Final – 7 November 2001

Regulation of provision of legal services by corporations - Legal Practitioners (Incorporation) Act

National Competition Policy Legislation Review

Legal Practitioners (Incorporation) Act

This Report has been prepared by the Northern Territory NCP Review Team for the *Legal Practitioners Act*, *Legal Practitioners (Incorporation) Act* and associated legislation. Any views or propositions in this Report should not be taken as representing the view of the Northern Territory Attorney-General's Department or the view of any arm of the Northern Territory Government.

TABLE OF CONTENTS

1 OVERVIEW

1.1 THE PURPOSE OF THIS REPORT

This Report identifies the issues concerning the provisions contained in the *Legal Practitioners (Incorporation) Act* that may be anti-competitive in terms of the National Competition Principles Agreement entered into by the Northern Territory Government.

It contains background and recommendations for the purposes of the Northern Territory Government meeting its legislative review obligations under the Competition Principles Agreement.[1]

2 SUMMARY OF FINDINGS

2.1 THE OVERALL FINDINGS

2.1.1 The legislation

The current relevant legislation is the *Legal Practitioners (Incorporation) Act*. This legislation has been in force in the Northern Territory since 1974 (though it was repealed and re-enacted in 1989 in order to facilitate a sole practitioner to practise as a company).

The legislation provides for a prohibition on forming a company for the purposes of carrying on the practice of a legal practitioner unless the company is a "practising company". Such a company can only exist if approved by the Chief Justice. It must be owned and controlled by legal practitioners who have unrestricted practising certificates. Some near relatives may also own interests and act as directors. For the purposes of the *Legal Practitioners Act*, a practising company is deemed to be a partnership comprised of its directors with each director being deemed to be the partner of each other director. The directors jointly and severally guarantee the debts of the company.

2.1.2 The objectives of the *Legal Practitioners (Incorporation) Act*

1. The findings concerning objectives are that the objectives for the regulation of companies that provide legal services are as follows:

   (a) To ensure that legal practitioners can use a corporation as the vehicle for conducting the business of providing legal services.

   (b) To ensure that the above objective does not reduce professional responsibility for legal services that are provided by legal practitioners.

2. The Review Team finds that these objectives remain valid.

2.1.3 Anti-competitive provisions that cannot be justified

The *Legal Practitioners (Incorporation) Act* contains anti-competitive provisions that cannot be justified as being in the public good. These anti-competitive provisions are:

(a) the prohibition on forming a company for the purposes of carrying on the practice of a legal practitioner unless the company is a "practising company" (s.4(1));

(b) the requirement that a legal practitioner who wants to be a director of a practising company must obtain from the Chief Justice approval to form a practising company (s.4(2) and (3));

(c) the requirement that each director is to hold an unrestricted practising certificate or, in the case where there are to be only 2 directors, one holds an unrestricted practising certificate and the other is a "near relative" (as defined in s.3);

(d) the requirement that all voting shares are to be held by one or other of the directors;

(e) the requirement that the name of the practising company can only be the name as approved by the Chief Justice (s.5(3));

(f) the provision that the directors jointly and severally guarantee the debts of the company.

2.1.4 Findings concerning alternatives

The Review Team finds that the objectives of the legislation could be met by the following alternative provisions:

1. That the *Legal Practitioners (Incorporation) Act* be repealed and replaced by alternate provisions to comprise a new Part to be contained in the *Legal Practitioners Act*. The main provisions of the new scheme could be based on Division 2A of Part 3 of NSW *Legal Profession Act 1987* ("the NSW Act") and comprise the following:

   (a) that, subject to the *Legal Practitioners Act*, all corporations be eligible to provide legal

services (with such corporations to be known as "incorporated legal practices"). However, this would not override any other prohibition in the *Legal Practitioners Act*. The term an "incorporated legal practice" should be defined so that:

(i) it includes a corporation that provides legal services ("work done, or business transacted, in the capacity of a solicitor");

(ii) it includes a corporation that may provide other services and conduct any other lawful business (excepting managed investment schemes);

(iii) it does not include corporations that are not paid for legal services provided or if the legal services are "in house";

(iv) it does not include corporate bodies exempted by regulation from the rules governing incorporated legal practices. Such exempted bodies might include the Law Society, Bar Association, government bodies and certain incorporated community legal centres;

(b) that there be a requirement for corporations providing legal services to notify the Law Society both of the fact that they are doing so and the name or names of the solicitor directors (see below). However, there would be no requirement for any approval[2];

(c) that the Law Society have the capacity to disqualify a corporation from providing legal services if the corporation has been found guilty of serious offences or if it has a history of employing persons found guilty of professional misconduct or unsatisfactory professional conduct[3];

(d) that an incorporated legal practice must have at least one solicitor director[4]. A solicitor director is a person who:

(i) holds an unrestricted practising certificate;

(ii) is, for the purposes of the Act, generally responsible for the management of the legal services provided in the Northern Territory by the corporation;

(iii) commits professional misconduct if he or she does not ensure that there are appropriate management systems for the purposes of the provision of legal services in accordance with professional and other obligations;

(iv) commits professional misconduct if he or she does not promptly report to the Law Society contraventions by other directors;

(v) commits professional misconduct if he or she does not promptly report to the Law Society professional misconduct committed by employed solicitors;

(vi) commits professional misconduct if he or she does not take all reasonable action available to deal with professional misconduct or unsatisfactory professional conduct by employed solicitors;

(vii) commits professional misconduct if he or she remains as "solicitor director" after the time when it is apparent that the provision of legal services will result in the breach of professional obligations of solicitors;

(e) that the "solicitors rules" (ie the professional conduct rules) apply to solicitors who are officers or employees of incorporated legal practices. However, such rules are not to prohibit or regulate eligibility of corporations to provide legal services, the provision of other services by the corporation or the conduct of officers or employees in respect of matters that are not connected with the provision of legal services[5];

(f) that the general rules regarding advertising are to apply to corporations that provide legal services (with any such advertising being deemed to have been authorised by the solicitor directors)[6];

(g) that the regulations may make provision for or in respect of disclosures concerning matters such as the types of services provided and whether or not those services are covered by insurance or whether they are regulated by the Act[7];

(h) that the professional obligations and professional privileges of legal practitioners are not

affected merely because a person provides legal services in the capacity of an officer or employee of a corporation;[8]

(i) that the same cost disclosures as apply to individual legal practitioners should also apply to corporations that provide legal services;[9]

(j) that corporations that provide legal services be obliged to comply with the requirements of the Act concerning insurance and payments to the Fidelity Fund;[10]

(k) that the general rules (as contained in Part VII of the *Legal Practitioners Act*) governing monies received by a solicitor in respect of the provision of legal services apply to corporations that provide legal services[11] (but the Regulations may modify the application of these general rules);

(l) that corporations that provide legal services are vicariously liable, in respect of various civil proceedings, for the acts and omissions of officers and employees in much the same way that they would be if they were carrying on business as a partnership;[12]

(m) that the relevant regulatory authorities be entitled to be parties to external administration proceedings under the *Corporations Act 2001* so long as those proceedings may affect the provision of legal services and that the Court may, in making any decisions in these proceedings, take account of the interests of clients; [13]

(n) that the legislation permit a period of grace in respect of the operation of the requirement to have a solicitor director during which a corporation providing legal services can replace a solicitor director following a solicitor director ceasing to occupy that role. That period is either that which is prescribed in the Regulations or, in the absence of such a regulation, "a reasonable time"[14]. During such a period there should be an obligation on the incorporated legal practice to ensure that there is an appropriate system to manage what occurs in the absence of a solicitor director. Such a system would be one whereby legal services of the kind that are the sole preserve of legal practitioners would only be provided by legal practitioners and other matters, such as the trust account, would be handled in accordance with the management system put in place by the most recent solicitor director;[15]

(o) that the legislation make it clear that an incorporated legal practice is protected from the prohibitions in conducting certain legal services (eg creating rights, wills, probate) if the work is done on its behalf by a barrister or solicitor[16].

2. That the new legislation contain no restrictions on who may own shares in a company that provides legal services and that there be no non *Corporations Act 2001* restrictions on who may be the directors (subject to the requirement for there to be at least one solicitor director).

3. That the rules regarding privilege of legal communications apply as if the company were a natural person with the legislation providing that the extent of the privilege will depend on the capacity in which any particular employee or officer of the corporation has made a communication.

3 THE REFERENCE

3.1 FORMAL TERMS OF REFERENCE

The Chief Executive Officer of the Northern Territory Attorney-General's Department has specified the following as being the terms of reference in respect of the National Competition Policy Reviews of legislation affecting the legal profession:

1. The review of the *Legal Practitioners Act* and the *Legal Practitioners (Incorporation) Act*[17] shall be conducted in accordance with the principles for legislation review set out in the Competition Principles Agreement. The underlying principle for such a review is that legislation should not restrict competition unless it can be demonstrated that:

   (1) The benefits of the restriction to the community as a whole outweigh the costs; and

   (2) The objective of the legislation can only be achieved by restricting competition.

2. Without limiting the scope of the review, the review is to:

   (1) Clarify the objectives of the legislation, their continuing appropriateness and whether the *Legal Practitioners Act* and the *Legal Practitioners (Incorporation) Act* remain appropriate for securing those objectives;

   (2) Identify the nature of the restrictive effects on competition;

   (3) Analyse the likely effect of any identified restriction on the economy generally;

   (4) Assess and balance the costs and benefits of the restrictions identified; and

   (5) Consider alternative means for achieving the same results, including non-legislative approaches.

3. When considering the matters referred to in clause 2 of these terms of reference, the review should also:

   (1) Identify any issues of market failure which need to be, or are being addressed by the legislation; and

   (2) Consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the *Trade Practices Act 1974* and the Northern Territory Competition Code.

4. The review shall consider and take account of relevant regulatory schemes in other Australian jurisdictions and any recent reforms or reform proposals, including those relating to competition policy in those jurisdictions.

5. The review shall consult with, and take submissions from, those organisations currently involved with the legal profession, other Territory and Commonwealth Government organisations, other State and Territory regulatory and competition review authorities, and affected members of the profession and their organisations.

This Report has been provided by a review team (see Part 3).

3.2 LEGISLATIVE PROVISIONS COVERED BY THIS REPORT

The Report covers the *Legal Practitioners (Incorporation) Act.* A separate report or reports will cover the *Legal Practitioners Act* and regulations and rules made under that Act.

4 PROCESS FOR THIS REVIEW

4.1 REVIEWERS

In accordance with the national understanding concerning the conduct of such reviews all members of the Review Team were chosen because they could bring an appropriate degree of independence of view to the process.

The current members of the Review Team are

Robert Bradshaw - Northern Territory Attorney-General's Department;
Margaret Rischbieth, Registrar, Supreme Court;
Tim Joyce - Chief Minister's Department;
Tony Clark - Department of Industries & Business; and
Craig Graham - Northern Territory Treasury.

Members of the private legal profession[18] are not part of the Review Team because they have an interest in the outcome. The profession's involvement in the review and the professional expertise for the Review came from the consultation part of the process.

4.2 REVIEW TEAM'S WORK

The review process under the Competition Principles Agreement involves:

1. Clarification of the Legislature's objectives for the legislation;
2. Identification of restrictions on competition;
3. Ascertaining the effects of the restrictions; and
4. Assessment of the costs and the benefits of the restrictions.

4.3 ISSUES PAPER AND CONSULTATION

An Issues Paper was released in September 2000. It dealt with both the *Legal Practitioners (Incorporation) Act* and with all other Northern Territory Acts and delegated legislation affecting the regulation of legal practitioners. It provided background and raised possible issues for comment. The Issues Paper was referred to each Northern Territory legal business, each State and Territory government Department having regulatory responsibilities, Territory and national professional organisations, and national regulatory authorities such as the NCC and the ACCC.

Comments were sought in relation to any issue concerning the regulation of legal practitioners. Commentators were asked not to limit themselves to any issues specifically raised in this paper but to be mindful of the terms of reference.

4.4 OUTCOME OF THE CONSULTATION PROCESS

Few comments were received in respect of the *Legal Practitioners (Incorporation) Act*. However, the generality of approach from those persons who commented would seem to be that legal practitioners ought be able to carry on business using a company structure in much the same way as any other business might use a company structure. There was no overt support of the proposition that legal practitioners should continue to be personally liable for debts incurred by a company that is in the business of providing legal services.

5 COMPETITION POLICY LEGISLATION REVIEWS - BACKGROUND

5.1 COMPETITION POLICY

5.1.1 National Competition Policy Agreements

On 11 April 1995, the Northern Territory Government, with the Commonwealth, State and Australian Capital Territory Governments agreed to adopt the National Competition Policy (NCP) and signed three specific agreements relating to the implementation of the policy. These agreements are:

5.1.1.1 Competition Principles Agreement

This agreement, amongst other things, imposes on all governments (the Commonwealth, the six States and the two self-governing Territories) an obligation to review and, if necessary, reform all legislation, which restricts competition for which they are responsible.

5.1.1.2 Conduct Code Agreement

This agreement creates various controls for the purpose of ensuring that, as a general rule, government businesses are subject to the same competition rules as privately owned businesses. Effectively, government agencies, corporations, professional bodies and natural persons shall be subject to Part IV of the *Trade Practices Act 1974* or its equivalent in place under State or Territory law.[19]

5.1.1.3 Agreement to Implement the National Competition Policy and Related Reforms

The Agreement to Implement the NCP and Related Reforms provides a timetable for reform and for the making of payments by the Commonwealth to the States and the Territories, in respect of appropriate progress in the making of the national competition reforms.

5.1.2 Legislative reform under NCP

Under clause 5(1) of the Competition Principles Agreement, the guiding principle is that:

> "Legislation should not restrict competition unless it can be demonstrated that:
>
> (a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> (b) the objectives of the legislation can only be obtained by restricting competition."

5.1.3 Rationale for Competition Policy Reforms[20]

The underlying rationale for the NCP is that of ensuring that markets are free to operate without any unnecessary regulatory restrictions. It is also about improving the efficiency of the public sector. NCP is based on the idea that greater competition will increase the incentive for producers:

(a) to use their resources more efficiently (thus achieving greater productivity);

(b) to increase their efforts to constrain costs and thus be in a position to reduce prices; and

(c) to be in a better position to be more responsive to user's demands.

However, increasing competition is put forward as a mechanism for the improvement of the general standard of living. It is not an end in itself. Increased competition is only to be adopted in so far as it increases public benefit overall.[21]

This NCP Review aims to assess how the current regulation of the legal profession affects the provision of legal services in the marketplace. The review will consider whether current restrictions on legal practice and on the entry of non-legal practitioners into the legal services market unnecessarily restricts competition or whether there are sufficient public policy reasons for retaining restrictions.

5.1.4 Principles which underlie a Competition Policy Review

The following have been widely identified[22] as principles which underlie a Competition Policy Review:

- there must be a presumption against statutory intervention and the onus of proof should be on the proponent of intervention;
- the direct costs of regulation should be borne by the immediate beneficiaries of the regulation; and
- co-regulation, self-regulation and codes of conduct are all valuable regulatory mechanisms but are potentially subject to capture. There are regulations with minimal statutory support that are very targeted and cost effective. The provision of information is important. Ordinary market mechanisms should generally not be inhibited, subject to active enforcement of ordinary fair trading and other laws.

5.1.5 Rationale for regulation[23]

The main rationale for government invention in markets is:

- To ensure that public goods are supplied (eg some railways, defence forces);
- To prevent externalities - this is where costs and benefits accrue to or spill over to third parties to a transaction (eg the activities of lawyers acting for parties may adversely affect the courts and the public). The main form of intervention is that of enactment of general laws which create offences, impose taxes or impose minimum standards;
- To prevent abuse of market power. The main form of intervention is the enactment of general laws (such as the *Trade Practices Act* 1974);
- To limit information asymmetry. This is where one party knows more than the other party. Consumers and clients deal with the service provider in ignorance of the quality of the service that is being provided. Occupational regulation can aim to have the result of providing objective information;
- To reduce transaction costs. Consumers/clients incur costs in locating services, changing between service providers, reaching agreement on price, ensuring compliance with the agreement. If the costs are too large clients/consumers may, because of the costs, desist from making sufficient inquiries in order to reach the correct decision; and
- To achieve other social objectives. This basically relates to the failure of service providers. The intervention is designed to prevent financial loss, prevent substandard work, protection of health and safety and the prevention of criminal activity.

5.1.6 COAG Principles for the Regulation of the legal profession

On 25 February 1994, the Council of Australian Governments (COAG) requested the Working Group on Micro-economic Reform to report on detailed proposals for the reform of the legal profession with the view to removing constraints on the development of a national market in legal services and developing other efficiency enhancing reforms.

Subsequently, the COAG working group developed a series of principles and actions in respect of each of the principles. The principles (and actions) in so far as they are relevant to the *Legal Practitioners (Incorporation) Act*[24] are as follows:

Principle

COAG Legal Profession Reform Principle 1:

> *"For competition law to have full effect, States and Territories agree that regulatory intervention should be kept to the minimum necessary to protect the public interest in the administration of justice and consumer protection."*

Actions

The proposed actions in respect of Principle 1 are, in so far as they are relevant to the *Legal Practitioners (Incorporation) Act*, as follows:

> "(a) Consistent with the legislation review principles contained in the National Competition Principles Agreement which requires that restrictions on competition should be both essential to achieving the objectives of the legislation and must yield a net benefit to the community, member Governments agree that legislation regulating the legal profession should not go beyond [containing provisions that regulate] . . . Business structures (so as to allow, for example, multi-disciplinary practices); . . ."

COAG Legal Profession Reform Principle 8:

> *"COAG agrees that flexible business arrangements are an important feature of a more responsive legal service market. In particular, combined practices such as multi-disciplinary partnerships may reduce transaction costs, particularly in the corporate sector where commercial requirements include a sophisticated mix of professional skills. However, some States have concerns in relation to the question of limited liability, given the costs that this might impose on consumers, and in regard to other consumer risks relating to multi-disciplinary partnerships."*

COAG referred this matter for further evaluation, requesting a report from the Legal Profession Working Group. Nothing appears to have resulted from this referral.

5.1.7 Law Council of Australia

The Law Council of Australia is constituted by the State and Territory legal professional organisations. With the support of its constituent bodies it has developed a "blueprint" for the development of a national legal profession. This "blueprint" is based on the following fundamental principles:[25]

"1. NCP principles apply to the legal profession;

2. Lawyers admitted in any State or Territory of Australia are able to practise law throughout Australia;

3. Existing constraints which prevent a lawyer's right to practise without restriction throughout Australia are removed in order to facilitate the development of a national market in legal services;

4. Recognition that the independence of the legal profession is dependent upon the profession's right to self regulation;

5. The system of regulation of the legal profession is implemented by uniform State and Territory legislation;

6. The self regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of the professional bodies are not inconsistent with national competition policy principles;

7. The protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care; and

8. Proper information is available for consumers of legal services as to quality and cost of legal services."

5.1.8 National Competition Council

The National Competition Council has issued a brief paper dealing with the reform of the legal profession.[26] This paper appears to support the following propositions:

- One of the biggest restrictions on legal businesses relates to ownership;
- Lack of competition in respect of indemnity insurance may be preventing the development of

tailored and more widely available insurance;

- It is incongruous to deny consumers advertising information;
- There are inherent dangers to allowing professions to make their own rules;[27]
- Independence (of the profession) must be balanced with transparency and accountability. Involvement in self regulatory bodies by persons from outside the profession appears desirable.
- Such bodies include registration and disciplinary bodies. Rules and processes should be public and be made with consumer debate and input; and
- Opening the market to alternate non-lawyer providers can significantly reduce costs and result in services becoming more widely available in the community. However if required, providers can still be regulated and can still have formal training and registration requirements for practice in that particular field.

In its July 2001 NCP draft assessment on the progress with legislation reviews the NCC noted, in respect of the restrictions on sharing of profits, the following:

- *"Historically, the legal profession used the need to preserve the confidentiality and trust of the lawyer/client relationship to justify controls over the ownership and organisation of legal practices. The argument is that lawyers must be allowed to pursue their clients' interests to the exclusion of the interests of third parties involved in the practice ...*
- *Limited evidence links ownership restrictions to the maintenance of professional ethics. New South Wales, for example, concluded from its NCP review that the most effective way in which to achieve professional legal objectives is to maintain a clear focus on the accountability of individuals rather than to restrict ownership ...*
- *Other[28] governments are also reviewing practice ownership and profit-sharing arrangements. Regulatory practices in other jurisdictions is an issue for these reviews because consistent regulation may reduce barriers to competition ad across State and Territory boundaries"[29]*

5.1.9 Trade Practices Commission [Australian Competition and Consumer Commission][30]

A number of inquiries have taken place concerning the legal services market and the role of regulators in recent years. The Trade Practices Commission issued its Report following an exhaustive, national study of the profession in March 1994. Amongst its recommendations, it sought the removal of many restrictions on the business structures of lawyers.

5.1.10 Access to Justice committee

In 1994 the Access to Justice Advisory Committee, chaired by Ronald Sackville QC, advocated a national reform of the legal profession. It proposed reforms designed to ensure the minimum restriction of competition 'consistent with protecting consumers and the public interest'.[31] The Committee proposed a number of substantive changes, including the removal of restrictions on lawyers' business arrangements.

5.1.11 Other National Competition Principles Reviews of laws relating to legal practitioners

The Competition Policy Agreement obligates States and Territories to identify anti-competitive legislative provisions and to then conduct a review. The proposed interstate reviews for the purposes of the Competition Policy Agreement and the summary status of them are as set out in the following table:[32]

National Competition Policy Reviews elsewhere in Australia

State/Territory	Legislation	Current position
NSW	*Legal Practitioners Act 1987.*	Review conducted by the NSW Attorney-General's Department Report completed

State/Territory	Legislation	Current position
		November 1998. Tabled in Parliament in 1998. The *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* appears to be an outcome of that Review.
Victoria	*Legal Practice Act 1997.*	Review was conducted in 1996. It has not been publicly released.
Queensland	*Legal Practitioners Act 1995.*	No time listed. However the review is expected to be commenced after the completion of a general review of the Act. Green paper on general issues released in June 1999. NCP review was expected to have been completed in early 2000. That does not appear to have occurred. However, on 13 December 2000 the Queensland Attorney-General announced a wide range of intended reforms of the legal profession. This announcement said nothing about incorporation except to mention that the issues were to be considered by the Standing Committee of Attorneys-General following concerns having been raised about the differing approaches being followed by the States.
Western Australia	*Legal Practitioners Act 1893 and Rules.*	Review being conducted by a Review Team of senior officials with the support of the WA Justice Department Issues Paper released in June 2000.
South Australia	*Legal Practitioners Act 1981.*	Review being conducted by the SA Attorney-General's Department. NCP Issues Paper released in 1999. Report is due out in August 2000.
Tasmania	*Legal Profession Act 1983.*	Review being conducted by the Tasmanian Justice Department. NCP Discussion Paper released in July 2000.
Australian Capital Territory	*Legal Practitioners Act 1970.*	Review being conducted by the Australian Capital Territory Department of Justice and Community Services. NCP Issues Paper on part of the review has been released by the Department. Current position is not known. However, it is understood that a consultancy may be being let for the remaining parts of the review.

5.1.12 Overview of other NCP Reviews

Most of the NCP reviews of the legal profession have reached the discussion stage. The only completed, and publicly available, review (NSW) generally upheld the then current provisions of the NSW legislation. However, it recommended change and reform in a number of areas. Those of some relevance to the review of the *Legal Practitioners (Incorporation) Act* include:

- Solicitors should be able to be members of multi-disciplinary partnerships with there being no need for a majority of the partners to be solicitors;
- Solicitors or barristers should be permitted to form incorporated practices under the *Corporations Law*. The objects and membership of such practices should be restricted but clear provision should be made to ensure that solicitor's professional and ethical obligations are maintained and insurance and fidelity cover is at least as favourable to clients as in the case of other solicitors. However, regulation should be directed at individual solicitors and barristers rather than the structure they adopt for practice. Consideration should be given to restricting the membership of

incorporated practices and limiting the number of non-solicitors who have voting rights. It may be necessary that the legislation or the professional rules to ensure that professional and ethical rules are not compromised by the choice of business structure. The regulatory scheme should also ensure that consumers are aware of the different obligations of service providers within multi-disciplinary partnerships and corporations. The regulatory scheme should also clarify the application of professional privilege to these entities;

The NSW *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* commenced operation on 1 July 2001. It provides:

1. For the corporations that can provide legal services

Section 47D of the NSW provides that all corporations are eligible to become incorporated legal practices. However, this does not override any other prohibition. The term an "incorporated legal practice":

(a) includes a corporation that provides legal services ("work done, or business transacted, in the capacity of a solicitor");

(b) includes a corporation that may provide other services and conduct any other lawful business (excepting managed investment schemes);

(c) does not include corporations that are not paid for legal services provided or if the legal services are "in house".

Additionally, section 47C provides for the exemption of certain corporate bodies from the rules governing incorporated legal practices. Those exempted include the Law Society, Bar Association and certain community legal centres,

2. For "solicitor directors"

Section 47E of the NSW Act provides that an incorporated legal practice must have at least one solicitor director. A solicitor director is a person who:

(a) holds an unrestricted practising certificate;

(b) is, for the purposes of the Act, generally responsible for the management of the legal services provided in NSW by the corporation;

(c) commits professional misconduct if he or she does not ensure that there are appropriate management systems for the purposes of the provision of legal services in accordance with professional and other obligations;

(d) commits professional misconduct if he or she does not promptly report to the Law Society Council contraventions by other directors;

(e) commits professional misconduct if he or she does not promptly report to the Law Society Council professional misconduct committed by employed solicitors;

(f) commits professional misconduct if he or she does not take all reasonable action available to deal with professional misconduct or unsatisfactory professional conduct by employed solicitors;

(g) commits professional misconduct if he or she remains as "solicitor director" after the time when it is apparent that the provision of legal services will result in the breach of professional obligations of solicitors.

3. For the application of professional conduct rules

Section 47G of the NSW Act provides that:

(a) the "solicitors rules" (ie the professional conduct rules) apply to solicitors who are officers or employees of incorporated legal practices;

(b) such rules cannot prohibit or regulate eligibility of corporations to provide legal services, the provision of other services by the corporation or the conduct of officers or employees in respect of matters that are not connected with the provision of legal services.

Additionally, section 47I of the NSW Act provides:

(a) that the general rules regarding advertising are to apply to corporations that provide legal services (with any such advertising being deemed to have been authorised by the solicitor directors); and

(b) that the regulations may make provision for or in respect of disclosures concerning matters such as the types of services provided and whether or not those services are covered by insurance or whether they are regulated by the Act.

Regulation 13K provides that there must be notice provided prior to or soon after the provision of any legal services, in writing to the client setting out, amongst other things:

(a) a description of the legal services to be provided;

(b) a description of the non-legal services to be provided;

(c) advice that the *Legal Profession Act 1987* regulates the provision of the legal services but does not regulate the provision of the non-legal service.

A breach of this regulation is capable of being unsatisfactory professional conduct or professional misconduct.

4. For the application for professional obligations and privileges of corporations that provide legal services

Section 47H of the NSW Act provides that the professional obligations and professional privileges of legal practitioners are not affected merely because a person provides legal services in the capacity of an officer or employee of a corporation.

5. For the application of costs disclosure rules to corporations that provide legal services and other legal practitioners in respect of obligations concerning fees

Section 47J of the NSW Act provides that, subject to any variations made by regulations, the general rules (as contained in Part 11 of the NSW Act) apply to corporations.

Regulation 13P provides that each solicitor director must ensure that there is compliance with the cost disclosure requirements. A breach of this regulation is capable of being unsatisfactory professional conduct or professional misconduct.

6. For the application of indemnity insurance for corporations that provide legal services

Section 47K(1) of the NSW Act obliges corporations that provide legal services to comply with the requirements of the Act concerning insurance and payments to the Solicitors' Mutual Indemnity Fund. These obligations relate to indemnity insurance and a Fund (funded by solicitors payments) that appears to exist to pay for overall insurance coverage and to cover gaps between coverage and liability. The Law Society Council may grant exemptions.

7. For the application of fidelity fund provisions to corporations that provide legal services

Section 47M of the NSW Act provides that:

(a) the general rules (as contained in Part 7 of the NSW Act) governing fidelity fund obligations apply to corporations that provide legal services;

(b) these rules only apply in respect of failures to account occurring in respect of the provision of legal services; and

(c) the Regulations may modify the application of these general rules.

8. For the application of trust account provisions to corporations that provide legal services

Section 47L of the NSW Act provides that:

(a) the general rules (as contained in Part 6 of the NSW Act) governing monies received by a

solicitor in respect of the provision of legal services apply to corporations that provide legal services;

(b) the Regulations may modify the application of these general rules.

Regulation 13L provides that monies obtained in respect of the provision of non-legal services are not deposited with trust monies.

Regulation 13M imposes on solicitor directors various duties of ensuring compliance with the Act in respect of the keeping of accounts.

A breach of these regulations is capable of being unsatisfactory professional conduct or professional misconduct.

Regulation 13N ensures that the standard audit provisions apply and that obligations in respect of auditors apply to both the solicitor directors and to the employed solicitors.

9. Vicarious liability of corporations that provide legal services in respect of failures to account and dishonesty

Section 47N of the NSW Act provides that corporations that provide legal services are vicariously liable, in respect of various civil proceedings, for the acts and omissions of officers and employees in much the same way that they would be if they were carrying on business as a partnership.

10. External administration of corporations that provide legal services

Section 47R of the NSW Act provides that:

(a) the Law Society Council and the Legal Services Commissioner are entitled to be parties to external administration proceedings under the *Corporations Act 2001* so long as those proceedings may affect the provision of legal services;

(b) the Court may, in making any decisions in these proceedings, take account of the interests of clients;

(c) Parts 8 and 8A of the Act don't apply to corporations that provide legal services. These Parts deal with Receivers and Managers.

Regulation 13T provides that the Law Society Council and the Legal Services Commissioner may exercise the powers conferred on ASIC by Division 2 of Part 3 of the *Australian Securities and Investment Commission Act 2001*. These provisions deal with the examination of persons in respect of investigations and information gathering concerning sections 55, 152 and 47P of the NSW Act. These sections deal with general compliance of incorporated practices with the NSW Act and the investigation of the affairs of legal practitioners.

Regulation 13W provides that failure to comply is unsatisfactory professional conduct or professional misconduct by an employed solicitor or by the solicitor directors.

11. For a corporation that provides legal services to always have a solicitor director

The NSW Act provides that there is a period of grace in respect of the operation of s.48D(1) in which a corporation providing legal services can replace a solicitor director following a solicitor director ceasing to occupy that role. That period is either that which is prescribed in the Regulations or, in the absence of such a regulation, "a reasonable time". Regulation 13X prescribes that the period of time is 7 days.

12. Other special provisions regarding the corporations that provide legal services

Section 47T of the NSW Act provides that Regulations can be made:

(a) dealing with the provision of legal services by corporations; and

(b) providing that a breach of the Regulations by a corporation may constitute professional misconduct or unsatisfactory conduct by either or both the solicitor director or the solicitor who actually committed the breach.

Section 48D of the NSW Act provides:

(a) that it is unlawful for a corporation to do anything that implies or may imply that the corporation is qualified to act as barrister or solicitor (s.48D(1));

(b) that the above does not apply if the corporation has at least one solicitor director;

(c) that there is a period of grace in respect of the operation of s.48D(1) in which a corporation providing legal services can replace a solicitor director following a solicitor director ceasing to occupy that role. That period is either that which is prescribed in the Regulations or, in the absence of such a regulation, "a reasonable time". Regulation 13X prescribes that the period of time is 7 days.

Section 48E(2) of the NSW Act makes it clear that an incorporated legal practice is protected from the prohibitions in conducting certain legal services (eg creating rights, wills, probate) if the work is done on its behalf by a barrister or solicitor.

Regulation 13R provides that the deliberate charging of excessive amounts of costs or the deliberate misrepresentation as to costs is professional misconduct by all solicitor directors and by any (employed) solicitor who is involved in the conduct.

6 ANTI-COMPETITIVE PROVISIONS IN THE LEGAL PRACTITIONERS (INCORPORATION) ACT.

6.1 THE COMPETITION PRINCIPLES AGREEMENT SETS OUT THE GENERAL PRINCIPLE THAT LEGISLATION NEEDS TO BE REVIEWED IF IT IS ANTI-COMPETITIVE.

The National Competition Council has identified that legislation may limit competition if it:

1. Governs the entry or exit of firms or individuals into or out of markets;[33]
2. Controls prices or production levels;
3. Restricts the quality, level or location of goods and services available;[34]
4. Restricts advertising and promotional opportunities;
5. Restricts price or type of input used in the production process;
6. Is likely to confer significant costs on business;[35] or
7. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.

6.1.1 Identification of the anti-competitive provisions contained in the *Legal Practitioners (Incorporation) Act*

The following table[36] contains a description of the possibly anti-competitive restrictions in the *Legal Practitioners (Incorporation) Act* and an assessment of their impacts and significance.

Legal Practitioners (Incorporation) Act

Description of the restriction.	Competition or economic effects.	Severity of the restriction.[37]
S 4(1) provides that no person can form a company other than a practising company for the purpose of carrying on the practice of a legal practitioner. S 4(2) provides that no person shall form a practising company other than with the approval in writing of the Chief Justice. S 4(3) provides that an application for the approval of the Chief Justice to form a practising company can only be made by a legal practitioner who is proposed to be a director of the proposed company.	Governs the entry or exit of firms or individuals into or out of market. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant

Description of the restriction.	Competition or economic effects.	Severity of the restriction.[38]
S 5 imposes controls on the ownership and directorships of practising companies. The constitution of the company must provide that directors must hold unrestricted practising certificates except where, in the case of only 2 directors, one is the parent, spouse, child or grandchild of the other director. Voting shares must be held by directors. Other shares must be held by a director, the parent, spouse, child or grandchild of a director or the executor etc of a director or a near relative of a director. The ownership/control structure must be approved by the Chief Justice. The Chief Justice must also approve of the name of the practising company.	Governs the entry or exit of firms or individuals into or out of markets. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant
S 6 The constitution of a practising certificate can only be altered with the approval of the Chief Justice.	Governs the entry or exit of firms or individuals into or out of markets. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant
S 7(2) deems the directors of a practising company to be partners for the purposes of the *Legal Practitioners Act.*		Trivial
S 8 deems the directors of a practising company to be jointly and severally liable to guarantee the debts of the company.	Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant

In preparing this table the following proposition has been heeded:

> *"The NCP review process involves assessing only those provisions which materially restrict competition and not those which impose only insubstantial costs on participants.*[39]"

The table contains an assessment as to whether the restriction is "trivial", "minor" or "significant". This is background information to Part 8 of this document which contains information concerning those parts of the *Legal Practitioners (Incorporation) Act* that may restrict competition and issues that have been raised in respect of those parts. Some of these issues include alternatives to the current provisions of the *Legal Practitioners (Incorporation) Act.*

In brief, the *Legal Practitioners (Incorporation) Act* imposes:

1. Additional restrictions on corporations to those imposed on corporations engaged in other kinds of businesses
2. Additional restrictions on individuals who provide legal services via a company compared to individuals who use the company structure to provide other kinds of services.

7 THE LEGAL PROFESSION

7.1 WHICH ACTIVITIES OF LEGAL PRACTITIONERS ARE REGULATED?40

In order to understand what might be the reasons for regulating companies that provide legal services there is some need to understand what are the kinds of services provided by legal practitioners. These issues will be dealt with in greater detail in the NCP review of the *Legal Practitioners Act.* For the purposes only of the NCP review of the *Legal Practitioners (Incorporation) Act*, it is assumed that the base regulation contained in the *Legal Practitioners Act* will be retained. Thus, NCP issues relating to that level of regulation will be ignored in this review.

7.1.1 Professional activities of legal practitioners

The members of the legal profession carry out a wide range of disparate activities.

The main professional activities appear, in no order of significance, to be as follows:

- To provide advice as to legal rights and responsibilities;
- To provide advice as to the prospects of success in civil litigation or in criminal proceedings;
- To prepare documents setting out legal rights and obligations (eg agreements, policies and legislation);
- To prepare the documentation necessary for court, tribunal and other proceedings;
- To provide personnel for the courts and the tribunals (ie judges, magistrates, tribunal members, registrars etc);
- To provide a service to the courts (in the capacity of 'officers of the court');
- To represent persons before Courts and Tribunals; and
- To represent persons conducting business or seeking approvals.

7.1.2 Areas of work reserved for legal practitioners

However, not all of these areas of professional work are reserved for the legal profession. The areas for which there are such general reservations in the Northern Territory are as follows:

- Preparation of instruments creating or regulating rights or relating to property or legal proceedings;
- Legal representation before Courts and Tribunals;
- Preparation of documents used in Courts and Tribunals; and
- Preparation of agreements relating to property and testamentary dispositions.

There is doubt as to whether there is a prohibition on non-lawyers who do or who hold themselves out as being able to provide advice as to the interpretation of the law.[41]

7.1.3 Areas of work shared with other professions and occupations

It can also be noted that for certain other services, legal practitioners share the market with other regulated professions and occupations. For example, conveyancing is shared with licensed conveyancing agents. The South Australian NCP discussion paper identified a list of legal services that are provided by non-lawyers in a number of spheres. They do so either as employees under the supervision of lawyers or in competition with lawyers. The areas of possible relevance to the Northern Territory now or in the future include:

- Taxation and company structures advice by accountants;
- Conveyancing by conveyancing agents;

- The preparation of wills and other documents concerning succession to property by trustee companies and the Public Trustee;
- Advocacy services that are provided routinely in many tribunals such as the Administrative Appeals Tribunal, small claims courts and residential tenancies tribunal;
- Advocacy in the industrial sphere;
- The prosecution of summary offences in the Magistrates Court by unqualified police prosecutors;
- The role that non-lawyers often play in preparing matters for court hearings. In some government legal offices non-lawyers may interview clients and witnesses to prepare briefs in relation to court proceedings;
- The provision by non-lawyers of advice and related information by telephone in the Legal Aid Commission;
- Migration advice by migration agents;
- The preparation of superannuation documents and trust deeds;
- The preparation of bankers' security documents;
- The work of patent attorneys;
- The sale of will kits;
- The sale of shelf companies and superannuation trust deeds;
- Amendments to insurance policies and advising in relation to the interpretation of insurance policies by insurance brokers;
- Advice on the Corporations Law and Securities Law, tendered by merchant bankers and financial advisers;
- Litigation support services offered by accounting firms; and
- Employment relations legal advice by outplacement consultants.

7.1.4 Changes in the activities of legal practitioners

The South Australian Issues Paper went on to note:

- That in some areas legal practitioners are excluded from providing legal services. Legal representation is restricted in some Tribunals and legal practitioners cannot provide migration advice unless they are registered migration agents under the Commonwealth *Migration Act 1958;*
- That, at the same time as more legal work traditionally done by lawyers is handled either by non-lawyers or consumers themselves, lawyers are moving into fields in which legal skill is not the primary consideration. Large and medium-sized firms are increasingly providing advice and other services in relation to corporate work with financial, economic, industry and trade aspects. In these fields lawyers are competing with non-lawyers such as accountants, financial and trade advisers, management consultants and others. Legal practitioners are becoming more involved in alternative dispute resolution procedures such as mediation and conciliation. Once again, in this area legal practitioners are competing with non-lawyers;
- Legal practitioners practise in a range of different modes and provide services targeted at different markets. Changes to the profession, which have been documented in the United Kingdom, appear to be taking place in Australia. Firms are differentiated by market sector, activities and client type.[42] Australia-wide, firms having more than 100 partners represent less than 1% of the total number of practices, but employ 21% of employees and produce 30% of the total income of the profession.[43] Corporate clients are the source of 36% of the income of the profession. While 95% of practices employ fewer than 20 persons, they represent only 54% of total employment and 46% of total income.[44] A similar point to this was made in the NSW Report; and

- While the majority of legal practitioners are employed in firms there are a significant number of legal practitioners employed by corporations to act as their "in house" legal advisers. The Government is a significant employer of legal practitioners. Similarly legal aid and community legal centres are also significant employers of lawyers.

Currently, legal firms in the Northern Territory do not share the same range of business size as reported for Australia as a whole. In time this diversity is likely to occur. However even at present there are, within the Northern Territory's legal profession, divergent views about the nature of the regulation that is required having regard to the differing legal businesses or practices that exist.

7.1.5 Does the legal services market possess special features?

The NSW NCP Report noted that legal services comprise a specialised market which differs in significant ways from other kinds of markets. This means that there is a consequent need to consider whether there are certain characteristics of the legal services market which may warrant special restrictions on services, for the public interest. Characteristics of the legal services market which may be difficult to reconcile with deregulation of the profession include matters set out below:

- Legal practitioners are bound by statute based professional and ethical rules of a kind that usually do not apply to other service providers.[45] Most importantly, they are considered to be officers of the Court. This duty is assumed to override their duty to their client if a conflict between the two duties arises; and
- Legal practitioners also have duties to each other.

7.2 THE MARKET FOR LEGAL SERVICES[46]

7.2.1 Nature of the market for legal services

The market for legal services is diverse. Clients of legal services possess different levels of sophistication and knowledge of available services. Some legal transactions are characterised by sophisticated clients who are familiar with the work required, who have the ability to choose competent practitioners without the need to rely on statutory recognition and whose market power and knowledge enables them to negotiate a market price for services. However, other consumers may have limited knowledge of the nature and complexity of the service required or its market value. For these latter circumstances, the market may operate imperfectly, and a market failure may result. Additionally, the modern legal services market may be local, regional, national or international in scope and the nature of the market affects the style and mode of practice.

The nature of legal services is not susceptible to simple analysis. Some services are straightforward and the level of training currently required of legal practitioners may not be necessary for the providers of these services. Other services may carry a high degree of complexity and require arcane, specialised knowledge. Moreover, it may be difficult to predict the complexity of a service in a particular case because of the role of third parties, the complexity of legal rules and the expectations of clients.

Some legal services are discrete while others, such as taxation services, are provided together with other professionals. The demarcation between legal work and other work may be unclear. Professionals whose work overlaps with legal work may not be subject to comparable legislative restrictions and professional rules. This may affect the ability of legal practitioners to compete with other professionals. Conversely, other professionals cannot hold themselves out as having legal knowledge or perform certain work, even though they may have detailed knowledge of the law in particular areas.

The specialised knowledge of legal practitioners may lead to market failure in the provision of legal services. The gap between the knowledge of the practitioners of the work involved and the skill required to deliver a service, and that of the client, may be such that the ability of the client to bargain for the service may be compromised. In these circumstances, regulation of the profession may be justified in the public interest as guaranteeing consumers a minimum standard of service and

protecting consumers from incompetence. However, it may not be possible to justify the degree of regulation that is currently set out in the legislative rules on this basis. This point was also made in the South Australian Issues Paper which noted that the provision of professional services is often done in an environment of "information asymmetry" between providers and consumers. In such a case the consumer may lack the knowledge to assess the quality of the service being provided or the knowledge or expertise of the practitioner.[47] The provision of information to consumers is, therefore, a significant factor in promoting competition. Deregulation of professions, without a concomitant increase in the knowledge of consumers to enable them to make informed choices regarding service providers, could expose consumers to risks of harm without providing them with the means of avoiding this harm.

The South Australian Issues Paper stated that legal services do not produce defined or predictable outcomes in the same manner as contracts for the supply of goods and many kinds of services. Many legal services consist of a process of negotiation and compromise with third parties, and the level of satisfaction of a client with the outcome of a legal service may not be related to the degree of expertise of the practitioner or the quality of the service. Clients often cannot identify the benefit obtained from legal services because legal advice or representation may not achieve the personal or business objectives of the client.

7.2.2 Participants in the legal services market

The South Australian Issues Paper noted that:

- The legal services market consists of all sellers and buyers of legal services;
- Sellers include all practising lawyers, whether practising in partnerships, as employees or as sole practitioners;
- Competition occurs between sellers who practise in the same fields of law, both within the private sector and between public and private sector sellers;
- Competition also occurs between lawyers and non-lawyers selling the same or substitutable services, for example between lawyers and conveyancers, taxation advisers, accountants, mediators, trustee companies, etc (see below);
- There may also be competition between lawyers and a small self-help market, such as sellers of kits, community agencies and lay advocacy services;
- Buyers include private individuals as well as trading and financial corporations, governments and government sector bodies, associations, community organisations, small businesses, and others;
- The market for legal services may no longer be geographically restricted, as mutual recognition arrangements permit lawyers admitted in one Australian jurisdiction to practise in another. Hence, local lawyers may compete with interstate lawyers and law firms both for local and interstate business;
- To a lesser degree, there may be competition with overseas lawyers for local and overseas work;
- Likewise, there may be training market competition across Australia's internal borders and even internationally, given that qualifications obtained overseas may be taken into account in admitting practitioners in the local jurisdiction;
- The market has temporal constraints in that a particular legal service must usually be purchased at need and the buyer may not be able to purchase in advance of need, or be at liberty to await an optimum purchase time. This is particularly the case in the purchase of litigation services, but also applies in the fields of family law, criminal defence, probate, taxation and some commercial transactions; and
- The functional level in this market is usually the retail level, ie, the purchaser of the service is its ultimate consumer. This may have market implications in terms of information asymmetry and title reliance.

7.3 DEFINITION OF "MARKET"

Restrictive legislative provisions affect the level of competition. To accurately assess the level of competition and the impact of any restrictions, it is helpful to define the market affecting the provision of these services. Restrictive provisions do not operate in a vacuum. They are only worth considering if they affect a market.

An often-cited definition of a 'market' is:

> "...The area of close competition between firms or the field of rivalry between them.... Within the bounds of the market there is substitution - substitution between one product and another, and between one source of supply and another - in response to changes in prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given sufficient price incentive."[48]

Hence, a 'market' is the area of trade or traffic in a commodity or service. The competitiveness of a market will vary according to how different the offered products are from one another in character or use, and the degree of substitution of products that may occur if a sufficient price incentive is present.

Substitution may occur on the supply side, where producers will switch to the production of different products in response to changing prices, and may occur on the demand side, where consumers may change to the consumption of different products as a result of a change in price.

It is also possible to define the boundaries of a market by reference to:

(1) The nature of the product;
(2) The geographical "reach" of supply;
(3) Where the product appears in the chain of production; and
(4) The levels of actual and potential competition - the latter requiring an estimation of what may occur in the future.

In the case of legal practitioners, the market is made up of consumers and businesses that use the services of legal practitioners and others who compete with legal practitioners. They include many persons in the Northern Territory and outside the Northern Territory who use legal practitioners as sources of advice, as the drafters of agreements and other documents, as negotiators and as representatives before the Courts.

As identified by the NCC (see above regarding July 2001 assessment) the participants in the market include national participants. Different rules in different jurisdictions can impede local Northern Territory legal practitioners operating elsewhere and interstate legal practitioners from operating in the Northern Territory. The Northern Territory is part of the scheme that recognises practising certificates issued in other States and the ACT[49]. However, that scheme does not apply to corporations that are entitled to provide legal services.

7.4 THE SIZE AND STRUCTURE OF THE LEGAL PROFESSION IN THE NORTHERN TERRITORY

The following table contains statistical information concerning the size and structure of the legal profession in the Northern Territory as at 30 November 1999.[50]

Description	Darwin	Alice Springs	Other	Total
Number of legal businesses[51]	79	24	9	112
Number of persons with unrestricted practising certificates	114	30	41[52]	185
Number of persons with a restricted practising	184	29	6	219

Description	Darwin	Alice Springs	Other	Total
certificate				
Total number of persons with practising certificates	298	59	47	404
Number of persons with practising certificates who are members of the Law Society Northern Territory[53]	290	58	41[54]	389
Number of persons with practising certificates working within government	72	6	1	79
Number of persons with practicing certificates working within firms	164	32	3	199
Number of barristers	30	0	36 (all interstate)	66

Submissions concerning this analysis of the market

The submissions dealing with the market will be summarised in the NCP report on the *Legal Practitioners Act*. In respect of this report it appears adequate to note that no submissions were made which might affect consideration of issues relating to the incorporation of legal practices.

8 DEVELOPMENT OF THE *LEGAL PRACTITIONERS (INCORPORATION) ACT* - HISTORICAL OVERVIEW

The NCP of the *Legal Practitioners Act* will set out this history. For the present it is sufficient to note that corporations have only been able to provide remunerated legal services since 1974 – with the Northern Territory legislation being one of the earliest of Acts permitting this to occur. In some jurisdictions, eg ACT, Western Australia and Queensland, there is still no capacity for this to occur.

9 OBJECTIVES OF THE LEGAL PRACTITIONERS (INCORPORATION) ACT

9.1 NEED TO ASSESS THE OBJECTIVES

An NCP Review is required to identify and clarify the objectives of the legislation being reviewed. Over time the objectives of legislation may change. Arguably this is the case with the legislation that regulates the legal profession. Part 7.4 of the Issues Paper sought to identify the current objectives of the legislation.

9.2 DISCUSSION OF OBJECTIVES

The objectives for the regulation of the legal profession are not stated in the *Legal Practitioners Act.* Nor are any objectives stated in the *Legal Practitioners (Incorporation) Act* in respect of the specific regulation of corporations.

Additionally, it is apparent that there are differences of view as to what should be the overall objectives in regulating legal practitioners. Stated as extremes the possible main objectives of the Acts are:

- To ensure that the legal profession can govern itself in a way that is independent of executive government but subject to the judicial arm of government;
- To ensure that the members of the legal profession can provide services competitively; and
- To protect the interests of the various consumers of the services provided by the legal profession (with such consumers including the executive and judicial arms of government).

Issues concerning the objectives of the Acts will be resolved as part of the NCP review of the *Legal Practitioners Act.* However, for the purposes of the review of the *Legal Practitioners (Incorporation) Act*, it is probably sufficient to note that the original objectives of the *Legal Practitioners (Incorporation) Act* were:

1. To ensure that legal practitioners can use a company as the vehicle for conducting the business of providing legal services.
2. To ensure that the above objective does not reduce the professional responsibility of the "owners" of the business. These objectives are derived from an examination of the relevant second reading speeches.

However, it appears that objective 2 is probably not current. There seems to be no particular policy imperative that only legal practitioners should be able to profit from the provision of legal services. Such a limitation should only exist if it is necessary in order to maintain appropriate levels of professional responsibilities. From an analysis of current thinking about the regulation of legal practitioners, the objectives should be the same as above excepting that the focus for the second objective should be that of ensuring that the first objective does not result in a reduction of professional responsibility for legal services that are provided by legal practitioners.

The Review Team finds that it remains a valid objective that legal practitioners professional responsibilities are not reduced by the mere fact that legal practitioners are able to use incorporation as a vehicle for business.

9.3 FINDINGS CONCERNING CURRENT OBJECTIVES OF THE LEGAL PRACTITIONERS (INCORPORATION) ACT

1. To ensure that legal practitioners can use a company as the vehicle for conducting the business of providing legal services.
2. To ensure that the above objective does not reduce professional responsibility for legal services that are provided by legal practitioners.
3. These objectives are current.

10 DISCUSSION AND ASSESSMENT OF ANTI-COMPETITIVE PROVISIONS

10.1 GENERAL ISSUE - CONTROLS OVER BUSINESS ARRANGEMENTS

There are many limitations on the way in which legal practitioners may provide legal services. These limitations come from a number of sources. The reasons for the limitations may no longer be justifiable in terms of the current objectives of the legislation. Part 8.6 of the Issues Paper described the limitations that exist in respect of the form of businesses that may be conducted by legal practitioners.

10.1.1 Legal form for the conduct of a lawyer's businesses in the Northern Territory

Historically, solicitors could form partnerships with other solicitors, but were not permitted to practise in any other kind of business arrangement. This meant that corporations could not provide legal services and that solicitors could not enter into business partnerships with other occupations – such as real estate agents.

Barristers were required to practise as sole practitioners. Issues peculiar to barristers will be considered as part of the review of the *Legal Practitioners Act.* In respect of the *Legal Practitioners (Incorporation) Act* there is nothing in it that distinguishes "barristers" from "solicitors" in terms of the kinds of legal services that can be provided by companies.

In the case of solicitors, the rules were justified on the basis that the unlimited joint and several liability of partnerships ensured that clients could receive compensation from other members of a firm for losses caused by negligence or defalcations. From 1974, solicitors have been permitted to practise in corporate form through 'Practising companies' approved by the Chief Justice under the *Legal Practitioners (Incorporation) Act*. However, that Act ensures that solicitors who control the company are still personally liable for the debts of the company. Additionally, there are severe limitations on who can own the company. Ownership is limited to legal practitioners and/or family members. In 1989 the legislation was amended [55]so that "sole practitioners" could also use the corporate structure.

In summary the restrictions under the *Legal Practitioners (Incorporation) Act* are:

a) requirements for approval of the Chief Justice in order to practise in a corporate form;

b) severe limitations on the extent to which legal practitioners can avoid personal liability for business failures;

c) severe limitations on the extent to which legal practitioners can carry on non-legal practice businesses in conjunction with legal practices; and

d) severe limitations on the extent to which non-lawyers may own legal practices.

Restrictions on the ownership and business structures of professional practices prevent the formation of practices with individuals who may provide non-legal services to both the practice and the public such as accountants, estate planners, conveyancers and management consultants.

The restrictions on non-legal practitioner equity holders or owners may raise a barrier to entry for new firms, or limit expansion by existing firms, by limiting the source of potential funds available to them.

The underlying concern reflected in these restrictions is that the lawyer's adherence to legal professional obligations may be compromised in such structures. In undertaking legal work, a lawyer must obey certain over-riding ethical and professional obligations even where this is to his or her commercial detriment. For example, a lawyer must decline to act where there is an actual or potential conflict of interest, and must refuse to give advice for a known or suspected illegal purpose, notwithstanding any associated loss of opportunity to earn fees. Such obligations may not necessarily apply to non-lawyer owners or partners.

Thus, if by reason of business association, non-lawyers are placed in a position to exert influence over lawyers to maximise commercial return, this could compromise ethics or professional conduct. Examples might include pressure to over-service, to provide a lower quality service, to breach

professional confidence, to make inappropriate use of confidential information, or to act in conflict of interest, in the commercial interests of the business.

As part of other developments it is proposed that there be new, nationally based, conduct rules. These are summarised in the Issues Paper. These Rules do not contain a Rule which so severely restricts the conduct of other businesses. Instead the relevant rule focuses on prohibiting the conduct of "concurrent businesses" where the legal practitioner's involvement would impact or conflict with the practitioner's duty to clients in the conduct of the legal practice. There are various specific duties concerning records and disclosure. The rules appear to be silent concerning the conduct of a 'business directly in association with the legal practice.'

Principle 8 of the COAG Working Party Report stated that flexible business arrangements are an important feature of a more responsive legal services market. In particular, combined practices, such as multi-disciplinary partnerships, may reduce transaction costs. The Trade Practices Commission recommended that rules preventing profit sharing by lawyers with other professionals should be repealed and that multi-disciplinary and incorporated practices should be permitted, including practices involving non-lawyer equity holders or partners. However, the COAG Working Party acknowledged that some jurisdictions had concerns about how incorporated practices would affect limited liability, the costs which this might impose on consumers, and the consumer risks relating to multi-disciplinary partnerships. Both the COAG Working Party and the Trade Practices Commission recommended that sole practice rules of Bar Associations be abolished.[56]

The South Australian NCP Issues Paper noted that the present unlimited liability for lawyers provides an incentive for lawyers to maintain high standards for professional services but the risks involved impose high costs on lawyers and their clients in the form of insurance premiums and monitoring costs. These costs may unduly restrict the supply of legal services which are more exposed to such risks with adverse consequences for the effectiveness and accessibility of the legal system.

10.1.2 Law Society Northern Territory

The Law Society Northern Territory states[57] that the various business restrictions significantly restrict competition and cannot be justified on the basis of any public benefit. In particular the legislation prevents legal practitioners enjoying the benefits of limited liability and capital raising which other providers of legal services enjoy.

The Society suggests that the consumer will be adequately protected provided that the legal practitioners who are employed by corporations are individually subject to the same rules of conduct and have the same qualifications, training and ethical standards as other legal practitioners. A level playing field in this regard along with the associated reduction in overhead expenses and increased capacity for capital raising is likely to result in greater access to legal services at reduced rates in many instances. It will certainly result in increased competition between legal practitioners and other providers of legal services with consequent benefits to the consumer.

The issue of whether to permit legal practitioners to operate within a business that provides professional, occupational or other services other than legal services (ie multi disciplinary practices[58]) is outside the scope of the review of the *Legal Practitioners (Incorporation) Act.* The potential need for conduct rules to govern such situations exists regardless of whether the form of the legal business is corporate, partnership or sole practitioners.[59] That is, even a sole practitioner could either through an employee or in their own right conduct such other professions, occupations or businesses. Nonetheless, the multi disciplinary practice issue is of relevance because the easiest vehicle for such a business is a corporation. There is little doubt that easing of the rules regarding corporations will facilitate multi disciplinary practices.

At this point, in respect of such multi disciplinary practices, it is sufficient to note that they have some strong supporters. For example, the Law Society Northern Territory identifies the major benefit as being that of integrated professional services being available at a single point of sale. It may lead to reduced transaction costs as groups of professions share overheads. Consumers will have greater choice in the range of services available to them. It will also lead to greater competition in the market

as new forms of business compete with older ones.

The Society states that it supports the policy adopted by the Law Council of Australia. [60] This policy is stated as having the following fundamentals:

- Paramountcy must be placed on the maintenance of the ethical obligations and professional responsibilities of legal practitioners;
- There should not be any restriction on the manner in which lawyers choose to practice unless that restriction is in the public interest;
- the interests of the consumer are properly protected;
- at the same time legal professional privilege and client confidentiality must be maintained.

Additionally the Law Society Northern Territory sees, in principle, no difficulty with legal practitioners and others incorporating their practices according to the *Corporations Law*. It adds that such companies may need to be licensed as proposed in Western Australia.[61]

10.1.3 Other comments

10.1.3.1 Queensland Green Paper on the Legal Profession

The Queensland Green Paper summarised submissions on this issue as follows:

> *"There were polarised views on this issue. Practitioners and others favoured a freeing up of business structures. Some favoured incorporation and others considered that the possibility of limited liability partnerships should be explored. They saw the structure as not altering the practitioners' ethical obligations.*
>
> *Consumer groups are critical ...on the basis that there would be too great a conflict between a solicitor's duty to the client and the interest of the equity participants in the relevant entity.*
>
> *The Judges of the (Queensland) Supreme Court have indicated that the removal of the restrictions on business structures should not be permitted to alter practitioners' status as officers of the Court and their obligations concomitant with that status. Legal practitioners, whatever their business structure, must remain amenable to the discipline of their professional bodies and the courts."*[62]

10.1.3.2 Local Practitioner

> *"The Legal Practitioners (Incorporation) Act provides useful protection for consumers in that the solicitors who control the practising company assume personal liability for debts. The requirements for the Chief Justice's approval and the restrictions on participation in the company are also measures designed to uphold the professional responsibility and integrity of the participating legal practitioners. If non-legal practitioners are to be allowed to compete with legal practitioners then the legal practitioners' personal liability should be abolished and the requirements and restrictions referred to should be removed."*[63]

10.2 DISCUSSION

The over regulation of business structures may impose costs on clients and the community by reducing competitive pressures. They may also deny legal practitioners access to alternative organisational structures that may reduce costs and provide a more efficient service to clients. They may also distort national business if the regulatory rules vary within Australia.

Additionally, the *Legal Practitioners Act* is relatively narrow about the types of services that can be exclusively provided by legal practitioners. This means that there are many other occupations and professions that are providing the same kinds of services as many legal practitioners but are not regulated in the same way as legal practitioners who provide additional services (but which services can only be provided by legal practitioners).

10.3 FINDINGS (INCLUDING ALTERNATIVES)

These findings relate only to incorporated legal practitioners. They assume that there is some point in regulating the provision of legal services.[64]

10.3.1 Is there any need to regulate corporations that provide legal services?

"Incorporation" is a legal concept. It bears minimal relationship to the quality of legal services that are provided. Such quality is dependent on a mixture of personal skills, personal ethics and organisational structures. All of these attributes exist[65] independently of the legal framework that supports them.

Accordingly, it seems that the appropriate form of regulation is one that focuses on individual legal practitioners whilst permitting the use of corporations as a vehicle for business.

The main finding is that, subject to compliance with the provisions of the *Legal Practitioners Act,* all corporations should be eligible to provide legal services (with such corporations to be known as "incorporated legal practices"). However, this does not override any other prohibition. The term an "incorporated legal practice" should be defined so that:

(a) it includes a corporation that provides legal services ("work done, or business transacted, in the capacity of a solicitor");

(b) it includes a corporation that may provide other services and conduct any other lawful business (excepting managed investment schemes);

(c) it does not include corporations that are not paid for legal services provided or if the legal services are "in house";

(d) it does not include corporate bodies exempted by regulation from the rules governing incorporated legal practices. Such exempted bodies might include the Law Society, Bar Association, government bodies and certain incorporated community legal centres.

The legislation would make it clear that an incorporated legal practice is protected from the prohibitions in conducting certain legal services (eg creating rights, wills, probate) if the work is done on its behalf by a barrister or solicitor[66].

The new legislation would contain no restrictions on who may own shares in a company that provides legal services and that there be no non *Corporations Act 2001* restrictions on who may be the directors (subject to the requirement for there to be at least one solicitor director).

An issue that has been raised is that of whether there is a need for a licensing, registration, notification or practising certificate requirement for corporations that provide legal services. There is no such licensing, registration or notification requirement in the NSW Act for corporations that provide legal services. However it is relatively standard that the participants in a regulated industry, occupation or profession be "registered". Equally, it often appears to be a waste of time and an unnecessary duplication to insist on the licensing of corporate bodies when the actual focus of the regulation is on individuals.

It is useful for regulators to know who are the members of the regulated occupation or profession. Such knowledge assists communications between the regulated and the regulator. It also makes it simpler for the regulator to supervise. Arguably, all of this information could be obtained in an indirect way because persons who are 'solicitor directors' would, in some way or other, reveal this to the regulatory authority at the time when the practising certificate is renewed. However, even this will be difficult if the solicitor director holds an interstate practising certificate.

The achievement of uniformity will be simpler if there could be acceptance of the need to, at the least, notify the regulatory agency. This is said given the approach in Western Australia, the position advocated by Queensland and the fact that, in the Northern Territory, companies are currently specifically approved (by the Chief Justice).

10.3.1.1 Summary of findings on the need to regulate corporations

There is a need to regulate corporations that provide legal services. However, the regulation should be much the same as the regulation that applies to natural persons who provide legal services. The regulation should focus on the individuals within the corporate legal practitioner who actually provide the services or who supervise the provision of legal services.

10.3.2 What should be the compliance requirements in respect of corporations that provide legal services

This raises the question of what should be the mechanism to ensure that the corporate veil does not interfere with professional responsibilities.

The obvious mechanism is to place the same kind of responsibilities on individuals that currently exist in respect of managing partners in legal businesses. This involves an incorporated legal practice being required to have at least one solicitor director[67]. This achieves much the same outcome as the *Legal Practitioners (Incorporation) Act* but without the burden of restricting ultimate ownership or control of the business or non lawyer activities of the incorporated practice. A solicitor director is a person who:

(i) holds an unrestricted practising certificate;

(ii) is, for the purposes of the Act, generally responsible for the management of the legal services provided in NSW by the corporation;

(iii) commits professional misconduct if he or she does not ensure that there are appropriate management systems for the purposes of the provision of legal services in accordance with professional and other obligations;

(iv) commits professional misconduct if he or she does not promptly report to the Law Society Council contraventions by other directors;

(v) commits professional misconduct if he or she does not promptly report to the Law Society Council professional misconduct committed by employed solicitors;

(vi) commits professional misconduct if he or she does not take all reasonable action available to deal with professional misconduct or unsatisfactory professional conduct by employed solicitors;

(vii) commits professional misconduct if he or she remains as "solicitor director" after the time when it is apparent that the provision of legal services will result in the breach of professional obligations of solicitors.

However, the legislation should permit a period of grace in respect of the operation of the requirement to have a solicitor director during which a corporation providing legal services can replace a solicitor director following a solicitor director ceasing to occupy that role. That period is either that which is prescribed in the Regulations or, in the absence of such a regulation, "a reasonable time"[68]. During such a period there should be an obligation on the incorporated legal practice to ensure that there is an appropriate system to manage what occurs in the absence of a solicitor director. Such a system would be one whereby legal services of the kind that are the sole preserve of legal practitioners would only be provided by legal practitioners and other matters, such as the trust account, would be handled in accordance with the management system put in place by the most recent solicitor director;[69]

There should also be a requirement for corporations providing legal services to notify the Law Society both of the fact that they are doing so and the name or names of the solicitor directors (see below). However, there would be no requirement for any approval.[70]

This structure really is a system of negative licensing and, as such, there should be a capacity to prohibit certain companies from carrying on the business of providing legal services if they in fact are guilty of crimes or if they have a history of employing persons found guilty of professional misconduct or unsatisfactory professional misconduct. The capacity to take some action against the company appears to be advocated in the Western Australian proposals of 2000 and by the chief executive officers of the various State and Territory professional organisations.

The general provisions regulating legal practitioners would apply to incorporated legal practices and those individuals who work in them. These general provisions include:

a) the "solicitors rules" (ie the professional conduct rules) would apply to solicitors who are officers or employees of incorporated legal practices. However, such rules should not prohibit or regulate eligibility of corporations to provide legal services, the provision of other services by the corporation or the conduct of officers or employees in respect of matters that are not connected with the provision of legal services.[71] This point is made because such rules have, in the past, often been the mechanism for ensuring that legal practitioners cannot provide non-legal services in addition to lawyers' services;

b) the general rules regarding advertising are to apply to corporations that provide legal services (with any such advertising being deemed to have been authorised by the solicitor directors);[72]

c) that the professional obligations and professional privileges of legal practitioners are not affected merely because a person provides legal services in the capacity of an officer or employee of a corporation;[73]

d) that the same cost disclosures as apply to individual legal practitioners should also apply to corporations that provide legal services;[74]

e) that corporations that provide legal services be obliged to comply with the requirements of the Act concerning insurance and payments to the Fidelity Fund;[75]

f) that the general rules (as contained in Part VII of the *Legal Practitioners Act*) governing monies received by a solicitor in respect of the provision of legal services apply to corporations that provide legal services[76] (but the Regulations may modify the application of these general rules).

Additionally, there may be special provisions for incorporated legal practices. These include:

a) that the regulations may make provision for or in respect of disclosures concerning matters such as the types of services provided and whether or not those services are covered by insurance or whether they are regulated by the Act[77];

b) that corporations that provide legal services are vicariously liable, in respect of various civil proceedings, for the acts and omissions of officers and employees in much the same way that they would be if they were carrying on business as a partnership;[78]

c) that the relevant regulatory authorities be entitled to be parties to external administration proceedings under the *Corporations Act 2001* so long as those proceedings may affect the provision of legal services and that the Court may, in making any decisions in these proceedings, take account of the interests of clients; [79] and

d) the rules regarding privilege of legal communications apply as if the company was a natural person with the legislation providing that the extent of the privilege will depend on the capacity in which any particular person has made a communication.

10.3.2.1 Summary of findings concerning compliance requirements

As far as possible the same rules should apply to legal practitioners who work in incorporated legal practices as the rules that apply to legal practitioners who work for sole practices or in partnerships or in "practising companies" of the kind recognised by the *Legal Practitioners (Incorporation) Act.* To ensure that the same principles apply there will be a need to have various provisions that amend the law so that it has this kind of application to persons who supply legal services in the name of a corporation.

11 TRADE PRACTICES ACT 1974 (COMMONWEALTH)

11.1 ISSUE

Much of the impetus for questioning the possible anti-competitive effect of provisions of legislation such as the *Legal Practitioners Act* stemmed from views of the former Trade Practices Commission concerning the anti-competitive effect of the legislation. Part 9 of the Issues Paper raises the prospect that some provisions in or under the *Legal Practitioners Act* may offend against the spirit of the *Trade Practices Act 1974.*

11.2 TRADE PRACTICES ISSUE

The review is also required to consider whether any of the provisions of the Act breach the *Trade Practices Act 1974* (Cth).

Part IV of the *Trade Practices Act 1974*, in its application to the Northern Territory, prohibits a person from engaging in certain anti-competitive practices. The Northern Territory Competition Code is in substantially the same terms as Part IV of the *Trade Practices Act 1974.*

Part IV of the *Trade Practices Act 1974* includes the following provisions:

- Section 45: This prohibits the enforcement of exclusionary provisions, whether or not they are anti-competitive, and arrangements which have the effect of substantially lessening competition;
- Section 45A: This deems horizontal price fixing to be anti-competitive, subject to some exceptions; and
- Section 45B: This proscribes covenants that have the effect of substantially lessening competition. In the case of price fixing covenants, these prohibitions are absolute.

Part IV does not apply to activities which are expressly authorised by Northern Territory statutes. A provision can only provide such an authorisation if it states that it is an authorisation for the purposes of section 51 of the *Trade Practices Act 1974.*

11.3 SUBMISSIONS AND OTHER COMMENTS

11.3.1 Law Society Northern Territory

The Law Society Northern Territory states that the *Trade Practices Act 1974* does not provide sufficient regulation of the legal profession. It is still necessary to have appropriate professional conduct rules and a self-regulating profession if consumers are to be adequately protected.

11.4 DISCUSSION

The restrictions on the rights of companies to provide legal services do not appear in any provision of the *Trade Practices Act 1974.*

11.5 FINDINGS (INCLUDING ALTERNATIVES)

There are no Part IV breaches permitted by the *Legal Practitioners (Incorporation) Act.*

12 COSTS AND BENEFITS OF LEGISLATION

12.1 General Costs of Regulation

Regulation must be assessed for the costs it imposes by way of costs associated with administration compliance and enforcement and costs associated with detrimental effects of regulation on competition and hence on economic efficiency.[80] Additionally, there are the costs of maintaining a practising certificate (including the professional indemnity insurance premium). These costs could impact on competition if they are sufficient to dissuade participation in the market for legal services or are substantial and passed on to consumers as an element of the price charged for legal services.

In respect of occupational regulation the costs consist of:

- Entry costs for persons who want to enter the occupational group;
- Compliance costs for those who are regulated;
- Costs to the public particularly in the form of the higher cost of services;
- Costs for government arising from the administration of the regulatory system[81]; and
- Economic costs in terms of distortions on competition.

Restrictions on admission and/or practice could affect the ratio of the supply of practitioners to the demand for practitioners. Variations in this ratio could have an effect on the price of legal services.

Competition policy reviews are only concerned with the provisions that materially restrict competition and not those which impose only insubstantial costs on participants.[82] The Freehills Regulatory Group,[83] identified the following impacts that flow from occupational regulation:

- Point of entry controls which restrict supply - may be a resultant increase in the price of services;
- Inhibition of innovation through lack of service differentiation or lack of technological advancement;
- Conduct prescriptions may limit the way service providers compete in terms of price, service, technology and/or quality;
- Prescriptions on standards and conduct may impede the ability of the occupation to respond to changes in the industry;
- Prescribed training standards may impede the ability of training providers to respond to the changing needs of industry;
- Functional separation on an industry which limits the functions that can be performed by lesser trained persons. This can be a competitive restriction which leads to an increase in the cost of the service; and
- Lack of consistency and transparency in the administration of an Act may result in restrictions on competition - eg where an Act gives the regulator large discretions.

12.1.1 General benefits of regulation

Benefits of occupational regulation may consist of:

- Benefit for the group in having a better image;
- Benefit for the group by improving their competitive position concerning the others who are not regulated with some elements of monopoly;
- Benefit to the public by reducing risks to health and safety;
- Reducing financial risks for members of the public;
- Reducing risks resulting from lack of information; and
- Reducing risks of dishonest or inappropriate behaviour.[84]

13 PUBLIC BENEFIT TEST UNDER THE COMPETITION PRINCIPLES AGREEMENT

The public benefit test identifies the nature and incidence of the costs and benefits to the community of restricting competition. If the net effects from deregulation are negative, there is a net public benefit for retaining the existing arrangements.

It is not possible to quantify in monetary terms the value of these costs and benefits. It is noted that other competition policy reviews for the legal profession in other jurisdictions and similar occupations in and outside the Northern Territory have not attempted such quantification.

13.1 CLAUSE 1(3) OF THE COMPETITION PRINCIPLES AGREEMENT

Additionally, as a tool in the application of clause 5(2) of the Competition Principles Agreement, clause 1(3) of that agreement provides as follows:

> "Without limiting the matters that may be taken into account, where this Agreement calls:
>
> a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
>
> b) for the merits or appropriateness of a particular policy or course of action to be determined; or
>
> c) for an assessment of the most effective means of achieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> d) government legislation and policies relating to ecologically sustainable development;
>
> e) social welfare and equity consideration, including community service obligations;
>
> f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
>
> g) economic and regional development, including employment and investment growth;
>
> h) the interest of consumers generally or of a class of consumers;
>
> i) the competitiveness of Australian businesses; and
>
> j) the efficient allocation of resources."

The Review Team has concluded that the restrictions in the current Act:

(a) may impose significant costs on legal practitioners;

(b) provide few benefits.

This means that there is no justification for retention of the current provisions.

14 DESCRIPTION OF ALTERNATIVE REGULATORY MODELS

Even if the regulatory (licensing) restrictions in the *Legal Practitioners (Incorporation) Act,* can be justified in the public interest as producing a net public benefit, there is an expectation that they will be removed if the policy objectives could be achieved by other less intrusive means.

There are various other general regulatory options that may be available. They include:

1. Self-regulation - This involves the affected occupation formulating rules and codes of conduct, with industry being responsible for enforcement. Such rules and codes of conduct would not be dependent on statute;

2. Quasi-regulation - This involves government supported or endorsed codes of practice. Such codes are possible under Sections 238-243 of the *Consumer Affairs and Fair Trading Act.* In essence, under those provisions, industry has a code of practice endorsed by Government. Breaches of the Code can be dealt with by injunction-like action taken by the Commissioner of Consumer Affairs. Other codes may not have the same legislative support. Such a code will exist under the *Legal Practitioners Act* in respect of the Law Society's professional rules of conduct;

3. Co-regulation - Effectively this is a regulatory system whereby legislatively based controls are given to industry organisations (with some degree of government and/or client/consumer participation). In many ways the *Legal Practitioners Act* reflects the co-regulatory model; and

4. Explicit Government rule based regulation/negative licensing - This involves the legislation containing prescriptive rules with the breaches of the rules constituting offences that can be subject to prosecution in the courts. These rules can include rules that might be that the practitioners have to notify a government agency or industry association of the fact that they are practising the occupation. Equally a rule could be that a person may not practise unless he or she has a particular qualification. One of the penalties for breach could be disqualification.

The Review Team's main conclusion is to the effect that there is no need for legislation along the lines of the *Legal Practitioners (Incorporation) Act* in order to achieve the objectives identified in part 9.3. However, there is a need to make sure that the general regulatory controls that apply to legal practitioners who supply services through partnerships or sole practice also apply despite the fact that they are supplied in the name of a corporation. In substance, all of the suggested amendments simply clarify that the current[85] controls should focus on individuals.

In the earlier body of this Report the Review Team has identified an alternative model based on legislation introduced in New South Wales. That model has been examined to see whether it contains anti-competitive provisions that might need to be justified in NCP terms. The conclusion is that the scheme provides for no anti-competitive provisions over and above those that apply to legal practitioners generally. The scheme merely operates so as to provide for the application of those provisions to corporations. These provisions will themselves be subjected to review in the NCP review of the *Legal Practitioners Act.*

The only provision of the NSW scheme that looks as though it is anti-competitive is the requirement for each incorporated practice have at least one director who is a legal practitioner with an unrestricted practising certificate. However, this is simply a mechanism for ensuring that incorporated practices are subjected to the same core rule that applies to all legal practices – namely that there is someone with sufficient authority to supervise the provision of the professional services provided by the business.

Nonetheless, to the extent that this requirement (or any other of the requirements) might be anti-competitive, the Review Team is of the view that the general approach in the NSW scheme (as modified in Part 2.1.4) represents the greatest net public benefit of the various options that are available.

15 MARKET FAILURE

The Review is required by its terms of reference to identify any issues of market failure which need to be, or are being, addressed by the legislation.

15.1 DISCUSSION

It could be argued that the provisions of the *Legal Practitioners (Incorporation) Act* seek to address market failure arising from information asymmetry, in other words, to avoid the promotion of commercial imperatives over professional integrity which has the potential to impose costs on consumers who have insufficient information to rationally assess the level and quality of services being provided. No other instances of market failure were identified in relation the operation of the *Legal Practitioners (Incorporation) Act.*

The potential market failure referred to above is the reason why the current legislation and the proposed replacement legislation focus on the need for a level of personal responsibility for legal practitioners for the activities for legal practitioner corporations. The main difference between the current legislation and the proposed legislation being a reduction in the level of personal responsibility for the business side of the provision of legal services.

[1] See Part 3 of this Report.

[2] The NSW Act does not contain this obligation

[3] The NSW Act does not contain this power

[4] This is based on section 47E of the NSW Act

[5] This is based on section 47G of the NSW Act

[6] Section 47I of the NSW Aet

[7] NSW Regulation 13K provides that there must be notiee provided prior to or soon after the provision of any legal services, in writing to the client setting out, amongst other things:
(a) a description of the legal services to be provided;
(b) a description of the non-legal services to be provided;
(c) advice that the *Legal Profession Act 1987* regulates the provision of the legal services but does not regulate the provision of the non-legal service. A breach of this regulation is capable of being unsatisfactory professional conduct or professional misconduct.

[8] Section 47H of the NSW Act

[9] Section 47J of the NSW Aet provides that, subject to any variations made by regulations, the general rules (as contained in Part 11 of the NSW Aet). Additionally, Regulation 13P provides that each solicitor director must ensure that there is compliance with the cost disclosure requirements. A breach of this regulation is capable of being unsatisfaetory professional eonduct or professional misconduct.

[10] Section 47M of the NSW Act.

[11] Section 47L of the NSW Act. NSW Regulation 13L provides that monies obtained in respect of the provision of non-legal services are not deposited with trust monies.
Regulation 13M imposes on solicitor directors various duties of ensuring compliance with the Act ion respect of the keeping of accounts. A breach of these regulations is capable of being unsatisfactory professional eonduct or professional misconduct. Regulation 13N ensures that the standard audit provisions apply and that obligations in respect of auditors apply to both the solicitor directors and to the employed solicitors.

[12] Section 47N of the NSW Act

[13] Section 47R of the NSW Act. Regulation 13T provides that the Law Society Council and the Legal Services Commissioner may exercise the powers conferred on ASIC by Division 2 of Part 3 of the *Australian Securities and Investment Commission Act 2001*. These provisions deal with the examination of persons in respect of investigations and information gathering concerning sections 55, 152 and 47P of the NSW Act. These sections deal with general compliance of incorporated practices with the NSW Aet and the investigation of the affairs of legal practitioners. Regulation 13W provides that failure to comply is unsatisfactory professional conduct or professional misconduct by an employed solicitor or by the solicitor directors.

[14] Regulation 13X of the NSW Legal Profession Regulation 1994 prescribes that the period of time is 7 days.

[15] There might also be a need for the regulatory authority to be able to approve someone to act for a specified time as 'solicitor director' notwithstanding that the person may not have the relevant qualifications. This seems more appropriate than the regulatory authority itself taking on the supervisory role.

[16] Section 48E(2) of the NSW Act

[17] This report only deals with the *Legal Practitioners (Incorporation) Act.*

[18] It can, however, be noted that four of the members (Bradshaw, Joyce, Clark and Rischbeth are lawyers from the Government sector). The other members are economists.

[19] *Competition Reform (Northern Territory) Act 1995.*

[20] The material under this heading is a precis of a discussion contained in *National Competition Policy - Review of the Security and Investigation Agents Act 1995,* Issues Paper March 1999, South Australian Offiee of Consumer and Business Affairs, pages 1-2, 4.

[21] See *Guidelines for the Review of Professional Regulation*, page 12.

[22] Victorian Department of Premier and Cabinet Competition Policy Taskforce, (1996) *Guidelines for Review of Legislation restrictions on Competition,* page 2.

[23] The following summary is taken from Victorian Department of Justice, Freehills Regulatory Group, June 1999, *Issues Paper National Competition Policy Review of Private Agents Legislation.*

[24] The NCP Review of the *Legal Practitioners Act* will deal with these principles in more detail

[25] As advised to the Attorney-General for the Northern Territory on 17 December 1998 by the President of the Law Council.

26 August 2000, NCC Webpage www.ncc.gov.au/

27 Noting, however, that the NCC specifically recognised the need for Judicial Independence

28 that is, other than NSW

29 Draft of Third Assessment of progress in implementing NCP, July 2001, National Competition Council

30 See para 1.43 *National Competition Policy Review of the Legal Profession Act 1987*, NSW Attorney General's Department Report, November 1998.

31 Access to Justice Advisory Committee, Access to Justice; an Action Plan, Commonwealth of Australia, 1994, page 123.

32 Information taken from *Legislation Review Compendium* 3rd Edition, December 1999, National Competition Council.

33 This includes restrictions on the types of business structure, form or ownership and size of a business.

34 This would include restricting certain forms of conduct and provisions that inhibit innovation and differentiation of products and services.

35 This would include costs that are greater in the Northern Territory than on competitors outside of the Northern Territory and also include unjustifiable administrative burdens.

36 The table is set out in a form recommended by the Northern Territory Treasury.

37 These terms, "trivial", "minor" and "substantial" are taken to have the following meanings:

Term	Meaning
Trivial	A trivial restriction is one that may look as if it could have some impact on competition but, for all practical purposes, appears to have no actual impact. Such trivial restrictions will not be analysed in detail.
Minor	A minor restriction is one that may have some actual minor impact on competition. Such restrictions will be analysed.
Significant	A substantial restriction is one that may have a major impact on competition. Even if the actual impact appears minimal such restrictions will, nonetheless, be subjected to analysis

39 Freehills Regulatory Group Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 11.

40 The following paragraphs are taken from the 1998 NSW Review.

41 There is no such prohibition. However, provisions such as section 135B(3) (which prohibits foreign lawyers from providing certain advice on Australian law) appear to assume that the provision of advice on the law is a function limited to being performed by legal practitioners

42Gerard Hanlon, 'A Profession in Transition? - Lawyers, Markets and Significant Others', (1997) 60 MLR.

43 Australian Bureau of Statistics, Legal and Accounting Services - Australia 1995-96 (Melbourne, 1997), at page 7.

44 ibid, at page 15.

45 Though there are other professions (eg medical practitioners and veterinary surgeons) and some occupations (eg real estate agents) which also have unique ethical rules.

46 The following outline is taken from the South Australian Issues Paper.

47 John Webster 'Competition Policy and the Professions - The Issues' in Australian Council of Professions *National Competition Policy and the Professions* at page 5.

48 Re QCMA and Defiance Holdings (1976) ATPR 40 at page 12.

49 As from 1 October 2000, see *Legal Practitioners Amendment Act 2000.*

50 The information that forms the basis of this table was provided by the Law Society of the Northern Territory.

51 This incudes firms, government departments, 'other' and "barristers'.

52 This figure includes 36 barristers who live outside of the Northern Territory.

53 A person with a Practising certificate is entitled to be a member of the Law Society, without additional fee.

54 This includes 31 interstate barristers.

55 For technical and statute law revision reasons this amendment took the form of repeal and re-enactment.

56 *National Competition Policy Review of the Legal Profession Act 1987*, NSW Attorney General's Department Report, November 1998.

57 See Law Society Northern Territory Submission, 25 October 2000, pages 16-18

[58] The Law Society Northern Territory gives the following as examples of multi-disciplinary arrangements - legal practitioner/accountant/superannuation & financial consultant, legal practitioner/mediator/psychologist, legal practitioner/town planner, legal practitioner/real estate agent/mortgage broker. In respect of this last example of an arrangement it can be noted that the *Agents Licensing Act* there is a specific prohibition on conveyancing agents acting as mortgage brokers. This provision was enacted because of problems experienced in South Australia and Victoria in the late 1980's and early 1990's with land brokers/lawyers who misused, in the mortgage broking capacity, trust monies. Such problems have in more recent times occurred in Western Australia

[59] There is a potential problem in respect of services that can be legally provided by both legal practitioners and others – for example, advice on the application of the law or conveyancing. In respect of the latter, an incorporated practice might provide conveyancing services via both legal practitioners and conveyancers (ie persons licensed under legislation such as the *Agents Licensing Act*). Such professionals may share "para legal staff". It is not obvious how such an incorporated legal practice might comply with regulation 13K of the NSW Regulations. Even if did attempt to do so by saying "conveyancing services as provided by a solicitor" or "conveyancing services as provided by a licensed conveyancer" it is not obvious that this would be conclusive in terms of claims against fidelity funds and compliance with the various regulatory Acts.
In any event the purpose of requiring the disclosure may not be obvious. Is disclosure some kind of assurance that the work will be provided by or under the supervision of a legal practitioner?
Additionally, there may be some occupations that are incompatible with the provision of certain legal services. For example, it may be impossible for a single entity to act as both real estate agent (for the seller of a property) and as solicitor for the purchaser of the property. However, the solution to these kinds of problem appears to be the capacity to impose conduct rules. The same approach was taken in the Northern Territory in respect of conveyancing agents.

[60] 1998

[61] In late 2000. Current Western Australian position is unknown

[62] Queensland Government Green Paper *Legal Profession Reform* June 1999, page 29

[63] *John Stewart, Ward Keller, Lawyers 24 October 2000*

[64] This assumption will be tested by the NCP review of the *Legal Practitioners Act*. However, the assumption seems safe given the outcome of the NSW Review and the approach taken by the National Competition Council in its 2001 draft assessment concerning the provision of legal services.

[65] Or, as the case may be, don't exist

[66] 48E(2) of the NSW Act

[67] This is based on section 47E of the NSW Act

[68] Regulation 13X prescribes that the period of time is 7 days.

[69] There might also be a need for the regulatory authority to be able to approve someone to act for a specified time as 'solicitor director' notwithstanding that the person may not have the relevant qualifications. This seems more appropriate than the regulatory authority itself taking on the supervisory role.

[70] The NSW Act does not contain this obligation

[71] This is based on section 47G of the NSW Act

[72] section 47I of the NSW Act

[73] Section 47H of the NSW Act

[74] Section 47J of the NSW Act provides that, subject to any variations made by regulations, the general rules (as contained in Part 11 of the NSW Act). Additionally, Regulation 13P provides that each solicitor director must ensure that there is compliance with the cost disclosure requirements. A breach of this regulation is capable of being unsatisfactory professional conduct or professional misconduct.

[75] Section 47K(1) of the NSW Act (in respect of an insurance indemnity fund (These obligations relate to indemnity insurance and a Fund (funded by solicitors payments) that appears to exist to pay for overall insurance coverage and to cover gaps between coverage and liability. The Law Society Council may grant exemptions) (There is no equivalent Fund in the Northern Territory) and Section 47M of the NSW

[76] Section 47L of the NSW Act. NSW Regulation 13L provides that monies obtained in respect of the provision of non-legal services are not deposited with trust monies.
Regulation 13M imposes on solicitor directors various duties of ensuring compliance with the Act ion respect of the keeping of accounts.
A breach of these regulations is capable of being unsatisfactory professional conduct or professional misconduct.
Regulation 13N ensures that the standard audit provisions apply and that obligations in respect of auditors apply to both the solicitor directors and to the employed solicitors.

[77] NSW Regulation 13K provides that there must be notice provided prior to or soon after the provision of any legal services, in writing to the client setting out, amongst other things:
(a) a description of the legal services to be provided;
(b) a description of the non-legal services to be provided;
(c) advice that the *Legal Profession Act 1987* regulates the provision of the legal services but does not regulate the

provision of the non-legal service. A breach of this regulation is capable of being unsatisfactory professional conduct or professional misconduct.

[78] Section 47N of the NSW Act

[79] Section 47R of the NSW Act.
Regulation 13T provides that the Law Society Council and the Legal Services Commissioner may exercise the powers conferred on ASIC by Division 2 of Part 3 of the *Australian Securities and Investment Commission Act 2001*. These provisions deal with the examination of persons in respect of investigations and information gathering concerning sections 55, 152 and 47P of the NSW Act. These sections deal with general compliance of incorporated practices with the NSW Act and the investigation of the affairs of legal practitioners.
Regulation 13W provides that failure to comply is unsatisfactory professional conduct or professional misconduct by an employed solicitor or by the solicitor directors.

[80] Frechills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 12.

[81] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 12.

[82] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 11.

[83] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 11.

[84] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, page 13, Victorian Regulation Review Unit and Law Reform Commission, 1988, *Principles of Occupational Regulation.*

[85] As mentioned above the issue of whether all of the current controls are required is a matter to be resolved as part of the NCP Review of the *Legal Practitioners Act.*