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COMPETITION FOR THE PROFESSIONS

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# FOREWORD

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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### A Timely Study

This is a timely book. It scrutinises four professions in Australia (law, medicine, dentistry and accountancy). It examines each from the perspective of the economist, and specifically against the criteria of competitive market practices. Between my own discipline, the law, and economics there has, until recently, been precious little dialogue. The consideration of the costs and benefits of law reform and legal organisation is now virtually forced upon the lawmaker (and those who advise him) by the universal pressures to limit the growth and expansion of the functions and costs of the public sector. In the United States, where these things tend to happen first, the Supreme Court has examined various costs and benefits in determining whether particular procedures argued for were required by the United States constitutional guarantee of due process.[1] The analysis was not universally applauded. But the effort and the idea received general approbation.[2]

In Australia, proposals by the Australian Law Reform Commission for the regulation of one modern 'profession', insurance brokers, was presented against a detailed argument about economic costs and benefits.[3] The guiding principles accepted by the Commission in determining the form of regulation that should be introduced included the following:

> Forms of regulation which might have an anti-competitive effect on the insurance industry or on any section of it should be avoided. Diminution of competition might increase the cost of insurance and adversely affect the range and quality of services offered and the development of the market in response to the needs of the insuring public. The Commission accepts the guiding philosophy of the Trade Practices Act 1974 (Cwlth), namely, that interference with freedom of competition is to be justified, if at all, by the public benefit which results from a particular form of regulation.[4]

In mid 1981, the Federal Treasurer announced the Government's rejection of the recommendations, preferring reliance upon market forces and self-regulation.[5] At the end of the year, a Private Member's Bill based upon the report and introducing a system of registration and trust accounting for insurance brokers passed through the Australian Senate without division. As this book is published, the debate stands adjourned in the House of Representatives. Interestingly, the report of the Committee of Inquiry on the Australian Financial System (the Campbell Committee) published in November 1981, whilst adopting a stance generally favourable to deregulation, specifically agreed with the Law Reform Commission's effort to promote greater real competition between insurance brokers and to provide a minimal regime of protective regulation.[6]

The Trade Practices Benchmark

This is a book voicing concern that the criteria of competition established by the Trade Practices Act 1974, and indeed substantially embraced by the predecessors of that Act, are not being applied generally to the older professions, particularly law, medicine and dentistry. The loser, it is claimed, is the individual client or patient and, in aggregate, the community. In these pages there is a sense of indignation, even anger, at the attempts of the old professions to distinguish themselves from the businessmen, tradesmen and people of commerce who fall under the disciplines of the Trade Practices Act. There is also a note of despair about the prospects for change. To bring the professions under the national Trade Practices Act would, in the current state of the law, probably require a constitutional amendment. Our nation's history in that regard is a sobering one which gives no encouragement to the hope that reform is just around the corner. Furthermore, it is pointed out that even where laws are changed (such as the abolition of the distinction between barristers and solicitors in some States or the abolition of the rule that junior counsel charge two-thirds of the fees of senior counsel) old practices die hard.

Some of the newer professions have already felt the pinch of the competitive implications of the Trade Practices Act. Mention is made of the decision of the Trade Practices Tribunal concerning the Association of Consulting Engineers Australia. The Association did not like the determination of the Tribunal which rejected, in effect, the claim of the Institution to exemption from the operation of the Act, including in respect of the setting of minimum fee scales. A recent publication, 'ACEA in Tradepracticeland', claims, somewhat too boldly, that the ACEA case was 'a test case for the professions'. The authors conclude:

> To the extent that the Tribunal's findings may tend to commercialise the contract, the professional relationship will suffer. Oddly enough it is the client's strictly practical commercial interests that stand to suffer as a result. This is a penalty for any damage to the quality of the contribution made by a professional adviser.[7]

This particular professional group urges amendment to the Trade Practices Act to exclude certain professions as such from the operation of the Act. Alternatively it seeks a change in the onus of proof of the Act. But it is acknowledged that:

> the trouble with the ACAE's position is that it is not a popular cause — there are no votes in it.[8]

In Australia, competition is a generally popular cause. Successive governments of radically different political persuasion have refined Federal legislation to provide detailed laws and machinery to uphold competition and to strike down, as unlawful, monopoly or anti-competitive practices. Because of the language of the Australian Constitution, the old professions have escaped this regulation. This is a book to question the justice and wisdom of that exemption. It examines the definition of professions today, the powers of professional bodies, the pricing and advertising policies that are adopted and the argument for greater competition within the four professions chosen.

State Developments

The book is also timely because it comes at a moment when, outside the area of Federal regulation, the States (who suffer no similar constitutional inhibition) are examining the rules that should govern the professions. Again, taking my own profession, the law, there have been developments even since the text was written:

- In New South Wales, the NSW Law Reform Commission continues its major inquiry into the organisation of the legal profession of that State. In December 1981 hot on the heels of the publication of the discussion paper No. 4 on the Structure of the Profession[9] the Commission has now published a discussion paper on Advertising and Specialisation.[10] There will be much in the latter to gladden the hearts of the authors of this work. The general thrust is towards a significant diminution in the barriers to informative professional advertising. Subject to certain limitations as to size, frequency and content, the suggestion is made for a far greater facility of informative advertising.

There has been some movement in the legal profession, with the publication by the NSW Law Society of a professional directory with information on solicitors' specialties, knowledge of foreign law and of languages other than English. But cost advertising is not permitted. Indeed a recent issue of the journal of the Society underlines the severe view taken about most other forms of advertising:

> So long as these Rulings remain in force, the committee is bound to enforce them. ... The committee has become rather tired of receiving weak, and sometimes impertinent 'explanations' from firms which should know better. ...[11]

In Victoria, there have also been a number of developments. In succession to the first report of the Committee of Inquiry into Conveyancing published in October 1979, a further and final report has now become available.[12] Amongst other things, this report notes the moves to introduce modern techniques to the Office of Titles. There are some who believe that the greatest pressure for the breaking up of the lawyers' monopoly in paid land conveyancing in some States of Australia will come not from arguments of efficiency and equity, as advanced in this book, but from the pressures of the new information technology, reducing routine activities largely to automated electronic procedures. In August 1981 the Victorian Government received advice from its Consumer Affairs Council. The advice was in some respects quite different to that offered by the Dawson Committee. Far from acceding to the maintenance of the legal monopoly of paid conveyancing, it concluded that this monopoly was 'contrary to the public interest' and that 'times are right for change'. Specifically it was suggested that systems of licensed conveyancing agents should be introduced and that conveyancing charges should be a matter for 'determination by the individual conveyancing agent'.

> We are opposed to the fixing of 'cost scales', whether 'recommended' or 'maximum' and whether settled by a licensing authority or a trade association.[13]

The conclusion produced an angry retort from the President of the Law Institute of Victoria and the allegation that the report was based on 'preconceived ideas'.[14] On the other hand, the Melbourne Age, in an editorial opinion, was unconvinced:

> It is true that conveyancing fees should be open to more competition. The Law Institute could do this by allowing solicitors to advertise the amount they charge for a routine conveyancing transaction, and thus allow active price competition at least between lawyers. This it refuses to do, presumably because it knows the result of such competition would be lower fees. The only alternative is for the government to intervene and open up conveyancing to non-lawyers, who in other States have shown they can do much the same work competently for one-third the price. ... The Law Institute has repeatedly used its control over professional ethics to stop solicitors working for a company that will do the same work for half the price. Buyers with nowhere else to turn have been forced to use a do-it-yourself kit that may require more skills than they possess, or else be fleeced of their money.[15]

- In Western Australia, in August 1981, a committee of inquiry headed by Mr. Justice Brinsden produced an interim report criticising the current measure of self regulation of the legal profession and urging many reforms.

- In South Australia, in November 1981, five non local lawyers, including a senior Victorian Queen's Counsel, have appealed to the Full Court of the Supreme Court of South Australia against the refusal of the Board of Examiners to allow them to practise in that State. The Chairman of the Victorian Bar is reported to have ascribed the rejection to 'some fears of competition'.[16] Lawyers often jest about the 'dingo proof fence' which effectively prevents interstate practice in some jurisdictions. But the joke may be as much on the client as on the excluded laywers.

A Serious Debate

Here, then, is a serious debate. Wounded lawyers write in strongly felt terms not only in their own journals but to the popular press, criticising the critics and seeking to justify the professional monopoly.[17] Though I have illustrated the debate by reference to the profession I know best, this book does the service of looking at other professions and raising the basic questions of principle that have to be faced in determining the path to reform.

It has been said that the way of the reformer in Australia is hard. Though the impediments to change seem great, the proponents of a greater measure of competition within the professions have many allies. They include the increasingly vocal reformers within professions, especially amongst the younger members. They also number the media and political representatives who no longer stand in awe of the traditional professions. Businessmen, tradesmen and people of commerce see an injustice in the competition law that applies to them but does not apply to the older professions, including the lawyers who take such an important part in the prosecution, defence, interpretation and implementation of the rules of the Trade Practices Act 1974. Government officials who see such large amounts of public funds channelled directly and indirectly to the old professions, must increasingly raise the question of government responsibility to ensure the efficiency and economy of the recipients of this bounty.

This is a controversial book and it will light fires of passion in some professional quarters. Those who hanker after the days of the old professional values will doubtless find many of the propositions, put forward here, misconceived and distressing. But none may doubt the importance of the issues raised and the certainty that we in Australia will hear more about them. I hope that the debate this book will provoke will be notable for the light that is shed as surely as for the heat it will engender.

M.D. KIRBY

8 January 1982

FOOTNOTES

1. The leading case is Mathews v. Eldridge, 424 US 319 (1976).

2. See e.g. J.L. Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication', 44 University of Chicago Law Rev 28 (1976).

3. The Law Reform Commission, Insurance Agents & Brokers (ALRC 16, 1980).

4. ibid, pp. xiv, 46.

5. J.W. Howard, Commonwealth Parliamentary Debates (House of Representatives), 10 June 1981, p. 3417. For a discussion and the Law Reform Commission's response, see The Law Reform Commission, Annual Report 1981 (ALRC 19, 1981), p.4 ('The Law and Economics — Cost/Benefit').

6. Report of the Committee of Inquiry on the Australian Financial System (Campbell Report), November 1981, paras. 20.208-210; 45.163-164.

7. Association of Consulting Engineers Australia, 'ACEA in Tradepracticeland', 1981, p.34.

8. ibid, p.35.

9. New South Wales Law Reform Commission, The Legal Profession, Discussion Paper No. 4 (Parts I and II); 'The Structure of the Profession', 1981. Cf. The Law Society of New South Wales, 'The Structure of the Profession', Submission to the Law Reform Commission, October 1981.

10. New South Wales Law Reform Commission, The Legal Profession, Discussion Paper No. 5, Advertising and Specialisation, 1981.

11. The Law Society of New South Wales, (1981) 19 Law Society Journal, p.407 (July 1981).

12. Victoria, Committee of Inquiry into Conveyancing (D. Dawson QC, Chairman), Further and Final Report, 1980.

13. Victoria, Consumer Affairs Council (Professor M. Brunt, Chairman), Report on Conveyancing, mimeo, August 1981. Cf. the statement by the Victorian Minister of Consumer Affairs (Mr. Haddon Storey), News Release, mimeo, 17 September 1981 ('New Laws on Conveyancing') in which it was stated that the government would 'give urgent consideration' to the Consumer Affairs Council recommendation on cost scales.

14. Law Institute of Victoria, (1981) 55 Law Institute Journal, p.793 (December 1981).

15. The Age, 15 September 1981 ('Competition True and False'). See to similar effect 'The Sydney Morning Herald', 22 September 1981, p.6 ('Legal Monopoly').

16. Sydney Morning Herald, 28 November 1981, p.21.

17. See e.g. M.J. Gill (President, Law Society of NSW) in Sydney Morning Herald, 24 September 1981, p.6 ('It's a Job for a Solicitor'); L.B. Boorman, Sydney Morning Herald, 24 September 1981, p.6 ('No Mongoloy'); J.R. Burke, Sydney Morning Herald, 30 September 1981, p.6 ('Solicitors Know the Pitfalls').