

# President's Column

## The Times They Are A-Changing

I am about to travel to Canberra for the June meeting of Presidents of the State and Territory Law Societies and of the Law Council of Australia. At the meeting we will again be considering the development of the national legal services market and the future structure of the Australian legal profession. To me this always seems like a lofty endeavour.

However, I invariably find that the participants, who are extremely able people, have their feet firmly planted on the ground and that perhaps we have a little catching up to do. Indeed, the profession continues to be pressed by the market gods to adopt the reforms which have been suggested by the various enquiries that have been held into the legal profession.

To meet the pressure for reform the Legal Structure Committee of the Law Society is holding a series of committee meetings to develop a strategy to deal with the reforms and to ultimately prepare submissions to the profession and to government on what reforms should be implemented in the NT. The committee, which is convened by Donna Dreier, would be grateful to receive any submissions members of the profession would wish to make in this regard.

The primary reforms which are being pressed upon the profession are:

1. a national practising certificate;
2. the Australia-wide adoption of model conduct rules;
3. the reduction in the kinds of work reserved exclusively for lawyers;
4. deregulation of the ways in which lawyers are entitled to organise and structure their legal practices;
5. limiting liability for lawyers;
6. expanding the opportunity for foreign lawyers to practise their own law in Australia.

I have previously expressed my views about these matters. However, I believe

it is important that I should set out in some detail the reforms which are being urged upon the profession as part of the nation's competition policy.

So far as the national practising certificate is concerned, it is proposed that a national regime should be set up whereby admission to practice in any one State or Territory would enable a legal practitioner to practise in all States or Territories. The system would work in a similar way to which driving licences work. However, it would be underpinned by the adoption of:

- a) similar admission criteria for each State and Territory;
- b) model conduct rules by each State and Territory;
- c) protocols and other arrangements about whether and in what circumstances the home or host State or Territory -
  - i) would be responsible for disciplining a practitioner guilty of misconduct in the host State or Territory;
  - ii) Fidelity Fund would be drawn on to meet defalcations;
  - iii) would be responsible for organising trust account inspections and audits.

As has been discussed in previous issues of *Balance* the adoption of a national practising certificate regime will have serious ramifications for the financial viability of the Law Society and the Legal Structure Committee is currently looking at ways of coping with the loss of funds which will be incurred if such a practising certificate regime is adopted.

As to the reservation of work for lawyers it is being urged upon the legal profession that the following principles should be adopted:

- a) the unique and distinguishing characteristics of a lawyer is his or her -
  - admission to the Court to practise



Steve Southwood, President

- law as an "officer of the Court"
- the ethical duties and professional responsibilities of a lawyer, particularly to the Court and to the administration of justice
- b) the status of a lawyer as an officer of the Court should define and limit the scope of any area of work reserved for lawyers;
  - c) the reserved area should be restricted to appearance in Court and matters incidental to that right such as -
    - advice on prospects in proposed or pending litigation;
    - advice on the legal aspects of contentious matters before litigation is proposed;
    - legal professional privilege.

If the principles are adopted it will be necessary to repeal sections 131 to 134 (inclusive) of the *Legal Practitioners' Act (NT)*.

A corollary of such an approach would be that people who undertook legal work as currently defined and who were not lawyers would not be able to describe or advertise themselves as lawyers, whereas legal practitioners could.

In addition, the grant of a practising certificate would bear no relationship to the type or nature of business structure in which the lawyer practises. Flexible business arrangements would become an important feature of a more responsive and competitive legal services market. This would be achieved by the repeal of those sections of the *Legal Practitioners' Act* which regulate lawyers' business structures (eg s 136 *Shar-*

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ing of Profits). In place of regulation there would be nothing.

Such repeal would enable the establishment of multidisciplinary practices. A multidisciplinary practice is a practice where the proprietors are members of two or more professions. The only State which currently permits such practice is New South Wales. SS 48F and 49G of the *Legal Profession Act 1987 (NSW)* provides as follows:

## Sharing Receipts

**48F (1)** A barrister or solicitor may share with any other person the receipts of a business of the kind ordinarily conducted by a barrister or solicitor, except to the extent (if any) that the regulations, barristers' rules solicitors' rules or joint rules otherwise provide.

(2) This section does not authorise a barrister or solicitor who is employed under a contract of service by a person who is not a barrister or solicitor to share with the employer the receipt of any business conducted by the barrister or solicitor on behalf of the employer.

(3) However, this section does not affect any business conducted by barristers and solicitors on behalf of their employer if the business:

- (a) concerns a proceeding or transaction to which the employer or a related body is a party; or
- (b) is of a kind prescribed by the regulations or is carried out in circumstances of a kind prescribed by the regulations.

(4) For the purposes of this section, a body is related to an employer if the body and the employer are related to each other in terms of section 50 of the Corporations Law.

## Multidisciplinary partnerships

**48G (1)** A barrister or solicitor may be in partnership with a person who is not a barrister or solicitor, except to the extent (if any) that the regulations, barristers' rules, solicitors' rules or joint rules otherwise provide.

(2) This section applies only if the business of the partnership concerned includes business of a kind ordinarily conducted by a barrister or solicitor.

(3) The following provisions apply in respect of a partnership in which a barrister or solicitor is authorised by this section to be a member:

(a) A partner who is not a barrister or solicitor does not contravene this Part merely because the partner conducts business of the partnership that is the business of a barrister or solicitor.

(b) A partner who is not a barrister or solicitor does not contravene this Part merely because the partner receives any fee, gain or reward for the business of a barrister or solicitor.

(c) A partner who is not a barrister or solicitor does not contravene this Part merely because the partner holds out, advertises or represents himself as a member of a partnership conducting the business of a barrister or solicitor.

(d) A partner who is not a barrister or solicitor does not contravene this Part merely because the partner shares with any other partner the receipt of business of a partnership that is the business of a barrister or solicitor.

(e) Part 6 (Trust Accounts), Part 7 (Solicitors' Fidelity Fund), Part 8 (Receivers) and Part 8A (Managers) apply, subject to the regulations, as if each partner who is not a solicitor were a solicitor. Those provisions so apply in connection with any business of the partnership (whether or not it is the business of a barrister or solicitor).

There are currently two multidisciplinary practises operating in NSW.

An MDP is not the only way legal practices could be restructured if this are is deregulated. Other structures include joint ventures between a legal practice and a related professional service by way of a "professional group" operating in common chambers or investment by lawyers in corporations or other entities providing ancillary services.

Under such a deregulation the Bar's sole practiser rule would still persist. There are strong pro-competition reasons why the rule should be maintained in the public interest. Bars are closer to a model of perfect competition than most other occupational groups or industries. Bars are also subject to competition from so-

licitors and other advocates.

Provided a regulating regime directed to the individual lawyer (who is bound by ethical obligations and professional responsibilities) still remains in force, the above approach will remove existing restraints on the capacity of the legal profession to compete with other service providers while continuing to place paramountcy on the maintenance of lawyers ethical obligations and professional responsibilities.

A further matter which is being advocated as a reform which will enable lawyers to compete more with other service providers is the introduction of limited liability. The impetus for such a scheme in part comes from the increasing number of large damages actions arising out of failed business venture claims, that is, when a business venture has made a bad decision and then attempted to shift responsibility to its professional advisers. Such a move is said to be consistent with the limitations which have been imposed in the personal injuries areas and which have been aimed at ensuring funds for compensation are always available up to the specified limit. Such a scheme is available in NSW pursuant to the *Professional Standards Act*.

While some of the above changes may seem intimidating it should not be forgotten that with change usually comes opportunity. An opportunity to combine with other professions to offer new services may lead to an even more rewarding career for some practitioners.

The Law Society is actively considering the above and related issues and over the next few months should be in a position to present some proposals to the profession. In the meantime keep an eye out for stray thunderbolts.

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