Commercial Lawyers Committee

by Kevin Stephens

One of the most significant legal events since the last commercial law column has been the National Legal Services Market Seminar conducted by the Law Society on Friday 11 June 1999. Proposed changes to the legal services market are likely to impact upon commercial lawyers to a far greater degree than litigation lawyers.

Reservation of Legal Work

Sections 132 and 133 of the *Legal Practitioners Act (NT)* prohibits any person, other than a legal practitioner, preparing for reward:

- wills and other testamentary instruments;
- any instrument creating or regulating rights between persons or relating to real or personal property or to a legal proceeding; and;
- papers relating to the grant of probate.

The proposal is to alter the reservation of legal work so that the only exclusive domain of the legal practitioner (with certain exceptions) will be:

(a)the right to represent persons in court;

(b) matters incidental to the right to represent sent clients in court, such as:

- advice on prospects in proposed or pending litigation;
- advice on the legal aspects of contentious matters before litigation is proposed; and
- legal professional privilege;

(c) the preparation of wills and other testamentary instruments; and

(d) probate work.

Litigation lawyers will retain their protected status whereas commercial lawyers will be open to a far greater degree of competition by non-lawyers. Interestingly, all commercial lawyers polled in the Northern Territory about the above changes supported the opening up of commercial legal work, provided that commercial lawyers were allowed to compete in the new deregulated marketplace in a less restricted way than currently allowed.

Commercial lawyers tend to support the deregulation of their marketplace because:

(a) it is in line with the business environment faced by most of their clients;

(b) it is seen as formally instituting what has already occurred; and

(c) it allows for the potential to provide greater and more innovative services to clients.

In terms of where the competition from non-lawyers is likely to originate the most often touted field is accountants. However in the NT the competition may be more likely to come (at least initially) from conveyancers and real estate agents.

It will be up to commercial lawyers to distinguish the quality of their services and product from such competitors to ensure that they maintain and expand their market. Regulation of competitors to lawyers is primarily a role for government and should not be used as a back door by lawyers to once again reserve all legal work to lawyers.

In return for the opening up of the commercial legal market commercial lawyers are looking for certain returns, in particular relating to the issues of liability, multidisciplinary practices and removal of costs limitations.

Limitation of liability

There are two proposals relating to liabilities faced by legal practitioners.

The first proposal is to revoke section 8 of the *Legal Practitioners (Incorporation) Act (NT)* which provides that the directors of a legal practising company shall be deemed jointly and severally to guarantee the depths of the company.

The removal of s8 would deliver to lawyers the same advantages of operating through a corporate entity as available to all other members of the community.

The second proposal is to limit the liability of lawyers through schemes of proportional liability and capped liability.

A scheme of proportionate and capped liability will require compulsory professional indemnity insurance, adequate complaints handling and discipline procedures and risk management and quality assurance programs and procedures.

It is likely that capped liability will not apply to:

- the death of or personal injury to a person;
- any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim;
- a breach of trust;
- fraud or dishonesty; or
- certain matters relating to the *Real Property Act.*

Kevin Stephens.

Mr Jack Rush QC of the Victorian Bar Association stated that capping of liability was being driven by large firms engaged in commercial transactions. In relation to Victoria at least the claims history showed that the vast majority of professional indemnity claims (according to Mr Rush, somewhere in the order of 99%) related to claims with a value of less than $150,000.00. Therefore a capping of liability to $1.5 million or above is likely to have only a limited effect.

Proportionate and capped liability is driven by a large extent to the big southern firms as a result of the national and international deals upon which they advise, structure and document. As NT firms are often involved in such work the same issues of liability arise.

There is no doubt that a large measure of self interest is involved in the proposed schemes, but so what. The rest of the legal profession is also to a large part driven by historical or current self interest. From a commercial lawyers point of view, being the persons most likely to be at risk of ultra large claims, the concepts of proportional and capped liability are attractive from a business point of view.

Compulsory insurance protects the client to the extent of the insurance. By ensuring that clients are aware of the issue of capped liability the client (most of whom are sophisticated) may demand that the lawyer take out additional insurance commensurate with the matter being dealt with.

Multi-disciplinary practices

Multi-disciplinary practices ("MDPs") are practices in which lawyers form a business associations with persons or entities other than lawyers.

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Society Noticeboard

MOVEMENT AT THE STATION

Australian Institute of Judicial Administration
Has moved to:
Level 1
723 Swanston Street
Carlton VIC 3053
Phone: 03 9347 6600
Fax: 03 9347 2980
Website: www.aija.org.au

Professor David Weisbrot
Elected President of the Australian Law Reform Commission. Three year term

Saul Harben
formerly of De Silva Hebron is moving to:
Freehill Hollingdale and Page
AMP Building
440 St George Terrace
Perth WA 6000
Phone: 08 9211 7777

Mr Damian Bugg QC
Appointed Commonwealth Director of Public Prosecutions. Appointed begins August 2, 1999

Bridget O'Brien
is returning to her position in Adelaide
Executive Assistant
Law Society of South Australia

Julie Davis
Administration Manager
Law Society Northern Territory
is welcomed back to her office.

CLA Legal Writing Competition
The deadline for the receipt of papers has been extended to: **July 18, 1999.**

Please mark your entry to the attention of:
Commonwealth Lawyers Association
International Directorate
The Law Society
113 - 114 Chancery Lane
London WC1A 2PL
United Kingdon
Fax: 0015 44 831 0057

Entries must be typed, no more than 2,000 words and unpublished, original work. Entries require a proof of eligibility (copy of practicising certificate and proof of age is required).

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round). Search terms enclosed in brackets will be evaluated first.
The only other operators that you may come across are segment operators such as @. AustLII provides the searchscope element in its search form, which has essentially two options: the whole document or the title. In other databases segments have a more useful role.
So now you should be able to string together very complicated search requests such as: neglig* and (solicitor or lawyer or "legal practitioner") near beneficiary
Of course you could narrow the above search to 'Hawkins v Clayton' and set the searchscope to case name. The first has 87 hits while the second has 1, but then I already knew the answer.
What you have learned here can be applied to any text retrieval system. The only difference will be the expression of their operators (e.g. 'AND' or '+'). I encourage everyone to experiment. I know that old systems such as InfoOne charged by the search, so experimentation was costly, however AustLII is free. I will end with one word of caution, and this applies to any database, always ensure you know what the database contains (and thereby what it does not contain) and the level of currency! Otherwise you may be searching in vain.

When the boss is not looking...
Yes, Australia is in the final of the World Cup Cricket 99. For all the news, facts and figures visit www.bol.net.in/cricket/. Have you wondered how the point system works? What about the words to the official song? It's all there!!

Jason Schoolmeester is a legal practitioner at Parishs.
He can be reached at jasons@legalnet.net.au (for those without email you can call on (08) 8948 1155)

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obtained from persons who find themselves in police custody regardless of whether the material has any relevance whatsoever to the charge that put them there.

As lawyers we have failed in our obligation to ensure that the Government has been properly taken to task over the issue. More importantly, pressure must now be applied in order to ensure that the process of gathering, sorting and using DNA samples is open to public scrutiny. Unfortunately that approach has all the effect of shutting the gate after the horse has bolted.

An independent forensic laboratory is a practical step to ensuring open access to sensitive information about ourselves. The idea of freedom is worth only as much as the work we put into maintaining it.

Leaving individual liberty in the hands of the Government is the equivalent of leaving a beautiful landscape by Matisse hanging on Mike Reed's lounge room wall.

Changes in the Australian palate

When Max Schubert began making Penfolds Grange Hermitage in the early fifties, its release was met by a less than enthusiastic response from wine drinkers. So much so that Penfolds directed Schubert to cease making it: luckily he didn't!

Grange was an enormous wine of tremendous power, something that was not appreciated then and was not offered to the small drinking public of the time. Since the fifties, the wine industry has moved forward in huge leaps and bounds in terms of choice of product and the overall quality of wine. These days choice is paramount, with many consumers looking for something a little different and new.
Penfolds chief wine maker, John Duval, currently has the responsibility of overseeing the maintenance of style of wines in Penfolds. Wines such as the St Henri have been around for many decades and it is imperative to keep consistency in the style that each wine displays from vintage to vintage. When red wines in the late 70's and early 80's went through a leafy, herbaceous phase, Penfolds resisted this trend and maintained the house style that we still see today. Even now with the shift towards high alcohol wines, Duval maintains the Penfolds style. Consumers accept this even though every year the wines are on allocation because there is simply not enough to go around.
Obviously consumers are quite happy with what they will be buying: they can buy with confidence and can drink the wine now or cellar it for many years.

Its not every day that one would open a Penfolds 707 Cabernet, price and the need to drink a variety of wines would see to that, so to cater for that market opening Bin 407 Cabernet was released in 1990.

The introduction of Rawson's Retreat was to fill the empty rung of Penfolds reds that was once occupied by Koonunga Hill. It is seen as the beginners red, and is produced to introduce the beginner to the delights of a particular style that is continued through into the other brands in the Penfold style.

The Barossa Valley is one of the only two or three regions in Australia that is associated as having a unique style, particularly its shiraz. A relative newcomer to the Penfolds range is the Old Vine Barossa Valley Grenache - Mouruedes - Shiraz, first vintage 1992, which was the Rhone varieties blended in varying proportions. This is a wine with drink-now appeal. Delivering good taste and plenty of savoury flavours along with good structure, it's a great food wine.

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The advantages of MDPs are:
- the provision of one stop shopping which may save clients time, reduce transaction costs and increase the type of legal and other services available;
- they serve the public interest by meeting the requirement of open and fair competition;
- they allow for one effective way to compete in the market place with other service providers, such as accountants and conveyancers;
- they may increase profits by sharing of overheads and economies as scale;
- they allow for practice and business expansion and development, allowing lawyers to apply their skills in domains outside core legal work; and
- they allow for additional means of raising capital.

Mr Jack Rush QC believes that MDPs are being driven by a fear of accountants and the self interest of lawyers, and in particular the self interest of major firms. Once again this is probably beyond doubt. But whereas litigation lawyers have the luxury of making such observations commercial lawyers must deal with the realities of the marketplace.
Mr Rush raised four main concerns in relation to MDPs:
- clear and distinct control by lawyers;
- independence;
- the maintenance of clients kept confidentiality and legal professional privilege; and
- the avoidance of conflicts of interest.

Each of these concerns are legitimate, but the answer is to deal with them by way of control as opposed to a complete rejection of MDPs.

Costs Limitations

Currently Part X (ss119 - 130) of the *Legal Practitioners Act (NT)* deals with the issue of costs charged by lawyers and taxation. Essentially it allows for a lawyer and a client to enter into a costs agreement under controlled circumstances (s129) but in all other events for a client to have a right to tax a bill in accordance with the Supreme Court Scale.

It has been a long time since the Supreme Court Scale has had any real relevance to commercial lawyers, it has been designed primarily by litigation lawyers for litigation lawyers.

Commercial lawyers should be freed from all costs limitations and control by Part X of the *Legal Practitioners Act (NT)*. The market and the law of contract should determine the issue of costs for commercial lawyers in the new open market place.

It is noticeable that most of the resistance to the proposed changes have come from litigation lawyers (most notably barristers) and the judiciary, the persons least effected by the current climate facing commercial lawyers and the persons who will maintain their protected practice.

There is little doubt that today the practice of litigation and the practice of commercial law are quite divergent. Many commercial lawyers view litigation as a highly protected and regulated industry (which is often highly inefficient and costly). Many litigation lawyers view commercial lawyers as something less than real lawyers.

The fact is that we live in a world of global competition and open markets. Commercial lawyers stand in an arena where they are often asked to provide legal advice with a sound commercial basis to business people, while facing competition from other professional advisers. If commercial lawyers cannot be freed from unnecessary and inapplicable regulation while protecting themselves to a fair and appropriate degree then being a commercial lawyer will involve bleak prospects.