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Comment on the Trade Practices Commission Draft Report:

STUDY OF THE PROFESSIONS

By Neville Henwood

There has been much publicity of late about the recent draft report of the Trade Practices Commission released as a result of the Commission's study of the legal profession.

The draft report has been welcomed by the legal profession Australia-wide as a positive and sensible report, at least for the most part. There are, however, important reservations to this general acceptance.

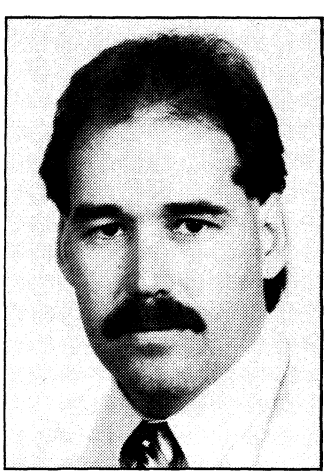
I have a number of reservations about the Report itself, and the calls for reform from political circles consequent upon it. Whilst the Report's conclusions and recommendations are perhaps understandable, albeit in some cases I think misguided, the tone of the body of the report is in one sense disappointing, and not devoid of its own particular prejudices.

Essentially, the Report appears to be written by economists for economists, and it therefore fails to give proper weight to many important policy factors. At the same time, however, there are a number of "social reform" recommendations to confuse things further.

Many of the reforms proposed will be nothing new to Territory practitioners - fusion of the profession, freedom of advertising, competition from non-layers in some areas, and even the application of the Trade Practices Act are already facts of life here.

Others, such as the recommendation to develop uniform specialist accreditation schemes and to allow a greater range of business structures, are worthy of further consideration.

Still others, including the proposal to examine the tax deductibility of legal expenses for businesses and, in particular, the suggestion that legal work should be opened up to non-lawyers, whether they be appropriately qualified or not, are to be resisted.



President
Neville Henwood

It is not only the Trade Practices Commission Report which has sought to question the "monopoly" which lawyers are said to have in relation to legal work.

There are a number of popular misconceptions which need to put right in this debate. The first is the basic premises that lawyers have a monopoly on the provision of legal services. Whilst the statement itself is probably unsaleable, it does involve a slightly distorted use of the word "monopoly". Lawyers have a monopoly on the provision of legal services in the same way that petrol stations have a monopoly on the sale of petrol or, in another sense, that pilots have a monopoly on flying aircraft. The assertion that the legal profession is monopolistic ignores the fact that there are more than 20,000 lawyers in Australia and within their geographic markets and fields of practice there is intense competition between them, both as to price and as to service. There is, therefore, a wide range of choices available to consumers of legal services.

As the Law Council of Australia has pointed out in its recent submission to the Commission, if the Trade Practices Act were to apply to the legal profession with its full force and effect - and it does, after all, here in the Territory and in the ACT - it is doubtful that any breaches could

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be pointed to (other than perhaps restrictions on entry which are, for the most part, imposed by governments in the public interest, as they impose licensing requirements on pilots).

The second major misconception which needs to be corrected is that which has appeared in more than one press release issued by the Minister for Justice, Mr Duncan Kerr, to the effect that legal services are now out of the reach of most Australians. Three comments can be made about this:

- Firstly, it is doubtful that this comment need be confined to Australians, since the position is probably the same, if not worse, in most other countries;

- Secondly, it is doubtful whether it has ever been any different; and

- Thirdly, the same can be said for other professions, such as accountants, architects, engineers and dentists.

The first two comments should not, of course, be any excuse for not striving for change to rectify the problem, insofar as possible.

The third raises a number of issues of its own. What distinguishes lawyers from doctors and dentists is Medicare and health insurance; what sets lawyers apart from most other professions is usually the amount of professional time necessary to achieve a result, particularly in litigious matters, but also in commercial transactions.

Because of these differences, changes more fundamental than seeking to reform the legal profession will be needed to make a significant difference, and governments should be encouraged to look to the wider considerations rather than to focus on lawyers alone. There are, no doubt, many steps which could be taken by governments, Courts and others to increase the availability of access to justice. This is, after all, the aim of the exercise.

The profession should take the opportunity to be at the forefront of advocating reforms to achieve the end sought, and the Law Council of Australia is endeavouring to be a leader in that process. In that endeavour, the Law Council deserves the support of the entire profession.

Many may regard resistance to any of the recommendations made by the Trade Practices Commission and others, and to the calls for reform from politicians, as self-interested conservatism. I disagree.

The Australian legal system is a much underrated but extremely important and valuable element of our society. For that reason, while criticism should always be heeded and suggestions for reform seriously considered, it is important to say so when important elements of that system are attacked by those whose agenda is reform for reform's sake or who regard price as the sole determinant of value.

Amendment to Liquor Act

The Liquor Amendment Act No 75 of 1993 came into effect on Monday 6 December 1993. This legislation was put in place in anticipation of the High Court decision on the Capital Duplicators case. The Liquor Act is amended by inserting after section 37 the following: -

"38. REFUNDS TO BE PAID TO PERSON ENTITLED

"(1) The commission shall not make a refund of any amount paid as a purported licence fee under this Act unless the person to whom the refund is payable (in this section called 'the applicant') satisfies the Commissioner that the applicant -

(a) has not charged to, or recovered from, and will not charge to, or recover from, any other person any amount in respect of the whole or any part of that amount so paid; or

(b) if the applicant has so charged or recovered any such amount, will reimburse, or will take all reasonable steps to reimburse, each such other person for the amount so charged or recovered.

"(2) A person referred to in subsection (1) (b) may sue for and recover as a debt due and payable by the applicant any amount referred to in that subsection as having been recovered from the person by the applicant."

Mary Richardson
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NT Liquor Commission