COMMERCIALISATION OF LEGAL PRACTICE – REGULATORY REFLECTIONS FROM NSW

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Over the last few decades we have witnessed a remarkable change in the way legal services have been and continue to be structured and delivered globally. In Australia, for example, the legal services market today includes traditional legal practices, incorporated legal practices, multidisciplinary practices as well as publicly listed law firms. Australia also has law firms that outsource their legal and non-legal work domestically and globally as well as law firms that undertake legal and non-legal work outsourced to them. Additionally, Australia has a number of firms that operate virtually via the World Wide Web as well as law firms that use social media networking sites to facilitate practice. We have also witnessed a growth in litigation funding. The expansion of litigation funding has great potential to affect the delivery of legal services and the operation of the judicial system.

A similar situation occurs overseas. In the United Kingdom, traditional law firms now find themselves operating alongside and in competition with alternative business structures which like incorporated legal practices in Australia permit non-lawyer investment. The legal services marketplace in the United Kingdom also includes an array of new law firms offering their services in shopping centres, on web sites as well as in Tardis booths. A number of law firms in the United Kingdom also outsource their work domestically and internationally. Similar developments are occurring in the United States, although they have not yet embraced the move to alternative business structures.

This change we are witnessing has been facilitated by three important factors – regulation, technology and cost. Over the last few years we have seen a fundamental shift in the way the legal services market has been regulated, domestically and globally. Legislation enabling law firms to change their traditional partnership structure has allowed practices flexibility to create novel structures to suit market needs. The impact of legislation has been augmented by developments in technology that have made it easier for law firms to operate virtually, using customised software or standardised web 2.0 tools like Skype and online file management applications. Thirdly, the change has also been facilitated by the rising cost of legal services and the attempts of some corporate law firms to mirror their corporate clients in terms of structure, size and service delivery.
Whilst these developments have broadened the delivery of legal services and enable practices to adapt to market forces, they have also brought concern that the commercialisation of legal practice will diminish the profession and bring it into disrepute. Commercialisation, it is said, can fuel not only profit but also greed. My experience in regulating the profession in NSW, Australia suggests that this is not always so. The commercialisation of legal practice while presenting major challenges, has not, in Australia, at least to this point, totally eroded the profession of lawyers or the practice of law.

CHANGES IN THE STRUCTURE AND DELIVERY OF LEGAL SERVICES IN AUSTRALIA

(a) Alternative Business Structures

Over the past decade, the legal profession in New South Wales has undergone a formidable change in both size and structure. Traditionally, solicitors in NSW, like many other common law jurisdictions, practiced as sole practitioners, or in partnership with other lawyers and this remained the dominant legal structure for many years. However, since 1999, there has been a notable move away from this structure toward more innovative alternative business structures (ABS), including incorporated legal practices (ILPs), multidisciplinary practices (MDPs) and publicly listed law firms.¹ The move was sparked by the introduction of legislation in NSW permitting incorporation and public ownership of law firms.² Adoption of alternative business structures has also been driven by a growing perception that the traditional structure of law firms no longer meets the needs of many practitioners and clients.³

This perception is not confined to New South Wales or, indeed, Australia. Similar sentiments have been – and continue to be – expressed by commercial clients, the legal profession, and the accounting profession in the United Kingdom, the United

² The Legal Profession (Incorporated Legal Practices) Act 2000 (the Act) and the Legal Profession (Incorporated Legal Practices) Regulations 2001 (the Regulations) entered into force on 1 July 2001. The legislation was principal legislation governing the legal profession today in NSW is the Legal Profession Act 2004 (NSW) and the Legal Profession Regulation 2005.
States and Canada. As a result, there is global recognition that legal practice and the regulation of the legal profession must evolve in order to keep up with the changing demands of the market.

In NSW today there are over twelve hundred ILPs in the legal services marketplace (representing 30% of legal practices). There are a number of reasons as to why incorporation has become so popular. Firstly, ILPs offer limited liability for their partners (limited to their investment in the practice), as those partners become shareholders. Secondly, there are a number of financial benefits in a corporate structure, including tax advantages, favourable superannuation and redundancy arrangements. Thirdly, the ILP structure provides better options for managing a legal practice.

The majority of ILPs are either sole practitioners or firms with three to ten partners. Several of the large firms have also incorporated in NSW. Incorporation in NSW has taken a number of different forms. These have included multi-disciplinary practices, which provide a one-stop-shop for clients offering for example, legal, property and financial services as well as at least one firm that has franchised its practice.

Law firms have also used incorporation to attract external funding through public listing. In May 2007, Slater & Gordon made legal and corporate history when it became the first law firm in the world to list its entire firm on the Australian Securities Exchange (ASX). One other law firm in Australia, Integrated Legal Holdings (ILH), has since listed on the ASX, and a number of other firms have expressed an interest in doing so.

Ancedotal evidence suggests that whilst many firms in Australia are interested in attracting external ownership there are a variety of reasons as to why they have not pursued this option. Some of these reasons include branding issues as well taxation issues and the lack of a national regulatory framework in Australia.

(b) Third party Litigation Funding

With the contraction of legal aid and a lack of public funding available to support civil litigation, demand for access to financial support for the conduct of litigation is continuing to grow in Australia. In Australia, we have both litigation lenders\(^5\) and litigation funders.

Australian-based and offshore funders are increasingly active in Australia. For example, the Singaporean litigation funder International Litigation Partners Pte Ltd recently funded litigation on behalf of an Australian mining company, Chameleon Mining. To offset variable domestic deal volume, some domestic litigation funders have also taken on foreign litigation and created subsidiaries in foreign markets. IMF (Australia)'s support of Uniloc's patent litigation in the US and its launch of a US subsidiary, Bentham Capital, provide examples of this kind of activity.

The market for major litigation funding remains concentrated amongst an oligarchy of six or seven firms, of which IMF (Australia) and Hillcrest Litigation Services (HLS) are listed on the ASX\(^6\). New and existing players in the market advertise themselves prominently to lawyers and insolvency practitioners. Funding is largely targeted towards claims which are likely to maximise the return for the funder (i.e. high profile and high-value claims) and which are likely to set valuable substantive or procedural precedents\(^7\). Class actions are an obvious example, and litigation funders have traditionally been associated with class actions, but their involvement in litigated matters in Australia is broader than that. For example, HLS has supported litigation by a consulting firm against a fertiliser manufacturer for contractual breaches of confidence\(^8\). The growth is largely due to the High Court of Australia's clear approval of litigation funding.

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\(^5\) Litigation lenders lend money to clients to enable clients to obtain lawyers and run litigation.
Litigation lending is in essence similar to a personal loan. The only major concern for the lender is that the loan will be repaid. The interest rates on money lent can in some instances be exorbitant.
Litigation funders on the other hand, fund a law firm to conduct litigation on behalf of a client(s) in return for a percentage of the ultimate settlement or court order.


\(^7\) Ibid

The High Court of Australia has endorsed the funding of litigation on two occasions already. The first endorsement was in 2006 in the matter of *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited*. In this matter the High Court declined to formulate a general rule of public policy that would prevent the practice of funding a party to institute or prosecute litigation in return for a share of the proceeds of the litigation. The second endorsement by the High Court was in the matter of *Jeffery & Katauskas Pty Limited v SST Consulting Pty Limited, Jeffery & Katauskas Pty Limited v Rickard Constructions Pty Limited*. In this matter the High Court held that a non-party who funded the plaintiff, without indemnifying it for adverse costs orders, had not been shown to have committed an abuse of process.

Litigation funding can bring numerous social and economic benefits. Commercial funding for large group plaintiff actions is an effective market-based solution for a public policy gap, that being the lack of affordable court access or public funding for such cases. There is no doubt that litigation funding allows people who otherwise couldn’t afford litigation to seek redress for real (and to them substantial) losses caused by the actions of others.

Access to litigation funding for individual plaintiffs may also help to counterbalance the taxation advantages available to corporate defendants in defending claims. If the litigation relates to corporate business activities, the corporate defendant can claim all litigation expenses as a tax deduction, which in effect publicly subsidises their defence.

(c) Outsourcing of Legal Work

Australia has become well entrenched in the legal outsourcing market (valued at $640 million globally) as both a provider and user of outsourcing. Initially, outsourcing was used to perform basic legal administrative functions, whereas today, complex legal research, due diligence, contract management and negotiation, and

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9 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41
10 *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd & Ors, Jeffery & Katauskas Pty Ltd v Rickard Constructions Pty Ltd (subject to deed of company arrangement) & Ors* [2009] HCA 43
intellectual property services are also being exported. The work of lawyers, paralegals, legal secretaries, and litigation support personnel are all capable of being performed by legal outsourcing companies.\textsuperscript{12}

There are a number of different types of legal outsourcing arrangements that exist in the Australian legal marketplace. Legal work can be outsourced directly to subsidiaries of the firm. Law firms can also hire a foreign law firm to undertake the work. Alternatively, a law firm can employ a third party vendor, known as a legal outsourcer (LO). The work conducted by an LO may be undertaken onshore (within Australia), near shore (e.g. New Zealand) or offshore. Over the past few years, global LOs such as Pangea3, Clutch Group, CPA Global and Integreon have expanded their reach into the domestic legal market, particularly at the large law firm level -firms such as King & Wood Mallesons, Ashurst, and Corrs Chambers Westgarth have all recently established agreements with offshore LOs to outsource repetitive due diligence and discovery tasks.\textsuperscript{13}

According to Mitt Regan and Palmer Heenan, legal process outsourcing has profoundly changed the provision of legal services. This is particularly true for in-house counsel who today face unrelenting pressure to reduce their numbers and spend less on external firms.\textsuperscript{14} The practice of outsourcing in the legal services market place is becoming more and more widespread and represents another step toward the disaggregation of legal service delivery.

(d) Virtual Legal Service Delivery

Virtual Law Offices, law firms that have an online presence exclusively, have not yet become the norm for legal service delivery in NSW. Nevertheless, aspects of virtual legal service delivery have become more commonplace with parallel developments in technology.

The use of social media tools, applications and strategies in legal practice provides just one example. Social media can have a great impact on both the internal and external communications of a law firm. Today, it plays an important role in a legal practice’s efforts to attract new clients and disseminate information about their legal services. Social and professional networking services such as Facebook, LinkedIn and Twitter are being used by legal practitioners both in Australia and overseas to create online profiles that contain personal information and legal opinions, which can be made available to anyone with an internet connection or who is a member of the networking site. For example, a legal practitioner may create a Facebook profile that is accessible to family, friends and prospective clients at the same time. The legal practitioner may then post professional announcements that are shared with all of those people.

Virtual Question-and-answer-style advice, pioneered in the social media space by @thelegaloracle (the first ‘Twitter law firm’, based in the UK) has been emulated in Australia. Several websites exist which allow people to post questions to a panel of legal practitioners about legal issues. The websites stipulate that no client relationship is created and that “the answers given are for information purposes only and are not a substitute for specific professional advice.” For example, www.justanswer.com/australianlaw allows anyone accessing their website to ask a legal question of an “online solicitor” about debt or bankruptcy issues, divorce, custody or child support issues. Questions can also be asked of the online solicitor about employment, criminal, or property issues. It should be noted however that a recent decision by the South Carolina Bar has opined that a lawyer answering questions on justanswer.com is improper.\(^\text{15}\)

**DRIVERS OF COMMERCIALISATION**

(a) Regulation

A non-prohibitive regulatory approach adopted in New South Wales has greatly facilitated the expansion of the legal services marketplace. The NSW model for ILPs,

for example, is liberal - ILPs are able to be formed with minimal regulatory restrictions. Legislation in NSW permits legal service providers to register a company with the Australian Securities and Investments Commission (ASIC), the agency responsible for ensuring compliance with corporations law. Once registered an ILP must fulfill three tasks.

Firstly, NSW legislation stipulates that an ILP must appoint a "legal practitioner director." The "legal practitioner director" is generally responsible for the management of the legal services provided by the ILP. The institution of the "legal practitioner director" is founded on (and now supersedes) a historical rule in NSW which required legal practices to retain at least 51% of the net income of a partnership.

Secondly, every ILP must implement and maintain "appropriate management systems" to enable the provision of legal services in accordance with the professional obligations of legal practitioners. In fulfilling this duty, an ILP must demonstrate that it has implemented a management system that addresses ten objectives. These objectives include, inter alia, competent work practices, effective communication, acceptable processes for liens and file transfers records, timely identification and resolution of conflicts on interest and effective staff supervision. The legal practitioner director is responsible for implementing this management system.

In order to enable legal practitioner directors to assess the appropriateness of their management systems, the OLSC has developed a standard self-assessment document. This takes into account the varying size, work practices, and nature of operations of different ILPs; it is thus not a 'one size fits all' approach, unlike most compliance-based regimes. The legal practitioner director rates the ILP’s compliance with the ten objectives as either "fully compliant", "compliant", "partially compliant", or "non-compliant", and then sends the completed form to the OLSC for review.

Third, the legislation imposes a range of reporting responsibilities on legal practitioner directors. A legal practitioner director has a responsibility to report any conduct of another director of the practice (whether or not a legal practitioner) that
has resulted in, or is likely to result in, a contravention of that person’s professional obligations or other obligations imposed by or under the *Legal Profession Act 2004* (NSW). In addition, the legal practitioner director must report any professional misconduct of a solicitor employed by the practice. A legal practitioner director must disclose all the services to be provided by the ILP, whether or not they will be provided by a legal practitioner, and those legal services that will not be provided by a legal practitioner.

The rationale behind mandating these three measures is not a mystery. The requirement that a legal practice appoint a “legal practitioner director” on incorporation ensures that a legal practitioner maintains a direct interest in the management of legal services of the practice. Similarly, the requirement that an appropriate management system be implemented and maintained ensures that the legal practice considers and implements measures that support and encourage ethical behaviour. The combination of these three measures thus ensures that the integrity of legal practice is preserved and respected.

Non-prohibitive regulation has also enabled the practice of litigation funding to flourish. At present in NSW and indeed Australia the regulatory regime governing third party litigation funding is elusive. It was not until the Federal Court’s decision in *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 (*Brookfield*) that the question of the regulation of litigation funders was actually addressed in Australia.

In *Brookfield*, the Full Court of the Federal Court held for the first time in Australia that a litigation funding arrangement constituted a managed investment scheme. The determination has caused great concern amongst existing litigation funders and law firms, particularly law firms pursuing class action backed by funding. Their concern is that the characterisation of a litigation funding arrangement as a managed investment scheme could increase the cost of litigation significantly and for some, eliminate litigation funding entirely.

As a result of these and other concerns, the Federal Government addressed the Multiplex decision by implementing a regulatory carve-out for funded class actions.
The carve-out was established by way of an Interim Class Order which exempts funded proceedings from the definition of managed investment schemes in s 9 of the Corporations Act and the disclosure requirements which follow. The Class Order also exempts litigation funders from the adverse NSW Court of Appeal decision in *International Litigation Partners Pte Ltd v Chameleon Mining NL and Anor* (2011) 276 ALR 138, which imposes financial licensing obligations on litigation funders if they do not wish to expose themselves to rescission of the funding agreement. A number of domestic litigation funders, such as IMF (Australia), already hold Australian Financial Services Licences (AFSLs).

The Interim Class Order has been re-issued numerous times since first issuance and is currently in force until 30 September 2012. The Interim Class Order issued by ASIC only provides temporary relief. Draft amendments to the Corporations Regulations to provide a more permanent carve-out were the subject of consultation last year but have not yet been implemented16.

Non-prohibitive regulation has also been adopted as the preferred model for regulating litigation funders in the UK. The Civil Justice Council, an independent governmental body, recently published a Code of Conduct, which must be adhered to by members of the newly established, voluntary, Association of Litigation Funders of England and Wales17.

In NSW and Australia we have also taken a non-prohibitive stance to the regulation of new technologies and their use by legal practices. We have not banned the use of legal outsourcing, nor have we banned the use of virtual legal service delivery or social media networking by legal practices. Rather we have sought to encourage and enable their use. This has been achieved through articles assisting practitioners wanting to use new technologies. We are also in the process of drafting guidelines for the profession on these issues.

**(b) Technology**

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According to the Department of Finance and Regulation, which produced the draft Cloud Computing Strategic Direction paper, the Australian Government spends an estimated $4.3 billion per annum on information and communication technology.

New technologies, such as cloud computing, are having a fundamental effect on law firms and the legal services marketplace. The Internet, computers and social media are revolutionising business and the practice of law. Communication is now easier, making lawyers' output timelier and more readily accessible regardless of their physical location.

Cloud computing has enabled legal practices to store data in the cloud. Cloud computing refers to the sharing and/or storage of data by users of their own information on remote servers owned or operated by third-party providers and accessed via the internet. Access to applications and data is on demand. Cloud computing is said to offer an IT system which delivers increased profitability, IT reliability, and staff mobility and productivity through remote IT access. Always-UP, for example, is a cloud computing service provider that offers hardware and software which can be customised to suit legal practices. All the information lodged in a busy practice can be hosted internally or on the external/secure server reducing the risk of data loss and making files easily accessible wherever and whenever required.18

A number of law firms in Australia are starting to catch on to the cloud concept. Blackstone Waterhouse Lawyers, for example, adopted cloud services in 2010. The managing director of the firm believes that cloud computing has offered less downtime, faster data recovery, more physical office space, higher staff morale, and attracts top-tier staff into its mid-tier environment.19

Implementation of new technologies can go hand in hand with new business practices. Nexus Lawyers is a firm that uses cloud computing and cloud-based operating systems to facilitate its 'dispersed' model, where its lawyers can work from

centralised, client or satellite offices. Cloud services are also being used to facilitate aspects of legal practice such as client authorisation in contract negotiations. Swaab Attorneys, for example, is in the process of trialling a mobile application developed by FormBay which accelerates the authorisation of documents by clients through electronic signatures and document delivery.

(c) Cost

The commercialisation of legal practice has also been prompted by concerns about the rising cost of legal services, and in particular the billable hour.

Hourly billing, once the bread and butter for lawyers, has been put under the spotlight in recent years for being, inter alia, an inefficient costing tool and a burden on the profession and the community. Hourly billing has severely altered the legal working environment, often with detrimental effects. The billable hour today extends far beyond calculating how a client should be charged. Hourly billing is now used by firms to measure the utility of an employee - hours now decide salary levels, raises, promotions and bonuses – driving up billable hours at an unreasonable rate. Such billing however not only prevents lawyers from accurately costing their services, it also prevents lawyers from understanding the real market value of their services.

Acknowledging the problems with the billable hour, some law firms have developed alternatives to the billable hour. Such alternatives include event-based billing, fixed fee agreements and value-based billing. These alternatives offer both lawyers and clients the ability to negotiate costs and can provide greater certainty in billing arrangements.

32. According to recent survey of legal practitioners by Mahlab, the proportion of lawyers putting in big hours is increasing, rather than decreasing, thanks to a boom in merger activity and private equity deals. Two years ago only 12% of the profession were working more than 50 hours a week. Today the number of practitioners working 50 hour or more has increased to twenty nine percent. The increase is also due to the expanding expectations of law firms who now expect a lot more chargeable hours from their employees that they did in the past. See K. Gibbs, “Firms’ budgets behind billing fraud”, Lawyers Weekly, 18 November 2005 available at http://www.lawyersweekly.com.au/articles
Unlike time costing, value-based billing, for example, acknowledges that not all legal work is of the same value. Value-based billing takes into account the degree of complexity, the predictability of results, and the effect on the client of exposure to loss. It involves the practitioner and client discussing at the outset the value of the legal work for the client and for the practitioner. Agreed upon fees are then negotiated. Value-based billing considers the importance of the matter to the client. It also considers consequences to the client of an unsatisfactory resolution. Value-based cost agreements can place higher value on legal services provided to a client which enable the client to ‘grow’, obtain something to which they are entitled or help the client avoid risk.  

Value-based billing requires forethought and planning on the practitioner’s part and can include practical policies such as offering a scale that includes reductions when additional time is needed to understand a new area of law. These costs agreements should be commenced only when the base cost is known and there is a clear idea of the numbers of hours involved and the fee required to cover these costs.

Technology has also had a significant impact on costs. Legal outsourcing is today placing pressure on the traditional law firm/client relationship and billing, offering a more cost-effective mechanism by which legal work can be performed. Legal outsourcers, for example can take advantage of economies of scale and specialisation by concentrating on performing a particular task as efficiently as possible. With increased specialisation and higher volumes, an LO’s inputs into its production process can be purchased at discounted rates due to greater buying power. It can also produce higher quality outputs because it can justify investing more heavily in those elements of the production process. Consequently, law firms may choose to obtain those outsourced services because they can be provided at a lesser cost or with greater efficiency than the law firm could if it performed the function internally.

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23 See for example, Beyond the Billable Hour- An Anthology of Alternative Billing Methods, Edited by Richard C Reed, American Bar Association, 1989
The use of India's outsourcing services above other nations has been primarily attributed to the significantly lower cost of legal services. For example, Indian lawyers are said to work for approximately 'US$50 to US$70 dollars per hour compared to [American lawyers who are paid] US$200 or more per hour'. In addition to the cost benefits, the fact that India is in a different time zone allows firms who have outsourced material to provide 'round-the-clock legal assistance'. Government intervention in the form of tax incentives and export exemptions has also made the use of Indian LOs more attractive to foreign firms. For American firms, the most commonly attributed significant factors relating to the use of India for legal outsourcing are the 'low cost of labour, the surge in information technology, favourable macroeconomic policies, the high quality of workers with advanced educations, the democratic system of government and the historical ties to the United States'.

The outsourcing trend has also been embraced by in-house corporate counsel. For example, Anglo-Australian mining giant Rio Tinto recently engaged CPA Global for a period of six months to perform certain aspects of their legal work. Rio Tinto has built a team of CPA lawyers in India who operate as an extension to its in-house legal department. The rationale for this arrangements is that Rio Tinto lawyers are then free to focus on more complex tasks. The arrangement has apparently been working favourably for Rio Tinto. A team of 50 CPA lawyers was assembled in under 48 hours to work with a US law firm on a document review for the Federal Trade Commission. This yielded savings of US$1 million. General Counsel at other large

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27 Ibid.
28 Ibid.
29 Jayanth K. Krishnan, 'Outsourcing and the Globalizing Legal Profession' (2006-7) 48 Wm. & Mary L. Rev 2189, at 2211
31 R SUSKIND, "Rio Tinto deal heralds huge changes", Times Online, 18 June 2009 available at http://business.timesonline.co.uk/tol/business/law/article6523920.ece
organisations such as AMP have incorporated the availability of outsourcing arrangements into their panel decision-making\textsuperscript{32}.

The cost of legal services have similarly been affected by virtual law practice and cloud computing. Virtual law practices can be run from anywhere, there is no need to lease or rent premises suitable for receiving clients.\textsuperscript{33} Savings may also arise from a reduced need for office staff and supplies (not to mention the environmental benefits associated with a paperless office). The reduced overheads may be passed on to clients through lower fees (making the lawyer more competitive) or may provide an increased profit margin for the lawyer. Legal practitioners striving for enhanced work-life balance may also consider a virtual law firm attractive because of enhanced flexibility.\textsuperscript{34}

**IMPLICATIONS FOR THE LEGAL PROFESSION**

The commercialisation of legal practice in NSW (and indeed, globally) has the potential to significantly affect the status and standing of the legal profession. Each dynamic of commercialisation presents its own unique challenges.

External ownership, for example, raises a myriad of ethical and professional challenges, such as how one should deal with the competing professional obligations of a legal practitioner to the court and the client versus the duties to a company’s shareholders, or how one should deal with the duty of confidentiality owed by a legal practitioner to his/her client versus the disclosure requirements under Corporations Law. Critics argue that external ownership fundamentally contradicts the principle of a legal practitioners independence, will lead to a lowering of professional standards and will prejudice the standing of all legal practitioners.

\textsuperscript{34}Kimbro ‘Inspired solo-Stephanie Kimbro the virtual law office’ \url{http://www.theinspiredsolo.com/inspired-solo-stephanie-kimbro-the-virtual-law-office/}. 
Litigation funding similarly raises an array of ethical challenges for the legal profession. The interpolation of third parties (and sometimes agents and contractors of those third parties) into the traditional lawyer/client relationship however has profound practical and regulatory implications. The interpolation of players who are not bound by traditional duties to the court and the administration of justice, but who are nevertheless increasingly actively managing the process is concerning. The traditional protections afforded to consumers through the long established rules of legal professional conduct and ethics may prove insufficient in this new legal landscape.

Unlike legal practitioners, third party litigation funders are not bound by the various rules and regulations covering lawyer professional conduct. Nor are third party litigation funders presently bound by fiduciary duties as are legal practitioners. Lawyers are officers of the Court. As officers of the Court they owe their paramount duty to the Court. The duty to the Court is their primary ethical duty and stands over and above any other ethical duties. Inherent in the lawyer’s duty to the Court is a duty to the community through the lawyer’s high ethical standards and duty to uphold the rule of law. Legal practitioners must not only obey the law but must also ensure the efficient and proper administration of justice. This is a duty owed to society as a whole. The duty to the court stipulates that as officers of the Court, legal practitioners must act in a certain way. Legal practitioners must not mislead the Court and must act with competence, honesty and courtesy towards other solicitors, parties and clients. The duty to the Court also provides that legal practitioners are independent (free from personal bias), frank in their responses and disclosures to the Court and diligent in their observance of undertakings given to the Court or their opponents.

Lawyers also have a concurrent duty to their client. This duty is a fiduciary duty. Fiduciary duties, inter alia, include a duty of loyalty, a duty of confidentiality and a duty of competence. The law of fiduciary duties ensures, for example, that a solicitor is not placed in a position whereby a conflict of interest arises between the solicitor’s and the plaintiff’s interests and the plaintiff’s interests and those of a third party.

It has been argued that litigation funders play a role that largely mirrors that of a law firm. Litigation funders must for example choose which cases to fund, which lawyers
to engage with, which clients to support and what litigation tactics should be followed. From a commercial perspective, this may make sense, but it seems to interfere with an individual’s right as to their choice of lawyer and with a lawyer’s duty to a client of confidence, full disclosure and confidentiality. Indeed, it would be surprising if litigation funders were not primarily staffed by people with at least legal qualifications as they would require some level of knowledge to be able to make these decisions.

Legal process outsourcing and virtual law practice also challenges the traditional lawyer/client dynamic. One of the major concerns is the potential for breach of confidentiality or security that can take place with regard to client information. Outsource providers and virtual law firms increasingly operate via “cloud computing” where the information is hosted by a system outside the law firm by a third party. The locating of client information offsite and out of the direct physical control of the legal practitioner is therefore potentially vulnerable to unauthorised access or inadvertent disclosure.

The concern for legal practitioners is founded on the simple premise – whether the duty of confidentiality can be effectively enforced upon the outsourced vendor with the same vigour as they abide by. Clients similarly face the same dilemma – whether or not the outsourced vendor is as careful with and protective of confidential information as the client would be. The concern is exacerbated in the absence of ethical rules concerning confidentiality in these situations.

Supervision is another concern. How, for example, can it be guaranteed that the work outsourced to another country is being handled in a professional manner? Is the work being completed by appropriately qualified practitioners? Have appropriate conflict checks been completed? Does the organisation providing the outsourced service also provide similar services to other (potentially competitor) firms or clients, or provide work for the other side in the same matter?

At present in New South Wales, supervision by senior practitioners over junior and non-legal staff often presents major difficulties for legal regulators. This is primarily due to the regulatory concept that misconduct is personal to the legal practitioner.
The concept of "vicarious liability" of a legal practitioner for the work of another, and particularly a non-lawyer, is not well developed and may well be significantly exacerbated particularly where a solicitor outsources legal work.

Conflicts of interest present another area of concern in relation to outsourcing and virtual law practice. Conflicts of interest are widely considered to be the most difficult and potentially damaging issue for legal practices today. At present, the rules in New South Wales that address this issue cover acting against previous clients, legal practitioners preferring their own interests to that of their client's and acting for two clients when their interests diverge. These cover a myriad of potential circumstances and are historically extremely difficult for regulators to address.

Most, if not all firms, presently utilise some form of conflict checking mechanism to determine whether they have previously acted in relation to a client or are presently so acting. This is particularly difficult and costly for larger firms, and even more so where those firms do work in multiple jurisdictions.

**A REGULATORY RESPONSE**

At the OLSC we strongly believe that the primary purpose of a regulator is to reduce complaints within a framework of consumer protection, promotion of the rule of law and of professionalism. One of the main concerns that has been expressed about the commercialisation of the profession is that the profession has become more focussed on profit rather than its duty to the Court (which stands for the community and the search for justice), particularly where coupled with the commoditisation of law through modern approaches to legal practice. The concern expressed is that commercialisation and commoditisation will diminish the profession in the eyes of the public thereby further diminishing the rule of law and its impact.

It is undisputed that today's lawyer faces a myriad of ethical challenges in light of the ever increasing commercialisation of legal practice. The commercialisation of legal practice brings to bear situations for lawyers in which competing duties such as the duty to the court and the administration of justice and the duty to the client need to be considered and weighed against each other.
In my experience the ethical challenges posed by commercialization can, at least in part, be addressed by an effective and responsive regulatory regime that creates a framework for instituting ethical behaviour, understands market dynamics and upholds the professionalism of practitioners. In NSW we have developed such a regulatory regime. We have done so in a number of ways.

Firstly, in relation to firms that have incorporate and publicly listed we have set up a regime requiring every firm to establish and maintain an "ethical infrastructure" - that is formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practices - that supports and encourages ethical behaviour.\textsuperscript{35} The ethical infrastructure is overseen by a legal practitioner director within the firm.

As discussed above we have required incorporated practices in NSW to establish and maintain an appropriate management system. The ethical infrastructure requirement imposed on ILPs has proven to be a great success. We are seeing, by and large, better and more ethically managed legal practices. We are also seeing a fall in the number of complaints. According to the results of a research study we conducted in 2008, together with Dr Christine Parker, of the University of Melbourne, on average the complaint rate (average number of complaints per practitioner per years) for ILPs after self-assessment was two thirds less than the complaint rate before self-assessment. This is a huge drop in complaints. The study involved analysing 620 initial self-assessment forms from ILPs. In addition to the complaints data the study also found that the majority of ILPs assess themselves to be in compliance on all ten objectives from their initial self-assessment (62%). Of the remaining 38%, about half have become compliant within three months of the initial self-assessment.

The requirement to implement an ethical infrastructure also provides better protection for consumers of legal services. This is because the management

\textsuperscript{35} The term "ethical infrastructure" was developed by Prof Ted Schneyer. See Ted Schneyer, A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure of Law Firms", 39 South Texas Law Review 245 (1998). It was developed further by Elizabeth Chambliss and David Wilkins in Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting, 30 Hofstra Law Review 691 (2002) and A New Framework for Law Firm Discipline 16 Georgetown Journal of Legal Ethics 335 (2003).
systems that ILPs are required to maintain act as a quasi-educative mechanism encouraging practitioners to adopt best practice in order to achieve compliance with the requirements of the legislation and the ethical duties of a legal practitioner.

We have also encouraged those publicly listed law firms in Australia to include in their constituent documents a hierarchy of duties that a law firm listed on the ASX must stipulate. Both Slater & Gordon’s and IHL’s constituent documents provide that their primary duty is to the Court, their secondary duty is to the client and their tertiary duty is to the shareholders. While this approach has received little comment to date from the wider community, it may be seen as addressing some of the problems identified in relation to the 2008 financial crisis where shareholder value and maximising shareholder wealth is considered to be one of the main causes of the 2008 crisis.

We are presently engaged in a major Australian Research Council (ARC) project together with the University of New South Wales, ASIC and Ernest & Young that is looking at better ways to regulate financial markets as a result of the crisis. While the research has yet to be concluded, the approach we have taken to regulating the legal profession in terms of promoting ethical infrastructures within law firms will be proposed as a model for the regulation of financial markets.

We have proposed an analogous regulatory regime for third party litigation funders. We have submitted that funding of litigation is inherently and intimately connected with the provision of legal services and the administration of justice, particularly where the funder plays an active role in choosing the litigation, the lawyers and being engaged with litigation strategy. We submit that a litigation funder’s relationship is thus fiduciary in nature and a litigation funder’s primary duty should be to the Court. We propose that litigation funders ought thus be regulated in the same manner as ILPs. We thus propose that litigation funders be required to adopt and maintain an ethical infrastructure similar to that required by ILPs and that litigation funders appoint a legal practitioner to oversees the infrastructure that is instituted.

In relation to the use of technology we have proposed that practitioners adopt an ethical infrastructure in the form of management policies and are now in the process
of drafting guidelines for practitioners that set out how to use new technologies ethically. We encourage firms to adopt a social media policy, a policy on outsourcing as well as a policy on virtual law practice. Guidelines are being developed to this end as well.

At the OLSC we have sought to promote ethics and integrity by focusing on policies and practices which can entrench ethical behaviour within firms. Our entire practice, including the handling of complaints by clients against legal practitioners is treated not only as a disciplinary matter but also educationally towards meeting our stated objectives. We have focused on employing an effective and responsive regulatory regime that seeks to encourage lawyers to adopt more ethical work practices. At the heart of the OLSC’s approach lies the notion of ‘regulating for professionalism.’ So, when the OLSC receives a complaint against a lawyer, our first response, where possible and appropriate is not to look towards prosecution of the lawyer but to work with him/her in trying to determine the underlying basis of the complaint, attempting to resolve the complaint and an appropriate response the lawyer can take in eliminating future complaints. The OLSC’s role as a regulator is therefore to work with the profession in entrenching an ethical culture and promoting professionalism in legal practices, while reducing complaints. This ‘education towards compliance’ framework is the dominant paradigm of the OLSC and sits well within our philosophical approach of ‘regulating for professionalism.’

We continue to remind practitioners that they are part of a noble profession. As members of a profession, legal practitioners have both an ethical and statutory obligation to ensure that they do not engage in conduct that diminishes public confidence in the administration of justice or is prejudicial to the administration of justice.

A legal practice must be a successful business but must not jettison ethics and professionalism in its desire for profits alone. While we believe that there is no irresolvable conflict between profit and ethics there is a conflict between ethics and greed.