Whose Interest?

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On 14 August 2000, the National Competition Council ('NCC') issued a press release 'Public Interest or Self Interest?' intended to 'highlight' the need for fewer restrictions on the availability of professional services.

It asserted that: 'Professionals, such as doctors, surgeons, lawyers, architects and pharmacists have almost unique market power because in most cases their own professional guilds set the rules and regulations for professional practice and market dealing.' Warming to the theme, it proposed that competition amongst professionals was limited by various combinations of, restrictions on advertising, entry to the profession and on the use of the professional title, to name a few.

Q: When do you know that you're a dry?

A: When you believe that the diplomatic service should be put out to tender, and that justice should be dispensed according to a voucher system.

(Imre Salusinszky, *Australian Financial Review,* 7 August 2000)

Its underlying thesis was that: 'professionals are service providers and inherently no different to any other service provider. The rules and regulations which govern their market dealings should be subject to independent checks, balances and transparency to ensure that they are serving the overall public interest'.

As was no doubt intended, this announcement was seized upon by the press with the *Australian Financial Review* (16 August 2000) trumpeting: 'Competition regulators are ready to pounce on the restrictive practices of doctors, lawyers and architects; the NCC warns they should be subject to robust competition.'

The NCC's press release and accompanying documents were extraordinarily generalised, inaccurate and out-of-date.

As the President of the Law Council, Gordon Hughes, has pointed out:

> The legal profession in Australia has been at the vanguard of reform of its structures and practices in the context of competition policy reform. It has driven this reform of its own initiative. The NCC's President, Mr. Graeme Samuel, has acknowledged that the legal profession are the leading profession in this regard.[1]

The NCC's press release did not mention this fact. Nor did it mention that in 1998 the New South Wales Government, as part of its obligations under the National Competition Principles Agreement, undertook a competition-focussed review of the *Legal Profession Act 1987 (NSW)*. That review required the government to consider any anti-competitive provisions in the Act and whether they served the public interest.

Submissions were received from a wide range of those identified as having an interest in the legal profession and its regulation, or the legal services market. These included the ACCC, the New South Wales Council of Social Services ('NCOSS'), the Law Foundation of New South Wales, the Legal Services Commissioner, the Legal Aid Commission and the Public Interest Advocacy Centre ('PIAC').

The report, *National Competition Policy: 1998 Review of the Legal Profession Act 1987* (the *'1998 Review'*), was issued by the New South Wales Attorney General's Department in November 1998. It found that New South Wales was doing well in removing anti-competitive provisions restrictions on practice.

The First 'Hurdle'

The NCC set out as an example of anti-competitive restrictions the fact that entry to a profession requires stipulated academic qualifications and experience. It gave as an example the requirement that lawyers must have a law degree or other prescribed academic qualification. Most people, one would think, would prefer their legal problems to be dealt with by a qualified legal practitioner - but not, it seems, competition proponents.

The *1998 Review* dealt with admission through the Supreme Court and the practising certificate system as a perceived 'barrier to entry'. It noted that the respondents' submissions supported restrictions on entry to the legal services market and the licensing system supervised by governments, as they believed they assisted consumer protection. In particular the ACCC, NCOSS and PIAC stated that licensing assisted in overcoming the information asymmetry between legal practitioners and consumers.

The *1998 Review* stated that, as at November 1998, there did not appear to be demand from either consumers or rival professional groups for the implementation of new schemes to facilitate the entry of non-lawyers into the legal services market. It also

concluded that activity based licensing could affect the access of consumers to complaint resolution and disciplinary bodies and the ability of those bodies to supervise individuals performing legal work.

It is difficult to believe that community sentiment on this point would have changed so remarkably since November 1998 as to require this issue to be re-visited.

When is a 'lawyer' not a lawyer?

The *1998 Review* also considered the question raised in the NCC's press release concerning restrictions on non-lawyers using titles of solicitor and barrister and performing legal work.

Both the Bar Association and the Law Society submitted that the current reservations on the uses of the titles 'solicitor and barrister' and 'barrister' were an important form of consumer protection. They pointed out that the community expected that service providers using such titles would both hold a Practising Certificate and have received academic and practical legal training. It was pointed out that the public benefited from the exclusion of non-lawyers from certain kinds of work, because of the distinguishing features of lawyers as officers of the court and the ethical duties and responsibilities of lawyers.

The ACCC said there should be no presumption that any area of legal work should necessarily be reserved to lawyers without scrutiny. It suggested that legislation reserve certain potentially harmful acts to legal practitioners, such as acts which might lead to financial detriment for clients.

As the *1998 Review* noted, however, it might be argued that a potential risk of harm to the public might arise if an unqualified person performs any kind of legal work. This proposition applies *a fortiori* where litigation and legal advice are concerned.

Who minds the shop?

The NCC exercise appears particularly directed to 'self-regulation'. It suggests that it is open to abuse, 'because it gives the professionals the power to manipulate the market towards their own interests rather than those of the consumer.' It called for 'transparency and accountability in order to protect the public interest.'

While it is the case that the Bar Association prepared the Barristers Rules, the draft rules were circulated for comment not only widely within the legal profession, but also to government and the media.

They have been considered by the Legal Profession Advisory Council which has substantial community representation. The Council examined them in performance of its function under s59(3) of the *Legal Profession Act*, to report to the Attorney General whether it considered the Barristers Rules imposed restrictive or anti-competitive practices, which were not in the public interest. In July 1995 it reported to the Attorney General that the Rules were not anti-competitive or against the public interest.

Further, the Barristers Rules are publicly available on the Bar Association's web page.

A rose by any other name?

It is simplistic to assert that 'professionals are service providers and are inherently no different to any other service provider.' To give a simple illustration:

Ten days before the NCC press release, the Commonwealth Attorney-General, The Hon. Daryl Williams AM QC MP convened the First National Pro Bono Law Conference in Canberra. The aim of the conference was to recognise and encourage the pro bono work undertaken by the Australian legal profession.

The keynote address was delivered by Professor Stephen Parker, the Dean of the Faculty of Law at Monash University. He argued that lawyers were under a moral obligation to engage in pro bono work 'because it is part and parcel of what they have chosen to do'.

This sentiment is not unique to Professor Parker. The distinguishing features of the legal profession are its practitioners' expertise in a specialised area of learning, its members' obligations to the court and the administration of justice. Its ethical obligations to clients and, of course, to the community at large, are reflected, in part, in its commitment to pro bono work.

As the Chief Justice of New South Wales, The Hon. J J Spigelman has said:

> In a period of this Nation's history, when more and more things are judged merely by economic standards, it is important that some spheres of conduct affirm that there are other values in life. The values of justice, truth and fairness are central to the activities of the legal system. That is why that system cannot be assessed only by economic criteria.[2]

Chicken or the Egg

I do not suggest that the legal profession should be immune from scrutiny nor, where appropriate, engage in reviews of its practices to ensure the delivery of benefits to the community. By the same token, it is absurd to lump all who engage in economic activity in the same basket without any apparent recognition of the benefits the community gains from the distinguishing characteristics of those professionals.

The NCC's simplistic and superficial approach to the application of competition principles to the legal profession in 2000 gives the strong impression that it pays lip-service to the notion that reform should not damage public safety and confidence in professions.

Those who advocate diversification to ensure not all legal services are provided by legal practitioners nevertheless recognise that ethical and professional standards should be developed to apply to *any* participants in the legal services market. That sounds remarkably like recognition of the necessity the standards which now provide the regulatory framework of the legal profession.

It raises real questions as to whether the NCC agenda is change for change's sake.

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1 Australian Financial Review, 18 August 2000, p71.
2 Spigelman CJ, 'A tradition of ethical service by members of the legal profession: Comments on admission of Legal Practitioners', 9 April 1999