

# Regulating the professions

by Robin McKenzie

*In line with broad community acceptance of the need to improve the competition and efficiency of all sectors of the economy, the Trade Practices Commission is examining competition in markets for professional services. The Victorian Government is also examining occupational regulation schemes.*

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## Overview of professional regulation

The framework for the Trade Practices Commission's inquiry into the regulation of professions which will ultimately include the legal profession, is set out in the discussion paper Regulation of professional markets in Australia: issues for review. The paper outlines the current features of professional regulation in Australia and overseas. These features typically include measures to influence the structure of the market such as licensing or certification of members, division of the market into separate areas of specialisation (eg barristers and solicitors) and controls on the ownership and organisation of practices. They also include measures to control conduct of the members such as rules prohibiting advertising, the setting of standard fees and charges and rules covering professional standards and disciplinary procedures.

## Application of competition law

The paper also outlines how competition law applies to the professions in Australia and overseas. In Australia, the Trade Practices Act prohibits a variety of trade practices which substantially lessen competition. The Act makes no distinction between the professions and other business activity, and it does cover a good deal of professional activity. However, because much of this activity is conducted by unincorporated associations operating within one State, the Act has only restricted application. Conduct authorised by State or Territory law also falls outside the application of the Act. The paper states

The important issue for consideration by policy makers and the community generally is whether these differences serve the interests of either the public generally or the professions themselves.

The paper discusses the issues raised in a number of re-examinations of the relationship between competition law and the professions which have been conducted in recent years in a number of overseas countries. These have been prompted by factors such as

- the escalating costs of professional services;
- changing technologies and methods of organising and managing professional practice; and
- importantly, changing views about the roles of government regulation and competition in promoting efficiency and the public interest.

## The public benefits and the public costs

The paper identifies in general terms the public benefits and the public costs that may result from regulation of professional markets and from accompanying restric-

tions on competition. In professional markets one of the main problems is the marked differences in knowledge and information between professional service providers and their 'amateur' clients. Regulation is said to ensure that consumers are not disadvantaged by their limited ability to

- assess the need for professional service or the type and quality of service required;
- distinguish the competent from the incompetent service provider; and
- assess the quality of the services rendered or whether they were excessive or inadequate in relation to their needs.

The paper points out that these problems, which may reduce the efficiency of competitive markets may be overcome by a range of market place and regulatory measures. Some, such as advertising, tend to increase competition. Others such as entry controls and standards tend to restrict competition. The paper therefore asks whether

the existing forms of regulation are the most appropriate to overcome information problems in professional service markets or whether more cost-effective alternative options are available.

### Other problems

Other problems in the market may be caused by high transac-

tion costs and the fact that the actions of professionals or consumers may have effects on third parties which are not reflected in the price of the service. Some form of regulations may be needed to deal with these. The paper discusses the fact that while professional regulation can sometimes generate public benefits, the resulting restrictions on competition can mean greater costs to the community.

### The approach to the study

The Commission's study will seek to identify both the benefits and the cost of existing regulations and to address the following public policy questions in relation to individual professions:

- Why is the regulation necessary? What is the nature, extent and consequence of the market failure it seeks to address?
- Does the regulation address the market failure effectively and result in net public benefits after taking account of the costs of restrictions on competition?
- Are less restrictive regulatory options available which would overcome the market failure more effectively and/or at lower cost?

### Implications

This study may have major implications for the legal profession in Australia. There may be considerable overlap with the parliamentary inquiry into the costs of justice.

### Victorian Government acts

Following the VLRC and Regulation Review Unit joint report *Principles for Occupational Regulation* the Victorian Government is examining occupational regulation.

It has adopted a framework for evaluating new occupational regulation schemes based on recommendations in the joint report. The Government's framework will be used to assess proposed schemes.

- Before a new scheme for occupational regulation is approved, it must comply with the following four basic principles:
  - it must benefit the public;
  - it must be the most effective way of correcting problems;
  - it should be the minimum necessary to alleviate existing problems;
  - its benefits must outweigh its costs.
- An Occupational Regulatory Questionnaire will be used in all cases to evaluate new occupational regulatory schemes.
- Consultation on new occupational regulatory schemes must occur with the Regulation Review Unit (RRU) before seeking Cabinet endorsement, so that the Unit can ensure that the correct evaluative framework has been adopted. □

**All professions are conspiracies against the laity.**

George Bernard Shaw, *The Doctor's Dilemma*, I.