Legal Profession Reform in Queensland: Multi-Disciplinary Practices (MDPs)

A Multi-disciplinary Practice (MDP) is a business structure that enables law partnerships to share profits, risk, and information with non-lawyer partners, such as accountants, architects, mediators, town planners, insurance consultants, or migration agents. However, of all the Australian states and territories, only New South Wales has passed legislation to facilitate the establishment of MDPs in that State. Elsewhere, while MDPs are common in Europe (particularly France and Germany), they are prohibited in the USA. Rules governing the legal profession in England also prevent MDPs developing there.

The MDP concept raises a number of issues, including that of consumer protection and regulation/discipline of solicitors. This Brief will attempt to identify and discuss some of the more important questions for Queensland regarding the establishment of MDPs. It will briefly consider the NSW position, proposed legislation to facilitate MDPs in Western Australia, and some international developments.

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1 INTRODUCTION

A Multi-disciplinary Practice (MDP) is a business structure that enables law partnerships to share profits, risk, and information with non-lawyer partners, such as accountants, architects, mediators, town planners, insurance consultants, or migration agents. Many professions do, already, have a number of employed solicitors on staff, particularly accounting practices (eg Ernst & Young) and banks (eg St George Bank). However, of all the Australian states and territories, only New South Wales has passed legislation to facilitate the establishment of MDPs in that State. Elsewhere, while MDPs are common in Europe (particularly France and Germany), they are prohibited in the USA. Rules governing the legal profession in England also prevent MDPs developing there.

Supporters of MDPs herald the business structure as an innovative and more efficient means of delivering legal services to those clients demanding more flexibility for their commercial transactions. For clients, there is the potential convenience of obtaining advice on a number of professional issues, all in one place. For lawyers and other professionals, it enables cost sharing. In addition, the lines between legal and non-legal areas (particularly in taxation and revenue matters) are becoming increasingly blurred and a combination of legal solutions and those provided by other professionals, such as accountants, architects, or counsellors may be appropriate for many commercial and personal relations issues faced by clients.

The MDP concept raises a number of issues, including that of consumer protection and regulation/discipline of solicitors. This Brief will attempt to identify and discuss some of the more important questions for Queensland regarding the establishment of MDPs. It will briefly consider the NSW position, proposed legislation to facilitate MDPs in Western Australia, and some international developments.

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3 ‘Law Council lobbies for Multidisciplinary Practices’.

2 STRUCTURE OF LAWYERS’ OPERATIONS

Solicitors have generally adopted a partnership structure, where duly qualified lawyers share liability (which is unlimited), and income is divided only between the lawyers. On the other hand, a corporate structure enables participants to share profits and to limit their personal liability. Only recently have solicitors been able to corporatise but, even so, there are some restrictions, such as not being allowed to limit liability or share income with non-lawyers (as would occur in a MDP).5 The consumer protection rationale for the traditional mode of practising as partners with unlimited liability may have lessened with the introduction of professional indemnity insurance to compensate clients for faulty legal services.

NSW, South Australia, Victoria, Tasmania, and the Northern Territory allow legal practices to incorporate on an unlimited liability basis with strict controls on who may be directors and shareholders but only NSW, to date, allows a MDP to adopt a corporate structure.

The two issues, incorporation and MDPs, tend to be considered simultaneously because the structure of a MDP will likely be a corporate one (in order to attract investors) where not all of the shareholders and directors will be lawyers, and they may wish to limit their liability, and they will wish to share income.6 The Council of Australian Governments (COAG) supports flexible business arrangements in the legal services market and considers that practices such as MDPs may reduce transaction costs. As far back as 1994, the former Trade Practices Commission favoured MDPs, subject to the adoption of appropriate rules of ethical and professional conduct to protect clients and the system of justice.7

It seems that, in the absence of facilitative legislation and given the existence of restrictive professional rules, law firms have tended to avoid joining with an existing accountancy or consultancy firm to form a MDP. Instead, they create their own consultancy and training ‘add-ons’ to deliver a full service to clients. For example, Freehills, a leading large law firm has Freehills Technology Services.8 Pricewaterhouse Coopers Legal emerged with significant presence in Sydney and Melbourne and is striving to be part of an international group with practices in non-

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6 R Cocks, p 341.
traditional legal areas. However, it still, apparently, retains the structure of a traditional law firm and is not yet part of Pricewaterhouse Coopers.

2.1 LAW COUNCIL OF AUSTRALIA

The Law Council of Australia (LCA) supports innovation in lawyers’ business structures, including incorporated legal practices and MDPs, and has called for the removal of existing legislative restrictions. When releasing the Multi-Disciplinary Practices: Legal Professional Privilege and Conflict of Interest Issues Paper (the MDP Issues Paper\(^9\)) in September 2000, the then LCA President stated that as commercial transactions become increasingly complex and clients become more demanding, legal practitioners are looking for innovative and more efficient ways to deliver their services.

The LCA supports the introduction of legislation to facilitate the incorporation of legal practices and establishment of MDPs. However, whatever form such a business structure takes must recognise (and legislation should enshrine) the paramountcy of a lawyer’s ethical obligations and professional responsibilities, and the lawyer’s role in relation to the administration of justice. Included would be a requirement that only the holder of an unrestricted practising certificate can be controller of the firm and a requirement that only qualified lawyers provide legal services.

2.1.1 Law Council’s MDP Policy Statement

The LCA has a progressive MDP Policy which is incorporated in its Policy Statement on Lawyers’ Business Structures. It reflects the LCA’s belief that regulation to protect the interests of consumers and the administration of justice should focus on the compliance by individual lawyers with their ethical obligations and professional responsibilities (including duties to the court; obligations regarding conflict of interest; duties of disclosure to clients) rather than regulating the nature of the business structure itself.\(^{10}\)

The Policy upholds the importance of the interests of consumers, which must be properly protected, and emphasises that services offered by the firm must be accurately and fully represented to clients, including the relevant qualifications of

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the service providers, and that clients must be made aware of all fees from internal referrals.

3 ISSUES FOR CONSIDERATION

There are a number of issues that arise when considering the adoption by lawyers of a business structure and environment very different from that in which the legal profession has traditionally operated.

While commitment to public service distinguishes a profession from other callings, the legal profession has possibly the most stringent duties of all the professions.\(^\text{11}\) It has been said that the ethical demands placed on lawyers exceed those of the general business community because of the special fiduciary nature of the relationship between lawyer and client and the lawyer’s role as an officer of the court.

It has been argued that the inherent elements of the fiduciary relationship between solicitor and client – fidelity, confidentiality and independence – may be compromised by the infiltration of business practices, particularly in an environment that includes non-lawyers not subject to the same special rules as the lawyer. Therefore, it is argued, any movement towards a MDP structure should be considered carefully if the legal profession is to ensure that it maintains public confidence.\(^\text{12}\) The counter argument is that if the new trend is not adopted by the profession, subject to reasonable safeguards, the public risks losing invaluable support from true professionals whose assistance is rendered the more valuable through observance of an objective, external standard and adherence to ethical responsibilities.\(^\text{13}\)

The issues relevant to lawyers operating in a MDP environment are considered below.

3.1 CONFLICT OF INTEREST

Solicitors must avoid an actual or potential conflict of interest. The types of potential conflict include a conflict between the lawyer’s interests and those of the

\(^{11}\) MDP Issues Paper, pp 5-6 citing Carindale Country Club Estate P/L v Astill & Ors (1993)115 ALR 112 [para 17].

\(^{12}\) R Cocks, pp 339, 342.

client (eg receiving a benefit under a will); and between two clients of the lawyer (although it is best for lawyers to avoid acting for two clients).

Although the business world raises issues of conflict, the duties of the lawyer are possibly more stringent. The lawyer/client fiduciary relationship prevents the fiduciary from making a profit from the relationship. The duty is inflexible. Business relationships tend to be on a more equal footing than those existing between fiduciaries.14

The MDP environment has potential to create difficulties for the lawyer because the business interests of the firm may be improved at the expense of those of the client. Also, the non-lawyer participants in the MDP may not be bound by the same stringent fiduciary duty.15

Many executives and others believe that the difficulties can be overcome by rigorous adherence to ethical practices by lawyers who will have incentive to do so because their livelihood depends upon avoiding conflicts of interest.16 However, there are other executives who adopt a more cautious approach. For example, Acuiti Legal investigated, but ultimately declined, becoming a MDP with the chief executive stating that the potential for real or perceived conflict of interest was a concern and would be time consuming and difficult to check.17

The MDP Issues Paper noted a further issue in this context. That is the possibility that a referral might be made to another part of the MDP where an outside professional would be more appropriate. It is the shared profit potential that gives rise to a conflict because of the benefit that the solicitor may receive from the referral. However, there are already ethical duties that prevent lawyers from making inappropriate referrals (potential for which already exists) that would also apply to the individual lawyer in the MDP context. To overcome the potential conflict, full disclosure should be made to the client, at the time of the referral, of the possible benefit that could be derived by the solicitor, and the availability of external services of the same type.18 Implementing barriers to restrict the flow of information within a MDP (‘Chinese walls’) may not be sufficient protection

14 R Cocks, pp 338-339.
15 R Cocks, p 342.
17 Gillian Bullock, ‘Perils of Wearing too Many Hats’.
against conflict unless they have been well established as part of the structure of the organisation.

The Enron collapse brought an aspect of the conflict issue into focus. This is because Andersen, an accounting firm, was responsible for auditing (in which profession, disclosure rules apply) Enron while, at the same time, providing it with other accounting services. Although not a MDP in the USA (those not being allowed there), Andersen operated as such in Australia. However, the point has been made that the potential for conflict exists for accountancy firms even if they are not MDPs. That is because the non-audit aspect of the business might be more profitable than the audit part and a person might be less inclined to be critical and analytical when auditing. It is possible that a MDP, with an even wider range of services, might increase the potential further.19

Wariness about merging professions where incompatible duties apply has been seen previously. In 2000, the American Bar Association Commission on Multi-disciplinary Practices suggested that the provision of audit and legal services to the same client should not be allowed and advised that MDPs should only be allowed with non-lawyer professionals who were governed by ethical standards. It proposed that bar associations in each jurisdiction develop a list of occupations which could join with lawyers without problems of this type emerging.20 On the other hand, the Federation of Law Societies of Canada (FLSC) opts for a general principle of disclosure. On this approach, where such a conflict emerges, the professional must obtain the client’s consent to disclosure or must limit the representation to services that do not create conflicts.21

The Law Council of Australia’s MDP Policy states that while there should not be a blanket prohibition on a MDP providing a combination of legal and other services, the government should have power to make a regulation to prevent a particular class of service from being provided which could result in incompatible duties of disclosure and confidentiality (eg legal and audit services).

The MDP Issues Paper states that each MDP will be slightly different and all need to be structured to avoid conflicts, particularly when different professional rules apply to the partners. In many situations (eg internal referrals) full and frank

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19 Gillian Bullock, ‘Perils of Wearing too Many Hats’, referring to comment by Mr Ian Ramsay, the director of the Centre for Corporate Law and Securities Regulation at the University of Melbourne.


disclosure to the client may overcome any potential problems.\textsuperscript{22} In any event, even in non-MDP practices of any size, potential for conflict exists and when it does actually arise, tends to be resolved.\textsuperscript{23}

3.2 DUTY TO THE COURT

The legal profession is unique in having a paramount duty to the court. The duty includes the need for the lawyer to inform the court of the clients’ actions which could tend to corrupt the administration of justice; and requires that the lawyer not abuse court processes. This duty has potential to conflict with the duty of a MDP lawyer in his or her position as a director to the shareholders.\textsuperscript{24}

3.3 LEGAL PROFESSIONAL PRIVILEGE

The solicitor/client relationship is a confidential one and every solicitor has a duty to maintain the confidentiality of his or her client’s affairs. The duty to maintain confidentiality of communications between client and solicitor may even amount to an ability to assert legal professional privilege to prevent disclosure of the communications. Other professions are not all subject to the same duty of confidentiality and may, in certain circumstances, be under an obligation to divulge information obtained from the client. As noted earlier, the latter is particularly true of auditors. In a MDP, there is an issue that a non-lawyer may disclose information that has been shared with the non-lawyer by a lawyer to whom it has been entrusted by a client. Divulging confidential, and possibly, privileged, information may cause a decline in client and public confidence.\textsuperscript{25}

The rationale for legal professional privilege is the public interest in full and frank disclosure by a client to their solicitor so that the solicitor can provide advice with full knowledge of the facts.\textsuperscript{26} There are two types of legal professional privilege. The first is confidential communications between a solicitor and client for the dominant purpose of providing or obtaining legal advice (eg legal advice regarding a property transaction). The other covers confidential communications where


\textsuperscript{23} M Randle & D Howard, p 36.

\textsuperscript{24} R Cocks, p 341.

\textsuperscript{25} R Cocks, p 341.

\textsuperscript{26} Grant v Downs (1976) 135 CLR 674, 685.
litigation is on foot or is reasonably anticipated. The latter includes communications with third parties, such as expert witnesses, where the dominant purpose of the communication is so that evidence may be used in the litigation (eg a doctor’s report).  

Legal professional privilege in the context of MDPs gives rise to a number of issues. Firstly, the protection is provided only for communications for the dominant purpose of providing or obtaining legal advice, or for use in litigation. It will not be available where the solicitor, for example, provides some legal advice but it is incidental to property development advice being sought by a client. MDP lawyers will often be providing a mixture of advice and they will have to ensure that they make clear distinctions between the different types of advice being offered so that a client will know when they can and cannot claim privilege in respect of a particular communication.  

A second issue is what happens when a solicitor or client makes a communication for the dominant purpose of receiving or obtaining legal advice through an agent (eg a non-lawyer employee obtaining preliminary information from a client)? The courts have tended to adopt a generous approach to what is an agent to enable a number of confidential communications to attract privilege even if made through an intermediary. The agent is seen as a representative of either the client or the lawyer, as the case may be. This would also apply in the MDP context to information provided to other professionals in the firm if the professional acts as a representative of the client for the purpose of placing a problem before the lawyer to obtain the legal advice or assistance. However, if the professional (eg accountant) is acting as an independent adviser rather than a mere representative, the communication will not be privileged.  

Confidentiality is the essence of the privilege. Therefore, a further issue for MDP lawyers is whether disclosure by a lawyer of a privileged communication to a non-lawyer partner other than for the purposes of legal advice or for litigation constitutes a ‘waiver’ of that privilege. It may be that if the lawyer gives confidential information to an accountant in order to give legal advice but the advice sought was actually accounting advice, then the information is not

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privileged. However, if the accountant was used to refine the information with the ultimate purpose remaining legal advice, the privilege is not waived.31

The MDP Issues Paper notes that while courts are likely to extend the privilege to communications shared with non-lawyer partners working with the lawyer on the legal advice, if the communication is for the purpose of legal advice, MDP clients should be made aware of the possible pitfalls.32

3.4 RELATED CONSUMER PROTECTION ISSUES

There are a number of statutory obligations on solicitors, meaning greater protections for clients. Examples are complaints procedures, costs agreements, trust account requirements, fidelity fund cover, and professional indemnity insurance. There may be an issue about their continued application where there is a mixture of legal and non-legal services provided.33 This may be resolved by legislation stating the way in which trust account, insurance and fidelity fund etc requirements apply to the MDP, and through practitioners’ rules imposing rigorous obligations about disclosure. The NSW Legal Profession Act 1987, which facilitates the establishment of MDPs in that State, provides (in s 48G(3)) that requirements applying to all lawyers, such as the need to hold insurance and trust account obligations, apply as if each partner who is not a solicitor were a solicitor and apply in connection with any business of the partnership.

The issue that limited liability in incorporated legal practices removes protection for clients in that they can no longer claim against personal assets of the principals of the firm, could, it is argued, be resolved by ensuring that practitioners meet appropriate standards of ethical conduct and have adequate levels of professional indemnity insurance.34 In addition, clients engaging in large transactions should be sufficiently sophisticated to check that the firm has adequate indemnity insurance cover before proceeding.35


There is an argument that any decline in ethical standards of lawyers in incorporated legal practices or MDPs could create more negligence actions against lawyers and greater demands on the Solicitors’ Fidelity Fund. That would, in turn, result in increased levies on practitioners.36

### 3.5 Consumer Convenience

It has been suggested that increasingly busy clients no longer have the time to go to several different professionals and/or firms to complete a complex but single transaction. A MDP could provide an integrated and seamless service for such clients. In addition, there might be smaller clients wanting advice, for example, on family law matters that may cross into superannuation issues or into a need for counselling.37

It has been argued that MDPs have practical advantages for both consumers and for MDP partners. The client benefits not only from the one-stop-shop nature of the business but also from the economies of scale achieved by reduced overheads. The partners benefit from a growth and expansion of skills and knowledge within the practice and an increase in income. For both, there should be a reduction in the duplication and cost of services where those of more than one professional are needed. The range of services provided may also increase. The MDP could offer across the board expertise in a particular field (eg a mining transaction), responding to problems demanding interdisciplinary skills.38

On the other hand, some commentators have argued that today’s sophisticated and demanding consumer may not be attracted to the concept, viewing a MDP as providing a narrower choice of supplier and lower levels of expertise. It will be difficult for a single firm to provide the absolute experts in all fields a client needs and, indeed, the reality is that business clients tend to obtain advice from experts across a range of firms. There are also questions concerning whether potential changes might cause a reduction in the number of firms as smaller firms, unable to compete with the range of services provided by the MDPs, leave the market. This might also reduce the amount of legal aid and pro bono work (ie free legal

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services) that is offered in the market place. If, therefore, MDPs do not respond to consumer demand, then establishing them may be a large business risk.\(^{39}\)

It may be that a MDP will have to structure itself in a totally new way to the traditional internal structures so that there would be a wider range of professional skills provided to a more focused marketplace.\(^{40}\) The MDP Issues Paper states that whether or not there is a demand for MDPs can only be answered after a period of time by consumers voting with their feet regarding which sort of firm offers the best type of service for them. The measure of a MDP’s success may depend upon the package of services offered. Important factors will be pricing, efficiency, and the quality of services being offered.\(^{41}\)

### 3.6 CONCLUSION

The MDP Issues Paper comments that while MDPs may be able to attract clients through the one-stop-shop concept, some clients may have to be sent away due to a potential conflict of interest. Full disclosure is crucial so that the client can always make a fully informed choice about whether he or she wishes to seek the assistance of the MDP. The LCA considers that the impact of business interests on the independence of legal advice and ethical practices will depend upon the personal integrity of individual lawyers in the MDP, rather than the type of business entity. It notes also that significant changes to professional conduct rules and legal practice legislation may not be needed, given the manner in which the courts have already adapted principles relating to legal professional privilege and conflict of interest to reflect new business developments.\(^{42}\)

### 4 NEW SOUTH WALES REFORMS

Since 1994, s 48G of the Legal Profession Act 1987 (NSW) has enabled barristers and solicitors to share profits and enter into partnership with non-lawyers. The current position is one of regulation of the practitioners within the relevant

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40 D Andrews, ‘Multi-disciplinary Practice – Dynamic or Delusion?’


business entity rather than regulation of the entity itself. The drive for MDPs is part of NSW’s contribution to the national legal profession model.43

The Final Report of the 1998 National Competition Policy (NCP) Review of the Legal Profession Act considered issues of incorporated legal practices and MDPs as part of its competition policy review of the NSW legal profession. In particular, the Review sought removal of the rules governing MDPs which, at that time, required that solicitors hold at least half of the shares. The minimum ownership rule no longer exists. The Legal Profession Act was recently amended by the Legal Profession Amendment (National Competition Policy Review) Act 2002 to implement a number of recommendations of that Review. In relation to MDPs, the Law Society’s power to impose practice rules that prevent solicitors joining with other professions to establish MDPs is curtailed.

Consequently s 48G of the Legal Profession Act now makes it clear that solicitors may enter into partnership with non-lawyers, despite anything to contrary in the Solicitors’ Rules. Barristers may also practise in MDPs, subject to the Barristers’ Rules. Both, however, are subject to any Regulation that may be made with respect to the business of the MDP. The provision allows for the sharing of profits and receipts between the lawyer and non-lawyer partners; and for non-lawyers to conduct legal services.

MDPs are subject to the same obligations and requirements of any legal partnerships, including the need to hold insurance. While only the legal practitioner partners are subject to the complaints system, sections 48J and 48K prevent solicitors or barristers entering into partnerships with disqualified persons. Requirements about trust accounts, the Fidelity Fund, Receivers and Managers apply as if all MDP partners were solicitors and apply in connection with any business of the partnership. The disciplinary tribunal can also order that a person is not fit and proper to be a partner.

When s 48G was originally introduced, the then Attorney-General stated that the provision would enable the participants to benefit from the advantages and efficiency gains that flow from shared overheads and economies of scale.44 The MDP concept appeared to show that the NSW Government supported innovative

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43 For more details about national uniform legal practice, see Nicolee Dixon, ‘National Uniform Admission and the Legal Profession, Research Brief No 2002/17, Queensland Parliamentary Library.

44 Hon J P Hannaford, NSW Attorney-General and Minister for Justice, Legal Profession Reform Bill 1993 (NSW), Second Reading Speech, NSW Legislative Assembly, Hansard, 16 September 1993, pp 3269-3280, p 3272.
development in the provision of legal services on a competitive basis but in a manner ensuring consumer protection.45

Rule 40 of the *NSW Solicitors’ Rules* provides that the lawyer partners of the MDP must ensure that –

- the NSW lawyers have the responsibility and authority for the management of the legal practice and delivery of legal services in NSW;

- the MDP provides the legal services and conducts the legal practice in compliance with the *Legal Profession Act* and subordinate legislation and rules;

- the MDP provides the legal services and conducts the legal practice in conformity with general legal requirements, ethical and professional standards in relation to areas such as privilege, duties to disclose, and conflict of interest;

- the MDP provides the legal services and conducts the legal practice in a way that ensures that the lawyers’ ethical and professional duties are not affected by other members;

- the services offered are accurately and fairly represented to clients and potential clients and the qualifications of the persons providing the services are disclosed.

In 2000, legislation was introduced to allow the incorporation of legal practices as limited liability companies under *Corporations Law 2001* enabling legal practices to float on the stock exchange and raise capital for expansion.46 The solicitors therein must hold practising certificates and are subject to professional and ethical obligations of the legal profession. Rules about the Fidelity Fund and professional indemnity insurance apply in the same way as for any other solicitor. Solicitors providing legal services as officers and employees retain the professional obligations of a solicitor (including duties to the court, conflict of interest, disclosure, ethical rules) and do not lose their professional privileges (including legal professional privilege).

At least one solicitor with an unrestricted practising certificate must sit on the board of directors who is/are responsible for the management of the legal practice and disciplinary proceedings against solicitor directors. Legal services provision is


overseen by the Law Society Council (which has powers over the corporation, including investigative powers) and the Legal Services Commissioner.\textsuperscript{47}

The incorporation legislation is under consideration by the Standing Committee of Attorneys-General (SCAG) as a model for adoption nationally.

However, it appears that the MDP concept has not had the enthusiastic response that was anticipated from the ‘big end’ of town. As at August 2002, there were only around 26 reasonably small law firms that have established a MDP in NSW. Large firms are awaiting international developments.\textsuperscript{48} Part of the reluctance may be due to uncertainty about client uptake and demand for the one-stop-shop and the difficulties of conflict and different professional ethics that were examined above. Some executives believe that MDPs have potential for more success in the middle market, particularly in Adelaide and Brisbane where top-end work has been lost to interstate firms and the firms there are considering alternative business structures. However, the largest firms are more sceptical and would tend to merge only with very large global top tier firms.\textsuperscript{49}

\section*{5 QUEENSLAND}

The \textit{Queensland Law Society Act 1952} and the \textit{Legal Practitioners Act 1995} do not make any provision regarding the establishment or existence of MDPs. However, rule 78 of the \textit{Queensland Law Society Rules 1987} prohibits lawyers sharing receipts with anyone other than retired partners or their legal representatives unless the QLS Council has approved otherwise. The \textit{QLS Act} does not appear to envisage the issue of a practising certificate to any entity apart from an individual. The Bar Association’s Rules require that barristers practice as sole practitioners, effectively preventing them from forming partnerships or companies.

In December 2000, the then Queensland Attorney-General, Matt Foley MP, announced a number of reforms in the wake of the December 1998 \textit{Discussion Paper on Legal Profession Reform} and June 1999 \textit{Green Paper on Legal Profession Reform}. The Attorney-General stated that among the issues remaining

\textsuperscript{47} Hon J W Shaw, Attorney-General and Minister for Industrial Relations, Legal Profession Amendment (Incorporated Legal Practices) Bill 2000 (NSW), NSW Legislative Council, \textit{Hansard}, 23 June 2000, p 7624.

\textsuperscript{48} A Evans, ‘To MDP or not to MDP?’, \textit{Law Institute Journal}, August 2002, p45.

\textsuperscript{49} LexisNexis Legal Profiles 2002 – Industry Review at \url{http://www.legalprofiles.com.au}
under review was the establishment of MDPs, which would be considered further by SCAG as part of the discussions regarding national legal profession reforms.\textsuperscript{50}

Submissions to the \textit{Discussion Paper} on the issue of business structure indicated a consumer preference for maintenance of the status quo on the basis of the potential for conflicts of interest.\textsuperscript{51} The Supreme Court Judges’ submission said that any changes to business structure should not alter lawyers’ status as officers of the court, the requisite obligations of that status, and their amenability to the inherent disciplinary powers of the Court. In response to the \textit{Green Paper}, the Judges said –

\begin{quote}
\textit{The Judges agree that "much work needs to be done, preferably on a national level, to develop a proper regulatory framework” to identify and address the problems which might arise. It would not be desirable for Queensland to proceed along this path without full consultation with the other States, and preferably with their agreement.}\textsuperscript{52}
\end{quote}

On the other hand, practitioners expressed a preference for more flexible business structures, with some favouring incorporation, and did not believe that the nature of the business structure would affect ethical obligations.

The \textit{Green Paper} stated that the Government did not oppose either incorporation or MDPs, subject to the need for practitioners continuing to be subject to unlimited liability. It was suggested that ethical rules and licensing of lawyers in such structures would need to be approved by a proposed new Legal Practice Committee, and backed by the passage of legislation.\textsuperscript{53} Both the \textit{Green Paper} and the November 2001 Queensland Government’s NCP Review of the Regulation of the Legal Profession \textit{Issues Paper} note that a consistent national approach on the issue of incorporation of legal practices is desirable.\textsuperscript{54}

It has been argued by supporters of an incorporated or MDP structure for Queensland law firms that any delay by Queensland will not stop the inevitability of national law firms incorporating. If they cannot practise in Queensland, the result may be that legal work will move out of Queensland and the legal profession


\textsuperscript{52} Response Of The Judges Of The Supreme Court Of Queensland to the Queensland Government Green Paper On ‘Legal Profession Reform’: The Judges’ Fundamental Position, September 1999. At \url{http://www.courts.qld.gov.au}.


that remains may be seen as increasingly irrelevant.\textsuperscript{55} There would be a consequential loss of opportunity for growth and for attracting legal work from other jurisdictions to Queensland, a state with low overheads and cost of living compared with NSW and Victoria.

It appears that the incorporation and MDP issues form part of pending national legal practice reforms under consideration by SCAG. In 2002, SCAG agreed to the drafting of model provisions on legal practice issues, including business structure changes, for possible implementation by each jurisdiction during 2003.

\section{WESTERN AUSTRALIAN PROPOSALS}

On 23 October 2002, the WA Attorney-General introduced the Legal Practice Bill into the Legislative Assembly.\textsuperscript{56} The Bill introduces a number of reforms to modernise the framework and regulation of the legal profession. The measures enable legal firms to adopt modern business structures to allow for more flexible and less costly services for consumers. The aim is to better place firms to participate in a legal services market with an increasingly national focus as well as in the developing international legal service market.\textsuperscript{57}

Under the Bill, law firms may incorporate (and a corporation which provides legal services is deemed to be an incorporated legal practice (ILP)) and form MDPs. The safeguards that are provided include –

\begin{itemize}
  \item individual practitioners must comply with the Act, regardless of the business structure, thus maintaining the focus of legal profession regulation on the practitioner and the requirement for individual accountability;\textsuperscript{58}
  \item an ILP may provide other services but Regulations may prohibit engaging in specified services or type of business;
  \item the rules that normally apply to lawyers apply to partners and employees in MDPs and ILPs but non-legal services cannot be regulated by legal profession rules;
\end{itemize}


\textsuperscript{56} The Bill is yet to be debated in the Legislative Assembly. Parliament resumes on 25 February 2003.


\textsuperscript{58} Legal Practice Bill 2002 (WA), \textit{Explanatory Notes}, p 5.
in a MDP, only legal practitioners can provide actual legal services;

notification requirements if the corporation intends to provide a legal service as an ILP to ensure that the Legal Practice Board is fully aware of which firms are in this category;

the ILP must have a legal practitioner director who is responsible for managing the legal services functions and for ensuring compliance by the firm and its officers and employees with regulations and professional obligations that apply to legal practitioners. Therefore, the final accountability for the provision of legal services rests with the legal practitioner;\(^5^9\)

in a MDP, the legal practitioner partner is responsible for the management of legal services through appropriate management systems and in accordance with the usual professional obligations which must not be compromised by other partners or employees. The legal practitioner partners have vicarious liability obligations with respect to the delivery of legal services and suitability of non-legal practitioner partners;

lawyers in the ILP and MDP are obliged to comply with professional obligations and have the same professional privileges that apply to any legal practitioner, including the duty to avoid a conflict of interest;

each lawyer in the ILP or MDP retains their individual legal professional privilege;

an ILP, and the lawyers within it, must take out professional indemnity insurance;

the same provisions regarding legal fees and costs applying to all legal practitioners apply to MDPs and ILPs;

requirements relating to trust accounts, as they apply to lawyers, apply to the MDP and ILP in relation to money derived from provision of legal services;

clients are properly informed about the nature of the service being provided and told that the protection of the legislation applies only to legal services;

duty of care requirements apply to the provision of non-legal services;

the ILP is vicariously liable for how officers and employees manage clients’ financial interests;

\(^5^9\) Hon J A McGinty MLA, Attorney-General, Legal Practice Bill 2002 (WA), Second Reading Speech.
• disqualified lawyers are prohibited from being involved;

• audit and investigation of ILPs will be undertaken by the Legal Practice Board. There are provisions enabling banning of an ILP and disqualification of a person from managing an ILP.

7 INTERNATIONAL POSITION

There is yet to be an international move for uptake of the MDP concept. MDPs are quite common in Europe, with the Netherlands one of the first countries to permit them. The major providers are large firms such as KPMG which offers accounting and legal services. In England and the USA, MDPs are not legally sanctioned but exist in a ‘de facto’ form.

7.1 ENGLAND

Restrictions on the creation of MDPs exist in England under the present Solicitors’ Practice Rules. The Office of Fair Trading has concluded that those rules restrict competition and hinder innovation in service provision.60 However, solicitors may work in incorporated practices with limited or unlimited liability, providing legal services. The directors and shareholders of the incorporated practices must be solicitors who manage and control the practice. While it has so far rejected proposals to remove the ban on sharing fees with non-lawyers, the Law Society is, however, continuing to review possible changes to business structures. It believes that the Government must provide appropriate safeguards for consumer protection and access to justice.61

The UK Government appears in favour of the removal of restrictions, subject to appropriate consumer protections being put in place.62 In July 2002, the Lord Chancellor’s Department published a Consultation Paper about a number of issues, including MDPs, to ascertain the demand for, and effects of, possible change.63

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7.2 **UNITED STATES OF AMERICA**

MDPs are prohibited in all US jurisdictions apart from the District of Columbia. MDPs are opposed by the American Bar Association (ABA) and the US Securities and Exchange Commission.

In practice, however, there are many ‘de facto’ MDPs with accounting firms employing many lawyers (although the lawyers do not practise law in the strict sense but provide ‘consulting’ services) or different professions share premises and services. It appears to be common, in the US, for companies, such as an environmental consulting firm, to take on regulatory work, monitor government regulations, and take clients through permits etc (which a law firm might do) and only tell a client to visit a law firm if the client wishes to engage in litigation. Otherwise, the company can provide the necessary services with environmental engineers, designers, consultants on staff, as well as persons with law degrees. There are also legal firms with bankruptcy expertise but the lawyer can only act as a ‘consultant’. Some legal firms have formed subsidiaries or affiliates to provide non-legal services for clients (eg environmental consulting).

In the 1990s, leading accounting firms with many employed solicitors showed enthusiasm for MDPs, as did small law firms which considered that partnerships with accountants or insurance brokers would provide the efficiencies of a full service to small business clients. In response, the ABA formed a Commission on Multi-disciplinary Practices to examine whether they should be permitted. The Commission was inclined toward the establishment of MDPs (with certain safeguards to preserve independence of the legal profession). However, the ABA House of Delegates did not accept the recommendation and, in July 2000, the ABA maintained that lawyers should not be permitted to share fees with non-lawyers and that non-lawyers should not be allowed to control or own legal practices.

The Enron difficulties have strengthened some opposition to MDPs, with the comment made by some that the situation is a good example of why MDPs are not in the best interest of the client or the public because of conflicting loyalties. However, proponents of the concept see the Enron problem as a temporary setback for MDPs whose future will be dictated by client demand. Others forecast that the realities of corporate mergers, MDPs overseas, expanding international trade,

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customer preferences and convenience may eventually isolate the US legal community and that the trend towards MDPs will be inevitable.67

Some US states have their own MDP policies and have implemented or are considering, some form of MDP.

8 CONCLUSION

The enthusiasm for the uptake of MDP business structures in Australia has yet to emerge. As with other contemporary challenges to the way in which lawyers practise in the 21st century, the concept presents both difficulties and possible advantages. The Hon M Gleeson, Chief Justice of the High Court, has said, with respect to such new forms of practice:

The professional associations, if they are to preserve the characteristics of professionalism, will need to ensure that the standards of behaviour they seek to impose and enforce will include such matters as not encouraging fruitless or merely tactical litigation, however profitable it may be to the corporate employer, accepting an obligation to undertake a reasonable share of pro bono work, and insisting upon full observance of duties to the court, as well as to clients, in all aspects of the administration of justice. Of course, there are already lawyers whose observance of professional obligations of this kind, is, to say the least, imperfect, but that is a reason for emphasising the obligations, not for relaxing them.68


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