

# Representative Proceedings – Discussion Paper – Project No 103

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**Law Reform Commission of Western Australia**

**June 2013**

## Introduction

1. The Law Council of Australia is pleased to have the opportunity to comment on the Law Reform Commission of Western Australia's (Commission) Discussion Paper on Representative Proceedings dated February 2013 (Discussion Paper).
2. This submission was prepared for the Law Council by the Legal Practice Section's Australian Consumer Law Committee and the Federal Litigation Section's Class Actions Committee. The lead author was the Deputy Chair of the Class Actions Committee, Mr Ben Slade, who is also a member of the Australian Consumer Law Committee. The Law Society of Western Australia and the Bar Association of Western Australia were consulted in the preparation of this submission.
3. The Law Council represents the 16 Australian state and territory Law Societies and Bar Associations and the Large Law Firm Group (collectively referred to as the 'Constituent Bodies' of the Law Council). In this way, the Law Council effectively acts on behalf of some 60,000 lawyers across Australia. Further information is at [Attachment A](#).
4. The Law Council is advised on legal and regulatory issues regarding representative proceedings or class actions by its Class Actions Committee, which includes some of Australia's leading practitioners in class action litigation. The membership includes senior lawyers who represent plaintiffs and class action members, as well as defendants, and includes a retired Federal Court Judge.
5. This submission is also an initiative of the Australian Consumer Law Committee, a sub-committee of the Legal Practice Section of the Law Council.
6. This submission responds to the Commission proposal at [6.29] of the Discussion Paper and the issues immediately following at [6.30] and [6.31] at 97–98.
7. The Law Council supports the Commission's proposal that Western Australia (WA) adopt legislation to create a scheme allowing representative actions in substantially similar terms to Part IVA of the *Federal Court of Australia Act 1976* (Cth).
8. Representative or group proceedings regimes exist in Australia in the form of Part IVA of the *Federal Court of Australia Act 1976* (Cth), Part 4A of the *Supreme Court Act 1986*(Vic) and Part 10 of the *Civil Procedure Act 2005* (NSW). In each instance those regimes have been established by the passage of legislation.<sup>1</sup>
9. The Law Council recommends that the amendments to the Federal Court scheme that have been adopted in NSW also be incorporated into the WA regime.

## Benefits of a comprehensive facilitated representative proceedings regime

10. The starting point for consideration of the benefits of a representative proceeding regime is the following comment by the Hon Justice McHugh in *Carnie v Esanda Finance Corp Ltd*:

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<sup>1</sup> *Federal Court of Australia Amendment Act 1991* (Cth), *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), *Court and Crimes Legislation Further Amendment Act 2010* (NSW).

*The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently and effectively on their behalf by one person with the same community of interest as other consumers.*<sup>2</sup>

11. In *Wong v Silkfield*<sup>3</sup> the High Court quoted the second reading speech for the bill that introduced Part IVA as follows:

*The bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.*

*The second purpose of the bill is to deal efficiently with the situation where the damages sought by each claim are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.*<sup>4</sup>

12. The Law Council notes that Part IVA of the *Federal Court of Australia Act* and Part 4A of the *Supreme Court Act 1986* (Vic) have seen many thousands of individuals and companies recover losses. It is suggested that it is likely that these actions benefit the wider community by making wrongdoers accountable and thereby improving compliance with corporate standards and consumer safety standards whereas absent a facilitated class action procedure, very few claims have been made for compensation by groups of claimants.<sup>5</sup>
13. Successful Australian class actions have compensated people suffering injuries from defective products and those misled into poor investments.<sup>6</sup> There have also been four cartel class actions to date, three of which have settled.<sup>7</sup>

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<sup>2</sup> *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at [10].

<sup>3</sup> *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

<sup>4</sup> Second reading speech for the bill for the *Federal Court of Australia Amendment Act, 1991* (Cth), House of Representatives, Parliamentary Debates, Hansard, 14 November 1991 at 3174.

<sup>5</sup> As noted at [1.22] of the Discussion Paper.

<sup>6</sup> Defective products: *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, *Darcy v Medtel Pty Ltd (No 4)* [2004] FCA 1599 (pacemakers); *Casey v DePuy International Limited* [2010] FCA 617 (prosthetic knees); *Stanford v DePuy International* Federal Court NSD 213/2011 (hips). Misleading borrowers: *Bass and Another v Permanent Trustee Co Ltd and Others* [1999] HCA 9 (the NSW Homefund class action). Misleading investors: *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2003] FCA 1602; *Spangaro v Corporate Investment Australia Funds Management Ltd (No 2)* [2003] FCA 1363; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19; *O'Sullivan v Challenger Managed Investments Ltd* [2008] NSWSC 602; *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342; *Cadence Asset Management Pty Ltd v Concept Sport Limited* [2006] FCA 944; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029; *Watson v AWB Limited (No 7)* [2010] FCA 41; *Hobbs Anderson Investments Pty Limited v Oz Minerals Limited (No 2)* [2011] FCA 1506; *Kirby v Centro Properties*

14. Class actions have also successfully sought compensation for a range of other reasons<sup>8</sup> and a number of actions for victims of mass torts have been concluded, are on foot or have been flagged.<sup>9</sup> The most substantial is a class action being conducted in the Supreme Court of Victoria by residents and businesses who suffered horrific injuries, loss and damage in or around Kilmore East and Kinglake in Victoria on Black Saturday, 7 February 2009.<sup>10</sup> Class Actions for the victims of the Black Saturday bushfires in Horsham, Coleraine, Weerite and Beechworth in Victoria successfully settled,<sup>11</sup> and an action on behalf of residents and businesses of Murrindindi and Marysville who were injured on that day has been commenced. As well, an action on behalf of 194 abalone fishermen and 40 abalone divers has been taken to the same court seeking compensation for economic loss caused by the alleged negligent release of a herpes-like virus from an abalone aquaculture farm privately operated near Port Fairy in Victoria.<sup>12</sup> A large class action is likely to proceed for the alleged mismanagement of the Wivenhoe Dam that caused extraordinary flood damage in Queensland in 2011, and a class action against the Commonwealth has recently commenced in the Federal Court for those businesses caught up in the equine influenza outbreak in 2007.

## Inadequacy of Order 18 Rule 12 of the Rules of the Supreme Court 1971 (WA)

15. The Law Council agrees with the Commission's conclusion that the old 'Chancery rule'<sup>13</sup> on which Order 18 Rule 12 is based is inadequate,<sup>14</sup> but as it is likely to be little used the Law Council does not have a strong view supporting its removal.
16. In *O'Sullivan v Challenger Managed Investments Ltd*<sup>15</sup> the Hon Justice White in the NSW Supreme Court determined that the plaintiff's application for declarations could be maintained under the similar rule in that state at the time<sup>16</sup> but that it could not extend to the claims for damages.<sup>17</sup> An attempt to amend the rule failed to address its

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*Limited (No. 6)* [2012] FCA 650; *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028.

<sup>7</sup> *Vitamins (Darwalla Milling Co Pty Ltd and other v F Hoffman-La Roche Ltd and others)*, (2006) 236 ALR 322; *Cardboard boxes (Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd)*, [2011] FCA 671; *Air cargo (Auskey International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd)*, FCA, VID 903 of 2009; *Rubber chemicals (Wright Rubber Products Pty Ltd v Bayer AG)*, FCA, VID 837 of 2009.

<sup>8</sup> *Tobacco licence fee recovery following Roxborough and Others v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399; *The Longford gas plan explosion class action (Johnson Tiles Pty Ltd v Esso Australia Pty Ltd)* [2003] VSC 244.

<sup>9</sup> Two claims were made in the past decade for classes who suffered serious illnesses caused by negligence: *Hilton v Melbourne Underwater World Pty Ltd and Ors* [2004] VSC 357 and *Georgiou v Old England Hotel Pty Ltd* [2006] FCA 705.

<sup>10</sup> *Mathews v SPI Electricity and SPI Electricity* [2012] VSC 66.

<sup>11</sup> *Thomas v Powercor Australia Ltd* [2011] VSC 614.

<sup>12</sup> *Regent Holdings Pty Ltd v State of Victoria & Anor* [2012] VSCA 221.

<sup>13</sup> *Duke of Bedford v Ellis* [1901] AC 1.

<sup>14</sup> See also Rule 9.21 of the *Federal Court Rules 2011*.

<sup>15</sup> *O'Sullivan v Challenger Managed Investments Limited* (2007) NSWSC 383.

<sup>16</sup> Rule 7.4 SCR (prior to its recent amendment).

<sup>17</sup> The rule was amended in an attempt to address this failing yet in *Jameson v Professional Investment Services Pty Ltd*, Young CJ in Eq exercised his discretion under the amended Rule 7.4(2) to strike out the claims by victims of the Westpoint collapse 'because of the lack of commonality of representation and reliance': (*Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437). The Hon Justice Young's decision was overturned by the Court of Appeal, which held that his Honour failed to give sufficient weight to the common issues or the fact that the representative proceeding would provide a mechanism for a significant number of people to obtain access to justice (*Jameson v Professional Investment Services Pty Ltd* [2009] NSWCA 28).

inadequacies, as has been identified by Legg et al,<sup>18</sup> in which the authors noted that the new rule failed to address many issues such as:

- mechanisms to terminate representative proceedings after commencement;
- standing requirements;
- whether the representative proceedings rule should require or allow an opt in, opt out or limited group procedure for forming the group; or
- substituting the representative party.

17. The Chancery rule does not contain many of those procedural provisions in Part IVA going to issues that arise *after* the commencement of a representative proceeding; for example, those mandating the opt out process,<sup>19</sup> resolving issues common to sub-groups and individuals,<sup>20</sup> regulating settlement,<sup>21</sup> the giving of notices to group members<sup>22</sup> and the power of the court on judgment.<sup>23</sup>
18. It is submitted that for these reasons the regime has not attracted much interest from victims of mass wrongdoing.

## Benefits of adopting a regime modelled on Part IVA

19. Many significant interlocutory issues relating to Part 4 of the *Supreme Court Act 1986* (Vic) have been resolved by the courts in a number of matters, thereby clarifying many procedural aspects of these regimes. For example, there is now a vast body of jurisprudence concerning the application and interpretation of s 33C, 33N and 33V of the *Federal Court of Australia Act* in relation to the commencement of proceedings.
20. The considerable volume of procedural jurisprudence interpreting and clarifying the application of Part IVA, suggests that there is considerable merit in introducing substantially uniform procedures in each of the Federal Court, Supreme Court of Victoria, the Supreme Court of NSW and the Supreme Court of Western Australia.
21. It is recommended that this be done departing from uniformity only to clarify areas in which Part IVA and the Victorian regime have been found to be wanting. Not only does the broad consistency between the draft Bill and Part IVA mean that there may be less scope for a new series of interlocutory challenges, it also provides litigants with a greater degree of certainty and clarity regarding the operation of the provisions in the draft Bill.
22. Uniformity is one significant reason why the establishment of a representative or group proceeding regime should occur by the passage of legislation. Another is to avoid uncertainty regarding the suspension of limitation periods for group members, an area in which rules of the court will be inadequate.

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Despite the encouraging comments and decision of the NSW Court of Appeal in *Jameson* the need for more comprehensive procedural machinery than was available under the NSW Rule 7.4 was clearly demonstrated.

<sup>18</sup> Michael Legg, Vanessa McBride and S Stuart Clark, 'The NSW Representative Proceeding: A Class Action Half-Way House' 12 *UNSWLR* 176.

<sup>19</sup> Section 33J.

<sup>20</sup> Sections 33Q, 33R and 33S.

<sup>21</sup> Section 33V.

<sup>22</sup> Sections 33X and 33Y.

<sup>23</sup> Sections 33Z, 33ZA, 33ZB, 33ZF, 33ZJ.

23. As well, legislative support for the exercise of broad powers for the court is considered necessary. This is seen in s33ZF of the *Federal Court of Australia Act* that gives that court the power to make any orders that the interests of justice require.

## Closed classes

24. The Law Council supports the introduction of a provision in WA to facilitate closed classes in the same manner as prescribed by s 166(2) of Part 10 of the *Civil Procedure Act 2005* (NSW) or, alternatively, based on the Federal Court Act provisions.
25. Closed class representative actions are relatively common in the Federal Court and the Victorian Supreme Court and while the provision may not be necessary since the decision of the Full Court of the Federal Court in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*<sup>24</sup> it is suggested that the addition of the provision will remove the threat of such a controversy arising in WA actions.<sup>25</sup>
26. Closed classes may also enable a defendant to 'better ascertain their potential liability',<sup>26</sup> give greater certainty of recovery of costs and whether to seek the payment of security for costs.

## The Philip Morris issue

27. The Law Council supports the suggestion that the WA legislation resolve the Philip Morris issue.<sup>27</sup> There remains a need for legislative clarity concerning the question of whether in respect of each defendant [respondent] there is at least one plaintiff with a personal claim against that defendant. As the Commission correctly observes in [3.38] the decision of the Full Court of the Federal Court in *Bray v F Hoffman-La Roche Limited* (2003) 130 FCR 164 has not resolved the problem.<sup>28</sup>
28. Such uncertainty is not in the interest of any party and is conducive to ongoing disputation and interlocutory appeals. The NSW legislative solution may not be ideal. Section 158(2) provides that:
- The person may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings.*
29. The position in Canada (and the United States) appears to be that there must be at least one named plaintiff with a cause of action against each defendant in multiple defendant cases. In Canada, see *Ragoonian v Imperial Tobacco Canada* [2000] OJ No 4597 (SJC): *Hughes v Sunbeam Corp (Canada)* 2002 Can LIII 45051, 61 OD (3d) 433 (CA) and the recent decision of Perell J in *Smith v Sino Forest Corporation*, 2012 ONSC 24 (Can LII) [266]–[268].

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<sup>24</sup> (2007) 164 FCR 275.

<sup>25</sup> Such a provision is consistent with the approach and recommendations of the Victorian Law Reform Commission in its *Civil Justice Review*: Report dated 28 May 2008 (Recommendation 100 at 38, and discussion at Chapter 8, 524 at [2.1]).

<sup>26</sup> King Wood Mallesons: *Class Actions Year in Review* 2011, 9.

<sup>27</sup> *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453.

<sup>28</sup> Note *McBride v Monzie* (2007) 164 FCR 559 where Finkelstein J held that he was bound by *Bray* and *Kirby v Centro Properties Ltd* [2010] FCA 1115 per Ryan J at [11] and [21] where he held that the comments in *Bray* were obiter and that he was therefore bound to follow *Phillip Morris*.

30. The standing provision in each of the three Australian class action statutes may require this in any event, but s 158(2) of the NSW legislation is silent on this. A possible solution may be to require that in addition to the current s 158(2), at least one plaintiff [applicant] has a cause of action against each defendant [respondent].
31. The current uncertainty is best resolved by parliament.

## Representative plaintiffs and their removal

32. It has been suggested that the Federal Court has not 'given adequacy of representation the prominence it deserves',<sup>29</sup> but it may be that s 33T<sup>30</sup> has not been the subject of judicial determinations because group members are not applying for orders, as the representatives are, in fact, adequate for the task.
33. The Law Council is not aware of any evidence that group members have been dissatisfied with the adequacy of representation of the class representative, and can see no reason to amend the Federal Court provision.

## Suspension of limitation periods

34. Section 33ZE of the *Federal Court of Australia Act* provides that limitation periods do not continue to run for class members while their claim is before the court through a representative proceeding.
35. The Explanatory Memorandum to the *Federal Court of Australia Amendment Bill 1991* (Cth) explained this in the following terms:

*The provision is designed to remove any need for a group member to commence an individual proceeding to protect himself or herself from expiry of the relevant limitation period in the event that the representative action is dismissed on a procedural basis without judgment being given on the merits.*

36. In *Bright v Femcare*<sup>31</sup> the Hon Justice Stone stated:

*Section 33ZE evinces the legislature's concern that an individual group member's claim should not be prejudiced by the proceedings having been brought as a representative proceeding.*<sup>32</sup>

37. The Law Council submits that this provision does not cover all situations, and greater certainty would be provided for plaintiffs and defendants if the limitation period were to continue to run in relation to parties who are subsequently excluded or removed from a class, or in situations where a class is disbanded.

## Security for costs in representative proceedings

38. The Law Council agrees with the Commission's preliminary view at [3.54], that a security for costs framework specific to representative proceedings should not be

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<sup>29</sup> Legg, Michael, 'Entrepreneurs and Figureheads - Addressing Multiple Class Actions and Conflicts of Interest' [2009] UNSWLawJl 47; (2009) 32(3) University of New South Wales Law Journal 909 at 924 as the Court can do under s 33T of the *Federal Court of Australia Act*.

<sup>30</sup> *Federal Court of Australia Act*.

<sup>31</sup> [2002] FCA 11.

<sup>32</sup> *Ibid* [8].

introduced. Representative proceedings enhance access to justice and they should not be overly burdened with special security for costs provisions.

39. As noted by Murphy J in *Kelly v Willmott Forests Ltd (in Liquidation)*:

*The risk of stifling the proceedings requires careful consideration in the context of class actions. They are notoriously expensive both to conduct and defend. Most natural persons who bring a class action will be relevantly impecunious and there are very few Australian citizens that could afford to meet security for costs in the amounts involved. Care must be taken in these circumstances to ensure that this does not unfairly deprive people of their fundamental right of access to the courts through the Part IVA mechanism.*<sup>33</sup>

40. By supporting the Commission's preliminary view, the Law Council is not suggesting that security for costs orders should not be made in representative proceedings; on the contrary, it is submitted that the same principles should apply to representative proceedings as for individual claims.<sup>34</sup>

## Opt out

41. The Law Council is of the view that the Courts have developed an effective approach to dealing with the opt out process as provided for in s 33J, including the publication of opt out notices under s 33X(1)(a) and s 33Y.

42. As Graves, Adams and Betts note:

*To some extent, this guidance [relating to the form and content of notices] has been provided by the experience of the court in approving notices to group members in representative proceedings commenced in the 11 years since the ALRC's report, and most recently by the introduction of the Practice Note which include a sample form of 'Opt Out Notice' as a guide to be adapted as appropriate.*<sup>35</sup>

43. There is however, a disconformity between the Victorian and Federal legislation as the latter has no equivalent of Victoria's s 33KA, which provides a useful provision for amending group definitions and is a useful supplement to s 33ZF. The Hon Justice Forrest considered the Victorian provision in *Matthews v. SPI* [2013] VSC 17. A similar provision may be considered useful in WA.

## Settlement or discontinuance

44. The absence of detailed criteria in 33V of the *Federal Court of Australia Act* has been largely resolved by judicial determination and the Law Council is of the view that further prescription is now no longer necessary, if it ever was.

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<sup>33</sup> *Kelly v Willmott Forests Ltd (in Liquidation)* [2012] FCA 1446 at [129].

<sup>34</sup> Defendants have won significant security for costs awards in representative proceedings, for example, In *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited* [2012] VSC 97 the Court ordered security in the order of \$6,212,962 in favour of the defendant.

<sup>35</sup> D Grave and K Adams, *Class Actions in Australia* (2<sup>nd</sup> ed, 2012) [8.160].

45. The principles to be applied are relatively well settled.<sup>36</sup>
46. *Consolidated Practice Directions* of the Supreme Court of Western Australia might be the best way to provide a list of criteria to guide practitioners.<sup>37</sup>
47. The Law Council supports the view of the Commission at [4.47] that the inclusion of an equivalent s 33V in the Western Australian framework should mirror those which already exist.

### **Miscellaneous matters: *maintenance* and *champerty***

48. The Law Council is of the view that there should be uniformity in the law across Australia regarding abrogation of the common law principles against *maintenance* and *champerty* as these causes of action were developed to counter the corruption and abuse of the medieval English court system and are no longer relevant.
49. The Law Council notes that that these causes of action in crime have been abolished in the Australian Capital Territory, New South Wales, South Australia, Victoria and United Kingdom, and as a tort, are regarded as obsolete at common law.
50. The Law Council notes that the abolition of these causes of action may facilitate parties' access to litigation funding arrangements.

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<sup>36</sup> As seen in the 'nine-factor test' used by Goldberg J in *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, 465-466 [19]; See also Gordon J in *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541; *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited* [2012] VSC 625.

<sup>37</sup> Practice Note CM 17: Representative proceedings commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth) at paragraph 11.

## ***Attachment A: Profile of the Law Council of Australia***

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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 Territory 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 60,000 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 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC,
- Mr Justin Dowd, Executive Member

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