17 Legal services

Legal services have an important role in ensuring justice according to the law and in the daily operations of businesses. Many individual Australians also use services provided by legal practitioners — for example, in the areas of finance, housing, wills, compensation for injury and family law. The legal services sector has an annual turnover of more than $6 billion per year and employs more than 70 000 people (ABS 2000b).

Legislative restrictions on competition

A range of laws, regulations, professional rules and court responsibilities govern legal practitioners and how they operate. Despite reforms by the legal profession in recent years, restrictions on competition in legal practice remain. Key restrictions include regulation of entry to the profession, the reservation of legal practice, commercial restrictions on legal practice ownership and advertising, and the monopoly provision of professional indemnity insurance for solicitors.

Entry standards and reservation of title

Registration as a legal practitioner requires applicants to meet admission prerequisites regarding training, experience and character. Training is usually a law degree and practical experience is generally articles in a legal office or completion of a practical training course. Only registrants are allowed to use restricted titles such as solicitor and barrister.

Legislation reviews have found net community benefit from maintaining entry restrictions: significant public harm (both to clients and third parties) could result from incompetent and unqualified persons providing incorrect or poor advice.

Reservation of practice

State and Territory laws reserve certain work, defined as legal work, for registered legal practitioners by making it an offence for unqualified persons to supply such services. The definition of legal work varies across jurisdictions, but generally includes drawing or preparing wills or documents

that affect rights between parties, affect real or personal property or relate to legal proceedings, and probate work.

The definitions of legal work are generally broad and there is a cross-over between work that lawyers and others may perform. In particular, there is little if any distinction between complex technical matters requiring legal training and less complicated services (such as wills and probate) that appropriately trained non-lawyers may be able to perform.

In three jurisdictions (Queensland, Tasmania and the ACT) conveyancing — that is, the legal transfer of property — continues to be defined as legal work. In Queensland, a Green Paper on legal reform has recommended that non-lawyers be allowed to provide conveyancing in competition with legal practitioners (Queensland Government 1999, p. 28). Tasmania's regulatory impact statement on the review of the *Legal Profession Act 1993* makes a similar preliminary recommendation (Legal Profession Review Body 2001, p. 26).

Commercial restrictions

Despite reforms in recent years, restrictions on lawyers' commercial operations remain, including restrictions on advertising and the ownership and organisation of legal practices.

Historically, restrictions on advertising were imposed to uphold the dignity of the profession by preventing legal practitioners from touting for business. The traditional view of the legal profession was that the benefits from restricting advertising outweighed costs such as reducing information to consumers and limiting any gains from competition.

More recently, advertising rules have been relaxed. Nonetheless, some jurisdictions have rules about advertising as a specialist or offering specialist services. Generally, professional association rules also prohibit advertising that is vulgar, sensational or otherwise would or could bring the profession into disrepute. The Northern Territory has rules dealing with advertised prices and Western Australia has guidelines on advertising. Both Queensland and New South Wales have recently introduced laws that limit the ways in which lawyers may advertise workers compensation services. These laws relate only to workers compensation claims.

Except in New South Wales (where legislation was recently passed to allow the incorporation of legal practices), legal professionals in all jurisdictions are restricted in their ability to share profits with non-legal partners. This means that they are limited in their ability to share the profits of their legal practice with non-lawyers, so have difficulty in forming multidisciplinary practices with other professionals such as accountants or doctors in a number of jurisdictions.

Historically, the legal profession used the need to preserve the confidentiality and trust of the lawyer/client relationship to justify controls over the ownership and organisation of legal practices. The argument is that lawyers must be allowed to pursue their clients' interests to the exclusion of the interests of third parties involved in the practice.

The Law Council of Australia has identified practice ownership and profit-sharing restrictions in the legislation of every State and Territory. It considers 'there should not be any restrictions on the manner in which lawyers choose to practise unless that restriction is in the public interest' (Law Council of Australia 2000).

Limited evidence links ownership restrictions to the maintenance of professional ethics. New South Wales, for example, concluded from its NCP review that the most effective way in which to achieve professional legal objectives is to maintain a clear focus on the accountability of individuals rather than to restrict ownership. The New South Wales Parliament passed legislation in October 2000 to allow the incorporation of legal practices.

Introducing the Bill, the Attorney-General detailed some costs involved in maintaining restrictions on ownership. These include limits on the competitive position of solicitors, management difficulties, complex decision-making and an inability to raise capital for expansion or to enter other markets. The Attorney-General described modern legal practice as rendering the partnership structure obsolete for large practices (Shaw 2000, p. 7624).

Other governments are also reviewing practice ownership and profit-sharing arrangements. Regulatory practice in other jurisdictions is an issue for these reviews because consistent regulation may reduce barriers to competition across State and Territory boundaries.

Professional indemnity insurance

Professional indemnity insurance is designed to meet client or third party claims of civil liability that may arise from practitioners' negligence or error. It is a common feature of many professions.

There are two significant restrictions on competition in current professional indemnity insurance arrangements for lawyers. First, unlike legislation for other professions, legislation in all jurisdictions obliges lawyers practising as solicitors to obtain professional indemnity insurance. Second, in all States and Territories there are legislated restrictions on the purchase of professional indemnity insurance, generally by requiring practitioners to be covered by a master policy purchased through a regulatory body. In South Australia, the regulatory body tenders out the work and there have never been fewer than two providers. There are two licensed providers of insurance in the ACT.

Mandatory insurance

Legal professional bodies generally argue that mandatory professional indemnity insurance has two benefits. First, it minimises information problems regarding compensation for loss. Second, it creates a sustainable insurance market by creating a pool of mixed risk, where low-risk solicitors cross-subsidise the riskier performers. The argument is that compulsion is required to enable creation of a sufficiently large pool of insured practitioners to operate effectively.

The counter to this argument is that insurance schemes generally operate to remove their worst risks by increasing premiums significantly or by refusing to insure high-risk operators. The central public interest question is whether positive outcomes such as improved public confidence in the legal profession and the effective operation of insurance schemes outweigh any anticompetitive effects from excluding uninsured lawyers from practising. Reviews have generally found that compulsory professional indemnity insurance is in the public interest.

Monopoly versus competition in insurance provision

A key question is whether it is in the public interest to require solicitors to obtain professional indemnity insurance from a single professional body on the terms and conditions set by that body. This lack of competition prevents insurers from competing for clients and denies lawyers the chance to obtain insurance that better suits their individual needs. For example, competition may facilitate the development of policies that reflect the riskiness of the type of work practitioners undertake. Those who conduct lower risk work may be able to pay a lower premium than those who conduct higher risk work.

Available evidence gives some support to the case for allowing solicitors to choose their insurer.[1] The New South Wales NCP review of the *Legal Profession Act 1987* noted two examples. In its submission to that review, Willis Corroun Professional Services Limited indicated, based on its experience as the agent of insurers entering the ACT market, that competition led to broader cover, cheaper premiums and a higher level of service. The New South Wales Bar Association noted that the insurance market for barristers has already been deregulated: there are two providers of insurance to barristers and there is price competition (Attorney General's Department [NSW] 1998).

In defence of the monopoly arrangement, professional bodies argue that allowing choice of insurance provider will result in the better risks leaving to obtain more suitable arrangements elsewhere, ultimately leaving an unsustainable arrangement comprising only the poorer risks and a reduced

[1] Barristers are generally able to choose from at least two insurers.

premium pool for meeting claims. This may then lead to the original pool having to reduce its liabilities, screening out the worst risks by not insuring them. Such high-risk practitioners would probably then be unable to practise, because they would have difficulty finding alternative insurance.

Such an outcome is relatively common in other insurance markets. The ability to exclude very poor risks allows insurers to operate insurance arrangements by maintaining a commercially viable balance of risks. There may even be some benefit to the community from excluding lawyers with poor records from practising, given that such exclusion could reduce the likelihood of future negligence or error.

Regulating in the public interest

Legal services regulation should promote competition, better quality services and lower prices. It should also protect consumers and the wider community. A National Competition Council staff paper explores many of the issues raised by professional regulation (Deighton-Smith, Harris and Pearson 2001). It also highlights principles for regulating professions and occupations, including the desirability of:

- regulatory objectives being clearly identified;
- links between specific restrictions and the reduction of harms being identifiable;
- regulations and other rules of conduct being transparent and public;
- restrictions being consistently applied, with a presumption against 'grandfather clauses';
- enforcement actions being open, accountable and consistent;
- regulatory bodies having broad representation, with strong community involvement; and
- regulation being the minimum necessary to achieve the government's objectives.

The Council considers there is a public benefit case to support, in principle, the licensing and registration of legal practitioners. However, for all other restrictions, the Council looks for robust public interest justifications and for regulatory outcomes to meet the above principles in assessing NCP compliance.

Review and reform activity

In all jurisdictions, review and reform of legislation regulating legal services is still underway (table 17.1).

Table 17.1: Review and reform of legislation regulating legal services

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
New South Wales	*Legal Profession Act 1987*	Licensing, registration, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance, advertising (must not be false, misleading or deceptive) and mandatory continuing legal education)	Review completed in 1998. Recommendations included allowing incorporation of legal practice and allowing competition in professional indemnity insurance.	Implementation underway. To date, the rule requiring solicitors to have majority control of multidisciplinary practices has been abolished, and legislation allowing solicitors to incorporate was passed in October 2000 (commenced on 1 July 2001). Government not yet responded to the professional indemnity insurance issue. New advertising restrictions for workers' compensation services introduced in May 2001.	Council to assess progress in 2002.
Victoria	*Legal Practice Act 1996*	Licensing, registration, entry requirements, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance)	Review of legal practice legislation completed in 1996, leading to a range of reforms being implemented in the *Legal Practice Act 1996*. Victoria has also undertaken two reviews into professional indemnity insurance, by KPMG (recommending removing the monopoly provision of professional indemnity insurance) and the Legal Practice Board (recommending maintaining the monopoly). The latter report was released for public comment in November 2000.	A draft Government response to the Legal Practice Board review was released in November 2000, for public comment. Response proposed to maintain monopoly provision of professional indemnity insurance (through the Legal Practice Liability Committee).	Professional indemnity insurance — Council to assess progress in 2002. Other areas — meets CPA obligations (June 1999).

(*continued*)

Table 17.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Queensland	*Legal Practitioners Act 1995* *Queensland Law Society Act 1952*	Licensing, registration, entry requirements, the reservation of practice (including conveyancing), disciplinary processes, business conduct (including the process for determining maximum prices, various educational programs and practise courses, indemnity insurance (with law society master policy or an insurer approved by the law society) and advertising)	Department review underway. Discussion paper released in December 1998 and Green Paper released in June 1999. NCP review expected to be completed in 2001.		Council to assess progress in 2002.
Western Australia	*Legal Practitioners Act 1893*	Licensing, registration, entry requirements, the reservation of title, the reservation of practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance, trust accounts, fees, advertising), competitive neutrality	Department review underway. Consultation involved establishing consultative group, releasing an issues paper (June 2000) and seeking submissions (by August 2000).		Council to assess progress in 2002.
South Australia	*Legal Practitioners Act 1981*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including monopoly professional indemnity insurance)	Review underway. Issues paper released in July 1999.		Council to assess progress in 2002.

(*continued*)

Table 17.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Tasmania	*Legal Profession Act 1993*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including monopoly professional indemnity insurance, operation of mandatory trust accounts and advertising (power to Council of Law Society to make rules))	Review underway. Issues paper released July 2000 and regulatory impact statement released April 2001. Preliminary recommendations include removing reservation of conveyancing practice and advertising and ownership restrictions; retaining civil fee scales; introducing mandatory continuing legal education; improving the disciplinary system; and allowing legal practitioners to arrange their own insurance. The review group is seeking feedback on the regulatory impact statement by late May 2001. It is anticipated the final review report will be presented to the Government in mid-2001.		Council to assess progress in 2002.
ACT	*Legal Practitioners Act 1970*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including professional indemnity insurance (two providers), ownership, locally registered foreign legal practitioner advertising (should not be false, misleading or deceptive or suggest legal practitioner is domestic))	Targeted public review underway. Review being undertaken in two stages by the Department of Justice and Community Safety. Stage 1 options paper, canvassing options for reform concerning admission and licensing of legal practitioners, complaints and discipline, released in November 1999, with submissions sought. Government is considering submissions. Stage 2 options paper, canvassing reform issues relating to business structures (including multidisciplinary practices), fee setting, insurance and the statutory interest account to be released in 2001.	As an interim measure pending the full NCP review, the Government amended the Act to introduce a second approved insurance provider.	Council to assess progress in 2002.

(*continued*)

Table 17.1 continued

Jurisdiction	*Legislation*	*Key restrictions*	*Review activity*	*Reform activity*	*Assessment*
Northern Territory	*Legal Practitioners Act*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance and advertising)	Public review underway. Review will also deal with the *Legal Practitioners (Incorporation) Act*, which imposes restrictions on who can own and control companies that provide legal services. Issues paper released in September 2000. Review due to be completed in December 2001.		Council to assess progress in 2002.