultants' work.

6. This submission focuses on three matters:

    a. the differences in the professions that arise not only out of different *regulatory environments* but different *ethical norms*. This provides some necessary background to the Committee's work and perspective on the Senate Committee Report;

    b. the use of claims of legal advice privilege by "multi-disciplinary partnerships" (or "practices", **MDPs**), which are business entities that provide legal services and other professional advisory services (most frequently accounting services, but commonly also consulting services). The Senate Committee Report referred to this problem at [1.76]:

    "… PwC subsequently sought to protect its reputation by effectively stonewalling the Australian Tax Office (ATO) in its pursuit of documentation related to the misuse of

confidential information by Mr Collins and other PwC partners. Based on evidence from the ATO, it is open to the committee to conclude that PwC did this by the inappropriate and incorrect application of legal professional privilege to tens of thousands of PwC documents. In this regard, the committee notes a relevant Federal Court case involving the Commissioner of Taxation versus PricewaterhouseCoopers [2022] FCA 278. In that case, Justice Moshinsky ruled that PwC had incorrectly applied legal professional privilege to more than half of approximately 15,500 documents requested by the ATO. It seems clear that PwC's use of this tactic is not restricted to the Collins matter."; and

c. the Commonwealth's procurement protocols being skewed towards the provision of services primarily by MDPs and other large consulting firms (not only for the provision of legal services, but professional services generally), when in many cases the better provider of those services might be individuals (who would certainly be more cost-effective and more accountable service providers).

7. The Bar submits that there is some justification for the widespread misgivings as to the use of large professional services firms, both in terms of the conflicts that their entrepreneurial drive for profit necessarily generate, and in terms of value. The increased reliance on such firms in recent times (driven in part by their own marketing budgets) has also led to less reliance on individual experts. Recourse to independent individuals when external expertise is required would mitigate the costs of services provided to the public sector, increase accountability, and protect against conflicts of interest and breaches of trust.

Some preliminary observations

Conflicts are best avoided, not managed

8. It is more important to *avoid* the possibility of a conflict of interest arising, or the opportunity to misuse confidential information, than to try to *manage* it. In the real world, "*management*" of conflicts seldom works.

9. One of the best-known apothegms in Australian politics, attributed to Jack Lang, is:

> *"Always back the horse named self-interest, son. It'll be the only one trying."*

10. Commissioner Hayne, in the "Banking Royal Commission", may or may not have had Jack Lang in mind in his introductory comments to the Commission's Final Report:[1]

> *"Chapter 7 of the Corporations Act 2001 … and the National Consumer Credit Protection Act 2009 … speak of 'managing' conflicts of interest. But experience shows that conflicts between duty and interest can seldom be managed; self-interest will almost always trump*

[1] The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1, 3.

duty."

11. One of the most effective ways in which the law's responds to the problem of self-interest is to insist on *undivided loyalty* in relationships that involve sufficient elements of trust, confidence and reliance. Such relationships are known as "*fiduciary relationships*" and give rise to "*fiduciary duties*". Lawyers, including barristers, are *automatically* presumed to owe such duties to clients; whether other professionals will owe such duties depends on the particular circumstances of each retainer.

12. Justices Gaudron and McHugh in the High Court explained the basis for fiduciary duties with scripture, rather than Jack Lang, in mind:[2]

> *"The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that "[n]o man can serve two masters". Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve."*

13. A fiduciary can only avoid the strict duties that arise from the obligation of undivided loyalty by obtaining the fully informed consent of the person to whom they are owed so as to permit departure from the duties in some particular way. If a potential conflict is unavoidable or possibly foreseeable, then the focus must be on a stringent disclosure of that conflict.

The modern professional services firm

14. The rise of the large professional services firm is a relatively new phenomenon, dating from the early 1980s. Prior to the 1980s, professional services firms rarely comprised more than a dozen partners, with individual partners servicing clients supported by a handful of employees. The business model of the large firm is based upon leveraging partners' time through the use of a large number of junior employees. Services are accordingly delivered in a fundamentally different way than prior to that time. Developments in information technology however mean that the case for using such large firms is far less pressing than it might have been.

15. MDPs are even newer, having first been allowed to operate in New South Wales from 1 July 2001. MDPs have typically involved accountancy firms integrating legal practitioners into their structure.

The unique position of government

16. The position of government is fundamentally different to that of the private sector because everybody deals with the government and the government owes duties to all of its citizens. A large professional services firm will inevitably have important clients who would welcome an insider's view.

17. Moreover, even without any direct breach of confidentiality, many clients of large firms will benefit

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2 *Breen v Williams* (1996) 186 CLR 71, 108.

indirectly from the firm's experiences of dealing with government. This raises another important issue, which is that, absent compelling reasons, government should not confer any special privileges on one group in society ("the clients of X firm") over another ("the clients of Y firm").

The problem for government in dealing with large firms

18. It follows from the fact that everyone deals with government in some way or another, together with the inevitably large private and corporate clientele of the big firms, that conflicts of interest are inherent in the relationship. The problem is worse still with multi-disciplinary firms, not only because of their even larger size and client base, but also because of the less rigorous regulation to which they are subject – a matter that is discussed below.

19. Further, the larger the size of the firm, the larger the incentive to obtain useful information to exploit for (and benefit) a larger client base; and in turn the larger the adverse impact of the dissemination of that material.

20. The response of large firms – to institute information barriers, sometimes called "Chinese walls" – is no answer. Repeated experience, running through decades leading up to the recent PwC scandal, is that information barriers are breached all too often. Self-interest will often get through. And even where it does not, inadvertent and accidental disclosure remains a serious risk. Where breaches do occur, their occurrence rarely comes to light; and when breaches occur, there is often limited recourse, a consequence of limited regulation of such consultancies and even less active enforcement.

Regulatory costs

21. Comprehensive regulation comes at a cost and the cost must be borne ultimately by the public, either as taxpayer or as consumer.

Individual experts often provide the best advice

22. Professor Samuel is right in what he says in Submission 1 to the Committee: suitably qualified individuals tend to give the best professional advice, both in terms of quality and cost. There are many examples of the successful use by government of individual professionals, not only as Royal Commissioners or to represent organs of the state before the Courts, but also such matters as inquiring into the need for, and drafting, new legislation. Examples include:

    a. the 1988 Harmer Report, whose author, Professor Ron Harmer, went on to undertake projects for the Asian Development Bank, the World Bank, the European Bank for Reconstruction and Development and the United Nations Commission on International Trade Law (UNCITRAL);

    b. Part IVA of the *Income Tax Assessment Act 1936* (Cth), drafted by Murray Gleeson QC (at that time a barrister, later Chief Justice Gleeson of the High Court of Australia); and

    c. the statutory review of the *Environment Protection and Biodiversity Conservation Act* 1999, commenced on 29 October 2019 by Professor Graeme Samuel AC, who was appointed as

the independent reviewer.

23. Retaining individuals, rather than firms, also provides the best environment for avoiding conflicts of interest. That is because of the necessarily narrower client base of individual professionals and, at least in the case of lawyers, tighter regulation and more effective enforcement of ethical rules. With an individual professional, both the motivation and the opportunity for conflicts and leakage of confidential information are minimised.

24. Perhaps most importantly, an individual is directly accountable for their advice. There is no corporate veil to hide behind, and poor advice or improper conduct will have immediate consequences.

25. A barrister, for example, does not have the option of resigning from a firm and continuing employment elsewhere if something goes wrong. By virtue of their sole practitioner status, barristers have immediate and unavoidable accountability. They face personal consequences for their behaviour and they may be personally liable for any wrongdoing. It is for this reason that, in Australia, barristers are not permitted form partnerships and must practice as individuals – they must be sole practitioners at law with immediate personal responsibility to the client which they serve.

26. The challenge for government, accordingly, is to employ procedures and protocols that encourage and facilitate the use of individuals as experts whenever appropriate. A shift away from large firms to individuals when external expertise is required should mitigate the costs of services provided to the public sector, increase accountability and protect against conflicts of interest and breaches of trust.

Regulatory environments and professional norms

Overview

27. The duties that a professional service provider owes to a client are primarily a matter of agreement between the provider and the client; the professional identity of the provider will also dictate what those terms can and cannot include.

28. Different professions are subject to different regulatory regimes. For example, Australian lawyers cannot charge a fee calculated by reference to a percentage of the value of a transaction or dispute; accountants can. Management consultants are not subject to any professional regulation or discipline.

29. Justice Brennan (as he then was) described the difference in this way:[3]

> *"[a lawyer's duty] … is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of a client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer, as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of a contract, charges under the criminal law or any other of the varied fields*

[3] *Leary v Federal Commissioner of Taxation* (1980) 11 ATR 145, 161–2.

> *of professional concern. It is a duty which arises out of the relationship of lawyer and client. But activities of an entrepreneur in the promotion of a scheme in which taxpayers will be encouraged to participate falls outside the field of professional activity; those activities are not pursued in discharge of some antecedent professional duty."*

30. The above passage highlights a key point of difference between a tax lawyer and a tax accountant:

> *"While lawyers, it seems, are to foster independence ahead of entrepreneurial spirit in dealings with clients, a characteristic of the accounting profession is its close association with entrepreneurial promotion to clients. It is something also reflected in restrictions on the manner in which tax lawyers can charge, which have no application to charging by tax accountants."*[4]

31. Accordingly, the entrepreneurial activities of other consultants provide a fundamental point of departure between lawyers and accountants (and management consultants).

Regulation of lawyers

32. Lawyers are subject to statutory regulation, including professional conduct rules which contain stringent ethical obligations. In Victoria and New South Wales, lawyers are regulated by independent State-based Legal Services Commissioners, whose boards include non-legally-qualified members.

33. The Commissioner enforces the legislation and rules. Serious breaches are prosecuted in public proceedings in State administrative tribunals, and sanctions are imposed by way of fines, conditions on practice, or suspension or cancellation of the practising certificates giving the right to practise.

Regulation of accountants

34. With the exception of registered company auditors and liquidators, and registered tax agents, there is no external regulation of accountants in Australia. Accountants are otherwise self-regulated by their professional associations, CPA Australia and CAANZ.

The position of MDPs

35. State-based lawyers' regulatory authorities do not regulate the non-legal activities or personnel of MDPs.

36. By contrast, in England and Wales multi-disciplinary practices are regulated by the Solicitors Regulation Authority (**SRA**). The SRA's guidance[5] states that the SRA may agree that particular non-reserved legal activity[6] performed by non-legal professionals may be excluded from regulation by the

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4 See Dal Pont, "Ethical Conflicts and the Tax Practitioner" (2015) *Revenue Law Journal* 1, 10.

5 https://www.sra.org.uk/solicitors/guidance/non-reserved-legal-activity/

6 The meaning of "non-reserved legal activity" is determined by s 12 of the *Legal Services Act 2007* (England & Wales). Broadly speaking it refers to the provision of legal advice, assistance or representation other than: the exercise of a right of audience; the conduct of litigation; probate and notarial activities; and the administration of oaths, among other matters.

SRA, but the MDP as a whole will be authorised and regulated by the SRA, and any misconduct of the firm, its members or employees in non-SRA regulated areas may be taken into account when considering the MDP's fitness to hold a licence, or compliance with conditions.

37. The SRA's guidance further states:

> *"We are particularly concerned that cases involving the provision of reserved legal activities do not move between SRA regulated and other services in a way that causes detriment."*

38. This appears to overlap with the concern that has prompted the inquiry. The SRA's position is that where substantial overlap exists between legal activity provided by a non-legal professional and the kind of legal work that a lawyer would provide, such as with taxation advice, the SRA will likely include it as SRA regulated activity, unless it is subject to suitable external regulation.

39. In the EU, MDPs are recognised where they are permitted in the host Member State.[7] In 2005, the Council of Bars and Law Societies of Europe (**CCBE**) considered the question of MDPs and concluded[8] that:

> *"… lawyers' duties to maintain independence, to avoid conflicts of interests and to respect client confidentiality are particularly endangered when lawyers exercise their profession in an organization which, factually or legally, allows non-lawyers a relevant degree of control over the affairs of the organization. Interests conflicting with the stated duties of lawyers, arising from the concerns of the non-lawyers involved, may directly influence the organization's aims or policies. The CCBE came to the conclusion that the problems inherent in integrated co-operation between lawyers and non-lawyers, with substantially differing professional duties and different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded."*

40. MDPs present a structure where the risk that entrepreneurial appetites will trump professional norms is, if anything, heightened. The PwC affair provides a clear example of the crystallisation of that risk. The Committee might well take the view that the example of how MDPs are regulated in England and Wales points to a gap in how those structures are regulated by the Australian States.

Barristers' professional ethical norms

41. Ethical norms are of critical, perhaps primary, importance in regulating the relationship of client and professional adviser.

42. Like all Australian lawyers, barristers are "officers of the Court", whose first and paramount ethical

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7 See e.g. Case C-309/99 *Wouters*; cf Case C-384/18 *EC v Belgium*.

8 CCBE Position on Multi-disciplinary Partnerships, June 2005, 5.

duty is to the administration of justice.[9] A barrister's duty to the Court has priority over their next most important duty, being their duty to zealously represent the interests of their client to the best of the barrister's ability – for example, a barrister must draw the Court's attention to legal authorities relevant to the case before the Court even if those authorities are against their client's interest.[10]

43. Studies in "ethics and professional responsibility" are compulsory elements of Australian lawyers' academic and professional qualifications. Moreover, the continuing professional development standards which are legally mandated for Victorian barristers require each barrister to undertake at least on unit of continuing professional development in the field of "ethics and professional responsibility" each year.

44. The nature of barristers' work is that they are "briefed" by clients (engaged as individuals, on short-term bases) to provide advice in relation to a discrete dispute or issue, and/or advocacy services before a court or tribunal in relation to a discrete dispute. A barrister is retained to provide independent opinions and services as an expert in their specialised field. Although some barristers might be engaged repeatedly by the same client, each "brief" is an independent contract. As a result, unlike law firms, barristers generally do not provide ongoing and wide-ranging legal services to clients for long periods of time.

45. Barristers are subject to the "cab rank rule", which (subject to narrow and stringent exceptions) requires a barrister to not discriminate against any client who offers the barrister a brief to appear in court in a case within the barrister's expertise.[11] This rule prevents barristers from not accepting briefs from clients they might find personally odious, or screening cases so they only accept briefs likely to result in a "win".

46. As discussed above, barristers practise as individuals. In addition to ensuring that barristers are personally accountable for the work they do, the above-mentioned constraints underpin the Bar's professional ideal of the pursuit of public service rather than profit. As Sir Anthony Mason AC, KBE observed, that ideal is the difference between professionalism and commercialism.[12]

Multi-disciplinary partnerships and legal advice privilege

Legal Professional Privilege

47. Legal professional privilege (**LPP**) is a rule of substantive law and an important common law right. Legal advice privilege, a form of LPP, protects confidential communications between a lawyer and client from being disclosed if those communications are made for the dominant purpose of giving or

[9] *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 23: "A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice."

[10] See *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 29.

[11] See *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 17.

[12] "The Independence of the Bench; the Independence of the Bar and the Bar's Role in the Judicial System", Keynote address to the 1992 Conference of English, Scottish and Australian Bar Associations, London 4 July 1992, (1993) 10 *Australian Bar Review* 1 at 9.

obtaining legal advice or the provision of legal services.

48. The "client" for the purpose of the rule includes any agent of the client; and, in the case of a document, it is not necessary that the client itself has prepared the document, ie if the client asks somebody else to prepare a document so that they can then give it to their lawyer in order to obtain legal advice, that document will be privileged.

Proposals for extension of LPP to accountants

49. LPP only applies to advice given by lawyers. Law reform commissions in Australia and the United Kingdom have suggested that if LPP is to be extended beyond lawyers then that extension must be clearly defined and delimited. New Zealand has in fact legislated along these lines.

50. In the United Kingdom, the 1983 Report of the Committee on Enforcement Powers of the Revenue Departments, Cmnd 8822 ("the Keith Report"), recommended that if LPP were to be extended to communications in connection with tax advice given by expert accountants, it be subject to two qualifications:

    a. the privilege should be overridden where it "*would … unreasonably impede the ascertainment of facts necessary to the proper determination of the taxpayer's tax liabilities, being facts not otherwise capable of ascertainment*";[13] and

    b. that LPP should not extend to advice given by in-house professional advisers.[14]

51. In New Zealand, the *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* created a statutory privilege in relation to any confidential "*tax advice document*" by inserting into the *Tax Administration Act 1994* a suite of statutory provisions (sections 20B to 20G) requiring the relevant "tax advisor" to be a member of an "approved advisor group" approved by the Commissioner of Inland Revenue and providing that disclosure must nonetheless be made, from any tax advice document, of "*tax contextual information*", which was broadly defined.[15]

52. In Australia, the Law Reform Commission, in *A Review of Legal Professional Privilege and Federal Investigatory Bodies* (ALRC Report 107 dated December 2007) supported "*the New Zealand model of creating a separate 'tax advice privilege', rather than simply extending client legal privilege to accountants giving tax advice*"; and it did this specifically because it would allow Parliament greater

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13 Para 26.6.5

14 Para 26.6.13

15 This was defined to include, amongst other things, (a) a fact or assumption relating to a transaction that has occurred or is postulated by the person creating the tax advice document; (b) a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document; (c) advice that does not concern the operation and effect on the person of tax laws; (d) advice that concerns the operation and effect on the person of tax laws relating to the collection by the Commissioner of debts payable to the Commissioner; (e) a fact or assumption relating to advice that is referred to in paragraph (c) or (d); and (f) a fact or assumption from, or relating to the preparation of (i) financial statements of the person, or (ii) a document containing information that the person is required to provide to the Commissioner under an Inland Revenue Act.

control over the operation and scope of tax advice privilege.[16]

53. As to the nature of the control, it said:[17]

> *"The ALRC is also supportive of the provision in the New Zealand legislation which does not apply the privilege to contextual information provided for the purpose of providing tax advice. It should be very clear in the operation of this privilege that only the advice itself will be protected, and not any other information that may form part of the accountant's file or briefing. The legislation should state that no privilege should apply to 'tax contextual information' given for the purpose of providing tax advice. 'Tax contextual information' should be defined as information about:*
>
> *a fact or assumption that has occurred or is postulated by the person creating the tax advice document; a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document; or*
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> *advice that does not concern the operation and effect of tax laws."* (emphasis added)

Wearing Two Hats: Commissioner of Taxation v PricewaterhouseCoopers [2022] FCA 278

54. The Federal Court decision of *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 has exposed difficulties with the way in which claims of LPP are dealt with in the context of MDPs:

    a. claims of legal advice privilege by multi-disciplinary partnerships are so inherently complicated and costly to resolve that there is no practical way to deal with them at present;

    b. the complexity of such claims results in claims being wrongly made, whether through innocent error or opportunism; and

    c. there is a question to be investigated as to whether in practice accountants are often, contrary to the ALRC's recommendations, able to successful obtain privilege over "tax contextual information".

55. The question central to whether LPP exists or not is: "*why was this document created?*". This normally arises where there is a clear distinction between who is seeking and who is receiving legal advice. However, as the Federal Court's PwC decision shows, that distinction can easily become blurred in the case of MDPs, where (in order to extend the umbrella of LPP as widely as possible) non-lawyers are expressed to wear two hats:

    a. as assistants to the relevant lawyer (notwithstanding that their charge out rates and

[16] Para 6.278

[17] Para 6.281

experience might be greatly in excess of that lawyer's); and

b. as agents of the *client*, to assist the client in giving instructions to and receiving advice on the client's behalf.

56. This leads to an impractical scenario where each document, amongst thousands, must often be considered individually in order to determine whether its creation satisfied the "dominant purpose" test for it to be privileged.

57. The PwC case involved a sample of 116 documents taken from approximately 15,500 documents over which the multi-national client of PwC (**JBS**) claimed legal advice privilege in response to a notice to produce documents issued by the ATO in the context of a tax audit.

58. The issue took five hearing days at which twelve counsel (three as *amicus curiae* appointed by the Court to review the documents for the Court's benefit) appeared. The judgment ran to 228 pages.

59. It was found that of the 116 documents, 61 were not privileged, 6 were partly privileged and 49 were privileged. This was from a sample of 50 documents chosen by JBS and PwC and 50 documents chosen by the Commissioner.[18]

60. It might be noted that, when the Commissioner listed the first 50 documents in respect of which he challenged the claim of LPP, the JBS parties *withdrew* their claims of privilege over many of them. When the Commissioner proposed replacement documents to his list, the JBS parties *again* withdrew their claims of privilege over many of those documents. Further replacements were chosen; and privilege claims over some of the documents concerned (or parts thereof) were *yet again* withdrawn.[19]

61. The evidence of the arrangements entered into between PwC and its various JBS clients might be summarised as follows. Mr Glenn Russell was a PwC partner working initially as an accountant in tax advisory work. On 14 June 2014 he was admitted to practise as a solicitor.

62. JBS and PwC entered into an Umbrella Engagement Agreement on 16 July 2014 which provided for services to be provided under particular statements of work.

63. The statements of work which the Umbrella Engagement Agreement anticipated were each for the provision of legal services which non-lawyers could assist in providing "*under the direction*" of a lawyer (Mr Russell).

64. However, they also included a "*Communications Protocol*" which provided that these same non-lawyers were also appointed as the agents of JBS:

> *"….for the purpose of communications to and from the legal services team. This includes*

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[18] Some documents chosen were ultimately treated as being more than one document for the purpose of consideration; hence 116 rather than 100 documents being considered.

[19] The process is set out at paragraphs [26]-[27] of the reasons.

> *giving instructions to and receiving legal advice and services from the Australian legal practitioners."*

65. The PwC team providing the services to JBS included Mr Russell, who was billed out at $862 per hour and two non-lawyers, an international tax partner billed out at $1,459 per hour and an international tax senior manager billed out at $1,141 per hour, rates that significantly exceeded that of Mr Russell. An internal email from PwC Australia to PwC USA stated that for work for JBS a partner who was not a lawyer:

> *"… will take the lead from the Australian side going forward with [Mr Russell] continuing on in a support role in order to ensure the timely delivery of the project and LPP is maintained."* (emphasis added)

66. The ATO unsuccessfully argued a number of broad propositions: first, that the PwC non-lawyers purportedly wearing two hats (as assistants to the PwC lawyers and as agents of the client) created a role for those non-lawyers that was "*so obscure and multifaceted*" that it prevented the necessary lawyer-client relationship from arising; secondly that as a matter of substance the arrangements involved such a level of work by non-lawyers that in truth what was being sought and received was not legal advice or alternatively that this meant that the dominant purpose of the documents in question was not for the giving or receiving of legal advice.

67. The Court rejected these submissions, in essence finding that, once it was clear that some legal advice had in fact been sought and had in fact been given, the question had to be considered on a document by document basis, noting (at [220]) that by reason of the services being provided by a mixed team of lawyers and non-lawyers "*caution is required in evaluating whether or not a particular communication was made for the dominant purpose of giving or receiving legal advice*".

68. The MDP structure in this case occasioned factually complex claims for LPP that would be beyond the resources of most private litigants to challenge. It also raises a serious question as to whether, as a practical matter, MDPs permit accountants substantial access to LPP without the clear carve-outs suggested by the ALRC and implemented in New Zealand.

Increasing the use of barristers as individual experts

69. For the reasons developed above, it is the Victorian Bar's submission that the use of independent experts should be preferred to the retention of large firms in order to overcome issues of cost, accountability and risks of breach of confidence and trust.

70. An important source of such independent individual experts for government and the public sector are Australian barristers.

71. Barristers are subject to some of the most onerous regulatory frameworks and common law duties. Those rules govern every aspect of a barrister's retainer, including the form of engagement, rigid

management of conflicts, and the charging of fees.

72. Of equal importance, the interests of independent practitioners such as barristers are better aligned with the interests of government clients by virtue of the short-term nature of barristerial engagements and natural risk aversion through personal accountability and potential liability. The use of barristers who are retained on short-term engagements means that barristers are best positioned to give frank and fearless advice. This is of great value in providing services such as the drafting of, or advising on, legislation, or reviewing the implementation of policy and regulation across government departments and services.

73. Further, the inability to leverage resources through pyramid structures in large firms removes the incentive to "up-sell" services, as a barrister can do no more work than there are hours in a day. This may be contrasted to a large firm with a pyramid structure that sees partners as hunters for work which is then "farmed out" to a team below.

74. Having an independent barrister review or advise on a course of action gives a government client a fresh and independent opinion from an expert in the field, as distinct from a large firm who may maintain ongoing and long-term relationships with the government client.

75. In the case of reviews, since barristers do not have long-term client relationships and are further removed from clients than firms, appointees to review positions are more independent.

76. Having recourse to all of the specialist independent barristers at the Bar provides an obvious benefit to parts of government who cannot cost-effectively maintain specialist experts as permanent staff or might have difficulty recruiting or retaining staff – which is traditionally one of the reasons that work has been outsourced by the public sector to large firms. The independent Bar allows those parts of government to obtain short-term counsel and assistance, without having to sign up to complex on-going engagements with large firms seeking to "up sell" services. The cost effectiveness of retaining an individual is superior as a result of not having the costly bureaucracy and sales functions that come with a large firm – a barrister charges and is paid directly as a sole practitioner.

77. Existing Commonwealth government policy and procedure for using barristers is relatively undeveloped. Accordingly, their use by public servants is not as easy as it should be. The consequence is that barristers, an important source of independent and accountable expertise, are underutilised by government other than in a litigation context.

78. The Legal Services Directions 2017 (**Legal Services Directions**) sets out binding rules issued by the Commonwealth Attorney-General about the performance of Commonwealth legal work.

79. At present the Legal Services Directions only deal fleetingly with the use of barristers; and are principally aimed at retaining firms of solicitors.

80. The Commonwealth maintains panels of firms for specific areas of legal work, but there is no

equivalent for independent counsel.

81. Other jurisdictions have sophisticated guidelines for the use of barristers in an equivalent way to solicitors firms: see, for example, the model adopted in the United Kingdom: https://www.gov.uk/guidance/attorney-generals-panel-counsel-appointments-membership-lists-and-off-panel-counsel.

82. The lack of any equivalent Commonwealth whole-of-government protocol for retaining barristers hinders the Commonwealth's ability to draw upon such a resource and in many instances will effectively deprive the Commonwealth of the possibility.

83. It is the Bar's submission that the Legal Services Directions should be updated in the following manner:

    a. a specific set of guidelines should be prepared on the engagement and use of barristers by government clients;

    b. standardised procedures should be developed for the retainer of barristers by all Commonwealth bodies;

    c. a panel of preferred barristers for Commonwealth clients should be developed to facilitate the easy identification of recommended and experienced counsel in specific fields which have application for government clients (as is done in England and Wales, a call for applications to be accepted into a particular category of such a panel be made at regular intervals);

    d. a standardised and easy briefing procedure should be adopted so that the public sector can readily call on independent counsel when required, rather than only engage with firms with pre-existing long-term engagements in place;

    e. steps should be taken to increase awareness of the availability of independent counsel to the public service in place of large firms (who are actively able to market and up-sell themselves to public officials); and

    f. an updated set of Commonwealth fee rates (also known as Office of Legal Services Coordination rates) should be developed to carefully set the hourly and daily rates for counsel services which are provided by barristers to government, in order to manage finite public sector resources and protect against the excessive costs seen with large firm retainers, while maintaining trust in retaining the services of barristers.