

Alternative Business Structures

Frequently Asked Questions

What are ‘Alternative Business Structures’ (“ABS”)?

ABS is a generic reference to any form of business model through which legal services are delivered that is different from the standard sole proprietorship or partnership model. ABS can include non-legal ownership of law firms, publicly traded law firms, external investment, or any other innovative way to offer legal services outside of the traditional partnership firm model.

At least four different ABS models have been identified to date:

- (1) Legal service entity providing legal services only in which individuals who are not licensed attorneys own a minority interest in the entity;
- (2) Legal service entity providing legal services only in which there are no restrictions on non-lawyer ownership;
- (3) Business entity providing legal and non-legal services in which non-lawyers own a minority interest in the entity; and
- (4) Business entity providing legal and non-legal services in which there are no restrictions on non-lawyer ownership.

What jurisdictions presently allow for ABS?

At present there are only two non-U.S. jurisdictions that allow ABS – Australia and England & Wales.

In Australia ABSs, called “incorporated legal practices” (ILP), have been permitted since 2001. New South Wales, the most populous State in Australia was the first jurisdiction to allow ABSs.¹ All of the other Australian jurisdictions have since followed suit.²

In England and Wales ABSs have been permitted since 2007 although the first licenses were issued in 2012.

In the United States, only the District of Columbia (“DC”) explicitly allows for a limited form of ABS. Specifically, pursuant to the DC Bar Rules of Professional Conduct, Rule 5.4, “[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs

¹ On 1 July 2001 legislation was enacted in NSW, Australia permitting legal practices, including multidisciplinary practices (MDPs) to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners: see the Legal Profession (Incorporated Legal Practices) Act 2000 and the Legal Profession (Incorporated Legal Practices) Regulation 2001.

² Legal Profession Act 2006 (ACT) Part 2.6; Legal Profession Act 2004 (NSW) Part 2.6; Legal Practitioners Act 2006 (NT) Part 2.6; Legal Profession Act 2004 (Vic) Part 2.7; Legal Practice Act 2003 (WA); Legal Profession Act 2007 (Qld) Part 2.7; Legal Profession Act 2007 (Tas) Part 2.5; Legal Practitioners Act 1981 (SA), Schedule 1.

professional services which assist the organization in providing legal services to clients, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by the [D.C. Bar] Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; [and] (4) The foregoing conditions are set forth in writing.”

In practice, very few ABS firms have organized in DC. At least two potential issues temper their use. First, because DC attorneys are routinely licensed in one or more other U.S. jurisdictions, and no other U.S. jurisdiction allows ABS, an attorney who is dual-licensed in DC and another jurisdiction may be concerned that the formation of or participation in an ABS in DC will constitute a violation of the Rules of Professional Conduct in the other jurisdiction in which the attorney is also licensed. Second, the prohibition on ABS in all U.S. jurisdictions other than DC limits the ability of a DC ABS law firm to expand beyond DC’s boundaries.

Washington State recently amended its Rules of Professional Conduct to allow Limited License Legal Technicians (“LLLTs”) to own a minority interest in a law firm. *See* Washington State Court Rules, Rules of Professional Conduct, Rule 5.9. LLLTs are considered lawyers in Washington State and arguably, therefore, Rule 5.9 does not allow ABS. LLLTs, however, are limited in their scope of practice. Thus, viewed from that perspective and whether labelled as ABS or not, Washington State is the only other U.S. jurisdiction, besides DC, that authorizes someone other than a fully licensed lawyer to own an interest in a law firm and share profits and fees from the firm.

What was the rationale for permitting ABS?

In Australia the rationale for introducing new forms of legal structures in 2001 was multi-fold. Reasons included removing the regulatory barriers between states and territories to facilitate a seamless, truly national legal services market and regulatory framework; providing greater flexibility in choice of business structures for law practices; enhancing choice and protection for consumers of legal services; and enabling greater participation in the international legal service’s market.³ There was also a growing perception in Australia that the traditional structure of law firms no longer met the needs of many practitioners and clients.⁴

How many ABSs are there in jurisdictions that have permitted them?

Today ILPs comprise about 30% of firms in Australia. In New South Wales for example, as at May 2015, there are 1788 ILPs. Three law firms have listed their practice on the Australian Stock Exchange.⁵

³ S. Mark and T. Gordon, *Innovations in Regulation - Responding to a Changing Legal Services*, 22 *Geo. J. Legal Ethics* 501 (2009)

⁴ Law Council of Australia, (2001) ‘2010: A Discussion Paper: Challenges for the Legal Profession’, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=0BE36A97-1C23-CACD-2225-CBD6713A3E09&siteName=lca

⁵ The first law firm to seek public listing was Slater & Gordon. Slater & Gordon’s decision to publicly list in May 2007 saw them move from being a traditional partnership to becoming a publicly listed law firm. Following Slater & Gordon’s listing, Integrated Legal Holdings (IHL), a Western Australian based law firm, listed on the ASX on 17 August 2008 and in May 2013, Shine Lawyers became the third law firm to publicly list in Australia.

It has now been just over three years since the Solicitor Regulation Authority (SRA) commenced accepting applications from firms wanting to offer legal services as ABSs.⁶ During this time over 387 law firms have been granted ABS licences.⁷ They vary widely from large new entrants to the legal market to existing firms tying up with other service providers, or firms seeking external investment from private equity companies and firms wishing to promote non-lawyers to partnership level. ABS licences have been awarded to a number of high profile firms over the past two years including Co-operative Legal Services, Riverview Law, Direct Line, Genus Law and PwC Legal.

The impact of ABSs to date on the legal services marketplace in England and Wales is interesting. According to the SRA, research indicates that ABSs “have achieved a significant share of the overall market in certain areas of legal work.” The SRA found that ABSs accounted for a third of all turnover in the personal injury market; ABSs have captured a significant percentage of turnover in mental health, non-litigation (e.g. mergers and acquisitions and probate), consumer and social welfare; and, ABSs are spread relatively evenly across a range of different legal work types.⁸ Of most interest, the survey found that “[T]he most significant changes that ABSs have made, as a result of their new business model, relate to how the business is financed and the attraction of new investment.

How do these jurisdictions regulate ABSs?

(a) Who oversees the regulation of ABSs?

In Australia individual state and territory statutory regulators and professional associations licence and regulate ILPs. For example, in New South Wales, the Law Society of New South Wales handles the licencing of ILPs whilst the regulation of ILPs is handled by the NSW Office of the Legal Services Commissioner (OLSC).

In England and Wales the Legal Services Board (LSB) is the oversight regulator. Only regulators designated as a “licensing authority” by statutory instrument can license and regulate an ABS. At present these regulators include as follows:

1. The Solicitors Regulation Authority (SRA);
2. The Council for Licensed Conveyancers;
3. The Chartered Institute of Patent Attorneys;
4. The Institute of Trademark Attorneys; and
5. The Institute of Chartered Accountants in England and Wales.

(b) What are the regulatory requirements for being granted an ABS licence?

⁶ Applications for the ABS licences commenced in October 2011: http://www.legalservicesboard.org.uk/news_publications/press_releases/2010/pdf/23022010_abs_press_release.pdf

⁷ As at 15 April 2015: Solicitors Regulation Authority, *Search for an alternative business structure webpage*, <http://www.sra.org.uk/absregister/>

⁸ Solicitors Regulation Authority, *Research on alternative business structures (ABSs) Findings from surveys with ABSs and applicants that withdrew from the licensing process*, May 2014, p.3, <file:///C:/Users/Tahlia/Downloads/abs-quantitative-research-may-2014.pdf>; See also ICF GHK, *Qualitative Research into Alternative Business Structures (ABSs)*, May 2014, [file:///C:/Users/Tahlia/Downloads/abs-qualitative-research-may-2014%20\(1\).pdf](file:///C:/Users/Tahlia/Downloads/abs-qualitative-research-may-2014%20(1).pdf)

In Australia a firm wishing to become an ILP must notify the relevant professional association in writing when it intends on providing to provide legal services; begins to engage in legal practice or ceases to engage in legal practice as an ILP.⁹ There is no application form or fee to become an ILP.

In England & Wales, a firm wishing to become an ABS must complete an application form; provide any additional information required by the licencing authority and pay an application fee. The firm must also set out which reserved activities the applicant wishes to be licensed to carry out.

(c) **What are the regulatory requirements for operating as an ABS?**

In Australia, every ILP must appoint a legal-practitioner director.¹⁰ The legislation required that a legal practitioner director must be an Australian legal practitioner who holds and unrestricted practising certificate. The rationale for this requirement is to ensure that a legal practitioner maintains a direct interest and accountability in the management of legal services of the practice.¹¹

Secondly, every ILP must establish and maintain a management framework, legislatively coined “appropriate management systems”, to enable the provision of legal services in accordance with the professional and other obligations of lawyers.¹² The responsibility for establishing and implementing “appropriate management systems” rests with the legal-practitioner director. The legislation provided that failure to establish and maintain “appropriate management systems” is capable of being professional misconduct.¹³

The introduction of legislation requiring “appropriate management systems” was unique not only to legal profession regulation but to regulation generally. It was not based on any pre-existing model and the regulators were not given any guidance from the legislators as to what “appropriate management systems” or a management based system for law firm should comprise.

Consequently the regulator in NSW was forced to think about the concept of “appropriate management systems” and what an appropriate management system for a law firm should comprise. After an extensive period of consultation with the profession and key stakeholders the regulators created the content for “appropriate management systems” for law firms. They did so by considering the types of complaints that were made against lawyers and what elements would comprise of sound legal practice. The regulator came up with ten such elements:

1. **Negligence** (providing for competent work practices).
2. **Communication** (providing for effective, timely and courteous communication).
3. **Delay** (providing for timely review, delivery and follow up of legal services).
4. **Liens/file transfers** (providing for timely resolution of document/file transfers).

⁹ For a copy of the required notification form see:

<http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/008711.pdf>

¹⁰ Section 140(1) Legal Profession Act 2004 (NSW).

¹¹ S, Mark and T. Gordon, Innovations in Regulation - Responding to a Changing Legal Services, 22 Geo. J. Legal Ethics 501 (2009), 506.

¹² Section 140(3) of the Legal Profession Act 2004 (NSW).

¹³ Section 140(5) of the Legal Profession Act 2004 (NSW).

5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer).
6. **Conflict of interests** (providing for 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** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors).
9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services).
10. **Trust account requirements** (providing for compliance with Part 3.1 Division 2 of the *Legal Profession Act 2004 (NSW)* and proper accounting procedures).¹⁴

The regulator then developed a process by which law firms could assess themselves against the ten objectives. The process was based on a self-assessment. That is, the legal practitioner director of the law firm assesses the appropriateness of their management systems using a self-assessment document (developed by the regulator) that is forwarded after completion by the legal practitioner director to the regulator for review.¹⁵ The self-assessment document takes into account the varying size, work practices, and nature of operations of different firms. Legal practitioner directors rate firm compliance with each of the ten objectives as either ‘Fully Compliant,’ ‘Compliant,’ ‘Partially Compliant,’ or ‘Non-Compliant.’¹⁶ In addition to developing the framework for appropriate management systems, the regulator in NSW also developed processes and procedures to assist incorporated legal practices through the self-assessment process, and to improve their management systems.

In England and Wales the Legal Services Act 2007 sets out the statutory requirements for ABS licences. The 2007 Act requires that a head of legal practice (HOLP) and head of finance and administration (HOFA) be appointed within each ABS. The SRA decided that all practices, including those which are not ABS practices, must appoint someone to these positions. The SRA has termed these roles compliance officer for legal practice (COLP) and compliance officer for finance and administration (COFA). It is the SRA Authorization Rules for Legal Services Bodies and Licensable Bodies that outlines the requirements for these roles.¹⁷ The designated COLP or COFA must be an individual; be a manager or an employee of the law firm; consent to their designation as the COLP and/or COFA; be of sufficient seniority and responsibility to fulfil the role; and not be disqualified from being a Head of Legal Practice (HOLP) or Head of Finance and Administration (HOFA).

¹⁴ Office of the Legal Services Commissioner, *Appropriate Management Systems to Achieve Compliance*, http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_appropriate_management_systems.html

¹⁵ Office of the Legal Services Commissioner, Self-Assessment Process, http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_self_assessment_process.html

¹⁶ Ibid.

¹⁷ See Solicitors Regulation Authority, COLPs and COFAs, <http://www.sra.org.uk/solicitors/colp-cofa.page>

The Compliance Officer for Legal Practice (COLP) is responsible for overseeing risk and compliance within their firm and be the SRA point of contact. COLPs are responsible for ensuring that the law firm complies with relevant statutory obligations that are set out in the SRA's Handbook; recording any failure(s) to comply and informing the SRA of such noncompliance. The COLP must report any material failure to the SRA as soon as reasonably practical.¹⁸

The Compliance Officer for Finance and Administration (COFA) are responsible for the role and its obligations. COFA's are responsible for the overall financial management of the firm. COFA's are required to ensure that the law firm, including its employees and managers, comply with any obligations imposed under the SRA Accounts Rules; keep a record of any failure to comply and make this record available to the SRA.¹⁹ COFA's are also required to report any material failure (either taken on its own or as part of a pattern of failures) to the SRA as soon as reasonably practical.

Individuals who are COLPs and COFAs must be fit and proper to undertake the role/s.²⁰ Fit and proper is assessed by taking into account the criteria in the SRA Suitability Test 2011 and any other relevant information. The assessment as to whether an individual is a fit and proper person is undertaken upon initial approval. If the COLP or the COFA is deemed unfit and improper, the SRA may withdraw its approval. The COLP is the SRA's principal point of contact within the firm but is not intended to take the full responsibility of ensuring law firm compliance. The entire management, and to some extent all regulated individuals, are held responsible for the firm's conduct.

Is there annual registration?

There is no annual registration in Australia. However upon becoming an incorporated legal practice an incorporated legal practice must provide to the regulator (OLSC) a self-assessment form demonstrating that it has "implemented and maintained appropriate management systems."

In England and Wales, individual lawyers must renew their licenses annually. Entities are only required to have initial authorization but must nonetheless submit certain details on an annual, or more frequent basis (e.g. insurance details, diversity statistics etc). New entities established under the regulation of the SRA must become either recognized bodies (traditional law firms) or licensed bodies (ABS businesses), a process collectively termed 'authorization'. Authorization must be received from the relevant authorities before commencing a practice and any changes in the composition of the management of the entity (or in the nature of the business of a licensed body) are also subject to prior approval.²¹

What jurisdictions are in the process of allowing ABS (i.e. more than just considering it as an option)?

¹⁸ See Solicitors Regulation Authority, Responsibilities of COLPs and COFAs, <http://www.sra.org.uk/solicitors/colp-cofa/responsibilities-record-report.page>

¹⁹ Ibid.

²⁰ See Solicitors Regulation Authority, What is a COLP and a COFA, <http://www.sra.org.uk/solicitors/colp-cofa/ethos-roles.page>

²¹ The Law Society of England and Wales, Setting up a Practice: Regulatory Requirements, <https://www.lawsociety.org.uk/support-services/advice/practice-notes/setting-up-a-practice-regulatory-requirements/>

Singapore: On October 7, 2014 the Ministry of Law submitted the *Legal Profession (Amendment) Bill 2014* for its First Reading in Parliament.²² The Bill establishes a new regulator, the Legal Services Regulatory Authority, and a frame work for entity regulation as well as permitting ABSs. The Minister's Second Reading Speech of the Bill describes the new arrangement for entity regulation and ABS briefly.²³ On November 4, 2014 the Bill was adopted as law in Parliament. Legal Disciplinary Practices ("LDPs) will be permitted, where non-lawyer managers / employees will be allowed to own equity and/or share in the profits of the LDP. LDPs will only be allowed to provide legal services.

What are the advantages of ABS?

The advantages of becoming an ABS are multiple. They include as follows:

- Equity can be raised from a broader base of potential partners, members or directors including other professionals and non-solicitor employees.
- Non-solicitor employees may be rewarded by partner, member or director status, with a direct stake in the firm.
- The ability to diversify the range of legal services provided by the practice.
- Equity can be raised from outside the legal sector without the need for non-lawyer involvement at the management level. This has the potential to allow firms to attract new investment from different markets.
- You can provide a wider range of services to clients through an ABS than you can through an ordinary law firm.

What concerns have been expressed about ABS?

- They could dilute the core values of the profession.
- A conflict of duties could emerge between a lawyer's duty to the Court, the client and a shareholder.
- Questions have been raised whether the model will positively increase profits.
- Doubts have been raised that they will positively impact on access to justice.

What Does the Research Say About ABS?

In 2008, a research study by Dr. Christine Parker of the University of Melbourne Law School in conjunction with the NSW regulator assessed the impact of ethical infrastructure and the self-assessment process in NSW to assess whether the process is effective and whether the process is leading to "better conduct" by firms required to self-assess.²⁴ The research focused on the number of complaints relating to incorporated legal practices after incorporation and

²² See *Legal Profession Amendment Bill 2014*, [http://www.parliament.gov.sg/sites/default/files/Legal%20Profession%20\(Amendment\)%20Bill%2036-2014.pdf](http://www.parliament.gov.sg/sites/default/files/Legal%20Profession%20(Amendment)%20Bill%2036-2014.pdf)

²³ See Ministry of Law, Second Reading Speech by Minister for Law, K Shanmugam, on the Legal Profession (Amendment) Bill, <https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/2R-speech-Min-LPA-bill-2014.html>

²⁴ C.E. Parker, T. Gordon, S. Mark, 2010, Regulating law firms ethics management: an empirical assessment of an innovation in regulation of the legal profession in New South Wales, *Journal of Law and Society*, Vol 37, issue 3, Blackwell Publishing, UK, pp. 466-500.

comparing this with prior to incorporation. The research found that complaints rates for incorporated legal practices were two-thirds lower than non-incorporated legal practices after the incorporated legal practice completed their initial self-assessment. The research also revealed that the complaints rate for incorporated legal practices that self-assessed was one-third of the number of complaints registered against similar non-incorporated legal practices.

Moreover, in another recent research study conducted on incorporated legal practices in NSW, by Professor Susan Saab Fortney of Hofstra University, New York, in conjunction with the NSW regulator, revealed that a majority (84%) of respondents reported that they had revised policies and procedures related to the delivery of legal services.²⁵ Seventy-one percent of the respondents indicated that they had actually revised firm systems, policies and procedures. Close to half (47%) of the respondents reported that they had adopted new systems, policies, and procedures. In terms of encouraging training and initiatives, 29% indicated that their firms devoted more attention to ethics initiatives and 27% implemented more training for firm personnel.

According to the Legal Services Consumer Panel in England and Wales “the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialized.”²⁶ The Panel state in their 2014 Consumer Impact Report, released on 5 December 2014, as follows:

“There have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman’s published data. Our Tracker Survey isn’t able to segment between ABS and non-ABS firms, but does show that overall consumer confidence in the quality of work and professionalism of lawyers has held steady since 2011.”²⁷

Although it is only early days for ABSs in England & Wales, these statements by the Legal Services Consumer Panel are an unequivocal affirmation that ABSs in practice do not appear to pose a threat to ethics or professionalism.

For More Information . . .

Much has been written about ABS. In addition to the articles and other materials cited in the text and footnotes, above, for additional information please consider the following articles on the topic:

Grech, A. and Gordon, T. (2015). Should Non-Lawyer Ownership of Law Firms be Endorsed and Encouraged? (available at <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/Grech-Gordon-Non-Lawyer-Ownership-Paper-Final.pdf>)

Gordon, T. and Mark, S. (2014). Access to Justice: Can You Invest In It? (available at http://www.researchgate.net/publication/275608762_Access_to_Justice_Can_you_Invest_in_it)

²⁵ S. Fortney & T. Gordon, Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, 10 St. Thomas L.J. 152 (2012).

²⁶ Legal Services Consumer Panel, 2014 Consumer Impact Report, 5 December 2014, p.15, http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf

²⁷ Ibid.

Mercer, M. (2014). A Different Take on ABS – Proponents and Opponents Both Miss the Point. (available at <http://www.slaw.ca/2014/10/31/a-different-take-on-abs-proponents-and-opponents-both-miss-the-point/>)

Robinson, N. (2014). When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access and Professionalism. (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878)

McGrath, S., Mercer, M., et al. (2014). Alternative Business Structures and the Legal Profession in Ontario. A Discussion Paper. (available at <https://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf>)