

The Trade Practices Act in Relation to the Legal Profession.

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Executive Summary.

1. This submission is focussed onto the legal services market. It argues that only way the legal services market can be opened up to competition is by totally dismantling the legal profession's monopolies in all 'legal services' markets *except* that of *courtroom* advocacy. Other countries have done this. Adopting the terminology of the Trade Practices Act, the business of the practice of law is so structured that there is little 'competitive trading which benefits consumers in terms of services and price'. It is the way the legal services markets are structured that leads to lawyers possessing 'excessive market power', and the high fees lawyers charge 'impede the ability of Australian industry to compete locally and internationally'. The reforms proposed would be so difficult to effect in Australia in the face of a profession that has the power to get what it wants, that no sensible trade practices reform organisation could ever be expected to try and implement them. Recommending them would be a waste of time, so AJ & R Inc has no illusions that its submissions will be seriously entertained at all. Nevertheless, since AJ & R Inc is dedicated to promoting truth, it makes these submissions anyway.

2. Section 45(2) in Part IV of the Act provides that a corporation (extended to ordinary persons by section 5(1) of the Act) shall not make an arrangement, or arrive at an understanding, if it would be likely to have the effect of substantially lessening competition. The activities of the legal profession are based on many such arrangements and understandings. However, the profession has always said that unrestricted competition would lead to a lowering of 'ethical standards', and for over a century the profession has operated under its own unique statutory regimes. Section 51 (1) states, in relation to

alleged Part IV contraventions, that “the following must be disregarded:
(a) anything specified in, and specifically authorised by....an Act or....
Regulations.

The attitude of the ACCC seems to be that the statutory legal practice regimes have the effect of exempting legal practitioners from the ambit of Part IV.

3. There is no reason for lawyers to have a monopoly on the practice of law, with the exception of the licensing of courtroom advocates. Comparisons can be made with other countries, with Scandinavian countries ‘leading the pack’ when it comes to deregulation of the supply of ‘legal services’

1.1 The biggest problem : the power of the legal profession to maintain monopolies.

“Allstate Guilty of Malpractice ; Told Plaintiff ‘Don’t hire Lawyer”” reads the main front page headline of Lawyers Weekly USA for 27 May 2002. Lawyers Weekly costs US\$10 per issue. It is for lawyers. They know what they want to read about, so this 30 page edition puts that as the main headline. The lawyers have been working on this one for years. It is the first time ever that a State Supreme Court has made such a finding, and it builds on a groundbreaking Federal Court decision last year. Karen Koehler, who chairs the insurance section of the Washington State Trial Lawyers Association, called the decision a ‘tremendous victory for consumers’, while it is really a tremendous victory for lawyers over consumers. How can one lose, if the judges are on one’s side. However, it must be conceded that there are many decent judges on the bench, and that was so in that case. There were nine judges hearing the case. Four said ‘we can’t do this’. Five said, ‘yes we can’, and did it. Around about this stage any practising lawyer reading this would probably select one of the larger guns in the ‘lawyer disinformational strategy cabinet’ and say “Yes, but that is in America, that does not apply here”. And, that is correct. It doesn’t, yet. But it would, if any insurance company ever did what Allstate had done *prior* to this. You see, we are miles behind the USA. Our lawyers have still got things so ‘rigged’ that no one would dare do the other thing that Allstate has done, which lawyers have been fighting for a few years now.

Allstate insures about 1 in 8 houses and cars in the USA. It is a huge insurer. For a few years it has been running a campaign, and it is a ‘corker’. For consumers. It advertises along these lines : If you have an accident with a

vehicle insured by us, do go to a lawyer. Come to us directly. We will make you an offer, and if you do not like it, then we suggest you *then* go to a lawyer and say : This is what Allstate has offered. I want you to get me more, NET. That is the key : NET. In other words, Allstate tells claimants to go and ask for a 'value added' fee contract. You, my lawyer, are only to get paid if you add value to my present situation. Better still, you are only to get a percentage of what you add.

Such a fee arrangement would, of course, deal most lawyers out of litigation, since they simply cannot add any real value by getting involved. They are primarily out to take a cut of what the plaintiff is going to get anyway, and a very big cut it is : 90%, in Australia, in the case of UMP, in respect of claims under \$100,000.

So anyone can see why lawyers have got it in for Allstate. Now the judges, just a slight majority of them, are swinging around behind the lawyers. Here in Australia we have not even gone to the first stage of the Allstate saga, that is to say where an insurance company actually tries to tackle the lawyers to make them compete, and give value to their clients.

Of course the Allstate decision was complex. It needed to be. The majority judges had to find a way of saying Allstate was practising law when it wasn't. On the other hand it could not ban Allstate from doing what it was doing. Well, not logically, anyway. The minority judges actually pointed out the irrationality of this rather well : *"The majority is clearly authorizing the practice to continue, however, and thus its actual holding is, despite its disclaimer, that the claims adjuster's activity constitutes the authorized practice of law."*

The point of all that is to demonstrate these basics : Lawyers will always organise the way lawyering is done so as to prevent competition from emerging, and a majority of the judges will support them. Lay people who try to work out what is going on will be quietly guided into a fog of spurious legal argumentational complexity. Allstate's real sin was, and is, in the advertising.campaign.

1.2 The traditional argument for 'no competition' in the legal profession.

I can still remember the name of the lawyer who came up from 'downtown' to lecture me, one of a class of budding lawyers in the late 1960's, and I can still remember his authoritative stentorian tone as he boomed 'we're a profession, not a trade'. That was all the lawyers needed to say, really, to every complaint in the 1960's. The arguments got a bit more vulnerable if

one probed, but few did. For example, the argument progressed to “We’d behave unethically if we had to compete”. Perhaps legal ethics were being taught, in in the ‘Don Corleone’ school of law, as ‘we’d start breaking their legs if they didn’t pay’. One thing was clear. It was professional misconduct to undercharge.

1.3 Profit levels indicate that there is little competition in the Australian legal services market

One of Australia’s most well informed observers of the legal professional scene has observed that “.....*the legal profession is the most profitable industry in the business services sector. More profitable than the great crapulous industry of advertising and the shocking rort ridden industry of real estate agents*” . Through the 1990’s the profit margins of ‘lawyering’ businesses have remained at around 30% for solicitors and in excess of 60% for barristers. The margin for consultant engineering is around 11% in a good year. The nearest competitors to the lawyers, in terms of profitability, seem to be general medical practitioners who have profit margins of around 27 %, while medical specialists achieve about 24.%. although the prognosis for continued profits at that level is not good, given predictions of massive increases in public liability insurance premiums. Barristerial profits are almost obscene. They do not reflect a competitive market. A few years ago a ‘source’ in England in the Lord Chancellor’s department, which would have to be the ultimate authority on barristers’ fees over there, which are not so different to fees over here, was reliably reported as saying that fees earned by barristers were a "complete rip-off". The reply from the profession was not so much that barristers fees were not a rip-off, but that “attacks” like that were a threat to the fabric of the entire justice system.¹ In other words, we have got to rip you off, or the justice system will fall apart.

1.3 The ‘upside down pyramid’ argument to support lawyer monopolies.

Lawyers form themselves into self regulating monopolies, protected by their own legislation, over ‘legal work’, which actually means over whatever ‘work’ lawyers want to do. This is a “*tautology - i.e., the practice of law is what credentialed lawyers have customarily done*”²

¹ “Attacks on the Bar are undermining the justice system, says Richard Benson”
The Times, UK, January 25 2000”

² “Impermanent Boundaries - Imminent Challenges to Professional Identities and Institutional Competence by Prof. Peter W. Martin, Cornell Law school

The monopoly should be limited to ‘advocacy services in court’. Everything else : anyone can do. (Obviously, we cannot let unlicensed, undisciplinable, dishonest people be standing up in court as advocates...I mean look at what we have got now even with licensing and ‘discipline’). So, imagine a gigantic pyramid of ‘legal services’, with ‘advocacy in court’ at the top of the pyramid. That is the reality. Hardly any lawyers are spending much time in court, relative to the total numbers of lawyers occupying office space around Australia. What one needs to do is to take away everything below the peak of the pyramid, and declare that work open to anyone. What the lawyers, however, have done, is to argue in favour of tipping the pyramid upside down, and that is what we have got. **We have a gigantic upside down pyramid, with ‘courtroom advocacy’ supporting the claims by lawyers to be exclusively entitled to do all the other ‘work’.** All the monopolies are built on the one thing of courtroom advocacy. The Law Council of Australia, the national lawyer union, is only too well aware that ‘courtroom advocacy’ is the only thing that can support all the ‘non legal’ services monopolies that comprise ‘legal services’. Texas lawyers have recently taken on real estate agents saying that filling out real estate forms in ‘practising law’. One wonders how they relate that back to courtroom advocacy, but they will have found a way.

In December 1998 the Law Council of Australia set out its arguments on the subject of lawyer monopolies in its *“Policy statement on the reservation of legal work for lawyers”*³. The opening words of the document are: *“1. The Law Council's policy on the reservation of legal work for lawyers has been formulated having regard to the following public interest considerations:”* (As an aside, sceptics might give more credence to what Adam Smith wrote over two centuries ago : *“I have never known much good done by those who affected to trade for the public good”*⁴)

The Law Council’s document is a marvel of sleight of hand. In no time at all, ‘out of court’ litigation activity is stacked on top of courtroom advocacy, and then all the other lawyering activities are stacked on top of that. Watch closely:

“ 3. The role of a lawyer as an Officer of the Court should be recognised in the core area of legal work reserved for lawyers.

4. The core areas⁵ of legal work should

<http://www4.law.cornell.edu/working-papers/open/martin/boundaries.html>

³ That is to say, “Policy statement on lawyer monopolies’.

⁴ “An inquiry into the Nature and Causes of the Wealth of Nations” by Adam Smith 1776 Book Four, Chapter ii.

(a) relate to appearances in Court and matters incidental to that right, such as

(i) advice on prospects in proposed or pending litigation;

(ii) advice on the legal aspects of contentious matters before litigation is proposed;

(iii) preparation and conduct of proceedings;

(iv) legal professional privilege.⁶

(b) relate to the drawing, filling up or preparing an instrument or other document for fee or reward.....”

That bit under “b” is where the ‘sleight of hand’ switch occurs. By the time the policy statement has finished, *everything* lawyers now do has ended up in a ‘core area of legal work’. Under 4(b) (ii) anyone who “*creates, regulates or affects rights between parties (or purports to do so)*” for reward has done ‘core legal work’. If someone *pays* you to go down to the shop to buy a lollipop for them and you do so, you have, according to the Law Council, done ‘core legal work’. It is interesting to see how societies in which lawyers play a less central role have developed in relation to core advocacy work.

*“In the civil law world, advocacy is the core of the private practitioners’ monopoly, vigorously defended against intruders. Indeed, countries like Germany, France, Italy, and Venezuela compel litigants to retain a qualified advocate in most matters, prohibiting self representation. Because civil lawyers have chosen to defend the core of advocacy while surrendering the periphery of advice, powerful competitors have occupied the latter realm.”*⁷

In other words, in other countries the lawyers have given up on trying to pile all the other services on top of advocacy, so as to create more monopolies.

1.4 The REAL challenge for Trade Practices reform of lawyers.

The real challenge is not fiddling around with distinctions between barristers and solicitors, and other such trivia that reform exercises always focus on. The real issue is simply removing lawyer monopolies which result in their handling of transactions form beginning to end, and calling all their work ‘lawyering’, and charging monopoly rates for it. There are those who say things will come right. US experience indicates it will not, without a huge fight. One of those who acknowledges the need for change, and assumes it

⁵ The introduction of an ‘s’ here (‘areas’) is very clever.

⁶ ‘Keeping client secrets’ (which often means concealing incriminating secrets) is a core area of legal work.?

⁷ Lawyers. A Critical Reader. Richard L Abel The New Press, 1997.page 137.

will come, is a former NSW Minister and now Adjunct Professor in the Faculty of Law, John Hannaford. He says : “*advocacy and preparing a case for court were likely to be the only legal services which would remain the exclusive province of lawyers.....All other work that a solicitor now does will be regarded as legal business services and will become unregulated other than for compliance with the Trade Practices laws and the Fair Trading laws,*” he said.⁸ This review, insofar as it concerns the legal services market, will be a complete waste of time unless it faces up to the issue of deregulation all ‘legal services’ except advocacy in a litigational courtroom setting. As for pre courtroom litigation work, that should probably be in the hands of licensed para legals, as in Japan. In other words, if you want court papers drawn up, you go to a ‘judicial scrivener’ or as seems to have come in California, a ‘licensed document assistant’. (visit the website www.calda.org)

2.1 The ‘understandings’ within the profession as to fees.

Back in the 1950’s the Chief Justice of England felt more able to speak freely than would be the case now. In one case he ruled that : “*There is nothing worse in any profession than that there should be open fee cutting, if I may use that expression....*”⁹. A few decades ago it was routine in Australia for the lawyer unions to state that price fixing was in the public interest.

Typical Law Society rules would read:

The Council [of the Law Society] has formed the opinion that it is neither in the interest of the profession nor in the interest of the public that fees for legal services be rendered at levels less than those which are necessary to provide a reasonable financial return to practitioners.....the Council considers that a practitioner will breach Rule 68A if he holds out to the public generally that he is prepared to undercut the fees of other practitioners.....The Council will prosecute practitioners where evidence is available that those practitioners have been engaging in any such activities”¹⁰. It is trite now to say that such understandings no longer exist. But proof of their continued existence still sometimes leaks out, even in legislation. Queensland’s Civil Justice Reform Act 1998 after banning

⁸ UTS Sydney. ‘Hannaford predicts law changes’ . UTS News 4-17 June 2001
<http://www.utsnews.uts.edu.au/index.html?>

⁹ Believe it or not, the case was called *Re Evill* (1951) 2 Times L.R. 265 at 267 (High Court, England)

¹⁰ From the “Conveyancing Scale” published by the Queensland Law Society , Rule 81

contingency fees (now permitted) went on to say that this “*does not prevent a solicitor or firm accepting a lower fee if the actual outcome of the work is less than the outcome sought...*”¹¹. In other words, if you want to relate your fee to the real value of the work done, you can, but there is no ‘professional’ obligation on you to do so.

Of course, since an unhappy client is more likely to reject the bill unless a lawyer does discount it, so the more sensible ones do so (unless they have little other work to do) in order to save time and expense chasing the excess.

2.2 The understandings within the profession as to making business out of thin air.

The core submission of Australian Justice & Reform Incorporated is that one cannot introduce competition into the ‘legal services’ ‘markets’ (bearing in mind that lawyers define the markets just by moving into whatever they want to move into) without restoring control to the ‘customers’ over what their lawyers do. Effectively. If lawyers decide that 50 page leases should be the norm instead of two page ones, then 50 page ones it is. If lawyers decide that 10 or 20 hours work can be churned into a company formation, then that is what it is. It becomes ‘professionally negligent’ not to churn the ‘usual amount’ of bureaucratic activity into any transaction, while documentation gets longer and longer. Is there is a clause in this document as to what is to happen if Saddam Hussein invades Australia?. “There isn’t !!!! ?” And as for the ‘costs’ clauses in any document : “If they default, then here is 20 pages covering how our fees are to be still secured and paid.” And, of course, someone must pay for the cost of us dreaming up that clause. So we end up with a ‘system’ that requires tons of legal documents being produced and millions of words being spouted every day, and thousand of law books and computer databases being pored over, and all this having to be paid for, when only a small amount of it was really necessary. The customer is not permitted to opt out. “I want a one page lease”. No chance.

2.3 Churning litigation : how to increase the fees, regardless of demand for work.

A J & R Inc has done some research in a simple jurisdiction, the criminal one, by carefully collating Australian Bureau of Statistics figures. It can be demonstrated that barristerial earnings from criminal law are increasing much faster than either the number of defendants being processed or the

¹¹ The Civil Justice Reform Act put that into s 48 D (1) of the Queensland Law Society Act.

number of defended trials (which is where the 'real' work is). Over the last few years, the higher Australian criminal courts have been processing only 11% more defendants and conducting only 7.4% more trials, while the barristers have been getting 41.3% more money. The answer is churning. Civil litigation is churned too. If the number of litigants presenting themselves to lawyers goes down, churning goes up in the remaining cases. Churning is not taught as an 'academic' degree subject. In a less self serving academic world, law degree subjects would include 'churning'. Examination candidates would be asked to estimate the increases in litigation churning that would result from lower actual caseloads, increased legal aid funding, increased numbers of lawyers, declines in workloads elsewhere, and so on. Candidates would be asked to propose ways by which national competition policy could be used to overcome the churning response.

2.4 Competition Authorities place legal services competition issues in the 'too hard' basket.

At the beginning of this submission AJ & R Inc noted the existence of s 51(1) of the Trade Practices Act. Every competition Authority we have written to in Australia has said it does not worry about supervising the lawyers because they have their own legislated framework. The most recent such letter is from the ACCC dated 3 June 2002, in response to our question as to who was policing the lawyers in competition matters (their ref MARS 287233) which states "...issues raised under Part IV of the Actwill be exempted from the Act's application due to section 51"

3.1 A proper sweeping approach to legal services reform.

We have already quoted Professor Hannaford of Sydney on what needs to happen : *"advocacy and preparing a case for court were likely to be the only legal services which would remain the exclusive province of lawyers.....All other work that a solicitor now does will be regarded as legal business services and will become unregulated..."*

In the US a professor has gone into more detail:

"At the extreme, the organized bar could dissolve itself and law schools go out of business. A more likely option, however, would abolish the restrictions on unauthorized practice, while maintaining the existing institutional arrangements, such as bar associations and law schools. While anyone could practice law, the bar could certify "lawyers." If those certified as lawyers behave ethically and provide high quality services, they will earn success in the market for legal services. Moreover, the increased total number of legal services providers will function as in other markets to

*decrease prices and improve quality. Where the market proves unable to protect consumers, the government will intervene with regulation. In the end, the so-called decline of law from a profession to a business is not a problem. Rather, it is an opportunity to take a dramatic step to improve the delivery of legal services and make our legal system more just”.*¹²

Allowing Law Societies and Bar Associations to have a monopoly on credentialling ‘lawyers’ is a disaster. Total deregulation will allow the creation of new organisations which can endeavour to create and market new forms of lawyers, creating ‘brands’ that people can trust that deliver reasonable quality ethical services at a reasonable price. The existing Law Society and Bar Association ‘brands’ have no credibility with a lot of consumers, and it is not fair to consumers to tell them that those are the only two ‘brands’ and that is all there is to it.

As already mentioned, total deregulation has been tried in other advanced countries, and works. But before citing such countries, AJ& R Inc would like to ask why it is necessary for us, a private organisation that receives no government funding, to be the one that has to draw attention to countries that have deregulated the legal profession. Why do all the well paid civil servants fail to mention even one country that has deregulated ?

In Sweden “.....advocates do not have a monopoly to practice law. There were [are] no restrictions for non-legally qualified people to provide legal advice and assistance in relation to claims by individuals, either free, or for reward.”¹³

“Finland is the most open market in legal services. In Finland and Sweden, no licence is required to provide legal services, except when legal practitioners seek to use the title of ‘Advocate’”¹⁴

Denmark is largely unregulated as well, although:

¹² “Face the facts: law is business” by Russell G. Pearce, associate professor of law at Fordham University School of Law in New York, National Law Journal, November 1996. See also "The Professionalism Paradigm Shift: Why Discarding Professional Ideology will Improve the Conduct and Reputation of the Bar," 70 New York University Law Review, p1229 (1995).

¹³ The UK Report of the Lord Chancellor's Committee to Investigate the Activities of Non-Legally Qualified Claims Assessors and Employment Advisers 29 February 2000

¹⁴ “Restrictions on Trade in Professional Services”. Staff Research Paper, Productivity Commission, Australia, August 2000 para 3.6 (visit the Commission’s website)

*“In Denmark, non lawyers are forbidden from advertising that they provide legal advice assistance for compensation.”*¹⁵

3.2 For those who want a lesser amount of deregulatory reform.

If total deregulation was considered too radical, then the Japanese solution could be adopted. The Japanese have an ‘unbundled’ profession. There are specialists who draft various types of common legal documents, who do that work for reasonable fees. There are people who draft court documents, but who are not entitled to practise as advocates in court, and indeed, most people do not hire advocates for court, even though they have enlisted the services of such a draftsman. The same would probably apply in Australia, since it is court ‘paperwork’ which is more difficult to cope with for most people than courtroom advocacy. It is to be noted that California has recently introduced ‘licensed document assistants’. Look at the power a Japanese system gives to consumers. The consumer can choose how much lawyer involvement to have in the one case. Advise me and stop there. (It seems there are ‘advisers’). Or I will then go to a judicial scrivener and get documents drawn up. Perhaps the scrivener will tell me it looks like I got stupid advice...that there is no formulatable claim. Look what is emerging. Accountability. As we have said, most Japanese do not hire a ‘bengoshi’ (barrister equivalent) but if they did and they lost, one can be sure the bengoshi would point the finger at the others : stupid advice, stupid documents. Whatever. That sort of accountability must help consumers, compared to our lawyers who go from beginning to end covering up their mistakes as they go. No one else ever gets to check on them. ‘Unbundling’ enables the consumer to control costs, by allowing clients to say “just do this bit’ I will do the rest’. Effectively, that is far too rare an option for Australian legal consumers.

3.3 For those who want almost no reform : Fee scales

“For many centuries, the courts have overseen the bills that solicitors send their clients. During the last decade, the scope and procedures of this governance have been questioned in many jurisdictions. Within Australia, The Report of the Access to Justice Advisory Committee (1994) questioned whether fee scales were an appropriate mechanism to regulate costs arrangements between lawyers and their clients. The then Federal

¹⁵ “Background” to the UK Report of the Lord Chancellor's Committee to Investigate the Activities of Non-Legally Qualified Claims Assessors and Employment Advisers 29 February 2000

*Government responded to this Report in its Justice Statement (1995). The Justice Statement supported the long-term objective of abolishing fee scales; but stated that the abolishing of fee scales should be delayed until the market for legal services was more competitive.”*¹⁶

But we have the West Australia lawyers saying their fee scales are legitimate because the market IS competitive. In WA the scale of lawyers’ fees for advocacy services is set out in a ‘Determination’. A Federal Court judge observed in 2001 that:

*“Clause 5(1)(g) of the Determination indicates that the Legal Costs Committee conducted a survey of members of the Western Australian Bar Association (Inc) to ascertain the hourly and daily rates charged by members of that association. Clause 5(2) records the satisfaction of the Committee that the existence of competition for the supply of services to parties involved in litigation made it safe to adopt the rates charged by practitioners as a guide to the rates to be used in this Determination.”*¹⁷

On balance fee scales while encouraging churning can be used to restrain fees a little bit. The Germans use them, which is always a good sign when matters of legal services efficiency are concerned. Certainly, the abolition of fee scales coupled with the abolition of taxing officer coverage of solicitor/client bill disputes alone whacked fees up by about 30% in 1994 in NSW (when it happened) and in Queensland in 1998 (which is when ‘reform’ to effect those changes was carried out in Queensland.) AJ&R Inc can refer to the research that proves those figures, but since it is highly unlikely that anyone who matters will read this far, we will not go into that.

For those who have read this far, thank you for your perseverance.

Yours faithfully,
B S Dawson.
President.
Australian Justice & Reform Incorporated.

¹⁶ Federal Attorney General’s Department Report of The Review of Scales of Legal Professional Fees in Federal Jurisdictions 31 March 1998

¹⁷ Justice Carr in *Boys v Australian Securities Commission* [2001] FCA 1440 (12 October 2001)