



Industry Economics Conference 2001

Regulation, Competition and the Professions

13 July 2001

Melbourne

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Australian Competition and Consumer Commission

1. Introduction

In the early 1940's two economics graduate students at Columbia University made a highly unusual proposal that they should be allowed to prepare and submit a joint Ph.D dissertation. After some debate, the faculty granted their request. The eventual outcome was a seminal study of the professions culminating in a National Bureau of Economic Research book, *Income from Independent Professional Practice* NEBR 1945. The authors were Milton Friedman and Simon Kuznets, both of whom were later to win the Nobel Prize for contributions in other fields of economics. Their study set the scene for modern studies of the professions, both at theoretical and empirical level.

This paper begins by briefly considering whether there any economics arguments in favour of some form of regulation of the professions and discusses some policy implications of these arguments. The remainder of the paper then turns to questions about the relationship of competition policy especially the application of the Trade Practices Act 1974, (TPA) in Australia to the professions.

2. The Rationale for Regulation of the Professions¹

This section discusses some rationales and some desirable properties of regulation.

Three potentially legitimate rationales are often given for regulating individual market transactions in occupational services. These are: information limitations; non-voluntary transactions; and distributional concerns.

2.1 Information Limitations

A person who is purchasing goods and services needs to make an assessment of the quality of the goods and services. The consequences of making incorrect judgments (ie. the risk) for a relatively simple good with few characteristics are likely to be small as consumers are likely to be able to form a reasonably accurate estimate of the value of the good. The ability of consumers to form accurate judgements is most likely when consumers can assess the quality of the goods after consumption and they undertake repeat purchases.

However, professional services are significantly more difficult for consumers to assess. Five key characteristics of professional services will tend to magnify the information asymmetry and its consequences. First, services are generally not observable before

they are purchased as the consumer cannot inspect a service before purchase in the same direct way as can be done with most goods. Second, professional services are by their nature complex and often require considerable skill to deliver a tailor to the consumer's needs. Therefore, it can be difficult for the consumer to assess the quality of the service before it is purchased. Third, the quality of many professional services can be difficult to assess even *after* the services has been purchased. For example, if a person hire a lawyer to undertake litigation, which is ultimately unsuccessful, it can be difficult for the consumer to know whether the legal services were poorly delivered or that the case was inherently difficult to win. Fourth, many consumers are very infrequent consumers of professional services. Therefore, they do not have repeat purchase to assess quality. Fifth, the consequences of purchasing poor professional services can be significant. For example, the service may represent a large expenditure for the consumer and a defective service (eg. a heart by-pass operation) can risk serious and irreversible harm.

The characteristics can be used to justify regulation aimed at quality assurance. Such schemes are intended to provide a guarantee level of service quality to consumers and therefore reduce the risks associated with purchasing professional services. To some extent these schemes substitute search and information gathering by individuals gathering and assessment through some regulatory mechanism. These arrangements can reduce the transaction cost for consumers and help the market to function efficiently.

The focus here is on consumer protection, but that does not imply that all professional services should be regulated in the same way. Different services have different complexities and risks and, in some markets, consumers may be able to form reasonably good assessments of quality and risk through word of mouth reputation or "branding".

2.2 Non-voluntary transactions

Non- voluntary exchange may not be mutually beneficial. Concerns about coercion can be used to justify laws that invalidate contracts that are entered into under duress. Generally societies have laws, customs and practices that limit the ability of individuals to coerce others. In markets for professional services there may be a case for special protection because of greater opportunities to misrepresent the costs and benefits of

taking a particular course of action. There may also be cases where relationships of trust between the professional and the client can be abused.

2.3 Distributional considerations

Distributional considerations are often used to justify regulations, which set the terms on which services are provided. These can include price caps, which are intended to provide services at lower cost to low income earners.

There is a debate about whether such occupational regulation is appropriate. The key question in that context is whether distributional concerns should be addressed through direct regulation of occupations or whether there may be a better, more direct redistribution mechanism. That may depend on the stage of development of the economy but generally it is worth noting the following points. First, attempting to redistribute through such regulatory mechanisms is often not transparent. That is, it can be difficult to know whether those who the government intends to assist are actually assisted by the policy. Second, a regulatory approach to redistribution may not be well targeted. The nature of such indirect regulation is such that they cannot differentiate between income groups. Therefore, high income groups will also benefit from the regulation (funded from a cross-subsidy from other consumers). If so, the total redistributive benefit is less than the total cost imposed on other consumers. Third, a more efficient method may be to target theoretical solution, if the redistribution would otherwise not take place, it may be best to undertake some, albeit imperfect redistribution via regulations consistent with the distributional objectives of the government.

In summary, economists are generally sceptical about the desirability of using occupational tools to achieve distributional objectives. Such regulation can lead to non-transparent outcomes, can benefit some recipients in unintended ways, and be less efficient than redistributing through the tax/transfer system.

2.4 Inappropriate Justifications

Regulations that have the intent of merely increasing returns to groups that are regulated are not generally considered appropriate given the arguments about distributional considerations noted above. In particular, the redistribution to regulated

groups is likely to involve negative distributional consequences for relatively poor consumers.

It is not unusual that occupational regulation does indeed have that effect. For example, restrictions on entry to a profession can be expected to limit supply of the services of that profession and raise the price of the service and the incomes of those providing the service. The restriction on entry may be justified on the basis of consumer protection and, in one sense, the resulting increase in price represents the cost to the consumer of that protection, ie the consumer pays. This suggests strongly that where restrictions on entry to an occupation are justified on safety grounds, then we should be confident that the restrictions are no tighter than necessary to achieve the safety objective and that there is not some better more direct mechanism to achieve the objective. Otherwise, the consumer will be forced to overpay for the protection and the unintended effect of the regulation will be to redistribute wealth from consumers to the regulated profession. Therefore, an important objective of regulatory reform of occupations should be to ensure that regulations which have the effect of increasing the returns to occupations have some legitimate justification.

Sorting appropriate from inappropriate justification for regulation requires that policy analysts to ask the question of what is the perceived problem that is to be addressed and why it is necessary to address this problem by regulation as apposed to a non-regulatory option. In particular, it is important that the objective of the regulation be thoroughly assessed and that the various ways in which that objective can be achieved and the actual outcome of proposed regulations are analysed. Assessing all regulations from an economy-wide perspective, as opposed to the perspective of only those being regulated, is important if the problem identified above are to be avoided.

Using that framework, we can define good quality regulation as regulation which achieves appropriate objectives in the most efficient way. Poor quality regulation can either have inappropriate objectives or achieve appropriate objectives in an inefficient way or with unintended consequences. Compliance costs are also important in this context. Experience in a number of countries has shown that substantial compliance costs can give rise to an increased incidence of non compliance.

2.5 Forms of Occupational Regulation

This section of the paper examines the various ways that regulation can achieve its objectives and illustrates the types of regulation which are likely to be most efficient.

Occupational regulations can deal with entry barriers, transactions, and redress mechanisms and can vary in the degree of restrictiveness.

2.5.1 *Entry Barriers*

Many occupations have barriers to entry. These barriers can take a variety of forms.

Registration requires practitioners to register to be able to provide a particular service. Requirements for registration can include appropriate educational qualifications and/or membership of professional bodies. In addition, candidates for registration may need to pass probity tests or satisfy the criteria to be a “fit and proper” person. Registration schemes can be run by government agencies or by self-regulating industry bodies. In Australia registration schemes apply to regulate entry into a range of occupations such as law, accounting and health services.

Licensing is similar to registration in the sense that the grant of a licence to practice an occupation is often dependent on formal qualifications, approved training periods, or general probity tests. However, licensing can restrict entry into an occupation and place restrictions on the range of activities that an individual can carry out. Licences can be issued by government agencies or by industry licensing boards. In Australia licences to practise have been traditionally associated with many occupations, including construction and manufacturing, engineering trades and agricultural industries as well as lawyers, accountants and other service professionals. For most occupations the licence to practice has been valid only within the jurisdiction in which the licence was granted. An additional licence has been required to practice in another State or Territory.

Negative licensing is an approach where individuals are generally entitled to practise but can be prohibited from practising if they have committed some form of offence deemed serious enough to warrant exclusion from the industry. Negative licensing imposes lower barriers to entry than licensing.

Whilst not restricting market entry, other forms of occupational regulation such as certification and information regulations are also aimed at ensuring that acceptable standards of conduct in practice are maintained.

Certification or accreditation is usually administered by a certification body responsible for keeping a ‘list’ of those practitioners who have reached a certain level of competency or meet other standards. These schemes are usually non-legislative and fostered by industry bodies. However, whereas certification indicates the achievement of a certain level of expertise or competency, a non-certified practitioner may also be able to provide similar services. For example, certified practising accountants (CPA) are distinguished from those accountants who have not completed the additional study required to become a CPA.

Accreditation operates in a similar way. For example under an Agricultural and Veterinary Chemicals Accreditation Scheme administered in some jurisdictions, manufacturers, distributors and retailers who are not accredited with necessary training in the appropriate handling and storage of chemicals can be prevented from trading in chemicals.

2.5.2 Transaction Content Regulation

Information regulations are designed to directly address information asymmetries. They may require government warnings, or may require a practitioner to provide specific guidance to a potential consumer. They are generally considered to be the least intrusive form of regulation.

Transaction regulations may also deal with price and other forms of regulation. In this context occupational regulation is part of the broader mosaic of regulation. For example, building codes and legal procedures provide a range of regulations to ensure quality standards.

2.5.3 Performance Based Regulation

It is commonly stated that performance based regulation focussed on outputs is generally to be preferred to prescriptive regulations which control inputs. This is because input controls tend to be more restrictive of innovation and competition. For example, it is usually better in environmental regulation to specify permissible levels of emissions rather than specify a particular technology (ie an input) that must be used in a production process. The idea is that the performance based regulation allows firms to discover the best, or invent a better, means to achieve the emissions target which may not necessarily be the technology chosen by the regulator.

In the case of occupational regulation, entry barriers are more in the nature of input controls than performance based criteria. To the extent that this is justified, it should be because performance based criteria would not provide adequate protection to consumers due to a significant risk that unqualified persons would not be able to systematically provide services that would reach reasonable performance criteria and that the risk to consumers of sub standard service was very high.

2.6 Sector Specific and General Regulation

The justification for specific occupational regulation is that there may be individual issues that need a tailored solution, or the consequences of inappropriate behaviour are so serious that there needs to be more stringent safeguards than would normally be required. However, the various approaches to regulation are not necessarily mutually exclusive. Rather, the approach adopted is usually a combination of the approaches described above and reliance on general law. Also, some laws provide for some professional associations to set standards for entry into the occupation, to make rules for the conduct of practitioners and set other consumer safeguards. Safeguards usually extend to redress mechanisms should inappropriate behaviour be detected. Aggrieved consumers can then access accelerated dispute settlement procedures in addition to access to general legal processes.

The above discussion illustrates that the overall regulatory structure applying to an occupation is often complex. The complexity can itself pose a challenge for the reform task because analysis of and agreement about the appropriate objectives of the regulation or the best means to achieve the objectives may not be straightforward.

The decision of whether there should be regulation will depend on the nature of the transaction which is to be regulated (ie to the seriousness of the consequences that would flow from inappropriate behaviour) and the likely effectiveness of different mechanisms. It does not necessarily follow that more serious consequences always imply that a regulatory solution should be adopted. In many cases government action will not be the most effective solution as the government may suffer from a lack of information and capacity to enforce regulations. Dispersed information held by groups and individuals that are closer to the industry may be more reliable and a better basis for action. In these situations it may be more appropriate for standards of practice, for example, to be developed and regulated by the profession rather than prescribed by

government. Or, the cultural context and general mores of social behaviour may impose significant sanctions for inappropriate behaviour through loss of face and reputation within the community.

Alternatively, the general legal and institutional structures which apply across the economy may be sufficient to appropriately control behaviour. This may include competition law, fair trading legislation and common law principles of contract and tort and equity. (An important issue in occupational regulation is the extent to which specific regulation should displace the general law. This is discussed further in the following section).

The general policy principle that minimum feasible regulation targeted directly at the identified objective offers some guidance on the issue of whether general or sector specific regulation should be adopted to address particular issues. Put simply, if an issue is of general concern, such as the potential for 'misleading conduct', that would be best addressed through legislation that is generally applicable. Addressing the general issue of misleading conduct on a sector by sector basis can invite problems if all sectors are not covered. On the other hand, if there is an issue that is specific to a sector, such as the need for lawyers to observe a higher than normal standard care, then that should be addressed in some form of sector specific regulation. There is a considerable risk that departures from minimum feasible regulation will give rise to unintended consequences.

2.7 Regulatory Failure

In practice regulation does not always achieve its objective and there can be undesirable side effects. This section addresses how we should evaluate regulation and further desirable properties that should be considered when setting regulations.

Three key questions arise when considering actual regulations, which are in place. First, are the regulations well targeted to address the identified problems? Second, do they have unintended consequences? Third, are other policy instruments better equipped to address the same problems? If the answer to any of these question is "no", then it is said that there is "regulatory failure". In the broad, the rationale for regulation is to address some form of market failure. There is a risk that in addressing a market failure, regulators can substitute a "regulatory failure" which may have worse consequences than the initial market failure. Ensuring that the process of regulation

setting and review follows sound principles reduces the likelihood of regulatory failure. Regulations should address a clearly stated objective, be analysed from an economy-wide perspective, be the minimum feasible regulation, and be periodically reviewed by appropriate bodies.

Even if regulations were appropriately targeted when established, it is possible that the context and application evolve over time such that regulation no longer addresses the objectives effectively. Two issues that need to be considered are “regulatory capture” and “regulatory drift”. Regulatory capture occurs when a regulator takes decisions which are biased in favour of the industry that is being regulated. There is a particular risk that this can occur when professional bodies or associations representing an occupation have an operational responsibility to set standards of entry, in addition to carrying out registration, licensing or even certification functions. Professional bodies may be keen to maintain the incomes of existing practitioners and do so by restricting the supply of practitioners through high entry standards.

For example, the 1994 Baume Report, commissioned by the Australian Commonwealth Government found that the Royal Australasian College of Surgeons and other associations of specialist surgeons exercised an exceedingly high level of control over the supply of qualified general surgeons as well as the number of surgeons in various specialities. It has been suggested that the control of supply by these medical bodies is reflected in the fees and charges surgeons are able to command. A range of other studies have made similar links between the control of supply and high costs in relation to legal and accounting services.

While entry standards may be necessary to ensure consumer protection, capture of the processes of occupational regulation may lift standards above the level, which is really necessary. This may create skilled, high cost services to an extent that lower quality, lower priced services are eliminated from the market. If so, consumers who cannot afford high cost services, but may be adequately served by a less qualified practitioner, tend to be marginalised or even excluded from the market. Where this occurs, governments may feel obliged to intervene further in the market to subsidise particular consumers to allow them access to the services. In effect, this is an additional layer of regulation with the objective of counteracting the effect of the regulatory failure.

However, a more direct means to address the issue is to address the prior cause of the regulatory failure.

Two factors can ameliorate the potential problems of professional regulation outlined above. Firstly, self-regulatory actions of professional bodies should be subject to competition law or to some other means of control if a competition law is not applicable. If there is no such control the likelihood of regulatory capture is high. Second, consideration should be given to ensuring that the professional governing bodies are not dominated by those that are being regulated. For example, restrictions may be placed on the number of board members who have a pecuniary interest in the regulated industry. Of course, in setting such restrictions due account should be given to the need to have members with specialist expertise.

Another concern is that even if regulations could be said to be appropriate when adopted, they can cease to be appropriate over the passage of time. Such “regulatory drift” can result from structural change in the economy due to changing technology or consumer preferences. The required level of consumer protection may rise (if services become more complex) or fall (if consumers become more sophisticated). This suggested that it is desirable from time to time to review regulations to ensure that they remain fit for purpose.

2.8 Reform of Occupational Regulation

The previous parts of this paper have developed a number of reform principles. In this part, those themes are illustrated with a number of examples from recent experiences in Australia.

In this part, these themes are developed. Broadly there are two distinct elements to regulatory reform – a substantive element and a procedural element.

The reform of substantive regulation applying to a sector is often called “deregulation”. But that term can be misleading, as reforms of this type are really aimed at better quality regulation. In some circumstances that can actually imply more regulation. Moreover, such substantive reform can often involve an easing of the prescriptiveness imposed by regulations, rather than a strict reduction in their number. In general, such reform should aim at maintaining necessary consumer protection mechanisms while increasing flexibility for providers of goods and services. As a first step, this usually

involves an assessment of the costs and benefits associated with regulation. Where necessary, it involves the pursuit of more cost-effective forms of regulation. Thus, prescriptive type regulation could be replaced by performance-based regulation, where the quality of services provided by an occupation is regulated by standards and performance measures. Governments, industry bodies and consumer groups could participate in the development of standards and performance indicators so that the priorities of each were being met by regulation. This kind of regulatory practice enables all participants in the market to take advantage of changing circumstances and adjust their priorities accordingly, without undermining the purposes of regulation.

Governments can reform their own internal processes for making regulation, with the objective that improved processes will help to ensure that new regulation is of better quality. This could involve a range of management techniques applicable in any particular situation. This process can involve a number of measures such as: provisions in specific legislation for the periodic review of that particular Act and associated regulations; providing for the review of legislation in general to determine anti-competitive effects and avenues of reform; requiring government proposals for new regulations or amendments to existing rules to be accompanied by regulatory impact statements; and sunset arrangements. Collectively, these are called “regulatory quality” mechanisms. Regulatory quality mechanisms can help to avoid and wind back the all too evident problems of the “regulatory inflation” that many countries have experienced over recent decades.

2.9 General Principles

Occupational regulation has a legitimate underlying rationale to protect the consumer due to the complexity of the services in question. However, actual regulations may not be well targeted to address these rationales and may be captured by and confer inappropriate benefits upon those who are regulated. Governments have become more aware of potential problems with regulation and have initiated a range of review processes and ongoing accountability mechanisms to make regulation more effective.

The discussion in this paper has raised a number of questions regarding appropriate policy towards regulation. The following principles attempt to capture the answers to these questions:

1. The objectives of a regulation should be clearly identified and the need for a regulatory solution should be demonstrated.
2. The merits of a regulation should be assessed from an economy-wide perspective.
 - That includes an assessment of the interests of those who the regulation is intended to benefit and those who are regulated, including the compliance costs. Where feasible, this should include consultation with affected parties.
3. Minimum feasible regulation which minimise restrictions on competition should be used to ensure that regulations are well targeted and to minimise the likelihood of unintended consequences of regulation.
 - The effects of various options (including non-regulatory options) should be analysed, including direct and secondary effects and implementation issues, to determine the net costs and benefits of the options.
 - Where possible, regulatory standards should be consistent with international standards to minimise barriers to international competition.
4. Competition law or some other controls should apply to “self regulatory” activities of professional organisations to ensure that these do not bring about unjustified restrictions on competition.
5. Jurisdictions should ensure that regulatory bodies are comprised of members that strike an appropriate balance between the need to have regulations set and administered by individuals with sufficient expertise, and the need to ensure that representatives of an occupation do not have inappropriate control over entry and conduct in a profession.
6. Regulations should be subject to an ongoing review process to ensure that the rationale for their existence remains relevant, and to ensure that the regulation remains the best way of addressing any underlying problem.

3. The Regulation of Competition and the Professions

The remainder of this paper discusses some questions about competition policy and the professions.

There are at least seven forms of regulation of professional markets that inhibit competition. They do so 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 include 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- professional practitioners;
- 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 practitioners); 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 application of fees scale 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.

4. The Trade Practices Act and the Professions

Since 1974, the restrictive trade practices provisions (sometimes also known as ‘the competitive conduct rules’) in Part IV of the *TPA* have applied to those professions practising their professions by means of a corporate business structure in Australia. In

particular, “services” has always been defined in the *TPA* to expressly include ‘work of a professional nature.’ⁱⁱ

Commonwealth Constitutional limitations exclude from reach of Part IV of the *TPA* professionals practising in partnerships of natural persons or other unincorporated basis. Exceptions to that exclusion are professionals whose conduct is in, or in relation to, trade or commerce between Australia and other countries; or across Australian State or Territory boundaries or within Australian Territories; or the supply of services to the Commonwealth or its authorities and instrumentalities.

A variety of Australian State and Territory legislation or regulation by specifically approving or authorising certain conduct, had also exempted such conduct by some professions from reach of the *TPA*. For example, advertising restrictions and fee setting regulations.ⁱⁱⁱ

In 1988-89 the Trade Practices Commission announced that it would conduct a research study of the impact on competition of professional regulation in Australia. The TPC produced in December 1990 a discussion paper on “*Regulation of professional markets in Australia: issues for review*”. The discussion paper contained the following observation:

“In Australia the professions are subject to a diversity of government and self-regulation arrangements which vary considerably between individual professions. In many cases, the regulatory arrangements for particular professions vary between the individual States and Territories.”

“The traditional justification for regulation of the professions has been the protection of consumers through measures to maintain the quality of services and the competence and integrity of their providers. It is being recognised increasingly, however, that such regulation is not without cost to consumers and the community. To the extent that it restricts competition, the service choices available to consumers may be limited, the incentive to innovate and contain costs may be reduced and prices may be inflated as a result.”

“From the community’s perspective, as well as that of the professions themselves, it is therefore important to be able to identify both the benefits and the costs of existing regulatory measures and to assess, as far as possible, for individual professions whether those regulations provide net benefits for consumers after taking account of any costs resulting from restrictions on competition”.^{iv}

Subsequently, the TPC conducted studies and issued final reports on the accountancy profession in July 1992; the architects in September 1992; and the legal profession in March 1994. A snapshot of the TPC’s views is as follows:

Regarding Accountancy:

“The accountancy profession in Australia is not subject to the same degree of regulation as other professions. This report concludes that, on the whole, regulation of the accountancy profession

does not overly impede competitive activity within the various markets in which accountants operate. Nevertheless, a number of areas raise the concern that the effects on competition of some of the present regulatory arrangements go beyond that necessary to serve the public interest”.^v

Regarding Architecture:

“The market for building design services is generally competitive. It appears that in recent years the share of the market traditionally serviced by architects has been eroded through competition from other service providers. The competitive nature of the market has been particularly evident under the current economic conditions that have severely depressed building activity.”

“The Commission concludes that the architectural profession’s regulatory arrangements do not generally inhibit competitive activity in the market for building design services. In the light of the issues raised during the Commission’s study a number of changes to current regulatory arrangements have been proposed by some State and Territory architects boards and by the RAlA. The Commission welcomes these proposed changes. It considers they will reduce the anti-competitive potential of those regulations, without having any adverse effects on the interests of consumers of architectural services.

The RAlA’s regulations were considered by the Commission during its authorisation of these arrangements in 1984 when the Institute amended its rules to lessen or remove their anti-competitive effect. The Commission does not consider the RAlA’s current self-regulatory arrangements are anti-competitive and it does not propose to review the authorisation granted in 1984 at this time.”^{vi}

Regarding Law:

“The Australian legal profession is heavily over-regulated and in urgent need of comprehensive reform. It is highly regulated compared to other sectors of the economy and those regulations combine to impose substantial restrictions on the commercial conduct of lawyers and on the extent to which lawyers are free to compete with each other for business. As a result, the current regulatory regime has adverse effects on the cost and efficiency of legal services and their prices to business and final consumers.

The legal profession plays an important role in the provision of justice for the Australian community under the law and it also has an important part to play in the day-to-day operations of business and in the affairs of households and individuals. The services of legal practitioners make an important contribution to the lives of ordinary Australians, for example, in the areas of housing, finance, personal injury, wills and probate and family law. Legal services also contribute to the establishment and expansion of businesses and to transactions between businesses and with their customers. The cost and efficiency of legal services therefore have a direct impact on the efficiency of business and the living standards of many consumers.

Reform of the extensive system of regulation applied to the legal profession is an important part of the agenda for micro-economic reform and the development of a national approach to competition policy. Inefficiencies in the provision of legal services will be passed on as costs incurred by downstream users including businesses exposed to international competition and final consumers. Thus, reforms which are focused on increasing competition and efficiency will have positive ramifications for users of legal services and for the economy as a whole.”^{vii}

And

“The Commission has examined the public interest arguments advanced in support of regulations which constrain the commercial behaviour of the legal profession against the public costs they impose by inhibiting competition and efficient service provision and has reached the overall conclusion that many of the regulations cannot be justified on public interest grounds. It therefore recommends comprehensive reform of those regulatory arrangements in each Australian State and Territory with the objective of exposing legal practitioners to more effective competition and of obliging them in that way to provide more efficient and competitively priced services to the business sector and the Australian public.

The regulations applied to the legal profession go far beyond the regulatory arrangements applied to any other sector of business, and to most other professions. The Commission considers that, by inhibiting market forces and competitive pressures and by discouraging innovation, the regulatory arrangements applied to the profession contribute to inefficiency in the organisation of legal practice and in the delivery of services. These inefficiencies will be reflected in the costing and pricing of legal services.

The Commission has not been persuaded that these rules and regulations result in benefits to the public which more than offset the costs imposed by their anti-competitive effects. There are sound public interest reasons for ensuring that lawyers practice according to high professional and ethical standards and contribute to the maintenance of a judicial and legal system of high standing. The Commission considers, however, that those public interest objectives should be pursued directly through ethical and professional rules and disciplinary arrangements, rather than by imposing restrictions on the normal commercial and market behaviour of lawyers.”^{viii}

Each of the above reports contained recommendations for detailed changes in professional regulation. In particular, the report on the legal profession made very detailed proposals for change. These included:

- the Trade Practices Act should apply in full to the legal profession.
- any anti-competitive regulations concerning the legal profession should be repealed.
- the Commonwealth Government should take the necessary action within its own jurisdiction to implement pro-competitive reforms.
- all states and territories should automatically recognise lawyers accredited in other jurisdictions in Australia;
- all governments should open up the supply of legal services to appropriate qualified non-lawyers to the maximum extent that is consistent with the public interest and there should be no necessary presumption that any area of legal **work should be** reserved to lawyers without scrutiny;
- there should be mechanisms to determine what work needed to be reserved for lawyers;
- an appropriate body should work on issues about the reservation of legal work for lawyers; appropriate standards of education, training and accreditation for lawyers and non-lawyers providing legal services;
- the need for any additional consumer safeguards for accredited non-lawyers;
- reform of regulations that limit competition;

- the artificial separation of different parts of the profession eg. **between** solicitors and barristers should be removed;
- any practices of the legal profession (eg. Bar rules) that provide **for** a division of the profession into separate branches should be stopped;
- to the extent that specialist accreditation schemes have merit, as they often do, they could be promoted providing they are were not used to restrict entry into specialist areas and providing unaccredited specialists have the freedom to practice and advertise in specialty areas as long as this is not misleading nor deceptive. Various safeguards were called for here;
- rules which impose restrictions on the ownership and organisation of legal practices should be removed or reformed to allow lawyers the freedom to choose the most efficient business and management arrangements. Further detailed recommendations **were made** about multi-disciplinary practices and corporation franchising, as well as the sole practitioner rule of the Bar.
- restrictions on barrister, solicitors and non-lawyers combining their services should be removed;
- subject to adequate freeing up of entry, the fees scales should be removed as they were seen to have adverse effects on competition and efficiency. They should be replaced by methods involving publication of market information about fees and a number of other devices to make the market better informed. There should be improved fee taxation;
- any professional rules prohibiting discounting below fee scales to be dropped

The reports and recommendations were influential. **Many** but not all of the recommendations have been implemented

5. Adoption of a National Competition Policy for Australia

In 1991 the Council of Australian Governments (“COAG”) established an Independent Committee of Inquiry to consider and advise COAG on the need for a National Competition Policy. The Committee was chaired by Professor Fred Hilmer. The Committee’s August 1993 Report to COAG after citing from a 1990 Trade Practices Commission discussion paper to the effect that data for 1987-88 suggests that five

occupational groups alone – lawyers, accountants, engineers, architects and real estate agents – accounted for nearly 2% of Australia’s GDP, observed that

“The professions clearly comprise an important sector of the economy, and their services are a significant cost to many businesses which compete internationally.”^{ix}

The ‘Hilmer’ report also observed that:

“Whatever significance is attributed to the professions generally, it is important to emphasize that their partial exclusion from the Act is primarily due to a constitutional limitation which is unrelated to the status of professions. The scope of the exception depends largely on the legal form of the business, which varies widely across professions.... The overall result is patchy and difficult to justify on public policy grounds.”^x

As part of an historic agreement signed by the members of COAG in April 1995 to implement a national competition policy, COAG agreed to – extend the application of Part IV of the TPA to all unincorporated businesses; to tighten the mechanisms by which Governments grant future legislative exceptions from the TPA; and to undertake a legislative review of their legislation that restricts competition. The purpose of the legislative review is to remove such restrictions unless it can be demonstrated that each such restriction is in the public interest and the restriction is the least restrictive way of achieving the policy or public interest objective, that is, there isn’t a less restrictive way of achieving the same outcome.

In 1995 each of the Australian State and Territory Parliaments passed legislation known as *Competition Policy Reforms Acts*, which achieved the goal of extending Part IV of the TPA to unincorporated businesses. This was done by including as a schedule to that State’s or Territory’s *Competition Policy Reform Act* a “Competition Code” which mirrored the provisions in Part IV of the TPA but changed the reference in those provisions from “a corporation” to “a person”. That legislation took effect on 21 July 1996.

So, in Australia, since 1996 the term “Competition Law” can be said to comprise the provisions in Part IV of the TPA and the *Competition Codes* of each of the Australian States and Territories. Apart from the universal application of the competitive conduct rules to the professions since 21 July 1996 the adoption and implementation of a National Competition Policy by COAG also means that during the period 1996-2000 the professions in Australia are also actively involved in making submissions and other

activities as part of the legislative review program of each Australian State and Territory in so far as that program deals with a review of legislation that restrictively regulates the structure or conduct of each of the professions in that jurisdiction.

The National Competition Council in April 1997 published a “legislation review compendium” which collated the list and timetables issued by each State and Territory Government of the legislation to be reviewed by that government for the purposes of its obligations under National Competition Policy. The NCC is the COAG advisory body on implementation of National Competition Policy. The NCC has since done work on the legal profession as has COAG but this paper will focus on the Commission activities.

6. Recent ACCC Activities Regarding the Professions

Enforcing Australia’s Competition Laws is one of the principal functions of the Commission. The Commission also has a relevant adjudicative function. Recognising that, in some instances, anti-competitive practices do deliver offsetting public benefits which can outweigh the anti-competitive detriments, Australian legislation^{xi} also empowers the Commission to authorise some forms of anti-competitive conduct otherwise at risk of breaching the competitive conduct rules, (except for the misuse of market power provision). Conduct at risk of breaching that provision cannot be authorised by the Commission under any circumstances. If the Commission authorises conduct, it is immune from legal action by the Commission or by private parties.

When the 1995 reforms were enacted, the Commission initial approach was to focus heavily on education for the professions about the rights and obligations under the Trade Practices Act. These activities were very extensive.

They involved publicity, publications, seminars, speeches and were supplemented by an extensive education program undertaken by private sector law firms and professional associations.

In the early years, the Commission did receive some complaints about alleged boycotts, particularly of country hospitals by doctors located in those towns. The Commission issued various warnings and indicated that it might have to consider Court action if necessary. This put a halt to the boycotts that the Commission had received complaints about.

As well as a major educational effort to assist professionals understand their rights and obligations under the competition laws the Commission has been and is active in its enforcement and adjudicative roles vis-a-vis the professions.

6.1 *Anaesthetist Case*

On 17 December 1998 the Commission settled injunction proceedings it had instituted in the Federal Court of Australia against the *Australian Society of Anaesthetists* and four individual anaesthetists from the State of New South Wales. In its proceedings instituted in October 1997, the Commission had alleged that unlawful agreements were reached by anaesthetists at three private hospitals to charge \$25 per hour for ‘on-call’ services which ensured an anaesthetist, although not on site, was available for emergency and after hours anaesthetic services at the hospitals.

The Commission had also alleged that on 3 April 1996 certain anaesthetists reached an unlawful agreement to tell the administrators at one of the private hospitals that unless the hospital agreed to pay for the supply of on-call services from 1 May 1996 those anaesthetists would not supply such services (a ‘boycott agreement’).

The Commission alleged that in late 1994, the ASA (NSW section) formed a sub-committee to formulate guidelines for the provision of on-call services in private hospitals. A sub-committee report was circulated to members in 1995. It said the ASA should “recommend and set an appropriate on-call fee to be paid by private hospitals to on-call anaesthetists” and that this fee should be \$25 per hour.

It was alleged that the sub-committee’s recommendations were endorsed by the ASA (NSW) Committee of Management in September 1995 and further endorsed at the annual general meeting of the NSW ASA in March 1996.

It was alleged that the anaesthetists, through their medical practice companies, arrived at agreements with other anaesthetists to charge a \$25 per hour on-call services fee. The Commission also alleged that the ASA and its NSW Chairman induced or attempted to induce and were knowingly concerned in, or a party to one or more of the agreements.

The anaesthetists and the ASA gave undertakings to the Federal Court that they would not engage in fixing, controlling or maintaining prices offered or charged by them for the supply of on-call services, and that they would not enter into agreements having the

purpose, effect or likely effect of substantially preventing, hindering or lessening competition in the market for the supply of on-call services.

The ASA also undertook to the Federal Court to develop and implement, at its own expense, a program of compliance with the *Trade Practices Act*. The program will be based on Australian Standard AS 3806. The Federal Court ordered that the respondents pay \$60,000 toward the Commission's costs.

In this case the Commission did not seek penalties as it was the first enforcement action against medical professionals following the competition policy reforms. However, a breach of the undertakings to the court would put the specialists or their association at risk of contempt of court.

ACCC v Real Estate Institute of Western Australia & Others

In October 1999, the Commission obtained declarations and injunctions in the Federal Court, Perth, in its proceedings against the Real Estate Institute of Western Australia and its Executive Director, Mr Michael Griffith.

After considering joint submissions from the Commission, REIWA and Mr Griffith, the Court declared in consent orders that REIWA had breached the anti-competitive provisions of the Trade Practices Act 1974. It restrained REIWA from engaging in similar conduct in the future and ordered REIWA to institute a trade practices compliance program. It also ordered public notices and payment of the Commission's costs. The Court also made declarations that Mr Griffith was knowingly concerned in the breaches in his capacity as Executive Director.

REIWA, whose membership comprises some 80 to 85 per cent of real estate agents operating in Western Australia, admitted that certain of its Rules and Rules of Practice had the effect of substantially lessening competition in the WA real estate market and breached the Act. It also admitted that it entered into agreements with the South West Regional College of TAFE and the West Coast College of TAFE (known at the time of the agreement as the North Metropolitan College of TAFE) which fixed the student fee for a training course, breaching the Act's price fixing provisions.

The Court made further declarations that REIWA's legal adviser, Mr Conal O'Toole, was knowingly concerned in the price fixing when he prepared the agreements with the

TAFE colleges. He was also ordered in February 1999 to refrain from engaging in similar conduct in the future and to take part in a trade practices compliance program.

In his judgment Justice French said that:

"...prior to the resolution of these proceedings, [there was] a strong, indeed it might be said righteous belief within REIWA of its entitlement to behave in the way in which it did, which was in blatant contravention of various provisions of Part IV*. In light of that entrenched culture of non-compliance, no doubt based upon misunderstanding of the application of Part IV, there is a need for the development in REIWA of an institutional sensitivity to and understanding of the principal provisions of Part IV."

This case serves as an important reminder to professional bodies that they are subject to the Act and, in particular, highlights the pitfalls for professional bodies that do not ensure that their own regulatory frameworks do not contravene the provisions of the Act. Further, the decision sends a clear warning to professional bodies about contracts or arrangements which they enter into with others in connection with their professional activities. Also, officers of professional bodies must ensure that their actions comply with the law as the Commission has and will continue to take action against individuals involved in such breaches.

This case also highlights the need for legal practitioners to comply with the Act when providing advice to clients. Legal practitioners who are, directly or indirectly, knowingly concerned in, or a party to, a contravention of the Act face a serious risk of being implicated in that contravention.

6.2 *ACCC v David Charles Miller*

The Commission alleged that Sure Sale Systems Pty Ltd offered services under the Sure Sale System to real estate vendors in Western Australia on condition that the vendors acquired various services from nominated third parties, including settlement services from Kott Gunning solicitors.

Mr Miller, a partner of Kott Gunning and legal adviser to Sure Sale, prepared the standard contracts used by the companies and provided advice on promotional material distributed to the public. The Commission alleged a contravention of the third line forcing provisions of the TPA.

By consent, the Federal Court of Western Australia declared that Mr Miller:

- Aided, abetted, counselled or procured Sure Sale to breach section 47 of the TPA; and
- Was directly or indirectly, knowingly concerned in or a party to the contravention by Sure Sale of section 47 of the TPA.

Mr Miller gave a written undertaking to the Court not to be involved in conduct prohibited by section 47 of the TPA for a period of three years.

The Commission is currently involved in the following litigation:

On 27 July 2000 the Commission instituted proceedings in the Federal Court, Perth, against the Western Australian branch of the Australian Medical Association and Mayne Nickless Ltd alleging that they were involved in price fixing and other anti-competitive conduct in breach of the Trade Practices Act 1974. The Commission alleges that:

- from December 1995 until February 1997, the AMA (WA), on behalf of the Visiting Medical Practitioners at Joondalup Health Campus, entered into negotiations with Mayne Nickless to determine the terms and conditions under which the VMPs would provide their services for the care of public patients at the new Joondalup Health Campus (formerly Wanneroo Hospital);
- during those negotiations the AMA (WA) told Mayne Nickless that the VMPs would withdraw their services unless Mayne Nickless agreed to their terms;
- the negotiations culminated in the Joondalup Health Campus Visiting Medical Practitioner Agreement which, among other things, fixed the price at which the VMPs provided their medical services for the care of public patients.

The ACCC is alleging in its proceedings that, by reason of the above conduct:

1. The AMA (WA): - arrived at an understanding the purpose of which was to prevent, restrict or limit the supply of medical services by some or all of the VMPs to Mayne Nickless; - arrived at, and gave effect to, an understanding which fixed the prices for medical services supplied by the VMPs to Mayne Nickless for the care of public patients at the JHC; - arrived at, and gave effect to, an understanding which substantially lessened competition in the market for medical services for the care of

public patients; and the AMA Chief Executive, Mr Paul Boyatzis, and former President, Dr David Roberts, were each knowingly concerned in the AMA's contraventions, and

2. Mayne Nickless Limited: - arrived at, and gave effect to, an understanding which fixed the prices for medical services supplied by the VMPs to Mayne Nickless for the care of public patients at the JHC;

- arrived at, and gave effect to, an understanding which substantially lessened competition in the market for medical services for the care of public patients; and Mayne Nickless's General Manager (Western Australia and Asia), Mr Martin Day, and JHC Chief Executive, Mr Ian MacDonald, were each knowingly concerned in the contraventions by Mayne Nickless Limited.

The proceedings between the Commission and the AMA will be determined at a penalty hearing on 7 August 2001. However, the proceedings between the Commission and Mayne Nickless are adjourned for a further directions hearing on 20 July 2001.

7 ACCC Adjudication Activities

The Commission has been active in its adjudication role in the professional sector and this is likely to increase in the future.

Australian Medical Association

On 31 July 1998 the Commission granted authorisation until 30 June 1999 to the South Australian and Federal Australian Medical Associations who had applied to the Commission for authorisation for the AMA and its members to collectively negotiate and give effect to a Fee for Service Agreement for the remuneration of visiting medical officers treating public patients in South Australian rural public hospitals.

South Australia has 65 rural hospitals ranging from some with only one doctor to others with 25-50. There are very few resident specialists in rural SA and hospitals arrange periodic visits by particular specialists to cover their needs. Emergency support for complicated matters is arranged by flying 'recovery' teams from Adelaide or by airlifting patients to Adelaide. A major issue in the South Australian rural medical system is trying to attract doctors. In mid-1998, it was estimated that the system was short by 30-40 doctors.

In a written determination dated 31 July 1998 the Commission indicated that it considered that the Fee for Service Agreement had anti-competitive effects because it acted as a price floor for all hospitals in South Australia. Hospitals in regions that have little trouble attracting doctors would have had to pay the same rate for medical services as those in regions that have difficulty. Sometimes negotiations are conducted to provide doctors with a package over and above that provided by the Fee for Service Agreement, but negotiations never result in a discount to the hospitals.

While the Commission agreed that the provision of medical services provides many public benefits, it was not convinced that the Fee for Service Agreement was the only method that would produce them. The Commission did, however, recognise that the South Australian Health Commission and the AMA and its members had established collective negotiation techniques. In light of the fact that doctors carrying on their professional businesses in SA without incorporating were not subject to the *TPA* until July 1996, the Commission indicated that it recognised some public benefit in allowing the parties to phase in a less regulated system.

Australian Society of Anaesthetists

On 8 October 1999 the Commission dismissed an application for authorisation lodged by the Australian Society of Anaesthetists (ASA) to undertake negotiations with health funds regarding rates and conditions on behalf of its members. The ASA also wished to be able to inform its members as to whether the ASA considers any standard form agreement (including rates of payment) arising from the negotiations to be fair and reasonable. It would make clear that the final decision rests with the individual anaesthetist and that he/she retains the right to negotiate individually.

The Commission was of the view that:

- the proposed conduct was likely to lead to an agreement in relation to minimum prices at a State level. The Commission considers price agreement to be one of the most serious anti-competitive practices. In this case, it considered that substantial weighting should be given to the detriment arising from the likely price fixing effects of the proposal;

- while the ASA claimed that anaesthetists do not compete with each other, the Commission's view was that , as alternative providers of anaesthesia services, anaesthetists are in competition with each other for the purpose of the Act;
- the development of 'no gap' or 'known gap' products would represent a public benefit. However, the Commission was not satisfied that the proposal would lead to such products being made available;
- the proposal to have negotiations conducted at a State level did not satisfy the Commission's concern with respect to equalising negotiating power. It remained of the view that the proposal had the potential to reverse the balance of negotiating power and not lead to a true equalisation of any imbalance that may exist. The Commission also had reservations concerning the effectiveness of the proposed barriers to the exchange of information given the corporate structure of the ASA;
- the ASA could provide guidance to its members on issues that needed to be addressed in their negotiations without conducting centralised negotiations through State Committees of Management. This would enable some of the concerns expressed about the possible introduction of US style managed care to be mitigated. The Commission was encouraged to note that anaesthetists were not implacably opposed to contract as other sections of the medical profession seem to be.

Royal Australasian College of Surgeons (RACS)

The Commission investigated allegations that RACS' processes restrict entry to advanced medical and surgical training in breach of the Trade Practices Act.

The Commission investigation has concentrated on RACS' role in determining how many trainees received advanced training in orthopaedic surgery and how it assesses overseas-trained specialists referred to RACS by the Australian Medical Council. The Commission formed the view that RACS' procedure and conduct may constitute a breach of some of the competition provisions of the Act and put this view to RACS.

On 24 November 2000, RACS applied for authorisation of its processes in:

- selecting, training and examining surgical trainees in each of the nine specialities in which it conducts training;^{xii}
- accrediting hospital posts as being suitable for training surgeons ; and

- assessing the qualifications of overseas-trained practitioners.

The RACS lodged a supporting submission on 30 March 2001. The Commission then invited interested parties to provide submissions or comments. While almost 50 submissions have been received, the Commission is still awaiting submissions from several key interested parties.

On 2 May, the Commission granted interim authorisation to the RACS until it issues a draft determination or 31 December 2001, whichever is the earlier, at which time the need for interim authorisation will be reviewed.

The Commission is currently assessing the RACS application. A draft determination is expected towards the end of the year.

7. International

There is an important International dimension to this topic. This concerns relations affecting international trade and professional business services, for example, nationality and local presence requirements, restrictions on investment ownership, restrictions on the exercise of professional activities, recognition of qualifications and so on. In this area, there are a number of significant and proposed international agreements and activities in support of liberalised trade in investment services and other policy steps and issues.

ⁱ This section of the paper draw heavily on a paper prepared by David Parker, Blair Comley and Vishhal Beri of the Treasury, Australia for the APEC Workshop on Competition Policy and Deregulation, Quebec, Canada May 18 – 19 1997, and a subsequent paper by the author of this paper and those three authors for the APEC Regulatory Reform Symposium held on behalf of the APEC Committee on Trade and Investment in Kuantau, Malaysia, 5-6 December 1998.

ⁱⁱ See section 4 *TPA*

ⁱⁱⁱ For example, Rule 34 *Medical Rules* 1987 under the *Medical Act* 1894 (Western Australia) provides

s34 (1) Subject to sub rule (2), a medical practitioner shall not cause or permit an advertisement to be published in connection with his practice as a medical practitioner except in accordance with Schedule 2.

(2) Where the Board is of the opinion that by reason of the isolation of an area, the unavailability of newspapers or postal services or both the Board may approve of advertising by means other than those referred to in clauses 1 and 2 of Schedule 2.

Schedule 2 provides *in part* as follows:

(1) An advertisement shall not occupy more than a 5 centimetre wide column or equivalent space.

(2) The printing of the advertisement shall be-

- (a) “run on” without spacing or display
- (b) of uniform type for the name and other particulars
- (c) in the type face used for non-display advertisements

(3) The content of the advertisement shall state only –

(a) with respect to medical practitioners –

- (i) the name of the medical practitioner and if the practice is carried on in association with other medical practitioners the names of the other medical practitioners

(ii) the address of his practice or, if more than one, then each of those addresses

(iii) the telephone number of each practice and the telephone numbers to be called after hours

(iv) the title “doctor” or such other title indicating that the person is a medical practitioner that is approved by the Board

(v) the languages spoken by the medical practitioner

(vi) the hours of attendance provided by the medical practitioner.

(b) the commencement of a practice – the extension of a practice to a new area – the resumption of practice – the closure of a practice for any period exceeding 30 days – the resumption of a practice after any period exceeding 30 days – the change of address of a practice – the sale of a practice,

as the occasion or circumstances requires.

(4) An advertisement shall not appear in more than 2 newspapers circulating in the area of the practice.

(5) An advertisement shall not appear in more than 5 consecutive daily issues of a newspaper.

Also see *Chiropractors Registration Board Rules 1966* made under the *Chiropractors Act 1964* (Western Australia) which includes:

s 10C(2) A chiropractor shall not:

(a) tout or canvas for patients

(b) pay, or offer to pay, commission for the introduction of new patients

(c) practice, or offer to practice, for donations in lieu of fees

(d) depart from his scale of fees and charges except bona fide necessitous cases

^{iv} *Regulation of professional markets in Australia: issues for review – A discussion paper – Trade Practices Commission – December 1990 at page 6.*

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- v Trade Practices Commission - *Study of the professions* – Final Report – July 1982 – *Accountancy* at page 2
- vi Trade Practices Commission – *Study of the Professions* – Final Report – September 1992 *Architects* at page ix
- vii Trade Practices Commission – *Study of the Professions* – Final Report – March 1994 – *Legal* at page 3
- viii Ibid at pages 6 and 7
- ix *National Competition Policy* Report by the Independent Committee of Inquiry, August 1993, Australian Government Publishing Service, at p.135.
- x Ibid at p.135.
- xi See Parts VII and IX of the *TPA* and sections 4(1)(b) and 5 of the *State and Territory Competition Policy Reforms Acts*
- xii The nine RACS specialties are: general surgery; cardiothoracic surgery; neurosurgery; orthopaedic surgery; otolaryngology-head and neck surgery; paediatric surgery; plastic and reconstructive surgery; urology; and vascular surgery.