

BALANCE

LAW SOCIETY OF NORTHERN TERRITORY

Edition: July 2003

* Wikiti reconciliation ceremony

* Guantanamo Bay update

* High Court controversy

To MDP or not MDP, err, what was the question?

There are a large number of incorporated practices in the Territory. These exist in a corporate Neverland, being neither companies nor partnerships - and some say retaining the worst aspects of both. Incorporated practices have been, however, useful on a number of "business" aspects.

As the legal profession has suffered the close examination of competition policy they have been seen as a restriction worthy of eradication and these "echidnas" of the corporate world will now be removed from the "protected" list. In their place will be the corporate legal creature acronymically known as MDP.

This creature will be introduced by the MDP Act (really called the *Legal Practitioners Amendment (Incorporated Legal practices and Multi-Disciplinary Partnerships) Act*), which is expected to be enacted in the next couple of months. As a result, the old sort of incorporated legal practices will cease to exist as an option for a new practice.

The dinosaurs of old companies will continue to exist because at the repeal of the old Legal Practitioners (Incorporation) Act, this Act will continue to exist for them, but new practices that wish to incorporate will be required to incorporate as a MDP. That means that you can have a company with not just lawyers as directors, and that means we will all be more competitive.

Lawyers, as you are aware, are known for wanting to work with other professions, or indeed, other people. Nonetheless, we can now all work with other people as fellow directors, the only restriction being that we can't work with struck off lawyers (or persons otherwise disqualified under the *Corporations Act* from being

directors).

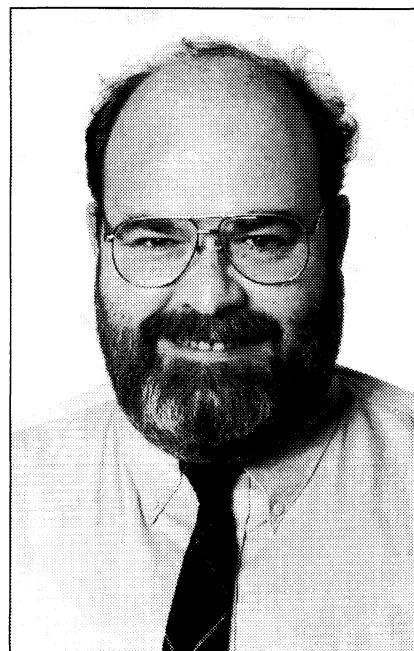
As with the introduction of any new aspect into the legal profession, there have been critics of MDPs. To the traditionalist a MDP means business and business means a departure from the profession of the law.

The Chief Justice of New South Wales, Spigelman C.J. has recently commented "if lawyers are treated as if they are only conducting business, then they will behave 'entrepreneurally' accordingly to an even greater degree than they do now. The ethics of service, which emphasises honesty, fidelity, diligence and professional self-restraint may, progressively, be lost".

His Honour made those comments in the face of a profession that had already installed MDPs as part of the legal framework. We have heard, anecdotally, that there have not been many MDPs established in New South Wales since the passing of enabling legislation a couple of years ago.

Nationally there are moves in Western Australia and Queensland to follow the New South Wales legislation and, as you have seen above, there are similar moves here. All this is part of the thrust toward a national profession. With the prospect that there may be similar legislation in Queensland, the Chief Justice of the Queensland Supreme Court, Paul De Jersey C. J. commented that he was "not necessarily opposed" to practitioners being committed to join MDP's but he conceded that there was a risk of a "pronounced retreat from professionalism into commercialism".

However His Honour went on to say "Provided the solicitor's ethical position is maintained, the proposal would be justified by the prospect of more efficient client service, and it is service for the public which is the essence of professionalism".



Ian Morris, president

There is always the unresolved dichotomy between business and professionalism. No one, of course, ever says that a certain development is forcing lawyers deeper into professionalism, although one could infer from the manner in which the profession has been dealt with in the Competition Review that professionalism, if it is supported by the restrictions that we are familiar with, is a great enemy. Why that should be so is still a mystery to me.

Well, what is the MDP Act all about? It brings us in line with the incorporation provisions in NSW and is pretty close to that which is proposed in the National Practice Bill. The changes are that there will no longer be the need to seek the approval of the Chief Justice to have an incorporated practice, and there will be no restriction on who can control or manage the company. However, when the company performs legal services, ethical obligations will apply to the nominated lawyer or lawyers in control, as will the Legal Practitioners Act, and the Supreme Court will still have the power to disqualify errant MDPs from offering legal services.

As an adjunct to the multi-disciplinary aspect of corporations, the Bill provides for the same aspect to apply

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to partnerships, should anyone wish to continue to have one. I haven't been able to work out when anyone would like to run a MDP Partnership, but I suppose there could be situations where a lawyer might wish to enter into a joint venture with a corporation, or there may be those who see some advantage in unlimited liability and, more importantly, unlimited cross liability.

A corporation becomes a MDP by providing legal services into the Territory other than legal services which the corporation provides to itself (in-house), that are services not required to be provided by a lawyer and that are provided by an employee who is not a lawyer, or for which it does not expect to be paid. In order to trade as a MDP it must notify the Law Society that it intends to operate as an incorporated legal practice and it must have at least one lawyer director.

The lawyer director(s) then becomes the focus of the "professionalism" referred to by both Chief Justices (above) and is responsible for the ethical conduct of the MDP. Legal employees of the MDP have the same professional obligations and privileges that a lawyer has currently.

Those professional obligations and privileges extend to the service provided by the MDP as long as that service is a legal service (and therein lies the rub) and if the MDP breaches a professional rule then either the lawyer director or the employed lawyer or, in some circumstances, the MDP becomes responsible and maybe dealt with by the Law Society or the Supreme Court. There are provisions that impose the same trust account and fidelity fund regime to a MDP.

Probably the biggest change in the proposed MDP Act is the movement away from "partnership liability" for the directors. This means that a lawyer director will now not be responsible for the debts of any other lawyer director or the MDP. However

the MDP is responsible for any damages payable to a client as a result of a dishonest act or omission by a lawyer employed by the MDP and for any action based on failure to account in the course of the provision of legal services by the MDP as if it were in partnership with the lawyer concerned.

From the Law Society's point of view there are some substantial changes to its powers and, in effect, the Law Society is granted various powers that are conferred upon ASIC to regulate, investigate, inspect and review the conduct of our MDPs and in the event that the conduct is found wanting, apply to the Supreme Court for the MDP to be disqualified from offering legal services.

There is no doubt that the powers vested in the Law Society are more substantial in relation to MDPs than they are in respect of the profession at large, indeed they could be described as draconian. These powers were originally provided in the NSW legislation to deal with practitioners trying to abuse the system.

The legislation does not specifically deal with the manner in which an old incorporated practice might become a new incorporated practice and the Law Society has raised this aspect with the Department of Justice. Hopefully some easy system for the transformation from old to new can be sorted out. The Law Society will shortly publish an instruction sheet that will show how this might be done. The catfish will closely watch to see if the butterfly of professionalism de-crystalises into the grub of business. (1)

Professional standards laws give real value to legal rights

Consumer legal rights will be enhanced rather than diminished by national professional standards laws, according to the Law Council of Australia.

"The net outcome of a professional standards approach is that Mum and Dad users of professional services will be in a far stronger position to actually recover economic loss caused by the negligence of a professional than is currently the case," Law Council President, Ron Heinrich, said.

"This is because to join the scheme, a professional will be required to hold profession indemnity insurance at a level which will cover consumer claims," Mr Heinrich said.

"The introduction of professional standards laws which combine mandatory risk management and professional indemnity insurance requirements is a trade off for high level caps on professional liability, and is a pragmatic way to give real meaning to consumers legal rights."

Professional standards legislation allows professional associations to apply to an independent authority to approve a scheme for that profession. Under the scheme, there are consumer protection measures, such as professional education, risk management to prevent accidents, and insurance (or asset) requirements on professionals to meet claims for negligence. There is also a limit on the amount of compensation payable for harm covered by the scheme.

Lawyers under the existing NSW scheme in firms with up to three partners are required to hold \$1.5 million in insurance. This figure rises to \$10 million for firms with ten or more partners. However, the average claim for negligence against a NSW solicitor for professional indemnity

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