THE APPLICATION OF COMPETITION PRINCIPLES TO THE ORGANISATION OF THE LEGAL PROFESSION

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I. INTRODUCTION

The Final Report on the Legal Profession published in March 1994 by the Australian Trade Practices Commission begins:

> 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.[1]

The Commission further made clear that it saw the reform of the legal profession as being "an important part of the agenda for micro-economic reform and the development of a national approach to competition policy".[2] This was said to be because inefficiencies in the provision of legal services "will be passed on as costs incurred by downstream users including business exposed to international

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1 Trade Practices Commission, *The Need for Regulatory Reform*, March 1994 at 3.

2 *Ibid.*

competition and final users".[3] Government policy at all levels, the Commission said, was "to expose more sectors of the Australian economy to the discipline of market competition as the preferred means of improving their efficiency and/or competitiveness and hence the welfare of the community at large".[4]

Notwithstanding "the unique role played by the legal profession in the judicial and legal systems" - which would "need to be given due weight" - the Commission concluded that competition policy and law principles "should be applied to the business and market activities of all legal practitioners in the same way as they apply to other business activities".[5]

The consequences and application of this fundamental (and somewhat simplified) competition philosophy were far-reaching. In essence, the Commission rejected the public interest arguments in favour of regulation of the legal profession - both legal or statutory regulation and self-regulation in the form of rules of conduct laid down by law societies and bar associations. In its place, it recommended "comprehensive reform of these regulatory arrangements" throughout Australia "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".[6] The existing regulatory provisions, the Commission thought, inhibited "market forces and competitive pressures", discouraged innovation, contributed to inefficiency in the organisation of legal practice and the delivery of legal services and thereby had adverse effects on the costing and pricing of legal services.[7]

Certainly, the Commission conceded, there were "sound public interest reasons for ensuring that lawyers practise according to high professional and ethical standards and contribute to the maintenance of a judicial and legal system of high standing".[8] But, in the view of the Commission, they were objectives that 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".[9]

These are views that should not go unchallenged. One can readily accept the general market and efficiency philosophy and its general validity across the broad spectrum of commercial and industrial activity. But it does not follow that its unmodified application to the legal profession will not have a serious and detrimental impact on the integrity of the legal system and on the conduct of litigation in the Courts in particular.

To make good the argument that the Commission has been over-zealous in its application of the concept and principles of competition to the legal profession, one

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3 *Ibid.*
4 *Ibid* at 3-4.
5 *Ibid* at 4.
6 *Ibid* at 6.
7 *Ibid* at 6-7.
8 *Ibid* at 7.
9 *Ibid.*

needs first, of course, to look more closely at the precise areas selected by the Commission for reform. These can be summarised as follows:

1. The *Trade Practices Act* 1974 (Cth) should be amended so that it applies "in full to the market conduct of the legal profession and to the rule making and other activities of its professional associations", with the intention that the collective rules of the profession and market conduct of lawyers "are subjected to competition law in the same way as other sectors of business";[10]
2. full inter-state recognition of legal practising certificates, no matter in which Australian jurisdiction issued;
3. the enactment of legal measures "to open up the supply of legal services to appropriately qualified non-lawyers to the maximum extent that is consistent with the public interest", based on the principle that there "should be no necessary presumption that any area of legal work should be reserved to lawyers without scrutiny";
4. the elimination of the "functional division between the work of barristers and solicitors" in those States (New South Wales and Queensland) where, at present, separate practising certificates are issued to barristers and solicitors;
5. the removal of Bar rules which reinforce the division of the profession into the separate branches of barristers and solicitors;
6. the establishment of specialist accreditation schemes as a means of informing the market but in a way that does not create barriers to entry into areas of specialised legal practice;
7. the removal of restrictions on the organisational structure which lawyers may adopt and in particular the enactment of rules which will permit lawyers to establish incorporated practices, multi-disciplinary practices with other professions and occupations, and franchise arrangements and also share profits with non-lawyers;
8. the breakdown of all rules which require barristers to operate as sole practitioners and/or from approved Chambers and which prevent barristers from combining in practice with solicitors and non-lawyers in partnership or in incorporated practices;
9. abolition of all existing fee scales for legal services and the adoption of more market-driven pricing practices through, inter alia, the publication of periodic surveys of prices and the introduction of statutory information disclosure requirements in relation to the basis for calculating costs as well as rules regarding the giving of estimates;
10. the introduction of limited contingency fee arrangements but with (non-market) restrictions on method and amount;

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10 *Ibid.*

11. lawyers should have the same freedom as any other trader to advertise and 'tout' for business (that is, subject to the fair trading law prohibitions on misleading and deceptive conduct);
12. a tightening up of professional disciplinary and client complaint handling processes which, the Commission said, "are essential for maintaining high professional and ethical standards which protect the interests of clients and the legal system and will be of even greater importance in a more competitive legal services market";
13. the retention of compulsory professional indemnity insurance, though without any law society direction as to the placing of that insurance with a particular insurer;
14. the abolition of the rank of Queen's Counsel.[11]

The perusal of the above list of major reforms that are proposed by the Commission reveals one interesting anomaly. This is that, although the philosophical base of its position is market competition carrying with it the rejection of the public interest justification for the regulation of those who practise law, the Commission resorts to regulatory controls in the form of the retention of compulsory professional indemnity insurance and a tougher professional disciplinary regime for facilitating the resolution of consumer complaints.

Whether it realised it or not, the Commission has thereby implicitly conceded the case for imposing a degree of regulation and acknowledged that unbridled market competition is not appropriate in relation to the provision of legal services. The question that immediately arises is whether the Commission has drawn the line in the right place or whether in fact there are strong public interest requirements and concerns which justify further inroads into the competition standard as the regulator of the provision of professional services in the legal system. The thesis of this paper is that the Commission has indeed failed to give proper weight to the public interest aspects of the practice of law and that, important as competition and market principles are, they must be balanced against the special considerations that integrity in our judicial system requires. That integrity will only be maintained by practitioners whose competence and ethical conduct are of the highest level. The introduction of 'non-lawyers' whose education and professional training are not derived from the traditions and ethos of the Law is inconsistent with that standard.

II. LEGAL RESTRICTIONS ON THE PROVISION OF LEGAL SERVICES TO "LICENSED" LAWYERS

A central plank of the reforms proposed by the Commission is the notion that "licensed" (ie qualified) lawyers should not have a "statutory 'legal monopoly'"[12] on the provision of legal services to the public. Rather, the Commission said, a "more competitive regulatory framework" should be established which would

11 *Ibid* at 7-12.
12 *Ibid* at 69.

"provide the opportunity for licensed lawyers and non-lawyers to compete in providing legal services within Australia and overseas".[13]

It should be noted that the Commission was not quite brave enough to suggest that non-lawyers should be able to set up in competition with lawyers without any restriction or regulatory restraint. Oh no - a system of "accreditation", based on "appropriate standards" of education and training, should be established. Further, it said, there may be a "need for ... additional consumer safeguards for accredited non-lawyers, for example regarding indemnity insurance and the handling of client moneys".[14]

Not surprisingly, the Commission recorded that most of the legal professional bodies in Australia, including the Law Council of Australia, took issue with allowing non-lawyers to provide legal services.[15] And the points made by these bodies, one would think, were fairly obvious. Thus, for example:

1. ... "unqualified persons will not have the training or expertise to deal with (or even recognise) the complex legal problems which could arise in the course of a matter which may otherwise appear straight-forward" (Law Institute of Victoria).[16]
2. "The [Queensland] Government ... recognises that 3500 solicitors in the private sector in Queensland centre a vigorous and competitive market for legal services" (Queensland Law Society).[17]
3. "Without a substantial system of education and proper standards in existence at an obvious cost, it is a concern ... that non-lawyers will be unable to recognise the change from a 'simple' will or divorce to a complex one before it is too late" (Western Australia Group (WA Law Society, WA Bar Association and Legal Practice Board of WA)).[18]
4. "As to the provision of legal advice, it would seem odd that persons whose distinguishing feature is an inferior knowledge of, or training in, the law should be welcomed by the Commission as an addition to the suite of practitioners available to the client ...
   So far as advocacy is concerned ... it is the experience of practitioners that the distinction drawn perhaps too readily by the Commission between routine advocacy and more complex matters is difficult to sustain in practice" (Victorian Bar).[19]
5. "I ... hope that the Commission will be prepared to shoulder its proper share of responsibility, and not duck for cover, when the first incompetent narrowly trained technician demonstrates his or her incompetence because of such training" (Professor Warren Pengilley).[20]

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13 *Ibid* at 78.
14 *Ibid* at 79.
15 *Ibid* at 57.
16 *Ibid* at 58 (emphasis added).
17 *Ibid* at 58.
18 *Ibid* at 58-9.
19 *Ibid* at 59.
20 *Ibid* at 60.

As against those views, there was recorded a variety of arguments from such bodies as the Australian Council of Social Service, the Public Interest Advocacy Centre, the Trustee Companies Association of Australia and the Federal Bureau of Consumer Affairs, all suggesting in different ways and to a greater or lesser extent that some areas of legal practice at least were amenable to competition from non-lawyers.[21] The point was made that other professionals (for example, accountants and tax consultants) were already competing with lawyers in areas of legal practice that had once been the exclusive domain of lawyers. This development, Mr Rob Clifton Steele (a consultant) said, should be expanded so as to "open up the legal advice industry to anyone who wants to give legal advice and not limit the field only to those who have law degrees...".[22]

In response, the Commission did not go quite so far as to suggest that non-lawyers - described and identified as "other professionals, para-professionals and others who are capable of offering services which are close substitutes in some fields" - could, effectively and competently and in a manner in which the public interest is adequately protected, compete with qualified and experienced lawyers in all aspects of legal practice. It nevertheless concluded that:

> ... licensed lawyers are unnecessarily protected from competition from non-lawyer service providers who may have the training, experience and competence to provide some of the relatively routine, straightforward areas of legal work currently confined to lawyers.[23]

Undaunted by Professor Pengilley's warning (supported by an entire branch of case law known as 'Vendor and Purchaser') that "legal training is required even for conveyancing transactions because one never knows where they will lead to",[24] the Commission selected a number of areas of what it grudgingly called "legal work" but which it said may not necessarily require the skills and training of a qualified lawyer. These were conveyancing, taxation, wills and probate, simple incorporations, uncontested divorce, simple civil claims and administrative and welfare advocacy.[25]

In the case of conveyancing, the Commission said that its assessment was that "exposing lawyers to competition from non-lawyers can reduce the average level of fees *without lowering the quality of the service provided*".[26] No empirical evidence was offered to support this latter qualification. The assessment of quality and competence in the provision of legal services is not an easy task at the best of times and it requires a very considerable knowledge of lawyers and the work that they do.

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21 *Ibid* at 60-2.
22 *Ibid* at 60-1.
23 *Ibid* at 67.
24 *Ibid* at 59.
25 *Ibid* at 67.
26 *Ibid* (emphasis added).

The Commission also argued that the permitted use of non-lawyers:

> ...might also mean for poorer consumers the difference between obtaining legal assistance and going without.[27]

This undoubtedly touches on a very real problem concerning the provision of legal services - indeed one may say, the major problem - namely, the increasingly large areas of conflict (often between the individual and the state) where legal redress is simply unavailable because of the cost of legal services.

The phenomenon of the "gap" between the provision of legal services for the rich (who can afford to pay) and the very poor (for whom, through the medium of legal aid, the state pays) is well understood and is a matter of constant concern for lawyers and governments. The move towards contingency fees is a response to the clearly perceived need to help fill the gap, as well as to supplement a legal aid system which is coming under increasing pressure as governments (and the communities who vote them in) become more and more reluctant to pay the legal bill for the problems of the poor.

The real question is not, however, what is the problem - that is identified - but rather whether it is solved, either substantially or otherwise, by allowing non-lawyers to perform legal work. The nub of the problem is that the performance of legal services is extremely labour-intensive and even non-lawyers will wish to be paid for their services. To say that non-lawyers will charge *less* is not a sufficient answer as the poor very often can afford to pay nothing or virtually nothing. And in any event, traditionally lawyers have often done legal work for no or little remuneration, often on a *pro bono publico* basis or as a means of obtaining a reputation. There is no evidence to suggest that other, non-lawyer professionals such as accountants will have the sort of dedication to the Rule of Law and to the legal rights of the individual and of the under-dog, in particular, that has motivated many lawyers to undertake worthy cases (and causes) for little or no remuneration.

The fact is that the Commission simply does not make out a valid case for ending the legal restriction on the practice of law to qualified lawyers. The assumption is that lawyers do not already compete effectively with one another. The reality is that client mobility is extremely high and certainly the days of unthinking client loyalty to traditional legal advisers have now gone forever. There is a huge contemporary emphasis on excellence in performance and a recognition that anything less will carry the danger of losing existing clients and failing to attract new ones. Practice development and the acquisition of special skills are at the forefront of the minds of most lawyers and their firms.

In transactions where the amount of work involved is relatively predictable, lawyers have become very competitive on price. In other, more complex, transactions or litigation, where the time that will be required for the work is unable to accurately predict in advance, price competitiveness is more difficult to gauge. To a large extent, there has been a move towards charging such work out at an hourly rate. While hourly rates can be compared, the efficiency of different

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27 *Ibid.*

lawyers measured by the number of hours taken to perform a particular task (or the number of lawyers required for the task) is impossible to compare. Those difficulties will not be solved by the introduction of competing non-lawyers, whether professional or otherwise. They too will seek to charge an hourly rate for complex work where the time required cannot be accurately assessed. The basic problem remains unresolved.

III. SEPARATION OF THE BAR

The virtue of the part of its report that deals with the division between barristers and solicitors is that the Commission recognises - or at least does not take issue with - the proposition that advocacy is a specialised function. It acknowledges also that "barristers specialise in advocacy and the provision of legal opinions on referral while solicitors as a group also engage in all other areas of legal work and their provision of advocacy services is therefore of lesser significance".[28]

What the Commission will not accept, however, is that there should be any formal or legal structural division between barristers and solicitors - as exists in Queensland and New South Wales - even where solicitors are given the same rights of audience in the courts as barristers and notwithstanding that solicitors undertake considerable advocacy work in the lower Courts. It therefore recommends reforms, especially in New South Wales and Queensland, that would involve the introduction of common practising certificates as well as common admission for barristers and solicitors.[29]

In this respect, the Commission rejected arguments that the requirement that barristers conduct their practices as sole practitioners (though being able to share some overheads through co-operative Chambers) has a public interest justification because it preserves their independence and ensures their general availability to clients (via the cab-rank rule). Its view was that:

> ... restrictions on business structure of this kind should be seriously questioned because of the limitations they place on the commercial and organisational choices of barristers responding to client needs. Rules which restrict business structure and ownership choices prevent legitimate forms of business co-operation and competition between members of the Bar and between barristers and solicitors which are commonplace in other product and service markets. Such restrictions on business ownership and structure can create a barrier to the entry of potentially more efficient forms of advocacy service provision. They also impose restrictions on the choices available to both lawyers and clients in relation to the supply of advocacy services.[30]

Elsewhere in its Report, the Commission identified as the "entry barrier" to "potentially more efficient forms of advocacy service provision" the "established

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28 *Ibid* at 81.
29 *Ibid* at 107.
30 *Ibid* at 103.

skills and market reputations of incumbent barristers".[31] As was argued by the Victorian Bar Council, solicitors may go to the bar and become barristers without difficulty so that, in economists' terms, the advocacy services market is contestable. And so far as established reputations of incumbents are concerned, as the Victorian Bar Council also put it:

> In any area of activity, commercial or otherwise, the investment in time and capital in acquiring skills and a position in the market will place an incumbent, in a sense, at an advantage to a potential entrant. That is not the test applied by economists, however, since to apply it would, for the purpose of a level playing field, require the dismantling of the efforts of those who have been in the market so that all would face the market with a similar lack of skills, experience or capital.[32]

That approach accords with the widely accepted analysis of Franklin Fisher in his work "Diagnosing Monopoly" in which he described barriers to entry as "the single most misunderstood topic in the analysis of competition and monopoly".[33] Fisher said that it was wrong to treat as a barrier to entry simply anything that made entry difficult. In particular, he thought that where an incumbent has achieved a deserved reputation for reliability and quality of product, it should not be assumed that failure of new entry signals a barrier to entry. To overcome the reputation that the investments made by the incumbent have achieved, the new entrant will - and should - necessarily have either to make similar investments to establish product reputation or offer a price or other incentive that will induce customers to try the new product.[34]

The response of the Commission to the view that the reputation of incumbents, which is the result of prudent investment, should not be regarded as a barrier to entry, was to refer to the difficulties encountered by Compass Airlines in seeking to compete against the two established domestic airlines. The "established operations and considerable sunk costs" of the incumbents and "the start-up and operating costs and risks of the potential entrant", the Commission said, constituted barriers to entry which conferred market power on the incumbents that could "be used strategically to deter entry and so maximise medium term profits". This "economic advantage", however, was not suggested to be "inappropriate" or of such a kind that it should be "dismantled". Nor, it was said further, should the advantages, which "the established skills and market reputations of incumbent barristers" gave to them, be regarded as inappropriate or in need of dismantling, even though they constituted "the main obstacle to rapid entry to the advocacy market by solicitors".[35]

If one accepts the distinction drawn by the Commission between appropriate and inappropriate barriers to entry, and if the view of the Commission truly were that the established market position and reputation of barristers were not to be

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31 *Ibid* at 97-8.

32 *Ibid* at 89-90.

33 F Fisher, "Diagnosing Monopoly" (1979) 19(2) *Quarterly Review of Economics and Business* 7 reprinted in F Fisher, *Industrial Organisation, Economics and the Law*, Harvester Wheatsheaf (1990) p 3.

34 *Ibid*, pp 22-4.

35 Note 1 *supra* at 88.

"dismantled", the debate would be semantic only. However, it is clear that the Commission was addressing the position of individual barristers and not the established position and reputation of the Bar as a whole. Indeed, its recommendations are all directed to breaking down - or "dismantling" - the very structural features of the Bar that give it the established reputation as an institution and that explains its survival in a commercial world where modern technology, capital aggregation and economies of scale and scope have, in most areas, pushed small business almost into oblivion.

This is not to claim that all barristers practising at the separate bar are of a uniformly high standard or that there are no incompetent barristers. But as a group they do possess certain features and claim certain aspirations that mark them out from lawyers practising in law firms. First, they are specialist advocates (or aspire to be). Secondly, they are independent in the sense that they are not beholden to partners and to clients and to an identity of a firm to which they belong. That independence means that they are free to give truly objective advice without any concern as to the potential effect of that advice on what in a law firm situation would be an on-going relationship. It also means that they are likely to be free of conflicts of interest and will not, for example, be in the position of defending the conduct of a commercial or property partner in the firm of which the litigation lawyer is also a member.

Another feature of the bar as a whole is that it will provide a range of advocates at varying levels of price, skill and experience that no firm (no matter how large) can ever hope to match. This was acknowledged by the Commission by way of a reference to a large international firm located in the United Kingdom. The firm had surveyed its use of barristers over a three year period and stated its conclusion as follows:

> The conclusion we drew from this was that there was absolutely no point in contemplating an in-house advocacy department. We could never have had as partners or as employees the 357 barristers we have instructed, and so we could not have replicated their varied expertise. Even if we had confined ourselves to our most popular choices - assuming that they would have joined our firm - we would have faced an enormous problem in coping with the imbalance of the minimum of five and the maximum of 17 advocates needed each day.[36]

On the other hand, the Commission also referred to the views of Justice de Jersey of the Supreme Court of Queensland that "the art of advocacy is over-rated" and that it was "far more difficult to become expert in an esoteric field of law".[37] With respect, I beg to differ. Advocacy in all its facets requires an ability to conduct a trial, to present submissions in appellate courts and to plan litigation strategies. It requires an ability to handle witnesses, a sound knowledge of legal principle, an indepth knowledge of the rules of procedure and evidence and an understanding of the judicial process and of individual Judges. Generally speaking,

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36 *Ibid* at 105, citing M Payton, "The Role of the Bar in International/Commercial Work: A City Solicitor's View", presented at the Bar Conference, 26-7 September 1992, pp 3-5.

37 Note 1 *supra* at 99, reported in *The Courier Mail*, 4 June 1992.

extensive experience of appearing in court as counsel over many years is an essential pre-requisite to the acquisition of such skills.

The skills of barristers as a group and their independence is, in my view, most apparent in the larger jurisdictions (England, New South Wales and Victoria). This is not to decry the strong separate bars that have grown up in recent times in South Australia, Western Australia and New Zealand. But it is where the Bar is most institutionalised, in the sense of either complete de jure or de facto separation and where there are traditions of large sets of barristers' Chambers, that the values of independence and of excellence in advocacy are most prized. It is legitimate to debate whether some of the rules that barristers have historically operated under are necessary to preserve the independence of the bar. The Commission is right to question, for example, rules that prevent a barrister ever attending a solicitor's offices or that always require an instructing solicitor to be in attendance in court, no matter how routine the appearance.[38]

A more difficult and complex rule is that which prohibits direct professional access to a barrister or, in other words, requires a solicitor to be instructed before a barrister can be retained. The Commission saw this rule, along with the requirement that barristers engage only in sole practice, as being an unwarranted restriction on business structure:[39]

> Such restrictions on business ownership and structure can create a barrier to the entry of potentially more efficient forms of advocacy service provision.[40]

And yet, if (as claimed by the various bar associations) the twin prohibitions against direct professional access and practising in partnership do in fact help to preserve the independence of barristers and make the provision of the services of advocates more readily available to the public at large, through the cab-rank rule (a rule that does not and cannot operate in a law firm), then surely that is in the interests of the goal (consumer welfare) that competition law and policy serves.

It also seems to be implicit in the approach taken by the Commission that structural or organisational restrictions are necessarily anti-competitive. This is reminiscent of the debate about exclusive dealing arrangements by which manufacturers or distributors, in return for certain marketing and efficiency gains and benefits, require franchised dealers in their products to sell those products exclusively. One view is that *any* restriction is to be regarded as being anti-competitive. But in *Fisher & Paykel Ltd v Commerce Commission*,[41] the High Court of New Zealand, adopting the views of distinguished US economists and also following high US legal authority, held that contractual and organisational arrangements of that kind, by improving efficiency, could enhance the competitiveness of such firms, a result that helped to fulfil the objectives of competition law.

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38 *Ibid* at 105.
39 *Ibid* at 100 and 103.
40 *Ibid* at 103.
41 [1990] 2 NZLR 731.

The reforms recommended by the Commission are in fact designed to "dismantle" the structural features of the separate bar that presently give the Bar its reputation. If that reputation is dissipated, consumers will be less informed as to whom they should turn in order to obtain expert advocacy services. Certainly individual lawyers at the very highest level will be known to have expertise but that is no substitute for a readily identifiable body of specialised advocates supported by common aspirations, beliefs and closely-knit peer pressures that go a long way towards ensuring that the requisite standards are achieved and maintained. The separate bar has an identity that can be likened to product differentiation, if one wishes to employ competition terminology. Breaking down that differentiation will serve only to strip a group of lawyers who have accepted a set of rules and disciplines that are intended to ensure that they are truly specialist advocates, of a reputation and recognition to which they are entitled.

This is not to argue that solicitors generally should not have rights of audience in the courts - as they do throughout Australia and New Zealand - or that an individual solicitor of merit should be prevented from seeking to establish a reputation as an advocate that is the equal or better of any barrister. But the public are entitled to know that a barrister is someone who is a sole practitioner and as such is independent and is also someone who has subjected himself or herself to a particular style of advocacy practice. By contrast, a solicitor will be known to be someone who practises in a particular way and who undertakes to provide a total service to his or her clients. The 'total service' package may of course appeal to some litigants. Others may be less inclined to have as their counsel lawyers whose commitment to providing the total service impacts on the experience that they are able to acquire appearing in court as counsel, or lawyers who, if in law firms, are subject to pressures and loyalties to clients that may impact on their ability to give independent and objective advice.

The rule against direct professional access also plays an important part in the maintenance of the identity of the separate Bar. It discourages barristers becoming dependent on an on-going relationship with particular clients and hence helps to maintain the quality of independence that has been referred to. However, it has to be conceded that the rule is looking a little shaky at the moment and that there are increasing pressures to either do away with it altogether or to at least relax it so as to allow chartered accountants and other firms to brief barristers directly, at least on advisory work. Indeed, legislative change in some jurisdictions has already occurred or is in the process of occurring. It is clear that this process needs to be carefully controlled if the bar is not to lose the very quality of independence that is its strength. Similarly, if barristers were to end up providing total service packages to clients, it would inevitably be at the cost of advocacy specialisation. It is simply not possible to provide the full service of handling clients' litigation requirements from initial instruction to trial appearance without detracting from the opportunities of acquiring experience as an advocate through regular and frequent court appearances.

IV. CONCLUSION

There are various other specific reforms proposed in the Report of the Commission. For example, as referred to above, the Commission has proposed the abolition of the rank of Queen's Counsel.[42] I have, however, restricted my commentary in this article to the major, structural reforms proposed for the legal profession which, if enacted, will have a significant impact on the way in which law is practised and on the standard of legal services provided to the public.

It is my clear and unambiguous view that, if the measures proposed by the Commission for allowing non-lawyers to 'compete' with lawyers are introduced and if the identity of barristers is diminished in the manner proposed by the Commission, the losers will be users of legal services. While in theory, the introduction of a greater number of people providing legal services may have an effect on reducing the price of legal services in some areas, it will be at the cost of lessening - and probably very considerably - the quality of legal services. The assessment of competency in legal work is not an easy task at the best of times. The maintenance of high standards in university law schools and by professional bodies such as law societies and bar associations is therefore absolutely critical to providing some guarantee of at least minimal professional competency. So too are peer pressures, legal traditions and pride in being a lawyer. The Commission's reforms will do nothing to enhance those values and will, to the contrary, weaken them.

To anyone who truly understands and knows the importance of quality in the provision of legal services, including especially the quality of legal representation in court, the Report of the Trade Practices Commission is hard to take seriously. It borders on the nutty. But regrettably, the members of the Commission, although not understanding the nature of legal services, are not nutty. The Commission has great standing. Its report will be taken very seriously. There is a great danger that its populist appeal will lead to legislative reforms that will be against the public interest. That will not matter to the many who dislike lawyers. It may not matter to politicians and to bureaucrats who do not welcome the greater use of judicial review proceedings by lawyers acting for citizens complaining of the abuse of governmental power. But it will matter to the quality of the legal system and ultimately to the maintenance of the Rule of Law.

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42 Note 1 *supra* at 212.