

INSURANCE

Professional indemnity insurance is designed to ensure that those who suffer loss as a consequence of a lawyer's negligence have the opportunity for redress and, that the lawyers who are the subject of claims are not financially ruined.

Currently in every State and Territory in Australia it is a compulsory requirement for lawyers to hold professional indemnity insurance. The insurance is usually provided by a monopoly supplier run by the law societies or an associated legal body.

Lack of competition for this sort of insurance could be preventing the development of tailored and more widely available insurance.

In a competitive market a country lawyer, for example, who did not generally take on large cases, may not have to pay the same premium as a lawyer working on multimillion dollar contracts. Similarly, those lawyers who chose not to offer mortgage brokering services (which are the source of most current claims on these insurance schemes), could possibly find insurance packages tailored for their business mix.

There are also insurance difficulties for lawyers wanting to work across State lines. Insurance in one State only indemnifies a lawyer in that State, thus, if a lawyer wants to work in two States then they must pay for two lots of indemnity insurance. A competitive market in liability insurance could potentially remove this impediment.

WHY CAN'T LAWYERS ADVERTISE?

In most States until recently it was illegal for lawyers to advertise at all. In some States advertising price, experience or skills is still heavily regulated.

Advertising gives any business the opportunity to give information to potential customers about the service being offered, the qualifications or experience of the professionals, waiting times and price.

Restrictions mean that new businesses (that potentially offer superior services or prices) are not able to inform potential customers.

Critics of advertising argue that professionals have reached a certain generic standard by virtue of their professional qualifications and that it is inappropriate for them to seek to differentiate themselves through advertising. There is also an argument that restrictions are necessary because advertising can create demand by encouraging legal action.

Given that all forms of advertising are subject to the Trade Practices Act (which prohibits false, misleading or deceptive conduct), it is important to ensure that there is a direct link between the specific advertising restrictions on lawyers and the perceived potential for harm to consumers.

As one of the reasons we regulate the legal profession is the difficulty consumers have in informing themselves about legal services and quality, it seems incongruous to deny consumers advertising information.

THE FUTURE

The legal profession has undergone a great deal of change in recent times.

The market for legal services has grown and become more sophisticated and the number of lawyers has increased.

It is important that Governments continually review and reform their laws and regulations to ensure that they are up-to-date, work in the overall public interest and do not overly restrict innovation.



REFORM OF THE LEGAL PROFESSIONS

National Competition Council
Community Information
2000



PROTECTING THE PUBLIC INTEREST

The legal profession plays an important role in the Australian justice system, both civil and criminal, and in the operation of most businesses.

To protect consumers from poor quality or unethical legal advice or representation, Governments around Australia use a range of laws, regulations, professional rules and responsibilities to regulate legal practitioners and how they operate.

A good system of regulation will ensure that lawyers are properly qualified, limit incentives for lawyers to mislead clients, encourage decisions based on quality rather than price, and preserve the public standing of the legal system.

However, overly restrictive or excessive regulation can impose major and unnecessary costs on consumers.

This paper discusses the regulation of the Australian legal industry and the need for transparency and accountability in order to protect the public interest.

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DIFFERENCES BETWEEN THE STATES

Each State and Territory regulates the legal profession differently (and extensively).

Different rules governing advertising, insurance, registration, ownership, profit-sharing and company structures create major difficulties for legal firms wishing to work across State borders, offer new or different services or, combine with other professionals to form 'multi-disciplinary practices'.

Legal businesses need to maintain expensive and complicated corporate structures in order to comply with the various requirements of each State.

Extra costs are obviously passed on to the firm's clients. Where these clients are other businesses, the costs are passed along again.

WHO CAN OWN A LAW FIRM?

One of the biggest restrictions on legal businesses relates to ownership.

Generally, law firms must be owned by lawyers and only lawyers can share in the profits. However, being a qualified lawyer in one State does not mean that you are automatically recognised as a lawyer in another.

Interstate law firms usually need to register (and pay) for each business partner to be a lawyer in each State regardless of whether the individual partner works there.

Ownership restrictions also make multidisciplinary practices hard to establish. If lawyers want to work with accountants, economists, architects or other professionals they face all sorts of problems because of limitations on profit sharing and variations between the States.

In NSW there are currently moves to allow law firms to 'incorporate'. This would mean they could form a company instead of being restricted to an unincorporated partnership. Incorporated firms could float on the stock exchange and raise capital from investors. This increases the potential for business expansion, particularly into international markets.

However, because the other States do not currently intend to make corresponding reforms, larger national law firms may be unable to take full advantage of the changes. Permitting incorporation in one State but not in others would result in a complex and expensive business structure.



LAWYERS AND NATIONAL COMPETITION POLICY.

In 1995, all nine Australia Governments agreed that in order to stimulate economic growth and job creation a co-ordinated approach to market reform was required.

As a result, all Governments undertook to implement, on an ongoing basis, a package of reforms to be known as the National Competition Policy.

In its simplest form, 'competition' in a marketplace is about choice and exists when a number of businesses strive against each other to attract customers and sell their goods and services. Competition generally will foster production efficiency and innovation and thus generate lower prices, greater choice and better levels of service for consumers.

One of the most important National Competition Policy undertakings is that each Government will review and reform all laws that restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs.

In line with this policy, anti-competitive restrictions and regulations for lawyers (and all professions) must be comprehensively reviewed by the Commonwealth and all State and Territory Governments and reformed if they are found not to be in the public interest.

WHO SHOULD MAKE THE RULES?

Australian Governments have historically allowed lawyers to take a large role in regulating themselves. Typically we have a system of 'co-regulation' where the relevant law society develops codes of conduct and disciplinary processes and the Government underpins these rules with legislation.

Separation from Government is considered to be very important for the judiciary and its officers. Judicial independence plays an important role in our democracy by protecting the community from the potential for abuse of executive power by governments.

However, there are inherent dangers in allowing lawyers (or any profession) to make their own rules. There can be a lack of public accountability and the professional associations have the power to work in the interests of their members rather than the interests of the public at large.

To ensure that the broader public interest is being served independence of the legal profession must be balanced with transparency and accountability. Involvement in self-regulatory bodies by people from outside the profession, would appear desirable for example, by having consumers represented on registration and disciplinary boards. Rules and processes should be public and made with consumer debate and input.

LAWYERS ONLY

Qualified lawyers have exclusive rights to practice in many areas of the law. However, in the delivery of some services it is clear that the wide-ranging legal skills of a qualified lawyer are not always necessary.

A number of governments have concluded that in areas such as property transactions ('conveyancing'), comprehensive legal training is not necessary. Specific training can be more appropriate and cheaper for the customer.

Immigration and taxation are other areas where formal legal qualifications are not always necessary for the performance of the specific legal services required.

Opening the market to alternate non-lawyer providers can significantly reduce costs and result in services becoming more widely available in the community. However if required, providers can still be regulated and can still have formal training and registration requirements for practice in that particular field.

CONVEYANCING - A CASE STUDY

When a property is bought or sold, there are a number of legal services that must be undertaken. These include ensuring that the seller actually owns the property and that the transfer of funds between buyer and seller proceeds smoothly.

While these tasks are important, and require experience and knowledge of the law, they do not require comprehensive high level legal skills.

Until recently, in most States and Territories this area of practice was reserved for lawyers only. However, a number of States have now changed their laws and conveyancing services can now be performed by licensed conveyancers. In those States services are now more widely available and significantly cheaper.

In the early 1990's New South Wales lifted its restrictions in this area as well as lessening restrictions on advertising and abolishing scheduled fees. Conveyancing costs have now come down by an average of 17%, regardless of whether they are provided by a licensed conveyancer or by a lawyer. This saves NSW consumers about \$86 million per year.

As at August 2000 conveyancing is still reserved practice for lawyers in Queensland, Tasmania and the ACT.

WHEN 'SELF REGULATION' MEANS 'SELF INTEREST'

Barristers used to have a number of rules that worked against the public interest. Barristers' fee schedules were set by the professional body, the Bar Council, and charging a lesser fee was considered to be a breach of ethics.

Barristers who charged less than the schedule fee could be disciplined by the Council. This reduced price competition, enriched barristers and kept consumer prices high.

As this and other practices were so obviously against the public interest, governments considered imposing laws on the profession to regulate barristers' conduct. Eventually, in the early 1990's barristers decided to reform their own rules rather than have a government determined solution imposed and a number of these anti-competitive practices were reformed.