

**PRESERVING THE ETHICS AND INTEGRITY
OF THE LEGAL PROFESSION IN AN
EVOLVING MARKET:
A COMPARATIVE REGULATORY RESPONSE**



**Office of the
Legal Services Commissioner**



Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response

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In this article we discuss the some of the main changes that have occurred in the regulation of the legal profession in Australia, focusing, in particular, on the state of New South Wales (N.S.W). Of special interest, are the measures that have been introduced in N.S.W by the Office of the Legal Services Commissionerⁱ, the legal regulator in N.S.W, to promote ethical behaviour and protect the integrity of the legal profession as it moves away from the traditional partnership model to alternative business structures like public listing. These measures include the appointment of legal practitioner directors, a requirement to implement and maintain an ethical infrastructure, a hierarchical stipulation of professional and ethical duties in corporate documents and the move to an outcomes-based regulatory model. We compare the N.S.W. initiatives to the measures adopted in the United Kingdom. Both surveys against the background of globalization and the resulting disaggregation of legal services. In addition, we identify current trends so that those jurisdictions wishing to adopt alternative business structures for legal practice can learn from the experience in Australia and the United Kingdom and are, thus, more fully informed about the direction that they may wish to take.

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Part 1: Introduction

New South Wales (N.S.W.) was the first jurisdiction in Australia and indeed the rest of the (common law) world to permit law firms to structure their practices as multi-disciplinary practices or incorporated legal practices. Such permission was not however without controversy. One of the main concerns was whether and how the legal profession would be able to maintain its ethical responsibilities and professional duties in the face of commercial pressures. The *profit* versus *ethics* debate resonated loudly, with many holding the view that the two are clearly incompatible (Mullerat, 2000, p.5, MacEwen 2008, p.62-63, Grout 2005, p.3). The N.S.W. experience has however clearly shown that the profit versus ethics debate can be overcome if regulatory measures are instituted to ensure that legal practices wishing to incorporate or publicly list preserve the ethics and the integrity of the legal profession.

Over the past few years, the legal profession in N.S.W., Australia has undergone a significant change in both size and structure. Traditionally, solicitors in N.S.W. practised as sole practitioners or in partnership with other lawyers, and this remained the dominant legal structure throughout the twentieth century. Since July 2001, however, there has been a noticeable shift away from the traditional sole practitioner or partnership structure toward more innovative structures including incorporated legal practices (ILPs), multi-disciplinary practices (MDPs) and even publicly listed practices as a result of legislation permitting such. In N.S.W. today there are 921 approved ILPs, 19.4% of private practices in N.S.W. (4742 practices in total). The reason for this move is largely due to a growing perception in Australia that the traditional structure of law firms no longer met the needs of many

practitioners and clients. (Law Council of Australia 2001, p.51, 97-106). 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 States and Canada. (Kritzer 1999, p.734; Susskind 2000, p.60-61 & 72-74, Mayson 2007, p.4; Podgers 2009, American Bar Association Commission on Ethics 20/20; Canadian Bar Association 1999, p.11-12) As a result, today 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.

These challenges are now being met by regulators worldwide. A number of jurisdictions are in the process of considering legislation that permits the creation of different business structures for legal practices. The United States, for example, are reconsidering the adoption of an MDP model as well as the opening up of external ownership and equity investment. Through many in the U.S. strenuously resist this move. The United Kingdom as discussed in greater detail below, has recently enacted legislation that will permit new legal structures known as legal disciplinary practices, “alternate business structures”, and external ownership.

Not unexpectedly, there have been extensive debates as to the ethical and professional implications of allowing the adoption of these various structures. (MacEwen 2009, Regan 2007, Mark 2007, Mark & Gordon 2009) External ownership raises a myriad of ethical and professional challenges. These challenges include in Australia how one should deal with the competing professional obligations of a legal practitioner versus the duties to a company’s shareholders, and how one should deal with the duty of confidentiality owed by a legal practitioner to his/her client when compared with the continuous disclosure

requirements established under *Australian Corporations Act 2001 (Cth)* (Mark & Gordon 2009).

Some have noted that external ownership fundamentally: contradicts the principle of a legal practitioner's independence; will lead to a lowering of professional standards; and will diminish the ethical standing of all legal practitioners as members of an honourable profession (Mark & Gordon, 2009, 521; Regan, 2007, MacEwen 2008; The College of Law of England & Wales 2008, p.9). The current N.S.W. model that permits the adoption of alternative business structures, however, challenges these criticisms and demonstrates that they can be overcome.

In this article we trace in greater detail the changes that have occurred in N.S.W., documenting how they have helped preserve the ethics of the profession and compare them with similar initiatives in the United Kingdom.

The Success of the New South Wales Model

The success of the N.S.W. model is founded on a number of specific measures. First, the N.S.W. 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 and ensuring that the practice (and the legal practitioners) meet their ethical and practice requirements under the legislation and the rules. The institution of the legal practitioner director is a historical artefact. Since 1990 N.S.W. required legal practices to retain at least 51% of the net income of a partnership.

Second, N.S.W. abandoned the traditional regulatory framework of prescriptive regulation in favour of an *outcomes-based model* for ILPs. The legislation, the *Legal Profession Act 2004 (N.S.W.) (LPA 2004)* requires that a legal practitioner director of an ILP implements and maintains ‘appropriate management systems’ to enable the provision of legal services in accordance with the professional obligations of legal practitioners. To fulfill this duty, an ILP must demonstrate that it has implemented a management system that addresses ten objectives that were developed by the OLSC together with large sections of the legal community in N.S.W. These objectives include, inter alia, competent work practices to avoid negligence and achieve effective communication, acceptable processes for liens, timely identification and resolution of conflicts of interest, and effective staff supervision. The legal practitioner director is responsible and accountable for insuring the implementation an appropriate management system.

The reason for mandating these 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 and accountability 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 and client-focused behaviour. The combination of these two measures, thus, assists practices to preserve the integrity of legal practice and legal ethics.

In addition to these two measures, the OLSC has also encouraged law firms who want to attract external investment to list on the Australian Stock Exchange (ASX) to preserve the

ethics of legal practice by explicitly stating in the prospectus, constituent documents and shareholder agreements that

- the *primary duty* of the legal practice is to the *court*
- the *secondary duty* is to the *client*;
- the *third duty* is to the shareholder; and
- that where there is a clash between legal profession regulation and the Corporations Act, the legal profession regulation will prevail.

Both Slater & Gordon and Integrated Legal Holdings (ILH), the two legal practices that have publicly listed in Australia, have stated so in their documentation. This articulated hierarchy of duties ensures that the listed legal practice – as well as the client and shareholders – clearly understand where the legal practices ethical and professional obligations lie.

The path that N.S.W. has taken to preserve the ethics and integrity of the firms by mandating these requirements is unique and is now being implemented across Australia. Interestingly, it is not the same path that other jurisdictions considering alternative business structures for the legal profession have taken. For example, in the United Kingdom, whose experience is outlined in more detail below, legislation requires that legal practices who wish to take on non-legal persons to manage and own a legal practice must apply and obtain authority from the regulatory authority as to the individual's fitness. The test is a subjective test and considers three factors in an applicant:

- (a) honesty, integrity and reputation;
- (b) competence and capability; and

(c) financial soundness.

A non-legal person is required to undergo a criminal records test as well as provide information about his/her character and suitability. Legal practices are required to complete an application form and pay a nominated fee to the regulatory authority.

The statutory regime for permitting new business structures in the United Kingdom is considered to be comprehensive and robust (The College of Law of England & Wales 2008, p.10). According to Stephen Mayson, the fitness to own test is the key component in the credibility and success of the regime. Time will tell whether this is so.

The approach taken by the United Kingdom provides an interesting comparison to that taken in N.S.W. One of the most significant differences between the United Kingdom and N.S.W is the application of different measures to preserve the integrity of the legal profession and legal ethics. In the N.S.W. model, integrity and ethics are preserved upon the appointment of a legal-practitioner director to the practice. Moreover, the ethical infrastructure that requires a legal practitioner director to establish and maintain an appropriate management system is designed to protect legal practice from engaging in unethical work practices. The approach has been a great success. An empirical study of incorporated legal practices in N.S.W. in 2008 showed they had one third of the complaints to the regulator, the OLSC, than other practices (Gordon et al, 2010).

The U.K. model does not require the appointment of a legal practitioner director, Nor does the U.K. require legal practices to maintain and implement an ethical infrastructure. In the U.K., the preservation of the integrity of the legal profession and legal ethics largely rests

with a scrutiny selection process for non-legal persons thru the fitness to own test. The U.K. model in effect attempts to preserve integrity and ethics at the outset by mitigating risk whilst the N.S.W model focuses more on establishing an ethical culture within the firm to protect and preserve integrity and less on the character and fitness of the person who is doing so.

This paper will explore these two approaches in detail.

Part 2: The Evolution of the Legal Services Marketplace: Globalization and Its Impact: The Disaggregation of Legal Services

The days are likely ending when lawyers can count on a body of work that only *they* are authorized to perform. Particularly lawyers who serve organizational clients are likely to find themselves competing for attention against a wide range of foreign lawyers and non-lawyer consultants. Fewer issues are likely to be seen as distinctly ‘legal’ in character, ... (Morgan, 2010, p.2, emphasis added)

It is an undeniable fact that globalisation has dynamically changed the services industries in the twentieth century (Hufbauer, G. and Warren T. 1999), including the disaggregation of legal services.ⁱⁱ, even though there are some naysayers, such as John Ralston Saul challenges this theory in his latest book, *The Collapse of Globalism and the Reinvention of the World* (Ralston Saul 2009). The dynamics of industry, technology, and trade liberalization, in particular, have had a fundamental effect on law firms and the legal services marketplace. The emergence of the modern big law firm, characterized by the ‘Cravath system’, Galanter & Palay (1991), arguably marked the first stage in the

evolution of the global legal services marketplace.ⁱⁱⁱ The ‘tournament’ for partnership, as described by Cravath, shaped modern legal practice in the large law firm marketplace until the 1980s when law firms globally became more entrepreneurial and business-oriented, leading to lawyers moving between firms more often, regularly taking clients with them.

The nature of legal practice has also changed; firms have expanded internationally, opening international offices, and have merged with or acquired other firms across borders in order to compete in the globalized business environment. In short, transnational trade in legal services has expanded rapidly to the point where John Flood argues that they have become the ‘architects of globalisation’, Bufithis (2010)

In conjunction, we have seen unprecedented developments in technology outside and within the legal services marketplace. The growth of the Internet and the increasing use of mobile telephones and computers have revolutionized business and the practice of law. Technological developments have effectively made communication easier, which has made lawyers work more readily accessible regardless of their physical location.

These technological developments have increased firms ability to outsource. The advance of technology makes it easier to separate the components of the services that legal professionals provide; each disaggregated service component becomes subject to its *own* set of market forces. Strangely few, if any law schools have responded to these significant changes except to (slowly) internationalise their curriculum (Hicks, 2007). Instead of preparing students to compete in a globalised economy legal work is also sent abroad, to countries such as India.

The work of lawyers, paralegals, legal secretaries, and litigation support personnel is being performed by legal process outsourcing companies (Regan & Heenan 2010, p.112-113). Today a number of law firms are increasingly turning to overseas contract labour to reduce costs. India has now become the prime provider for legal services for the United States. Legal secretarial tasks and repetitive legal administrative functions were one of the first functions to be delegated offshore. However, offshore services now extend to almost all legal work (Krishnan, J.K. 2006, p.9-10). Complex legal research, due diligence, contract management and negotiation, appellate briefs and research, and intellectual property services are among the legal tasks being exported offshore. Legal processing outsourcing (LPO) is also making an impact on the paralegal industry (MacIntyre, L. 2009)

As a result, we have seen the emergence of a plethora of legal process outsourcing firms set up in the United States. One of the largest and most talked about of such firms is RR Donnelley which provides a wide range of services to a number of industries, including the law. Document production and review, bibliographic e-discovery, coding, transcription, and proofreading are some of the services RR Donnelley provides to law firms and in-house legal departments. (RR Donnelly 2010).

We now witness the emergence of legal process outsourcing firms specifically focused on providing assistance to the legal industry (whether of lawyer, paralegal, or support staff work) ala RR Donnelly (e.g. Pangea3, Mindcrest, and QuisLex, all service law firms and in-house legal departments). Although most of these firms are American owned they are primarily located in India, but they have started to appear in other jurisdictions as well. Recent additions in the legal marketplace include Intellevate, Integreon, Lexadigm, and SDD Global Solutions. Once limited to providing legal work for U.S. law firms, LPO firms

are now servicing law firms beyond. Integreon, for example, has entered into what it describes in a press release as the largest legal outsourcing deal ever, worth \$852 million over 10 years, with British law firm CMS Cameron McKenna. The work covered by the agreement does not affect lawyers directly, but this will not be the case for long (Lin 2010).

This trend to outsourcing has been widely embraced by many corporations. Recently Anglo-Australia mining giant Rio Tinto, for example, engaged CPA Global for six months to perform some 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; thus Rio Tinto lawyers are free to focus on more complex tasks (Aldridge 2009). Apparently this arrangement has been working favourably for Rio Tinto. To illustrate: 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 initiative yielded savings of \$US 1 million (Susskind 2009).

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 (Regan & Heenan 2010). Outsourcing of work, is not, however, a new phenomenon. Regan and Heenan note that corporations have uncontroversially been outsourcing their administrative and support services for years:

Outside vendors now assume responsibility for human resources, accounting, and information technology functions for many economic enterprises. These

are all activities that assist an organization in conducting its basic line of business, whether manufacturing automobiles or providing telecommunications services. ...

Examples from manufacturing and service industries illustrate how far this trend has progressed. In aerospace manufacturing, companies have begun to outsource responsibility not only for producing discrete parts of an aircraft but for more complex and knowledge-intensive activities, such as conceptualization and design.” (Regan and Heenan 2010, pp.2139-2140)

The practice of outsourcing in the legal services market place is becoming more and more widespread and represents another model in the disaggregation of legal services. Levi-Strauss, for example, has just engaged U.S. firm Orrick, Herrington & Sutcliffe to perform all its legal work worldwide except for small amount of IP work (Royal 2009). Orrick handles all of Levi Strauss’ legal work worldwide in exchange for a fixed yearly fee paid in monthly increments (Royal 2009). Levi Strauss only keeps one other firm to continue its brand protection work. The law firm retains and pays outside counsel when Orrick does not have an office.

According to Susskind, this kind of outsourcing arrangement ‘presents a fundamental assault on the business model’ (Susskind 2009). As Susskind explains;

Although some law firms have responded positively, the Rio Tinto approach does present a fundamental assault on their business model — hourly billing in a pyramid-shaped organization. At the top is the partner who passes routine work to

junior lawyers whose efforts generate more fee income than they are paid; and the more junior lawyers per partner (the wider the base of the pyramid), the more profitable the firm. But if some work can be undertaken at lower cost by other means (for example, by outsourcing), then profitability drops, and the firm is left with the high costs of luxurious buildings populated by expensive lawyers who are no longer required. The base of the pyramid must shrink. Some new-look law firms will soon spring up, streamlined, free of high fixed costs, and designed to work easily with outsourcing providers.” (Susskind 2009).

The change in legal practice over the years has corresponded with a change in legal structures. Today we are seeing an emergence of a range of different types of business structures that, like external ownership by non-lawyers are far removed from the traditional common law partnership model. We are also seeing a corresponding change in the nature of legal regulation to keep up with these new structures. The path to external ownership provides a fascinating read.

Part 3: The Path to External Ownership in New South Wales

Historically, legal practitioners in Australia, like in many other common law jurisdictions, could traditionally form partnerships with other legal practitioners, but they were not permitted to practise in any other kind of business arrangement. Barristers were similarly only permitted to practise as sole practitioners. This structural limitation for solicitors was justified; partnerships were regarded as the only appropriate business structure to preserve the independence of legal profession. Partnerships were seen to provide optimal protection to clients: because a solicitor partnership has unlimited liability, unlike a company

established under the *Corporations Act (2001) (Cth)* and because partners are jointly and severally liable for the actions of the partnership. The structural limitation was also justified because it was feared that if non-lawyers were entitled to fees from legal work, they could influence the way in which lawyers conducted their work. The sole practice rule for barristers was meanwhile justified; it was claimed that it ensured independence and, moreover, promoted the duty of a barrister to the court and, thereafter, the client. These limitations whilst understandable ignored the reality that the law has always been both a business and a profession.

This remained the dominant paradigm in Australia until the late 1970s when the professional associations lobbied to relax the prohibition on receipt sharing.^{iv} In relaxing the prohibition, legislation was enacted permitting legal practitioners to incorporate.

The *Legal Profession (Solicitor Corporations) Amendment Act 1990* introduced Part 10A which enabled the formation of solicitor corporations. Solicitor corporations were incorporated under the provisions of the *Legal Profession Act 1987* and not under the uniform and Australia-wide *Corporations Act 2001 (Cth)*. In order to become a solicitor corporation, a legal practitioner had to apply to the Law Society of New South Wales for a certificate of approval to incorporate. Under the legislation any one or more persons could form a solicitor corporation by placing their names to the constitution of the incorporated body and complying with the registration requirements. However, the Law Society placed restrictions on solicitor corporations. These restrictions included a requirement that: the companies have unlimited liability (section 172E); voting shareholders must be solicitors holding unrestricted practising certificates; and shareholders must be ‘approved persons’, which can include solicitors and their relatives (section 172G).

It was not, however, incorporation in the true sense of the word. The legislation placed strict controls on solicitor corporations; only an ‘approved solicitor’ could hold voting shares in such a corporation, and only an ‘approved person’ could hold shares in such companies. According to the then Attorney-General of N.S.W., Jeff Shaw, the restrictions existed to ensure that only solicitors and their families controlled solicitor-corporations (Shaw 1999, p.67). As a result of these restrictions, there was little attraction in practising as a solicitor corporation because of the imposition of numerous conditions on these structures.

These rigid structural rules continued until 1994 when the *LPA 1987* was further amended broadening the legal services marketplace. New legislation was introduced permitting solicitors to form MDPs. Section 48G, inserted into the *LPA 1987*, provided that a barrister or a solicitor may be in partnership with a person who is not a barrister except to the extent (if any) that the regulations, barristers rules, solicitor rules, or joint rules otherwise provide. The legislation permitted a limited sharing of receipts (section 48G(3)(d) of the *LPA 1987*).

The introduction of these new business structures was justified on the assumption that they would assist in eliminating restrictive practices. As The Hon. John Fahey, the then Premier and Minister for Economic Development of N.S.W. stated on the Second Reading of the Bill,

Although the community has in many instances benefited from high-quality legal services, it remains the case that the New South Wales legal profession is characterised by a large number of restrictive work practices. These have

created a costly and often cumbersome legal system. There are many demarcations between solicitors and barristers that offer a poor match between consumer needs and the services, which can be purchased in the market. ...

Clients must have a choice as to how they obtain legal services, including choices between different price-service combinations. Lawyers should have the freedom to choose the manner in which they provide these services and organise their practices. Freedom of choice encourages flexibility, diversity, competition and innovation. If the structure and regulation of the profession unduly restricts this, it will adversely affect the quality, accessibility, speed and cost of legal service. (Fahey 1993, 4983)

Despite opening up the legal services marketplace, the amendments never achieved their ultimate aim of allowing unrestrictive legal structures because the legislation continued to impose several restrictions on the practice structures.

The most notable and problematic restriction was the requirement that legal practitioners must retain the majority voting rights in the MDP. The 1993 legislation required legal practitioners to retain at least 51% of the net income of the partnership. The reason for the 51% rule was to ensure that the majority of ownership and control was in the hands of legal practitioners, thus encouraging law firms to retain their ethical structure. The MDP model failed to attract interest by the profession (Mark & Cowdroy 2004).

However, it was not just the legislative restrictions that dissuaded legal practitioners from adopting the MDP or solicitor corporation model. Attitudinal dissatisfaction and concern about the dichotomy of 'law as a *business*' versus 'law as a *profession*' also played a large

role. As The Hon. Ron Dyer, a member of the N.S.W. Parliament, commented during the Second Reading of the *Legal Profession Reform Bill (No.2) 1993*:

There is no limit or definition within the bill as to the persons with whom a barrister or a solicitor could enter into a partnership. For example, it is entirely possible and probable that barristers and solicitors could go into partnership with accountants, real estate agents and so on. In fact, there is nothing in the bill, if I may say so, that would prevent a barrister or solicitor going into partnership with Christopher Skase^v. ... (Dyer 1993, p.4510)

This comment was based on a concern that allowing solicitors and barristers to be in partnership with non-lawyers would present an ethical danger to an ethical and dignified profession. Despite such attitudes, more legislative changes aimed at freeing up the legal services marketplace were to come when the Legal Profession Advisory Council^{vi} recommended changes to the Act to allow solicitors to incorporate under the *Corporations Act 2001 (Cth)*. The Council argued that the rules concerning MDPs and solicitor corporations were restrictive and not in the public interest. (Legal Profession Advisory Council Report 1998, at 9604). The Council further argued that permitting solicitors to practise in structures regulated under the Corporations Law would: facilitate competition between lawyers and other professionals; result in better management of practices; and give solicitors greater choice about their mode of practice (Legal Profession Advisory Council Report 1998, at 9605).

In 1998 the N.S.W. Attorney General's Department conducted a statutory review of the *Legal Profession Act 1987 (N.S.W.)* (Attorney General's Department of N.S.W, 1987).

The review was undertaken: pursuant to a requirement of the Australian Governments Competition Principles Agreement to consider any potentially anti-competitive restrictions in legislation and whether they are in the public interest; and pursuant to a statutory requirement that the amendments made by the *Legal Profession Reform Act 1993* (N.S.W.) be reviewed within four years of their commencement. As part of the review an Issues Paper was released in August 1998, calling for submissions on a wide range of topics including the business associations of solicitors and barristers. Of relevance were the following questions:

- Are prohibitions on barristers practising with other professionals warranted?
Do they promote, or hamper, the efficient and competitive provision of advocacy services?
- Should solicitors or barristers be permitted to become members of multi-disciplinary partnerships? What restrictions should be placed on such partnerships?
- Should solicitors or barristers be permitted to form incorporated practices under the Corporations Law? Should the objects and membership of such practices be restricted? Should such practices be required to have a majority of directors who hold practising certificates?
- How can compliance with the ethical and professional rules of solicitors and barristers be reconciled with participation by members of the profession in multi-disciplinary partnerships and companies? (Attorney General's Department of N.S.W, 1998).

There was much support for relaxing the rules in relation to MDPs and incorporation. For example, the OLSC responded resoundingly in favour of allowing MDPs and incorporated legal practices; however, in doing so the Commissioner stressed the need for compliance with the ethical and professional rules ((N.S.W. Office of the Legal Services Commissioner 1998).

The Australian Competition and Consumer Commission (ACCC) also supported rules that would allow legal practitioners to organise their practices in any commercial manner, including as a sole trader, a partnership, or company under the Corporations Law, as well as enjoy the advantages of these structures, including limited liability (Attorney General's Department of N.S.W, 1998). As to the 51% requirement, the ACCC recommended that this restriction be lifted. The ACCC also recommended that, while the provisions of the Act, Regulations, and Rules governing trust accounts should apply to the solicitor members of multi-disciplinary partnerships, other members of MDPs should not be bound by these rules. The ACCC did, nevertheless, recommend that MDPs should be prohibited from requiring solicitor members to do anything which might make them breach their duties to the court, clients, or professional and ethical rules.

The N.S.W. Law Society and the ACCC expressed a similar view in relation to incorporated legal practices (Attorney General's Department of N.S.W, 1998). Both the Law Society and the ACCC supported limited liability being extended to any act of a solicitor who was a director or an employee of a corporation. The Law Society agreed that the constitution of a corporation providing legal services should not be restricted in terms of the 51% rule, but it did indicate that its position regarding the number of directors required to be solicitors was not settled. The Law Society recommended that membership

should be confined to natural persons who are fit and proper persons and that non-solicitor shareholders should not hold more than one third of the votes (Attorney General's Department of N.S.W, 1998).

In November 1998 a final report was published following the consultation period. The Final Report determined that, despite the earlier attempt at liberalizing the rules for MDPs (under the 1993 Act), the rules governing MDPs were still anti-competitive and should be repealed (Attorney General's Department of N.S.W, 1998). The Report also recommended that:

- solicitors practising within MDPs should practise on a level playing field with other solicitors and clients should receive at least the same level of protection;
- provision should be made to ensure that the ethical and professional duties of solicitor members of MDPs and corporations cannot be disturbed by the requirements of other members of the partnership or corporation;
- disclosure should be made to clients of a MDP as to whether the services are provided by solicitor or a non-solicitor member;
- solicitor members of MDPs and corporations should be permitted to obtain professional indemnity insurance and fidelity insurance in common with other members of the MDP or corporation, provided that the minimum terms of the insurance comply with the guidelines set by the Attorney-General.

Following the Attorney General's recommendations legislation was enacted, amending the LPA 1987 on 1 July 2001.^{vii} The legislation allowing legal service providers to register as a company with the Australian Securities and Investments Commission (ASIC), the agency responsible for ensuring compliance with the Corporations Act 2001 (Cth). Similar

provisions are also included in the *Legal Profession Act 2004 (N.S.W.) (LPA 2004)*, which superseded the 1987 Act.

The amendments were novel. For the first time in Australian legal history, legislation permitted legal practices to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners. In order to be able to do so, however, the legislation required legal practices to fulfil two requirements.

The first stipulated that on incorporation a legal practice must appoint at least one legal practitioner director.^{viii} The legal practitioner director is generally responsible for the management of the legal services provided in N.S.W. by the ILP. It is an offence if an incorporated legal practice does not have any legal practitioner director for a period exceeding seven days, If the practice does not comply, it may be forced into administration.

The second stipulated that, in addition to his/her usual professional obligations, the legal practitioner director, must implement and maintain ‘appropriate management systems’ to enable the provision of legal services in accordance with the professional obligations of solicitors and the other obligations imposed under LPA 2004. Failure to implement and maintain appropriate management systems constitutes professional misconduct and can result in a legal practitioner director losing their practising certificate.

‘Appropriate management systems’ are not defined in the LPA 2004. In collaboration with the Law Society of N.S.W., the College of Law, and LawCover, the main professional

indemnity insurer in N.S.W., the OLSC developed key criteria as a guide for legal practices to demonstrate that they have developed such management systems. These criteria include:

1. Competent work practices to avoid negligence.
2. Effective, timely, and courteous communication.
3. Timely delivery, review, and follow up of legal services to avoid instances of delay.
4. Acceptable processes for liens and file transfers.
5. Shared understanding and appropriate documentation from commencement through to termination of retainer covering costs disclosure, billing practices, and termination of retainer.
6. Timely identification and resolution of the many different incarnations of conflicts of interest including when acting for both parties to a transaction or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies or conducting another business, referral fees and commissions etc.
7. Records management which includes minimizing the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements as regards registers of files, safe custody, financial interests.
8. Undertakings to be given with authority, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the N.S.W. OLSC, Law Society of N.S.W., courts, or costs assessors.
9. Supervision of the practice and staff.

10. Avoiding failure to account and breaches of s61 of the Act in relation to trust accounts.

The OLSC developed a standard self-assessment document to enable legal practitioner directors to assess the appropriateness of their management systems. The self-assessment document takes into account the varying size, work practices, and nature of operations of different ILPs. Legal practitioner directors rate the ILP compliance with each of the ten objectives as either ‘Fully Compliant,’ ‘Compliant,’ ‘Partially Compliant,’ or ‘Non-Compliant.’ The legal practitioner director then sends the completed self-assessment form to the OLSC for review.

In addition to implementing and maintaining appropriate management systems, a legal practitioner director has a responsibility to report to the Law Society of N.S.W. 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 Act. In addition, the legal practitioner director must report to the N.S.W. Law Society any professional misconduct of a solicitor employed by the practice. A legal practitioner director of an ILP also has obligation to take all action reasonably available to deal with any professional misconduct or unsatisfactory professional conduct of a solicitor employed by the practice. Finally, a legal practitioner director has an obligation to disclose the services to be provided by the ILP, whether or not the legal services to be provided will be provided by a legal practitioner and to disclose those legal services that will not be provided by a legal practitioner. In making such disclosures the legal practitioner director must identify those services and indicate the status or qualifications of the person(s) who will provide the services.

Part 4: The Path to External Ownership in the United Kingdom

The parallels between what has occurred in N.S.W and the United Kingdom are noticeable, at least from a historical perspective. Legal practice in the United Kingdom was largely restricted to the traditional partnership model, as was the case in N.S.W. U.K. solicitors could only practise in firms wholly owned and managed by other solicitors or registered European lawyers. In 2000 the *Limited Liability Partnership Act 2000 (U.K.)* was passed. The Act allowed partnerships to be organised on a limited liability basis. Since the passing of this Act, most of the large law firms in the United Kingdom have become limited liability partnerships (LLPs). These LLPs share features of limited liability companies and unincorporated partnerships and enjoy the protections of limited liability that exist in English company law. LLPs were not however full corporations in the true sense of the word.

In 2001, the Office of Fair Trading (OFT) conducted an examination into competition within the professions in the U.K. The OFT focused on three themes: restrictions on entry, conduct, and methods of supply, which included aspects of price competition, advertising, and types of business organizations through which professions deliver their services. In relation to the legal profession, the OFT Report identified a number of anti-competitive restrictions and recommended that: the conveyancing and probate markets should be liberalized to remove the lawyer's monopoly; legal professional privilege should be restricted because of concern that it may distort in favour of lawyers as against non-lawyers; cold-calling by lawyers should be permitted; and MDPs should be permitted

(Office of Fair Trading United Kingdom 2001). The OFT Report also recommended that lawyer-client privilege should be limited to those areas where other professionals could not give cognate advice.

Following the OFT Report, in July 2003 the Government commissioned Sir David Clementi to review the regulatory framework for legal services in England and Wales. In 2004 Clementi issued his report (Clementi 2004, p.1). Clementi found the British legal market to be outdated, inflexible, overly complex, and insufficiently accountable or transparent. Clementi proposed that lawyers from different professional backgrounds should be able to practice together in Legal Disciplinary Practices (LDPs) and that non-lawyers should also be able to be managers provided that they remained in a minority.

Clementi also proposed that MDPs where lawyers and non-lawyers work together and share fees should be permitted. Clementi envisaged, for example, lawyers and accountants, practising together delivering tax advice and investment services, and lawyers and real estate specialists, surveyors, and architects providing construction packages. Clementi understood the complexities of the MDP model and, thus, proposed a staged approach – LDPs should be permitted first and MDPs later.

In 2005 the Government issued a white paper entitled, *The Future of Legal Services: Putting Consumers First*, which set out the reform agenda for implementing Clementi's recommendations (Department for Constitutional Affairs, 2005). The White Paper supported Clementi's recommendation that lawyers and non-lawyers should be able to work together to provide legal and non-legal services within a single business. The White paper proposed to introduce legislation to this effect. The Legal Services Bill was drafted

after much consultation and passed into law in October 2007 as the *Legal Services Act 2007* (U.K.) (the *LSA 2007*). The *LSA 2007*, which came into effect on the 1st April 2009, liberalized and regulated the market for legal services in England and Wales in order to encourage competition. The *LSA 2007* created a new entity called the Solicitor's Regulation Authority (SRA), previously the Law Society Regulation Board. The SRA is the regulatory body for solicitors in England and Wales. Its purpose is "to set, promote and secure in the public interest standards of behaviour and professional performance necessary to ensure that clients receive a good service and that the rule of law is upheld." (Solicitor's Regulation Authority website). The 2007 Act also created a new body, the Office for Legal Complaints, to deal with complaints against legal service providers.

The Legal Services Act 2007 (U.K.)

The *LSA 2007* established a regime, which permits the creation of LDPs, law firms whose professional structures may comprise up to 25 percent non-lawyers, and alternative business structures (ABSs). ABSs encompass MDPs, external ownership of legal businesses, and just about any other combination of lawyers and non-lawyers.

Legal Disciplinary Practices in England and Wales

LDPs have been permitted since 31 March 2009 when provisions in the *Administration of Justice Act 1985*, the *LSA 2007* and amendments to the *Solicitors Code of Conduct 2007* came into force to permit the creation of LDPs and to bring into effect firm-based regulation. In firm-based regulation all legal practices, regardless of size, are regulated as a firm or 'recognised body'.

An LDP is a form of recognised body that provides legal services which can be owned and managed by persons who are not exclusively solicitors of England and Wales, registered European lawyers, or registered Foreign Lawyers. Licensed conveyancers, barristers, notaries public, legal executives, patent and trademark agents and law costs draftsmen are able to be managers of LDPs. The LSA 2007 uses the term ‘manager’ to mean a partner in a partnership; a director of a company or a member of a limited liability partnership. Furthermore, any individual who is not legally qualified can also be a manager of an LDP. Non-lawyer managers must contribute to the management of the practice and be of ‘suitable character’. A non-lawyer manager must not own or control more than a 25 per cent stake in the practice, or be a Registered European Lawyer or a member entitled to practice as a lawyer in England and Wales. Therefore, at least 75 per cent of those owning and controlling the recognised body at any time are practising lawyers. The restriction on the extent of non-lawyer ownership and management of an LDP is by proportion rather than number.

Firms that wish to take on a non-lawyer manager must obtain approval for the employment of the individual from the SRA before he or she takes up that position. Before a non-lawyer can become a manager in a LDP, the SRA must be satisfied as to that individual’s character. To determine this, the practice must arrange and pay for the prospective candidate to undertake a Criminal Records Bureau (CRB) check and provide the SRA with additional personal and professional information about the individual as required in form NL1.

LDPs may only provide the type of services that can be provided by solicitors, notaries, and foreign lawyers. For example, an accountant within an LDP may not provide company audit services to clients of the practice because this is outside the scope of a solicitor's practice. However, the accountant may provide the firm's clients with tax advice, general accounting services, management advice, or investment advice within the limits of the *Solicitors Financial Services (Scope) Rules 2001* because all these are within the defined scope of a solicitor's practice.

Non-lawyer managers are prohibited from holding themselves out to be a lawyer or undertaking certain reserved legal work such as advocacy in open court or in an immigration tribunal, conducting litigation or immigration tribunal proceedings, notarising documents and administering oaths. However, non-lawyer managers may undertake other reserved or unreserved legal work under adequate supervision, including giving legal advice, advocacy in chambers and preparing legal documents. If the non-lawyer does so the firm must ensure that the manager is competent to provide such services, and is given appropriate supervision, especially for reserved work.

The introduction of firm-based regulation will mean that all employees of a recognised body will be regulated, including non-lawyers. Non-lawyers are therefore subject to all of the rules and regulation applicable to lawyers.

All existing recognised legal practices were 'passported' on the 31st March 2009, enabling them to become LDPs. As from the 31st March 2009, all new firms must obtain recognition from the Solicitors Regulation Authority (SRA) before they start practising. The

requirements for approval depend on the structure of the practice and on the type of non-solicitor managers it intends to appoint, if any.

Alternative Business Structures in England and Wales

From late 2011 "alternative business structures" (ABSs) will be permitted under Part 5 of the *LSA 2007*. ABSs differ from LDPs in that they allow participation by a larger proportion of individual non-lawyers in a firm, as well as external ownership or part ownership of law firms. ABSs will also permit firms to provide novel combinations of legal and non-legal services.

The minimum requirements for an ABS are twofold. First, an ABS must have at least one 'manager' who is authorised to provide the legal activity delivered by the ABS, and second, an ABS must have at least one non-lawyer 'manager' or owner. The requirement of having at least one manager who is authorised to provide the legal activity is in effect similar to the requirement in N.S.W of having the legal practitioner director.

The 2007 Act envisages that ABSs will take different forms and assume different structures. The SRA have identified several models:

- (1) firms that are basically like traditional law firms or like LDPs, but they cannot have external ownership and can only provide solicitor-type services, although one or more individual non-lawyer managers may be involved. The level of their involvement will not be limited, as it is now, to 25 per cent ownership and control.

A firm with three lawyers and one non-lawyer manager with no external ownership will be classified as an ABS;

- (2) firms with complete ownership with no legal interest. In this model there is 100% external ownership of the firm and the external owner has a commercial ownership interest only. In this model the ABS, according to the SRA would be a “ring-fenced legal services arm of the parent external owner and could take advantage of the owner’s corporate brand e.g. Nike Law”;
- (3) firms with complete ownership with a legal interest. In this model there is 100% external ownership of the firm and the external owner does have an interest in providing legal services. According to the SRA, in this model the ABS would be ring-fenced and branded as in Model 2. The parent external owner may have an interest in, for example, cross-selling insurance products, litigation funding and other financial or other services to clients of the ABS as a component part of the legal service supplied to clients;
- (4) firms which combine different services within one entity (i.e. the MDP model). According to the SRA the firm could be a niche property practice with surveyors, architects, town planners, property managers, builders, decorators, furniture removers and conveyancers. The SRA would regulate only the legal services; other professionals would be regulated by their own regulators;
- (5) firms with external ownership as well as legal and non-legal services. The firm in this model would use a corporate brand to for example provide funeral services, will-writing services and probate services; or the firm could provide a mixture of social welfare advice, administration, and legal services;
- (6) a legal services firm with partial private equity ownership. In this model Representatives of the private equity house might become members of the ABS

incorporated practice, and the private equity company may hold shares in the ABS;

or

(7) a firm floated on the stock market.

The 2007 Act requires all ABSs to have a Head of Legal Practice (known as the HOLP) and a Head of Finance and Administration (known as the HOFA). The HOLP must be a lawyer who will be responsible for ensuring compliance with the terms of the ABS's license and for reporting to the licensing authority any failure to comply with the terms of the license. The HOFA, who does not need to be a lawyer, will be responsible for: ensuring compliance with the licensing rules that relate to the treatment of money held by the ABS; the keeping of the firm's accounts; and the reporting of any breach of the licensing rules to the licensing authority.

There are notable limits on non-lawyer participation in both LDPs and ABSs. First, Rule 14.01(3) provides that no more than 25 per cent of the firm's managers, determined by number, proportion of ownership, or voting rights, can be non-lawyers. Second, a non-lawyer manager must be an individual, not a corporate person pursuant to section 9A of the *Administration of Justice Act 1985*. Third, rule 14.01(3)(d) provides that every non-lawyer who has an ownership interest, or controls any voting rights, in a recognised body must not only be approved under Regulation 3 but must also be a manager of that body. A recognised body is a partnership, LLP, or company recognised by the SRA.

The Non-lawyer Fitness Test in England and Wales

In the U.K. a firm that wants to employ a non-lawyer as a manager of a LDP or an owner or manager of an ABS must apply to the SRA for approval of that individual and satisfy the SRA that the individual is fit and proper to assume that role. Regulation 3 of the SRA *Recognised Bodies Regulations 2009* (the Regulations) contain the basic provisions regarding the criteria and procedures for approving and withdrawing approval of non-lawyer managers. Approval is obtained by completing a Standard Application Form known as NL1. The fee for an NL1 application is £250.

Individuals needing approval under regulation 3 of the Regulations fall into three categories:

- (1) non-lawyers, i.e. individuals who are not members of a legal profession of England and Wales, whether practising or not a profession or a foreign legal professional whose members are eligible to become Registered Foreign Lawyers (RFLs);
- (2) members of a foreign legal profession whose members are not eligible to become RFLs;
- (3) non-practising barristers and non-practising members of other legal professions, who are prevented by professional rules or training regulations from changing status so as to be able to seek approval as practising lawyers

The applicant (or the firm) is responsible for applying for approval. and must confirm that any information provided in connection with the application is correct and complete by signing a declaration.

The fitness test focuses on a range of issues including past criminal convictions and allegations of previous misconduct in business activities. The Government amended the *Rehabilitation Offenders Act 1974* to extend the Criminal Records Bureau Standard Disclosure Check (CRB) that apply to new solicitors to non-lawyer applicants. The SRA will not make a decision on the application unless the candidate's CRB standard disclosure check has been completed.

In addition to the criminal check, non-lawyers must provide information about their character and suitability to become a non-lawyer owner of a legal practice. For example, applicants are asked if they have ever been involved in 'other conduct' which calls into question their honesty, integrity, and respect for law. The SRA interprets this question broadly. Firms must provide information about matters that are not the subject of another question on the form but are or may be relevant to the consideration of the candidate's character and suitability—for example, a caution, warning, Anti-Social Behaviour Order, or charge or conviction relating to an offence that is not indictable.

Under Regulation 3.3(c) the SRA may reject an application if the applicant fails to disclose, refuses to disclose, or seeks to conceal any matter within Regulation 3.3(a) or (b) in relation to the application. Conduct of this kind could also lead to the withdrawal of approval and to disciplinary action.

The SRA can reject an application if the individual:

- (i) has been committed to prison in civil or criminal proceedings;
- (ii) has been disqualified from being a company director;

- (iii) has been removed from the office of charity trustee or trustee for a charity by an order within the terms of section 72(1)(d) of the Charities Act 1993;
- (iv) is an undischarged bankrupt;
- (v) has been adjudged bankrupt and discharged;
- (vi) has entered into an individual voluntary arrangement or a partnership voluntary arrangement under the Insolvency Act 1986;
- (vii) has been a manager of a recognised body which has entered into a voluntary arrangement under the *Insolvency Act 1986 U.K.*;
- (viii) has been a director of a company or a member of an LLP that has been the subject of a winding up order, an administration order or administrative receivership; or has entered into a voluntary arrangement under the *Insolvency Act 1986 U.K.*; or has been otherwise wound up or put into administration in circumstances of insolvency;
- (ix) lacks capacity (within the meaning of the *Mental Capacity Act 2005 U.K.*) and powers under sections 15 to 20 or section 48 of that Act are exercisable in relation to that individual;
- (x) is the subject of outstanding judgments involving the payment of money;
- (xi) is currently charged with an indictable offence, or has been convicted of an indictable offence or any offence under the *Solicitors Act 1974 (U.K.)*, the *Financial Services and Markets Act 2000 (U.K.)*, the *Immigration and Asylum Act 1999 (U.K.)*, or the *Compensation Act 2006 (U.K.)*; has been the subject of an order under section 43 of the *Solicitors Act 1974 (U.K.)*;
- (xii) has been the subject of an equivalent circumstance in another jurisdiction to those listed in (i) or (ix); or

(xiii) has been involved in other conduct which calls into question his or her honesty, integrity or respect for law.

Under Regulation 4.1 the SRA may impose one or more conditions when granting approval of an individual. Where the SRA refuses an application, grants an application subject to condition(s), or refuses a permission required under a condition on a body's recognition, the SRA must notify its reasons in writing. The reasons must be given to the applicant body and the individual.

Regulation 7 sets out the appeal provisions. An applicant who wishes to appeal the SRA's decision must first proceed through the SRA's own appeals procedure and then may appeal to the High Court.

The test applied to non-lawyers is premised on the same test that of character and suitability as those applying to individuals wishing to become solicitors. The "General principles for assessment" set out in the guidelines seek to ensure that there is confidence that an individual is honest and trustworthy; and willing to comply with regulatory requirements; and able responsibly to manage financial affairs for themselves and clients; and that there is no reasonable risk that his or her admission will: diminish the public's confidence in the solicitor's profession; or be harmful to members of the public, the profession or to him or herself.

Management & Supervision in the U.K. model

Similar to N.S.W. the U.K. model has also devised a system of management and supervision to establish and maintain an effective ethical culture within legal practices.

The U.K. model instead stipulates in Rule 5 that a recognised body, a manager of a recognised body or a recognised sole practitioner, must make arrangements for the effective management of the firm as a whole, and comply with:

- (a) the duties of a principal, in law and conduct to exercise appropriate supervision over all staff, and ensure proper supervision and direction of client's matters;
- (b) the money laundering regulations, where applicable;
- (c) the firm and individuals with key regulatory requirements such as certification, registration or recognition by the Solicitors Regulation Authority, compulsory professional indemnity cover, delivery of accountants' reports, and obligations to co-operate with and report information to the Authority;
- (d) the identification of conflicts of interests;
- (e) the requirements of rule 2 (Client relations) on client care, costs information and complaints handling;
- (f) control of undertakings;
- (g) the safekeeping of documents and assets entrusted to the firm;
- (h) Rule 6 (Equality and diversity);
- (i) the training of individuals working in the firm to maintain a level of competence appropriate to their work and level of responsibility;
- (j) financial control of budgets, expenditure and cashflow;
- (k) the continuation of the practice of the firm in the event of absences and emergencies, with the minimum interruption to clients' business; and
- (l) the management of risk.

Again similar to that in N.S.W., the term "arrangements" is used broadly. There is no requirement that the arrangements take a particular form. A firm will however have to demonstrate with evidence that appropriate arrangements are actually in place and are operating to demonstrate compliance. Responsibility for the overall supervision framework rests with the recognised body and its managers. There are however limits on who can supervise. Supervision is only restricted to lawyers who have practised for a period not less than 3 years in a ten year period.

Part 5: The Differences between the N.S.W. Model and the U.K Model

The two regulatory regimes discussed above provide an interesting comparison as to how each seek to preserve and maintain professional integrity and legal ethics within a changing legal marketplace.

As we have seen the key component of the U.K. model in the preservation of integrity and legal ethics is the fitness test. The fitness test is applied at the outset of the regulatory regime to act as an effective barrier to prevent unscrupulous people from becoming owners or managers of legal practices. The purpose of this test is grounded in the philosophy of protecting the public and maintaining (if not enhancing) the public's confidence in the legal profession.

The second key component of the U.K. model focuses on an approval process not in relation to individuals in relation to firm structure. There is a great emphasis in the U.K. model on the types of structures that are and will be permitted in the legal services marketplace. The SRA provides a comprehensive example, as set out above, of the types of firms that may be accepted once the regime for ABSs comes into effect. The rationale

behind this component is to ensure that business models are not “high-risk”, such as an MDP bringing together insurers and lawyers. Such a model would be high risk because it may create potential conflicts, according to the SRA, in the field of personal injury (Legal Services Board 2009, p. 29). The third component of the U.K. model, as discussed above, then focuses on management and supervision. It is, in essence, it is the same as the system that operates in N.S.W. But once again for N.S.W. management and supervision is the lynchpin that protects and preserves ethics and integrity, unlike the U.K.

The philosophy behind the U.K. approach appears to rest, in our view, with the belief that the real threat to ethics and professional integrity of the legal profession lies more with the people who are involved and less with the cultural environment. The upfront approach applied in the U.K. is entirely different to that in N.S.W. As discussed above N.S.W has developed its approach by focusing rather on establishing an effective ethical culture within a legal practice at the outset. The U.K., on the other hand, focus on establishing an ethical culture once “appropriate” persons have been accepted and appointed and business structures have been approved. That is not to say that N.S.W does not have a mechanism for dealing with unscrupulous people. It does.

Section 154(1) of the *Legal Profession Act 2004* (N.S.W.) provides that the Supreme Court may disqualify a person from managing a corporation that is an ILP. A disqualification order will be made by the Supreme Court if it is satisfied that (a) the person is a person who could be disqualified under sections 206C, 206D, 206E or 206F of the *Corporations Act 2001* (Cth) from managing corporations, and (b) the disqualification is justified.

Section 206D of the Corporations Act, for example, states that a Court may disqualify a person from managing corporations if within the last seven years, the person has been an officer of two or more corporations when the corporations have failed; and the Court is satisfied that: (i) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and (ii) the disqualification is justified. In determining whether the disqualification is justified under section the Court may have regard to (i) the person's conduct in relation to the management, business or property of any corporation; and (ii) any other matters that the Court considers appropriate. Section 206E is drafted to apply to persons who have been officers of a body corporate.

Section 206F of the Corporations Act further provides that ASIC may disqualify a person from managing corporations if within seven years immediately before ASIC gives a notice under paragraph (b)(i) that: the person has been an officer of two or more corporations, and while the person was an officer, or within twelve months after the person ceased to be an officer of the corporations. A disqualification order made under section 154 has effect for the purposes only of the Act and does not affect the application or operation of the *Corporations Act 2001 (Cth)*.

There is also a specific provision relating to MDPs. Section 179 of the LPA 2004 provides that on application by the Law Society Council or the OLSC, the Supreme Court may make an order prohibiting any Australian legal practitioner from being a partner, in a business that includes the provision of legal services if (a) the Court is satisfied that the person is not a fit and proper person to be a partner, or (b) the Court is satisfied that the person has been guilty of conduct that, if the person were an Australian legal practitioner, would have constituted unsatisfactory professional conduct or professional misconduct, or

(c) in the case of a corporation, if the Court is satisfied that the corporation has been disqualified from providing legal services in this jurisdiction or there are grounds for disqualifying the corporation from providing legal services in this jurisdiction.

The provision relating to MDPs is not dissimilar to the U.K. fitness test but it is important to note that the N.S.W provision is restricted to MDPs, unlike the U.K. test which applies to all business structures. This is a fundamental difference between the two models. Another fundamental difference is the fact that the N.S.W model does not actually prohibit any type of business structures or place any ownership demands in term of proportion like the U.K. model does. The only requirement, as discussed above, in N.S.W is that ILPs must have a legal practitioner director.

The U.K. model however requires firms to go through an approval process before they will be registered. When an application is made by a new firm, the SRA will analyse the information they receive about the proposed structure, governance and systems for compliance within the firm's business model. The SRA can request additional information and undertake further investigations in order to form a view on whether or not authorisation should be granted. The U.K. model also permits the SRA to place conditions on firms once approved. The SRA may consider at the application stage whether conditions on an authorisation are necessary to mitigate any perceived risk to consumers and their regulatory objectives. The SRA could for example impose conditions on firms if they are concerned about the extent of external influence, concerned about any risk issues emerging from a business model, and concerned about any risk issues arising from proposed arrangements to obtain business.

Conclusion

The structural changes offered by the *LPA 2004* in N.S.W. and the *LSA 2007* in the U.K. are being embraced with much enthusiasm. In N.S.W. more than 30% of the profession is today made up of non-traditional business structures with a majority of these structures being ILPs. We have also seen in Australia, firms who have incorporated taking the next step and publicly listing on the Australian Stock Exchange. The rate of incorporation take-up in N.S.W. is growing by the day and it would not be presumptuous to pontificate that ILPs will be the dominant legal structure in the not too distant future. Murmurs of a move by the Australian Taxation Office to no longer subject ILPs to capital gains tax and stamp duty will no doubt make incorporation attractive to many more law firms including the larger law firms who have to date been reluctant to incorporate (Nickless, 2010, p.43).

Similarly, in the U.K. we are seeing a corresponding enthusiasm for alternative legal structures with the emergence of the branch law firm in which solicitors have joined forces with banks and supermarkets to create a branded law firm. More than 200 law firms in the U.K. have signed up to relaunch themselves and form a new law firm under the brand name 'QualitySolicitors'. The law firm provides, according to their website, "friendly and approachable lawyers" that "couldn't be more different to the typical stuffy image of solicitors." The firm guarantees that there are no hidden costs in their work and that their solicitors will respond to calls and emails the same day. This firm is not a lone shark in the market. The Co-op grocery chain and Halifax, Britain's biggest mortgage lender are also making plans to enter the legal services market (Gibb & Spence, 2010, p.38).

The flexibility of regulators to permit these legal structures marks a fascinating departure from tradition. We are no longer practising law in a world, which is familiar, or the norm.

The *LPA 2004 (N.S.W.)* and the *LSA 2007 (U.K.)* and the regimes set up within has profoundly changed the practice of law today and provided new and emerging challenges for regulators to ensure that ethics and integrity of the legal profession is preserved. As this paper has shown N.S.W and the U.K. have attempted to meet these challenges through a varied approach. N.S.W has sought to preserve ethics and integrity by focusing primarily on entrenching ethical behaviour within firms. The U.K. on the other hand have designed their regulatory model to focus first on entry requirements, second on structural approval and third on ethical culture. There are a myriad of issues that arise to further consider from each approach. These issues, for example, include

- The impact of regulating legal firms rather than the conduct of individual lawyers;
- Meeting consumer needs in complaints of negligence;
- Dealing with legitimate professional concerns about the role of government regulating the legal profession and its perceived loss of independence;
- The role of legal education and continuing professional development in embracing ethics as well as black letter legal knowledge;
- The impact of outcomes-based regulation as distinct from traditional proscriptive legislation;
- The role of litigation funding and the establishment of international or cross-national ethical norms.

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ⁱ The Office of the Legal Services Commissioner (“OLSC”) receives complaints about solicitors and barristers in NSW. The OLSC works as part of a co-regulatory system, together with the Law Society of NSW (professional body for solicitors) and the NSW Bar Association (professional body for barristers) to resolve disputes and investigate complaints about professional conduct. The OLSC’s main role is to ensure that legal practitioners abide by their ethical and other professional obligations when providing services to the public. The OLSC can take disciplinary action against legal practitioners and help resolve problems between practitioners and other members of the community. The OLSC is an independent statutory body and its decisions, can only be challenged through the normal process of administrative law.

ⁱⁱ Disaggregation refers to the ‘breaking up’ or ‘parcelling out’ of legal representation to an appropriate service provider (Steele 2009).

ⁱⁱⁱ The Cravath model is characterized by the hiring of “outstanding graduates” who come straight out of law school. The model presumes that the graduates will progress to partnership after an extended probationary period. This model presented new and emerging trends in the global legal services marketplace. (Galanter & Palay (1991).

^{iv} The prohibition on receipt sharing was relaxed on the grounds that there were a number of taxation advantages which flowed from the assignment of partnership income to members of a lawyer’s family: See *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440. See also Law Society of N.S.W., ‘Solicitors Superannuation and Sharing of Receipts of a Solicitors Practice’, (Bulletin No. 31 of 1978).

^v Christopher Skase was an Australian entrepreneur whose multimillion dollar company Quintex and empire led him to bankruptcy. Skase left Australia for Spain to escape his creditors and the law. In 1998 Skase’s passport was cancelled and he was ordered to leave Spain. Skase never returned to Australia and died in Spain leaving investors without recourse.

^{vi} The Legal Profession Advisory Council was established in 1987 to provide external scrutiny of the Law Society Council and the Bar Council, principally in their rule making functions. The Council consists of 11 members. Three members are solicitors, two members are barristers and five members are lay persons: section 58. One of the barristers and two of the solicitors are appointed from panels nominated by the Bar Council and the Law Society Council respectively.

^{vii} the *Legal Profession (Incorporated Legal Practices) Act 2000* (the Act) and the *Legal Profession (Incorporated Legal Practices) Regulations 2001* (the Regulations)

^{viii} A legal practitioner director is defined as a director of an incorporated legal practice who is an Australian legal practitioner holding an unrestricted practicing certificate.