



THE LAW SOCIETY
OF NEW SOUTH WALES
REGULATORY COMPLIANCE
SUPPORT UNIT

INCORPORATED LEGAL PRACTICE

UNDER LEGAL PROFESSION LEGISLATION

OCTOBER 2015

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CONTENTS

INTRODUCTION	4
OBLIGATIONS ON INCORPORATED LEGAL PRACTICES	5
OBLIGATIONS ON PRINCIPALS	7
SHARING RECEIPTS	9
PROVISION OF OTHER SERVICES	10
DISQUALIFICATION OF ENTITIES FROM PROVIDING LEGAL SERVICES	11
GENERAL TRUST ACCOUNT PROVISIONS	11
LAW SOCIETY JOURNAL ARTICLES	12
HELPFUL REFERENCES AND LINKS	13

1. INTRODUCTION

Note: legal profession legislation means:

- (a) the Legal Profession Uniform Law Application Act 2014 and the local regulations, and
- (b) the Legal Profession Uniform Law (NSW), and
- (c) the Uniform Regulations and the Uniform Rules as they apply in this jurisdiction

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

The Legal Profession Uniform Law (NSW) (the Uniform Law) prohibits a person from engaging in legal practice in New South Wales unless the person is a qualified entity. Included in the definition of a qualified entity is a law practice. An incorporated legal practice is a type of law practice.

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 earlier legislation and the commencement of legal profession legislation on 1 July 2015, a corporation that engages in legal practice in New South Wales now comes under the provisions of Part 3.7 of the Uniform Law and Part 3.7 of the Legal Profession Uniform General Rules 2015 and Division 4 of the Legal Profession Uniform Law Application Act 2014.

1.1 What is an incorporated legal practice?

Incorporated legal practice is defined at part 1.2 of the Uniform Law as a “corporation” that satisfies certain criteria. The criteria are as follows:

- (a) It is-
 - (i) a company within the meaning of the Corporations Act; or
 - (ii) a corporation, or a corporation of a kind, approved by the Council under section 114 or specified in the Uniform Rules for the purposes of this definition;
- (b) it has given notice under section 104 that it intends to engage in legal practice in Australia and that notice is still operative;
- (c) the legal services it provides or proposes to provide are not limited to either or both of the following services-
 - (i) in-house legal services for the corporation or a related entity;
 - (ii) services that are not legally required to be provided by an Australian legal practitioner and that are provided by an officer or employee who is not an Australian legal practitioner;
- (d) it is not excluded by the Uniform Rules from being an incorporated legal practice – but does not include a community legal service.

A corporation that engages in legal practice in New South Wales and which satisfies the criteria listed above is an incorporated legal practice.

An incorporated legal practice may, in addition to the provision of legal services, provide other services (s.103).

2. OBLIGATIONS ON INCORPORATED LEGAL PRACTICES

The obligations imposed by legal profession legislation on a “law practice” 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.

2.1 Corporation must give the Law Society written notices in approved form:

2.1.1 Before engaging in legal practice

An incorporated legal practice does not itself hold a practising certificate. Before a corporation may engage in legal practice in New South Wales as a law practice, it must give the Law Society at least 14 days written notice in the approved form, of its intention to do so (s.104(1) & r.28). Section 104(2) prohibits an entity from engaging in legal practice as a law practice unless this notice has been given.

2.1.2 Upon Termination of provision of legal services

An incorporated legal practice must give the Law Society written notice in the approved form within 14 days after it ceases to engage in legal practice: (s.104(3) & r.29).

2.2 Incorporated legal practice must have at least one Authorised Principal

An incorporated legal practice must have at least one authorised principal (s.105). “Authorised principal” is defined as a principal who is authorised by his or her Australian practising certificate to supervise others.

The authorised principal must also be a validly appointed director of the company. It is an offence if an incorporated legal practice does not have any authorised principal for a period exceeding 7 days (s.106(1)).

If an incorporated legal practice does not have an authorised principal for a period exceeding 7 days, the incorporated legal practice must notify the Law Society of New South Wales of that fact within 7 days. The incorporated legal practice must not provide legal services in this jurisdiction during any period it is non-compliant (s.106 (3)).

2.3 Contravention by law practice – disqualified or convicted person as lay associate.

An incorporated legal practice cannot have a lay associate whom any principal or other legal practitioner associate of the law practice knows to be a disqualified person or a person who has been convicted of a serious offence unless the lay associate is approved by the Law Society Council (s.121).

2.4 Compliance Audit and Management System Direction

Where there are reasonable grounds for doing so, the NSW Commissioner or the Council of the Law Society may conduct (or appoint a suitably qualified person to conduct), an audit of the compliance of a law practice with legal profession legislation and other professional obligations. The reasonable grounds must be based on the conduct of the law practice or one or more of its associates or a complaint against the law practice or one or more of its associates. A report of a compliance audit is to be provided to the law practice concerned and may be provided to the designated local regulatory authority (s.256).

Subsequent to the conduct of a compliance audit, the NSW Commissioner or the Council of the Law Society may give a management system direction to a law practice if considered reasonable to do so.

A **management system direction** is a direction to a law practice or class of law practices to ensure that appropriate management systems are implemented and maintained to ensure the provision of legal services by the law practice is in accordance with legal profession legislation and other professional obligations. A management system direction may also direct a law practice to provide periodic reports to the NSW Commissioner or the Council of the Law Society on compliance with the systems.

An incorporated legal practice must comply with any management system direction given to it.

2.5 Professional Indemnity Insurance

An incorporated legal practice must not engage in legal practice in this jurisdiction unless the incorporated legal practice itself holds an approved insurance policy for this jurisdiction and the policy covers the legal practice in which it is engaged (s.212).

3. OBLIGATIONS ON PRINCIPALS

3.1 Responsibilities of Principals

Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that all legal practitioner associates of the law practice comply with their obligations under the Uniform Law and the Uniform General Rules and other professional obligations (s.34(1)(a)). Further it is the responsibility of each principal to take reasonable steps to ensure that the legal services provided by the law practice are provided in accordance with the Uniform Law and the Uniform General Rules (s.34 (1) (b)).

3.2 Liability of Principals

Where an incorporated legal practice has contravened a provision in the Uniform Law or the Uniform Rules imposing an obligation on the practice, a principal of the incorporated legal practice is taken to have contravened the same provision in the following circumstances:

- (a) the principal knowingly authorised or permitted the contravention; or
- (b) the principal was in or ought reasonably to have been in a position to influence the conduct of the law practice in relation to its contravention of the provision and failed to take reasonable steps to prevent the contravention (s.35).

Such deemed contravention by a principal is capable of constituting unsatisfactory professional conduct or professional misconduct.

3.3 Storage of archived files (trust property¹)

Rule 14 of the Solicitors Practice Rules requires a solicitor with **designated responsibility**² for a client's matter, to ensure that upon completion or termination of the law practice's engagement that the client or former client is given any client documents unless there is an effective lien.

A solicitor with **designated responsibility** or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.

What happens to archived files when a law practice ceases to provide legal services?

In these circumstances the former **principal/s** of former law practices³ are responsible for the storage of archived files of the former law practice as they are by definition, the **solicitor with designated responsibility** for a client's matter.

1 Under section 128 of the Legal Profession Uniform Law (NSW) **trust property** means property entrusted to a law practice in the course of or in connection with the provision of legal services by the practice for or on behalf of another person, but does not include trust money.

2 **Solicitor with designated responsibility** means the solicitor ultimately responsible for a client's matter or the solicitor responsible for supervising the solicitor that has carriage of a client's matter. The solicitor with designated responsibility **is the principal or principals of the law practice.**

3 s132 of the Act applies in relation to **former law practices** and **former principals** and associates of law practices in relation to conduct occurring while they were respectively law practices, principals and associates in the same way as it applies to law practices, principals and associates, and so applies with any necessary modifications.

Incorporated legal practices (in liquidation)

If an ILP has given notice to the Law Society of NSW that it will no longer engage in legal practice because managers/ liquidators have been appointed to the company then the company ceases to be an ILP for the purposes of the Act. The ILP is however, a **former law practice** for the purpose of s132 of the Act

In these circumstances, it is not the appointed managers or liquidators who have designated responsibility for the storage of archived files of a former ILP it is the former principal/s of the former ILP.

Note: a principal of an incorporated legal practice is an Australian legal practitioner who holds and Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice; AND is a validly appointed director of the company.

3.4 Advertising

Rule 36 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 prohibits false or misleading advertising and states that a solicitor or principal of a law practice must ensure that any advertising, marketing or promotion in connection with the solicitor or law practice is not false or misleading or deceptive or likely to mislead or deceive.

3.5 Stationery - Business Name

Rule 9 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 states:

A solicitor must cause the firm or business name of the solicitor or firm to be mentioned in legible characters on all communications written in the course of legal practice by the solicitor.

In addition to this the Corporations Act 2001 imposes disclosure obligations on every company in Australia. Section 153 dictates that a company's ACN should appear on all of its public documents and negotiable instruments. Items on which it should appear include:

- Business letterheads
- Statements of account including invoices
- Receipts which are not machine produced
- Cheques, promissory notes and bills of exchange
- Written advertisements making a specific offer which is capable of being accepted

3.6 Conflict of Interest

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.

4. SHARING RECEIPTS

Subject to the Uniform Law and to the conditions on his or her Australian practising certificate, an Australian legal practitioner is not prevented from being a partner, director, officer or employee of a law practice merely because of one or more of the following:-

- (a) the business of the law practice includes the provision of both legal services and other services;
- (b) one or more other persons are lay associates of the law practice;
- (c) the practitioner shares receipts, revenue or other income from the provision of his or her legal services with the law practice or one or more lay associates of the law practice (s.37)

“**lay associate**” is defined as a person who is not an Australian legal practitioner and who is:

- (a) an associate of the law practice; or
- (b) a consultant to the law practice (however described) who provides services related to legal services to the law practice, other than services of a kind specified in the Uniform Rules for the purposes of this definition; or
- (c) a person who shares receipts, revenue or other income arising from the law practice.

5. PROVISION OF OTHER SERVICES

An incorporated legal practice may provide any other lawful service or conduct any other lawful business but an incorporated legal practice (or any law practice) or a related entity must not promote or operate a managed investment scheme (s.103 & s.258).

Legal Profession Uniform Legal Practice (Solicitors) Rule 8⁴ must be observed when a law 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.

5.1 Disclosure obligations

There are additional disclosure obligations on incorporated legal practices where the practice provides both legal and other services and a person engages the law practice to provide services that the person might reasonably assume to be legal services (s.107).

The Uniform General Rules at rule 31 sets out that written notice to the person must be made:

- (a) setting out the legal services to be provided; and
- (b) stating whether or not all of the services are to be provided by an Australian legal practitioner; and
- (c) if some or all of the services are not to be provided by an Australian legal practitioner, identifying those services and indicating the status or qualifications of the person or persons who are to provide the services; and
- (d) stating that the Uniform Law and these Rules apply to the provision of legal services but do not apply to the provision of non-legal services.

4 8.1 A solicitor who engages in the conduct of another business concurrently, but not directly in association, with the conduct of the solicitor's legal practice must:

- 8.1.1 ensure that the other business is not of such a nature that the solicitor's involvement in it would be likely to impair, or conflict with, the solicitor's duties to clients in the conduct of the practice, and
- 8.1.2 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business, and
- 8.1.3 disclose the solicitor's financial or other interest in that business to any client of the solicitor, who in the course of dealing with the solicitor, deals with the other business, and
- 8.1.4 cease to act for the client if the solicitor's independent service of the client's interest is reasonably likely to be affected by the solicitor's interest in the other business.

8.2 For the purposes of this rule, a solicitor is taken to engage in the conduct of another business where the solicitor, or an associate:

- 8.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value; or
- 8.2.2 exercises any material control over the conduct and operation of the business; or
- 8.2.3 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.

6. DISQUALIFICATION OF ENTITIES FROM PROVIDING LEGAL SERVICES

The designated tribunal may, under section 120 of the Uniform Law, make an order disqualifying an entity that is or was a law practice from providing all or specified legal services on the following grounds:

- (a) that a legal practitioner associate of the law practice has been found guilty of professional misconduct under a law of this jurisdiction or another jurisdiction;
- (b) that the law practice (or a related body corporate) has contravened section 121 (contravention by law practice – disqualified or convicted person as lay associate);
- (c) that the law practice has failed to comply with a management system direction under section 257;
- (d) that the law practice or a related entity has contravened section 258 (prohibited services and business – managed investment scheme)

7. GENERAL TRUST ACCOUNT PROVISIONS

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 have been published at:

<http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/formsdirectory/index.htm>

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 published at:

<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Trustaccounts/index.htm>

'LAW SOCIETY JOURNAL' ARTICLES:

- 'Should your firm incorporate?'
by **Philip King** (March 2001)
<http://www.lawsociety.com.au/resources/journal/archives/Issue/033555>
- 'Management Systems for your Incorporated Legal Practice'
by **Terry Purcell** (March 2001)
<http://www.lawsociety.com.au/resources/journal/archives/Issue/033532>
- 'Risk Management: Protecting Personal Assets'
by **Bruce Mac Dermott** (June 2002)
<http://www.lawsociety.com.au/resources/journal/archives/Issue/033867>
- 'What are the tax effects of incorporating legal practices?'
by **Richard Vincent** (July 2002)
<http://www.lawsociety.com.au/resources/journal/archives/Issue/031392>
- 'What are the commercial and corporate law effects of incorporating legal practices'
by **Richard Vincent** (July 2002)
<http://www.lawsociety.com.au/resources/journal/archives/Issue/030726>
- 'Practice Structure: Incorporation issues - What is an incorporated legal practice and how does it operate?'
by **Chris Shrewsbury** (June 2006)
<http://www.lawsociety.com.au/resources/journal/archives/Issue/029949>

HELPFUL REFERENCES AND LINKS

- **The Law Society Compliance Review Toolkit** – now available for download at:
<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/RegulatorySystems/index.htm>
- **Office of the Legal Services Commissioner**
The website of the Office of the Legal Services Commissioner contains a good deal of helpful material.
[http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_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/ll_olsc.nsf/vwFiles/New%20Structures%20for%20Legal%20Practices%20CLC2005.doc/$file/New%20Structures%20for%20Legal%20Practices%20CLC2005.doc)
- **Practitioners must Notify Council in writing of change in particulars**
Regulation 61 Legal Profession Uniform Law Application Regulation 2015 [NSW] 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 or for renewal of a local practising certificate) within 7 days after the change occurs; note, this includes local legal practitioners in incorporated legal practices. This may also be done online via the Law Society’s Update Details form which is located at:
<http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/1036878.pdf>
- **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”.
<http://law.ato.gov.au/atolaw/view.htm?rank=find&criteria=AND~TR~basic~exact:::AND~2006%2F2~basic~exact&target=EA&style=java&sdoid=TXR/TR20062/NAT/ATO/00001&recStart=1&recnum=4&tot=8&pn=ALL:::ALL>
- **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.

- **Law Society of New South Wales Scheme (Limitation of Liability)**

Principals and employed solicitors of an incorporated legal practice may have the benefit of the Law Society of New South Wales Scheme (“The Scheme”).

The background of the Scheme is set out in the Information Bulletin at

<http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/limitationofliability/index.htm>

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.

Section 33 (3) of the Professional Standards Act 1994 (NSW) provides 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 that the person’s occupational liability is limited. Clause 9 of the Professional Standards Regulation 2014 prescribes the following form of statement:

“Liability limited by a scheme approved under Professional Standards Legislation.”

Although the liability of the incorporated legal practice cannot be limited under the scheme, provided the principals and employed solicitors of the incorporated legal practice are indeed persons to whom the scheme applies in accordance with cl.2 of The Law Society of New South Wales Scheme, the following expanded statement is suggested:

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

Information in respect of the Scheme can be obtained from Ms. Bridget Sordo of the Law Society - Telephone (02) 9926 0344

- **Transfer of practitioner’s practice**

Practice Rule 6.1 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 - Transfer of a solicitor’s practice - may be helpful to facilitate the transfer of matters from an existing practice to a new incorporated legal practice.

Practice Rule 6.2 provides:

6.2 Any notice which is sent to any client, on whose behalf the solicitor holds money in trust or under the solicitor’s control, must advise the client of –

6.2.1 the balance of money held on the client’s behalf; and

6.2.2 the solicitor’s intention to transfer the relevant account to the practitioner acquiring the practice, unless advised by the client to the contrary; and

6.2.3 the client’s right to give to the solicitor a contrary direction as to the manner in which the solicitor should deal with the account on the client’s behalf.

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 Trust Accounting software is available on the Law Society's website at:

<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Trustaccounts/Trustaccountingsoftware/index.htm>

- **Shareholder 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 on 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 of 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 Shareholder Agreements, see:

"Shareholder Agreements – Setting the terms of a business relationship"

by Shah Rusiti, Law Society Journal, October 2008

And

"Fine-tuning Shareholder Agreements"

by Shah Rusiti, Law Society Journal, November 2008

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