

alternative
BUSINESS STRUCTURES

The Future of Legal Services



The Emergence of Alternative Business Structures in Other Jurisdictions

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THE FUTURE OF LEGAL SERVICES:

THE EMERGENCE OF ALTERNATIVE BUSINESS STRUCTURES IN OTHER JURISDICTIONS

ENGLAND AND WALES

Alternative Business Structures (ABS) have only recently emerged in England and Wales, but a new regulatory framework for legal services has been developing over the past eleven years.

In 2003, the Lord Chancellor of Great Britain asked Sir David Clementi, an accountant and former Director of the Bank of England, to recommend a regulatory framework for the legal services market that would promote competition, innovation, and the public and consumer interest in an efficient, effective and independent legal sector. This request was a response to perceived issues with the Bar's handling of disciplinary complaints and its insulation from competition.¹ Before Mr. Clementi's appointment, the Office of Fair Trading had issued a White Paper that was critical of the Bar's practices.²

Mr. Clementi identified the following goals for his review, which are reflected in the legislation:

- maintaining the rule of law;
- access to justice;
- protection and promotion of consumer interests;
- promotion of competition in the provision of services;
- encouragement of an independent, confident, strong and effective legal profession;
- promoting public understanding of a citizen's legal rights and duties; and
- promoting and maintaining adherence (by authorized persons) to the professional principles.³

The Clementi review led to a new *Legal Services Act 2007* (LSA) which broadened the objectives of the regulation of legal services. In addition to protecting the public interest and promoting access to justice, the regulation of legal services is also founded on objectives such as protecting and promoting consumer interests and competition. The LSA expressly permits the provision of legal services through ABS in furtherance of these objectives. ABS permits

¹ Deborah L. Rhode, "Reforming American Legal Education and Legal Practice: Rethinking Licensing Structures and the Role of Nonlawyers in Delivering and Financing Legal Services", *Legal Ethics*, Volume 16, Part 2.

² Office of Fair Trading, 2001, *Competition in Professions – A report by the Director General of Fair Trading*, OFT 328, online at http://www.oft.gov.uk/shared_oftr/reports/professional_bodies/oft328.pdf.

³ Ibid. See Legal Services Board, *The Regulatory Objectives: Legal Services Act 2007*, online at http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf.

individuals without legal training to have ownership or managerial authority over legal services firms, subject to certain constraints.

The first ABS was approved by the Council of Licensed Conveyancers in October 2011. The Solicitors Regulatory Authority approved its first ABS application in early 2012. There are 308 Alternative Business Structures in England and Wales.⁴ For additional discussion regarding the types of ABSs which have emerged, see the Law Society's background paper: [Profile of Legal Services Professionals in England and Wales](#).

Consistent with the policy shift towards regulating legal services markets, rather than individual professionals or practitioners, entity regulation was a significant feature of the Clementi proposals.⁵ In England and Wales, the entity as a whole must adhere to ten mandatory principles set out by the regulatory authority. The regulator also establishes mandatory outcomes that must be achieved.⁶

AUSTRALIA

Australia is a federation of seven jurisdictions with one federal, six state, and three territorial governments. New South Wales, which is Australia's most populous state, has seven million residents, four million of which live in Sydney. Australian states and territories permit legal practices to incorporate under ordinary company law without restrictions on share ownership or the nature of the business that is carried on.

In 1998 the National Competition Policy Review found the partnership model, which was the most common form of business structure for law firms in NSW, to be anti-competitive.⁷ Consequently, New South Wales passed legislation in 2001 permitting the creation of incorporated legal practices (ILPs), which could also include multi-disciplinary practices. Other Australian jurisdictions (such as Victoria and Queensland) subsequently amended their legislation to permit ILPs.

In New South Wales, the Law Society and Bar Association co-regulate lawyers together with the Office of the Legal Services Commissioner (OLSC), an office which is independent of the legal profession which was established in 1994 to receive complaints against legal practitioners.

⁴“ABSs top 300 mark with latest licensees demonstrating variety of new legal breed”, April 16, 2014, Legal Futures, online at <http://www.legalfutures.co.uk/latest-news/abs-top-300-mark-latest-licencees-demonstrating-variety-new-legal-breed>.

⁵ Frank Stephen, *Lawyers, Markets and Regulation* (Cheltenham, UK/Northampton, MA, 2013), p. 113.

⁶ Solicitors Regulation Authority, *Application for designation as a Licensing Authority in accordance with Part 5 of the Legal Services Act 2007*, 17 March 2011, online at [http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Licensing_Authority_Application_inc_HB_25th_March_REVISION_\(single%20pdf\).pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Licensing_Authority_Application_inc_HB_25th_March_REVISION_(single%20pdf).pdf), p. 8.

⁷ Steven Mark & Tahlia Gordon, ‘Innovations in Regulation – Responding to a Changing Legal Services Market’, J. Legal Ethics 501 (2009).

The regulatory framework for ILPs is different from the Ontario framework for lawyers. As set out in the *Legal Profession Act 2004*, ILPs are required to implement and maintain “appropriate management systems” and compliance with these requirements is the focus of regulatory activity (rather than complaints). The Legal Practitioner Director (LPD) of the ILP must ensure that the practice has “appropriate management systems” in place that meet the requirements of the Act.

“Appropriate management systems” are not defined in the legislation. The list of issues, or regulatory objectives for which the LPD is responsible, was established by the Office of the Legal Services Commissioner in collaboration with the College of Law, Professional Indemnity insurers, and numerous law firms and practitioners.⁸

Once the OLSC has received notification that a practice has incorporated, a self-assessment form must be completed listing the ten objectives. The LPD is required to rate the ILP’s compliance with each of the ten objectives. The Legal Practitioner Director then sends the form to the OLSC for review. The OLSC has developed an online portal to enable Legal Practitioner Directors to submit the forms online.⁹

Research suggests that the self-assessment process has a significant impact on firm culture and reduction in complaints about the firm. Professor Susan Fortney of Hofstra University analysed surveys sent to 356 Incorporated Legal Practices in New South Wales with two or more solicitors regarding their experience with the self-assessment process. The survey asked about the relationship between self-assessment and the ethical norms, systems, conduct and culture in firms. Some highlights of the results are that

- 71 percent of respondents said they revised firm systems, policies and procedures as a result of the self-assessment process.
- 47 percent reported that they had adopted new systems, policies and procedures.
- The largest percentage of respondents stated that the greatest impact of self-assessment was on matters relating to firm management and risk management, followed by impact on client services matters.¹⁰

⁸ Steve Mark, “Re-imagining Lawyering: Whither the Profession”, p. 4, Australian Academy of Law Symposium 2008.

⁹ Office of the Legal Services Commissioner, “Self-Assessment Process”, online at www.olsc.nsw.gov.au.

¹⁰ Susan Fortney, “The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms”, (January 6, 2014). St. Mary's Law Journal Symposium on Legal Ethics and Malpractice. 2014; Hofstra Univ. Legal Studies Research Paper No. 2014-01. Available at SSRN: <http://ssrn.com/abstract=2375219>.

Today there are over 1,200 approved ILPs in New South Wales, representing roughly 30% of all legal practices in that jurisdiction.¹¹

Three¹² Australian ABS are listed on the Australian stock exchange. Slater & Gordon was the first law firm in the world to be publicly listed on May 21, 2007. Prior to its listing, Slater & Gordon worked closely with the OLSC to ensure that its prospectus, constitution, and shareholder agreements specify that the firms' primary obligation is to courts and clients. Further, Slater & Gordon has adopted corporate governance policies to reinforce the primacy of professional and ethical obligations of legal practitioners in the company.¹³

OTHER JURISDICTIONS

Other jurisdictions have more recently decided to permit ABS. In January 2014 for example, it was reported that legislation would be introduced in Singapore to permit ABS, although non-lawyer ownership would be capped at 25%.¹⁴

¹¹ Steve Mark, "Commercialisation of Legal Practice – Regulatory Reflections from NSW", Commonwealth Law Conference, 21 April 2012, online at http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/commercialism_of_legal_practice_clth_law_conference_april2012.pdf.

¹² The other two firms listed on the Australian stock exchange are Shine Lawyers and Integrated Legal Holdings. Slater & Gordon and Integrated Legal Holdings are discussed in Steve Mark, "Commercialisation of Legal Practice – Regulatory Reflections from NSW", *Ibid.* Regarding Shine Lawyers see "Newly listed Australian law firm plans to follow Slater & Gordon to UK", online at <http://www.legalfutures.co.uk/latest-news/newly-listed-australian-law-firm-plans-follow-slater-gordon-uk/print/>.

¹³ Andrew Grech & Kirsten Morrison, "Slater & Gordon: The Listing Experience", (2009) 22 *Georgetown Journal of Legal Ethics* 535.

¹⁴ Julius Melnitzer, "Alternative Business Structures Spread to Singapore", *Financial Post*, January 31, 2014, online at <http://business.financialpost.com/2014/01/30/alternative-business-structures-spread-to-singapore/>.