

New Zealand Law Society

Supplementary submission on the Patents Bill

1. This supplementary submission by the New Zealand Law Society (the NZLS) on the Patents Bill –
 - 1.1. **addresses** the implications of Part 5 of the Bill (Patent attorney profession) for “mixed practices” of lawyer patent attorneys and non-lawyer patent attorneys permitted by the Lawyers and Conveyancers Act (Lawyers: Income Sharing with Patent Attorneys) Regulations 2008 (the Regulations); and
 - 1.2. **recommends** the addition to Schedule 2 of the Patents Bill of three further amendments to the Lawyers and Conveyancers Act 2006 (the LCA) designed to align the Regulations and the LCA in respect of such “mixed practices”.
2. The need to align the Regulations and the LCA arises because –
 - 2.1. Clause 187 of the Patents Bill retains the prohibition under s 103 of the Patents Act 1953 on patent attorneys practising with anyone other than patent attorneys. In other words, “mixed practices” between patent attorneys and non-patent attorneys will continue to be prohibited.
 - 2.2. The Regulations permit “mixed practices” between patent attorneys who are lawyers and patent attorneys who are not lawyers. The NZLS view is that such “mixed practices” are effectively prohibited under the LCA or at least should not be permitted and that, at least to the extent that the Regulations recognise such practices and permit income sharing within them and by them with other practices or firms, they are invalid. The NZLS is supported in that view by the attached opinion from D J White QC.

- 2.3. The lawyers in “mixed practices” with non-lawyer patent attorneys are regulated in the public interest by the LCA and the various regulations and rules made under that Act by the Government or the NZLS with the approval of the Minister of Justice. The lawyers’ regulatory regime, which is designed to protect the public, includes –
- the fundamental obligations imposed by s 4 of the LCA;
 - the restrictions on the provision of legal services in Part 2 of the LCA;
 - the obligations in relation to the conduct of practices imposed by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;
 - the obligations in relation to trust accounts imposed by ss 110-116 of the LCA and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008;
 - the obligations in relation to the Fidelity Fund under Part 10 of the LCA; and
 - the disciplinary regime under Part 7 of the LCA.
- 2.4. Non-lawyer patent attorneys in “mixed practices” with lawyer patent attorneys as permitted by the Regulations are not currently subject to the lawyers’ regulatory regime.
- 2.5. Under Subpart 3 of Part 5 of the Patents Bill (Standards of conduct and discipline) there is to be a new code of conduct for patent attorneys developed by the Institute of Patent Attorneys and approved by the Patent Attorneys’ Standards Board of New Zealand: see clauses 201-207. There is also to be a new disciplinary regime for patent attorneys which will be administered by the Board with a right of appeal to the District Court: see clauses 208-229.
- 2.6. The proposed new code and disciplinary regime for patent attorneys will be quite unlike the comprehensive regulatory and disciplinary regime for lawyers. In particular, the new code will not impose on patent attorneys all the practice obligations and requirements imposed on lawyers. Patent attorneys will not be subject to the public interest protections referred to in

paragraph 2.3 above. Significantly, the grounds for discipline of patent attorneys under clause 216 of the Patents Bill will be quite different from the grounds for discipline of lawyers under the LCA. The disciplinary penalties for patent attorneys under clause 217 of the Bill will also be different.

- 2.7. Lawyer patent attorneys and non-lawyer patent attorneys in the same “mixed practices” will therefore be subject to quite different practice obligations and requirements in respect of the same clients and the same matters and quite different disciplinary regimes in respect of the same complaints.
 - 2.8. This outcome is not in the public interest. Clients of “mixed practices” are entitled to expect lawyer patent attorneys and non-lawyer patent attorneys in the same practice to be subject to the same regulatory and disciplinary regimes.
3. To avoid this outcome and to align the Regulations which permit “mixed practices” with the LCA, the following additions to Schedule 2 of the Patents Bill are **recommended** by way of further amendments to the LCA –
- 3.1. “Amend s 7(4) to read –
 - “Despite subsection (3), a lawyer or an incorporated law firm is not guilty of misconduct under that subsection by reason only of –
 - (a) in the case of a lawyer, practising in partnership with a patent attorney who is not also a lawyer;
 - (b) in the case of an incorporated law firm and notwithstanding the definition of *incorporated law firm* in section 6, having as a director or shareholder a patent attorney who is not also a lawyer; and
 - (c) sharing with a patent attorney (in the circumstances, and in accordance with any conditions, prescribed by the practice rules) the income from any business involving the provision of regulated services to the public.” ”

3.2. “Amend s 94(h) to read –

“in the case of the New Zealand Law Society, the circumstances in which, and the conditions subject to which –

- (i) lawyers and incorporated law firms may share with patent attorneys the income from any business involving the provision of regulated services to the public; and
- (ii) patent attorneys who are not lawyers may practise in partnership with patent attorneys who are lawyers or be directors or shareholders of incorporated law firms, including stipulating the provisions of this Act and the regulations and practice rules made under this Act which will be binding on those patent attorneys.” ”

3.3. “Amend s 9(1) to add –

“(bb) by a partnership of patent attorneys who are lawyers and patent attorneys who are not lawyers as permitted by practice rules to be made under section 94(h) of this Act.” ”

John Marshall QC

President

29 July 2009

29 July 2009

OPINION FOR:

Christine Grice
Chief Executive
New Zealand Law Society
PO Box 5041
WELLINGTON 6145

Lawyers and Conveyancers Act (Lawyers: Income Sharing with Patent Attorneys) Regulations 2008

Summary

1. I have been asked to advise whether the Lawyers and Conveyancers Act (Lawyers: Income Sharing with Patent Attorneys) Regulations 2008 (the Regulations), which permit “mixed practices” between lawyer patent attorneys and non-lawyer patent attorneys, have been validly made under the Lawyers and Conveyancers Act 2006 (the LCA).
2. For the reasons which following I have concluded that -
 - 2.1. at least to the extent that the Regulations recognise “mixed practices” between lawyer patent attorneys and non-lawyer patent attorneys and permit income sharing within them and by them with other practices or firms, there is real doubt as to whether the Regulations have been validly made under the LCA; and
 - 2.2. if it is considered that “mixed practices” between lawyer patent attorneys and non-lawyer patent attorneys should be permitted, then an amendment to the LCA should be sought providing the necessary statutory or regulatory authority.

3. My opinion is provided under the following headings –

- The validity of Regulations
- The empowering provision
- The Regulations
- Are the Regulations expressly authorised?
- Are the Regulations authorised by necessary implication?
- The legislative history.

The validity of regulations

4. The principles which the Court applies in considering whether regulations have been validly made are conveniently set out in Joseph, Constitutional & Administrative Law in New Zealand, 3rd ed., 2007, 1015 ff. For present purposes the principles may be summarised as follows –

- 4.1. The first task is to ascertain the true scope of the empowering provision in the statute under which the regulations were made.
- 4.2. The empowering provision should be construed in the usual way by reference to its text and in light of its purpose having regard also to its context and the scheme of the relevant legislation: Interpretation Act 1999, s 5(1), and Burrows and Carter, Statute Law in New Zealand, 4th ed., 2009.
- 4.3. Express statutory words authorising the regulations are required, although regulations may also be authorised by necessary implication as a matter of logic and the express language used. The threshold for authorisation by “necessary implication” is high as explained in *R (Morgan Grenfell & Co. Ltd) v Special Commissioner of Income Tax* [2002] 3 All ER 1, HL, at 13, per Lord Hobhouse –

“A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.”

This approach has been applied to New Zealand statutes in *B v Auckland District Law Society* [2004] 1 NZLR 326, PC, at 349, para. [58], and *Cropp v Judicial Committee* [2008] 3 NZLR 774, SC, at 786, para. [26]. It has also

been applied in the context of determining whether regulations were authorised: *Harness Racing NZ v Kotzikas* [2005] NZAR 268, CA, at 285-286, paras [92]-[95], *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 at 793 and see Joseph, above, 1025, para. 25.5.11.

- 4.4. A regulation may neither prohibit that which statute permits, nor permit that which statute prohibits. Delegated legislation will exceed Parliament's delegation if it permits/prohibits that which the enabling statute expressly or by necessary implication prohibits/permits: Joseph, above, 1036.
- 4.5. If a particular regulation or part of a regulation is held to be invalid, it may be severed from the remaining regulations provided that the invalid part is not inextricably interconnected with the valid part, and where to omit the invalid part does not alter the essential character or substance of the remaining part: Joseph, above, 1053 ff.

The empowering provision

5. The Regulations in question here were made pursuant to ss 94 and 108 of the LCA.
6. The relevant part of s 94 provides –
- “The New Zealand Law Society and the New Zealand Society of Conveyancers must each have rules that include or provide for –
- ...
- (h) in the case of the New Zealand Law Society, the circumstances in which, and the conditions subject to which, lawyers and incorporated law firms may share with patent attorneys the income from any business involving the provision of regulated services to the public:
- ...”
7. Under s 108 the Governor-General may, by Order in Council, make regulations providing for any of the matters in respect of which rules to which s 100 applies may be made. Rules to which s 100 applies includes the practice rules required by s 94. This means that regulations providing for the matters in s 94(h) were expressly authorised by s 108.
8. The question, however, is whether the Regulations which have been made are within the scope of s 94(h). This question requires consideration of the text and purpose of s 94(h) having regard to its context and the scheme of the LCA.

9. The text of s 94(h) is reasonably clear. It requires rules (or regulations) which include or provide for the circumstances in which, and the conditions subject to which –
- “lawyers and incorporated law firm may share with patent attorneys the income from any business involving the provision of regulated services to the public.”
10. The focus is on the circumstances and conditions for the sharing of income from “any business involving the provision of regulated services.” Under s 6 of the LCA “regulated services” are defined “in relation to a lawyer or incorporated law firm” as “legal services”, “conveyancing services” and “services that a lawyer provides by undertaking the work of a real estate agent.” When this definition is taken into account, it is apparent that in terms of s 94(h) the income which is being shared with patent attorneys is the income which the lawyers or incorporated law firm earn from their business providing “regulated services” to the public.
11. The provision is not concerned with the sharing of income from any business of the patent attorneys because they do not provide “regulated services” under the LCA. The view that patent attorneys do not provide “regulated services” or “legal services” under the LCA is reinforced by the inclusion of separate, specific provisions in the Act recognising some limited exceptions for patent attorneys: see 36(3) and the statutes referred to in s 47(e), (j) and (l). The need for, and the existence of, these exceptions confirm that the “business” referred to in s 94(h) is the “business” of the lawyers and incorporated law firm providing “regulated services” to the public under the LCA. The provision is not concerned with the business of patent attorneys or the sharing of their income.
12. This interpretation of s 94(h), the empowering provision, is also consistent with the other provisions of the LCA directly in point. Under s 7 which defines “misconduct” in relation to lawyers and incorporated law firms –
- “(3) A person is guilty of misconduct if that person, being a lawyer or an incorporated law firm, shares, with any person other than another lawyer or incorporated law firm, the income from any business involving the provision of regulated services to the public.
- (4) Despite subsection (3), a lawyer or an incorporated law firm is not guilty of misconduct under that subsection by reason only of sharing with a patent attorney (in the circumstances, and in accordance with any conditions, prescribed by the practice rules) the income from any business involving the provision of regulated services to the public.”
13. The prohibition on income sharing imposed by s 7(3) on lawyers and incorporated law firms is one of the important provisions of the LCA. The purpose of the provision is to enact the policy decision made by the Government of the day after representations from the NZLS not to permit lawyers to practise in multi-

disciplinary practices (MDPs). This decision reflected an appreciation of the public interest concerns which would have arisen in permitting non-lawyers to be involved in practices which provided “regulated services” to the public: Dal Pont, Lawyers’ Professional Responsibility, 3rd ed., 2006, 459. It was also recognised that if MDPs had been permitted a wide range of further specific provisions would have been required in the LCA regulating such practices which could not have been left unregulated in the new regulatory regime: Dal Pont, above, 459-460. The LCA contains no such provisions.

14. The exception in s 7(4) to the general prohibition on income sharing in s 7(3) therefore needs to be seen as a very limited exception, reinforced by the use of the words “by reason only”, permitting a lawyer or incorporated law firm to share with patent attorneys income from the business of providing “regulated services” to the public. The cross reference in s 7(4) to the rules required by s 94(h) and the use of the same language in both provisions serves to confirm that they have the same meaning. In the context of the LCA, with its general prohibition on MDPs and the absence of any provisions regulating MDPs, the income sharing exception relates only to the income from the business of the lawyer or incorporated law firm. The purpose of the provision, necessary in the face of the general prohibition in s 7(3), was to permit income sharing to this limited extent only. It was not to permit MDPs between lawyer patent attorneys and non-lawyer patent attorneys.
15. All this suggests that the scope of s 94(h), as the rule or regulation making empowering provision, is limited to rules or regulations providing for the circumstances in which, and the conditions subject to which, lawyers and incorporated law firms may share with patent attorneys the income from their businesses of providing “regulated services” to the public under the LCA.
16. An examination of the text, context and purpose of s 94(h), especially when read with s 7(3) and (4), does not suggest that rules or regulations permitting MDPs between lawyer and non-lawyer patent attorneys are expressly authorised. The question whether such rules or regulations ought to be authorised by “necessary implication” is considered below after reference to the Regulations themselves.

The Regulations

17. The principal provision of the Regulations is regulation 4 which provides –
 - “Income may be shared between the following:
 - (a) a practice and a patent attorney firm:
 - (b) a mixed practice and a practice:

- (c) a patent attorney firm and a mixed practice:
- (d) lawyers and patent attorneys in the same mixed practice:
- (e) lawyers and patent attorneys in a company carrying on business as a patent attorney pursuant to section 103(2) of the Patents Act 1953.”

18. The expressions “practice” and “mixed practice” are defined in regulation 3 as follows –

“**practice** means a law practice, whether conducted by 1 lawyer, a partnership of lawyers, or an incorporated law firm”

“**mixed practice** means a firm conducted by 1 or more patent attorneys and where all the partners in the firm are patent attorneys and 1 or more partners in the firm are lawyers.”

19. Regulation 7 then provides –

“Requirements for mixed practices relating to communications, advertisements, etc

(1) Every lawyer in a mixed practice must ensure that all of his or her communications, advertisements, promotional material, or representations concerning the provision of legal services that use any of the terms set out in subclause (2) –

- (a) identify the lawyer or lawyers providing the legal services; and
- (b) identify any partner of the mixed practice who is not a lawyer but who is involved in the provision of the legal services.

(2) The terms referred to in subclause (1) are –

- (a) a lawyer:
- (b) a law practitioner:
- (c) a legal practitioner:
- (d) a barrister:
- (e) a solicitor:
- (f) a barrister and solicitor:
- (g) an attorney-at-law:
- (h) counsel.”

20. It is apparent that the Regulations –

20.1. permit the sharing of “income” generally and not just income from the provision of “regulated services” to the public by lawyers and incorporated law firms under the LCA;

20.2. recognise and permit a “mixed practice” between lawyer patent attorneys and non-lawyer patent attorneys; and

20.3. recognise that a non-lawyer partner in a “mixed practice” may provide “legal services”: regulation 7(1)(b).

21. The question is whether regulations of this nature are expressly or by necessary implication authorised by their empowering provision, s 94(h) of the LCA.

Are the Regulations expressly authorised?

22. It is reasonably clear that, in permitting the sharing of “income” generally and in recognising “mixed practices” and the provision of “legal services” by non-lawyers, the Regulations go considerably beyond what is **expressly** authorised by s 94(h).
23. As already noted, the regulations **expressly** authorised by s 94(h) relate only to the sharing of income from the provision of “regulated services” to the public by lawyers and incorporated law firms under the Act. There is no authorisation for regulations relating to the sharing of “income” generally between lawyers, incorporated law firms and patent attorneys because patent attorneys do not provide “regulated services” to the public under the LCA. Yet regulation 4 purports to do so by providing that income may be shared between lawyers, incorporated law firms and patent attorneys in the situations referred to in paragraphs (a) to (e) of the regulation. To the extent that the income from patent attorney firms, mixed practices and patent attorneys which may be “shared” under the regulation will comprise income that is not income from the provision of “regulated services” to the public under the LCA, the regulation clearly goes beyond what is expressly authorised.
24. In recognising “mixed practices” between lawyer patent attorneys and non-lawyer patent attorneys and in permitting the sharing of income within such practices under paragraph (d) of regulation 4, the Regulations have purported to recognise and permit a form of MDP. As there is no authority under s 94(h) for regulations recognising or permitting particular types of practice, let alone “mixed practices” of this nature, this aspect of the regulations is not expressly authorised.
25. Similarly, there is no authority under s 94(h) for regulations permitting a non-lawyer partner in a “mixed practices” to provide “legal services”. Regulation 7(1)(b) which purports to do so is therefore not expressly authorised.

Are the Regulations authorised by necessary implication?

26. Again it is reasonably clear that, in permitting the sharing of income “generally” and in recognising “mixed practices” and the provision of “legal services” by non-lawyers, the Regulations are not authorised by **necessary implication** under s 94(h). Indeed, as such regulations run counter to the scheme and purpose of the LCA, there is no basis for any “necessary implication” that they are authorised by s 94(h).

27. The scheme of the LCA suggests that “mixed practices” are effectively prohibited or are at least not permitted –

27.1. The LCA is designed in the public interest to regulate lawyers and incorporated law firms and their provision of “regulated services” to the public. For this purpose a range of obligations are imposed on lawyers and incorporated law firms, including -

- the fundamental obligations imposed by s 4 of the LCA;
- the restrictions on the provision of legal services in Part 2 of the LCA;
- the obligations in relation to the conduct of practices imposed by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;
- the obligations in relation to trust accounts imposed by ss 110-116 of the LCA and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008;
- the obligations in relation to the Fidelity Fund under Part 10 of the LCA; and
- the disciplinary regime under Part 7 of the LCA.

27.2. There are no provisions in the LCA imposing similar obligations on non-lawyer patent attorneys or regulating them in a similar manner or regulating MDPs of any description. One, perhaps significant, illustration of this is that an undertaking given by a non-lawyer patent attorney, who owes no overriding duties as an officer of the High Court, will be unenforceable under the Court’s inherent jurisdiction: cf. s 4(d) of the LCA, rule 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and Dal Pont, Lawyers’ Professional Responsibility, 3rd ed., 2006, 499-500.

- 27.3. As already noted, the income sharing prohibition in s 7(3) effectively prevents MDPs under the LCA. The limited exception created by s 7(4) permitting lawyers and incorporated law firms to share with patent attorneys income from the business of providing “regulated services” to the public does not permit lawyer/patent attorney MDPs.
- 27.4. There is no provision in the LCA which expressly or by necessary implication refers to or permits a “mixed practice” between lawyer patent attorneys and non-lawyer patent attorneys. There is no definition of “mixed practice” in the LCA. Nor is there any provision authorising a practice of that nature. In the face of the general prohibition on MDPs in s 7(3) and in the absence of any provisions regulating MDPs, an express provision referring to or permitting such “mixed practices” would have been expected. The fact that the definition is included solely in the Regulations is also significant.
- 27.5. There are other provisions in the LCA which suggest that Parliament did not intend to permit “mixed practices” of this nature –
- s 9(1)(b) which prohibits lawyer employees from providing regulated services to the public other than in the course of their employment “by a partnership comprised entirely of lawyers”. This prohibition prevents a “mixed practice” of lawyer patent attorneys and non-lawyer patent attorneys from employing any lawyers. If Parliament had intended to permit “mixed practices” of this nature, it would surely have created an exception to the prohibition under s 9(1)(b) for the employment of lawyers by such practices.
 - the definition of “incorporated law firm” in s 6 which requires the directors and voting shareholders to be lawyers and which thereby prohibits “incorporated law firms” with non-lawyer patent attorney directors or voting shareholders. This prohibition explains why the definition of “mixed practice” in the Regulations is limited to partnerships and does not extend to incorporated firms, but, if Parliament had intended to permit lawyer patent attorneys and non-lawyer patent attorneys to practise together, it would surely have permitted them to do so through incorporated firms as well as through partnerships.

- s 21(1) which, subject to the limited exceptions in ss 25(2) and 27, prohibits anyone other than a lawyer or an incorporated law firm from providing “legal services” in New Zealand. Subject to the limited exceptions, this prohibition prevents non-lawyer patent attorneys from providing “legal services” in New Zealand. If Parliament had intended to permit “mixed practices” of lawyer patent attorneys and non-lawyer patent attorneys which were entitled to provide “legal services” in New Zealand, it would need to have created a further specific exception to the prohibition for this purpose.

28. When the scheme of the LCA is taken into account, it is reasonable to conclude that the Regulations are not authorised by necessary implication under s 94(h). On the contrary, it is reasonable to conclude that the Regulations are invalid in purporting to permit what is prohibited or at least not permitted, namely –

28.1. the sharing of income generally contrary to ss 7(3) and (4);

28.2. “mixed practices” when MDPs are prohibited by s 7(3); and

28.3. the provision of “legal services” by non-lawyer patent attorneys contrary to s 21(1).

29. It is possible that these invalid parts of the Regulations might be severed from the Regulations so as to leave valid Regulations relating to the sharing of income from the provision of “regulated services” between “a practice” as defined in regulation 3 and “a patent attorney firm”, but even then the Regulations would require amendment to narrow the definition of “income” so as to comply with the empowering provision and s 7(4).

The legislative history

30. It is reasonably well-established, especially in the case of doubt as to the meaning of statutory provisions, that Courts may gain assistance when construing legislation from submissions to Select Committees and Select Committee reports, particularly in understanding why amendments have been made to Bills: Burrows, Statute Law in New Zealand, 4th ed., 2009, 264-265. Here the specific provisions relating to patent attorneys in the LCA were added at the Select Committee stage.

31. The specific provisions relating to patent attorneys were in fact added to the Bill as a result of submissions made to the Select Committee by the New Zealand Institute of Patent Attorneys (the IPA) and the NZLS. The position of the NZLS on

the issue of partnerships between lawyers and patent attorneys was addressed in its supplementary submission of 5 February 2004 which attached a separate detailed letter of the same date on the issue. This letter summarised the position as follows –

- “2.6 IPA in its submissions at paragraph 46 states that most practices have operated by having two partnerships – one comprising patent attorneys and one comprising lawyers, with a ‘smoothing of income from both the patent attorney and the legal work’. IPA further states that this in large measure is driven by sheer necessity because of the impossibility of defining with precision the dividing line between legal work and patent attorney work.
- 2.7 On balance, particularly having regard to the arrangements that have existed over many years, it would seem reasonable to have a limited exception to clause 7(3) of the Bill to permit sharing of income between patent attorneys and lawyers in closely defined circumstances. **IPA in paragraph 52 of its submissions states that ‘patent attorney practices can reluctantly live with the need for two partnerships for their practices, that is one for lawyers and one for patent attorneys’.**
- 2.8 Paragraph 7(3) of the Bill could be amended to permit the sharing by a law firm or a lawyer of income with an associated patent attorney firm in the circumstances to be set out in NZLS Practice Rules and in accordance with the provisions of those Rules. It would be necessary in those Rules to ensure that there was a close one-to-one relationship between the law firm and patent attorney firm concerned. **The partners in the law firm would all need to be lawyers, although they could be patent attorneys as well. The partners in the patent attorney firm would need to be limited to patent attorneys although they could include patent attorneys with legal qualifications who do not hold practising certificates.**”
(emphasis added)

32. As the IPA, albeit reluctantly, and the NZLS appeared to be in agreement on the issue, the Select Committee recommended the inclusion of what became s 7(4). The Select Committee stated in its report at pp 5-6 –

“Patent attorneys

We recommend the inclusion of new clause 7(4) to permit a lawyer or incorporated law firm to share the income from any business involving the provision of regulated services to the public with an associated patent attorney. Circumstances for the sharing of income will be set out in New Zealand Law Society practice rules. Five submissions from firms of patent attorneys stated that the prohibition on income sharing would impact adversely on existing lawful business practices by patent attorneys.

We were advised that most patent attorney practices are operated by having two partnerships: one partnership comprising registered patent attorneys solely and the other partnership comprising patent attorneys who are also barristers and solicitors. (See also ‘Provision of legal and conveyancing services’.)

ACT, National and United future are concerned that this issue has been left to the New Zealand Law Society to determine.”
(emphasis added)

33. The Select Committee also made it clear in its report that the prohibition on MDPs was not intended to be contained solely in s 7(3). The Select Committee stated in its report at p 5 –

“Continuation of prohibition on multi-disciplinary practices

The decision to maintain the prohibition on multi-disciplinary practices has necessitated very detailed drafting. We are not confident that the outcome is as coherent as we would like but most of us have accepted it on the basis that it reflects long-standing law.”

34. The legislative history therefore supports the view that in enacting s 7(4) of the LCA Parliament was not intending to permit MDPs between lawyers and patent attorneys who were not also lawyers. It was simply intending to create a limited exception to the “income” sharing prohibition in s 7(3) by permitting a lawyer and incorporated law firm to share the income from any business involving the provision of “Regulations” to the public with “an associated patent attorney”, not a patent attorney in partnership. In the context of the “two firm model”, where one firm comprised solely practising lawyers and the other firm comprised solely practising patent attorneys, there was no suggestion that the second firm might include lawyers. That was not envisaged by the IPA or the NZLS submissions to the Select Committee or the Select Committee’s recommendation.
35. In my view the legislative history, together with the absence of any provisions in the LCA permitting or regulating MDPs, also answers the opinions of Mr BWF Brown QC, the Ministry of Justice and Crown Law to the contrary.

Douglas White