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**Peering Over the Ethical Precipice:
Incorporation, Listing and the Ethical
Responsibilities of Law Firms**

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PEERING OVER THE ETHICAL PRECIPICE: INCORPORATION,
LISTING, AND THE ETHICAL RESPONSIBILITIES OF LAW FIRMS

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I. INTRODUCTION

On the 21st of May 2007 the incorporated law firm Slater and Gordon listed on the Australian Securities Exchange with a fully subscribed offer of \$35 million dollars worth of A\$1 shares¹—the first law firm in the world to list.² \$20 million had been allocated to institutional investors. By the close of trading that day the shares were up 40c, and by August 2007, Slaters had announced a profit for the previous year of \$10.7 million, 18% above their forecast. Slater and Gordon was able to list because Australia is the first place in the world where legal practices have been allowed to incorporate under the ordinary corporations law without restriction.³ This will soon occur in the United Kingdom too.⁴

Slater and Gordon's listing has prompted a flutter of commentary – from people outside the profession seeing it as a novelty, and from those within the profession wondering what it means for the future of the profession. This paper argues that it could have profound implications for the future of the profession and its ethics – but not just for the obvious reasons. There are plenty of obvious temptations and pressures implicit in the full incorporation and listing of law firms. But incorporation and listing are also providing a new – and well overdue – opportunity for the profession and its regulators to recognise the ethical responsibilities of law firms – as firms and businesses.

In the past much thinking about lawyers' ethics has ignored the fact that law firms, incorporated or not, are business organisations, and that they can be designed either to undermine or to support ethical behaviour by individual lawyers. Because incorporation and listing make obvious the organisational and commercial aspects of law firms, they are also forcing the profession, its regulators, academics and commentators to recognise that law firms need to develop organisation-level ethical infrastructures that encourage and nurture individual ethical responsibility in the face of corporate and competitive pressures.⁵

¹ All the documentation, history of company announcements and information about Slater and Gordon's share price can be found by searching Slater and Gordon (coded 'SGH') on the Australian Securities Exchange webpage: www.asx.com.au See *Appendix One* for a summary of the events leading up to and following its listing.

² Subsequently a second firm, Integrated Legal Holdings, listed in Australia on 17 August 2007. Previously in March 2004 another Australian law firm, Noyce Legal, spun off and listed its residential mortgage processing division on the ASX as National Lending Services Ltd. Previously the British Murgitroyd Group, a holding company that operates subsidiary intellectual property advisory services, had also publicly listed: see Vanea Burrow with Marc Moncrief, 'Legal Eagles Soar on Day One' *The Age Business Day* (Melbourne) 22 May 2007, 1. See *Appendix One* for a summary of the events leading up to the listing of each of these Australian firms and how they fared up to February 2008.

³ See below nn 11 and 15 and accompanying discussion for details of the relevant legislation in various Australian jurisdictions.

⁴ See below at n 22 and accompanying text for discussion of UK reforms that will allow this to happen.

⁵ The term, "ethical infrastructure", is further explained below at discussion accompanying n 96 and following. The term was coined by Ted Schneyer, 'A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms' (1998) 39 *South Texas Law Review* 245. See also

To illustrate and explore these arguments, this paper examines the experience of Slater and Gordon – and later one of its main foes in litigation – more closely.

First, the paper briefly sets out the logic behind Slater and Gordon’s listing, and some background information of the extent to which Australian law firms are taking advantage of the opportunity of full incorporation – and why. It also explains the main two ethical dangers that law firms that incorporate and list are likely to face.

Second, the paper uses the story of one of Slater and Gordon’s most high profile pieces of litigation – the McCabe tobacco litigation – to show that the ethical dangers that commentators worry *will* come with incorporation and listing are a formalisation and accentuation of *existing* ethical pressures on legal practice, rather than a fundamental change in those pressures.⁶

Third, the paper argues that there is an opportunity to improve ethical practice in law firms that *could* come with the advent of incorporation and listing. The legislative framework for full incorporation of law firms in Australia requires legal practices to adopt a rudimentary ‘ethical infrastructure’ as a condition of incorporation, and Slater and Gordon voluntarily went well beyond these requirements for ethical infrastructure as part of their process of listing. The third and final part of this paper critically assesses the potential of Australia’s governance framework for ‘meta-regulating’ law firms’ ethical infrastructure to address the organisational and business aspects of law practice.

Ted Schneyer, ‘Professional Discipline for Law Firms’ (1991) 77 *Cornell Law Review* 1. It was further developed by Elizabeth Chambliss and David B. Wilkins, ‘A New Framework for Law Firm Discipline’ (2003) 16 *Georgetown Journal of Legal Ethics* 335; and Elizabeth Chambliss and David B. Wilkins, ‘Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting’ (2002) 30 *Hofstra Law Review* 691. For a widening of the term and application to Australia law firms, see C. Parker, A. Evans, L. Haller, S. LeMire & R. Mortensen, ‘The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour’, forthcoming (2008), *University of New South Wales Law Journal*. For this broader conception see also Milton C. Regan Jr, *Eat What You Kill: The Fall of a Wall Street Lawyer* (2004) 358-361.

⁶ For a similar argument see Elizabeth Chambliss, ‘The Nirvana Fallacy in Law Firm Regulation Debates’ (2005) XXXIII *Fordham Urban Law Journal* 119.

II. THE ETHICAL PRECIPICE: THE DANGERS OF INCORPORATION AND LISTING

The Listing of Slater and Gordon

Slater and Gordon is one of the most recognisable names in the legal industry in Australia – its prospectus claims 80% brand recognition in its home state of Victoria and 60% nationally – mainly because of its involvement in many of the most high profile class actions and personal injuries test cases in Australia, its relationship with unions, and its advertising of no-win no-fee plaintiff litigation.⁷

It is a business success in a market for personal injuries in Australia that is highly fragmented and generally considered to have shrunk in recent years due to legislative and insurance changes restricting liability and putting onerous obligations on lawyers to ensure that they only take cases with reasonable prospects of success.⁸ Slater and Gordon has about 10% of the national market and is increasing its market share, geographical reach – and profitability.⁹ Moreover, in Australia lawyers are not allowed to recover contingency fees:¹⁰ Profits of the magnitude available in North America are not available in personal injuries in Australia.

Slater and Gordon incorporated in 2001 soon after New South Wales (Australia's most populous state) became the first jurisdiction in the world to allow unrestricted incorporation under the ordinary companies law for legal practices.¹¹ When they took the next step in 2007 and listed on the Australian Securities Exchange, Slater and Gordon was carrying at least A\$15 million in short term debt.¹² Presumably they listed because they wanted to grow off a

⁷ Slater and Gordon Limited, *Prospectus*, 13 April 200, 25. (Prospectus available at http://www.slatergordon.com.au/pages/reports_presentations.aspx - visited 27 February 2008.)

⁸ See Stuart Clarke, Colin Loveday & Greg Williams, 'The Future for Product Liability Law in Australia' (2005) 16 *Australian Product Liability Reporter* 129; Estelle Pearson, 'Insurer Profitability and the Impact of Tort Reform' (2005) 70 *Precedent* 40; JJ Spigelman, 'Tort Law Reform: An Overview' (2006) 14 *Tort Law Review* 5; EW Wright, 'National Trends in Personal Injury Litigation: Before and After Ipp' (August, 2006) *Brief* 6.

⁹ Slater and Gordon Limited, *Prospectus*, above n 7, 24.

¹⁰ *Model Laws* cl 1025. In Australia lawyers are allowed to enter into 'conditional costs agreements' with clients in which the lawyer can only recover a fee from the client if the client is successful. Most conditional costs agreements allow the lawyer to charge an 'uplift' on their normal fee if the client – up to 25% of their normal fee in addition to the normal fee (*Model Laws* cl 1024). (See n15 below for an explanation of the *Model Laws*.)

¹¹ *Legal Profession Act 1987* (NSW) ss 47B-47T (now *Legal Profession Act 2004* (NSW) Part 2.6, ss 135-164). These sections were originally inserted by the *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* and commenced on 1 July 2001. Incorporation of legal practices was allowed in NSW as a direct result of the 1998 NSW national competition policy review. See Attorney-General's Department, *National Competition Review of the Legal Profession Act 1987: Final Report* (1998) <http://www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncpf_toc> at 17 November 2004.

¹² According to the Slater and Gordon *Prospectus*, above n 7, 44, \$15 million of the capital raised was to be used to 'reduce' existing debt. According to the balance sheet in the *Prospectus* (at 46) Slater and Gordon had approximately \$15 million in short term borrowings and \$6 million in long term borrowings at the end of 2006. The notes to the balance sheet show that there was in fact an additional \$14 million in debt that was retired some time between December 2006 and April 2007.

solid financial base, did not want to continue to rely on debt to fund their growth, and wanted to provide a sustainable future for the firm even when the existent partners sought to leave the firm and wanted to take their capital with them. It therefore sought external investment through the securities exchange in order to acquire other firms, fund litigation, advertise its services, and acquire shares back from the partners and lawyers who were the original shareholders in the incorporated firm.¹³ In other words, they did something that thousands and thousands of businesses have done over the last 300 years.¹⁴ *Appendix One* provides a brief summary of the events leading up to and following the listing of Slater and Gordon and the two other legal businesses that have listed on the Australian Securities Exchange.

For many commentators on ethics in the profession this sort of ‘business’ thinking in a law firm is a dire threat. If other law firms follow Slater and Gordon’s lead in listing, or even just incorporating, it will be the final step that tips the noble profession of the law over the ethical precipice into the grubby, greedy world of business.

Extent of Incorporation and Listing of Legal Practices in Australia

In Australia the full incorporation of law firms – under the ordinary company law and without any restrictions on who may own shares or what type of business can be carried on – is now allowed in six of Australian’s eight states and territories, and will probably be allowed shortly in the other two.¹⁵ (See *Table 1* for a state-by-state breakdown of when incorporation was first allowed and the number of incorporated legal practices, where that information is available.)

¹³ See the Slater and Gordon *Prospectus*, above n 7, and also Bruce MacEwen’s interview with Andrew Grech (Managing Director of Slater and Gordon) (August 2007) available at <http://www.bmacewen.com/blog/archives/2007/08> (visited at 6 March 2008). Contrast the more sceptical view of some commentators that the Slater and Gordon float was just a way to deal with the firm’s debt and allow the most senior partners to get their money out of the firm: Carolyn Batt, ‘Law Firm’s Float Raises Cash and Eyebrows’ *The West Australian* (Perth) 14 April 2007, 70.

¹⁴ Charles R. Geisst, *Wall Street: A History* (Oxford University Press, New York, 1997).

¹⁵ See the *National Legal Profession Model Bill* (‘*Model Laws*’) Part 13. Available at <<http://www.lawcouncil.asn.au/natpractice/currentstatus.html>> at 1 June 2004. (The *Model Laws* were agreed by the Attorneys General of the states and territories of Australia, as well as the Law Council of Australia, the peak organization representing Australian legal professional associations and lawyers. The bill sets out core model provisions for state legislation governing the legal profession and most states have now implemented legislation in line with the *Model Laws*.) The provisions allowing full incorporation of legal practices in the states and territories that allow it is as follows: *Legal Profession Act* 2006 (ACT) Part 2.6 (commenced 01/07/06); *Legal Profession Act* 2004 (NSW) Part 2.6, ss 135-164 (commenced 01/10/05); *Legal Practitioners Act* 2006 (NT) Part 2.6 (commenced 31/03/07), replacing *Legal Practitioners Amendment (Incorporated Legal Practitioners & Multidisciplinary Partnerships) Act* 2003 (NT), commenced 01/05/04); *Legal Profession Act* 2004 (Vic) Part 2.7, ss 2.7.4 to 2.7.35 (commenced 12/12/05) *Legal Practice Act* 2003 (WA) ss 45-74 (commenced 01/01/04); *Legal Profession Act* 2007 (Qld) Part 2.7 (provisions were originally inserted in 2003 but only came into effect when the 2007 Act commenced on 01/07/07). Similar legislation is in progress in Tasmania and SA: *Legal Profession Act* 2007 (Tas) Part 2.5 (Not yet proclaimed, received assent 15/08/07); *Legal Profession Bill* 2007 (SA) Part 5 (third reading speech 26/02/08). The rest of this paper will refer

Table 1: Year in Which Incorporation First Allowed, and Number and Proportion of Incorporated Legal Practices by State and Territory

State	Date Full Incorporation Allowed	Number of Incorporated Legal Practices	ILPs as % of Total Legal Practices (Total in Brackets)
New South Wales	July 2001	800 (March 2008) ¹⁶	18% (4341) ¹⁷
Northern Territory	May 2004	Not known	Not known (approx. 56) ¹⁸
Western Australia	June 2004	173 (Feb 2007)	Approx. 27% (approx. 649)
Victoria	December 2004	519 (Feb. 2007)	Approx. 21% (approx. 2430)
Australian Capital Territory	July 2006	Not known	Not known (approx. 133)
Queensland	July 2007	91 (& rapidly increasing) (31 March 2008) ¹⁹	7% (& rapidly increasing) (1294) ²⁰
Tasmania	Legislation passed in 2007 but not yet in effect (March 2008)	NA	NA (approx. 116)
South Australia	Reforms in progress (March 2008)	NA	NA (approx. 413)

Other common law jurisdictions, including Canada, New Zealand and the US, currently allow only limited liability partnerships or very restricted forms of incorporation, not the full, unrestricted incorporation allowed now in Australia.²¹ But legislation in the UK will soon

to the relevant provisions in the *Model Laws* where relevant, rather than each of the state laws. For further discussion of these provisions, see Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 *University of Queensland Law Journal* 347, Jeff Shaw, 'Incorporation of Legal Practices Under the Corporations Law' (1999) 37 *Law Society Journal* 66.

¹⁶ Figure at 1 March 2008, from Law Society of NSW.

¹⁷ Figure at 2 May 2007, obtained from Law Society of NSW.

¹⁸ Approximate totals for ACT, NT, SA, WA, Tas and Vic are based on 2002 figures reported in Australian Bureau of Statistics (ABS), *Legal Practices, 8667.0, 2001-2* (Australian Bureau of Statistics, Canberra) 20. The actual numbers of practices in each state/territory are probably greater.

¹⁹ Figure at 31 March 2008, obtained from Qld Legal Services Commissioner.

²⁰ Figure at 30 June 2007, obtained from Qld Legal Services Commissioner.

²¹ Eg *Lawyers and Conveyancers Act 2006* (NZ) ss 16 – 17. Previously in Australia, several States (New South Wales, South Australia, Tasmania and Victoria) allowed incorporation of legal practices in the early 1990s, but the legislation preserved unlimited liability for all members of the corporation (except non-voting shareholders), stated that all directors had to be legal practitioners and prohibited non-lawyer members (except for relatives and persons approved by a regulatory body - these could only become non-voting shareholders).

allow UK law firms to incorporate without restriction similar to in Australia.²² Some commentators have suggested that once full incorporation is allowed in the UK, there will be very heavy pressure on US jurisdictions to allow incorporation so that US firms can compete with the cashed up ‘Magic Circle’ firms from the UK in Asia.²³ Other jurisdictions too may well follow the UK’s lead on full incorporation and listing of law firms.²⁴ The Australian experience gives us the best taste of what impact this might have on the legal profession.

In New South Wales, where incorporation has been allowed since 2001, there has been a steady stream of firms incorporating year by year (as shown in *Table 2*) — and almost 20% of the firms in that state have now incorporated. In Western Australia the proportion is similarly high, and in Queensland, where incorporation was only allowed in the middle of 2007, the proportion is rapidly rising and will probably be around 10% by the end of the first year of incorporation. Only two firms (Slater and Gordon, and Integrated Legal Holdings) have listed so far.²⁵

²² *Legal Services Act* UK (2007). For a brief summary of the impact of the Act in relation to incorporation of legal practices and multidisciplinary practice see Solicitors Regulatory Authority, *Legal Services Act: New Forms of Practice and Regulation* (November 2007). Note that according to this guide the new Act will apply some sort of firm-based regulation to all law firms, not just incorporated legal practices. However incorporated legal practices with non-lawyers and external investment (ie ‘alternative business structures’) are not likely to be allowed until 2011 or 2012 because first a new regulator, the Legal Services Board, must be set up. ‘Legal disciplinary practices’ (with a minority of non-lawyers) will be allowed around the end of 2008.

²³ See Chris Mondics, ‘Buy Stock in a Law Firm? There’s Talk Again’ *The Philadelphia Inquirer* 12 August 2007, D01. On the other hand there has also been reported scepticism about whether the very big City law firms in the UK would find any advantage in incorporation and listing: see Joshua Rozenberg, ‘It’s Tempting, But the Magic Circle is Unlikely to go Public’ *The Evening Standard* (London) 16 October 2007, B30; Alex Spence and James Rossiter, ‘Investors Give Thumbs Up to World’s First Law Firm Flotation’ *The Times* (London) 21 May 2007 (online edition) (both reporting that the biggest firms have other ways of getting cash and are not keen to list and that listing is likely to be more attractive to medium-sized, low-margin claimants’ firms). See also Charlotte Edmond, ‘Private Equity Firm First to Openly Target Legal Services in U.K.’ *Legal Week* 6 March 2008 (for a report that Lyceum Capital, a private equity house, is targeting mid-tier UK law firms that want to expand and those doing bulk work ahead of 2011 when incorporation and outside investment in law firms is allowed).

²⁴ For example, see discussion of law firms expressing an interest in listing in Singapore in Wee Li-en, ‘Major Law Firms Express Interest in Going Public; UK’s Upper House Passes Bill to let British Law Firms List on Stock Exchange’ *The Business Times Singapore* 29 October 2007 (online edition).

²⁵ See above notes 1 & 2. A third firm, Sparke Helmore, the twelfth largest firm in Australia (by number of lawyers) is reportedly looking into incorporation and listing: James Eyers & Rachel Nickless, ‘Hearsay’, *The Australian Financial Review* (Sydney), 14 March 2008, 61.

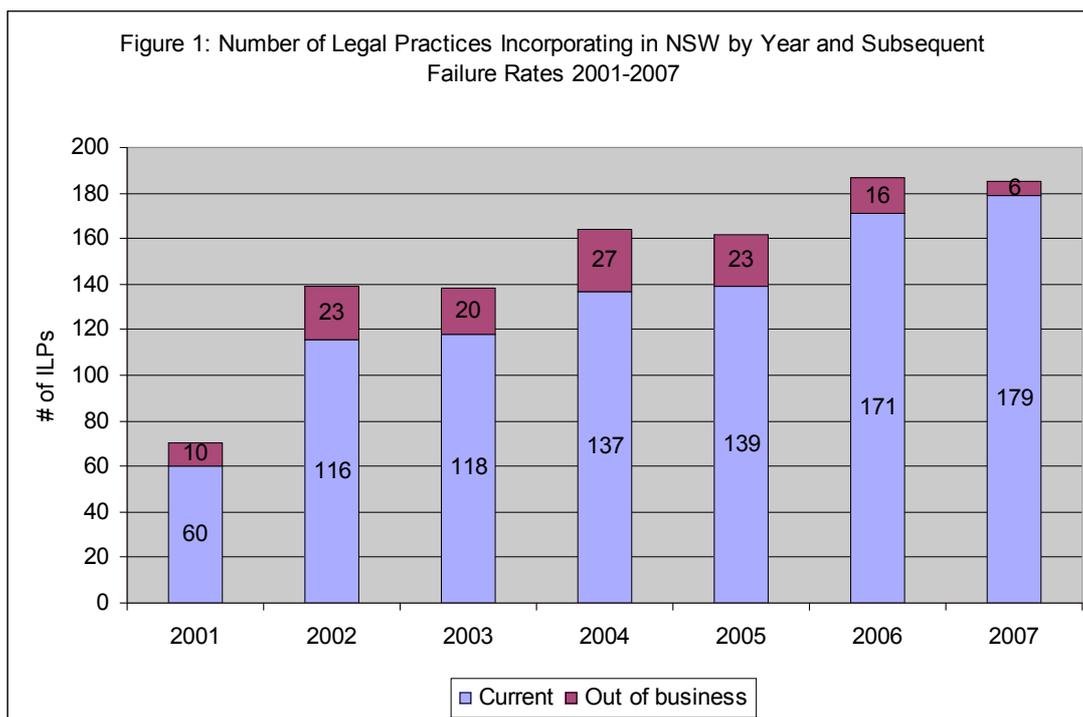


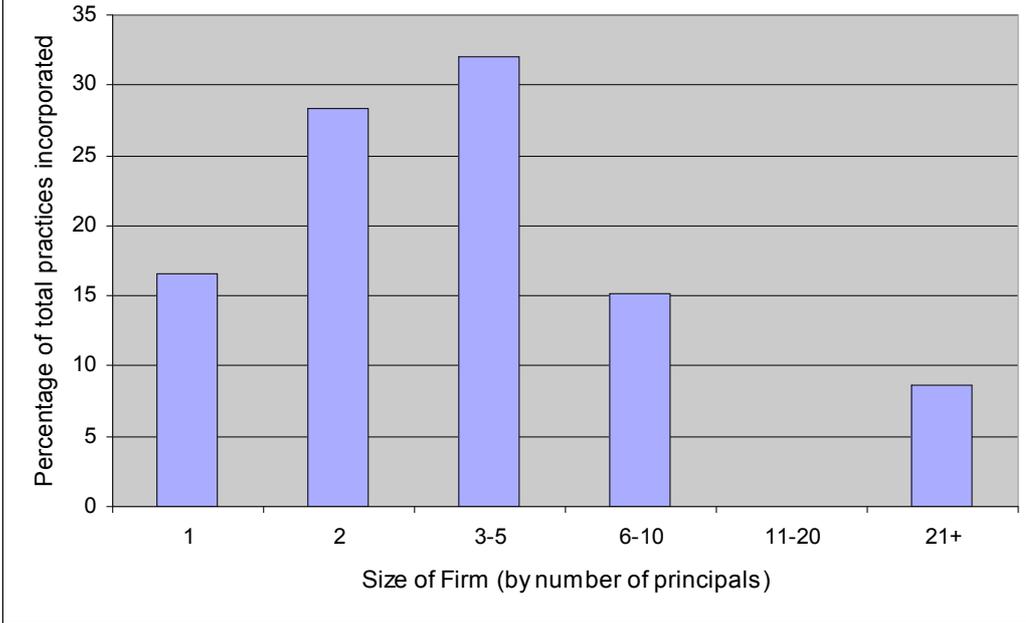
Table 2: Proportion of NSW Practices Incorporated by Size (Number of Principals) 2008²⁶

Number of principals ²⁷	Number of ILPs	ILPs as a Percentage of all Practices (Total Number of Practices)
1	612	17% (3684)
2	113	28% (398)
3-5	55	32% (172)
6-10	8	15% (53)
11-20	0	0% (13)
21+	2	9% (23)
Total	790	18% (4343)

²⁶ Based on information about ILPs at 1 March 2008 and total practices at 1 May 2007 supplied by Law Society of NSW. Does not include 6 ILPs with 0 principals.

²⁷ Counted as number of partners in partnership or in incorporated legal practice number of solicitors holding principal practising certificate.

Figure 2: Proportion of NSW Practices Incorporated by Size



The vast majority of practices in Australia are still small practices with a single principal (with or without employee lawyers) – and the vast majority of incorporated legal practices are too.²⁸ Many single principal practices are incorporating, but the figures from New South Wales (see *Table 2* and *Figure 2*) show that, proportionately, incorporation is most popular with medium sized practices (3-20 principals), and two-principal practices are also more likely to incorporate than single principal practices. The pattern seems to be repeated in Queensland although, since incorporation was allowed much later than in New South Wales, a much lesser proportion of all practices have incorporated to date. Just over 50% of the 43 Queensland ILPs for which we have figures employ 5 or less people (not just solicitors) overall; 37% employ 6-20; and 12% employ 21 or more. (This data from other jurisdictions is not currently available.)

The very largest practices (20+ principals) on the whole have not yet incorporated. The main reason is that it is only as of 2007 that the four largest states all allowed incorporation. Previously it would have been inconvenient for the largest, multi-state, Australian law firms to incorporate in some states and not others. For larger firms there may also be significant capital gains tax liabilities to be paid on the transfer of the business to the newly incorporated entity that provide a disincentive against incorporation.²⁹ Reportedly many larger firms are waiting for clarification from the Australian Tax Office about how goodwill will be valued and taxed in relation to capital gains tax rules before seriously considering whether to incorporate, and potentially list.³⁰ It has also been widely reported that very large firms see the public reporting requirements that would come with incorporation³¹, and even more so with listing,³² as very unattractive.

²⁸ The largest 5 law firms in Australia each have around 200 principals and 800-1000 lawyers (including principals) nationally, with numbers dropping rapidly after that. Only 100 or less firms in Australia have ten or more principals: See ABS, Legal Practices, above n 18, 21. (Our own data collated from the various state bodies about the largest firms in 2007 confirms that this is still the case.) According to the ABS in 2002 about 70% of Australian solicitors' firms had single principals/proprietors. Note that the figures in Table 2 and following give only numbers of principals and lawyers in the relevant state office of national firms.

²⁹ There are exemptions available for smaller businesses. A 2005 newspaper article reported that a number of the largest firms were considering incorporating at that time Marcus Priest, 'Lawyers Inc to Beat Taxman' *The Australian Financial Review* 29 June 2005, 1, 4.

³⁰ Eyers and Nickless, 'Hearsay' above n 25.

³¹ Incorporated firms with any two of \$10 million or more annual turnover; \$5 million or more in assets; or 50 or more employees are required to file annual financial statements under Australian company law. Note that all of the top 25 firms in Australia would satisfy at least the first and last of these criteria. These would need to be in accordance with Australian Accounting Standards, meaning a profit and loss statement would be required.

³² Managing Director of Minter Ellison, Guy Templeton: 'Minter Ellison is a large firms, and we just can't see a reason to list. We simply don't need the capital and we want to share our profits only with those that make a difference to serving our clients and that's our legal partners. We could certainly live without the onus of stock market regulation and the need to report to the stock market quarterly.' Transcript of ABC Radio National *The World Today*, Legal Firm Lists on Stock Market, Monday 21 May 2007 (available via <http://www.abc.net.au>).

Our research team's interviews with some of the largest clients of large law firms in Australia have found that most of these clients do not care whether their law firm is incorporated (and/or listed) or not, as long as they have adequate insurance liability!³³ So that worries about what clients will think is unlikely to be a reason for large law firms not to incorporate and list – although perhaps some are nervous about what they think clients will think regardless of reality.

A review of the 'trade' literature³⁴ on the pro's and cons of legal practices incorporating in Australia suggests that those firms that do incorporate are probably doing so primarily in the belief that they will be able to organise their finances so that most of their income can be taxed at the company rate - which is lower than the personal rate that applies to partners' income.³⁵ Some probably also see incorporation as a good way of managing retirement and succession since it makes the legal practice easier to transfer to younger colleagues or sell to another practice. Note however that in early 2006 it was reported that one third of the original 300 firms that had incorporated had either collapsed or wound back their incorporation.³⁶ Figure One shows the number of firms that failed or unincorporated out of each year's cohort of firms that incorporated, according to Law Society of NSW records (as at March 2008). Less than 20% of those that incorporated in the first three years failed or closed according to these figure. But a larger number changed their name. We do not have figures on how many of all practices go out of business each year to compare. Also it is important to note that the unsuccessful ILPs stay in business for 1.5 to 2 years on average, so firms commencing in 2006 and 2007 have not had enough time to go out of business yet compared with those commencing earlier.

³³ Interviews conducted by Suzanne LeMire and Christine Parker in March and April 2008 to be written up and presented at the International Legal Ethics Conference, Gold Coast, July 2008.

³⁴ We reviewed all the articles in legal professional journals and legal affairs sections of *The Australian* and *Australian Financial Review* on incorporation between 1999 and the end of 2007. Major pieces providing advice to legal practitioners on issues to consider in deciding whether to incorporate or not include: Nicola Berkovic, 'Company Structure can be Poison' and 'Is Public Listing Worth the Bother?' *The Australian* (Sydney) 31 August 2007, 37; Kellie Harpley, 'Practice Simplified' *Lawyers Weekly Magazine*, 24 March 2006 (online edition); Keith Harvey & Anna Tang, 'Making it your Business' (2005) 79 *Law Institute Journal* 62; Philip King, 'Should your Firm Incorporate?' (March 2001) *Law Society Journal* 44; Julie Lewis, 'In Good Company' (2007) 45(2) *Law Society Journal* 28; Julie Lewis, 'Board Games: NSW Law Firms Embrace Incorporation Part 1' (2007) 29(4) *Law Society of SA Bulletin* 8 and 'Part 2' (2007) 29(5) *Law Society of SA Bulletin* 12; Megan Mahon, 'The Role of ILPs, Service Trusts and Other Entities' (December 2005) Proctor 19; Mark Northeast, 'Practice Structuring' (2007) 81(11) *Law Institute Journal* 35; Richard Vincent, 'What are the Tax Effects of Incorporating Legal Practices?' and 'What are the Commercial and Corporate Law Effects of Incorporating Legal Practices?' (July 2002) *Law Society Journal* 44; Maciej Wasilewicz and George Beaton, 'Undressing Incorporation' (2006) 80(4) *Law Institute Journal* 40. Our review of these articles is the basis for the statements in the following paragraphs except as otherwise noted.

³⁵ It can also provide tax advantages by distributing income to non-lawyer employees or relatives.

³⁶ Office of the Legal Services Commissioner, Annual Report 2004-2005 (Sydney) 21; Marcus Priest, 'Clients Laud Law Firms Inc but Many Early Adopters Sink' (6 January 2006) *Australian Financial Review* (Sydney) 3.

Full incorporation of legal practices was introduced in New South Wales, and later in the other states and territories because it was recommended as part of Australia's National Competition Policy Review process.³⁷ It was not introduced so that firms could simply minimise their tax or organise a smooth retirement. The hope was that firms would use incorporation to make themselves more competitive and efficient, and that this would strengthen the Australian economy and improve access to justice.³⁸ It was seen as 'a key means of enabling legal practices to raise capital for expansion to facilitate competition in domestic and international markets' and also 'allow legal practitioners to compete with other service providers, such as banks and retailers.' In particular, it was intended to encourage multidisciplinary practices that would be 'one stop shops' that increased 'competition and efficiency, thereby reducing costs for consumers.'³⁹

Allowing full incorporation of legal practices was supported by at least parts of the profession because in the late 1990s the larger law firms in Australia were worried about the increasing amount of legal work being done by the big accounting firms, and to a lesser extent wanted to be able to limit their liability for their partners' defaults.⁴⁰

Some of the main ways in which incorporation is intended to give legal practices the opportunity to become more efficient and competitive are:

- Through streamlining governance and management arrangements by providing the possibility of a corporate management structure rather than the more unwieldy partnership structure (eg differentiating between the duties and powers of partners and management and formalising decision-making powers in an appropriately accountable

³⁷ The Australian federal government's National Competition Policy Review process required all states and territories to review all legislation and practices for competition implications. Regulation of the professions, especially the legal profession was a particular priority for competition reform: see F. Hilmer, M. Rayner, & G. Taperell, *National Competition Policy (The Hilmer Report)* (Canberra, Australian Government Publishing Service, 1993). The regime introduced in NSW to allow ILPs discussed below was introduced as a direct result of the 1998 NSW *National Competition Policy Review of the Legal Profession Act 1987*. See also Trade Practices Commission, *Study of the Professions: Legal*, Final Report, March 1994. For a discussion of the application of competition policy to the Australian legal profession see E. Shinnick, F. Bruinsma, & C. Parker "Aspects of regulatory reform in the legal profession: Australia, Ireland and the Netherlands" *International Journal of the Legal Profession*, 10(3), 2003, 237.

³⁸ For the competition agenda behind allowing incorporation of law firms see *Legal Profession Amendment (Incorporated Legal Practices) Bill Second Reading*, NSW Legislative Council, Hansard, 12 October 2000, p9152: 'The bill will allow incorporated companies to expand and compete with other occupational business. The flexible corporate structure will allow Australia to become the legal hub for the provision of legal services in the Asia-Pacific region.' On the potential for competition reforms to the legal profession to benefit consumers see Robert Evans and Michael Trebilcock (ed), *Lawyers and the Consumer Interest* (Butterworths, Toronto, 1982)

³⁹ Quotations from Victorian Attorney General Robert Hull's *Second Reading Speech – Legal Profession Bill*, Victorian Hansard, 16 November 2004, 1546.

⁴⁰ Chris Merritt, 'Lawyers look at survival plan' *The Australian Financial Review* (Sydney) 3 February 1997 5 (early report on discussions in the Law Society of NSW to support allowing incorporated legal practices).

board of directors and corporate officers).⁴¹ This may be especially attractive for larger firms;

- Making it easier to re-invest profits in the business rather than partners taking the profits out at the end of each year;
- Giving the opportunity to reward both lawyer and non-lawyer staff with employee share ownership plans, rather than lawyers only having the opportunity of partnership;
- The corporate governance structure and non-lawyer ownership of the firm would provide a more solid basis for multi-disciplinary practice with the different aspects of the firm integrated in one structure rather than operating through less formal alliances or with non-lawyers being minor players compared to lawyers;⁴²
- The corporate form is also a more flexible way of dealing with admission and resignation of partners, since ownership interests in the firm are easily transferred and the firm has its own continuity of existence not dependent on its individual members. This makes it easier to enter into contracts and other commercial relationships including groupings of practices (eg through franchise type arrangements or corporate groups).⁴³

The most significant way in which incorporation can assist with competitiveness is that with full incorporation comes the possibility of public fundraising. It has been suggested that on the whole the business of legal practice is not that capital-intensive and that most legal practices operate satisfactorily with assets worth less than one year's income and borrowing

⁴¹ See John Story, 'Incorporation of Legal Practices' (November 1999) *Proctor* 16. Mayson suggests that there is a natural limit on the size of a fully effective partnership because of the need to monitor against the risks of moral opportunism and moral hazard and the need for the partnership to be built on trust and susceptibility to peer pressure. Note however that he also says that he prefers partnership for legal practice and does not see why a partnership could not have the management maturity to remain a partnership without needing to incorporate: Stephen Mayson, *Making Sense of Law Firms: Strategy, Structure and Ownership* (1997) 138-9.

⁴² The first justification given for allowing full incorporation in the NSW Second Reading Speech, above n 38, was that although practice in multidisciplinary practices was already allowed, it had 'not widely occurred because solicitor companies have unlimited liability and restrictions on membership prevent fundraising from the public.' Firms which have in the past formed informal alliances with financial, technical or other providers, can properly integrate those businesses using the corporate structure. See also John Quinn, 'Multidisciplinary Legal Services and Preventive Regulation' in Robert Evans and Michael Trebilcock (eds), *Lawyers and the Consumer Interest* (1982) 329 (on the benefits to consumers of multi-disciplinary practice); Christine Parker, *Just Lawyers* (Oxford University Press, Oxford, 1999) 38-41. [More recent references??] Contrast Maciej Wasilewicz and George Beaton, 'Undressing Incorporation' (2006) *Law Institute Journal* 80(4), 40 (arguing that the corporate structure of a firm is much less important than good governance and culture and that the supposed advantages of incorporation in creating value from human capital can be realised just as easily within partnerships.)

⁴³ According to 'Hearsay' *Australian Financial Review* (Sydney), 16 April 2004, 57, in NSW 'One medium-sized law firm has now incorporated its Sydney office, and then franchised its regional legal practices. Another legal practice incorporated and created several subsidiary companies.' For general discussion and analysis of the advantages of incorporation, see Philip King, 'Should Your Firm Incorporate?' (March 2001) *Law Society Journal* (2001) 44, and Law Society of Western Australia, *Position Paper: Flexible Practice Structures for Lawyers, April 1999*, (1999) <http://www.lawsocietywa.asn.au/public_discuss.html> at 7 June 2004.

as required – implying that incorporation and listing will make little difference.⁴⁴ However there are some areas of practice, such as personal injuries, where the ability to raise capital from the public might be very important in building a competitive, efficient business – because of the upfront expenses involved in making an income.⁴⁵ Debt recovery and real estate practice are two other areas regularly mentioned as areas where significant capital investment might be helpful.⁴⁶ Where a big investment in information technology could lead to more efficient service provision, then incorporation and listing in order to get that upfront capital might also make sense. Finally, any law firm that wants to expand, might also find public fundraising valuable to get the capital to acquire other firms and to give the option of using the issue of shares as part of the acquisition price.⁴⁷ Even the very largest law firms might find this attractive in order to fend off encroachments and attacks from global law firms and multi-disciplinary investment banks and accounting firms.⁴⁸

Expected Ethical Dangers of Full Incorporation and Listing of Legal Practices

By allowing full incorporation of legal practices and multidisciplinary practice, the Australian legislation is recognising that it is no longer seen as ‘appropriate to use business structures as a way to regulate legal practice. Responsibility to maintain professional and ethical rules should be placed solely with individual solicitors, who should be free to choose the business structures which suit them’.⁴⁹

In Australia, Britain, Canada, and the US, the practice of law by incorporated entities was traditionally completely banned. Only individual professionals could practise law – either as solo practitioners or in partnership. This was because the professional skills, moral character and ethical responsibility of each and every *individual* lawyer was seen as the only appropriate foundation for the ethical conduct of the profession as a whole. The very concept

⁴⁴ Richard A. Brealey and Julian R. Franks, ‘The Organisational Structure of Legal Firms: A Discussion of the Recommendations of the 2004 Review of the Regulatory Framework for Legal Services in England and Wales’, paper prepared for UK Dept of Constitutional Affairs, 13 July 2005, 10.

⁴⁵ Brealey & Frank, *ibid.*

⁴⁶ See also Richard Lloyd, ‘British Firms Watch Australia’s Law Firm IPOs with Interest’ *The American Lawyer* 6 June 2007 (online edition).

⁴⁷ Integrated Legal Holdings, the other law firm listed in Australia, sought listing for this reason and to fund investment in technology.

⁴⁸ Clearly the NSW Parliament saw the potential for Australian law firms to expand into Asia and compete with global firms based in the US and UK as an important reason for allowing incorporation. It is also true that it was the largest firms in Australia that originally lobbied for incorporation probably partly for this very reason.

⁴⁹ Shaw, above n 15, 68.

of an ethically responsible legal professional working in an incorporated legal practice was a non-sequitur for two main reasons:⁵⁰

First, incorporation degrades the personal moral judgment and responsibility of individual legal professionals. In a partnership individual partners share personal liability for each others' negligence and breaches. They therefore have an incentive to monitor the quality and honesty of their own and each other's work, to assist one another, and to train and mentor the new recruits who will become their partners in the future.

Incorporation puts the firm and its governance structures in the place of the individual partner. The board of directors make decisions for the firm, which is now owned by shareholders - and neither the directors nor the shareholders have personal liability for the way the firm runs its business. The shareholders of course are only liable to pay for their shares, while the directors do have responsibility for the overall control and monitoring of the firm, but not necessarily for the individual mistakes and frauds of its employees.

Managerialism and bureaucracy replace professional responsibility and collegiality in the day to day running of the firm. Lawyers have little incentive to develop their own ethical and professional judgment or to encourage others to do so. Rather they perform their role in the hierarchy. Even the language reflects this change – what 'partner' would not feel a little less ethically responsible once their title has been changed to 'head of practice area' or 'director'?

Second, incorporation privileges commercialism and profit-orientation over ethical responsibilities to the law, the court, access to justice and loyalty to individual clients. Incorporated firms can have non-lawyer investors, officers and employees who do not share legal professionals' commitment to prioritising ethics over profit.⁵¹ The very creation of an

⁵⁰ The author has previously published a more detailed analysis of the arguments against incorporation in Christine Parker, 'Law Firms Incorporated' above n 15. Since then there have also been a number of more nuanced analyses of the likely ethical pressures and counter-productive incentives that incorporation and listing will provide: See Brealey and Franks, 'Organisational Structure of Legal Firms' above n 44; Bruce MacEwan, Milton Regan and Larry Ribstein, *Law Firms, Ethics, and Equity Capital: A Conversation* (Georgetown Law, Center for the Study of the Legal Profession, 2007); Steve Mark, 'A Short Paper and Notes on the Issue of Listing of Law Firms in New South Wales', Presentation to the Joint NOBC, APRL and ABA Center for Professional Responsibility entitled "Brave New World: The Changing Face of Law Firms and the Practice of Law from a Professional Responsibility Perspective"; Steve Mark, 'The Corporatisation of Law Firms – Conflicts of Interests for Publicly Listed Law Firms' Paper presented to Australian Lawyers Alliance National Conference 2007 (both available at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches - visited 26 February 2008); Milton Regan, 'Commentary: Nonlawyer Ownership of Law Firms Might Not cause the Sky to Fall' *The American Lawyer* 14 August 2007 (online edition); Jordi I Vidal, Ian Jewitt & Clare Leaver, 'Legal Disciplinary Practices: A Discussion of the Clementi Proposals' (2005) Paper prepared for the UK Department of Constitutional Affairs (available at <http://www.dca.gov.uk/legalsys/blanes-i-vidal-leaver-jewitt.pdf>).

⁵¹ But note that lawyers have already found various ingenious ways around the prohibition on sharing profits with non-lawyers: Eg Firms commonly use 'service entities' (most commonly trusts) to minimise tax. The service entity is controlled by the firm, which pays it in exchange for the provision of services: clerical, administrative support, catering, etc. This payment is then claimed by the firm as a

incorporated firm means that the firm now acquires its own legal personality and its own interests and reputation. A listed firm in particular will be all about making profit since this is the very basis for the securities market. It is what investors and analysts expect of a listed firm – they have no metric or incentive for valuing the ethical judgment of the individual lawyers who make up the firm. Incorporated legal practices will greedily seek profits by seeking to please profitable clients at the expense of their duties to the law, the Court and to access to justice for all.

Moreover, external investment will create a whole new range of conflicts of interest when the shareholders in an ILP include businesses and individuals whose commercial or legal interests are at odds with those of clients.⁵² What does Slater and Gordon do if the next big securities class action it could take on for a client would be against one of its own institutional investors? Is there a danger that some of Slater's most likely corporate foes will purposely protect themselves from the risk of litigation by buying shares in Slater and Gordon and conflicting them out of acting against them? External investment also creates conflicts between lawyers' traditional obligation to do pro bono work and the need to justify how the activities of the firm will lead to profit. How will Slater and Gordon explain to its shareholders why it is 'sinking' a million dollars or more in a pro bono class action case the next time it takes on an Australian company that's operations in some third world country have harmed local inhabitants who could never hope to pay their legal fees themselves? Will the obligation to report to shareholders stop some of these cases?

deduction for business expenses, but the profits of the service entity go to the partners (or their family members). There are several reasons why this occurs, including tax savings and de facto profit sharing. It is argued that incorporated legal practices do not need service entities as they provide all the same benefits. Recent ATO rulings are also seeking to crack down on these types of scheme. See Keith Harvey and Anna Tang, 'Making it Your Business' (2005) *Law Institute Journal* 79(7) 62, 64-5; Mark Northeast, 'Legal Practice Structuring: Making the Right Selection' (Nov. 2007) *Law Institute Journal* 81(11) 34, 35.

⁵² Steve Mark, New South Wales Legal Services Commissioner was quoted as saying in 2004 'My tentative view is that where an ILP becomes publicly listed, the duty of an ILP solicitor-director to the court and to clients will inevitably conflict with the duty of a solicitor-director to the ILP and its shareholders. Furthermore I believe that such conflict is irreconcilable... While the perceived conflict between professional ethics and profit is an ongoing concern in the regulation of at least some present partnerships, in publicly-listed ILPs, shareholder pressure for commercial gain will introduce a dynamic for solicitor-directors which was non-existent in partnership structures': quoted by Marcus Priest, 'Hearsay', *The Australian Financial Review* (Sydney), 16 April 2004, 57. In 2007, Steve Mark stated that 'Apparently however my fears about law firms adopting unethical practices appear to be largely unwarranted': Mark, 'Corporatisation of Law Firms' above n 50, 11. (He goes on to cite statistical evidence in relation to the adoption of ethical infrastructure by incorporated firms in support of his view.)

Note s2.7.12(4) *Model Laws* which allows ILPs to engage in pro bono services without breach of duties to shareholders ('The directors of an incorporated legal practice do not breach their duties as directors merely because legal services are provided without fee or reward by the Australian legal practitioners employed by the practice.')

Incorporation and listing indubitably do increase the ethical pressures on lawyers working in law firms. The degradation of personal moral responsibility and the temptation to put profits above ethics are very serious threats to legal professionalism. But incorporation and listing represent an *accentuation* and *formalisation* of these threats – a quantitative, not a qualitative shift in the ethical dangers of legal practice. A listed law firm like Slater and Gordon might be very precariously balanced on the ethical precipice between profession and business – but so are many, many other law firms.

III. ACCENTUATION AND FORMALISATION OF EXISTING ETHICAL DANGERS

The McCabe Tobacco Litigation

One of Slater and Gordon's high profile pieces of litigation – the McCabe tobacco litigation – illustrates the ways in which commercialism, managerialism and bureaucracy are already hopelessly intertwined with professionalism, individual ethical judgment and justice values in law firm practice.⁵³ On one side of this litigation was Slater and Gordon, an incorporated firm of about 150 lawyers, acting for Rolah McCabe, a woman who had started smoking in 1959 when she was 9 years old and was now dying. On the other side were an army of in-house corporate lawyers and external commercial law firm lawyers – including most prominently lawyers from the unincorporated law firm, Clayton Utz, a firm of about 800 lawyers, and the 4th largest firm in Australia.

Ms McCabe became the first plaintiff outside of the USA⁵⁴ to win a judgment against a tobacco company. In 2002 a single judge of the Victorian Supreme Court found that the solicitors for the defendant tobacco company, had advised the company on a 'document retention policy' that intentionally resulted in the destruction of thousands of documents, as part of the preparation for an anticipated wave of litigation against the tobacco industry.⁵⁵ The court also found that the defendant and their legal advisers had misled the plaintiff and the Court about the fact and the extent of their document destruction. The trial judge struck out the defendant's defence and ordered judgment in the amount of \$700 000 for McCabe,

⁵³ Citations to the various judgments and other developments in this case are given below as relevant. The author has previously written about aspects of this case as a case study for teaching and learning legal ethics with Adrian Evans in Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2007) 15-16, 67, 213, and in relation to incorporation of law firms in Parker, 'Law Firms Incorporated' (2004) above n 15, 362-364. For an excellent analysis of the McCabe case from a legal ethics perspective see Camille Cameron, 'Hired Guns and Smoking Guns: McCabe v British American Tobacco Australia Ltd' (2002) 25 *University of New South Wales Law Journal* 768. See also Peta Spender, 'McCabe: Unresolved Questions About Truth and Justice' (2004) 12 *Torts Law Journal* 155.

⁵⁴ Laura Cameron, 'McCabe v Goliath: The Case Against British American Tobacco Australia Services Ltd' 2002 22 (1) *University of Queensland Law Journal* 124, 124.

⁵⁵ *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002).

without a trial because the destruction of documents had been done with the ‘deliberate intention of denying a fair trial to the plaintiff’.⁵⁶

Rolah McCabe died 6 months later. It is unlikely her case would have got to trial before she died if this extraordinary judgment had not been made.

The defendant tobacco company, however, appealed successfully.⁵⁷ The full court of the Supreme Court of Victoria overturned the judgment in favour of McCabe on the basis that the trial judge had applied the wrong test in entering summary judgment, and that the defence should only be struck out if the defendant had intentionally acted to pervert the course of justice or in contempt of court. The Court of Appeal found there was not sufficient evidence of this.

By the time of this appeal judgment Rolah McCabe had already passed away. Her family were left with a bill for the other sides’ costs—A\$2 million. (In Australia costs generally follow the event.) Slater and Gordon were left with the dilemma of whether to keep fighting an extremely risky case on behalf of a deceased plaintiff.

It is at this point that the moral character of Slater and Gordon as a firm becomes obvious—at least as far as we can tell from what is available on the public record.

Testing the Moral Character of Slater and Gordon

For Slater and Gordon, there is now little direct commercial benefit to be gained from pursuing the McCabe Case—bearing in mind that there will never be any contingency fee windfall to compensate them for this risk.⁵⁸ Nevertheless Slaters have been pursuing the case. Presumably this is out of a sense of loyalty to their deceased client and her family, their commitment to social justice (which they are very clear is a central mission of their firm), and the lawyers’ own personal emotional and professional investment in the case. The result is that, for the first time in the Australian courts, tobacco companies and their litigation strategies are very slowly and painfully being made legally accountable. Even if McCabe’s case is ultimately found to be unmeritorious on the facts, some of the facts of the tobacco

⁵⁶ *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [385].

⁵⁷ *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524. The High Court of Australia refused special leave for a further appeal: *Cowell v British American Tobacco Australia Services Ltd* [2003] HCA Trans 384.

⁵⁸ See above n 10.

company's practices and knowledge are coming out. Previous cases have all been settled or stymied before they got anywhere close to a trial.⁵⁹

There is even a sense in which Slater and Gordon's commercial orientation has probably supported their professional and ethical commitments in this case. This is a hugely costly and risky piece of litigation for the firm and for the individuals involved in it. Even with pro bono assistance from barristers, this particular piece of litigation would have financially and professionally exhausted most smaller, less profitable firms. Few firms would have had the social justice commitment combined with the capital necessary to run a case like this without collapsing.⁶⁰

This is not to say that the listed Slater and Gordon company will not have many ethical temptations. But the competing pressures and obligations at stake are not fundamentally any different now than what they were *before* incorporation and listing. They include the competing pressures to remain true to the client commitments and social justice values that comprise their fundamental ethical and brand identity, while maintaining a healthy enough balance sheet to provide reasonable prospects of ongoing employment and remuneration for each of the individual lawyers who put their hearts and souls into the firm's cases, and, at the same time, invest enough back into the firm to provide a buffer against the risk of loss in litigation and grow a future for the firm. In other words, it was equally important before the firm was listed and incorporated as after that the firm be profitable. The difference is that now external investors will be formally voicing that expectation.

Large commercial law firms may not feel any great need to seek external investment because of their regular billings from rich and highly liquid corporate clients. But there is a strong argument that incorporation and listing provide a useful pathway for those firms that serve individual clients of modest means to develop their businesses to a scale and management model that would allow them to serve these clients reliably, efficiently and affordably. In other words, as with the legal profession's former ban on advertising, there is an argument that the ban on incorporation and listing disproportionately affects the sort of firms that serve individual clients—and that it therefore helps maintain unequal access to justice.

Slater and Gordon's prospectus and public statements certainly make it clear that they believe that their incorporation and listing were an important step in consolidating the market for

⁵⁹ For an investigative journalists' account of the ways in which this had happened pre-McCabe, see the episode of Four Corners (The Australian Broadcasting Corporation's in depth investigative journalism program) broadcast on 10 June 2002 and titled 'Beyond the Brief' (Reporter: Ticky Fullerton, Producer: Linda Larsen).

⁶⁰ Consider the account in the novel and movie, *A Civil Action* (Jonathan Harr, *A Civil Action*, Random House, 1995; *A Civil Action*, Touchstone Pictures, 1998) of the way in which litigation on a similar scale causes the collapse of a legal practice and the nervous collapse of the main lawyer involved in running the case. See also discussion in Vidal et al, 'Legal Disciplinary Practices', above n 50 at 24.

personal injuries lawyering in Australia—and therefore making those services more widely available at high quality and affordable price—as well as providing a financial basis for broader social justice lawyering.

Similarly the other firm that has listed in Australia, Integrated Legal Holdings, has done so as part of a strategy of trying to find a better way to deliver services to individuals.⁶¹

And, as we have seen, in fact most of the firms incorporating are smaller firms who in fact probably provide services to individuals although it is unlikely that most of them are incorporating as part of any vision of innovative service delivery. More likely they are incorporating as part of some apparently advantageous tax arrangement.

Overall it may be investments in technology that allow for the more efficient processing of volume – or ‘disruption’ with innovation in whole way legal services are delivered that is a good reason for seeking external investment through incorporation and listing.⁶²

The following part of the paper will discuss the safeguards that Slater and Gordon and other firms are putting in place to try to make sure that incorporation and listing do provide a basis for ethical practice, rather than taking over the whole enterprise.

The Ethical Temptations of Corporatised Legal Practice

It is on the other side of the McCabe litigation where the corporate and business pressures on ethical practice are most obvious. Clayton Utz’s tobacco company client may not have been a *shareholder* in their firm, but Clayton Utz’s lawyers appear to have been sufficiently aware of the tobacco industry’s investment in their firm’s profitability – by way of monthly fees – to create a conflict of interest and duty.

The precise legal obligations and ethical responsibilities that applied to this particular situation remain a topic of legal debate.⁶³ But the public and media reaction to the case indicated that ordinary members of the public considered Clayton Utz’s advice on the tobacco company’s document ‘retention’ policy to be at least unethical, if not illegal.⁶⁴ Certainly the destruction of documents with the purpose of making it difficult or impossible for meritorious

⁶¹ See Appendix One for a general account of Integrated Legal Holdings.

⁶² Darryl R. Mountain, ‘Disrupting Conventional Law Firm Business Models using Document Assembly’ (2007) 15 *International Journal of Law and Information Technology*, 170.

⁶³ See Camille Cameron and Jonathon Liberman, ‘Destruction of Documents Before Proceedings Commence: What is a Court to Do?’ (2003) 3 *Melbourne University Law Review* 273; Spender, ‘McCabe: Unresolved Questions’ (2004) above n 53.

⁶⁴ This is evident from the titles of newspaper articles reporting the case such as Amanda Keenan and Janet Fife-Yeomans, ‘Lawyers Choking in Their Own Smoke’, *The Weekend Australian* (Sydney), 13-14 April 2002, 1, 4; Chris Merritt, ‘Call for Ethics Debate After BAT Case’, *The Australian Financial Review* (Sydney), 2 August 2002, 55.

plaintiffs to prove their case, and the fact that the defendants did not at first reveal the intentional destruction of those documents during the discovery process could both amount to a breach of the ethical duty to the administration of justice.⁶⁵ That duty is supposed to override lawyers' duties to their clients.

A government report recommended that the law in Victoria, where the case occurred, should make it unambiguously clear that such actions are unlawful,⁶⁶ and there is now a maximum five year jail term for wilful document destruction.⁶⁷

Clayton Utz have now dropped their tobacco litigation practice – although the reason for doing so was framed in terms of a 'business' decision about wanting to foster work from other important clients (especially government clients), not an ethical decision as such.⁶⁸

Since the tobacco company's successful appeal of the judgment against them, a number of new facts have come to light:

A former inhouse counsel to the tobacco company has now come forward and provided compelling evidence that the tobacco company and its law firm had participated in a 'contrivance' to hide evidence behind client legal privilege.⁶⁹ The tobacco company would give its law firm copies of its documents ostensibly for legal advice. The originals would be destroyed under the document retention policy while the law firm kept the copies, but claimed that they were protected by privilege. This may mean that the McCabe family and Slater and

⁶⁵ Cameron, 'Hired Guns and Smoking Guns' above n 53.

⁶⁶ Peter Sallman, *Report on Document Destruction and Civil Litigation in Victoria* (Crown Counsel Victoria, Melbourne, 2004).

⁶⁷ *Crimes (Document Destruction) Act* 2006 (Vic) s 3, amending *Crimes Act* 1958 (Vic) ss 253-255. A professional conduct rules to similar effect was also introduced in New South Wales: *Legal Profession Regulation* 2005 (NSW) reg 177.

⁶⁸ Clayton Utz Media Release, 'Clayton Utz to Close Tobacco Claims Litigation Practice', 18 July 2002. The media release states:

Clayton Utz Chief Executive Partner David Fagan today announced that Clayton Utz will close its tobacco claims litigation practice, effective immediately. Mr Fagan said the Board of Clayton Utz had decided that tobacco claims litigation did not fit with Clayton Utz's positioning as a key strategic adviser to Government and Corporate Australia and was no longer compatible with the firm's long-term national business interests. "The tobacco claims litigation practice is a small Sydney based practice area, representing less than 1% of the firm's business," Mr Fagan said. "For instance, this is substantially less than our pro bono practice, which has a value of \$5M per annum." He said the decision removed any potential incompatibility with Clayton Utz's strongly growing public sector practice, and was also in the interests of its thriving corporate business. Mr Fagan said today's announcement related to the firm's business strategy. He said that the review into various aspects of the McCabe judgement was continuing but it was inappropriate to finalise that review until after the McCabe vs BATA appeal and the investigation by the NSW Legal Services Commissioner.

⁶⁹ See (*Re Mowbray*) *Brambles Australia Ltd v British American Tobacco Australia Services Ltd* [2006] NSW Dust Diseases Tribunal 15 (Unreported, Curtis J, 30 May 2006) (rejecting a claim by BAT for legal privilege on the grounds that its document retention policy was 'in furtherance of the commission of a fraud' at [57] and set up under the 'pretence of a rational non-selective housekeeping policy' at [44]). See also Elisabeth Sexton, 'Ifs, Butts and Big Bucks' *The Age* (Melbourne) 3 June 2006, Insight 4; Elisabeth Sexton, 'Tobacco Giant Sidesteps Claim it Destroyed Damaging Records' *Sydney Morning Herald* (Sydney) 6 July 2006 (online edition).

Gordon can get access to previously privileged tobacco company documents that will allow them to re-open the original McCabe case.⁷⁰

Also a former partner at Clayton Utz has come forward and leaked to Slater and Gordon and *The Age* newspaper the report of an internal Clayton Utz investigation into whether any misconduct had occurred inside the firm in relation to the document destruction.⁷¹ This indicated that at the time of the investigation Clayton Utz itself believed that two of its own lawyers acting for the tobacco company had engaged in serious professional misconduct and in one case potentially perjury. One of the two senior lawyers involved in the conduct had reportedly been told to leave, and another had also left, although other lawyers named in the original judgment are still at the firm. Neither of the two lawyers identified in the Clayton Utz report has faced any official regulatory action, as far as can be seen from the public record.⁷² Nor, as far as we can tell, was this internal investigation disclosed to the independent regulators of the legal profession in the relevant states – even though they were known to be attempting to investigate whether any misconduct had taken place.

With these two new sets of evidence, the Director of Public Prosecutions in Victoria has now referred the whole matter to the Australian Crime Commission with a strong recommendation that both the law firm and the tobacco company be investigated for misconduct including perjury and conspiracy to pervert the course of justice.⁷³ The reason for the reference to the Australian Crime Commission is that this is probably the only body with sufficient powers to compel production of the relevant documents and evidence from the firm and its (now

⁷⁰ An initial decision to this effect in favour of Slater and Gordon and the McCabe family was made in December 2007 in the Victorian Court of Appeal: *Cowell & Ors v British American Tobacco Australia Services Ltd & Ors* [2007] VSCA 301 (Unreported, Warren CJ, Chernov JA, Nettle JA, 14 December 2007). Note that because of the fact that Slater and Gordon itself has been subject to legal action from BAT, Slater and Gordon has now become a litigant and both Slater and Gordon and the McCabe family are now represented by another law firm, Arnold Bloch Liebler.

This decision is now subject to appeal: William Birnbauer, 'McCabe Rollercoaster Hits a High as Saga Rolls On' *The Sunday Age* (Melbourne) 16 December 2007, 9. [check and update as necessary.]

⁷¹ 'How Lawyers Set Out to Defeat a Dying Woman' *The Age* (Melbourne) 29 October 2006 (online edition); William Birnbauer, 'Cheated by the Law' *The Age* (Melbourne) 29 October 2006 (online edition). Subsequently British American Tobacco sought orders to prevent the publication of the documents against the newspapers, the Cancer Council and Slater and Gordon: William Birnbauer, 'Tobacco Giant Sends in Big Guns' *The Age* (Melbourne) 3 December 2006 (online edition); Nick McKenzie, 'Tobacco Giant Gags Cancer Council' *The Age* (Melbourne) 9 December 2006 (online edition).

⁷² The legal profession regulators have been rather vague about the outcomes of their inquiries. Presumably they are leaving themselves the option open of being able to re-open those inquiries if more evidence becomes available. [check for cites for this in newspaper articles – no official communications from regulators]

⁷³ William Birnbauer, 'Top Lawyers Face Scrutiny' *The Age* (Melbourne) 19 August 2007 (online edition). (Reportedly this was in a 'letter' to the Attorney-General from the DPP in August 2007 which was presumably leaked to the newspaper.)

former) client.⁷⁴

This occurred in a commercial, business-like but *unincorporated* law firm. The ethical environment in which lawyers in this firm apparently disregarded their own, and their client's, duty to the court is similar to that in many other large law firms around the world.⁷⁵ (In fact a number of Australia's largest law firms had also advised on different aspects of the tobacco company's document 'retention' policy at different times and the tobacco company is now represented by another one of these firms.⁷⁶) And the firm-level factors that probably contributed to this conduct show that the sort of ethical evils that we fear *will* come with incorporation and listing are already thriving in at least some corners of contemporary legal practice.

We have seen that it is feared that incorporation and listing will privilege commercialism and profit-orientation over ethical responsibilities to the law, the court, access to justice and loyalty to individual clients. Yet law firm *partnerships* are also of course run for profit. The partners draw down the profits each year, and in many large law firms partners and employees are painfully aware of the extent to which they are contributing to profits on a monthly or even weekly basis.⁷⁷ It is very common now in Australian law firms for employee lawyers to receive a weekly print-out of the number of billable hours they have billed compared with their colleagues that clearly shows their place in the race to bill more hours. The relative rates at which different lawyers are charged out to clients also indicates their place in the profit-making hierarchy of the law firm. And the partners know who among them have brought in new work or organised their teams to leverage more billing out of existing clients – with these metrics used in many firms to decide how profits and various perks will be divvied up between partners and their work teams.

⁷⁴ See explanation of referral by William Birnbauer, 'Smoking Gun Aimed at Big Tobacco' *The Sunday Age* (Melbourne) 19 August 2007 4.

⁷⁵ For summaries of evidence about the commercialism, profit-orientation and ethical culture of contemporary legal practice in larger law firms see John M. Conley and Scott Baker, 'Fall From Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street' (2005) 30 *Law & Social Inquiry* 783; Parker et al, 'The Ethical Infrastructure of Legal Practice', above n 5; Parker & Evans, *Inside lawyers' Ethics*, above n 53, pp216-224; Milton C. Regan and Jeffrey D. Bauman, *Legal Ethics and Corporate Practice* (2005).

⁷⁶ See the original judgment above n 55.

⁷⁷ For summaries of the profit-orientation and billing culture in law firms see Lillian Corbin, 'How "Firm" are Lawyers' Perceptions of Professionalism?' *Legal Ethics* 8 (2005) 265; Susan Saab Fortney, 'Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements' (2000) 69 *UMKC Law Review* 239; Susan Saab Fortney, 'The Billable Hours Derby: Empirical Data on the Problems and Pressure Points' (2005) 33 *Fordham Urban Law Journal* 171; Lisa Lerman, 'Blue-Chip Billing: Regulation of Billing and Expense Fraud by Lawyers', (1999) 12 *Georgetown Journal of Legal Ethics* 205, 241, 266; Lisa Lerman 'A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation' (2006) 34 *Hofstra Law Review* 847; William G. Ross, 'Kicking the Unethical Billing Habit', (1998) 50 *Rutgers Law Review* 2199; William G. Ross, 'The Ethics of Hourly Billing by Attorneys', (1991) 44 *Rutgers L. Rev.* 1. Cf Herbert M Kritzer 'Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?' (2002) 80 *Texas Law Review* 1943.

In Clayton Utz, there was a case several years before the McCabe litigation in which the senior partner in its family law division was disciplined for forging the evidence required to sue her client for half a million dollars in fees for her divorce and property settlement.⁷⁸ It turned out that Clayton Utz had told this lawyer that the family law section of the firm was going to be closed down unless she could start delivering the same sort of regular fees and profitability that the firm was making from one of its most longstanding clients – the Tobacco Institute! At the time of her forgery, she had been allowed to continue practising with the firm on a trial basis for six months during which time she and others gave evidence that she was totally cost-driven, worked 12.5 hour days, and was close to breakdown. She was struck off for her forgery, but a charge of gross over-charging – half a million dollars for a divorce in 1994 –was dropped. Despite heavy judicial criticism of the firms’ charging culture and policies, a complaint of gross overcharging can only be sustained if a lawyer’s charges were grossly in excess compared with other similar lawyers, and there is no legal or regulatory capacity to call *the firm* to account for the way in which its management policies and decisions probably contributed to overcharging and misconduct. Only *individual* lawyers can be disciplined, not firms.

The pressure to prioritise profit over ethical obligations has deepened in recent years as the market for legal services has become more competitive and fragmented. Big companies (and also government departments) now shop around more for the right legal advice at the right price. They have unbundled their legal services so that no one firm, not even their own in-house legal department, is necessarily guaranteed a steady flow of legal work, or is aware of all legal matters in which the company is involved. At the same time, there is also more demand for commercial lawyers to be embedded in (employed by, or seconded to) business sub-units within corporate clients so that they can provide commercially realistic advice and anticipate, avoid or resolve legal problems for that unit.⁷⁹ At the same time that there is demand for a closer relationship between lawyers and business, that relationship is also less secure for the lawyer—lawyers can easily be sacked if their advice does not suit. In this environment we can expect lawyers to come under increasing pressure to please individual managers, executives or work teams (who control the purse strings) rather than consider their obligation to the corporate client as a whole, let alone any duty to the law or the public interest.

⁷⁸ *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408. See also previous more detailed discussions of this case in Ann Daniel, ‘Chapter Four: The Cost of Justice’ in *Scapegoats for a Profession* (1998) 71; Parker, ‘Law Firms Incorporated’ above n 15, 358-361; Parker & Evans, *Inside Lawyers’ Ethics*, above n 53, 209-210.

⁷⁹ See Robert Eli Rosen, ‘“We’re All Consultants Now”: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services’ (2002) *Arizona Law Review* 637.

This environment also creates a dynamic not unlike the securities market: Firms and lawyers are constantly competing with each other to attract and retain income streams from the sort of clients who will pay very large fees regularly. There have been many cases where larger law firms have dropped one client they perceive to be less profitable in order to take on the legal work of a bigger, richer client with opposing commercial or legal interests to their original client.⁸⁰ (Clayton Utz's eventual dropping of its tobacco litigation practice can be construed in these terms – since they feared the loss of government and other work due to the bad publicity associated with the McCabe decision.) There have also been many cases of larger law firms deciding they could unilaterally 'manage' a conflict of interest with information barriers because they want to keep the income streams from two clients on opposite sides of a deal – regardless of whether the two clients are happy with this arrangement or not.⁸¹ Often this has occurred where a large firm has grown by swallowing a smaller firm (and its clients) whole.

If one of the defendants Slater and Gordon are suing buys some of its shares, then it will be far from the first time that a law firm has accepted an 'investment' in its business from someone with opposing interests to its existing clients and has had to work out how to handle the consequential conflicts.

The behaviour of the Clayton Utz lawyers in the McCabe litigation was a good example of the commercialism and profit-orientation of contemporary legal practice. The law firm's closeness to, and financial dependence on, its tobacco company client was no doubt a big factor in its disregard for its duty to the court. As the trial judge described the facts,

One outstanding feature of this case is the extent to which, after 1985, the terms of the Document Retention Policy, and the implementation of a program of destruction of documents, were the product of advice, decision and supervision by an army of litigation lawyers, from several countries, and being both retained private practitioners and in-house lawyers. The relationship between the defendant and its retained solicitors was so close that solicitors employed by private firms sometimes became employees of Wills and then continued to work alongside members of their former firm, and employees of one of the legal firms sometimes spent months working on the premises of Wills. Private practitioners and in-house lawyers travelled together to conferences of litigation lawyers, organised by companies in the BAT Group, to discuss litigation tactics... The long standing and very close

⁸⁰ See Parker and Evans, *Inside Lawyers' Ethics*, above n 53, 161, 172-3; Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart Publishing, Oxford, 2002); Susan Shapiro, *Tangled Loyalties: Conflicts of Interest in Legal Practice* (2002).

⁸¹ See Milton Regan, *Eat What You Kill: The Fall of a Wall Street Lawyer* (2004).

association between in-house lawyers and private practitioners had the potential for blurring the roles and responsibilities of the lawyers.⁸²

The ethical dangers posed by businesses' increasingly commercial and profit-oriented approach to legal advice are compounded by the fact that law firms themselves are also being managed more and more like large business corporations. We have seen that it is feared that incorporation and listing will degrade the personal moral judgment and responsibility of individual legal professionals.

But the increasing size and organisational complexity of much of contemporary legal practice is already degrading lawyers' personal moral judgment. An increasing number of lawyers today work as employees subject to detailed direction and supervision, in large national and international law firms and in-house corporate legal departments. Individual employee lawyers often do not even meet the client or understand how the work that they are doing relates to the clients' overall aims and what ethical ramifications it may have. Employed lawyers in law firms and in-house legal departments must answer to whichever partner is their boss on each case. Kimberly Kirkland's in depth interview research in large US firms has shown that this means young lawyers learn to not only second-guess the legal style of each different supervising partner they work with, but also their ethical norms. They come to see ethics as contingent on the demands of their supervisor and client – rather than having their own sense of personal ethical responsibility nurtured and sustained.⁸³

It has also been shown that about 150 people is the largest number of people who can work together in a community with shared ethical and other norms.⁸⁴ Once a firm expands beyond this size, there will inevitably be sub-communities that might have quite different ethical norms – or a sense of alienation and norm-less-ness which makes people feel that they do not have any particular ethical standards in responsibility for their own work – they just have to do what their boss tells them.

The work team within Clayton Utz that represented tobacco companies probably had their own norms developed in response to law firm billing policies, pressure from the clients' internal lawyers and the fact that they spent so much time with one client and its lawyers. The reported facts indicate that the Australian lawyers in the case were essentially following the

⁸² *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) [62], 284-286.

⁸³ See Kimberly Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' (2005) 4 *The University of Memphis Law Review* 631. See also Robert L. Nelson, 'The Discovery Process as a Circle of Blame: Institutional, Professional and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behaviour in Corporate Litigation' (1998) 67 *Fordham Law Review* 773

⁸⁴ David Hess, Robert S. McWhorter and Timothy L. Fort, 'The 2004 Amendments to the Federal Sentencing Guidelines and their Implicit Call for a Symbiotic Integration of Business Ethics' (2006) *Fordham Journal of Corporate and Financial Law* 725, 754 citing Robin Dunbar, *Grooming Gossip and the Evolution of Language* (1996).

litigation tactics developed by the tobacco industry and its lawyers in the US, and to a lesser extent the UK. They may not have exercised independent individual judgment about the propriety of what they were doing.

This is not an atypical story. There have recently been a number of corporate scandals in which external lawyers have failed to show the sort of independent ethical judgment that we might expect of a professional lawyer.⁸⁵ In the collapse of Enron a number of lawyers have been criticised for exactly this sort of failure precisely for the same reason - getting too close to clients on whom they were financially dependent.⁸⁶ Similarly, another of Slater and Gordon's arch foes, James Hardie, a major Australian company that previously produced asbestos, recently devised a scheme, with the help of its inhouse lawyer, in which it was able to quarantine its asbestos liabilities in a couple of orphaned subsidiaries while the parent decamped to the Netherlands - leaving the subsidiaries with inadequate funds to properly compensate all of the known James Hardie asbestos cases. James Hardie's external lawyers were heavily criticised in the report of a public inquiry into this incident for completely failing to provide the sort of independent ethical advice that might have stopped this from happening.⁸⁷

⁸⁵ For US examples see Susan Koniak, 'Corporate Fraud: See, Lawyers' (2003) 26 *Harvard Journal of Law and Public Policy* 195; Milton C. Regan, 'Teaching Enron' (2005) 74 *Fordham Law Review* 1139; William H. Simon, 'Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct' (2005) 22 *Yale Journal on Regulation* 1; Eli Wald, 'Lawyers and Corporate Scandals' (2004) 7(1) *Legal Ethics* 54. For Australia see Barbara Robin Mescher, 'The Business of Commercial Advice and the Ethical Implications for Lawyers and Their Clients' (2007) *Journal of Business Ethics*, forthcoming; Parker and Evans, *Inside Lawyers' Ethics* above n 53, 221-222.

⁸⁶ Peter Margulies, 'Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organised Crime' (2006) 58 *Rutgers Law Review*, 939, 973 (arguing that Enron's outside lawyers had such a close relationship with their client that were less able to resist client pressure and see issues objectively); Milton C. Regan, 'Teaching Enron' (2005) 74 *Fordham Law Review* 1139; Deborah Rhode and Paul Paton, 'Lawyers, Ethics and Enron' (2002) 8 *Stanford Journal of Law, Business & Finance* 9.

⁸⁷ See Gideon Haigh, *Asbestos House: The Secret History of James Hardie Industries* (2006); Suzanne Le Mire, 'The Case Study: James Hardie and its Implications for the Teaching of Ethics' in Bronwyn Naylor and Ross Hyams (eds), *Innovation in Clinical Legal Education: Educating Lawyers for the Future* (2007) 25; Parker and Evans, *Inside Lawyers' Ethics*, above n 53, 237-241. Note that in the end Slater and Gordon, among others, helped to negotiate a deal that overcame the effects of the scheme and guaranteed compensation for James Hardie's asbestos victims.

IV. THE ETHICAL OPPORTUNITY IN INCORPORATION AND LISTING

Moral Panic and Moral Opportunity

There are always those who say that whatever is the latest development in professional practice, it always marks the point at which legal practice has finally ditched all the ethical ideas of professionalism and careened over the precipice.⁸⁸ This sense of ‘moral panic’ is a completely natural defensive reaction to apparently radical new developments – such as the listing of a law firm.

Moral panics are usually directed at some obvious, discrete behaviour that people believe can be easily reversed or eradicated. Most often, however, the real moral issues that need to be addressed are entrenched, enculturated, and systemic. They are difficult to perceive, let alone effectively address. The particular behaviour that prompts the moral panic is often just a manifestation of a problem that has been festering below the surface for some time.

The incorporation and listing of law firms accentuate and bring into focus certain ethical issues, but it is not incorporation and listing as such that are the main thing we should worry about. Law is already a business as well as a profession and has been so for a very long time. The ethical issues that come with incorporation and listing are already with us at least among the largest firms and those that aspire to be like them.

The real issue with ethics in law firm practice that must be urgently addressed is the historic failure of law firm leaders, professional associations, independent regulators and academic ethicists to adequately recognise that law is *both* a business and a profession, and that it is carried on by commercial firms, not just professionally qualified individuals. We need better ways to ensure ethical responsibility in both incorporated and unincorporated law firms.

Individual professionals have traditionally been seen as the only, or main, focus of ethical responsibility and regulation. This is not sustainable in a world where firms and work teams within firms significantly influence individuals’ ethical judgments and behaviours.⁸⁹ Firms have the power to either prevent or encourage ethical or unethical behaviour by individual lawyers – and to prevent individual lawyers ever being held to account for their behaviour. Yet they are generally still not the subject of the regulatory system,⁹⁰ and rarely even of ethical discussion.

⁸⁸ Wesley Pue, ‘Moral Panic at the English Bar: Paternal vs Commercial Ideologies of Legal Practice in the 1860s’ (1990) 15 *Law & Social Inquiry* 49.

⁸⁹ See Note, ‘Collective Sanctions and Large Law Firm Discipline’ (2005) 118 *Harvard Law Review* 2236; Schneyer, ‘Professional Discipline for Law Firms’ above n 5.

⁹⁰ But note that two US jurisdictions (New York and New Jersey) have introduced the possibility for discipline of law firms: see Transcript, ‘How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?’ (2002) 16 *Georgetown Journal of Legal Ethics* 203. And as we see

Historically the business aspects of legal practice have been denied and deemed illegitimate rather than acknowledged and addressed as legitimate objects of ethical deliberation and regulation. We tend to assume that individual lawyers in law firms should not feel, let alone succumb to, the ordinary ethical pressures of business. And so we have not done enough to identify what those pressures are and how we might ethically manage them.

In Australia the advent of incorporation and listing have prompted both law firms and legal profession regulators towards some initiatives that begin to address these problems. As the Australian experience shows, along with the ethical dangers of incorporation and listing, there is also an opportunity that regulators and the profession can take advantage of – to address and improve the moral character of law firms as firms and businesses.

As part of their listing, Slater and Gordon started an extensive and continuing process of identifying all their ethical and legal obligations and values – and then working out what policies, practices and structures they need within their firm to make sure that they implement those obligations and norms. This was partly voluntary – in response to the Australian Securities Exchange’s *Listing Rules* which include the requirement for each listed company to disclose the extent of its compliance with the voluntary *Australian Corporate Governance Principles*.⁹¹ But it was also partly compulsory - to ensure compliance with the Australian requirements for incorporated firms, explained further below. Much of it is consistent with what other well-governed, socially responsible listed businesses do in order to maintain and strengthen their ethical culture.⁹² But for a law firm, it is particularly important that some ethical obligations to law and justice override the financial bottom line in all circumstances.

Slater and Gordon therefore included prominently in their prospectus and in their constitutional documents a very clear statement that one of the risks for an investor of investing in their business is that:

Lawyers have a primary duty to the courts and a secondary duty to their clients. These duties are paramount given the nature of the Company’s business as an Incorporated Legal Practice. There could be circumstances in which the lawyers of Slater & Gordon are required to act in accordance with these duties and contrary to

below, incorporated legal practices (but not other legal practices) have some regulatory requirements and monitoring in Australia.

⁹¹ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Australian Securities Exchange, August 2007).

⁹² At least two UK-based global law firms (SJ Berwin; Freshfields Bruckhaus Deringer) have even gone to the extent of having formal corporate social responsibility programs and reports: see Gemma Westcott, ‘SJ Berwin Puts Corporate Social Responsibility High on its Agenda’ *The Lawyer*, 18 December 2006, 5.

other corporate responsibilities and against the interests of Shareholders or the short-term profitability of the Company.⁹³

This wording was developed in consultation with the relevant corporate and legal professional regulators.⁹⁴ It clearly addresses the problem of the conflict created by having a shareholder in the firm whose interests are at odds with those of a client – along with other more specific provisions making it clear that investors cannot interfere with the running of the firm and its cases.⁹⁵ It is clear that client interests come first, and that the duty to the court is paramount over both clients and shareholders.

We shall have to wait to see how well this protection compares with the Chinese walls that commercial firms put in place to deal with their similar conflicts. At least Slaters have a clear recognition of the fact that they may feel beholden to investors, and have given clear notice to those investors (and clients) that their duty to the court comes first. However a policy like the statement in Slater and Gordon's prospectus is not much use if it is not borne out in the way the firm and its lawyers actually practice. Law firms are businesses need to develop 'ethical infrastructures' in practice that provide a bulwark that will protect their lawyers from the unadulterated pressure of commercialism.

Ethical Infrastructure for Incorporated Legal Practice

A firm's 'ethical infrastructure' is its formal and informal management policies, procedures and controls, and, importantly, habits of interaction and practice that support and encourage ethical behaviour.⁹⁶ It recognises that firms above a certain size cannot rely on the natural functioning of informal collegial relations among the partners to ensure consistent ethical norms are transmitted throughout the work teams that make up the firm – and that junior lawyers develop their own sense of individual ethical judgment and responsibility. As firms

⁹³ Slater & Gordon, *Prospectus*, above n 7, p84. Slater and Gordon also point out that a further risk to their business that their reputation 'could also be damaged through Slater & Gordon's involvement (as an adviser or as a litigant) in high profile or unpopular legal proceedings.' In other words, investors are on notice that Slater and Gordon will not give up their role as zealous advocates even if the case they take on is unpopular. There is also a statement in the Integrated Legal Holdings prospectus about their duties as 'officers of the court'.

⁹⁴ Mark, 'Corporatisation of Law Firms' above n 50, 8.

⁹⁵ Clause 3.2 of the Slater & Gordon Constitution states: 'The Company and the Directors must procure that, where possible, the Company fulfills its duty to the Shareholders, to the clients of the Company and to the court. In the case of an inconsistency or conflict between those duties of the Company, that conflict or inconsistency shall be resolved as follows:

(a) the duty to the court will prevail over all other duties; and
(b) the duty to the client will prevail over the duty to Shareholders.'

Clause 16 gives the Board power to not register a share transfer to a person who is a 'disqualified person' under the Legal Profession Acts or to require such a person to dispose of their shares.

⁹⁶ See above n 5.

become larger and more bureaucratic in the way they organise their business activities,⁹⁷ they will also need to become more intentional about designing ethics into their organisational structures.⁹⁸ At the moment we rely too much on individual lawyers to act professionally and ethically in organisational contexts that put tremendous pressure on them to act unethically.

Most law firms, especially the larger ones, already recognise that some aspects of ethical infrastructure are desirable and necessary in some areas as a matter of good practice, although they may not have thought of what they do as 'implementing an ethical infrastructure'. For example, most law firms in Australia and elsewhere already recognise the need to have systems for checking for potential conflicts of interest before taking on a new client.

These conflicts systems have often involved appointing a conflicts partner or conflicts committee to decide how obligations to avoid conflicts should be complied with in specific cases.⁹⁹ In the United States over the last ten years many larger law firms have begun to appoint ethics partners and ethics committees to be specially responsible for monitoring compliance with professional ethical obligations more broadly, and to act as a point of contact for advice and discussion about ethical issues.¹⁰⁰

After the McCabe case, some Australian legal professional associations also encouraged law firms to appoint ethics partners and put in place more general measures to promote ethical discussion and 'reporting up' of potential ethical problems.¹⁰¹ My colleagues and I have

⁹⁷ See John Flood, 'Partnership and Professionalism in Global Law Firms: Resurgent Professionalism?' in Daniel Muzio, Stephen Ackroyd and Jean-Francois Chanlet (eds), *Redirections in the Study of Expert Labour* (forthcoming, 2007). Available at SSRN: <http://ssrn.com/abstract=949565>; Ashly Pinnington and Timothy Morris, 'Archetype Change in Professional Organizations: Survey Evidence from Large Law Firms' (2003) 14 *British Academy of Management Journal* 85. There is evidence that medium and large Australian law firms have been particularly quick to embrace bureaucratized management practices, at least compared with their counterparts in the UK: Ashly Pinnington and John T. Gray, 'The Global Restructuring of Legal Services Work? A Study of the Internationalisation of Australian Law Firms' (2007) 14 *International Journal of the Legal Profession* 147.

⁹⁸ Cf Stephen Mayson, 'Your Capital: Building Sustainable Capital: A Capital Idea' in Laura Empson (ed), *Managing the Modern Law Firm* (2007) 141, 157.

⁹⁹ Susan Saab Fortney, 'Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest' (2002) 33 *Saint Mary's Law Journal* 669, 689 and 697.

¹⁰⁰ Chambliss, 'The Nirvana Fallacy', above n 6, 129-130. See also Elizabeth Chambliss, 'The Professionalization of Law Firm In-House Counsel' *North Carolina Law Review* 84 (2006) 1515; Elizabeth Chambliss and David B. Wilkins, 'The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms' (2002) 44 *Arizona Law Review* 559

¹⁰¹ In 2002 Kim Cull, President of the Law Society of New South Wales encouraged law firms to introduce 'ethics partners' and for the legal profession to protect whistleblowers within the legal profession: Kim Cull, 'Ethics and Law as an Influence on Business' *Law Society Journal* (2002) 50. In the same year the Law Institute of Victoria launched a program for law firms to appoint 'a partner or senior consultant to be the designated ethics practitioner' as a point of first contact for all solicitors in the firm with an ethical question or problem: John Cain, 'Good Ethics Requires Constant Vigilance' 76 *Law Institute Journal* (2002) 4; see also Fergus Shiel, 'Push for Ethics Advisers at Law Firms' *The Age* 6 September 2002, 7; Katherine Towers, 'Ethics Standards Under Attack' *Australian Financial Review* 7 March 2003. The Law Institute of Victoria through its Ethics Committee said it would provide ongoing training for the ethics practitioners and started an Ethics Liaison Group as a direct result of that.

argued elsewhere that Australian law firms that take their ethical infrastructure seriously might need to make the ethics partner a fulltime, specifically compensated position, as it is in some US firms.¹⁰² Having a compensated ethics partner position, and appropriate time sheet options for raising, discussing and receiving advice on ethical problems would be an important way for a firm to show how serious it is about ethical behaviour. If firm managers want lawyers to have the capacity to see ethical issues, and the opportunity to make and act on ethical judgments, then the firm needs to provide the time, resources and incentives for lawyers to be able to do so.

Some Australian law firms have hired external ethics consultants to audit their ethical infrastructure and suggest changes. Clayton Utz did this in direct response to the criticism of their behaviour in the McCabe case and are now considered a leader in this area.¹⁰³ Slater and Gordon, as we have seen, are also doing it as part of their listing and ongoing governance arrangements.

But being intentional about ethical infrastructure is not just voluntary for incorporated legal practices in Australia –it also a regulatory requirement. The Australian law requires that all incorporated legal practices must have ‘appropriate management systems’ in place to ensure that the firm, its directors and employees comply with all their legal and professional ethical obligations.¹⁰⁴ Each incorporated legal practice must have at least one director who is a legal practitioner and whose nominated job it is to make sure that appropriate management systems are in place and that everyone complies with their obligations. It is important to note that these are additional responsibilities on incorporated legal practices that are intended to complement and supplement the continuing professional conduct and duty of care obligations of all legal practitioners employed by the firm.¹⁰⁵ In other words a degree of firm-level *corporate* responsibility has been *added* onto the existing individual responsibility system.

It is the legal practitioner director’s role to make sure that the company, its directors and its employees comply with all their legal and professional obligations in relation to the carrying on of legal practice. Importantly for the argument in this paper, they must also ensure that there are ‘appropriate management systems’ in place to do so. Thus, according to the legislation, the legal practitioner director:

¹⁰² Parker et al, ‘The Ethical Infrastructure of Legal Practice in Larger Law Firms’ above n 5, p ?.

¹⁰³ Bill Pheasant, ‘Clayton Utz to Run Ethics Audit’, *Australian Financial Review* (Sydney) 24 April 2004, 3.

¹⁰⁴ *Model Laws*, s 2.7.9. One lawyer, the ‘legal practitioner director’, has responsibility for the introduction, supervision and monitoring of the practice’s ethical systems. *Model Laws*, ss 2.7.9, 2.7.10. For MDPs, see *Model Laws*, ss 2.7.39, 2.7.40. See also Parker, ‘Law Firms Incorporated’ above n 15, 372.

¹⁰⁵ Note that individual practitioners in each firm continue to have their normal obligations to have a practising certificate if they are practising law, and to have mandatory professional liability insurance.

...must ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the practice –

- (a) under the professional obligations of Australian legal practitioners and other obligations imposed under [the legal profession legislation and regulation]; and
- (b)
- (c) so that the obligations of the Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice.¹⁰⁶

and

If it ought to be reasonably apparent to a legal practitioner director of an [ILP] that the provision of legal services by the practice will result in breaches of the professional obligations of an Australian legal practitioner or other obligations [imposed by legal profession regulation], the director must take all reasonable action available to the director to ensure that –

- (a) the breaches do not happen; and
- (b) if a breach has happened - appropriate remedial action is taken in relation to the breach.

It is the legal practitioner director, and not the ILP as an entity, who is liable for disciplinary action if the provisions quoted above are breached. Moreover the legal practitioner director can also be liable for disciplinary action for:

- (a) disciplinary breaches by any legal practitioners employed by the ILP;
- (b) conduct of another director of the ILP, who is not a legal practitioner, that adversely affects the provision of legal services by the practice;
- (c) the unsuitability of another director of the ILP, who is not a legal practitioner, to be a director of a corporation that provides legal services.¹⁰⁷

The various regulatory requirements on ILPs and their officers are to be supervised and enforced by the ordinary professional conduct regulators (such as the Legal Services Commissioner, Legal Practice Tribunal, and self-regulatory professional associations). These regulators are given powers to audit the compliance of ILPs, their officers and employees

¹⁰⁶ s1309 (3) *Model Laws*.

¹⁰⁷ s1310 *Model Laws*.

with their regulatory obligations, as well as their management of the provision of legal services (including the way they supervise officers and employees). These audits may be conducted whether or not a complaint has been made about the ILP's provision of legal services. They may be taken into account in disciplinary proceedings against a legal practitioner director or other persons, and in decisions about the grant, renewal, amendment, cancellation or suspension of a practising certificate.¹⁰⁸

The New South Wales Legal Services Commissioner (regulator of the legal profession in that state) has developed a list of ten areas to be addressed by 'appropriate management systems' – known colloquially (and somewhat infelicitously) as the 'Ten Commandments' (see Table 3). These 'ten commandments' have also been adopted and developed by the Queensland Legal Services Commissioner.¹⁰⁹ The other state regulators of the state legal professions are still working on their strategy for implementing and enforcing the legislative requirements for incorporated legal practices, but are likely to adopt an approach consistent with New South Wales and Queensland.

¹⁰⁸ s 107 *Legal Profession Act 2004* (Qld); s 1322 *Model Laws*. ss 47O, 47P; *Legal Profession Act 1987* (NSW). Note that there is no provision for the ILP as an entity to have or need a practising certificate, only individuals who provide legal services. Provision is also made in the legislation for cooperation between the general corporate regulator, the Australian Securities and Investments Commission, and the legal profession regulators. The legal profession regulators generally only have authority in relation to professional obligations: see s 110 *Legal Profession Act 2004* (Qld); s 1326 *Model Laws*. Note also that while it was intended that these obligations on legal practitioner directors and incorporated legal practices will override directors' other obligations to the company in the case of conflict, there is some doubt about whether this is legally the case.

¹⁰⁹ See website explaining the Queensland Legal Services Commissioners' policies and procedures for regulating ILPs at <http://www.lsc.qld.gov.au/ILP/default.html>. See also John Briton and Scott McLean, 'Regulating the Provision of Legal Services by Incorporated Legal Practices' Paper presented to Conference of Regulatory Officers, Brisbane 2007, available at <http://www.lsc.qld.gov.au/speeches.htm> - visited 28 February 2008.

Table 3: Ten Areas to be Addressed to Demonstrate "Appropriate Management Systems" for Incorporated Law Firms in NSW and Qld¹¹⁰

1.	Negligence	Competent work practices
2.	Communication	Effective, timely and courteous communication
3.	Delay	Timely review, delivery and follow up of legal services
4.	Liens/file transfers	Timely resolution of document/file transfers
5.	Cost disclosure/billing practices/termination of retainer	Shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer
6.	Conflict of interests	Timely identification and resolution of "conflict of interests", including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc
7.	Records management	Minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests
8.	Undertakings	Undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the Office of the Legal Services Commissioner, courts, costs assessors
9.	Supervision of practice and staff	Compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing; quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services
10	Trust account regulations	Compliance with Part 3.1 Division 2 of the Legal Profession Act and proper accounting procedures

¹¹⁰ From NSW Office of the Legal Services Commissioner website: http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_tenobjectives
Last accessed on 6 August 2007.

The New South Wales and Queensland Legal Services Commissioners are requiring incorporated firms to assess themselves as to how well they have achieved each of these ten objectives throughout the firm on a five point scale from ‘non compliant’ to ‘fully compliant plus’ (see Tables 4 & 5) – and report the results to the independent regulators.¹¹¹ They are also developing a program for external auditing, monitoring and assessment of these appropriate management systems.¹¹² Audits by the regulator are triggered by events such as ‘a referral from a Law Society trusts account inspector, a failure to respond to the request for self-assessment or ratings less than ‘compliant’ on the self-assessment form.’¹¹³

In New South Wales all firms were required to undertake a self-assessment in February 2004. Only six of the three hundred firms notified failed to return a self-assessment. These were audited. Of those who did return a self-assessment, a significant number were honest enough to rate themselves as non-compliant on some objectives.¹¹⁴ In Queensland all firms are required to complete a self-assessment upon registration as an incorporated legal practice.¹¹⁵ Table 6 provides summary results from the first 43 Queensland incorporated legal practices to conduct these self-assessments.

¹¹¹ The Office of Legal Services Commissioner ‘Self-assessment and Audits for Incorporated Legal Practices’ (February 2004) *Without Prejudice* 1-2. See also the document issued by the NSW Legal Services Commissioner for self-assessments, ‘Suggestions Concerning The Elements Of “Appropriate Management Systems” for Incorporated Legal Practices In NSW’ available at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_ilp (4 April 2008).

¹¹² See Briton and McLean, above n 109.

¹¹³ Ibid 2. Steve Mark, New South Wales Legal Services Commissioner, has also stated that just because a firm filled in a self-assessment does not mean they will not be audited. Apart from the triggers quoted in the text, they might also be audited if there were a newspaper article or other information that indicated there might be a problem: above n 127.

¹¹⁴ Information about the results of the self-assessment process from Steve Mark, above n 127.

¹¹⁵ See Legal Services Commissioner, ‘Regulating Incorporated Legal Practices: Compliance Audits’ at <http://www.lsc.qld.gov.au/ILP/regulating-ILPs-compliance-audits.html> (4 April 2008).

Table 4: Ratings for Self-Assessment of ILPs in Queensland¹¹⁶

SELF-ASSESSMENT RATING (equivalent NSW code in brackets)	EXPLANATION
1. (Non-Compliant)	The Objective has not been addressed.
2. (Partially Compliant)	The Objective has been addressed but management systems are not fully functional.
3. (Compliant)	Management systems exist for the Objective and are fully functional.
4. (Fully Compliant)	Management systems exist for the Objective and are fully functional and regularly assessed for effectiveness.
5. (Fully Compliant Plus)	The Objective has been addressed, all management systems are documented and all are fully functional and all are assessed regularly for effectiveness plus improvements are made when needed.

¹¹⁶ Ibid. These are based on the NSW Legal Services Commissioner's ratings.

Table 5: Example of Queensland Self-Assessment Form for One Objective – Supervision of Practice and Staff (last two columns and last row to be filled in by a representative of the firm as self-assessment)¹¹⁷

<i>Key concepts to consider when addressing the Objective</i>	<i>Examples of possible evidence or systems most likely to lead to compliance</i>	<i>Arrangements already implemented/ Location of evidence</i>	<i>Details of System Improvement required by ILP</i>
Ensuring all practitioners have practising certificates and that all legal practitioner directors have unrestricted practising certificates.	Each legal practitioner director must hold an unrestricted practising certificate and there is to be a record of the appointment of the legal practitioner director.		
Ensuring notifications of changes are provided to the Law Society e.g. new legal practitioner director/s or employed solicitors etc.			
Legal practitioner directors meet on a regular basis (at least monthly) to review the performance of the practice with an agenda covering such items as operational and work/risk management policies and controls, compliance issues and people management. In practices with one legal practitioner director, such meeting should be held with senior staff such as selected employed solicitors, paralegals, bookkeeper etc	Minutes/notes of such meetings recording the matters covered, decisions agreed on and action taken.		
Compliance with the Legal Profession Act, Legal Profession Regulations, Rules and other statutory/taxation obligations	On a periodic basis, at least several times a year, there is a review of compliance. All personnel, both professional and support, are aware of relevant obligations and compliance standards and a record of outcomes and action taken are kept. Evidence of compliance with withholding tax obligations e.g. PAYG, GST as well as payment of superannuation guarantee contributions.		

¹¹⁷ This Qd form is based on the NSW self-assessment form and is fairly similar to it.

<p>A delegation process ensuring that:-</p> <ul style="list-style-type: none"> • staff are clear about the boundaries of their role, responsibilities and authority • staff are capable of doing the work delegated 	<p>People management policies and procedures, a file of executed employment agreements, duty statements/job descriptions of all staff and copies of up to date practising certificates.</p>		
<p>A structured induction and training program, which will ensure that all staff are properly trained and qualified for the duties they are employed to perform. Induction and training should also cover statutory obligations in the Legal Profession Act; Workers Compensation, holidays and leave etc</p>	<p>Documented induction procedures for both professional and support staff; a training register for both professional and non-professional staff and records of training needs being addressed in the staff performance review process.</p>		
<p>Staff performance reviews should be carried out on a periodic basis no less frequently than once a year.</p>	<p>Records of regular staff feedback and appraisal.</p>		
<p>All current files are reviewed by a legal practitioner director or nominated supervising practitioner on an appropriate periodic basis.</p>	<p>Notations on files used to review and discuss files with employed solicitors. Compliance with policy and procedures is part of staff performance reviews.</p>		
<p>Development of budgets</p>	<p>Budgets are in place and future profitability is monitored.</p>		
<p>Overall Rating for Objective</p>	<p>1 2 3 4 5</p>	<p>(Please circle one rating)</p>	

Table 6: Summary of Self-Assessment Ratings from 43 of First Qld Firms to Incorporate¹¹⁸

	1	2	3	4	5	Rating Average
Negligence	0% (0)	7.0% (3)	30.2% (13)	44.2% (19)	18.6% (8)	3.74
Communication	0% (0)	2.3% (1)	34.9% (15)	46.5% (20)	16.3% (7)	3.77
Delay	0% (0)	2.3% (1)	34.9%(15)	44.2% (19)	18.6% (8)	3.79
Liens and File Transfers	0% (0)	7.0% (3)	34.9% (15)	44.2% (19)	14.0% (6) ""	3.65
Costs Disclosure	0% (0)	2.3% (1)	46.5% (20)	30.2% (13)	20.9% (9)	3.70
Conflicts of Interest	0% (0)	7.0% (3)	41.9% (18)	27.9% (12)	23.3% (10)	3.67
Records management	0% (0)	0.0% (0)	27.9% (12)	46.5% (20)	25.6% (11)	3.98
Undertakings	0% (0)	4.7% (2)	32.6% (14)	37.2% (16)	25.6% (11)	3.84
Supervision of practice	0% (0)	4.7% (2)	44.2% (19)	30.2% (13)	20.9% (9)	3.67
Trust Account	0% (0)	2.3% (1)	25.6% (11)	25.6% (11)	46.5% (20)	4.16

¹¹⁸ Data from Queensland Legal Services Commissioner at 1 March 2008.

Critical Assessment of Australian Meta-Regulation of Law Firm Ethical Infrastructure

I have previously labelled this kind of regulatory requirement, ‘meta-regulation’ because it seeks to regulate self-regulation.¹¹⁹ It seeks to ensure that law firms have in place internal systems and cultures that ensure compliance with professional conduct obligations, and, obversely, to make sure they do not have in place systems and cultures that are likely to discourage employees’ and officers’ ethical conduct. A number of scholars have argued that that law firms ought to be the subject of discipline and regulation and that the primary purpose of this regulation and discipline should be to promote compliance efforts by firms because firm policies and procedures create economic and social incentives for individual conduct that are distinct from and prior to individual bad acts.¹²⁰ The Australian requirements for incorporated legal practices to have appropriate management systems in place are directed at this goal. There was also some suggestion at the time that these requirements were introduced for New South Wales incorporated legal practices that the same requirements for appropriate management systems should be applied to all legal practices, not just those that are incorporated.¹²¹

But there are a number of limitations to this approach - at least as far as it has been developed to date (although it must be noted that the Australian regulators are still working on extending and improving the assessment and monitoring of ILPs).

First, the currently regulatory assessment of whether incorporated firms is currently based mainly on *self-assessment*. The New South Wales and Queensland Legal Services Commissioners are both committed to auditing incorporated legal practices that either receive a lot of complaints or where their self-assessments are inadequate, and are developing further strategies for monitoring and audit.¹²² However legal profession regulators face the underlying problem that they are not adequately resourced to proactively monitor all incorporated legal practices, let alone all practices (if requirement for ethical infrastructure spread). Moreover they have traditionally used a mainly reactive style of regulation (in the technical sense that they react to complaints rather than engaging in proactive inspections and

¹¹⁹ C. Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, Cambridge, 2002). See also Christine Parker, ‘Law Firms Incorporated’ above n 15.

¹²⁰ See Elizabeth Chambliss, ‘MDPs: Towards an Institutional Strategy for Entity Regulation’ (2002) 4(1) *Legal Ethics* 45; Chambliss and Wilkins, ‘A New Framework for Law Firm Discipline’ above n 5; Schneyer, ‘A Tale of Four Systems’ above n 5; Schneyer, ‘Professional Discipline for Law Firms’ above n 5. See also Milton C. Regan, ‘Risky Business’ (2006) 94 *The Georgetown Law Journal* 1957.

¹²¹ Greg Dwyer, ‘The Business of Ethics’ (2003) *Law Society Journal* 38 at 38 (‘in a report issued in November 2002 the NSW Attorney General recommended that the power of the OLSC [Office of the Legal Services Commissioner] to audit the management systems of ILPs should be extended to any legal practice in NSW, including barristers and MDPs [multi disciplinary practices]’).

¹²² One mechanism is confidential survey that employed lawyers must fill in looking at hypotheticals... Another way around it is to require on independent third party certification of quality assurance...

monitoring) and so taking on responsibilities for monitoring management systems to ensure professionally competent and ethical practice requires new skills and ways of thinking about the regulatory role. There is, however, one area where the profession's regulators have previously engaged in proactive monitoring and inspection—trust accounting—and, not surprisingly, this is the area where incorporated legal practices are assessing themselves as having the best systems in place (see Table 6).

Second, there is a danger that ethical infrastructure initiatives will be *narrowly designed to enforce compliance only with lawyers' clearest and most visible legal obligations* - duties to the client, rather than duties to the court and the legal system as a whole, and trust accounting duties in particular.

This bias is already evident in the way the ten commandments have been framed. They clearly focus mostly on obligations to client. Moreover since legal profession regulators have generally been mainly reactive regulators, and most complaints are received from clients, this is likely to continue to be an issue that needs to be watched. They are unlikely to receive complaints from clients about their own lawyers' failing to fulfill their lack of duty to court, and others do not necessarily know about it. Moreover ethical difficulties with the duty to court in litigation may exist despite formal policies that value ethics because informal work team cultures and incentives promote aggressive adversarialism to advance client interests.

Even in relation to duties to clients, there is a danger of a legalistic focus in appropriate management systems. For example, in relation to billing, mere compliance with legal obligations and contractual principles are not enough to inculcate ethical behaviour. The law is mainly aimed at making sure that the client understands and agrees to the fees to be charged so that the lawyer can legally recover those fees if the client later does not pay up. But an ethical law firm would want to make sure the fees it charged were not only authorised by a properly constituted contract with the client after full disclosure, but also that the fees were actually reasonable in all the circumstances. This would require regular, ethically sensitive bill review or double-checking procedures and attention to what 'padding' conventions existed within the firm. A firm concerned with ethical billing, and not providing ethical disincentives to its lawyers, might even reconsider the need for hourly billing in all circumstances given its ethical implications, and would set billable hours targets for lawyers with a view to them being achievable without padding or unreasonable working hours.¹²³

¹²³ My co-authors and I have discussed ethical issues around billing and litigation and their implications for ethical infrastructure in law firms in greater detail in Parker et al, 'The Ethical Infrastructure of Legal Practice', above n 5, pp??.

A third limitation of the current legislation in Australia regulating incorporated legal practices is the fact that it is *the one 'legal practitioner director' who bears the burden on behalf of the whole practice* for making sure appropriate management systems are in place. It may be useful to require a nominated person to have a specific responsibility in this area,¹²⁴ but why is the obligation not also shared by the practice as a whole? Some have argued that the burden placed on solicitor directors by provisions such as these is too large.¹²⁵ That one lawyer can be responsible for the misconduct of every member of the firm and every member of the board is much more onerous than the responsibilities which would fall on a similarly appointed person in a corporation. The only sanction available against the firm for failure to have appropriate management systems in place or for substantive breaches of professional responsibility requirements is the possibility that the relevant Supreme Court can disqualify a corporation from providing legal services in the jurisdiction. (The Court can also disqualify a particular person from managing an ILP.)¹²⁶

The fourth and most challenging limitation is the danger that regulators and law firm management will be satisfied with *formalistic ethics management initiatives* that do not make any difference to everyday actions and behaviours, and are not supported by commitment to ethical values by lawyers throughout each firm. In particular they will fail to support or encourage the development of individual lawyers' awareness of their own ethical values and ethical judgment as to how to apply them in practice.

There is the danger that legislators and regulators will fall into the trap of thinking that law firms that incorporate operate in practice as purely hierarchical, command and control structures in which ethics can easily be legislated from above by the executive via appropriate management systems. There is a danger that an 'ethical infrastructure' will implicitly be thought of as an optional accessory that slots neatly into the corporate form and works instantly once slotted in — just like you can choose to add a dvd player or hot pink leather seat covers to your new car. But just because a legal practice is incorporated does not necessarily mean that the lawyers and other staff in the firm itself work and organize themselves in a hierarchical, goal-oriented way and that ethics can be value added through a command and control ethical infrastructure. Some incorporated legal practices — such as Integrated Legal Holdings 'franchise model' business may not be very hierarchic at all. They might be more like a set of contracts and relationships linking various individuals and practice units.¹²⁷ Careful thinking about what makes for 'appropriate' management systems for legal

¹²⁴ See Chambliss and Wilkins, 'A New Framework for Law Firm Discipline' above n 5.

¹²⁵ [Mark 2001]

¹²⁶ Sections 1324 & 1325 *Model Laws*. Note that New South Wales does not have these provisions.

¹²⁷ Pursey P. M. A. R. Heugens, Muel Kaptein & J. (Hans) van Oosterhout, 'Contracts to Communities: A Processual Model of Organizational Virtue' (2008) 45 *Journal of Management Studies* 100.

practices that are organized in different ways will be necessary. The most robust way of institutionalizing ethics in an organization is likely to be through creating a ‘moral community’ that is not hierarchical, but more dialogic.¹²⁸ The application of moral theory to lawyers’ ethics suggests that a crucial aspect of individual lawyers’ expression of their own ethical values and judgment should be a law firm context in which lawyers are encouraged and empowered to individually and together deliberate over what ethics requires of them in different situations — and then, importantly, to put the outcomes of those deliberations into practice. Formal policies must support this, for example by allowing time sheet options for ethical discussion, but cannot create such a culture without imaginative leadership.

V. CONCLUSION

Incorporation and listing of law firms may have a few access to justice advantages for some kinds of legal practice at least, but plenty of ethical dangers to go along with them. What is encouraging about the incorporation and listing of law firms in Australia – and the debate that this has sparked in North America – is that we are now discussing what it means for the ethics, governance and management of legal practice for it to be both a profession and a business. The increasing organisational complexity and commercialism of legal practice have subverted traditional individual ethical responsibility in *substance*. But the fact that legal practice has up to now maintained the *form* of a profession has made it seem unnecessary to develop new ways of supporting ethics in the business of law. This is dangerous if the community expects the legal profession to continue to safeguard the rule of law above private client interests. It also fails to support the vast majority of individual lawyers who want to be able to take pride in the ethical practice of their professional skills – but find it increasingly difficult to do so in the law factories and in-house situations in which they find themselves practising.

As lawyers, regulators and legal ethicists, the incorporation and listing of law firms has prompted us to take the first steps towards working out how to design 21st century commercial legal practices—whether in law firms, multi disciplinary practices or inhouse—where individuals can develop and exercise their own ethical judgment and responsibility in partnership with others.

Many commercial lawyers have considerable expertise in advising their corporate clients on how to comply with the spirit of the law - and run a successful business at the same time. We might hope that these lawyers can bring their expertise and ingenuity to marrying their own particular legal and ethical responsibilities with the successful running of legal businesses.

¹²⁸ Ibid. See also

There is even some hope that this might have a flow-on effect to other businesses making it clear that the general duty to make a profit for shareholders is always subject to other more specific legal obligations (eg environmental regulation, occupational health and safety standards, competition and consumer protection law and so on) and ethical standards.

APPENDIX: TIMELINES OF THREE LEGAL PRACTICES THAT HAVE LISTED ON THE AUSTRALIAN SECURITIES EXCHANGE

Slater and Gordon Ltd (Listed 21 May 2007)¹²⁹

1935

William Slater and Hugh Gordon found Slater & Gordon in Melbourne.

2001

Slater & Gordon is incorporated.

2005

Slater & Gordon acquires Geoffrey Edwards & Co, based in Sydney and Newcastle.

2006

Slater & Gordon acquires Maurice May & Co, based in Sydney and Newcastle, and Reid & Reid, based in Newcastle.

29 September 2006

Slater & Gordon acquire Gary Robb & Associates, a Canberra law firm.

6 November 2006

Slater & Gordon acquire Paul J Keady & Associates, a law firm based in Broken Hill.

Jan-Feb 2007

Slater & Gordon begin talks with the Victorian Legal Services Board about its plans to list on the ASX.¹³⁰ Talks are also held with the NSW Legal Services Commissioner.¹³¹

16 February 2007

Slater & Gordon Pty Ltd lodge an application with ASIC to become a public company.¹³²

12 March 2007

Slater & Gordon's plans to list on the ASX are made public in general terms, although its prospectus is yet to be released. 41 lawyers, including partners, principals of subsumed firms and employees, have shares in the firm's equity. The firm is expected to use the money raised to fund takeovers and litigation (currently funded with debt).¹³³

2 April 2007

Slater & Gordon lodges its prospectus with ASIC. The float offer will open on April 11 and close on April 27. It will be underwritten by Austock Corporate Finance. Slater & Gordon plans to raise \$35 million from the float (35 million shares at \$1 each), with existing equity holders retaining 55.9% of the company. \$17.7 million will be used for acquisitions, advertising, litigation and other costs, with \$17.3 million going to existing shareholders selling part of their stake. \$15.4 million is to be used for acquisitions. Andrew Grech and Peter Gordon currently own about 16.5% each of the firm's equity. They and the other vendor shareholders have also agreed to restrictions on when they can sell their shares, whereby they can only sell 20% of their shares each year. The prospectus also underlines that fact the firm will still put the interests of the court and its clients ahead of the interests of its shareholders.

¹²⁹ This summary largely based on Slater & Gordon's *Prospectus*, above n 7, and announcements to Australian Securities Exchange except as otherwise noted.

¹³⁰ Chris Merritt, '\$14m for partners in Slater float', *The Australian*, 23 March 2007.

¹³¹ Chris Merritt, 'Fears of conflicting duties in listed firms were baseless, state regulator admits', *The Australian*, 19 October 2007.

¹³² Information available from ASIC webpage.

¹³³ Chris Merritt, 'Slater & Gordon poised to net float bonanza', *The Australian*, 12 March 2007.

This position had to be negotiated with ASIC and the ASX.¹³⁴ Shares issued to employees are non-voting shares and are not part of the offer and listing.

3 April 2007

Austock Corporate Finance announces it has already received substantial interest from about 40 institutional investors in the planned float, amounting to about \$20 million out of the \$35 million proposed equity.¹³⁵

13 April 2007

The IPO opens.

2 May 2007

The Slater & Gordon IPO closes fully subscribed. As expected, about \$20 million of the \$35 million offer is taken up by institutional investors.¹³⁶

21 May 2007

Slater & Gordon list on the ASX. The shares close at \$1.40, a 40c improvement on the \$1.00 issue price.

28 May 2007

Slater & Gordon announce they will be acquiring D'Arcys Solicitors, a firm specialising in military compensation and based in Brisbane. The consideration for the sale is \$2.33 million in cash and \$475,000 in Slater & Gordon shares (the share component being subject to shareholder approval). D'Arcys will be integrated into Slater & Gordon's Brisbane practice. The firm's principal, Vince Green, will be under contract to Slater & Gordon for at least three years. The acquisition was delayed slightly for, and conditional on, the introduction of legislation on 1 July 2007 enabling non-lawyer ownership of firms in Queensland.

17 June 2007

Perpetual Ltd emerges as the largest external shareholder in Slater & Gordon, reaching 5% of the issued capital. It began buying on the day the firm listed.¹³⁷

9 August 2007

Slater & Gordon announce they will be purchasing Sydney law firm McClellands, which specialises in personal injury litigation. Consideration for the sale will be an undisclosed amount of cash and \$2 million in Slater & Gordon shares (for which shareholder approval is required). The transaction is expected to be completed on 31 August 2007.

25 August 2007

Slater & Gordon announce profits for 2006-2007 of \$10.7 million, 18% above the profit forecasts made in the prospectus. However, its dividend is limited to 2c per share, allowing further acquisitions to be made.

22 November 2007

Slater & Gordon announce they will be acquiring Crane Buther Mackinnon (Coffs Harbour, New South Wales), Nagle & McGuire (Nowra, New South Wales) and Edwin Abdo & Associates (Bunbury, Western Australia) for a total of \$1.8 million in shares and \$3.2 million in cash and assumed liabilities.

9 January 2008

Slater & Gordon announce they are acquiring the personal injuries and professional negligence practices of Quinn & Scattini, a Queensland firm.

20 February 2008

¹³⁴ Bruce MacEwen, 'A Talk with Andrew Grech' above n 13.

¹³⁵ Carolyn Batt, 'Slater & Gordon hits boards with a bang', *The West Australian* (Perth), 5 May 2007.

¹³⁶ Ibid.

¹³⁷ Christopher Webb, 'Slater stake a winner for Perpetual', *Sunday Age* (Melbourne), 17 June 2007. Perpetual appears to have subsequently sold off some or all of its stake: Slater & Gordon, *Annual Report 2006-2007*, released 22 October 2007 at 82.

Slater & Gordon issues 2 625 000 shares at price of \$1.75 under employee share ownership plan.

22 February 2008

Slater & Gordon announce profits for first half of 2007-2008 of \$6.9 million, up 56% on the previous year. Another dividend of 2c a share. Slater & Gordon now has 25 locations in its network of offices and a further new office is to be opened in Gosford.

28 March 2008

Slater & Gordon announce they are acquiring the Sydney CBD commercial law firm Blessington Judd for a combination of cash and \$350 000 in Slater & Gordon shares.

2 April 2008

Slater & Gordon obtains an injunction against ANZ Bank (one of its shareholders) on behalf of a client to stop selling shares that both the client and the ANZ claim ownership of. This is a dispute arising out of the failure of stockbroker and margin lender, Opes Prime and is likely to lead to further significant litigation involving ANZ as a party.¹³⁸

4 April 2008

Shares are trading at \$1.46.

¹³⁸ 'Opes Client Wins Injunction Against ANZ' 2 April 2008 *Sydney Morning Herald* (online edition).

Integrated Legal Holdings (Listed 17 August 2007)¹³⁹

27 June 2006

Integrated Legal Holdings Ltd ('ILH') applies to ASIC for registration as a public company.¹⁴⁰

10 October 2006

ILH announces plans to list on the Australian Stock Exchange. The prospectus issued by ILH proposes to sell 28 million shares at 50c each, worth \$14 million, and amounting to 46% of ILH's equity. This capital is to be used to acquire five entities:

- law firm Talbot Olivier
- law firm Durack Zilko
- law firm Brett Davies Legal
- online legal document business Paw Central
- management consultancy firm Professional Services Development

The company's assets (worth \$14.7 million) are said to be constituted largely of goodwill, valued at \$12.3 million, or 80% of the assets. Essentially ILH is to be a holding company with a number of wholly owned subsidiaries and web-based document production IT.¹⁴¹

13 October 2006

The NSW Legal Services Commissioner, Steve Mark, raises concerns about the float with *The Australian Financial Review*. He refers to the problems of liability in the case of a large negligence action: "If one lawyer creates a huge negligence action, is the holding company liable? There is a question [as] to what extent the directors of the parent company will need to have control of the legal work to ensure there is no liability."¹⁴²

18-19 October 2006

The Legal Practice Board of Western Australia ('LPBWA') meets to discuss the proposed ILH listing. This came after phone conferences earlier in the week on the subject with other legal regulators around Australia. The Chairman of the LPBWA, John Penglis, writes to ILH Chairman John Dawkins, advising of the LPBWA's concerns about the proposed listing. A copy of the letter is also sent to the Australian Securities and Investments Commission ('ASIC').¹⁴³

23 October 2006

ASIC issues an interim stop order on the ILH prospectus.¹⁴⁴

10 November 2006

A second interim stop order is placed on the ILH prospectus, less than 21 days after the first interim stop order has been issued. This is said to be due to ILH's request for more time to revise the prospectus.¹⁴⁵

¹³⁹ Information based on the ASIC company search for Integrated Legal Holdings (ASIC, *Integrated Legal Holdings* (2007) <<http://www.search.asic.gov.au>> at 29 Oct 2007), Integrated Legal Holdings Limited, *Prospectus* (2006), and Australian Securities Exchange, *Integrated Legal Holdings Limited (IAW)*, (2 April 2008)

<<http://www.asx.com.au/asx/research/CompanyInfoSearchResults.jsp?searchBy=asxCode&allinfo=&asxCode=IAW>> at 2 April 2008, unless otherwise noted.

¹⁴⁰ ASIC, *Integrated Legal Holdings* (2007) <<http://www.search.asic.gov.au>> at 29 Oct 2007.

¹⁴¹ Marcus Priest & Matt Drummond, 'New chapter as firms go public', *The Australian Financial Review* (Melbourne), 13 October 2006, 54; Marcus Priest & Matt Drummond, 'Goodwill the major asset in the game', *The Australian Financial Review* (Melbourne), 13 October 2006, 54.

¹⁴² *Ibid.*

¹⁴³ Marcus Priest, 'WA regulator refers ILH listing to ASIC', *The Australian Financial Review* (Melbourne), 20 October 2006, 57.

¹⁴⁴ Marcus Priest, 'ILH prospectus placed on hold', *The Australian Financial Review* (Melbourne), 27 October 2006, 60.

¹⁴⁵ Harriet Morley, 'Holdings on legal listing' (2006) 80 *Law Institute Journal* 23, 23.

November 2006

ILH submits 2 new prospectuses to the WALPB, but fails to allay its as yet unannounced concerns. Media reports suggest that the LPBWA's concerns centre on the amount of goodwill forming part of ILH's assets.¹⁴⁶

December 2006

The stop order is extended indefinitely by ASIC.¹⁴⁷

February 2007

A revised prospectus is scheduled for release but is further postponed to some time in 2007.¹⁴⁸

1 May 2007

The LPBWA goes public with its concerns over the ILH float. It states that the major issue is whether ILH's asset valuation relies too heavily on goodwill. In addition, the Board queries whether the amount of goodwill is in accordance with 'the established legal definition of goodwill', and whether the amount to be paid to the founding partners is appropriate. The LPBWA also indicates it will refer the matter to the (WA) Legal Practitioners Complaints Committee. ILH, with \$6.6m out of \$11.2m in assets, or 59%, classed as goodwill, is contrasted with recently listed Slater & Gordon, which attributes only 3% of its \$114.4 million in assets to goodwill.¹⁴⁹

May 2007

Law firm Durack Zilko announces it has pulled out of the ILH group. A spokesperson says the firm were concerned about the unresolved issues with the LPBWA, and the potential negative effect of this on the ILH share price.¹⁵⁰

16 May 2007

ILH submits a revised prospectus to ASIC. ASIC indicates it does not have any problems with this new prospectus. The document explains how goodwill is calculated (the cost of acquiring the law firms minus the value of identifiable assets) but actually increases the payment to founding partners. It values goodwill at \$6.2m, with total assets of \$11.1m. It seeks to sell only 24 million shares this time, with the option to oversubscribe up to 28 million.¹⁵¹

It emerges Professional Services Development has also withdrawn from the float, after having 'had another offer'.¹⁵²

30 July 2007

The ILH initial public offering closes, having sold around 24.8 million shares. 998 different investors subscribe to the offer.¹⁵³

¹⁴⁶ Marcus Priest, 'Hearsay', *The Australian Financial Review* (Melbourne), 1 December 2006, 55.

¹⁴⁷ Lawyers Weekly, *Setback for ILH*, (17 January 2007)

<http://www.lawyersweekly.com.au/articles/Setback-for-ILH_z69078.htm> at 5 September 2007.

¹⁴⁸ Marcus Priest, 'Hearsay', *The Australian Financial Review* (Melbourne), 9 February 2007, 60.

¹⁴⁹ Neale Prior, 'Integrated sticks with float despite legal board attack', *The West Australian* (Perth), 1 May 2007, 57; Sean Hocking, *W.A. Law Firm Float Criticized*, (3 May 2007),

<<http://practicesource.com/australian-asia-legal-eye/w.a.-law-firm-float-criticized.html>> at 10 September 2007; Australian Legal Business Asia Edition, *News Analysis: Who's to judge?* (May 2007), <www.asianlegalonline.com> at 10 September 2007. According to *The Australian Financial Review*, goodwill was calculated in the ILH prospectus by taking a multiple of annual earnings and subtracting all tangible assets: Marcus Priest, 'Hearsay', *The Australian Financial Review* (Melbourne), 1 December 2006, 55.

¹⁵⁰ ASX Media Release, 'ASX welcomes Integrated Legal Holdings Limited (IAW)', 16 August 2007; Australian Legal Business, *Who's to judge?*

¹⁵¹ Hocking, 'Float Criticized.'; Integrated Legal Holdings, *Prospectus*, 50, 52. \$3.2m for Talbot Olivier, up from \$2.1m (Prospectus at 77); \$800k for Brett Davies Lawyers, up from \$600k (Prospectus, 78); \$2.7m for Law Central, down from \$3m (Prospectus, 78).

¹⁵² Australian Legal Business Asia Edition, *ILH opens 12% below issue price*, (August 2007), <www.asianlegalonline.com> at 10 September 2007.

17 August 2007

ILH lists on the ASX on the day the ASX suffered its biggest loss in seven years, It opens at 12% below the issue price.¹⁵⁴

19 September 2007

ILH purchases Perth firm Peter Marks Succession Lawyers for \$125,000. The firm will be incorporated into Talbot Olivier. The acquisition included the firm's business assets, including a will bank and commercial lease.¹⁵⁵

28 September 2007

ILH agrees to purchase the legal practice of Shayne Leslie, a Perth solicitor. Mr Leslie had formerly been a consultant to Talbot Olivier, and after acquisition his firm will also be integrated into Talbot Olivier's practice. The consideration for the purchase was cash and shares, although its value remains unclear.¹⁵⁶

October 2007

ILH share prices languishes at around 25c per share.

29 February 2008

ILH announces half year profits up to 31 December 2007 of \$895 412. Shares close trading for the day at 18c.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Daily Business Alerts (Australia), 'Integrated Legal Acquires Peter Marks for \$125K', 19 September 2007.

¹⁵⁶ Daily Business Alerts (Australia), 'Integrated Legal Acquires Shayne Leslie in Cash, Scrip Issue', 28 September 2007.

National Lending Solutions Pty Ltd

1971

Michael Noyce begins his own legal practice, one year after being admitted as a lawyer.

1990

Noyce Legal is founded in Parramatta, Sydney.

21 December 1999

InfoChoice Limited ('InfoChoice') lists on the Australian Stock Exchange.¹⁵⁷ InfoChoice operates a consumer finance website and assists financial institutions with online services.

1990-2003

Noyce Legal is built up by Michael Noyce. The mortgage business in particular starts to flourish.¹⁵⁸ Throughout the 1990s the firm wins awards and accreditation for best practice legal services.¹⁵⁹ Between 1994-2000, the firm takes over three other firms.¹⁶⁰

13 February 2003

National Lending Solutions Pty Limited ('NLS') is incorporated.¹⁶¹ It provides mortgage and documentation processing services to Australian lenders, including title searching, document drafting, settlement, registration etc.¹⁶²

26 June 2003

NLS enters into a Memorandum of Understanding ('MOU') with InfoChoice and WealthPoint Pty Limited ('WealthPoint'). Wealthpoint is a technology consultancy to the financial services sector. The MOU proposed that InfoChoice, NLS and WealthPoint would merge their businesses, with InfoChoice shareholders to obtain 36% of the new entity, NLS 33% thereof, and WealthPoint 31%. The Board would comprise representatives of each company.¹⁶³

19 November 2003

A new MOU is executed, with WealthPoint withdrawn from the deal. The merger is to proceed as a merger between InfoChoice (38% share) and NLS (44% share). The remainder of the equity is to be allocated through a private placement. WealthPoint is to remain as a technology partner.¹⁶⁴

4 December 2003

An agreement is entered into for the merger to proceed. It entails InfoChoice acquiring all of the shares in NLS. Consideration for the sale is in the form of shares, representing 44% of InfoChoice capital, and cash of \$2m. InfoChoice shareholders will retain 38% of the company. A private placement is to take place, and expected to raise \$1.5m. Michael Noyce will be appointed to the board of InfoChoice. The deal is pending the approval of InfoChoice shareholders.¹⁶⁵

¹⁵⁷ See Australian Securities Exchange, *Infochoice Limited (ICH)*, (2 April 2008)

<<http://www.asx.com.au/asx/research/CompanyInfoSearchResults.jsp?searchBy=asxCode&allinfo=&asxCode=ICH>> at 2 April 2008.

¹⁵⁸ Julie Lewis, 'Backdoor listing gives firm some teething problems' (March 2007) 45 *Law Society (NSW) Journal* 32.

¹⁵⁹ Infochoice Limited, *Prospectus* (2004), 16.

¹⁶⁰ Mary Rose Liverani, 'It's so Noyce to make a winning match of business and law' (2000) 38 *Law Society Journal* 22.

¹⁶¹ ASIC, *National Lending Solutions Pty Ltd*, (2007) <<http://www.search.asic.gov.au>> at 29 Oct 2007

¹⁶² *AAP Company News*, 'ICH – Proposed merger with NLS and Wealthpoint', (Sydney), 26 June 2003.

¹⁶³ *Ibid.*

¹⁶⁴ *Australian Company News Bites*, 'Infochoice announces new Memorandum of Understanding', 19 November 2003.

¹⁶⁵ *RWE Company Announcements*, 'ICH – InfoChoice to merge with National Lending Solutions', (Sydney), 4 December 2003.

3 February 2004

InfoChoice lodge a prospectus for a capital raising of \$2m. The proceeds are to be put towards the cash component of the deal. The capital raising also requires InfoChoice shareholder approval.¹⁶⁶

9 February 2004

The InfoChoice capital raising offer opens.¹⁶⁷

12 March 2004

The InfoChoice capital raising offer is scheduled to close. The Board of InfoChoice resolves to extend the prospectus until 18 March 2004. An extraordinary meeting of InfoChoice shareholders is held to consider both the capital raising and acquisition. Both proposals are approved. At this point, NLS is owned by Michael Noyce (managing partner of Noyce Legal), as to an 85% share, and Jennifer Powell (partner in Noyce Legal), as to a 15% share. Noyce Legal still owns the mortgage documentation and processing business, and the deal is accepted on the assumption that NLS will acquire it for a cash consideration of \$5.6m.¹⁶⁸

17 March 2004

Michael Noyce tells the Sydney Morning Herald that he has assured the NSW Legal Services Commissioner, Steve Mark, that NLS's professional obligations will prevail over its financial interests.¹⁶⁹

19 March 2004

The acquisition is completed. Michael Noyce is appointed to the board of InfoChoice Ltd as an executive director. NLS, as a subsidiary of InfoChoice, is now intended to operate separately from Noyce Legal. Noyce Legal intends to now focus on other aspects of its practice, and cites as its rationale that the spun-off firm would be more attractive to investors than a general practice.¹⁷⁰

30 March 2004

InfoChoice shares resume trading on the ASX, at a price of 25c.¹⁷¹

19 April 2004

InfoChoice's share price has increased to 39c.¹⁷²

31 August 2004

InfoChoice announces an increase in profits of 216% for the financial year 2003-2004.¹⁷³

2008

InfoChoice is still trading on the ASX. On 11 February 2008 the share price was 48c.

¹⁶⁶ *Australian Company News Bites*, 'InfoChoice raises \$2 million to acquire National Lending Solutions' 3 February 2004.

¹⁶⁷ *Ibid.*

¹⁶⁸ InfoChoice, *Prospectus*, (2004), 6, 22.

¹⁶⁹ Michael Pelly, 'Law firm lists itself', *Sydney Morning Herald* (Sydney), 17 March 2004, 22.

¹⁷⁰ *The Lawyer*, 'Australia: Aussie firm becomes first to list on stock exchange', 19 April 2004; Kate Gibbs, *ASX grabs law firm division*, (30 March 2004), *Lawyers Weekly*, <www.lawyersweekly.com.au>, at 5 September 2007.

¹⁷¹ Gibbs, *ibid.*

¹⁷² *Australian Company News Bites*, 'InfoChoice raises \$2 million to acquire National Lending Solutions' 3 February 2004.

¹⁷³ *AAP Company News*, 'ICH – Proposed merger with NLS and Wealthpoint', (Sydney), 26 June 2003.

