"Can the Professions Survive under a National Competition Policy?" - The ACCC’s view

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Introduction

To put the application of the competition laws to the professions in proper context, it is important to bear in mind the following brief background.

In October 1992 an independent Committee of Inquiry was established by the Prime Minister following agreement by all Australian Governments on the need for a national competition policy and its basic principles.

In August 1993 the Independent Committee of Inquiry reported to the heads of Australian Governments ("the Hilmer Report").

In February 1994 the Council of Australian Governments ("COAG") meeting in Hobart agreed to enact legislation to achieve the universal application of competition laws to all businesses throughout Australia.

In particular the aim was to apply the competition laws to unincorporated businesses and Government businesses. So, that included all the professions for example, - lawyers, architects, engineers and doctors.

Since then, nine Parliaments have passed legislation to achieve the universal application of the competition laws to everyone in business in Australia - that is, each State and Territory Parliament as well as the Commonwealth Parliament have passed laws to apply Part IV of the Trade Practices Act 1974 or its counterpart - known as the Competition Code. These laws essentially took effect from 21 July 1996. So, to the extent that it can be said that the community makes changes to its laws through our Parliaments - it can truly be said that each and every jurisdiction has actively participated in applying competition laws to everyone in business throughout Australia - including the professions.

The rationale behind the changes to the law is that they are a part of the micro-economic reforms which have been underway for many years in Australia. In the context of what we are discussing - that means that any anti-competitive regulation should be opened up to public scrutiny and only be allowed to remain if the public interest from maintaining the anti-competitive regulation can be shown to outweigh its anti-competitive detriment. To the extent that any anti-competitive regulation is found in legislation then the review process is a matter for the Commonwealth, State or Territory Government (and the National Competition Council - which was set up as part of the legislative changes I mentioned earlier). It is not a matter for the ACCC.
As part of the legislative changes the ACCC was formed from a merger of the Trade Practices Commission and the Prices Surveillance Authority.

Now, it is crucial to cover some of the fundamental issues to ensure that the debate on the implications of the extension of competition law to the professions is an informed one. There are six fundamental issues that I believe you must constantly bear in mind. They are as follows:

First, the policy of the Act.
Secondly, the role of the ACCC.
Thirdly, rights of legal action.
Fourthly, what does Part IV of the TPA (or State Competition Codes) cover?
Fifthly, the authorisation process.
Sixthly, concerns about professionalism.

1. Policy of the Act

The overall policy of the TPA can be shown by looking at 3 different aspects of the TPA. The first, is Part IV - headed "Restrictive Trade Practices". The policy underpinning that Part of the Act is to - promote competition.

The second aspect is:

- Part IVA - headed "Unconscionable Conduct"; and
- Part V - headed "Consumer Protection".

The policy underpinning those two parts of the Act is to ensure competition is fair.

The third aspect is:

- Part VII - headed "Authorisations and Notifications in respect of restrictive trade practices"; and
- Part IX - headed "Review by Tribunal of determinations of Commission"

The policy underpinning those two parts is to allow the ACCC to authorise some forms of anti - competitive conduct which would otherwise breach the competitive conduct rules (ie breach Part IV of the Act). If the ACCC authorises the anti - competitive conduct it gets immunity from Court action. The related policy reflected by Parliament through Part IX of the TPA is to provide a mechanism for people affected by a Commission determination to seek independent review of that determination from the Australian Competition Tribunal.

So, whilst the policy of the TPA is to promote competition, it is not competition at any cost to society. Parliament, has recognised that there are exceptions and has set up in the TPA itself various mechanisms to allow for appropriate exceptions. The Act therefore contains checks and balances.

2. Role of the ACCC

I turn to the second fundamental issue - the role of the Commission.
The ACCC is a law enforcement agency. It does not make the laws - that is for Parliament. Relevantly, the role of the ACCC is to impartially enforce the TPA. Similarly, the ACCC does not and cannot impose fines or penalties on people. That is the role of the Courts. To establish a breach of the Act, the ACCC like any other litigant has to produce evidence and prove to the Court that there has been a breach of the TPA.

3. Rights of legal action

The third fundamental issue I want to mention is the question of who can take legal proceedings under the TPA? On this issue its important for you all to realise or remember that the Commission shares the right to take legal action under the TPA with the private sector. In the health sector for example, that includes - health funds, patients, hospitals and doctors. The importance of private litigation on development of competition laws can be seen from the following 3 examples:

- the main case on misuse of market power is the 1989 High Court decision in a private action brought by Queensland Wire Industries P/L against BHP;

- Secondly, a major case on market definition is the 1991 local (Western Australian) Full Federal Court decision in Singapore Airlines Ltd v. Taprobane Tours WA Pty Ltd; and

- thirdly, a recent and very public example of a case dealing with the restraint of trade or contracts substantially lessening competition in breach of s.45 of the TPA is the Super League case between News Limited and ARL.

4. Competitive Conduct Rules - Part IV of the TPA

So, what are the anti-competitive practices prohibited by Part IV of the TPA? This is the fourth fundamental issue I want to cover. Essentially, they can be summarised into the following 8 types of conduct:

- Agreements that have the purpose or effect or likely effect of substantially lessening competition in a market (section 45);
- Agreements that contain an exclusionary provision. (sections 45, 4D). These are sometimes referred to as primary boycotts and involve competitors agreeing not to deal with another party;
- Price fixing agreements. That is, agreements that have the purpose, effect or likely effect of fixing, controlling or maintaining prices (section 45A);
- Secondary Boycotts - that is, action by two or more people which hinders or prevents a third person from supplying goods or services to a business, acquiring goods or services from a business or engaging in interstate trade or commerce (section 45D);
- Misuse of market power - that is, taking advantage of a substantial degree of power in a market for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into any market or deterring or preventing a person from engaging in competitive conduct in any market (section 46);
Exclusive Dealing - that is, one person who trades with another imposing restrictions on the other's freedom to choose with whom, or in what, to deal (section 47);

Resale Price Maintenance - that is, suppliers specifying the minimum price to a reseller (section 48, 96-100);

Mergers which have the effect, or likely effect, of substantially lessening competition (section 50).

5. Authorisations

As I mentioned earlier parties can apply to the ACCC for authorisation. The fifth fundamental issue I want to deal with is an overview of the authorisation process. The authorisation provisions give the ACCC the power to grant immunity from legal proceedings for conduct that might otherwise breach the restrictive trade practices provisions of the Act. Decisions of the ACCC can be reviewed by an independent body - the Australian Competition Tribunal. A Judge of the Federal Court of Australia, presides at hearings of that Tribunal. It is a truly independent review process.

You should also note that authorisation is a public process not one conducted privately behind closed doors. The ACCC will approach all interested parties to enable them to make submissions on the application for authorisation.

For authorisation to be granted, the applicant must satisfy the ACCC that the conduct in question will result in a benefit to the public that outweighs any anti-competitive effect. So, it's a balancing exercise between public benefits and anti-competitive detriment. Examples of the public benefits that the Commission has recognised over the years will be provided in the presentation that Sitesh Bhojani will give later this afternoon.

Finally on this point I would like to say that the Commission considering these matters is comprised of people with a practical background in law, business and commerce and economics. Claims that the Commission is full of economic rationalists are unfounded. For example, the Associate Commissioners on the Commission include Mr Jeffrey Hilton S.C. - a Senior Counsel practising at the Sydney Bar; Mr Warwick Wilkinson - who is a past President of the Australian Council of Professions and a past Chairman of the Pharmacy Board of New South Wales; and Mr Don Watt, from Western Australia who is a lawyer and company director. I cannot of course forget Ms Theresa Handicott who is a partner with Corrs Chambers Westgarth solicitors and who is based in Brisbane.

6. Concerns about "Professionalism"

The sixth fundamental issue is concern over "professionalism". Members of the professions often present the view that rules prohibiting anti-competitive conduct should not apply to them as the conduct complained of has the purpose of protecting the public. For example, the President of the Law Society of Western Australia said in her report in the February 1996 edition of the Society's magazine ("Brief") (at page 3):
"Many of the requirements of practice are there for a reason: public benefit. They are not restrictive practices designed to exclude others from the market - although economic theorists will argue that they are."

At a BLEC health seminar in Melbourne on 29 March 1996, the legal profession's example was raised by Mr. Ron Hastings who currently runs his own health industry consulting firm. He spoke of the "fiduciary relationship" or "relationship of trust" between the professional and the client and how those issues are not taken into account when imposing laws such as the TPA on the professions.

The Commission's response to this issue is a straightforward one, in two parts -

First, what is it about the fiduciary relationship between a professional (doctor or lawyer) and his or her patient or client that requires the professional to engage in price fixing with his or her competitors?

What is it about the fiduciary relationship between a professional and his or her patient or client that requires the professional to engage in a misuse of market power?

What is it about the fiduciary relationship between a professional and his or her patient or client that requires the professional to engage in exclusive dealing, or resale price maintenance or the other conduct prohibited by Part IV of the TPA? The ACCC response to those questions is "probably nothing".

But if there is something that is anti-competitive and it really is for the patient's benefit or client's benefit that is, for the public's benefit (as distinct from being a private benefit for the doctors/lawyers etc) - then Parliament has set up a mechanism whereby that conduct can continue with immunity from Court action - seek authorisation. That is, demonstrate that the public benefit of that conduct outweighs its anti-competitive detriment and obtain immunity from Court action for that conduct.

I would now like to look at two specific types of conduct of professionals that may have to change for some professions under the competition law scenario. They are setting fees or pricing behaviour and advertising.

(i) Setting Fees/Pricing Behaviour

As a professional, you can generally choose the business structure by which you will provide services to the public. That is, whether to practise as an independent practitioner, in a partnership or by incorporating the practice. (The Commission is aware that there are some statutory restrictions in some professions, for example, an inability to incorporate the practice).

In making that decision, you have to bear in mind that each form of structure - independent practitioner, partnership or incorporated practice - has both its benefits and responsibilities. For example, just as a partnership can’t say "we want to operate as a partnership - but we only want to pay the corporate rate of tax", so too an independent practitioner can’t say "I want to operate as a sole practitioner but I want to agree my fees with other practitioners".
For example, in relation to the medical profession, it appears that many specialists and other medical professionals choose to work on the basis of a group of independent professionals working together from one set of rooms to share the accommodation, secretarial and other expenses. So, if a professional chooses to work as an independent or sole practitioner then he or she is choosing to operate as an independent business. In those circumstances that independent practitioner cannot "agree on fees with colleagues" who are also operating a separate business. It is the same principle as a group of barristers operating out of one set of chambers.

The specialist/medical professional does have alternatives - he or she can choose to form a partnership with his colleagues or they could choose to incorporate the group practice - if they really believe it is necessary to agree on fees with their colleagues.

But whilst the professional chooses to work as an independent or sole practitioner then those business decisions such as setting fees or negotiating contracts need to be done on an independent or individual basis.

(ii) Advertising

Any advertising restrictions imposed by Commonwealth/State or Territory Government Legislation is exempt from the TP legislation. Restrictions on advertising that are not backed by legislation but formulated and enforced by Associations and Societies will be subject to ACCC investigation. Advertising can be an important part of the competition process (particularly in providing information to the public).

The ACCC does not believe that removing advertising restrictions which would allow professionals who choose to do so to advertise necessarily raises issues of ethics. For example, in relation to the medical profession, the ACCC does not believe that doctors advertising the fact that they can speak foreign languages; or that they are willing to bulk bill; or the fees they charge for certain procedures raises ethical issues - why shouldn’t patients be informed about such things? These sorts of restrictions have been used in the past to threaten a professional with expulsion from a professional association - because she wanted to deliver a professional paper to a related but not the same group of professionals. The ACCC is also aware of a restriction where the mere advertising of a fee was, under the rules of an association, characterised as "unprofessional conduct".

On a positive note, the Commission notes that in relation to the legal profession a number of Bar Associations now produce an Annual Directory of Members by which members of the public and the Solicitor’s branch of the profession can obtain information about the particular barrister’s practice and in some cases even the fees the barrister will charge. Those Bar Associations are to be commended for such initiatives. The Commission would encourage other Bar Associations and other professional associations to adopt such initiatives.

As for anyone contemplating any advertising or promotion which genuinely raises issues of ethics or "miracle cures" etc then any professional would also need to be aware of Part V of the TPA and equivalent provisions of the State Fair Trading legislation. Under those provisions anyone whose advertising is false, misleading, or deceptive, or likely to mislead or deceive would be in breach of the legislation. For
example, the Commission took action last year against "On-Clinic Australia" for misleading and deceptive advertising in relation to its impotency treatment.

**Competition Issues for Professional Associations**

I would like to summarise the competition issues for professionals and their associations.

Under both the regulation review process and the requirements of the Trade Practices Act a number of the rules and practices of professional associations are likely to come under scrutiny.

Many of the rules and regulations which apply to the professions inhibit competition in two broad ways; through their effects on the structure of the relevant professional market and on the market conduct of professional practitioners.

**Structural** regulations of professional markets includes those which:

- regulate entry into the market (including the imposition of educational and competency standards, licensing and certification requirements and restrictions on entry by foreign professionals and para-professionals);
- define the field of activity reserved for licensed or certified professional practitioners;
- separate the market functionally into discrete professional activities (including those performed by accredited specialists such as insolvency practitioners, barristers and medical specialists); and
- impose restrictions on the ownership and organisation of professional practices.

**Conduct** regulations include those which:

- limit the fees which professionals may charge or require the application of fee scales for particular professional services;
- prohibit certain kinds of advertising, promotion or solicitation of business by professional practitioners; and
- specify professional and ethical standards to be observed by, and disciplinary procedure to apply to, professional practitioners.

Such regulations combine to impose substantial restrictions on the commercial and competitive conduct of professionals and on the choices available to consumers of professional services. Where such rules are imposed by the self-regulation arrangements of professional associations, contraventions of the Trade Practices Act may be involved in some cases.

An example, that the ACCC considers amply demonstrates:

1. The Commission’s willingness to work constructively with a professional association where that is possible and mutually desired; and
2. That the obligations imposed by the fiduciary relationship between a solicitor/barrister and his or her clients and the conduct proscribed by Part IV of the TPA really have little to do with each other;

is the dealings between the Law Council of Australia and the ACCC in relation to the Law Council of Australia’s National Profession Blueprint - Draft "Core" Rules of Professional Conduct and Practices proposed for adoption in each Australian State and Territory. These rules are intended as a set of model rules which each Constituent Body of the Law Council might agree to adopt with a view to ensuring greater uniformity in the regulation of legal practitioners throughout Australia.

After a meeting with the Law Council in March 1996, the Model Rules were forwarded to the ACCC in May 1996 by the President of the Law Council to gain the Commission’s consideration and comments on the Model Rules from a competition perspective. After consideration of the rules, the Commission responded in August 1996 noting that the Model Rules focus almost exclusively on the ethical and professional responsibilities of lawyers in their dealings with clients and other lawyers and in giving effect to the requirements of the legal and judicial systems.

The Commission confirmed that the Model Rules as provided to the Commission for consideration did not cause the ACCC any concern in terms of the requirements of the TPA. At the same time it was pointed out to the Law Council by the ACCC that the other rules and regulations which deal with issues such as entry requirements, pricing and advertising conduct and the organisation of legal practices - MAY raise issues of concern under the TPA.

Ongoing Reform of the Legal Profession

Finally whilst acknowledging that there have been some positive reforms of the legal profession for example, the developments in relation to the national practising certificate scheme, the ACCC notes the July 1996 Report to COAG on "Reform of the Legal Profession in Australia".

Conclusion - "Can the Professions survive under a National Competition Policy?"

Professionals enjoy the fruits of competition in other sectors of the economy. I believe the Australian community/Australian consumers and businesses can legitimately expect the professional sector of the economy:

1. to be subject to the same procedures for obtaining or maintaining immunity for anti-competitive conduct as all other businesses; and

2. to contribute to the economy the fruits of competition that other sectors of the business community (including Government businesses) are expected to provide.

In the fullness of time, I am sure the professions will not only survive under a National Competition Policy - they will continue to flourish under it.