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The price we pay for the Legal Services Act

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With government reform on the way, John Gould assesses the impact ABSs and a finance-inspired compliance approach have had on the industry

The arrangements to accommodate alternative business structures (ABSs) sometimes feel like a house prepared for a party. No effort or trouble has been spared, the furniture has been moved around, parents have been sent away, and neighbours warned. But, it's nearly midnight and hardly any guests have appeared. Perhaps a Mad Men fancy dress theme was a bad idea after all.

Although the Legal Services Act 2007 has arguably led to far-ranging consequential changes in the way lawyers are regulated, the basic changes were significant but few. Non-lawyers were allowed to own and manage law firms; the separation between representative bodies and regulation was given a legislative base; the handling of service complaints was consolidated under an ombudsman; and a new regulator of regulators, called the Legal Services Board, was created.

Professional titles

Clearing the way for non-lawyers to engage in the provision of regulated legal services is a different matter. Non-lawyers, of course, provided unregulated legal services long before the Act. Most legal services are not reserved to lawyers and never have been. But, even in non-reserved activity, non-lawyers have been unable to sell their services under the protected professional titles, such as solicitor or barrister. So, the objective was to find a way in which non-lawyers could provide services, such as conveyancing and litigation, on the same basis as existing law firms.

It was thought this would unleash competition, innovation, and the application of commercial investment and nous for the benefit of consumers. Questions may be asked, with the benefitof hindsight, as to the strength of any economic analysis and evidence supporting this belief, but there it is.

The direct provisions to allow ABSs, also called licensed bodies, to operate are necessarily complicated. It is understandable that the licensing of a new type of law firm and the approval of individual non-lawyer owners and managers would be approached with at least some degree of care (the concept seems to have had little precedent either historically or globally). In addition, there have been complaints that applications have been processed slowly, but so far less than 500 ABSs have been authorised and their market impact has been small.

Licensed bodies required different regulatory treatment from conventional law firms.The emphasis needed to be on the corporate body or entity, rather than an individually accountable lawyer. Entity regulation raised the question of individual responsibility for compliance, and so the Act introduced compliance officers.

The regulators were given powers to punish the new bodies without reference to the traditional tribunal-based approach. Codes of conduct needed to be expressed in a way that allowed the new bodies to operate differently from existing

firms, but yet maintain standards. This meant moving away from rules requiring specified conduct to an outcomes-focused approach.

It would have been very difficult to accommodate this change without adjusting the regulation of the existing 150,000 or so lawyers and around 12,000 law firms. It is these adjustments which have had the greatest impact so far. It is an impact that greatly exceeds the impact of any change in the way that legal services are provided by licensed bodies.

Disproportionate risk assessment

The regulatory emphasis on the supervision of all lawyers is now on entities, rather than individual lawyers. Compliance officers are now mandatory for all law firms and ubiquitous. The resources devoted to managing compliance risks in many firms may now be beyond those required by the actual risks, because the system has introduced someone whose job is to be cautious. Since it seems likely that the change has increased the total cost of compliance, the question is whether a proportionate benefit for consumers has been achieved.

At the same time as compliance responsibilities of firms have been formalised and focused, the emphasis of the regulators has moved to supervision. This moves the approach towards that of financial services regulation, which is perfectly logical where services are provided by similar corporate players. The trend of regulators having stronger powers to fine entities directly, rather than refer to independent tribunals, has been established.

It may have been that some of the changes would have happened anyway. It could be that the evidence will show, eventually, that even the changes which were simply the consequences of the Act have produced real benefits to both consumers and the professions. It is possible, however, that a price has been paid in some otherwise unnecessary consequential changes for a concept which is failing.

It has been reported that the government has reform on the agenda again. It might be wise for them to get excellent evidence in advance, so that people will come to the party. **SJ**

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