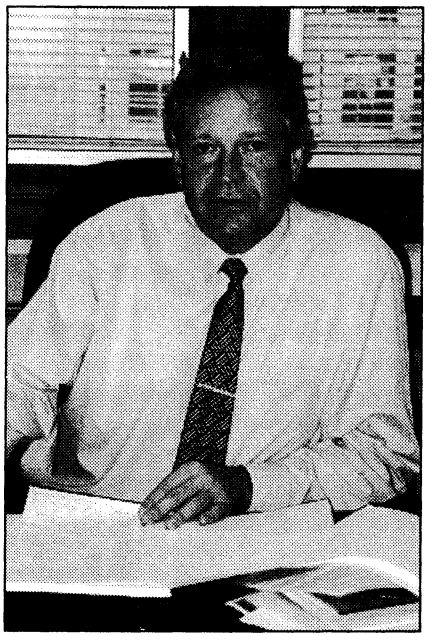
The sole practice rule and competition policy



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I confess that I often have great difficulty understanding exactly what competition policy exponents mean when they say something is "anti competitive". Let me give you an example that I have been grappling with recently.

Rule 81 of the NTBA's Barristers' Rules requires a barrister to be a sole practitioner. Thus a barrister cannot practise in partnership with another person. Section 16(4) of the *Legal Practitioners Act* is to similar effect.

Among other things, these provisions assist to ensure undivided loyalty, confidentiality and independence of advice between a barrister and a client.

For many years the Australian Competition and Consumer Commission (or its predecessor, the Trade Practices Commission) has held the view that the barristers' sole practice rule is anticompetitive and has recommended that it be abolished. For example, see Trade Practices Commission Final Report 1994, Study of the Professions: Legal.

So far as rule 81 is concerned, this recommendation has not been heeded by the Australian Bar Association.

The sole practice rule is still included in the ABA's Model Conduct Rules, which all Bar Associations rely upon as the source for their jurisdiction's conduct rules.

Thus its inclusion in the NTBA's Barristers' Rules.

In relation to s16(4), sentiments similar to those expressed by the ACCC appear in the Issues Paper for the Northern Territory's National Competition Policy Review of the Legal Profession published in September 2000.

There, s16(4) is said to: "restrict the quality, level or location of goods and services available" and further : "is likely to confer significant costs on business", see the table at p59 of the Issues Paper.

Putting aside the puzzling reference to "goods", it is difficult to see exactly how s16(4) brings about these effects.

Indeed, one would have thought that the converse is the case, that s16(4) promotes competition in the market place for persons offering "barrister's services".

To propose an example (some may say extreme): If the restriction in s16(4) were removed and every sole practice barrister in the NT entered into partnership with one other sole practice barrister the result would be that the size of the market for persons or practices offering "barrister's services" would be reduced by 50%.

Surely that would be anti competitive because it would reduce the level of "barrister's services" available and, with fewer competitors in the market, eventually bring about significant cost increases to businesses using those services.

Of course there is another very good reason for s16(4) that the competition exponents seem to have ignored.

That is that a person practising exclusively as a barrister in the NT does not have to maintain a trust account nor contribute to the fidelity fund, but those practising as solicitors do.

S16(4) simply provides that if a person elects to practice exclusively as a barrister, then that person must abide by that election.

Without s16(4), a person could elect to practice exclusively as a barrister to avoid the responsibility to maintain a trust account and otherwise practice as a solicitor. ①