PRODUCING 'THE GOODS'

Peter Huxtable

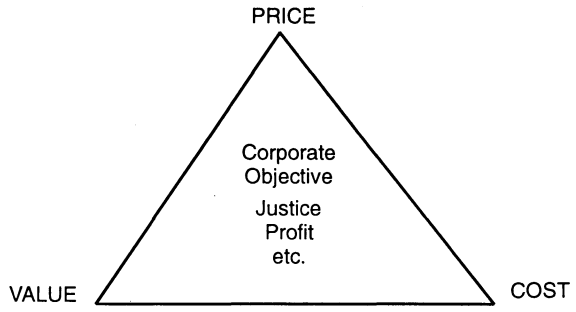
Competition and co-operation in poverty law services.

In these days of economic rationalism and professional management, publicly funded activities, like private enterprise, must produce the goods.

What are 'the goods'?

In free enterprise, the goods are normally profit maximisation, although they may also be, for example, increased market share, quality leadership, positive public profile and even (due to any dichotomy between ownership and management) the aggrandisement of top managers. In the case of poverty law services, be they delivered through legal aid commissions (LACs), community legal centres (CLCs), Aboriginal legal services (ALSs) or private lawyers, the goods are access to improved justice in our society, especially for those most in need (the poor, the disabled, Aborigines, children etc.).

No matter what the primary corporate objective, long term survival and success depends on adding value that others in the industry don't provide. This can be summarised in the following diagram:[1]



In economic and marketing theory, the firm produces a product or service the customer wants, the product/service is distinct from that of competitors, production costs are pushed down, prices are set at levels the market will tolerate and extra value or benefit is provided to the customer, thus ensuring the firm's product is bought rather than the competitor's. All this leads to profit maximisation.

In the 1970s and 1980s, poverty law services were largely insulated from such hard-nosed business analysis — but no longer.

The welfare state is shrinking fast throughout the Western world, and the survival of institutionalised poverty law services depends primarily on understanding economic rationalist ideology and meeting it on its own terms. The motherhood statements of efficiency and effectiveness in Legal Aid Commission Acts are now life and death imperatives.

Poverty law service providers must now cut costs to the competitive bone, must provide services at a price the government is prepared to pay (unless substantial, supplementary funding comes from other, creative sources — remote, but not impossible) and must produce

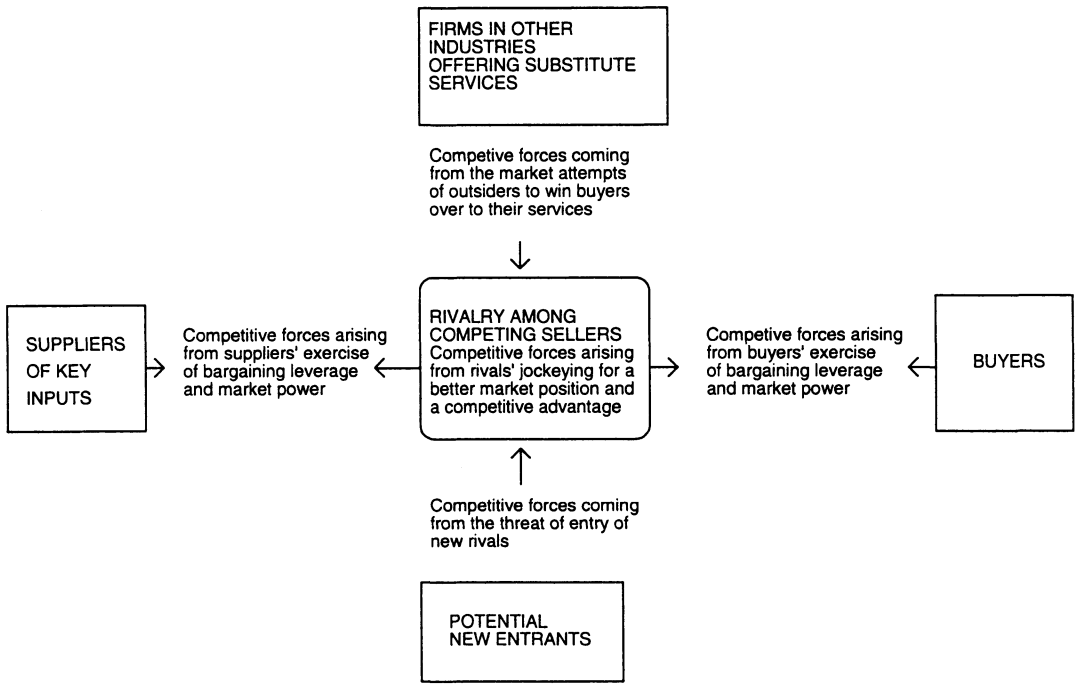
Peter Huxtable is a lawyer and mediator and currently manager of Legal Aid's regional offices in Western Australia. Views expressed in this article are his own.

client and community justice outcomes which can't be as effectively provided by others.

The five forces of competition

All legal service providers live in a dynamic, changing environment. According to Porter, 'Change is an unnatural act, especially in successful companies'.[2] However, change all organisations must, if they wish to survive and prosper in the current and future environment. Ignoring market opportunities and the actions of competitors will spell doom.

Critical factors can change fast, creating opportunities and threats. Management needs good knowledge of the organisation's weaknesses and strengths, sound strategic planning and positioning, and an organisational structure and culture which allows adaptability and flexibility. Porter has devised a five-forces model of competition:[3]



The underlying principle of Porter's model is that a business entity must be aware of its turbulent environment so that it can produce a competitive strategy in order to achieve market success. Strategic analysis is ongoing and aimed at achieving and maintaining competitive advantage, usually through offensive moves to secure market strength and defensive moves to maintain competitive strategy.

Lengthy, fertile analysis of the Australian legal services industry can flow from an examination of this model, but it is not intended to do that in this paper apart from noting a few driving forces of change:

recognition of the severe cost, time and justice limitations of the one lawyer to one client, adversarial model of litigation;

broad acceptance of alternative dispute resolution, including mediation, ombudsmen, and tribunals in which lawyers can't appear;

as many law students presently in Australian universities as there are practising lawyers, which will result in a huge shake-out of the industry, especially through price competition;

cross-party political support for a national competition policy in the legal services industry;

strong competition from sectors offering substitute services, such as accounting, conveyancing, government and financial organisations;

- cost cutting, such as through the heavy use of paralegals rather than lawyers (although this is probably tapering off now);
- greater expectations from clients, particularly corporate and government clients, in terms of price and quality of service;
- technological change, particularly in the form of computerisation, such as in practice management and the information superhighway of the Internet;
- the nationalisation and globalisation of the legal industry.

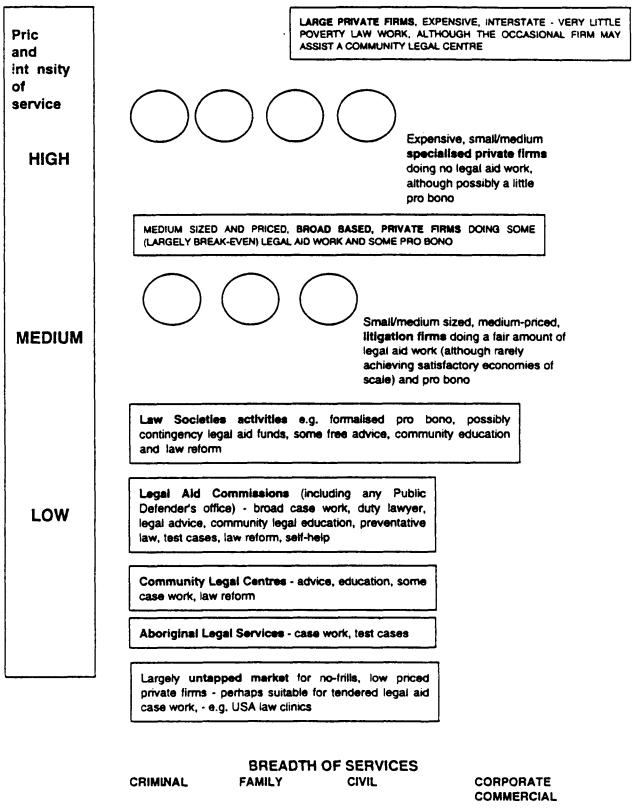
Dollar value of the market and rival groups

The Australian legal services industry was valued at a whopping $5.105 billion a year in 1992-93.[4] It is probably more like $7 billion now. The poverty law services component of this (that is, funding of legal aid, CLCs and ALSs) was a relatively paltry $300m in 1994-95,[5] that is, only some 4% or 5% of the total expenditure on legal services in Australia.

This $300m was far from adequate in meeting the needs of justice and, moreover, State legal aid commissions are to have their total budget cut by some $33m a year following the 1996-97 Federal Government budget.[6] But the poverty law budget is still far from chicken feed for disadvantaged clients, salaried workers relying on it for their livelihood, and cash-strapped governments. Competition for the poverty law budget is strong.

In competition theory, one technique for examining the comparative positions of rival players is strategic group mapping. When firms, companies or organisations employ similar competitive strategies and occupy similar positions in the market, they are said to be in the same strategic group.[7]

STRATEGIC GROUP MAP OF COMPETITORS IN THE POVERTY LAW MARKET



The strategic group map is not to scale, and has deficiencies too many to explore here, but it does give a broad idea of where players lie in the provision of services in the poverty law market.

Competition by co-operation

Natural alliances tend to form, due to ideology and method of staff remuneration. These are seen more clearly through strategic group mapping.

On the one hand, it can be broadly argued that there are LACs, CLCs and ALSs banding together to provide mutual support and perspective. While still subject to a range of interesting competitive tensions among themselves, their services are to a large extent complementary and not duplicated. However, while recognising the unique philosophy and role of each of these main players, governmental desire for a co-ordinated, overall resource-allocation strategy, can be understood.

In apparent competition with the salaried block are the private law firms, of varying size and expertise, which are driven by more orthodox business objectives, particularly survival and profit.

But are the differences between salaried and private providers of poverty law services really so great? Both provide case work services for disadvantaged clients (although private firms have a more limited range of overall services), both are having to force costs down, both must come up with prices which are acceptable to an increasingly assertive client base (private, corporate or government), and both must provide quality services which effectively meet customer needs.

If any organisation does not achieve these objectives, the future competitive environment will see their demise, be it a sole practitioner or a $50 million legal aid commission. In the not too distant future, all can be expected to tender competitively for the work, to a greater or lesser degree, with obvious implications for client solicitor of choice, and raising issues of work quality and effectiveness. All players must also address increasing threats from government as to their independence.

Moreover, heavy competition in the open market, particularly on price, is not the only, nor necessarily the best, way to produce efficient organisations, quality services and lowest prices. Co-operation, collaboration and networking between players can be fundamental to achieving individual corporate objectives (including reasonable profit and incomes) and society's well-being (access to justice).

Coalitions of those with common interests, including workers, managers, customers, kindred organisations, and even traditional market-place rivals, can be built, and can result in outcomes which increase benefits to all stakeholders.

Competition by co-operation[8] in the poverty law market is important because, while maintaining the vibrancy and benefits of competition, it:

- allows a more comprehensive tackling of increasingly complex justice issues, such as human rights transcending political borders, and
- allows legal services, which are more and more knowledge-based, information-intensive and computerised, to be broadly shared. This leads to lower costs, such as generic research for test cases.

Internal co-operation in business entities is epitomised in practices such as total quality management. The 'competing by co-operating' concept extends the idea further, so that co-operation can occur among those who would otherwise be fierce rivals but who share common goals and interests and who can gain from working together.

The mixed model of poverty law service delivery

From my study of Australian and overseas legal aid schemes,[9] the ideal model of poverty law service delivery is the mixed model, that is, involving LACs (including a Public Defender's office), CLCs, ALSs and private lawyers, each with their own proven, cost-efficient and effective services and market niches, forming part of a comprehensive, integrated strategy. When working properly, the mixed model achieves all the benefits of competition by co-operation.

However, it has been advocated in powerful places that all Australian poverty law services should be put out 100% to competitive tender. If this occurred, it would obviously destroy the mixed model of service delivery, and would most likely result in pure bottom-line price competition. That risks the whole poverty law scheme collapsing by precariously putting all the eggs in one basket (either private *or* salaried lawyers), by losing enormous in-house expertise built up over decades, and by forfeiting the inherent tautness of healthy (hopefully co-operative) competition achievable under the present system, to a possibly monopolistic one in the long run.

Moreover, a fully tendered out scheme would lose much of the added value of the mixed model of poverty law service delivery in terms of justice outcomes for the community as a whole.

References on p.299

Author's reply

Mr Stewart seems to have fallen into the trap of failing to distinguish between what he wanted to see in my article and what it was about.

My article discussed the ABS survey of the Australian Legal Services Industry for the period 1988-93. I focused in particular on the survey data in relation to growth in employment and income. But neither the ABS survey or my article discussed the period after 1993. It is possible that things have deteriorated dramatically since then as Mr Stewart suggests. In fact I commented towards the end of the article that 'This is not to say that the future may bring substantial change'. It is now up to Mr Stewart and others to demonstrate with hard data that things have deteriorated dramatically since 1993 as he suggests. But that was not the purpose of my article.

Mr Stewart also raises the question of profitability measures. But perhaps he should read the survey rather than use the old line about 'statistical interpretation'. I merely discussed the ABS data that demonstrate conclusively that this was a very profitable industry in that period. On any profitability measure the profession was doing very well. Mr Stewart does not take issue with this overall conclusion. Even using the measure preferred by Mr Stewart (allowing for partners income to be subtracted from profits) the industry's profit level was three times that of non-farm businesses in the economy generally. The real issue here seems to be that Mr Stewart does not want readers to think that the profession is ever very profitable. He may like us to think this but the data does not support such a conclusion.

Francis Regan

Goldie references continued from p.297

5. Huxtable, P., 'An Examination of Some Foreign Legal Aid Schemes with Implications for Australia', 1993.
6. Australian Law Reform Commission, 'Reform', June/July 1996 , p.26.
7. National Legal Aid Advisory Committee, 'Legal Aid for the Australian Community', July 1990, p.246.
8. Nilon, C., 'An Evaluation of the Effectiveness of the Child Support Forums operated by the Legal Aid Commission of Western Australia', 1988; LAWA: 'Armadale Domestic Violence Intervention Project', 1994; LAWA: 'Pilbara Community Legal Service Project', 1994; LAWA: 'Migrant Worker Legal Information and Referral Training Evaluation Report', 1995; McKelvie, G. and O'Rourke, M., 'An Evaluation Study of the Legal Aid Child Access Forum Western Australia', 1995; LAWA: 'Community Legal Education in Tenancy Law', 1995; LAWA: Domestic Violence Information and Referral Training', 1995; Integra Pty Ltd: 'An Evaluation of the Legal Aid Migrant Workers Program', 1996.
9. This figure reflects staffing and disbursement gross costs associated with Legal Aid WA's live CLE and publication production and distribution, as well as its networking and consultation activities.
10. Baghwati, P.N., 'Legal Aid in Crisis — The Present and the Future', World Legal Aid Conference, 2-4 May 1995, Kuala Lumpur, Malaysia. Justice Bhagwati is known as the father of the legal aid system in India, and is a recipient of the International Bar Association Award for his contribution to the field of legal aid at a state and international level.

Huxtable article continued from p.275

References

1. Maital, S., *Executive Economics. Ten Essentials for Managers*, The Free Press, New York, 1994, p.233.
2. Porter, M.E., *The Competitive Advantage of Nations*, MacMillan, Hong Kong, 1990, p.71.
3. Thompson, A.A. and Formby, J.P., *Economics of the Firm*, Prentice-Hall, New Jersey, 1993, p.405, adapted from M.E. Porter; 'How Competitive Forces Shape Strategy', (1979) 57(2) *Harvard Business Review* 137-45.
4. Australian Bureau of Statistics, Legal and Accounting Services, Australia 1992-93, p.1.
5. National Legal Aid, 'Meeting Tomorrow's Needs On Yesterday's Budget', 1996, p.10; National Commission of Audit Findings, Report on Aboriginal and Torres Straight Islanders Legal Services, 1996, p.63.
6. Fife-Yeomans, J., *The Australian* , 5 October 1996.
7. Thompson, A.A. and Formby, J.P., above, p.410.
8. Maital, S., above, p.229.
9. Peter Huxtable undertook an extensive study of North American and European legal aid schemes, under a 1993 Churchill Fellowship.