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COMPETITION POLICY REFORM AND INDEPENDENCE:

IRRECONCILABLE IDEAS?

Arthur Hugh Clough, a Welsh poet from the Victorian era once wrote:

> "Thou shalt not covet, but tradition
>
> Approves all forms of competition."

As advocates, we are members of an ancient and learned profession, one whose rules of professional conduct have developed of centuries of commitment to the administration of justice. The profession had thought, apparently misguidedly, that it conducted itself in an environment of pure competition.

In Australia, as in England and Wales, Ireland and Scotland, the practices of the independent Bars have been subject to scrutiny both at a Federal level, and at a State level. Practices which any advocate knows foster competition have been described as anti-competitive, and have been the subject of legislative change and government pressure.

If one characterised profession in the 90's, one would say that it was a period where the profession's rules were under attack by competition theorists and idealogues. It must be said that, initially, it was thought that it would simply be a matter of explaining to such persons the reasons our rules had evolved the way they had and the high standards that have been achieved by virtue of such rules.

The first concern I have is with the term "competition policy". This phrase, widely used, is often a synonym for unnecessary interference, and it is often difficult to unearth any actual policy, let alone one which can be shown to foster competition.

However, challenges have come from government, from so-called reformists, and, of course, have been fuelled by the media.

In March 1994, the Trade Practices Commission published a report into its study of the legal profession, a chapter in the ongoing series "Study of the Professions".

In this report, the Trade Practices Commission purported to identify restrictive practices which were said to affect the legal profession in general and the independent Bars in particular.

In its opening paragraph, the Commission criticised the requirement of independent Bars that barristers only practice as sole practitioners. Equally unpopular with the Commission were rules requiring barristers to practice from chambers, the requirement that barristers employ a clerk, and later, rules

preventing direct access and prohibition of advertising, of which more later.

Whilst practices in relation to these matters have variations from state to state or territory, solicitors in Australia have always been granted a right of audience before the Courts, so allegations of practices that are in restraint of trade in that regard have been unavailable to our watchdogs.

Additionally, differences exist from state to state or territory in relation to clerking and what may be offensive in one area may not be offensive in another.

The final report of the Trade Practices Commission recommended sweeping changes including:

- The repeal of all rules preventing lawyers from legal practice profit sharing with non-lawyers, and from limited liability incorporation;

- The repeal of all Bar Council rules requiring Bar members to be sole practitioners;
- The repeal of rules prohibiting franchises for legal practices;
- The repeal of the Chambers rules;
- And the reform of the Bar Council clerking rules, so as to provide flexibility and commercial choice by member barristers.

In discussing changes, my emphasis will be on Victoria, where I principally practice. I apologise for this, and mean no disrespect to other Bars, but am able to say that the experience of the Victorian Bar is very similar to the experience of other Bars.

In 1995, the Council of Australian Governments signed off on the Competition Principle Agreement, and each signatory agreed to undertake a review of the legal profession.

This led to each to state or territory considering their relevant legislation and legal profession, and in many cases instituted wide spread changes.

In December 1995, the Victorian Department of Justice came up with some 2000 draft proposals covering all areas of legal practice.

This culminated in the Legal Practice Act 1996, which incorporated several reforms – it permitted co-advocacy, allowed direct access controlled by the relevant regulatory authority, prohibited compulsory clerking, the chambers requirement and compulsory robing. It did allow the Bar Council to enforce a sole practice rule.

By that time, the Bar Council had already allowed direct access and had modified substantially its requirement in relation to chambers so that barristers were required by the Bar Council to practice from such chambers and use such facilities as were

reasonably necessary to enable him or her to discharge his or her obligations properly and in a professional manner. It was thought that this accommodated those barristers, particularly junior barristers, who could not afford to rent chambers which the Victorian Bar has always provided, subsidised for junior barristers.

Other Bars around Australia had also made similar accommodations, and were affected by legislation which was often broader than that imposed upon Victorian advocates.

These changes, of course, were not enough for the Australian Competition and Consumer Commission, the renamed Trade Practices Commission. Nor were they enough for the Legal Ombudsman, who challenged the Victorian Bar when it declined to provide services to a barrister merely because he refused to pay his subscription. Try that at your golf club!

The ACCC has tended to have bursts of activity in relation to the independent Bars, and in 2000 challenged the sole practice and direct access rules and the now modified rule in relation to chambers. The sole practice rule, effectively sanctioned by State Governments, is particularly close to what the ACCC is pleased to call its heart.

Ultimately, the Victorian Bar responded by advising the ACCC that it considered its rule were not anti-competitive, but were in fact pro-competitive and had not been disallowed by the Legal Practice Board, the body charged with administering the Act in Victoria. This resulted in a period of almost two years' silence from the ACCC.

At about the same time the ACCC corresponded with the NSW Bar, after an hiatus of 21 months, indicating that it was now giving priority to the conduct of professions. At that time, it sought to challenge New South Wales rules on barristers work

which forbade barristers doing solicitors' work and again raised the question of direct access.

The President of the NSW Bar Association responded, as had the Chairman of the Victorian Bar, to such correspondence. In the latter response, the Chairman of the Victorian Bar pointed out the simple fact that advocates could choose to be members of the Bar or not and, if they chose not to be, they were not subject to the rules of the Bar. Of course, most did so because of the benefits offered, especially in the provision of advocacy training, rental and subscription subsidies in the early years and ongoing assistance & guidance.

In this period, other independent Bars have had intermittent skirmishes with the ACCC, all of which is resulted in periods of silence followed by flurries of activity. Its approach to the issues, including targeting the smaller Bars, and not seeking to justify its assertions, suggests a confidence found only in a body not subject itself to any competitive forces.

However, the ACCC has never issued proceedings or sought to have declared anti-competitive, any of the Bars' rules, notwithstanding the ever-present Sword of Damocles.

Of one thing we can be sure, the ACCC will continue to monitor the Bars and continue to attack what it believes to be anti-competitive behaviour.

It is preaching to the converted to suggest that the rules of the Bars both in Australia and in other jurisdictions are tried and true and have proven to encourage competition in its purest sense.

What we believe is really surprising is that the Commission has never explained how for example, allowing barristers to enter into a partnership could encourage competition. There are a number of solicitors in partnership who practice purely as advocates and compete directly with the advocates who are sole

practitioners. There is no restraint on anyone doing so as a solicitor.

As long ago as August 1992, Dr Ian McEwin of the University of New South Wales pointed out that there were good reasons not to allow partnerships for barristers; in partnerships, competition would be reduced as there would be a conflict in one partner taking a brief against another. It would be particularly so in narrow, specified fields. One can readily imagine a situation where two barristers were litigating, perhaps one on a no-win no-fee basis and, where, should they be in partnership, the pressure to settle to suit their interests would be substantial.

It is impossible to see how changes such as the formation of partnerships between barristers could do anything but increase market power of the partners to the detriment of competition.

Similarly, a reduction in the number of competitors by the formation of partnerships could not, in my opinion, increase the growth of productivity, or reduce costs.

From my observations, partnerships are much more expensive to run than sole practices, and one only has to look at the level of overheads of a barrister compared with a solicitor, even solicitors who practice solely as advocates.

For many years the Bars prohibited advertising on the basis that it may lower standards. The prohibition was removed be legislation and under pressure from the Trade Practices Commission.

Now, governments are criticising lawyers who advertise for a so-called explosion of litigation which is in fact non-existent. The Premier of New South Wales has now legislated to ban advertising for personal injuries work. This is an instance of

where the necessity to have competition has been overruled by the necessity to appease the demands of insurance companies.

For it is insurance companies that have argued that advertising, inter alia, has led to an explosion of litigation. This has been used to justify savage increases in premiums to replenish their capital, so often depleted as a result of poor judgment in litigation by just those companies.

The fact is that very few barristers have ever chosen to advertise.

The abolition of the chambers rule has meant that more barristers practice from home or even, effectively, from the boot of their cars. The Bar in Victoria has always provided accommodation to its members, heavily subsidised for the first several years, as are subscriptions, and has strongly believed that barristers working from chambers meant that, should a problem arise, either involving practice or ethics, it would be a

simple matter for the barrister to seek advice from his or her experienced colleagues. A barrister practising from home without entering into the collegiate spirit is much less likely to seek appropriate guidance, and thus, more problems are likely to arise.

Experience shows that, where chambers bring barristers together, they are much likely to seek assistance from their colleagues, a parallel perhaps to the peer review process conducted by doctors.

This paper questions whether or not independence is irreconcilable with competition policy reform. Perhaps it should question whether or not there was any need for a competition policy review of the Bars' practices, before even considering whether the changes foisted upon the independent Bars could properly be described as "reform".

Paramount to all barristers is the independence of the Bar. This is not just for the independence barristers claim to enjoy, but to enable a disadvantaged litigant to obtain the best representation available against a bigger or more financially advantaged litigant.

It is hard to know what goes on in the minds of those who press us. Perhaps it is not covetousness, but envy. In Australia we have never had a satisfactory explanation for the reasons the ACCC disapproves of our sole practice rule and, when explanations for our stance have been offered, no serious attempt to respond to our explanations has ever been received.

However, it is a fact of life that regulation will proliferate further. One could be excused for the cynical view that regulatory bodies will regulate because it is for that purpose they exist.

I perceive the next inroad will be the removal from the Bars of their disciplinary powers. In Victoria, as in other jurisdictions, a complaints procedure is set up which enables a complainant to bypass the Bars disciplinary powers and have a matter dealt with directly by the Ombudsman or perhaps the Legal Practice Board. Those who volunteer their time to sit on Ethics Committees will be, to a degree, relieved to have this task taken from them, but what is remarkable, in an profession which deals almost exclusively with significant disputes, is the high level of satisfaction that clients have for their representation. In every piece of civil litigation there is a loser, sometimes there are several losers, and on many occasions, all litigants lose. Yet the level of dissatisfaction by people using the services of advocates is minuscule in such an environment.

Unfortunately, it is becoming more and more difficult to persuade those less well informed, but with power, that this is so.

As the Bars grow, and grow they have, with more universities conducting more law schools, the challenge to maintain a high quality of advocacy is an ever-growing one.

But the aforementioned idealogues assert that, not only should the present restrictions be removed, but non-lawyers should have the right to appear in Courts as advocates.

It does seem there is a significant tension between competition and the provision of high quality service, such service being backed by a mandatory professional indemnity scheme.

Non-advocates, would not of course, be required to carry insurance to protect their customers from the consequences of negligence.

It was said by Thomas Carlisle that all reform except a moral one will prove unavailing. I believe that reforms proposed to our profession, almost inevitably by those not a part of it, and

certainly with the limited experience to it, are reforms which do nothing to serve the interests of the community or the administration of justice.

I believe that, underlying the approach of these reformers is the fact the Bar consists of a number of wealthy, indolent ne'er-do-wells who live very well by provoking trouble for others and charging a fortune to deal with it. If only this were the case!

However, the Bars have always proved to be resilient and I have no doubt will continue to do so. I hope my optimism is not misplaced for, without a strong, independent Bar, the justice system will be all the poorer.