

Information kit

Incorporated Legal Practices (ILPs)

Contact

QLS Ethics Centre
ethics@qls.com.au
P 07 3842 5843

Version: 9

Date: June 2016

Queensland Law Society (the 'Society') has prepared this information kit to assist legal practitioners in understanding the laws regulating corporations engaging in legal practice in Queensland. The purpose of this document is to provide general guidance – it is not intended to be comprehensive or constitute legal, structuring, financial, tax or duty advice. The Society accepts no responsibility for the accuracy of any of the information or opinions contained in this information kit, or for any loss flowing from its use. You should obtain your own legal and financial advice about the contents of this document, including whether you should incorporate your practice.

© Queensland Law Society 2016.

Contents

| | | |
|------|---|----|
| 1. | Commentary on <i>Legal Profession Act 2007 (Qld) (LPA)</i> , Chapter 2, Part 2.7, Divisions 1 to 7 and 9 and <i>Legal Profession Regulation 2007 (Qld) (LPR)</i> , Part 2.7 | 4 |
| 1.1 | Introduction | 4 |
| 1.2 | Definitions (s 110 and schedule 2) | 4 |
| 1.3 | Eligible corporations (ss 111 and 113) | 4 |
| 1.4 | Prohibited services/businesses (s 112) | 4 |
| 1.5 | Notices (ss 114, 115, 116 and 119) | 4 |
| 1.6 | Legal practitioner directors (ss 117, 118 and 119) | 5 |
| 1.7 | Obligations and privileges of ALPs (s 120) | 6 |
| 1.8 | Professional indemnity insurance (s 121) | 7 |
| 1.9 | Conflicts of interest (s 122) | 7 |
| 1.10 | Disclosure obligations (s 123 and 124) | 7 |
| 1.11 | Application of legal profession rules (s 125) | 7 |
| 1.12 | Advertising (s 126) | 8 |
| 1.13 | Vicarious liability (s 127) | 8 |
| 1.14 | Sharing of receipts (s 128) | 8 |
| 1.15 | Disqualified persons (s 129) | 8 |
| 1.16 | ILP authority (schedule 2) | 9 |
| 1.17 | Audit (ss 130, 131 and chapter 6) | 9 |
| 1.18 | Banning of ILPs (s 132) | 9 |
| 1.19 | Disqualification from managing an ILP (s 133) | 10 |
| 1.20 | Disclosure of information to ASIC (s 134) | 10 |
| 1.21 | External administration proceedings under other legislation (ss 135 and 136) | 10 |
| 1.22 | Receivership under LPA and external administration under other legislation (ss 137 and 138) | 10 |
| 1.23 | Cooperation between courts (s 139) | 10 |
| 1.24 | Relationship of LPA to ILP's constitution (s 140) | 10 |
| 1.25 | Relationship of LPA to legislation establishing ILP (s 141) | 10 |
| 1.26 | Relationship of LPA to Corporations legislation etc (s 142) | 10 |
| 1.27 | Undue influence (s 143) | 11 |
| 1.28 | Practitioners' obligations not affected (s 160) | 11 |
| 1.29 | Approved forms (ss 114, 116 and 119) | 11 |
| 1.30 | Insurance implications of restructuring or purchasing a practice | 11 |
| 2. | Frequently asked questions | 13 |
| 3. | Letterhead requirements | 16 |
| 4. | Transitioning issues | 17 |
| 4.1 | Operational issues | 17 |
| 4.2 | Financial issues (internal) | 17 |
| 4.3 | Financial issues (payroll) | 17 |
| 4.4 | Financial issues (external accountants) | 18 |
| 4.5 | Legal team issues | 18 |
| 4.6 | Human resource issues | 18 |
| 4.7 | Client relations issues | 18 |
| 4.8 | Self assessment on ILP | 18 |

1. Commentary on *Legal Profession Act 2007 (Qld) (LPA)*, Chapter 2, Part 2.7, Divisions 1 to 7 and 9 and *Legal Profession Regulation 2007 (Qld) (LPR)*, Part 2.7

1.1 Introduction

The provisions of chapter 2, part 5 of the *Legal Profession Act 2004 (Qld)* never commenced. They have been amended and form part of chapter 2, part 2.7, divisions 1-7 and 9 of the *Legal Profession Act 2007 (Qld) (LPA)*, which commenced on 1 July 2007. As a result, corporations may now engage in legal practice in Queensland. This is one part of the process of creating a national legal market in Australia.

1.2 Definitions (s110 and schedule 2)

Certain terms are defined for the purposes of part 2.7 of the LPA (s 110). The term 'legal practitioner director' (LPD) is defined as a director of an incorporated legal practice (ILP) who is an Australian legal practitioner (ALP) holding a principal practising certificate).

Other defined terms are contained in schedule 2 to the LPA.

1.3 Eligible corporations (ss111 and 113)

A corporation is an ILP if it engages in legal practice in Queensland (regardless of whether it also provides non-legal services) (s 111(1)).

However, a corporation is not an ILP if the only legal services it provides are:

- 1.3.1 in-house; and/or
- 1.3.2 services that are not legally required to be provided by an ALP, and are provided by an officer/employee who is not an ALP (s 111(2)).

A regulation may also prescribe corporations that are not ILPs (s 111(3)). The LPR provides that community legal services and certain non-profit legal services are not ILPs (s 10).

Further, a corporation that the Court disqualifies from providing legal services in Queensland ceases to be an ILP (s 132(7)).

The LPA does not authorise a corporation to provide legal services, if the corporation is prohibited from doing so under an Act or law of the jurisdiction in which it is incorporated or in which its affairs are regulated (s 113(2)).

An ILP is not required to hold a practising certificate (s 113(3)).

1.4 Prohibited services/businesses (s112)

An ILP may provide any lawful service or conduct any lawful business (s 112(1)), except that it (and any related bodies corporate) must not conduct a managed investment scheme (s 112(2)).

A regulation may also prohibit certain services or businesses (s 112(3)), although none has yet been made under this subsection.

Contravention of s 112 or a regulation made under it is a ground for banning an ILP under s 132 (see paragraph 1.19 below).

All practitioners should note that s 24 of the LPR prohibits a law practice from providing legal services to a person relating to a transaction if the practice has provided services, as a PAMDA licensee or interstate real estate agent, to the person for the transaction. (Note: the term 'PAMDA licensee' is defined in s 24(7) of the LPA, and the term 'interstate real estate agent' is defined in s 24(3) of the LPR.)

1.5 Notices (ss 114, 115, 116 and 119)

Before a corporation starts engaging in legal practice in Queensland, it must give notice to the Society of its intention to do so (in QLS Form 23 (LPA)) (s 114(1)). There is no prescribed time frame for giving the notice (except that it must be given before engaging in legal practice in Queensland).

Accordingly, interstate-based ILPs must give this notice to the Society before engaging in legal practice in Queensland. In contrast, interstate-registered ALPs are entitled to practise in Queensland without notifying the Society.

It is an offence to engage in legal practice without giving this notice (s 114(2)). A corporation is not entitled to any payment for legal services provided before the notice was given (s 114(5)). It is also an offence for a corporation (s 115(1)), or a director, officer, employee or agent of a corporation (s 115(2)), to represent or advertise that the corporation is an ILP, unless this notice has been given (except if it has a reasonable excuse).

If a corporation engages in legal practice in Queensland without giving notice, it remains in default until it gives notice to the Society (in QLS Form 24 (LPA)) of its failure to comply with s 114(1) and the fact that it has started engaging in legal practice (s 114(3)).

Within 14 days after a corporation stops engaging in legal practice in Queensland as an ILP, it must give notice to the Society (in [QLS Form 25 \(LPA\)](#)) (s 116(1), LPR s 12). Failure to give this notice is an offence.

If an ILP stops having an LPD, it must notify the Society (in [QLS Form 26 \(LPA\)](#)) as soon as possible (s 119(2)). Failure to do so is an offence.

Practitioners would be aware that further notice requirements are contained in s 18A of the Queensland Law Society Administration Rule 2005 (Qld) (Admin Rule). Firstly, a holder of a practising certificate who intends to dissolve an existing partnership must notify the Society before this occurs. Secondly, a holder of a Queensland practising certificate must notify the Society of any changes to the information shown on the practising certificate application/renewal form, or any amended details subsequently notified, within seven days of the changes occurring. There is no prescribed form for these notices.

The approved forms mentioned above are available on the Society's website (qls.com.au/ilp).

1.6 Legal practitioner directors (ss 117, 118 and 119)

As outlined in paragraph 1.2 above, an LPD is defined as a director of an ILP who is an ALP and holds a principal practising certificate (s 110).

An ILP must have at least one LPD (s 117(1)). If an ILP does not have an LPD for more than seven days, it will be in default from the end of that period until either:

- it has an LPD; or
- the Society appoints someone under s 119(5) (or someone is appointed under a corresponding law) to perform/discharge the functions/duties conferred/imposed on an LPD under part 2.7 of the LPA (s 119(4)).

An ILP must not provide legal services in Queensland during this period of default (s 119(3)). The Society may appoint a person under s 119(5) if it considers it appropriate.

For the purposes of the LPA, each LPD is, responsible for the management of the legal services provided by the ILP in Queensland (s 117(2)).

Each LPD must ensure that appropriate management systems are implemented and kept to enable the ILP to provide legal services:

- under the professional obligations of ALPs and other obligations under the LPA; and
- so that the obligations of the officers/employees who are ALPs are not affected by those who are not ALPs (s 117(3)).

The 'professional obligations' of an ALP are defined as including duties to the Supreme Court, obligations in connection with conflicts of interest, duties to clients (including disclosure), and ethical rules the ALP must observe (s 110).

The term 'appropriate management systems' is not defined in the LPA. However, the view of the Society and the Legal Services Commission (LSC) is that the following 10 areas of sound legal practice (known as the 'ten commandments') need to be addressed to ensure that an ILP has appropriate management systems in place:

- 1.6.1 negligence (providing for competent work practices);
- 1.6.2 communication (providing for effective, timely and courteous communication);
- 1.6.3 delay (providing for timely review, delivery and follow up of legal services);
- 1.6.4 liens/file transfers (providing for timely resolution of document/file transfers);
- 1.6.5 cost disclosure/billing practices/termination of retainer (providing for shared understanding and appropriate documentation on commencement and termination of retainer, along with appropriate billing practices during the retainer);
- 1.6.6 conflict of interests (providing for timely identification and resolution of conflicts of interests, including when acting for both parties or acting against previous clients, as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc);
- 1.6.7 records management (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests);
- 1.6.8 undertakings/orders etc (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the LSC and courts);
- 1.6.9 supervision of practice and staff (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services); and
- 1.6.10 trust account regulations (avoiding failure to account and breach of chapter 3, part 3.3 of the LPA).

If you would like more information about appropriate management systems, please contact the QLS Ethics Centre's Practice Support Solicitor on 07 3842 5843 or ethics@qls.com.au.

Advice and assistance is available before, during and after the self-assessment stage on how best to design and implement the kinds of management systems and arrangements that best suit a particular practice.

If it ought reasonably to be apparent to an LPD that the ILP's provision of legal services will result in breaches of the professional obligations of an ALP or other obligations under the LPA, then he/she must take all reasonable action available to ensure that the breaches do not happen (s 117(4)(a)). If a breach has occurred, then the LPD must ensure appropriate remedial action is taken (s 117(4)(b)).

An LPD must also ensure that all reasonable action available to him/her is taken to deal with any unsatisfactory professional conduct or professional misconduct of an ALP employed by the ILP (s 118(3)).

Each of the following is capable of constituting unsatisfactory professional conduct or professional misconduct by an LPD:

- unsatisfactory professional conduct or professional misconduct of an employee who is an ALP (s 118(1)(a)), unless the LPD establishes that he/she took all reasonable steps to ensure ALP employees did not engage in the conduct (s 118(2)(a));
- conduct of a non-ALP director that adversely affects the provision of legal services by the ILP (s 118(1)(b)), unless the LPD establishes that he/she took all reasonable steps to ensure non-ALP directors did not engage in the conduct (s 118(2)(b));
- the unsuitability of a non-LPD director to be a director of a corporation that provides legal services (s 118(1)(c)), unless the LPD establishes that he/she took all reasonable steps to ensure unsuitable non-ALP directors were not appointed or holding office (s 118(2)(c));
- failure to ensure the ILP complies with s129(1) regarding disqualified persons (s 129(2));
- failure to ensure the ILP or any officer/employee complies with any requirement made by an ILP investigator (or someone authorised by an ILP investigator) in the exercise of his/her powers under chapter 6, part 6.7 (Provisions about investigations relating to ILPs) (s 574(c)(i)); and
- failure to ensure the ILP or any officer/employee complies with any condition imposed by an ILP investigator in the exercise of his/her powers under chapter 6, part 6.7 (s 574(c)(ii)).

In addition, an LPD's failure to ensure that the ILP complies with s 121 regarding professional indemnity insurance is capable of constituting professional misconduct (s 121(3)).

A regulation may provide that a breach of a provision of a regulation is capable of constituting unsatisfactory professional conduct or professional misconduct by an LPD (s 161(3)(a)) (although none has been made at this time).

Further, if a corporation commits an offence against the LPA, each of its executive officers (meaning any person who is concerned, or takes part, in the management of the corporation, including each LPD) commits the offence of failing to ensure that the corporation complies with the provision (s 702). The maximum penalty is the penalty for the contravention of the provision by a person or, if the penalty is expressed to be for this section, the expressed penalty (s 702(2)). Such offences by a corporation include:

- failure by an ILP to give the appropriate notices under the LPA (ss 114, 116, 119);
- representing/advertising (without a reasonable excuse) that it is an ILP when the required notice has not been given (s 115(1));
- an ILP providing legal services despite not having an LPD for more than seven days (s 119) or not having professional indemnity insurance (PII) (s 121(1));
- an ILP breaching the Queensland Law Society Indemnity Rule 2005 (Qld) (Indemnity Rule) (s 121(2));
- certain dealings by an ILP with a disqualified person (s 129(1)); and
- providing legal services in contravention of a disqualification (s 132(6)).

See also:

- paragraph 1.6 above regarding the offence of representing or advertising that a corporation is an ILP when the required notice has not been given (s 115(2));
- paragraph 1.11 below regarding disclosure obligations; and
- paragraph 1.13 below regarding advertising.

1.7 Obligations and privileges of ALPs (s120)

An ALP who provides legal services for an ILP in the capacity of officer/employee is not excused from complying with the professional and legal obligations of ALPs, and does not lose the professional privileges of an ALP (s 120(1)).

As regards the term 'professional obligations', see paragraph 1.7 above. The term 'professional privileges' is not defined in the LPA.

These obligations and privileges apply as if:

- for an ILP with two or more LPDs – the practice were a partnership of the LPDs and the employees of the practice were employees of the LPDs; and
- for an ILP with only one LPD – the practice were a sole practitioner and the employees of the practice were employees of the LPD (s 120(2)).

The law relating to ‘client legal privilege, or other legal professional privilege’ is not affected by the fact that an ALP is acting in the capacity of officer/employee of an ILP (s 120(3)).

The directors do not breach their directors’ duties merely because the ALPs employed by the ILP provide legal services pro bono (s 120(4)).

An ALP who provides legal services on behalf of a corporation in the capacity of officer/employee may commit unsatisfactory professional conduct or professional misconduct, if he/she ought reasonably to have known that the corporation is disqualified (s 132(8)).

See also:

- paragraph 1.6 above regarding the offence of representing or advertising that a corporation is an ILP when the required notice has not been given (s 115(2)); and
- paragraph 1.11 below regarding an ALP’s disclosure obligations.

1.8 Professional indemnity insurance (s121)

ILPs are required to have PII. It is an offence for an ILP to engage in legal practice without PII that complies with a regulation (s 121(1)). There is currently no regulation relating specifically to PII for ILPs, but s 81 of the LPR contains the PII requirements for law practices generally. A failure to comply with the Indemnity Rule is also an offence (s 121(2)). An LPD’s failure to ensure such compliance by the ILP can constitute professional misconduct (s 121(3)).

1.9 Conflicts of interest (s122)

This section applies for the application of any law or the legal profession rules relating to conflicts of interest to the conduct of an ALP who is an LPD, officer or employee of an ILP (s 122(1)). The interests of the ILP or any related body corporate are also taken to be those of the ALP concerned, in addition to any other interests of the practitioner (s 122(1)). LPDs need to be vigilant in implementing and keeping appropriate management systems (see paragraph 1.7 above) to identify and deal with such imputed conflicts.

Legal profession rules may be made for or in relation to additional duties and obligations in connection with conflicts of interest arising out the conduct of an ILP (s 122(2)). However, no such rule has been made at this time.

1.10 Disclosure obligations (s 123 and 124)

If an ILP:

- provides both legal and non-legal services in Queensland; and
- is engaged to provide services that the client might reasonably assume to be legal services (s 123(1)),

then each LPD, and any ALP employee who provides the services, must ensure that the client is given a written disclosure notice (s 123(2)):

- 1.10.1 setting out the services to be provided;
- 1.10.2 stating whether all the legal services will be provided by an ALP (and if not, identifying which will not be provided by an ALP, and stating the status/qualifications of the person who will provide the legal services); and
- 1.10.3 stating that the LPA applies to the provision of legal services, but not non-legal services (s 123(3)).

There is no prescribed form for this notice but it must comply with s 123 of the LPA and a regulation (although none has been made at this time) (s 123(2)).

A failure to comply with this section is an offence (s 123(2)).

If such disclosure is not made, then the standard of care owed by the ILP in relation to the service is the standard that would apply if it had been provided by an ALP (s 124(2)).

1.11 Application of legal profession rules (s125)

The Australian Solicitors Conduct Rules 2012 (ASCR) applies to an ALP who is an officer/employee of an ILP in the same way it applies to any other ALP (unless the rule provides otherwise).

The ASCR commenced on 1 June 2012 (replacing both the Legal Profession (Solicitors) Rule 2007 (Qld) and the Solicitors Handbook).

1.12 Advertising (s126)

Restrictions on advertising by ALPs also apply to advertising by ILPs about the provision of legal services (s 126(1)), unless ILPs are expressly excluded (s 126(4)).

For the purposes of disciplinary proceedings, an advertisement contravening a restriction is taken to have been authorised by each LPD (s 126(3)).

Such restrictions include the following:

- 1.12.1 section 66 of the *Personal Injuries Proceedings Act 2002* (Qld), which restricts advertising of personal injury services (for more information, see the guidelines on the LSC's website at lsc.qld.gov.au/publications/regulatory-guides, which were published in the July 2006 edition of *Proctor*).
- 1.12.2 rule 36 of the ASCR which provides as follows:
 - 36.1 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:
 - 36.1.1 false;
 - 36.1.2 misleading or deceptive or likely to mislead or deceive;
 - 36.1.3 offensive; or
 - 36.1.4 prohibited by law.
 - 36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words "accredited specialist" or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional body

The Accredited Specialist logo:



1.13 Vicarious liability (s127)

If an ILP would not normally be vicariously liable for acts/omissions of its officers/employees, but would be liable if it were carrying on business in partnership, then it is liable under s 127 in respect of civil proceedings relating to:

- 1.13.1 a failure to account for, pay or deliver money or other property received by, or entrusted to, the ILP or an officer/employee in the course of the provision of legal services (being money or other property under the direct or indirect control of the ILP); and
- 1.13.2 dishonest acts/omissions by an ALP employed by the ILP in connection with the provision of legal services.

1.14 Sharing of receipts (s128)

Nothing in the LPA prevents an ALP from sharing with an ILP receipts, revenue or other income arising from the provision of legal services (s 128(1)) (except that they must not be shared with a disqualified person (s 128(2)) – see paragraph 1.16 below).

1.15 Disqualified persons (s129)

'Disqualified person' is defined in schedule 2 to the LPA as, inter alia, a person whose name has been removed from and not restored to an Australian roll; whose practising certificate is cancelled/suspended; who has been refused a renewal of a practising certificate and has not since been granted one; who is the subject of an order prohibiting a law practice from employing him/her; and/or who has been disqualified from managing a legal practice under s 133.

An ILP commits an offence if a disqualified person:

- 1.15.1 is an officer/employee of the ILP or a related body corporate (regardless of whether the person provides legal services);
- 1.15.2 is a partner of the ILP in a business that includes the provision of legal services;
- 1.15.3 shares the receipts, revenue or other income arising from the provision of legal services by the ILP;
or
- 1.15.4 is engaged or paid for the provision of legal services by the ILP (s 129(1)).

Failure by an LPD to ensure the ILP complies with the above is capable of constituting unsatisfactory professional conduct or professional misconduct (s 129(2)).

1.16 ILP authority (schedule 2)

An 'ILP authority' is defined as either the Legal Services Commissioner (Commissioner) or the Society, or both acting jointly under an arrangement between them.

1.17 Audit (ss 130, 131 and chapter 6)

An ILP authority may conduct an audit of an ILP about:

- 1.17.1 the compliance of the ILP, its officers and employees with the requirements of chapter 2, part 2.7 of the LPA, the LPR, the Conduct Rule or the Admin Rule (so far as these regulations and rules apply to ILPs); and
- 1.17.2 the management of the ILP's provision of legal services (including the supervision of officers and employees providing the services) (s 130(1)).

An audit may be conducted regardless of whether a complaint has been made (s 130(2)). The audit report must be given to the ILP and may be given to another ILP authority or a corresponding authority (s 130(3)). An audit report may be taken into account for a discipline application or the grant, renewal, amendment, suspension or cancellation of a practising certificate (s 130(3)).

Chapter 6 of the LPA (Investigations) applies to an audit under s 130 (s 131).

The Commissioner and the Society have agreed that the Commissioner will take the lead role in the audit of ILPs, while the Society will have an educative and member services focus.

The Commissioner until recently had required all newly established ILP's to undertake a self-assessment audit. The Commissioner has now adopted a different approach after reviewing this process. Therefore newly created ILP's will no longer be required once notice of their establishment is given to the QLS/LSC to undertake an initial self-assessment audit unless specifically requested to do so. However all newly established ILP's will receive informative correspondence from the LSC advising the LPD of their responsibility to ensure their practices meet the compliance standards of the legislation. That correspondence will also set out the process that the LSC will adopt in any future audits and the obligations of ILP Directors in general.

To assist LPD'S the LSC has developed a self-assessment form for Queensland which is available online from the Legal Services Commission website at http://www.lsc.qld.gov.au/__data/assets/pdf_file/0005/97781/ILP-Self-Assessment-Audit-Form-Version-4.pdf.

In relation to the responsibility to ensure an ILP has appropriate management systems in place (see paragraph 1.6 above) all ILP's should become familiar with the ten objectives in the self-assessment form. The form outlines the key concepts for LPDs to consider (based on the ten commandments) and provides suggested approaches to ensure the ILP meets the objectives. The suggestions are not exhaustive or prescriptive, as each ILP will differ in terms of its size and the nature of legal work undertaken. Each ILP should determine the most effective systems for its practice.

The Commissioner and the Society encourage ILPs to engage positively in the self-assessment process should you be requested to undertake that process and to candidly identify areas of non-compliance. If the form contains any 'non-compliant' or 'partially compliant' responses, the LSC or possibly the Society (by arrangement between them) will work collaboratively with the ILP to assist in achieving compliance. If the ILP fails to respond to the self-assessment process, then the LSC will likely conduct an external audit of the ILP's management systems. This may also occur if the LSC considers it necessary, such as when an ILP is the subject of a number of complaints, or if a matter of concern is raised by a Society trust account auditor. As with trust accounts, the LSC may also undertake random ILP audits.

Information about ILP audits can be found on the LSC's website at: lsc.qld.gov.au/compliance/incorporated-legal-practices.

1.18 Banning of ILPs (s132)

On the application of an ILP authority, the Supreme Court may disqualify a corporation from providing legal services in Queensland (s 132(1)) if:

- 1.18.1 an LPD, or an ALP who is an officer/employee, is found guilty of professional misconduct;
- 1.18.2 the ILP has failed to implement satisfactory management and supervision of its provision of legal services;
- 1.18.3 the ILP or a related body corporate has contravened s 112 (by conducting a managed investment scheme or an unlawful business, or by providing an unlawful service) or a regulation made under that section (see paragraph 1.5 above);
- 1.18.4 the ILP has contravened s 129 concerning disqualified persons (see paragraph 1.16 above); or
- 1.18.5 an officer of the ILP acting in the management of the practice is the subject of an order under s 133 (disqualification from managing an ILP – see paragraph 1.20 below), s 158 (prohibition on partnership with particular non-ALP partner – see paragraph 1.16 of the information kit on multi-disciplinary partnerships), or a corresponding law (s 132(3)).

1.19 Disqualification from managing an ILP (s 133)

On the application of an ILP authority, the Supreme Court may disqualify a person from managing an ILP (s 133(1)). A disqualification order has effect only for the purposes of the LPA, and does not affect the application/operation of the *Corporations Act 2001* (Cth) (s 133(3)).

A regulation may provide for the publication and notification of orders made under this section (s 133(4)). Section 13 of the LPR has been made for this purpose.

A person who is disqualified from managing a corporation under a corresponding law is taken to be disqualified from managing a corporation under this section (s 133(5)).

1.20 Disclosure of information to ASIC (s134)

If an ILP authority, in connection with performing functions or exercising powers under the LPA, acquires information about a corporation that is/was an ILP, it may disclose to ASIC information about the corporation that is relevant to ASIC's functions. This section applies despite any law relating to secrecy/confidentiality, including any provision of the LPA.

1.21 External administration proceedings under other legislation (ss 135 and 136)

An ILP authority is entitled to intervene in external administration proceedings under legislation other than the LPA relating to a corporation that is/was an ILP, unless the court decides that the proceeding does not concern or affect the provision of legal services by the ILP (s 135(2), s 136(2)). The court may have regard to the interests of the clients of the ILP (s 135(3), s 136(3)). These provisions prevail over the *Corporations Act 2001*, to the extent of any inconsistency (s 135(5)).

However, the court must not otherwise make any decision that is contrary to a specific provision of any legislation applicable to the ILP (s 135(4), s 136(4)).

1.22 Receivership under LPA and external administration under other legislation (ss137 and 138)

If an ILP is the subject of both the appointment of a receiver by the Society (under chapter 5, part 5.5 of the LPA) and an external administrator (under other legislation), then:

- 1.22.1 the receiver must notify the administrator of his/her appointment (s 137(2), s 138(2));
- 1.22.2 the receiver and/or administrator may apply to the Supreme Court to resolve issues relating to the dual appointments and their respective powers (s 137(3), s 138(3)) (unless an external administration proceeding under the *Corporations Act* has been started – s 137(3));
- 1.22.3 the Supreme Court may make any orders it considers appropriate, and no liability attaches to the receiver or administrator for any act/omission done in good faith for the purposes of carrying out or acting under the orders (s 137(4), s 138(4)); and
- 1.22.4 each ILP authority is entitled to intervene in the proceeding, unless the court decides that it does not concern or affect the ILP's provision of legal services (s 137(5), s 138(5)).

Paragraphs 1.22.2 and 1.22.3 prevail over the *Corporations Act 2001*, to the extent of any inconsistency (s 137(6)).

1.23 Cooperation between courts (s 139)

Queensland courts may make arrangements for communicating and cooperating with other courts/tribunals in connection with the exercise of powers under part 2.7.

1.24 Relationship of LPA to ILP's constitution (s 140)

The provisions of the LPA applying to an ILP prevail over its constitution or other constituent documents, to the extent of any inconsistency.

1.25 Relationship of LPA to legislation establishing ILP (s 141)

As regards an ILP that is not a company under the *Corporations Act 2001*, the provisions of the LPA applying to an ILP prevail over the legislation under which the corporation is established/regulated that are prescribed under a regulation (although none have been made at this time).

1.26 Relationship of LPA to Corporations legislation etc (s 142)

A regulation may declare a provision of the LPA relating to an ILP to be a Corporations legislation displacement provision for the purposes of s 5G of the *Corporations Act 2001* (s 142(1)). A regulation may also declare a matter relating to an ILP that is prohibited, required, authorised or permitted under the LPA to be an excluded matter for the purposes of s 5F of the *Corporations Act 2001* (s 142(2)). No such regulations have been made at this time.

1.27 Undue influence (s 143)

It is an offence to cause or induce (or attempt to cause or induce) an LPD, or an ALP who provides legal services for an ILP, to contravene the LPA or the practitioner's professional obligations as an ALP. As regards the term 'professional obligations', see paragraph 1.7 above.

It appears that this section is aimed at ensuring directors who are not ALPs do not attempt to interfere in the discharge of an ALP's professional obligations.

1.28 Practitioners' obligations not affected (s 160)

Except as provided by part 2.7, none of its provisions affect any statutory obligation imposed on an LPD, or an ALP employed by an ILP, in his/her capacity as an ALP.

1.29 Approved forms (ss114, 116 and 119)

The [approved forms for ILPs](#) under chapter 2, part 2.7 of the LPA are as follows:

- [QLS Form 23 \(LPA\)](#) – Notice of a Corporation's Intention to Engage in Legal Practice in Queensland;
- [QLS Form 24 \(LPA\)](#) – Notice of a Corporation's Failure to Comply with Subsection 114(1);
- [QLS Form 25 \(LPA\)](#) – Notice of Cessation of Legal Practice by a Former Incorporated Legal Practice; and
- [QLS Form 26 \(LPA\)](#) – Notice that an Incorporated Legal Practice No Longer has a Legal Practitioner Director.

These forms are available on the Society's website (qls.com.au/ilp).

1.30 Insurance implications of restructuring or purchasing a practice

The levy model caters for changes which occur to practices over time through the concepts of the prior law practice and the successor law practice. The primary purpose of these concepts, which are similar to those used in many solicitors' indemnity insurance schemes (including other states of Australia and in several common law jurisdictions), is to ensure continuity of coverage for practices (including staff) for past legal services performed regardless of developments at the practice and also to encourage appropriate risk management as part of succession planning. At the same time, the concept seeks to maintain equity in the Scheme, by ensuring a practice (and its relevant successor) retains responsibility for the levy consequences of a claim against it.

Criteria

The prior law practice/successor law practice concepts can have application in many scenarios including the purchase of a practice, merger, amalgamation, takeover, transfer, split of partnership, entity transition (eg firm to ILP), principals (or former principals) leaving or joining, dissolution of a practice or the recommencement of a former practice.

In these circumstances, there are six related criteria considered, satisfaction of any one of which can trigger the definition and give rise to significant financial consequences (outlined later in this Information kit) for the successor practice. In summary, the requisite relationship will exist if a law practice:

- holds itself out as being the successor of another law practice, whether this is express or implied;
- takes on all or a majority of the principals of another law practice;
- acquires from another law practice the majority of goodwill or assets or client files, or assumes the majority of liabilities;
- adopts the same or a similar name to the other law practice;
- carries on the practice of the other law practice from its premises; or
- employs the majority of the legal staff of the other law practice.

If more than one practice satisfies at least one of the criteria (eg after a partnership split) then only one will be attributed as the successor practice. From 1 July 2011, this has been the practice deemed to be most closely related to the prior law practice (previously it was by consideration of the criteria in priority order).

From 1 July 2012, two circumstances have been specifically excluded from the operation of the principle:

- employment of a former sole principal when no other indicia of their practice is also taken on (ie files, safe custody, goodwill, the practice name); or
- when a practice receives, without consideration, documents formerly held in the safe custody of another practice.

Financial Consequences

There are significant financial consequences which should be borne in mind when considering purchases, mergers, acquisitions, dissolutions or any other change in circumstance which could trigger the criteria outlined above. The consequences are summarised below:

- Future year levies will be based upon the combined GFIs of the constituent prior law practice/s.
- Claims against any prior law practice falling within the relevant indemnity period will be incorporated into the claims history of the successor, which may affect the claims loading levy (if any) of the successor.
- The prior law practice would be considered an Insured under the successor's Certificate of Insurance. For any claims first made against the prior law practice after the joinder, and subject to the general terms and conditions of the policy, the cover of the successor would respond, with the successor responsible for any payment (eg standard/deterrent excesses, claims loadings etc).
- In general, there are no adjustments or refunds of levies for changes during a policy year, although if sufficient notice is given of a merger/amalgamation to take effect from 1 July, Lexon may be able to calculate the levy for the combined entity.

Practical steps prior to purchasing, merging, dissolving etc

Law practices are strongly encouraged to:

- Be familiar with the policy wording and Indemnity Rule (including Rule 10(6)) and the implications they may have.
- Contact Lexon or your insurer to discuss your particular circumstances.
- Take independent legal advice where required.
- Consider contractual terms for adjustments/indemnities to provide some recourse in the future.
- Obtain a written authority and direction for Lexon or your insurer to disclose the claims history and insurance history of any practice which you may be acquiring etc. Note – this will only reveal existing matters.

2. Frequently asked questions

Q What are the advantages of engaging in legal practice as an ILP?

A The advantages include:

- directors are not liable for the actions of other officers/employees, unless a personal guarantee has been given or the veil of incorporation is lifted (although LPDs have responsibilities relating to the suitability of other directors and the conduct of ALP employees);
- shareholders' liability is limited to the value of their shareholding (unless an indemnity has been given to directors);
- creditors can only access the ILP's assets, not the directors' personal assets (unless a personal guarantee has been given or the veil of incorporation is lifted);
- although there is nothing to prevent principals in a traditional law firm structure from sharing receipts (subject to the provisions of s 40 of the ASCR, an incorporated structure allows for more capital-raising opportunities and allows non-ALP staff, family members, clients and other investors to own a share of the practice; allows more flexibility in motivating and retaining staff; allows for easier funding of lawyer retirements; and alleviates the problem of older practitioners managing the business with short-term financial objectives;
- equity holders can contribute capital at different times;
- different classes of shares can be issued, as well as share options;
- shares are easily bought/sold/transferred;
- an ILP can reduce share capital by way of a share buy-back;
- shareholders need not hold shares personally, allowing for income and asset protection, as well as potential tax savings;
- company tax rate (30 percent or 28.5 percent for small business companies);
- employees benefit from favourable tax, superannuation and redundancy pay arrangements;
- ability to retain rather than distribute profits (which will be taxed at the company rate while retained);
- broader knowledge/skill base from non-lawyers with complementary skills;
- improved management practices, as management can be left to those with management skills (whether directors, shareholders or employees), while lawyers focus on providing legal services;
- those contributing to the success of the business (both ALPs and non-ALPs) may be more appropriately remunerated according to their performance and may be rewarded by being offered a directorship;
- superior management options where the CEO is answerable to the board of directors, and is not impeded by individual partners;
- a company continues in existence regardless of the personal circumstances of its members or directors (whereas upon the death/retirement/withdrawal/bankruptcy of a partner, the partnership must be reconstituted, details of the ownership of the partnership's assets must be changed etc);
- non-performing LPDs may simply be voted off the board (whereas litigation may be required to remove a non-performing partner);
- opportunity to change the culture of the law practice;
- incorporation can be used as a tool to facilitate a merger with another law practice (and a de-merger is easier if a shareholders' agreement is in place); and
- debt financing is easier, as the financier is dealing with only one entity rather than all partners.

Q What are the disadvantages of engaging in legal practice as an ILP?

A The disadvantages include:

- transfer duty payable on the transfer of the business to the company;
- additional duties for LPDs and other company officers under the *Corporations Act 2001* (see ss 179-197 and 588G), and the burden on LPDs under the LPA (including responsibility for the conduct of ALP employees and the suitability of other directors);
- potential conflict between the duties owed to the court, client and profession on one hand and to the company and its shareholders on the other hand, which may lead to extra pressure on LPDs (particularly in publicly listed ILPs);
- non-ALP directors, and ALP directors who were previously salaried partners, will have access to the practice's financial records;
- possible obligation to comply (some small proprietary corporations are exempt) with the requirements of chapter 2M of the *Corporations Act 2001* (Financial reports and audit). This may involve regularly submitting to ASIC information regarding the ILP's financial position and the remuneration of LPDs, resulting in clients and competitors having access to this information when the audited financial statements become public records;

- obligation to comply with other provisions of the *Corporations Act* (eg chapter 2G Meetings);
- if the ILP is floated on an Australian stock exchange, then it must also comply with the stock exchange financial reporting rules;
- costs of incorporation;
- capital gains tax issues;
- payroll tax, PAYG tax, fringe benefits tax, workers' compensation and superannuation guarantee and employment law issues for former partners who become salaried employees of the company;
- small business concessions may not apply;
- admission and exit of equity holders, and variations in equity interests may be less flexible in a company structure than in a partnership, due to tax implications;
- necessity to comply with and manage company franking rules;
- requirement to perform self-assessment, and possible audit by the Commissioner;
- loss of status and autonomy for former partners who do not become directors;
- loss of collegiality;
- exposure to the possibility of a takeover;
- ILPs as corporate entities are not protected by the Queensland Law Society Limitation of Liability Scheme, however, individual solicitors within ILPs are;
- obligation to comply with the *Competition and Consumer Act 2010* (which is less applicable to a partnership);
- incorporation may change the culture of the law practice;
- shareholders cannot make use of the ILP's tax and capital losses; and
- necessity to renegotiate the practice's banking facilities.

Q Does the LPA impose any restrictions on who may be a director of an LPD?

A The only restriction is that a disqualified person cannot be an LPD (see paragraph 1.16 above).

Q Does the LPA impose any restrictions on shareholders or shareholdings?

A Arguably, disqualified persons cannot be shareholders of ILPs, as they are prohibited from sharing the receipts, revenue and other income arising from the provision of legal services by the ILP under s 129(1)(c) (see paragraph 1.16 above).

The LPA makes no other mention of who may own shares, what types of shares may be issued, or how many shares may be held by a shareholder.

Q Are all directors of ILPs required to hold principal level practising certificates?

A The Society's preliminary view is that the LPA does not require a director of an ILP to hold a principal level practising certificate, but anyone who does will be deemed to be an LPD under s 110. The only requirement appears to be that at least one director hold a principal level practising certificate (see paragraph 1.7 above re LPDs).

Q Are there any restrictions on how I may structure my law practice?

A Under the LPA, it is not a function of the Society to approve the structure of a law practice. The Society's role is limited to receiving notifications, and it is the responsibility of each law practice to ensure that its structure complies with the law.

The Society's view is that your law practice must be structured so it falls within the definition of 'law practice' in schedule 2 of the LPA, which defines 'law practice' and 'law firm' as follows:

law practice –

- (a) for part 3.3, division 6 (Prescribed accounts and Legal Practitioner Interest on Trust Accounts Fund) – see s 284; or
- (b) otherwise means –
 - (i) an Australian legal practitioner who is a sole practitioner; or
 - (ii) a law firm [see below]; or
 - (iii) an ILP; or
 - (iv) an MDP.

law firm means a partnership consisting only of –

- (a) Australian legal practitioners; or
- (b) 1 or more Australian legal practitioners and 1 or more Australian-registered foreign lawyers.

The Society's view is that engaging in legal practice in a structure falling outside this definition of 'law practice' is not permissible, and may involve a breach of s 24 of the LPA (prohibition on engaging in legal practice when not entitled).

One particular example of a query we have received is whether solicitors may practice as a partnership of discretionary trusts with corporate trustees. The Society's view is that, having regard to the above definitions of 'law practice' and 'law firm', the LPA appears to preclude this (because apart from MDPs, the only partnerships included are those between individual Australian legal practitioners and/or Australian-registered foreign lawyers).

Provided a structure falls within the above definition of 'law practice', the Society is unaware of any other specific restrictions to structures featuring trusts and trustees.

Q Where can I obtain further information about ILPs?

A Further information can be obtained from:

QLS Ethics Centre (the Centre) – The Centre provides guidance on ethics and practice support issues. Resources are located on the Ethics Centre website qsl.com.au/ethics or you can contact the Centre on 07 3842 5843 or by email ethics@qsl.com.au.

Legal Services Commission (LSC) – can be contacted on 07 3406 7737 (Brisbane) or 1300 655 754 (outside Brisbane) or by email lsc@lsc.qld.gov.au.

The LSC's website also has information on the regulatory framework and self-audit forms located on their website lsc.qld.gov.au.

3. Letterhead requirements

Sections 153 and 88A of the *Corporations Act 2001* require a company to set out its name and ACN on business letters, statements of account, invoices, receipts, orders for goods/services and official notices.

The relevant provisions of the *Corporations Act 2001* are set out below.

Using a name and ACN on documents:

- (1) A company must set out its name on all its public documents and negotiable instruments.
- (2) Subject to sections 154 and 155, if the company's ACN is not used in its name, the company must also set out with its name, or with 1 of the references to its name, either:
 - (a) the expression 'Australian Company Number' followed by the company's ACN; or
 - (b) if the last 9 digits of the company's ABN are the same, and in the same order, as the last 9 digits of its ACN – the words 'Australian Business Number' followed by the company's ABN.

If the company's name appears on 2 or more pages of the document or instrument, this must be done on the first of those pages.

Note 1: If a company has a common seal, its name and ACN or ABN must be set out on the seal (see section 123).

Note 2: A public company must display its name at its registered office. Every company must display its name at places at which the company carries on business and that are open to the public (see section 144).

Note 3: Section 149 provides that 'ACN' is an acceptable abbreviation of 'Australian Company Number', and that 'ABN' is an acceptable abbreviation of 'Australian Business Number'.

Note 4: In any case where the company's ACN would be used, the company's ABN may be used instead if section 1344 is satisfied.

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

Exception to requirement to have ACN on receipts

A company does not have to set out the expression 'Australian Company Number' followed by its ACN on a receipt (for example, a cash register receipt) that sets out information recorded in the machine that produced the receipt.

Regulations may exempt from requirement to set out information on documents

The regulations may exempt a specified company, or a class of companies, from the requirement in subsection 153(2) to set out information on its public documents and negotiable instruments. The exemption may relate to specified documents or instruments, or a class of documents or instruments.

Public document of a body corporate

- (1) Subject to this section, public document, in relation to a body, means:
 - (a) an instrument of, or purporting to be signed, issued or published by or on behalf of, the body that:
 - (i) when signed, issued or published, is intended to be lodged or is required by or under this Act or the ASIC Act to be lodged; or
 - (ii) is signed, issued or published under or for the purposes of this Act, the ASIC Act or any other Australian law; or
 - (b) instrument of, or purporting to be signed or issued by or on behalf of, the body that is signed or issued in the course of, or for the purposes of, a particular transaction or dealing; or
 - (c) without limiting paragraph (a) or (b), a business letter, statement of account, invoice, receipt, order for goods, order for services or official notice of, or purporting to be signed or issued by or on behalf of, the body.
- (2) A thing is not a public document of a body if it:
 - (a) is applied, or is intended or required to be applied:
 - (i) to goods; or
 - (ii) to a package, label, reel or thing in or with which goods are, or are to be, supplied; and
 - (b) is so applied, or is intended or required to be so applied, for a purpose connected with the supply of the goods.

4. Transitioning issues

Some issues to consider when transitioning to an ILP:

4.1 Operational issues

- Registration of Incorporated Legal Practice with ASIC.
- Prepare and lodge 'Notice of a Corporation's Intention to Engage in Legal Practice' with Queensland Law Society.
- Ensure all existing client agreements are formally re-confirmed for that new practice (simple notification may not be sufficient).
- Notify contractors/suppliers of change of entity – existing agreements will need to be reassigned in some cases to new entity.
- Amend contracts of employment – seek advice from employment law specialists.
- Amend existing 'Public' documents, ie letterhead, Court documents in line with ASIC guidance. Display the company name, the words ACN or ABN and the relevant number on:
 - the common seal
 - all company documents
 - all negotiable instruments (eg cheque, promissory note) of the company,
 - all documents lodged with ASIC.

With this in mind, the new stationary will need to be revised to include under the logo the name of the ILP and the ABN number. This will appear on letterhead, with compliments slips, fax cover sheets and business cards.

In accordance with the Society guidelines, remove 'partner' from the firm's documentation and website, and replace with the term 'legal practitioner director' or 'director' as appropriate.

- Lodge notice of Change of Solicitor for existing Court matters.
- Update insurance – include new entity. Advisable to obtain Directors and Officers Liability Insurance (management liability insurance) to cover newly appointed directors of ILP, and covers all officers (staff) in the business.

4.2 Financial issues (internal)

- Decide whether to transfer WIP and debtors to new practice (additional taxes) or run the old entity concurrent with the new until WIP and debtors are run down (additional hassle).
- Opening of new general and trust bank accounts.
- Notification of opening of new trust account to the Society.
- Appointment of trust auditor and written notice to the Society.
- Amend cheques.
- Templates for bills, receipts for the ILP.
- Follow-up of changes to bank accounts, including BPay and credit card merchant facilities.
- Procedures for allocating cash received and transfers between accounts.
- Procedures for trust and investment transactions during transition.
- Accounting cut-off between partnership and ILP – including detailed reports as at transition.
- Notification to suppliers and third parties – other than clients.
- Set up new general ledger accounts in OP – clearing, general, trust, director's remuneration, and balance sheet items.
- Review periodic payments and direct debits being drawn from partnership accounts or credit cards.

4.3 Financial issues (payroll)

- Human resource (HR) review of applicable legislation.
- Arrangements with third party payroll bureau.
- Set-up for payroll tax under ILP.

4.4 Financial issues (external accountants)

- Liaise with bank (explanation about change of entity before submitting account opening forms).
- Liaise with legal advisors on transition documentation.
- Notifications to ATO and OSR.
- Liaise with internal accounts team on accounting entries for old/new entities.
- Financial planning arrangements on transition of partners from drawings to payroll.
- Proposal for accounting between Partnership and ILP on WIP, debtors, bills and write-offs.
- Plan for closing down of partnership financial accounting.
- Letters of agreement/arrangements relating to any service company.
- Review of fixed assets to be transferred.
- Plan for tax/cash flow implications on invoicing and collection of partnership WIP.

4.5 Legal team issues

- Changes to precedents (remove all references to partners/partnership or any wording which may be misleading).
- Review changes in responsibilities directors vs partners.
- Script for what our legal teams need to know (particularly if they are queried by clients after they receive notification of the incorporation).

4.6 Human resource issues

- Announcement to staff (including essential information regarding impact of incorporation on their employment).
- Changes to HR contracts and documentation for continuation of employment from old entity to new.
- Review differences under employment legislation for incorporations.
- Change HR templates/documents.
- Review super fund requirements with reference to the Legal Services Award.

4.7 Client relations issues

- Review of everything in marketing collateral and website to ensure the words 'partner'/'partnership' are removed.

4.8 Self assessment on ILP

- Following commencement of the ILP, the Legal Services Commission will contact you to complete a self assessment form, which requires you to assess how effectively your management systems address ten key objectives of sound law firm management. These are addressed in detail on the Legal Services Commission website and in the information kit for Incorporated Legal Practices (this document) available from the Society.

This information kit was prepared by, and is reproduced with, the kind permission of de Groot's Wills and Estate Lawyers.