



THE LAW SOCIETY
OF NEW SOUTH WALES

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INCORPORATED LEGAL PRACTICES

1. General Notes – Incorporated Legal Practices

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Download from the Law Society website at

www.lawsociety.com.au/idc/groups/public/documents/internetregistry/008711.pdf

5. Part 2.6 of the Legal Profession Act 2004

Go to

<http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22Legal%20Profession%20Act%202004%20No%20112%22&nohits=y>

6. Part 6 of the Legal Profession Regulation 2005

Go to

<http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?SRTITLE=%22Legal%20Profession%20Regulation%202005%22&nohits=y>

7. 'Law Society Journal' Articles:

- 'Should your firm incorporate?' by **Philip King** (March 2001)
- 'Management Systems for your Incorporated Legal Practice' by **Terry Purcell** (March 2001)
- 'Incorporation's Management Side' by **Robyn Duncan** (October 2001)
- 'Risk Management: Protecting Personal Assets' by **Bruce Mac Dermott** (June 2002)
- 'What are the tax effects of incorporating legal practices?' by **Richard Vincent** (July 2002)
- What are the commercial and corporate law effects of incorporating legal practices ' by **Richard Vincent** (July 2002)
- Practice Structure: Incorporation issues – What is an incorporated legal practice and how does it operate? by **Chris Shrewsbury** (June 2006)

Members of the Law Society can access full-text online versions of these articles from the Law Society website (member login and password required). Go to www.lawsociety.com.au/resources/journal/archives

General Notes – Incorporated Legal Practices

The following comments do not purport to be exhaustive and are intended only to provide a general, practical overview.

The Legal Profession Act 2004 (“the Act”) provides that a person must not engage in legal practice in New South Wales unless the person is an Australian legal practitioner. That prohibition does not, however, apply to legal practice engaged in by an incorporated legal practice in accordance with Part 2.6 of the Act: s.14.

Incorporated legal practices have been allowed in New South Wales in substantially the present form since the commencement of the Legal Profession Amendment (Incorporated Legal Practices) Act 2000 on 1 July 2001.

Following the repeal of that legislation and the commencement of the Legal Profession Act 2004 on 1 October 2005, a corporation that engages in legal practice in New South Wales now comes under the provisions of Part 2.6 of the Act and Part 6 of the Legal Profession Regulation 2005.

Overview

What is an incorporated legal practice?

Although Part 2.6 of the Act speaks of an incorporated legal practice as a “corporation” that engages in legal practice, “corporation” is defined by s.133 of the Act as meaning a company within the meaning of the Corporations Act 2001 of the Commonwealth.

A corporation that engages in legal practice in New South Wales is an incorporated legal practice, unless it receives no fee, gain or reward for the legal services it provides or the only legal services it provides are in-house legal services, or one of the other exceptions in section 134 of the Act applies.

Any corporation is, subject to Division 2, eligible to be an incorporated legal practice, but this does not authorise a corporation to provide legal services if the corporation is prohibited from doing so by any Act or law under which it is incorporated or its affairs are regulated: s.136 (1) and (2).

Corporation must give the Law Society written notices in approved form

Before engaging in legal practice

An incorporated legal practice does not itself hold a practising certificate (s.136(3)), but before a corporation may engage in legal practice in New South Wales, it must give the Law Society written notice in the approved form, of its intention to do so: s.137. Section 138 makes it an offence where a corporation is held out to be entitled to engage in legal practice unless this notice has been given.

Termination of provision of legal services

A corporation must give the Law Society written notice in the approved form if it ceases to engage in legal practice: s.139.

Incorporated legal practice must have at least one Legal Practitioner director

An incorporated legal practice must have at least one legal practitioner director: s.140 (1). "Legal practitioner director" is defined as a director of an incorporated legal practice who is an Australian legal practitioner holding an unrestricted practising certificate.

It is an offence if an incorporated legal practice does not have any legal practitioner directors for a period exceeding 7 days: s.142.

Legal Practitioner directors Professional Obligations and Privileges

Australian legal practitioners, who provide legal services on behalf of an incorporated legal practice in the capacity of an officer or employee of the practice, maintain the professional privileges of an Australian legal practitioner and must comply with their usual professional and other obligations (s.143). The legal profession rules also apply to Australian legal practitioners who are officers or employees of an incorporated legal practice, unless the rules otherwise provide (s.148).

Responsibilities of legal practitioner directors

Each legal practitioner director of an incorporated legal practice is, for the purposes of the Act, responsible for the management of the legal services provided in New South Wales by the incorporated legal practice and must ensure that appropriate management systems are implemented and maintained: s.140(2) and (3).

If the provision of legal services by an incorporated legal practice is likely to result in breaches of professional or other obligations under the Act, the regulations or the legal profession rules, the director is required to take all reasonable action to ensure that the breaches do not occur, and that appropriate remedial action is taken in respect of breaches that do occur: s.140 (4).

Obligations of legal practitioner director relating to misconduct

Unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the incorporated legal practice; conduct of any other director (not being an Australian legal practitioner) of the incorporated legal practice that adversely affects the provision of legal services by the practice; or the unsuitability of any other director (not being an Australian legal practitioner) of the incorporated legal practice to be a director of a corporation that provides legal services, is each capable of being unsatisfactory professional conduct or professional misconduct on the part of the legal practitioner director. A legal practitioner director of an incorporated legal practice must also ensure that all reasonable action is taken to deal with any unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the practice: s.141.

A legal practitioner director must ensure that no disqualified person is an officer or employee of the incorporated legal practice or related body corporate, is a partner of the incorporated legal practice in a business that includes the provision of legal services, shares the income arising from the provision of legal services by the incorporated legal practice, or is engaged or paid in connection with the provision of legal services by the incorporated legal practice: s.152.

“Appropriate management systems”

Each legal practitioner director of an incorporated legal practice must ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the incorporated legal practice in accordance with the professional obligations of Australian legal practitioners and other obligations imposed under the Act, the regulations or the legal profession rules, and so that those obligations of Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice: s.140(3).

The Legal Services Commissioner has developed a set of objectives covering the areas that must be addressed to demonstrate that the incorporated legal practice has appropriate management systems in place. Details are available from the website of the Office of the Legal Services Commissioner.

The Law Society Council or the Commissioner may audit the compliance of an incorporated legal practice with the requirements of Part 2.6; in particular to ensure that appropriate management systems are implemented and maintained: s.670.

Professional Indemnity Insurance

An incorporated legal practice must comply with the obligations of an insurable solicitor with respect to professional indemnity insurance and payments on account of the Solicitors Mutual Indemnity Fund: s.144. Each insurable solicitor who is a legal practitioner director or an officer or employee of the practice must comply with similar obligations.

As it is necessary to ensure that LawCover compulsory professional indemnity insurance is in place in respect of the new law practice before it engages in legal practice, a company should contact LawCover well before it proposes to engage in legal practice in New South Wales.

Conflicts of interest

In questions of conflict of interest concerning the conduct of an Australian legal practitioner who is a legal practitioner director, officer or employee of an incorporated legal practice, the interests of the incorporated legal practice or any related body corporate are also taken to be those of the practitioner: s.145(1).

Australian legal practitioners who are officers or employees of an incorporated legal practice are also subject to the common law duty *not* to act in any matters where there is a conflict of interest. Equally, there will be a common law duty on the part of directors who are not legal practitioners not to act (either in the delivery of other services provided by the corporation or in relation to the delivery of its legal services) in a manner which in any way disadvantages the interests of the client of an incorporated legal practice in which they have a direct or indirect conflict of interest.

Providing services other than legal services

A corporation that engages in legal practice in New South Wales is an incorporated legal practice whether or not it also provides services that are not legal services. An incorporated legal practice may provide any other lawful service or conduct any other lawful business except a managed investment scheme (as in Chapter 5C of the Corporations Act 2001 of the Commonwealth): s.135.

Where an incorporated legal practice provides other services in addition to legal services, each legal practitioner director, and any employee who is an Australian legal practitioner and who provides the services on behalf of the practice have additional obligations of disclosure to clients under s.146.

Legal profession rules

Australian legal practitioners, who are officers or employees of an incorporated legal practice, are bound by the legal profession rules (s 148).

Engaging in the conduct of another business

Professional Conduct and Practice Rule 37¹ must be observed when a legal practice, including an incorporated legal practice, engages in the conduct of another business.

Australian legal practitioners who are officers or employees of the incorporated legal practice must ensure that the other business is not of such a nature that it would be likely to impair, or conflict with, the practitioner's duties to clients in the conduct of the practice. They are also required to maintain separate and independent files, records and accounts in respect of the legal practice, and the other business. Australian legal practitioners who are officers or employees of an incorporated legal practice must cease to act for a client if the practitioner's independent service of the client's interest is reasonably likely to be affected by the practitioner's interest in the other business. (The interests of the incorporated legal practice or any related body corporate are taken to be those of the practitioner: s.145 (1)).

Disqualified persons

Under section 154 of the Act, the Supreme Court may disqualify a person from managing a corporation that is an incorporated legal practice. As well as a person who is the subject of an order under section 154, or section 179 (Prohibition on partnerships with certain partners who are not Australian legal practitioners) or under provisions of a corresponding law that correspond to section 154 or 179, "disqualified person" also includes:

- a person whose name has (whether or not at his or her own request) been removed from an Australian roll and who has not subsequently been admitted or re-admitted to the legal profession under the Act or a corresponding law, or
- a person whose Australian practising certificate has been suspended or cancelled under the Act or a corresponding law and who, because of the cancellation, is not an Australian legal practitioner or in relation to whom that suspension has not finished, or
- a person who has been refused a renewal of an Australian practising certificate under the Act or a corresponding law, and to whom an Australian practising certificate has not been granted at a later time, or

¹ 37.1 A practitioner who engages in the conduct of another business concurrently, but not directly in association, with the conduct of the practitioner's legal practice must ensure that the other business is not of such a nature that the practitioner's involvement in it would be likely to impair, or conflict with, the practitioner's duties to clients in the conduct of the practice, and the practitioner must –

37.1.1 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business;
37.1.2 disclose to any client of the practitioner, who, in the course of dealing with the practitioner, deals with the other business, the practitioner's financial or other interest in that business; and

37.1.3 cease to act for the client if the practitioner's independent service of the client's interest is reasonably likely to be affected by the practitioner's interest in the other business.

37.2 A practitioner will be deemed to be engaged in the conduct of another business where the practitioner, or an associate:

37.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value;

37.2.2 exercises any material control over the conduct and operation of the business; or

37.2.3 has an entitlement to a share of the income of the business which is substantial, having regard to the total income which is derived from it.

- a person who is the subject of an order under this Act or a corresponding law prohibiting a law practice from employing or paying the person in connection with the relevant practice, or
- a person who is the subject of an order under the Act or a corresponding law prohibiting an Australian legal practitioner from being a partner of the person in a business that includes the practitioner's practice.

It is an offence under section 152(1) of the Act if a person who is a disqualified person:

- (a) is an officer or employee of the incorporated legal practice (whether or not the person provides legal services) or is an officer or employee of a related body corporate, or
- (b) is a partner of the incorporated legal practice in a business that includes the provision of legal services, or
- (c) shares the receipts, revenue or other income arising from the provision of legal services by the incorporated legal practice, or
- (d) is engaged or paid in connection with the provision of legal services by the incorporated legal practice.

The failure of a legal practitioner director of an incorporated legal practice to ensure that the practice complies with section 152(1) is capable of being unsatisfactory professional conduct or professional misconduct.

Disqualification of corporation from providing legal services

The Supreme Court may, under section 153 of the Act, make an order disqualifying a corporation from providing legal services on the following grounds:

- (a) that a legal practitioner director or an Australian legal practitioner who is an officer or employee of the corporation is found guilty of professional misconduct under a law of this jurisdiction or another jurisdiction,
- (b) that the Law Society Council or the Regulator is satisfied, after conducting an audit of the incorporated legal practice, that the incorporated legal practice has failed to implement satisfactory management and supervision of its provision of legal services,
- (c) that the incorporated legal practice (or a related body corporate) has contravened section 135 (Non-legal services and businesses of incorporated legal practices) or the regulations made under that section,
- (d) that the incorporated legal practice has contravened section 152 (Disqualified persons),
- (e) that a person who is an officer of the incorporated legal practice and who is the subject of an order under:
 - (i) section 154 (Disqualification from managing incorporated legal practice) or under provisions of a corresponding law that correspond to that section, or
 - (ii) section 179 (Prohibition on partnerships with certain partners who are not Australian legal practitioners) or under provisions of a corresponding law that correspond to that section,
 is acting in the management of the incorporated legal practice.

It is an offence if a corporation provides legal services in contravention of a disqualification under this section.

Further, an Australian legal practitioner who provides legal services on behalf of a corporation in the capacity of an officer or employee of the corporation may be guilty of unsatisfactory professional conduct or professional misconduct where the practitioner ought reasonably to have known that the corporation is disqualified under this section.

“Law practice”

An incorporated legal practice comes within the Act’s definition of a “law practice”². Accordingly, the obligations which are imposed in the Act on a “law practice” generally apply to an incorporated legal practice in the same way as they would apply to a partnership or sole practice; obligations such as those concerning trust money and trust accounts, costs disclosure and assessment.

General trust account

A law practice, including an incorporated legal practice, must notify the Law Society Council of the opening or closure of a general trust account.

Forms for this purpose can be downloaded from the Law Society website at:
www.lawsociety.com.au/ForSolicitors/professionalstandards/Trustaccounts/Notificationform

It should be noted that a general trust account can only be maintained with an approved authorised deposit taking institution (“Approved ADI”). A list of Approved ADI’s is on the Law Society website at:
www.lawsociety.com.au/ForSolicitors/professionalstandards/Trustaccounts/Authoriseddeposit-takinginstitutionsADIs

² "law practice" means:

- (a) an Australian legal practitioner who is a sole practitioner, or
- (b) a law firm, or
- (c) a multi-disciplinary partnership, or
- (d) an incorporated legal practice, or
- (e) a complying community legal centre.

HELPFUL REFERENCES AND LINKS for incorporated Legal Practices

- **Office of the Legal Services Commissioner**

The website of the [Office of the Legal Services Commissioner](#) contains a good deal of helpful material with respect of; “**appropriate management systems**”

“New Structures for Legal Practices and the Challenges they bring for Regulators” by Steven Mark and Molly Hutcherson. Download at [http://www.lawlink.nsw.gov.au/lawlink/olsc/olsc.nsf/vwFiles/New%20Structures%20for%20Legal%20Practices%20CLC2005.doc/\\$file/New%20Structures%20for%20Legal%20Practices%20CLC2005.doc](http://www.lawlink.nsw.gov.au/lawlink/olsc/olsc.nsf/vwFiles/New%20Structures%20for%20Legal%20Practices%20CLC2005.doc/$file/New%20Structures%20for%20Legal%20Practices%20CLC2005.doc)

- **Notice of Intention to provide legal services**

A copy of the form of Notice of Intention to start providing legal services under section 137 (1) is attached. Download from the Law Society’s website at: www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/formsdirectory/008711

- **Practitioners must Notify Council in writing of change in particulars**

Clause 21 of the Legal Profession Regulation 2005 provides that a local legal practitioner must NOTIFY the appropriate Council, in writing, of ANY change in the particulars relating to the *practitioner* (as disclosed in the practitioner’s last application for a local practising certificate) within 7 days after the change occurs; note; this includes local legal practitioners in incorporated legal practices.

As to the information required in an application for a local practising certificate see Clause 11 of the Legal Profession Regulation 2005.

http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/s11.html

Download the change of details form from the Law Society website at www.lawsociety.com.au/idc/groups/public/documents/internetcontent/008719.pdf

- **Ordinary statutory obligations**

An incorporated legal practice is a company within the meaning of the Corporations Act 2001 (Cwlth) and has the ordinary statutory obligations of a company. It must, for example set out its name followed by its ACN, or corresponding ABN, on all its public documents and negotiable instruments. Public documents include business letters, statements of account, invoices, and receipts: Corporations Act 2001, ss153 and 88A.

- Taxation Ruling

Taxation Ruling TR 2006/2 "Income tax: deductibility of service fees paid to associated service entities: Phillips arrangements" is being seen by some as a reason for law firms to incorporate. Access from:

<http://law.ato.gov.au/pdf/pbr/tr2006-002.pdf>

Consider "Step 3: what documentation do you need?" on page 10 of Your service entity arrangements. Download from:

<http://www.ato.gov.au/content/downloads/N13086-04-2006.pdf>

- Capital Gains Tax

A text published by Butterworth "Incorporating Your Law Firm – A Practical Guide" Brown, B; Duncan, R; Pearson, G: covers CGT issues both on commencement and exist. At page 37: "CGT is the major concern when transferring your sole tradership or partnership business to a company."

- Possible exemption ad valorem duty

As to the possible exemption from ad valorem duty on the transfer to an incorporated legal practice, see the Duties Act 1997, s.65 (5).

- Professional indemnity insurance

To arrange the compulsory professional indemnity insurance in respect of the new law practice before it engages in legal practice, contact [LawCover](#).

- Professional Standards Liability Scheme

Solicitors employed by a company which is an incorporated legal practice may have the benefit of The Law Society of NSW (NSW) Scheme. The company however, not being a member of the Law Society of New South Wales, cannot enjoy the benefit of limiting occupational liability under the Professional Standards Act 1994.

The regulations under the Professional Standards Act 1994 (NSW) provide that all documents given by the person to a client or prospective client that promote or advertise the person or person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation and similar documents, must carry the statement "Liability limited by a scheme approved under Professional Standards Legislation".

It would seem wrong to say on letters from the incorporated legal practice that liability is limited by a scheme approved under Professional Standards Legislation, when the liability of the incorporated legal practice is not so limited.

Such a statement on correspondence from an incorporated legal practice might be conceived as being in breach of provisions like s.53(g) of the TRADE PRACTICES ACT 1974 (Cwlth), that a corporation must not in connexion with the supply or possible supply of services make a false or misleading representation concerning the exclusion of any right or remedy.

http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s53.html

Provided legal practitioners employed by an incorporated legal practice are indeed persons to whom the scheme applies in accordance with cl.2 of The Law Society of NSW (NSW) Scheme, the following expanded statement does not appear to breach the Trade Practices Act 1974 (Cwlth) while still satisfying the requirements of New South Wales Professional Standards Legislation.

Liability limited by a scheme approved under Professional Standards Legislation.
Legal practitioners employed by (name of ILP) are members of the scheme.

The statement may need to be varied further where legal practitioners who are members of the scheme are, for example, directors but are not employees.

The background of the Solicitors Limitation of Liability Scheme is set out in the Information Bulletin which can be downloaded from the Law Society website at

<http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/indemnityinsurance/limitationofliabilityscheme>

Information in respect of the Scheme can be obtained from Mrs Cheryle O'Loan of the Law Society - Telephone (02) 9926 0213 Facsimile (02) 99260166; E-mail cheryle.oloan@lawsociety.com.au.

- Transfer of practitioner's practice

Practice Rule 30 - Transfer of a practitioner's practice (see www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/SolicitorsRules/027122) may be helpful to facilitate the transfer of matters from an existing practice to a new incorporated legal practice.

Practice Rule 30 provides at 30.2 and 30.3

30.2 The notice which is sent to any client, on whose behalf the practitioner holds money in trust or under the practitioner's control, must advise the client of –

30.2.1 the balance of money held on the client's behalf;

30.2.2 the practitioner's intention to transfer the relevant account to the practitioner acquiring the practice, unless advised by the client to the contrary; and

30.2.3 the client's right to give to the practitioner a contrary direction as to the manner in which the practitioner should deal with the account on the client's behalf.

30.3 The practitioner, in addition to giving notice to clients as required by paragraphs 30.1 and 30.2, must comply with all other legislative provisions applicable to the trust money or controlled money held by the practitioner."

It is suggested that you discuss any trust account concerns with the Law Society's Trust Accounts Department on (02) 99260337.

- **Practice Management software**

Information about Practice Management software is available on the Law Society's website at:

Legal Technology: A What, Why and How of Practice Management Systems:
www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023699.pdf

Practice Management and Legal Accounting:
www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023700.pdf

SHAREHOLDERS' AGREEMENTS

Solicitors considering incorporation should consider using a detailed Shareholders' Agreement to address issues which are not covered by a company's constitution or the Corporations Act. Many of the issues which arise between partners in partnerships also need to be addressed by incorporated legal practices.

Section 140(1) of the Corporations Act 2001 provides that a company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:

(a) between the company and each member; and

(b) between the company and each director and company secretary;

and

(c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

A company's constitution however does not usually:

- confer upon a shareholder a personal right to be employed by the company.

- confer a right of shareholders to ensure that other shareholders do not compete with the company.
- create obligations of confidentiality between shareholders and the company.
- deal adequately with financial issues such as capital contributions and budgets
- deal adequately with retirement, removal or buy-out a 'partner'
- deal with transfer of clients upon departure of a 'partner'
- deal with consequences of death or disability
- deal adequately with dispute resolution

Because the Corporations Act and the company's constitution may not cover all areas which might be included in a contract between the parties, a shareholders' agreement can be an effective device to enhance the rights of shareholders and provide a more structured approach to dispute resolution.

For a more detailed analysis of the use of Shareholders' Agreements see; "*Drafting Shareholder Agreements*" by Shah Rusiti, Accredited Specialist – Business Law, a paper presented at the Legalwise Seminars conference on Effective Shareholder and Partnership Agreements in Sydney on 13 March 2008 at www.legalwiseseminars.com.au