

# Attorney Code of Conduct Review and conflict issues relating to publicly listed IP Attorneys



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# Incorporation and public listing

- ▶ Traditionally, in the practice of law and as patent attorneys the incorporation of entities was banned.
  - ▶ Attorneys granted the right to incorporate under 2013 “Raising the Bar” amendments to the Patents Act.
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# Rationale for changes as set out in Explanatory Memorandum

- ▶ Limitations on the flexibility of the attorney to choose the most appropriate structure removed.
- ▶ Most other professions, including lawyers, engaged to practice through corporate structure rather than unincorporated partnership
- ▶ Rationale: freedom to choose structure (choice), conformity within the legal profession and removing unnecessary regulation



# Implementation of incorporation

- ▶ EM “The scheme is broadly based on the existing laws regulating incorporated legal practices, with appropriate adjustments to reflect the difference between lawyers and patent and trade marks attorneys. Adopting such a scheme has several benefits. The model has already proven to be successful in regulating a similar profession. Additionally, given the overlap between the legal and attorney professions, having similar regulatory schemes is likely to reduce compliance costs for joint lawyer-attorney firms.”
- ▶ s198 of the Patents Act amended to allow registration of a company provided at least one patent attorney is a director and notice being given to the designated manager.
- ▶ Changes implemented the concept of “*incorporated patent attorney*”.



# Public listing

- ▶ Immediate move towards incorporation.
- ▶ Changes to incorporation then opened the structure to the possibility of ownership by non-patent attorneys and, in particular, the public.
- ▶ IP sector embraced public listing on the ASX with the first corporation IPH Limited, listing in late 2014.
- ▶ Subsequent listings have resulted such that a high proportion of firms are owned by a publicly listed entity which, in turn, owns multiple incorporated attorney practices.



# What changes are there for the individual lawyer/attorney in an incorporated firm?

- ▶ Incorporation and public ownership per se does not appear to change the position.
- ▶ Professor Parker in her paper "*Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms*" stated:

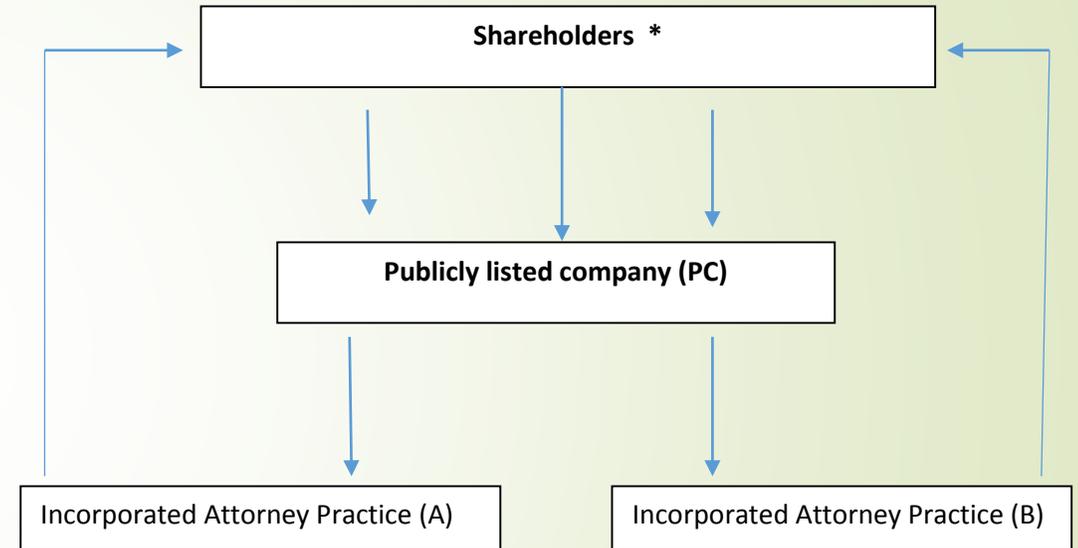
"The incorporation and listing of law firms accentuate and bring into focus certain ethical issues, but it is not incorporation and listing as such that are the main thing we should worry about. Law is already a business as well as a profession and has been so for a very long time. The ethical issues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

# Duties

- ▶ In other words, the attorney has always maintained a business interest in the practice. Notwithstanding the interest, the attorney is required to act in the interests of the client. For example, attorney may have a financial interest (in the form of fees) in an opposition proceeding, where it is in the client's interests to settle.
- ▶ The Code sets out that the core obligations of a registered patent or trade mark attorney are, in order, to act:
  - (a) In accordance with the law; and
  - (b) In the best interest of the registered attorney's client; and
  - (c) In the public interest; and
  - (d) In the interests of the registered attorney's profession as a whole.

# Structure of listed entities

- Presumably implemented to take advantage of economies of scale and the desire to diversified exposure to the sector have resulted in groups where one entity owns several incorporated entities.
- Advantage of size have a potential disadvantage re: conflicts.



\*Directors and employees of the Incorporated Attorney Practice are also in many cases significant shareholders.



Drawing an analogy with conflicts arising in the context of solicitors: *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065 per Beach J

- ▶ There are three potential bases by which the Court's jurisdiction to restrain solicitors from acting against a former client or a new client from retaining such solicitors might be said to arise: (a) **first**, that there is a real risk of the misuse of confidential information; (b) **second**, that there is a breach of a duty of loyalty which has survived the termination of the prior retainer; (c) **third**, that the proper administration of justice requires that the solicitors should be prevented from acting to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice.



# Dealer Support Services (*finding*) – first & second basis

- ▶ First basis, is that there is a real risk of breach of confidential information. This has been typically justified as restraining parties from acting including in a patent context – see *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick Lawyers* [2000] VSC 196 . This did not arise in *Dealer Support Services* – as a question of fact there was no risk of misuse of confidential information.
- ▶ Second basis, there was no breach of duty of loyalty. The analysis in this case appears largely confined to an analysis of the particular situation where a solicitor acts against a **former** client. It appears there is no continuing duty of loyalty when a practitioner no longer acts – fiduciary obligation terminates with retainer (or to the extent it is an obligation to safeguard confidentiality). This factual situation is different to that facing listed groups.



# Dealer Support Services (finding) – third basis – proper administration of justice

- First, the test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a solicitor [or patent attorney] be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice. Per [94] **(ie. appearance)**
- Secondly, due weight should be given to the public interest in a client not being deprived of the solicitor of its choice. That public interest is an important value, although it can be overridden with due cause (*WA v Ward* at 498 per Hill, Branson and Sundberg JJ). per [95] **[ie. choice]**
- Thirdly, this third basis is not discharged by it being demonstrated that the first basis does not apply (cf *Photocure* at [56] and [60] per Goldberg J). It has independent scope. The third basis deals not just with private fiduciary relationships and *inter-parties* fiduciary obligations, but rather the administration of justice, the public interest and the appearance of propriety of officers of the court. The third basis is not only justified, but its justification explains its additional scope. Per [96]
- Fourthly, nevertheless this jurisdiction is an “*exceptional one*” and is “*to be exercised with appropriate caution*” (Young J in *Geelong School Supplies* at [35] and Brereton J in *Kallinicos* at [76]). Per [97]



# Considering the Code in the context of *Dealer Support Services*

Three contentious issues in potential revisions to the Code bear discussion:

- (1) Recognition of independence possible in a group
- (2) Double employment permissible with consent
- (3) Double employment (contentious) prohibited.



# *Recognition that independent practice possible within group*

- ▶ The relevant question is:

*“Should the Code provide that incorporated attorney practices that are commonly owned are not to be treated (a) as other than separate practices, and (b) as business associates of each other for the purposes of the conflict of interest provisions, so long as they are operated independently?”*

\* What is the outcome? Assuming operating independently, this means that Practice A can engage in (for example) an opposition against Practice B regardless of informed consent (**double group employment**).



# *Double group employment*

- ▶ Double group employment would not likely result in a misuse of confidential information where practices are operated independently. At law, this would be incumbent on the practices to show this is the case.
- ▶ Open question whether, in some cases, this might place group members in conflict where they have an interest (through shareholding for example) in the other practice in the group. There are some situations which one can envisage which potentially placing the attorney's business interest in conflict with the interests of the client.
- ▶ Open question whether the third group discussed by Beach J applies, protecting the administration of justice (bearing in mind the differences between judicial and administrative forums). The appearance of propriety is an important factor in framing the Code.



# My view – Double Employment within group

- ▶ I recognise that independence is *possible* within a group although query whether the Code should go so far as to state that parties who are related in a business sense are not so related.
- ▶ Whilst not going so far as to say that double employment within a group is unlawful – there are potential situations where it is undesirable and has the potential to place the attorney in conflict or at least give the appearance of conflict.
- ▶ My preference, in the interests of clients, is that if the Code is to expressly allow double group employment then it should do so in circumstances where there is *informed consent* by both clients to place the matter beyond doubt (or, at least, notification if not consent).



# Double Employment (non-contentious)

- ▶ Double employment within the one firm has the potential to result in the misuse of confidential information per the first basis set out in *Dealer Support Services*.
- ▶ Notwithstanding this, the prospect of confidential information being misused is less acute in non-contentious matters which there is no current dispute between the parties.
- ▶ I agree that this might be allowed with consent.



# Double employment (contentious)

- ▶ If double employment (within the same firm or company) were allowed in contentious matters then there would be a potential for misuse of confidential information.
- ▶ Note, however, one could envisage a situation where a “*Chinese Wall*” was established such that there could be no misuse of information. For example, where Practice A maintained offices in different states. If that could be overcome then the two further basis identified by Beach J in *Dealer Support Services* are particularly relevant.
- ▶ I therefore agree that double employment (in the one entity) in contentious matters should be prohibited.



# Code

Ultimately the role of the Code is to dictate the minimum professional standards.

- Question to what degree Code will deal with matters of conflict and to what degree it will leave it to the attorney to ensure that their own affairs do not result in conflict.
- Code should therefore:
  - (a) prohibit conduct in the clearest of cases.
  - (b) allow conduct in the clearest of cases.
- Notwithstanding what is said, there is a questions whether double employment is sufficiently clear such that the Board should give either permission or prohibit. In other words, the Code should follow the law (where crystal clear) but otherwise leave it to Courts to oversee professional standards should a dispute between clients arise.
- Best way to minimise any dispute is acting with fully informed consent.



Thank you

