Law Council
OF AUSTRALIA

Professor (Emeritus) Sally Walker
Secretary-General

20 July 2012

Assistant Secretary
Business Law Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Assistant Secretary

Submission on the Review of Australian Contract Law

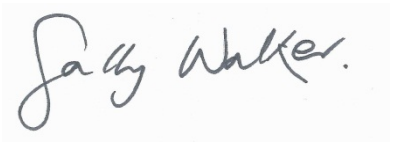
The Law Council of Australia is pleased to provide the attached submission to the consultation paper released by the Attorney-General's Department, *'Improving Australia's Law and Justice Framework: A discussion paper exploring the scope for reforming Australian contract law'*.

The Law Council is pleased to discuss its submission in greater depth and to provide any assistance to the Attorney-General's Department.

The Law Council contact for this matter is Mr Simon Henderson, Policy Lawyer, Civil Justice Division, who can be reached at 02 6246 3736 or simon.henderson@lawcouncil.asn.au.

Please note that due to time constraints the submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely



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OF AUSTRALIA

Response to Discussion Paper '*Improving Australia's Law and Justice Framework: A discussion paper to explore the scope for reforming Australian contract law*'

Commonwealth Attorney-General's Department

20 July 2012

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Executive summary

1. The Law Council of Australia (**the Law Council**) is the national peak body representing the Australian legal profession through the Law Societies and Bar Associations of the States and Territories and the Large Law Firm Group (collectively referred to as the "constituent bodies" of the legal profession). For further information on the Law Council, please see **Attachment A**.

2. The Law Council welcomes the opportunity to respond to the Attorney-General's Discussion paper *"Improving Australia's Law and Justice Framework: A discussion paper to explore the scope for reforming Australian contract law"* (**the Discussion Paper**) and considers the present inquiry to be a valuable opportunity to examine the operation of contract law and consider how its operation may be improved.

3. The Law Council recognises that Australia's contract law is complex and contains a number of specific areas where the operation of contract law or related regimes may be improved and enhanced by greater clarity.

4. The Law Council does not, however, consider that sufficient evidence currently exists for a comprehensive simplification, restatement or reform of Australian contract law.

5. The Law Council considers that the current system continues to function well. Nevertheless, to the extent that the operation of specific areas may be improved, the Law Council submits that this inquiry presents an opportunity to explore how the existing law of contract in Australia may be improved, through harmonisation across the states and territories, specific reforms to address certain anomalies and clarification of a number of key principles.

6. If a reform project of any nature is ultimately to proceed, the Law Council considers that a thorough review process is required. The Law Council suggests that the Australian Law Reform Commission (ALRC) would be an appropriate body to engage in such a process.

7. In the event that a reference is made to the ALRC, the Law Council would suggest that a threshold consideration for the ALRC would be whether there are economic as well as legal indicators supporting comprehensive reform.

8. The Law Council would be pleased to provide input in relation to any future discussions and initiatives regarding the reform of Australian contract law.

Background

9. The Discussion Paper acknowledges that contract law forms one of the most important elements of any legal framework.[1] Australia's contract law is noted as performing well by international standards, with Australia ranked 17th out of 183 countries on a measure of the ease with which contracts can be enforced. This provides, however, "only one indicator of contractual efficiency" and is "no excuse for complacency".[2]

[1] Discussion Paper, para 1.3.
[2] Discussion Paper, para 1.5.

10. The Discussion Paper questions whether reform of Australian contract law may improve efficiency of business transactions, in the context of various factors including:

    - developments and reforms to the law, which may have created confusion and uncertainty;
    - an expanding digital economy;
    - the needs and interests of small and medium sized businesses; and
    - Australia's trade and business transactions with parties around the world.

11. The Discussion Paper seeks broad input and comments in relation to this debate and, in particular, has raised 8 questions for consideration. The Law Council has considered each of these questions and provides its responses below.

12. The Law Council formed a national working group to consider the discussion paper and prepare this submission. The working group included senior legal practitioners from across Australia with extensive legal experience and expertise in various areas of contract law.

13. The Law Council also acknowledges the New South Wales Bar Association, Queensland Law Society and the Large Law Firm Group which provided input into the submission.

Drivers of reform

Question 1: What are the main problems experienced by users of Australian contract law? Which drivers of reform are the most important for contract law? Are there any other drivers of reform that should be considered?

14. The Discussion Paper identifies various drivers for reform, in particular the need for accessibility, certainty and simplification, the need to maximise participation in the digital economy and the desirability of harmonisation across jurisdictions, both nationally and internationally.

15. Although the Law Council agrees in principle with the desirability of many of these elements, the Law Council does not agree that existing problems with Australian contract law are so extensive that a restatement or comprehensive reform is necessary. The Law Council considers that the fundamental principles of contract law remain sound, but are challenged by increasingly complicated factual scenarios. This is compounded by the impact of legislative requirements, particularly consumer legislation. Although some concerns have been expressed about the complexity of contract law, there does not appear to be any serious call by business for full-scale reform.

16. As acknowledged by the Discussion Paper, Australian contract law originates in English common law, which has been supplemented by equitable doctrines, Commonwealth, State and Territory statutes and international law instruments.[3]

17. Contract law in Australia has evolved over many years. Its strengths and weaknesses have continually been tested in the courts and will continue to be so

[3] Discussion Paper, para 1.4

tested. There is a body of case law and statutes that enable lawyers to advise on, and clients to assess, any contractual risks and to proceed with commercial transactions with reasonable certainty and fairness.

18. The Law Council considers that the common law has the flexibility necessary to reflect developments in business and society.

19. The Law Council is concerned that further legislation or codification could, rather than simplifying contract law, potentially increase uncertainty and costs, particularly in the short term.

20. Contract law underpins trade and commerce throughout the country and any reform of contract law should not be undertaken lightly, given the potentially significant ramifications of such reforms.

21. The Law Council considers that before embarking upon any formal program of contract law reform, a comprehensive study should be undertaken, involving government, academia and the legal profession, to determine whether there are any major problems with contract law as it currently exists and to ascertain whether there are any areas in need of reform. The study should also consider the likely impact of any such reform, including a comprehensive assessment of the costs, benefits and feasibility of contract law reform proposals under consideration. The Law Council suggests that the ALRC would be the most appropriate body to engage in such a process.

Areas of potential improvement

22. Although the Law Council does not believe that there are sufficient drivers to justify full-scale reform of Australian contract law, it acknowledges that there are aspects of existing contract law which would benefit from refinement. The Law Council remains supportive of any initiative to improve the operation of contract law, particularly in view of the fact that several legislative schemes have grown around or otherwise impact on contract law. It submits that this review presents an appropriate opportunity to clarify contract law as it is intended to operate within contemporary legal frameworks.

23. In addressing these issues, the Law Council emphasises that a consideration of the rights of consumers is as important as the need to facilitate domestic and international trade and investment. The Law Council also remains supportive of refinements to Australian contract law which have the effect of promoting Australia as a regional hub for dispute resolution.

24. The Discussion Paper queries: what are the "main problems" experienced by "users" of Australian contract law? The term "users" could be interpreted in a number of ways and the Law Council's response is formulated from the perspective of problems encountered by practitioners when advising their clients in relation to contract negotiation and formation, interpretation and other disputes.

25. The Law Council emphasises that the "main problems" experienced by users do not constitute a business case for full-scale reform. It identifies the following as examples of areas of contract law which nevertheless potentially warrant some form of further attention.

(a) Formation

- *Parol evidence rule*

  Various aspects are uncertain, including situations where collateral contracts constitute an exception or limitation; or differ from principles accepted in the domestic law of our major trading partners or international instruments, especially the use of subsequent conduct to interpret contracting parties' intentions.

- *Pre-existing duty rule*

  It is unclear whether and how this rule is avoided, and good consideration provided, where a 'practical benefit' is achieved.

- *Misrepresentation*

  Clarification may be appropriate in relation to the uncertainty which may arise from the interpretation of statutes. For example, greater clarity may be useful in relation to the effect of pre-contractual representations, in terms of entering into a contract on the basis of a misrepresentation and the circumvention of liability caps through reliance upon section 18 of the *Australian Consumer Law*.

(b) Content and scope

- *Incorporation of terms*

  There is uncertainty over the principle and scope for incorporation by course of dealing, particularly where there is a series of oral contracts followed by written terms. An additional issue for consideration may include the effect of deeming provisions and the point at which contextual changes may impact on the effect and operation of the contract.

- *Impact of consumer protection legislation on contracts*

  Contracts which are classifiable as "consumer contracts" are subject to statutorily implied guarantees or other terms, meaning that the written document does not always reflect the entire scope of the agreement. While it is acknowledged that such provisions are designed to protect consumers, there is potential for both the consumer and supplier to be confused about the full extent of their contractual obligations on a mere reading of the contract itself.

- *Interaction between legislative regimes and choice of law clauses*

  There would be benefits in a clear statement of rules governing identification of the proper law of a contract. Clarification would also be helpful in relation of the extent to which consumer protection legislation, and other legislation affecting the interpretation of a contract, can be excluded by choice of law or forum clauses.

- *Formal requirements for contracts*

  Clarification may be appropriate on the question of whether there is still a place for contracts under seal and, if so, the distinction between contracts, deeds and contracts made under seal.

- *General duty of good faith*

  There is uncertainty and inconsistency as to how a contractual obligation to exercise "good faith" should be interpreted and also the circumstances in which an obligation of good faith may be implied into a contract.

- *The Law of Usury*

  Consideration could be given as to whether there ought to be restrictions upon lenders and mortgagees (largely second and third tier lenders and mortgagees) regarding the largely unfettered sums of interest capable of being charged. Bearing in mind the risk for the lender, the capping of interest from such lenders should be considered.

(c) Performance and Termination

- *Privity of contract*

  It would be in the interests of all parties in some circumstances to have the flexibility to contract for the benefit of third parties, without those third parties becoming parties to the contract, but where the third parties can enforce, and are nevertheless bound by at least some of the obligations arising under, the contract. In this context it may be useful to consider the United Kingdom's approach in the *Contracts (Rights of Third Parties) Act 1999*.

- *Frustration of contracts*

  There would be benefit in clarifying when the commercial impracticability of contract performance metamorphoses into frustration of the contract, as well as the advisability of the only form of relief for frustration being automatic termination (without notice to the non-affected party). The NSW experience of the *Frustrated Contracts Act 1978* is an example of how difficult legislative reform can be. Few decisions have been reached under the Act because its application is often too difficult, and most commercial parties exclude its operation. Clarification in relation to hardship and *force majeure* provisions may also be beneficial.

- *Avoidance of contracts for incapacity*

  In the context of avoidance of contracts for incapacity, there may be benefits in revisiting the doctrine of *non est factum* (see *Petelin v Cullen* (1975) 132 CLR 355 at 359-61) and the interplay with the avoidance of a contract at common law for lack of contractual capacity (see *McLaughlin v Daily Telegraph Newspaper Co Ltd* (No 2) (1904) 1 CLR 243 at 272-4; *Gibbins v Wright* (1954) 91 CLR 423 at 443-4; cf *Ford by his Tutor Watkinson v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42 at 60[71] et seq). Consideration could be given to whether there could be greater harmony between the two doctrines.

- *Limitation of liability/unlimited liability*

  Clarification may be beneficial as to the enforceability of liability caps, including circumstances in which a limitation of liability may be deemed unconscionable or in some other way unenforceable. It would be helpful to consider whether certain categories of liability should be incapable of being capped, and to implement clear rules regarding the enforceability of liquidated damages. A nationally consistent approach to the interpretation of the expression "consequential loss" would be beneficial.

- *Champerty*

  The law pertaining to champerty could be further clarified and harmonised across different legislative frameworks. For example, choses in action are property for the purposes of section 5 of the *Bankruptcy Act 1966* (Cth) and section 9 of the *Corporations Act 2001* (Cth) and thus are assignable. Yet a chose in action is generally not otherwise assignable unless the assignee has a genuine and substantial, or genuine commercial, interest in the enforcement of that cause of action (see *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679; [1981] 3 All ER 520; cf *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267 at 280[42] et seq).

(d) Remedies

- *Statutory limitation periods*

  There is little logic in having different statutory limitation periods for different types of actions in relation to contracts.

- *Set-off*

  The Australian law of set-off is unclear in some respects, for example in the context of inter-related contracts between the same parties.

(e) Alternative Dispute Resolution

- *ADR and the absence of a choice of law clause*

  In circumstances where certain types of commercial contracts have no dispute resolution clause, there would be merit in considering the creation of a statutorily implied right to invoke alternative dispute resolutions such as mediation, expert determination and/or arbitration.

(f) Australian Consumer Laws

- *Interconnection between consumer protection law and contracts*

  It may be useful to consider how consumer protection law and contracts work together, including whether some provisions should be retained in light of the *Australian Consumer Law* and whether some state legislation ought to be adopted nationally.

(g) E-Contracts

- *Role of e-contracts*

  Further consideration of the role of e-contracts would be valuable, including the interaction with existing consumer protection laws such as the *Australian Consumer Law*.

26. The Law Council does not consider that these issues reflect flaws in Australia's contract laws which are sufficiently fundamental as to warrant a comprehensive reform or restatement of the law. They are the inevitable consequences of the complexities of trade and commerce in a dynamic environment.

27. Uncertainty that may arise in these areas of contract law is often a result of legislative intervention which overlaps with the applicable common law, for example the impact of consumer protection legislation on contracts.

28. The Law Council is supportive of any initiative to consider whether any or all of the above issues warrant legislative intervention. However, any such legislative measures must be carefully researched and drafted in clear and certain terms.

Challenges for Australian Contracting

Question 2: What costs, inefficiencies, difficulties or lost opportunities do businesses experience as a result of the domestic operation of Australian contract law?

29. The Law Council acknowledges that there are some challenges confronting the domestic operation of Australian contract law. These challenges include uncertainty and a lack of clarity arising from the interrelationship between common law rules, equitable doctrines and statute,[4] the various legislative regimes which impact on the operation of contract law, difficulties in identifying the proper law of the contract[5] and the increasing use of clickwrap licences over the internet.[6]

30. In particular, the Law Council notes that the overlay of a number of legislative regimes, in addition to the common law, has created additional challenges for the domestic operation of Australian contract law. For example, lack of uniformity in the area of proportionate liability contributes to the tendency of parties to engage in forum shopping.

31. The Law Council notes that with international agreements, the general practice is for the party with the greater bargaining power to determine the jurisdiction to which the agreement will apply. There are many reasons why one party might choose a particular jurisdiction over another. One risk associated with reforming contract law to make it more 'palatable' to international parties is that it may dilute or weaken the established common law of contract without any significant improvement to the attractiveness of Australia as a host jurisdiction.

32. The Law Council disagrees with the premise that there are systemic costs, difficulties, inefficiencies or lost opportunities of a disproportionate nature which

[4] Discussion Paper, para 3.4.
[5] Discussion Paper, para 3.11-3.13.
[6] Discussion Paper, para 3.14-3.15.

impact upon business as a result of inefficiencies in Australian contract law. The Law Council considers that many of the challenges faced may be effectively addressed through discrete and incremental reforms.

Question 3: How can Australian contract law better meet the emerging needs of the digital economy? In what circumstances should online terms and conditions be given effect?

33. Whilst the principles of contract law remain robust and adequate, e-commerce inevitably gives rise to jurisdictional issues and other complex factual scenarios. By way of example only, it remains an open question whether electronic service would satisfy the delivery requirements for a deed of ownership.

34. The Law Council is familiar with international initiatives relevant to electronic contracts, including UNCITRAL publications and model laws, and Australia's electronic transactions legislation. However, the Law Council appreciates that these initiatives only address the issue peripherally and would therefore support a review and clarification of the enforceability of on-line contracts.

35. Whilst the Law Council would seek to participate in any reform initiatives – legislative or otherwise – relevant to on-line terms and conditions, it also maintains the view that the common law has thus far proved itself to be capable of addressing such issues.

Challenges for International Contracting

Question 4: To what extent do businesses experience significant costs, inefficiencies, difficulties or lost opportunities as a result of the differences between Australian and foreign contract law?

36. Concern was expressed in the Discussion Paper over the differences in legal systems involving Australia's major trading partners. It is noted that the United States of America has a largely codified system of contract law, China has a nationally applicable unified contract law, India and Malaysia have codified law based on English contract law whilst England and Wales, like Australia, has a largely non-codified common law system.[7] An important difference between English contract law and Australian contract law, however, is that equitable doctrines (such as promissory estoppel and unconscionability) have not developed in England to the same extent as they have in Australia.[8]

37. The Law Council also notes that there have been recent initiatives amongst Australia's major trading partners, including large scale reforms to the Dutch Civil Code in 1992 and the German Law of Obligations in 2002, as well as contract law reform projects in France, Japan and Korea.

38. The Law Council acknowledges that there may be examples of costs, difficulties, inefficiencies and/or lost opportunities arising from differences between Australian and foreign contract law. For example, one disadvantage of adopting a codification approach favoured by some jurisdictions is that it may not be able to deal with all relevant issues and situations in the same way as a flexible and maturing common law system. This could lead to further uncertainty and consistency in the application

[7] Discussion Paper, paras 4.8-4.14.
[8] Discussion Paper, para 4.15.

of the laws. Further research is required into the potential impact of adopting models from other countries, including the costs and inefficiencies that may result. Unfortunately, the timeframe for responding to the Discussion Paper has not permitted further detailed investigation.

39. Little evidence is presented in the Discussion Paper, or elsewhere, suggesting that companies overseas may be unwilling to trade with Australian companies due to Australian contract law. Nor is there any evidence that foreign companies have been unwilling to accept contracts of Australian companies, governed by the laws of a state or territory in Australia.

40. The Law Council notes that there are a number of factors which may influence a party's decision on whether to engage in trade with an Australian company, including language, currency, shippings costs and distance. The Law Council believes that these other factors are more likely to affect decisions on whether to trade with Australian companies, than any issues or concerns regarding differences between Australian and foreign contract law.

41. The Law Council would be willing to consider and comment upon any evidence which suggests that Australian businesses are experiencing significant transaction costs, difficulties, inefficiencies or lost opportunities due to differences between the formulation and doctrinal structure of Australian contract law and those of its major trading partners.

International Approaches

Question 5: What are the costs and benefits of internationalising Australian contract law?

42. The Discussion Paper refers to various international principles – such as those contained in the United Nations Convention on Contracts for the International Sale of Goods (the **"Vienna Convention"**) and the UNIDROIT Principles of International Commercial Contracts (the **"UNIDROIT Principles"**). The Law Council notes that parties are able to opt-in to the application of these principles to Australian contracts. The principles appear to be used only sparingly by Australian business, however, perhaps reflecting a lack of familiarity with international developments and a general suspicion of legal principles which had their origin partly in civil law systems.[9]

43. The Law Council recommends caution with respect to any proposal to adopt a large-scale approach to reform which would reflect either the Vienna Convention or the UNIDROIT Principles. Whilst arguments are made that such instruments promote certainty, in the context of a common law jurisdiction adopting a civil approach, prolonged uncertainty and consequent increased costs are likely to ensue.

44. Of the various options presented, the UNIDROIT Principles appear to be the preferable option. However, the Law Council does not recommend adoption of the UNIDROIT Principles, given the time and resource implications that such a project would entail. As previously highlighted, the Law Council suggests that incremental reforms, or perhaps the enactment of harmonised State and Territory laws, addressing specific issues would be a better approach than codification or restatement of contract law in Australia. The opt-in and opt out method of the

[9] Discussion Paper, para 5.11.

UNIDROIT Principles would also be contrary to the overall aims of the proposed project, potentially resulting in a patchwork of principles.

45. The attempts by UNIDROIT to develop a 'standard franchise agreement' demonstrate the difficulties in adopting a one-size-fits-all approach. UNIDROIT eventually abandoned such attempts because of the realisation that each franchise system displays unique features and characteristics making it impossible to apply for every jurisdiction. Instead, UNIDROIT has published papers such as the 'Guide to International Master Franchise Arrangements' and the 'Model Franchise Disclosure Law', as well as the UNIDROIT Principles. None of the UNIDROIT member countries has adopted the Model Franchise Disclosure Law as part of its national law. Australia's mandatory Franchising Code, by and large, only prescribes the content and format of a franchisor's disclosure document. The Code does not prescribe or propose a 'standard' franchise agreement. Such an example is a useful analogy to the proposal to reform contract law.

46. Beyond the above observations, the Law Council considers this question difficult to address in the absence of detailed research. The Law Council recommends that research be undertaken and data compiled and presented for consideration before any reforms are further contemplated.

Reform options

Question 6: Which reform options (restatement, simplification or substantial reform of contract law) would be preferable? What benefits and costs would result from each?

47. The Discussion Paper has raised three possible approaches to contract law reform – restatement of the current law in a new form, simplification of the current law in certain areas, and reform of the current law.[10]

48. The Discussion Paper describes the respective approaches as follows:

- Restatement – distil the existing law into a single text without attempting to change the substance except where necessary to resolve inconsistencies or lack of clarity.[11]

- Simplification – change the law to eliminate unnecessary complexity without attempting a general overhaul.[12]

- Reform – update the law with significant changes to its content, with a particular focus on responding to technological change and the growing prominence of e-commerce, as well as the approaches of Australia's major trading partners.[13]

49. The Discussion Paper appears to proceed on the basis that retention of the status quo is not considering viable option. The Law Council questions this premise, given the present paucity of empirical evidence demonstrating systemic problems.

[10] Discussion Paper, para 6.2.
[11] Discussion Paper, para 6.4.
[12] Discussion Paper, para 6.5.
[13] Discussion Paper, para 6.6.

50. As stated previously, the Law Council does not consider that a comprehensive restatement, simplification or substantial reform is warranted.

51. To the extent that there are areas within contract law which could be further improved or clarified, the Law Council recommends an approach that engages incremental and targeted reform, including in the areas highlighted above in response to Question 1.

52. In particular, the Law Council cautions against a United States style restatement of contract law. The first restatement took 21 years and the second restatement took 17 years to develop. The time and resources required are not justified given the lack of evidence provided for wholesale reform. Furthermore, the Law Council considers that the reform process in the US has not resulted in a reduction in contract litigation or an improved reputation internationally.

53. Complete reform would be an extremely time consuming, complex and costly process as demonstrated by the attempt to reform uniform evidence law.

54. Despite concerns regarding comprehensive reforms of Australian contract law, the Law Council would seek and expect to be involved in any further consideration of potential reforms to Australian contract law. To the extent that a more ambitious reform project might be considered, nevertheless, the Law Council would suggest consideration be given to a regional approach (perhaps on a Trans-Tasman basis).

55. The Law Council recommends the Commonwealth Government consider the need for better education for businesses to understand and interpret common law principles for emerging areas that arise in contract law, such as online terms and conditions. Given the paucity of evidence to demonstrate the need for contract law reform, education and training options should be considered as another approach to handling any perceived problems with the current system.

Implementation

Question 7: How should any reform of contract law be implemented?

56. The Discussion Paper raises questions regarding the practical aspects of implementing reform.

57. As noted above, the Law Council questions the premise that there are fundamental problems with the existing law of contract requiring comprehensive reform. Accordingly, the Law Council considers it is premature to consider the mechanism for reform. The Law Council is willing to contribute to further discussion on this issue, nevertheless, if a reform initiative is to be pursued by the government.

Next Steps

Question 8: What next steps should be conducted? Who should be involved?

58. The Discussion Paper foreshadows wide ranging consultation and input from stakeholders as the reform project develops, including surveys about user experience and round table discussions.[14]

[14] Discussion Paper, para 8.2.

59. If a comprehensive law reform initiative is to be pursued, the Law Council suggests that a reference to the Australian Law Reform Commission would be logical. The Law Council also suggests that a thorough consideration of the costs, benefits and feasibility of different reform options should represent an integral preliminary component of the process when determining the most appropriate approach to reform.

60. The Law Council would be happy to provide any further input or assistance to the discussion regarding the desirability and necessity of reforms to Australian contract law.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.