Submission in response to Takeovers Panel consultation paper on Guidance Note 7

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Telephone +61 2 6246 3737 • *Fax* +61 2 6248 0639
Email Jessica.Morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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Introduction

1. On 14 December 2023, the Takeovers Panel (**Takeovers Panel** or **Panel**) published a consultation paper inviting comments on its draft revised 'Guidance Note 7—Deal protection' (**Revised Guidance Note**). This submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to that consultation paper.

2. Unless otherwise stated, all references to paragraph and footnote numbers in this submission are references to the paragraph and footnote numbers used in the Revised Guidance Note.

Responses to specific questions

Question 1

Do you agree that the principles in the Revised Guidance Note should generally apply to deal protection arrangements entered into in respect of both binding and non-binding proposals? Please explain.

3. Yes, the basic principle—that deal protection arrangements entered into by the target should not unduly fetter the market for control of the target—should generally apply to deal protection arrangements entered into in respect of both binding and non-binding proposals. However, different considerations apply at each stage, and there are significant differences between what is acceptable at the binding transaction phase versus what may be acceptable at the non-binding bid phase. For example, at the non-binding bid phase, where the target has received a confidential non-binding indicative proposal subject to due diligence and entry into a binding implementation agreement, the default position for a target board, if it decides to grant due diligence access, should be that such access is on a non-exclusive basis, while recognising that there may be situations where the target board determines that it is necessary to grant exclusivity with a fiduciary out (and potentially a short period of hard exclusivity) in order to facilitate a potential control proposal. However, the position is different once the bidder has put forward a binding proposal, which may justify a broader suite of deal protection arrangements (e.g. matching rights; notification obligations and equal access obligations), although any no-talk must be subject to a fiduciary carve-out, particularly where the arrangements will continue for a period of potentially 6 months or more.

4. The Committee considers that the Revised Guidance Note would benefit greatly from some re-drafting to (a) more fully explain the different considerations at the non-binding proposal stage versus the binding transaction phase; and (b) to capture in one place in the Revised Guidance Note the rules that apply during the non-binding proposal stage. At the moment, there is a section on the "Non-binding bid stage" (paragraphs 39–45), which largely deals with hard exclusivity, but the rules relating to other deal protection arrangements in the non-binding proposal stage, such as break fees, notification obligations and matching rights, are found elsewhere throughout the document. To make the Revised Guidance Note easier to read, the Committee suggests that the Revised Guidance Note deal firstly with the rules applying at the

binding transaction phase, and then have a separate section which explains the different considerations, and what the rules are, at the non-binding proposal stage. That separate section could emphasise the point made in the *Virtus* and *AusNet* decisions that the Panel will look at the various deal protection provisions as a whole.

5. In the Committee's view, the Revised Guidance Note also needs to more fully explain the rules that apply at the non-binding proposal phase. For example:

    - As discussed above, the Committee considers that the default position for a target board, if it decides to grant due diligence access, should be that such access is on a non-exclusive basis, while recognising that there may be situations where the target board determines that it is necessary to grant exclusivity with a fiduciary carve-out (and potentially a short period of hard exclusivity) in order to facilitate a potential control proposal.

    - On break fees in respect of non-binding proposals, the Revised Guidance Note states (at paragraph 19) that "the Panel does not expect" that a target board would agree to a break fee in respect of a non-binding proposal, but then suggests that a break fee would not be unacceptable if it was "substantially lower", without any indication of what that means. A reference to actual out-of-pocket external adviser costs would be a helpful starting point. The Revised Guidance Note also does not address cost reimbursement arrangements in the non-binding proposal stage, which have been a feature of a number of 'process deeds' entered into over the past few years. There is also the issue, which arose in *Virtus*, whether the break fee/cost reimbursement fee which is payable in circumstances where the target terminates the discussions for a competing proposal should be no higher than the cost reimbursement fee which is payable where the bidder puts a binding proposal at the original indicative price, but the target board decides not to recommend it.

    - On matching rights, there is no real discussion of whether they should apply and, if so, how they should apply, in relation to a non-binding proposal. In the Committee's view, matching rights are not appropriate where the proposals are non-binding and can be withdrawn by the bidder(s) at any time anyway. Matching rights in respect of non-binding proposals can lead to the situation where each of the existing bidders continues to increase its indicative price simply to maintain the exclusivity, in circumstances where it will not ultimately be held to that increased price.[1]

    - On notification obligations, the Revised Guidance Note does not fully differentiate between the situation where the proposal remains confidential versus where it is not; nor does it focus on the nature and extent of the disclosure obligation (i.e. is it an obligation to notify the identity of the competing bidder and the full terms of the proposal, or

[1] This was an issue in *Re Ludowici Ltd* [2012] ATP3 (see especially at [17]).

simply for the target to notify the first party that the target is no longer dealing with it on an exclusive basis).

- On disclosure, the Revised Guidance Note should reflect the fact that usually there is no obligation under continuous disclosure rules to disclose the arrangements at the non-binding proposal phase, while the deal protection arrangements remain confidential, and because they concern an incomplete proposal or negotiation. However, the Revised Guidance Note could also make it clear that if a 'process deed' has been entered into under which the target board has agreed to recommend the transaction if the bidder puts a binding proposal on the terms of the indicative proposal (or if a material fee would be payable by the target if the target board fails to recommend a binding proposal on the same or better terms than the indicative proposal), then the carve-out to the continuous disclosure rules for an incomplete proposal or negotiation ceases to apply, and the 'process deed' should be disclosed. Some clear guidance on this issue would be welcomed, including on the circumstances in which the Panel considers that a process deed should be disclosed to the market in full.[2]

6. These issues are dealt with further below.

Question 2

Are the general principles and factors that the Panel will have regards to in considering whether deal protection devices give rise to unacceptable circumstances useful (see paragraphs 8 to 16)? Do you agree with the approach set out? Please explain.

7. Yes. The guidance in paragraphs 8–16 is useful, and the Committee generally agrees with the approach set out. However, the Committee has set out below a few specific comments in relation to some of the principles and factors discussed.

(a) **Paragraph 11**

In addition to the factors already listed in paragraph 11, if the target is in financial distress/approaching insolvency, the Panel should also be able to take this fact into account when considering whether a deal protection device gives rise to unacceptable circumstances.

This would be consistent with 'Guidance Note 17—Rights issues', which indicates that the Panel will look at the "financial situation and solvency of the company" when considering whether a rights issue gives rise to unacceptable circumstances.[3]

[2] See *Re GBST Holdings Ltd* [2019] ATP 15 at [43]-[44], where the Panel noted that market practice varied on whether a process deed is released in full or summarised. The Panel noted that it was "an open question in what circumstances it may be sufficient to disclose a summary of a process deed instead of the process deed itself".

[3] Takeovers Panel, 'Guidance Note 17 – Rights issues', Issue 4, 27 June 2018 at [6(a)]. See also [10]-[12], which indicates that a company's need for funds may be relevant to whether a rights issue constitutes unacceptable circumstances.

It would also be consistent with the Panel's decision in *Re Mission NewEnergy Ltd* [2012] ATP 19 and *Re Mission NewEnergy Ltd (No 1R)* [2012] ATP 20, which involved a company with significant financial difficulties entering into a term sheet (which contained an exclusivity regime without a 'fiduciary out') with another party for the provision of a credit facility. In concluding that that there were no reasonable prospects of making a declaration of unacceptable circumstances, the Initial Panel took into account (among other things) the fact that the company was "in a financially precarious position and in urgent need of funds to remain solvent".[4] The Review Panel came to the same conclusion, having regard to the "commercial reality" that the company was in "extremely difficult financial circumstances" and that, as a result, it had to deal with the proposed creditor "regarding any financing proposal".[5]

From a drafting perspective, this could be accommodated by adding a new paragraph 11(f) which reads:

> *"(f) the financial situation and solvency of the target."*

(b) **Paragraph 13**

Paragraph 13 states that there is no requirement for a target to undertake an auction process prior to entry into any deal protection arrangements, but that where there has not been any auction process prior to entry into the arrangements, the Panel will consider what processes and analyses have been undertaken and what advice has been obtained by the target. Here, the Committee assumes that the references to an "auction process" are meant to include an informal auction process, in which the target approaches a range of likely interested parties on a confidential basis, as well as the situation where the target announces a formal auction process. This could perhaps be made clear in paragraph 13.

Question 3

Is the guidance on an effective 'fiduciary out' useful (see paragraphs 35 to 38)? Please explain.

8. Yes, although the Committee thinks that the Revised Guidance Note should have a better description/definition of what is meant by a 'fiduciary out', and the circumstances in which it applies.

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[4] [2012] ATP 19 at [44].

[5] [2012] ATP 20 at [20].

9. A typical form of 'fiduciary out' states that the relevant exclusivity provisions (i.e. the no-talk and the no-due diligence obligations) do not prevent the target or its board or representatives from taking or refusing to take any action with respect to a bona fide actual or proposed competing proposal (which was not solicited in breach of any no-shop) provided that the target board, acting in good faith, has determined:

    (a) after consultation with its financial and legal advisors, that such competing proposal is, or could reasonably be expected to lead to, a superior proposal; and

    (b) after receiving written legal advice from its external legal advisers, that failing to respond to such competing proposal, or failure to take or not take the action which would otherwise breach the exclusivity provision, would, or would be reasonably likely to, constitute a breach of any of the target directors' fiduciary or statutory duties.

10. For this purpose, a 'superior proposal' is typically defined as a bona fide competing proposal (which was not solicited in breach of the no-shop) which the target board, acting in good faith and after having obtained written advice from the target's financial and legal advisers is:

    (a) reasonably capable of being valued, and reasonably capable of being completed within a reasonable timeframe; and

    (b) would, if completed substantially in accordance with its terms, be more favourable to target shareholders than the existing proposal.

11. It may be helpful if the Revised Guidance Note actually gave this as an example of an effective 'fiduciary out', and made it clear that any additional fetters or constraints, beyond those set out above, on the ability of the target to rely on the fiduciary out (such as those listed in paragraph 36) will generally be unacceptable.

12. In addition to the above, the Committee suggests the following changes to paragraph 36, and related paragraphs, in the Revised Guidance Note:

    (a) **Incorporation of references to existing judicial statements**

    To further enhance the usefulness of the Revised Guidance Note, the Panel should reference all of the additional principles that have emerged from various judicial decisions on 'fiduciary outs'.[6]

    Gathering all of the relevant decisions in one place would help to contextualise the Panel's position in light of the existing judicial guidance and would provide a useful consolidated reference point for market participants. Those judicial decisions are broadly consistent with the Panel's proposed position in the Revised Guidance Note.

[6] Those judicial decisions are discussed in T Damian and A Rich, *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement*, Fourth Edition, The University of Sydney, Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2021, at 1,000-1,011 [7.3.4].

From a drafting perspective, this could be accommodated by making the following changes in paragraph 36:

(1) adding a new subparagraph (c)(iv) which explains that there may be an unacceptable fetter or constraint if:

> "it is specified that the 'fiduciary out' can only be relied on if the board is acting 'unanimously' [Footnote: *Re Terry White Group Ltd (No 1)* [2018] QSC 254 at 9–10] or 'reasonably' [Footnote: *Re NetComm Wireless Ltd* [2019] FCA 795 at [14] and *Re Real Energy Corporation Ltd* [2020] FCA 1634 at [22]–[25]]"; and

(2) adding a new subparagraph (c)(v) which explains that there may be an unacceptable fetter or constraint:

> "where the 'fiduciary out' can only be enlivened if the target board receives advice from its lawyers to the effect that failing to respond to the competing bid 'would' or 'would be likely' to cause the directors to breach their duties—the content or conclusion of the advice should not be prescribed [Footnote: *Re Perseverance Corporation Ltd* [2007] VSC 574 at [16]–[17] and *Re David Jones Ltd* [2014] FCA 530 at [21]]".

Consistent with the proposed new subparagraph (c)(v) above (and the case law referred to therein), paragraph (b) should be amended as follows:

> "additional requirements are imposed on how the target board should act beyond requiring the target to obtain:
>
> (i) legal and/or financial advice ~~that~~ as to whether a competing proposal could reasonably be considered to become a superior proposal"; and
>
> (ii) legal advice ~~that~~ as to whether failing to respond to a competing proposal would, or would be reasonably likely to, breach the any of the director's statutory or fiduciary duties."

(b) Clarification of decision in *Re Magna Pacific Holdings Limited 02* [2007] ATP 03

Paragraph 36(c)(ii) of the Revised Guidance Note explains that there may be an unacceptable fetter or constraint if:

> "where the terms of the exclusivity arrangements require a superior proposal before the 'fiduciary out' can be relied upon (rather than to allow the target board to respond to a competing proposal which "would be likely" to constitute a breach of those duties)".

The wording in brackets is slightly unclear in that it does not specify whose determination is relevant to the phrase "would be likely". In our view, consistent with the approach of the Panel in decided cases and consistent also with the

relevant judicial decisions, we consider that a more appropriate formulation for the text in brackets would be:

> "(rather than to allow the target board to respond to a competing proposal which the target board considers "would be likely" to constitute a breach of those duties)".

This would be consistent with paragraph [28] of *Re Magna Pacific Holdings Limited 02* [2007] ATP 03, which states:

> "The Panel considered it overly onerous to require legal advice that "failing to respond **would** breach their fiduciary duties" (emphasis added) and this may have effectively rendered the fiduciary exception meaningless. The Panel would have been more comfortable to leave the decision to the directors having a reasonable basis to believe that failing to respond would be likely to breach their fiduciary duties."

Interestingly, footnote 28 of the Revised Guidance Note refers to paragraphs [31]–[32] of *Re Magna Pacific Holdings Limited 02* [2007] ATP 03, instead of paragraph [28]. In our view, the Panel should consider amending footnote 28 to also refer to paragraph [28] from *Re Magna Pacific Holdings Limited 02* [2007] ATP 03.

The position set out in paragraph [28] aligns with the Court's approach to the issue in *Re Perseverance Corporation Ltd* [2007] VSC 574, where Robson J stated at [16]:

> "The duty of directors is a personal and subjective one and, in my view, the duty should not be overborne by the advice of lawyers, although clearly their duty can be informed by external advice and should in a difficult case be so informed".

(c) **Typo in footnote 30**

Footnote 30 of the Revised Guidance Note contains an incorrect citation. The correct citation should be:

> "*Re Queensland Cotton Holdings Limited* [2007] ATP 5 at [28]".

(d) **Application of 'fiduciary out' to matching right regime**

The Panel should take the opportunity to clarify its position in relation to the application of 'fiduciary outs' to a matching right regime.

The Courts have long accepted that matching rights do *not* need to be subject to a 'fiduciary out': see, for example, *Re Healthscope Ltd* [2010] VSC 367 at [22]–[23]; *Re Tatts Group Ltd* [2017] VSC 552 at [41]; *Re Mantra Group Ltd* [2018] FCA 510 at [32]; *Re Watpac Ltd* [2018] FCA 656 at [46]; *Re Kidman Resources Ltd* [2019] FCA 1226 at [55]; *Re QMS Media Ltd* [2019] FCA 2172 at [54].

From a drafting perspective, this could be accommodated by adding a new sentence at the end of paragraph 32 in the matching right section of the Revised Guidance Note which states:

> "There is no requirement for matching rights to be subject to a fiduciary out."

Question 4

Do you agree with the Panel's approach to 'hard' exclusivity arrangements agreed in respect of non-binding proposals? Do you consider that a short period of 'hard' exclusivity is not unacceptable in certain limited circumstances (and do you have any comments on the example circumstances described in paragraph 43)? If yes, is the proposed acceptable 'hard' exclusivity period of up to 4 weeks in which exclusive access to non-public due diligence is provided appropriate? Please explain.

13. Yes, the Committee generally agrees with the Panel's approach to 'hard' exclusivity agreed in respect of non-binding proposals. As discussed above, the Committee thinks that the default position for a target board, if it decides to grant due diligence access, should be that such access is on a non-exclusive basis, but that there may be situations where the target board appropriately determines that it is necessary to grant exclusivity with a fiduciary out (and potentially a short period of hard exclusivity) in order to facilitate a potential control proposal. So yes, the Committee agrees that 'hard exclusivity' should not be per se unacceptable.

14. The Committee did not have any material comments on the examples in paragraph 43 where 'hard exclusivity' may be justified, other than to note that the references in paragraph 43(c) to extracting a 'material price increase' from the existing bidder should make it clear that the 'material price increase' will itself be non-binding and indicative only.

15. As to the period, the Committee thinks it is useful to state a maximum 'hard' exclusivity period, and that the maximum should be 4 weeks, beyond which the 'hard' exclusivity may unduly impact the market for control of the target. While private equity bidders may argue that they are disadvantaged by this versus a trade bidder, as the private equity bidder may require a longer period of due diligence than the trade bidder, the Committee thinks a fixed maximum period is clearer, and appropriate.

Question 5

Do you agree with the Panel's position on break fees in respect of non-binding proposals (see paragraph 49)? Please explain.

16. The Committee agrees with the first sentence in paragraph 49, but the statement in the second sentence of paragraph 49 suggesting that a break fee is acceptable if it is 'substantially lower' than for an equivalent binding proposal is unclear, and potentially unhelpful.

17. The Committee thinks that the starting point should be that an obligation on the target to pay a break fee in respect of a non-binding proposal should be unacceptable, but that, in certain limited circumstances, it may be acceptable for the target to agree to reimburse the bidder for its actual external adviser costs in conducting due diligence during the exclusivity period, up to an agreed cap (which itself should generally speaking not exceed the lower of 0.1 per cent of deal value and $1 million, but recognising that 0.1 per cent may be inappropriately low in the case of a small transaction). The examples in paragraph 43 may also be examples of situations where it may be appropriate for the target to agree to such cost reimbursement. Typically, the cost reimbursement would only apply if the target terminates the due diligence access during the exclusivity period (at a time when the bidder is continuing to undertake material work and has confirmed its indicative price), or if at the end of the period the bidder puts a binding proposal at or above the original indicative offer, which the target board decides not to recommend.

Question 6

> Do you agree that deal protection arrangements should be disclosed where a notification obligation has been agreed as part of those arrangements in respect of a non-binding proposal (see paragraph 53)? Does this have the potential to cut across the continuous disclosure provisions and the exceptions in Listing Rule 3.1A? Please explain.

18. Generally yes, although disclosure should not necessarily be required where the notification obligation simply requires the target to notify the existing bidder of the fact that the target has received a potential competing proposal, without having to identify the competing bidder or the terms of the potential competing proposal.

19. If, in the context of a confidential non-binding indicative proposal, the target is required to notify the existing bidder if the target receives a competing proposal (including the identity of the third party making the competing proposal and its terms), this has the potential to operate as a de-facto exclusivity arrangement, as the third party will not be previously aware of the existing bidder and its proposal, and the third party will not want its identity and terms disclosed to the existing bidder. The anti-competitive effect of this notification obligation needs to be measured against the fact that the existing bidder's proposal is non-binding in any event.

20. The Committee does not think that this cuts across the exceptions in ASX LR 3.1A to require disclosure of such a notification obligation. The fact that there is an exception to the continuous disclosure obligations for a confidential and incomplete proposal or negotiation does not mean that a notification obligation which may unduly impact the market for control of a listed company should be permitted.

21. For the sake of completeness, the Committee notes that this type of notification obligation does not necessarily have the same anti-competitive effect where the existing proposal and the fact that the existing bidder is undertaking due diligence has previously been announced to the market, because the target will usually announce the receipt of the third party's competing proposal in any event (and the existing bidder will therefore be aware of it anyway), where the target has already announced the original bidder's proposal and the fact that the original bidder was in due diligence.

22. As flagged above, the position may be different, however, in the context of a confidential non-binding proposal, if the notification obligation simply requires the target to notify the existing bidder of the fact that an approach has been made, but not the identity of the person making it or its terms. Here, the Committee thinks that the existing bidder, who may think that they are dealing with the target on an exclusive basis, has a legitimate expectation that it be informed that that is no longer the case. Also, the fact that the existing bidder knows that there is another party on the scene does not unduly impact the potential competing bidder.

Question 7

> Do you agree with the other amendments made to the Guidance Note? Please identify any other amendments you think should be made.

23. The Committee considers that the following refinements should also be made to the Revised Guidance Note.

(a) **Paragraph 20**

This paragraph states:

> "Exclusivity arrangements are less likely to give rise to unacceptable circumstances if the target has conducted an auction or market testing process before agreeing to it or where the potential transaction has been in the market for a **long** period." (Emphasis added.)

The Committee considers that it would be more appropriate to use the phrase "reasonable period" instead of "long period", noting the inherent subjectivity of the word "long" (and the absence of any hard guidance of what length of time constitutes a "long period"). By contrast, the question of whether something is "reasonable" is more amenable to case-by-case evaluation having regard to the specific facts and circumstances of the case, which the Committee considers is appropriate in this context.

(b) **Paragraph 46, Footnote 36**

There have been a number of judicial decisions that have considered 'naked no vote' break fees as well. The Committee thinks it would be helpful to collate those in the Revised Guidance Note.

From a drafting perspective, this could be addressed by adding the following new wording at the end of footnote 36:

> "See also *Re Bolnisi Gold NL (No 2)* (2007) 65 ACSR 510 at 513 [12]; *Re Rusina Mining NL* at [2010] FCA 517 at [50]–[53]; *Re Airtrain Holdings Ltd* [2010] FCA 517 at [50]–[53]; *Re Atlantic Gold NL* [2014] FCA 697 at [30]; *Re Pulse Health Ltd* [2017] NSWSC 140 at [24]; *Re Creso Pharma Ltd* [2019] WASC 472 at [87]."

(c) **Paragraph 46**

This paragraph lists a number of reasonable triggers for a break fee. Subparagraph (e) says reasonable triggers include "other events affecting the bid (e.g. a major asset of the target is destroyed)".

Whilst such "other events" would be appropriate as negative conditions precedent or termination rights, the Committee does not consider that such break fee triggers should automatically be suggested to the "reasonable". To avoid confusion, the Committee would recommend that subparagraph (e) be deleted.

(d) **Paragraph 46(a)**

At the end of paragraph 46(a) of the Revised Guidance Note, the Committee suggests adding "or, in the case of a scheme of arrangement, that the transaction is in the best interest of shareholders".

This would align the wording with the prescribed independent expert test for schemes of arrangement in regulation 8303 of the *Corporations Regulations 2001* (Cth).

(e) **Paragraph 47**

This states that, in considering whether a break fee gives rise to unacceptable circumstances, the Panel will be guided by a non-exhaustive list of factors. The Committee queries whether the Panel will really look at these factors where the break fee is 1 per cent or less, or whether the factors set out in paragraph 47 are meant to apply where the Panel is considering a break fee in excess of 1 per cent. The clear practice in the Australian market is to have a 1 per cent break fee, on the basis that a 1 per cent break fee subject only to the triggers in paragraph 46 ultimately does not have a material effect on the market for control of the target.[7]

The Committee would recommend deleting paragraph 47, or making it clear that it only applies where the Panel is considering a break fee in excess of 1 per cent.

In the alternative, the Committee would recommend including the following new footnote at the end of paragraph 47:

> "The mere fact that none of these factors was present in a particular transaction does not mean that the break fee in that transaction will constitute unacceptable circumstances."

[7] For example, in FY22 94 per cent of all negotiated public M&A deals contained a break fee (see Herbert Smith Freehills, *Australian Public M&A Report 2022*, at 34).

(f) **Paragraphs 29, 31 and 43(a)**

There are a few instances where the Panel should adjust its language to convey a *possibility* as opposed to *certainty*. In this regard, the Committee suggests the following amendments:

- **Paragraph 29**—amending "A notification obligation reduces" to "A notification obligation may reduce";
- **Paragraph 31**—amending "it reduces" to "it may reduce"; and
- **Paragraph 43(a)**—amending "would incentivise" to "would likely incentivise"**.**

Annexure A: About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently, the Business Law Section has approximately 900 members and also 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group

- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Philip Argy, Chairman
- Professor Pamela Hanrahan, Deputy Chair
- Mr Adrian Varrasso, Treasurer
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Caroline Coops
- Dr Elizabeth Boros
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.