4 Legal services

Legal services play an important role in ensuring justice according to the law for citizens and businesses. Legal practitioners provide services in areas such as finance, housing, wills, compensation for injury and family law. The legal services sector has a turnover of more than A$10 billion and employed more than 90 000 people in 2001-02 (ABS 2003a).

Legislative restrictions on competition

A range of laws, regulations, professional rules and court responsibilities govern legal practitioners and how they operate. Each State and Territory has legislation to facilitate the administration of justice and protect consumers by setting standards for who may practise law and how they may represent themselves. Legal practitioner legislation sets certain character, training and practice experience requirements for entry into the legal profession. It requires practitioners to be licensed by a registration board to practise, and it reserves for those practitioners the exclusive right to perform certain types of legal work. It also regulates the business conduct of registered legal practitioners.

The National Competition Council released a staff paper in 2001 that sets out how these legislative measures restrict competition and explores many of the issues raised by professional regulation (Deighton-Smith, Harris and Pearson 2001). The paper highlights the importance of:

- clearly identifying regulatory objectives;
- linking any restrictions on competition to those objectives;
- ensuring the restrictions represent the minimum necessary to achieve the objective; and
- applying best practice principles of transparency, consistency and accountability in the regulatory process.

In its 2001 National Competition Policy (NCP) assessment report, the Council considered that the licensing and registration of legal practitioners provide a net public benefit in principle. For all other restrictions, however, the Council looks for a robust public interest case and regulatory outcomes that meet best practice principles. It uses these criteria to assess jurisdictions' compliance with their obligations under the Competition Principles Agreement (CPA)

clause 5. Other restrictions applied to legal practitioners that may raise competition issues relate to:

- reserved areas of practice;
- restrictions on advertising;
- restrictions on legal practice ownership; and
- the monopoly provision of professional indemnity insurance for solicitors.

Reservation of practice

State and Territory laws reserve certain legal work for registered legal practitioners by making it an offence for unqualified persons to supply the services. The work reserved for lawyers varies across jurisdictions, but generally includes probate work and preparation of wills or documents that affect rights between parties, affect real or personal property or relate to legal proceedings. Reserving practice helps to protect the public by ensuring legal work is carried out by qualified practitioners who are subject to a disciplinary system.

The reservation of broadly defined practices can raise competition issues, however, by preventing suitably trained nonlawyers from performing some work that they could undertake without undue risk to the community. This hindrance can stifle innovation in the delivery of legal services and increase costs to consumers. Conveyancing service fees, for example, fell by 17 per cent in New South Wales between 1994 and 1996, after the Government removed the legal profession's monopoly on this service. It also removed price scheduling and advertising restrictions.

All jurisdictions except Queensland, Tasmania and the ACT permit conveyancers to settle real estate transactions (for assessment of the legislation regulating conveyancers, see volume 2, chapter 5). Most legal practitioner legislation, however, draws little, if any, distinction between other services (such as the drafting of simple wills) that appropriately trained nonlawyers could perform and complex technical matters that require legal training. Some legislation reviews have identified scope to open up additional areas of reserved legal work to competition from nonlawyers.

Advertising restrictions

Advertising allows lawyers to inform potential clients about the services they offer and their terms, thus assisting consumer choice. Advertising controls restrict competition, however, by making it harder for new entrants to make themselves known to potential clients and harder for consumers to compare

the services and prices being offered. They tend to hinder innovation, discourage price competition and reduce consumer choice.

Legal practitioner legislation and professional conduct rules traditionally contained stringent advertising controls to ensure that consumers were not misled by deceptive advertising and that the legal profession was not brought into disrepute. In the late 1980s and early 1990s, advertising controls were relaxed. Generally, the only remaining restriction on advertising by lawyers is that it should not be false, misleading or deceptive, in line with the requirements of the *Trade Practices Act 1974* (TPA) and equivalent State and Territory fair trading legislation. The Northern Territory also has rules dealing with advertised prices and Western Australia has advertising guidelines.

Some jurisdictions have recently introduced new restrictions on advertising personal injury legal services, in response to rising public liability insurance premiums. To comply with the CPA clause 5, these governments must support the advertising restrictions with a public interest case that establishes a clear link between the regulatory restriction and the reduction of the identified harm.

Restrictions on business ownership and association

Most States and Territories restrict legal practitioners' ability to share profits with nonlegal partners. Historically, controls over the ownership and organisation of legal practices have been used to help preserve the confidentiality and trust of the lawyer/client relationship. Lawyers are able to pursue their clients' interests to the exclusion of the interests of third parties involved in the practice. In addition, nonlawyer owners or partners are not bound by the legal practitioners' professional obligations, which require, for example, lawyers to decline to act where an actual or potential conflict of interest exists.

Ownership restrictions potentially impose significant costs on legal practices, however, and thus on consumers of legal services. Such restrictions make it difficult for legal practitioners to form multidisciplinary practices with other professionals such as accountants, conveyancers and management consultants. They may also create an entry barrier for new legal firms or limit existing legal firms' ability to raise capital for expansion or entry into other markets (Shaw 2000, p. 7624).

Further, legislation reviews have found limited evidence that ownership restrictions help to maintain professional ethics. For achieving professional legal objectives, maintaining a clear focus on the accountability of individuals may be more effective than restricting ownership.

Professional indemnity insurance

Professional indemnity insurance is designed to meet client or third party claims of civil liability that arise from practitioners' negligence or error. In all jurisdictions, registered legal practitioners are required to hold professional indemnity insurance. In some jurisdictions, barristers may obtain their professional indemnity insurance from a selection of approved providers. Solicitors are usually required to obtain this insurance from a single body on the terms and conditions set by that body.

Some jurisdictions exempt national law firms from the requirement to insure through the approved monopoly supplier if they can show that they have appropriate cover in place. These firms are effectively free to choose their insurer from the options provided by different States and Territories. Legal firms have demonstrated sensitivity to premiums by seeking to insure with low cost schemes. In 2001, a number of prominent New South Wales firms insured with Victoria's professional indemnity insurance scheme because it offered lower premiums than those of the New South Wales scheme (Department of Treasury and Finance, Victoria 2002).

Chapter 6 (volume 2) examines the competition questions related to statutory insurance monopolies providing compulsory insurance. In this chapter, the Council's assessment of jurisdictions' compliance with CPA obligations in relation to compulsory professional indemnity insurance for solicitors is based on the chapter 6 analysis. In the area of legal professional indemnity insurance, the issues relate to coverage, the cost of premiums, the delivery of run-off cover, risk management and prudential supervision.

A current Productivity Commission inquiry (due for completion in March 2004) on workers compensation arrangements and occupational health and safety may make recommendations relevant to NCP compliance issues in all cases of statutory monopoly provision of insurance — namely, compulsory third party insurance for motor vehicles, workers compensation insurance and legal professional indemnity insurance. Given this outstanding national process, the Council will not complete in 2003 its assessment of review and reform in these areas. The focus of this chapter, therefore, is on aspects of legislation affecting the reservation of legal practice and the restrictions on advertising, business ownership and association.

Harmonising legislation regulating the legal profession

In March 2002, the Standing Committee of Attorneys-General (SCAG) agreed on the need for uniform rules to govern the legal profession. It asked a working group to develop policy options for aspects of legal profession regulation, including practice reservation, professional indemnity insurance

requirements and business structures. Ministers subsequently instructed the Parliamentary Counsel's Committee to draft model provisions for admission and legal practices, the reservation of legal work, costs and costs disclosure, and complaints and discipline.

In November 2002, SCAG asked that consultation versions of the model provisions be circulated and that final versions be submitted for consideration at the next meeting of SCAG in April 2003. Commonwealth, State and Territory Attorneys-General agreed to endorse comprehensive model provisions as a basis for consistent laws to facilitate a national profession in August 2003. Further work is now under way to refine the model provisions.

Consistent regulation would reduce barriers to competition across State and Territory boundaries, and significantly enhance competition in the legal services industry at a national level. Some jurisdictions have delayed part or all of their review and reform activity, given the national model laws project. They consider that the benefits of ensuring national consistency and avoiding double handling of reform implementation outweigh the costs of delaying some reforms for a short period. The Council accepts the benefit in this approach, provided that unreasonable delays do not result (NCC 2002).

Review and reform activity

New South Wales

New South Wales completed a review of its *Legal Profession Act 1987* in 1998. The Attorney-General's department conducted the review, with advice from a reference group (including representatives of consumers, practitioners, the insurance industry and the courts). The review recommended giving consideration to removing the reservation of certain categories of legal work. It considered that the criteria for any reservation of work should be based on the potential harm to the public if a nonlawyer undertakes that work. It recommended reserving functions for lawyers where there is a genuine and necessary requirement for legal professional skills, but allowing appropriate competition among professions in other areas.

The review recommended removing the rule that solicitors must have majority control of multidisciplinary practices, and allowing solicitors and barristers to form incorporated practices under the Corporations Law. In both cases, however, the review considered that the regulatory system should help maintain solicitors' professional and ethical obligations, and ensure insurance and fidelity cover are at least as favourable to clients as when they use other solicitors.

The review recommended deregulating the market for professional indemnity insurance for solicitors, subject to appropriate client protection through

minimum standards for policies, run-off cover and indemnity. The review found general support for deregulation, but suggested using a levy on premiums to fund the Law Society and Bar Association to provide risk and practice management training, because such management is also an important mechanism for containing the costs of legal services.

The review did not find justification for reintroducing controls on advertising. It noted that in some areas of practice, such as wills and conveyancing, advertising may have facilitated competition. It found limited evidence of harm to the public as a result of advertising restrictions being removed, and considered that the public benefit conferred by freedom to advertise outweighs any such harm.

Reform activity

New South Wales is progressively implementing reforms. It amended legislation in October 2000 to allow solicitors to incorporate. Its incorporation model requires that individual solicitors (but not their incorporated practices) hold practising certificates and that incorporated legal practices have at least one solicitor on their board of directors (Government of New South Wales 2001). It passed legislation in 2002 implementing other reforms recommended by the review, except the recommended reforms of the professional indemnity insurance requirements (NCC 2002).

Professional indemnity insurance

The Government rejected the recommendation to deregulate professional indemnity insurance; instead, it proposed to establish a new mutual fund to cover all solicitors (excluding those who have exemptions). This proposal did not proceed, however, after the Australian Prudential Regulatory Authority advised that the entity managing the scheme would require a licence under the *Insurance Act 1973* (Commonwealth) and would be subject to its capital adequacy requirements (Government of New South Wales 2003).

As part of the National Legal Profession Model Laws Project, SCAG is exploring the possibility of a national insurance scheme. New South Wales advised the Council that it intends to consider arrangements for solicitors' professional indemnity insurance in this context (Government of New South Wales 2003).

The New South Wales Cabinet Office also advised that recent civil liability reforms — in particular those provisions relating to the standard of care for professionals and proportionate liability — could have an impact on legal professional indemnity insurance in the State. The provisions relating to proportionate liability have not yet commenced, because their interaction with the TPA is being considered. The Government has asked the Commonwealth to introduce similar reforms to damages provisions under the TPA as soon as possible (Government of New South Wales 2003).

New restrictions on advertising

Regulations introduced in New South Wales in May 2001 restrict advertising of workers compensation services by legal practitioners. In March 2002, the Legal Profession (Advertising) Regulation 2002 extended these restrictions to cover all personal injury services. The Regulation states that lawyers must not advertise personal injury services except by means of a statement that:

- includes only the name and contact details of the lawyer, together with information about their area of practice or speciality (although advertising the availability of 'no-win, no-fee' arrangements is not permitted); and

- is published by only certain allowable methods such as printed publications and Internet databases/directories (advertising in hospitals or on the radio or television is not permitted).

Lawyers registered in New South Wales can be found guilty of professional misconduct if they contravene the advertising regulations, with penalties ranging from reprimands to deregistration.

The New South Wales Government introduced the advertising restrictions with the expectation that they would help to keep public liability insurance premiums affordable. It cited evidence that that the increasing number and cost of personal injury claims are contributing to an increase in public liability insurance premiums — a rise in premiums is adversely affecting nongovernment service delivery and small business (Government of New South Wales 2002).

Limits on advertising restrict competition by making it harder for newly qualified practitioners and practitioners entering new markets to inform potential clients of their services and terms. The Council recognises that the Legal Profession (Advertising) Regulation, while restricting advertising of personal injury services, does not prohibit or constrain advertising of other legal services. The adverse impacts on competition are thus limited.

Given concerns, however, that some lawyers are ignoring or attempting to circumvent the advertising restrictions, the New South Government has implemented the Legal Profession Amendment (Personal Injury Advertising) Regulation 2003, strengthened the restrictions to:

- prohibit a barrister or solicitor from advertising personal injury services in any way and in any media; and

- increase penalties for breaches of the regulations, including making a breach professional misconduct, which is subject to criminal charges.

The new amendments implemented by the New South Wales Government result in an effective *prohibition* on advertising, which is a severe restriction on competition. This would be justified only if the Government had shown that the restrictions are in the public interest and could not be achieved without restricting competition.

While New South Wales acknowledges that the advertising restrictions raise competition issues, its evidence of the link between restricting advertising and maintaining affordable public liability insurance is much less clear. New South Wales deregulated advertising in 1994. If, as a result (perhaps) of advertising by lawyers, there has since been a fundamental shift in community values and a lasting increase in the community's knowledge of their legal rights to compensation for personal injuries, then re-regulating advertising may not be effective in reducing the number of claims.

Even if restricting advertising does reduce the number of claims, it is not clear whether this would lead to lower premiums. Other drivers of recent premium increases include increases in the compensation awarded and the state of the insurance market cycle (Trowbridge Consulting 2002) — factors that may be more significant influences than the number of claims.

Further, New South Wales has not shown that it is necessary to restrict advertising to achieve its objective of maintaining affordable public liability insurance. Governments are considering a range of reforms to ensure insurance is available at reasonable prices. Many of these reforms appear, in principle, less restrictive of competition than are restrictions on advertising by lawyers.

Although the stated object of the Legal Profession (Advertising) Regulation (as set out in the Explanatory Note to the Regulation) is to 'restrict [or prohibit, in the case of the 2003 amending regulation] the manner in which barristers and solicitors advertise personal injury services', the Government's policy objective appears to be to maintain affordable public liability insurance. There may be alternative ways of achieving this objective that are less restrictive of competition. Governments across jurisdictions are considering and/or have implemented a range of reforms in response to the recent public liability insurance premium rises.

- Commonwealth, state and territory governments agreed to a series of reform during 2002, which included changes to the application of tort law, the use of structured settlements, legal system reforms, data collection and risk management strategies.

- Trowbridge Consulting (2002) identified possible reforms (without drawing any conclusions on appropriate responses), some of which have been or will be adopted across the jurisdictions. In addition to restrictions on legal advertising and legal fees, and limits on damages, these reforms include:

  - reducing the number of successful claims by changing what counts as 'negligence' in certain situations or amending the standard of negligence through tort law reforms.

  - exempting certain volunteers and organisations from negligence actions, or allowing valid contractual waivers of liability for participation in inherently risky activities;

- promoting alternatives to legal action for resolving issues, by increasing the cost of unsuccessful litigation or mandating alternative dispute resolution systems;

- facilitating the public liability insurance market by arranging market access through local government, and publishing data to help set and evaluate prices; and

- supplementing the public liability insurance market by allowing pooling of risks outside the insurance regulatory framework or by providing subsidies to insurance buyers in critical segments.

Many of the reform options appear, in principle, less restrictive of competition than is the restriction on advertising by lawyers. Without assessing the feasibility and effectiveness of the alternatives, it is not possible to demonstrate the necessity of restricting legal advertising.[1] The fact that a comparative analysis of possible regulatory options was not undertaken indicates that New South Wales' new legislation gatekeeping mechanism is not consistent with it CPA clause 5(5) obligations for review of new and amended legislation (for details see volume 2, chapter 13)

New South Wales advises that it will consider reviewing the need for the advertising restrictions as part of tort law reforms in New South Wales or under the national reform process (Government of New South Wales 2003).

Assessment

New South Wales has almost completed its review and reform of its legal practitioner legislation. The outstanding issues relate to the national model laws project and professional indemnity insurance which are beyond the direct control of the New South Wales Government. While New South Wales has made good progress with its review and reform obligations under CPA clause 5, it has not provided clear evidence that advertising restrictions help maintain affordable public liability insurance. Further, it has implemented a prohibition on advertising of personal injury legal services without considering whether there are less restrictive means for achieving this objective. Moreover, the Council considers the recent implementation of a prohibition on advertising of personal injury services a significant breach of CPA obligations, which has not been supported by substantial new evidence that demonstrates a net public benefit. For these reasons the Council considers that these advertising-related regulations do not comply with CPA obligations.

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[1] PriceWaterhouseCoopers (2002), for example, have assessed the potential financial impact of the tort law reform recommendations of the *Review of the law of negligence*, but there has been no assessment of the merits of such reforms compared with restrictions on advertising.

Victoria

Legal services are regulated in Victoria by the *Legal Practice Act 1996*. This legislation was enacted following a legal practitioner regulation review that commenced before the NCP. Subsequently, it has been assessed against the CPA guiding principles. The Legal Practice Act introduced a range of reforms, which included:

- removing the distinction between solicitors and barristers;
- allowing direct access by clients to barristers;
- introducing nonlawyer property conveyancing, but restricted to the nonlegal aspects of conveyancing only;
- allowing the incorporation of legal practices and multidisciplinary practices; and
- removing binding fee scales and abolishing compulsory membership of professional associations.

The Act provided for competition in legal professional indemnity insurance from 1999. It also provided for a further review before the onset of the sunset clause removing the Legal Practice Liability Committee's professional indemnity insurance monopoly. This review, conducted by the Legal Practice Board in June 1998, recommended that the monopoly continue. Parliament subsequently amended the Act to remove the sunset clause.

In its 1999 NCP assessment, the Council considered that Victoria had met its CPA commitments to legal practice review and reform, except in retaining the professional indemnity insurance monopoly (NCC 1999). The then Government agreed to review the monopoly and provide the Council with a supplementary report on this matter in June 2001.

The supplementary report noted that Victorian solicitors must hold professional indemnity insurance for consumer protection reasons. It observed that a move to a competitive scheme would risk solicitors being denied insurance cover (because their risk is difficult to assess even where their professional competence is not in doubt). It also considered that it is necessary to require all solicitors to insure through the Legal Practice Liability Committee, to ensure the provision of adequate run-off insurance. Victoria confirmed its decision to retain the monopoly arrangement, but will review this decision in light of any national scheme developed by SCAG.

In June 2000, the Victorian Attorney-General announced a review of the Legal Practice Act. This was not an NCP review, but the final report (November 2001) made recommendations on the profession's regulatory structure that could have an impact on competition, although not substantially. The review proposed to simplify the regulatory system to improve its efficiency and reduce compliance and administrative costs. In

particular, the complaints-handling mechanism would be centralised. The Government has yet to announce its response to the review.

Assessment

The Council assesses Victoria's legal services legislation (except for professional indemnity insurance, which is subject to national processes) as complying with the State's obligations under CPA clause 5.

Queensland

The Queensland Government conducted a two-stage review of its regulations covering the legal profession. The first stage was a broad review of contemporary regulatory issues affecting the profession. The review resulted in a discussion paper in 1998, followed by a green paper in 1999.

Recommendations in the green paper included introducing a new complaints-handling mechanism, allowing common admission of barristers and solicitors, removing the reservation of conveyancing practice, developing a framework for facilitating the incorporation of legal practices and maintaining mandatory professional indemnity insurance requirements but providing competition in the insurance market.

In December 2000, the Queensland Government accepted the green paper recommendations to introduce a new complaints-handling mechanism and allow common admission of barristers and solicitors. It also announced that it would:

- remove restrictions on professional indemnity insurance cover (subject to minimum standards), while allowing the current arrangements to continue for another three years;
- consider the incorporation of legal practices through SCAG, in light of concerns about the States adopting different approaches and the implications of this for national firms; and
- consider the issue of removing reservation of conveyancing work through a separate NCP review.

The second stage review considered competition-related issues in Queensland's legal profession legislation (including the December 2000 proposals). It examined restrictions such as the requirements for admission to the legal profession, qualifications for practice, ownership restrictions, practice reservation (including the reservation of conveyancing work) and the legislated arrangements for professional indemnity insurance. The Government is considering the review's recommendations on these issues, in conjunction with the draft national model laws proposed by SCAG. The Government is expected to announce its response soon, so as to have a Bill for

reforming its legal profession legislation ready for introduction into Parliament in the latter half of 2003.

New restrictions on advertising

At the meeting of the Heads of Treasuries on 30 May 2002, Commonwealth, State and Territory Ministers and the President of the Australian Local Government Association met to continue work on addressing issues associated with the availability and affordability of public liability insurance. Among other things, Ministers noted a perception that advertising of personal injury legal services, including through 'no-win, no-fee' arrangements, could encourage inappropriate social expectations about assumption of risk and personal responsibility. Ministers agreed that limits on advertising and legal fees would be considered on an individual jurisdictional basis.

The Queensland Parliament passed the *Personal Injuries Proceedings Act 2002* in June 2002. The objective of the Act is to facilitate the ongoing affordability of insurance. In addition to reducing the costs of legal proceedings by introducing pre-court processes and placing caps on economic loss, the Act restricts lawyer advertising to address the pressure on insurance premiums from the increasing volume of claims.

The advertising restrictions, which are similar to those implemented in New South Wales in March 2002, prohibit lawyers from advertising personal injury services except by means of a statement that:

- includes only their name and contact details, together with information about their area of practice or speciality and the conditions under which they are prepared to provide personal injury services (although advertising the availability of 'no-win, no-fee' personal injury services is not permitted); and

- is published by only certain allowable methods such as printed publications and Internet databases/directories (advertising in hospitals or on the radio or television is not permitted).

Queensland expects that the proposed reforms would reduce the overall liability of insurers and, as a result, lead to more affordable insurance, while encouraging insurers to widen the scope of risks they are prepared to underwrite. It noted that an actuarial report by PricewaterhouseCoopers found that the reforms advocated by the expert panel reviewing the law of negligence (which forms the basis of many of Queensland's reforms) could theoretically reduce public liability insurance premiums by around 13.5 per cent. The Council adds, however, that the expert panel did not make recommendations in relation to advertising restriction and consequently no cost assessment of the impact of such restrictions was included in the actuarial report.

In presenting this evidence, Queensland noted that it is difficult to accurately determine the overall impact of these reforms on insurance premiums, given the long tail nature of the industry and the wide range of risks covered by liability insurance. It also noted that the insurance industry has not committed to reduce premiums or provide insurance in those areas for which they recently withdrew coverage.

Queensland considered that existing restrictions on advertising were not working effectively. Under the Queensland Law Society Rules, for example, advertising that is false, misleading or deceptive, would contravene the Fair Trading Act 1989 or the *Trade Practices Act 1974* (Cwlth), and constitute a breach of the rules. The society has recently notified practitioners that it has advice from senior counsel that 'no-win, no-fee advertising' is misleading and deceptive and will constitute a breach of the Queensland Law Society Rules in the absence of full cost indemnity being given by the solicitor to the client. The society has not observed a reduction in 'no-win, no-fee' advertising.

The Australian Plaintiff Lawyers Association has a voluntary code of conduct that specifically addresses practices related to soliciting at times of trauma or distress, soliciting in a manner which is likely to offend or distress and the visiting of accident scenes for the purposes of solicitation. The code applies to all association members, but not all plaintiff lawyers are members of this organisation. Existing provisions in the *Criminal Code Act 1899* prohibit the payment of secret commissions for the acquisition of business, but an offence is only committed when the payment of a commission is undisclosed.

By placing restrictions on the allowable methods of publications, Queensland's advertising restrictions in the *Personal Injuries Proceedings Act 2002* go beyond restriction of no-win, no-fee advertising and touting. (The Council does, however, recognise that restrictions on radio and television advertising may be an indirect means of addressing touting.)

Queensland did not provide any evidence to demonstrate that restrictions on advertising might contribute to reducing insurance premiums. Further, it did not provide any evidence that advertising restrictions provide a net benefit or that such restrictions are necessary to meet its policy objectives. The Council considers, therefore, that Queensland's restrictions on legal profession advertising are not consistent with the CPA guiding principle.

Assessment

Queensland has not met it CPA clause 5 obligations in relation to the legal profession as it has not completed its review and reform activity. It has not implemented any of the recommendations from its NCP review of legal profession regulations, in part because it is waiting on the outcome of the national process. Its current legislation contains significant restrictions on competition — including restrictions on entry to the profession as a barrister or solicitor and the reservation of conveyancing practice — which have been shown not to be in the public interest. In addition, Queensland has imposed

advertising restrictions without demonstrating that they meet the CPA guiding principle.

Western Australia

Western Australia's review of the *Legal Practitioners Act 1893* and related legislation commenced in 2000, with the final report released in June 2002. Key recommendations in the final report were to:

- reserve core areas of legal work (such as appearances in court, probate work and the drawing up of wills and documents that create rights between parties) for certified legal practitioners, but:
  - remove restrictions on the practice of tribunal-related work by nonlawyers;
  - prescribe arbitration services that can be undertaken by nonlawyers who satisfy prescribed competency standards and/or comply with consumer protection and transparency safeguards under the Law Council of Australia's Policy Statement and Model Legislative Scheme on the Reservation of Legal Work for Lawyers; and
  - continue to permit settlement agents to arrange or effect the settlement of real estate or business transactions for reward.
- retain compulsory professional indemnity insurance and the requirement to insure through the Law Society, but codify in legislation the Law Society's practice of allowing practitioners to opt out of its scheme if they give adequate notice and provide evidence of having made suitable alternative arrangements for professional indemnity insurance; and
- remove restrictions on lawyers forming incorporated practices and multidisciplinary practices (Department of Justice, Western Australia 2002).

The draft review report noted that benefits would arise from delaying the implementation of the review proposals (even those that could be implemented unilaterally) so the Government could progress reforms as a single package following the outcomes of the national model laws project. The final report maintained this view, but recommended that reforms be pursued where agreement and commitment already exist, and that matters awaiting national resolution be dealt with separately. This recommendation supported the Government's decision to commence drafting new legislation before knowing the outcome of the national review.

Reform implementation

The Government introduced the Legal Practice Bill 2002 into Parliament in October 2002 to repeal and replace the Legal Practitioners Act and reform associated legislation. The new legislation provides for:

- the incorporation of legal practices, which will enable lawyers to operate in multidisciplinary practices with other professions;
- the registration of foreign lawyers wishing to practise in Western Australia, which will reduce the barriers to entry for foreign lawyers into the local market; and
- the introduction of national practice certificates that allow automatic recognition of certificates from other Australian jurisdictions, removing the barriers to competition for interstate lawyers wishing to practise in Western Australia.

The Bill introduces new provisions to clarify that unqualified persons are prohibited from practising law in Western Australia, but expands opportunities for nonlawyers to practise within the regulatory framework. It also expands the definition of unsatisfactory conduct to include any contravention of the Act and any conduct that does not match the level of competence and diligence that could reasonably be expected. The Bill was passed in the Legislative Assembly on 24 June 2003.

Advertising restrictions

Via the *Civil Liability Act 2002*, the Government introduced new restrictions on advertising of personal injury services. In addition, the Act implements a number of recommendations from the joint Commonwealth, State and Territory commissioned review of the law of negligence. It caps economic losses, provides for structured settlements, sets a minimum threshold below which general damages cannot be awarded and limits gratuitous attendant care.

The Civil Liability Act aims to slow the rate at which premiums increase and to make public liability insurance more readily available, by improving the predictability and containing the costs of such insurance for lawyers. In addition, its advertising restrictions aim to strike a balance between providing access to legal services and avoiding the type of advertising that detracts from the interests of injured persons (McGowan 2002).

The advertising restrictions are based on those introduced in Queensland and, to a lesser extent, New South Wales. For television, radio, print and electronic advertising of personal injury legal services, the legislation limits advertising content (allowing only the name, contact details, area of practice and specialty of the firm) and publication methods (allowing only certain

printed publications and web sites). Advertising in or around hospitals is prohibited as is touting at the scene of an accident.

Western Australia did not provide any evidence of how advertising restrictions help reduce insurance premiums or meet other objectives of the Act. Further, it did not show that advertising restrictions are the least restrictive option available to meet this objective. The Council considers, therefore, that Western Australia's restrictions on advertising are not consistent with the CPA guiding principle.

Assessment

Western Australia has not met it CPA clause 5 obligations in relation to legal profession regulation because it has not completed its review and reform activity. The Council recognises, however, that Western Australia has implemented most of the recommendations from its NCP review of legal profession (except those issues being dealt with at the national level) although the Council also notes that advertising restrictions implemented in 2002 do not comply with CPA obligations.

South Australia

South Australia completed a review of the *Legal Practitioners Act 1981* in October 2000. The review recommendations included:

- removing Australian residency requirements for applicants for admission as a barrister or solicitor;
- giving further consideration to opening up areas of reserved work to nonlawyers with appropriate alternative formal qualifications;
- continuing to monitor developments in business structures, but considering permitting multidisciplinary practices once ethical and consumer protection issues are resolved; and
- maintaining the Law Society's monopoly over professional indemnity insurance for legal practitioners, provided premiums remain competitive.

In response to the review, the former South Australian Government invited submissions on areas of reserved work that could be opened up to nonlawyers, and announced that it would work with SCAG to devise a national legislative model for incorporated legal practices (Government of South Australia 2001a). It introduced a Bill to implement the remaining recommendations, but the Bill lapsed when the State election was called.

The current Government has incorporated the review recommendations — with the exception of allowing multidisciplinary practices, which is being

progressed as part of the national model laws — into a draft Miscellaneous Amendment Bill for introduction into Parliament in July or September 2003.

Assessment

South Australia has not completed its review and reform of legal services regulation. Even excluding the issue of insurance monopolies, significant restrictions related to residency requirements and the prohibition of incorporation/multidisciplinary practices are still in place. These have the potential to impose significant ongoing costs on consumers and the economy.

Tasmania

Tasmania established a team to review the *Legal Profession Act 1993* in February 2000. The review team released a discussion paper in May 2000 and sought public comments on a regulatory impact statement in April 2001. The review's preliminary recommendations, as reflected in the regulatory impact statement, included:

- removing the reservation of conveyancing work (but regulating conveyancers);
- removing restrictions on business structures for legal practices;
- allowing legal practitioners to arrange their own insurance (see chapter 6, volume 2);
- removing restrictions on advertising; and
- improving the disciplinary system.

The review team provided its final report (yet to be publicly released) to the Attorney-General and the Treasurer in August 2001.

Following the review, the Department of Justice commenced a proposal for a new complaints-handling system and associated disciplinary proceedings for lawyers, with the aim of introducing legislation into Parliament in the first half of 2003. It also proposed conveyancing reform to the Attorney-General, and the Conveyancing Regulation Bill 2003 is being drafted. The Government is reconsidering the review's remaining recommendations in the light of the March 2003 decision of SCAG to prepare and adopt uniform national laws for the legal profession. A legislative package addressing the recommendations of the review of the Legal Profession Act and adoption of the uniform national laws is expected before the end of 2003 (Government of Tasmania 2003).

Assessment

Tasmania has not implemented reforms to its legal services legislation. While it is working actively with other jurisdictions to develop model legislation consistent with NCP obligations, significant restrictions on business structure and advertising are still in place.

The ACT

The Department of Justice and Community Safety began a two-stage review of the *Legal Practitioners Act 1970* in 1999. The first stage involved releasing an options paper in November 2001, canvassing reform of the admission and licensing of legal practitioners, and the complaints and disciplinary systems. The second stage was to involve releasing an options paper that canvassed reforms to business conduct restrictions, including restrictions on multidisciplinary practices, fee setting, insurance and the statutory interest account. The Government ceased this review, however, so all outstanding review and reform activity could be progressed through the national model laws project to ensure a uniform and nationally consistent framework for the industry. As an interim measure, however, the Government amended the Legal Practitioners Act to introduce a second insurance provider (Government of the ACT 1999). The ACT expects to repeal its existing Act once the national framework is complete.

Assessment

The ACT has introduced reforms to professional indemnity insurance in advance of the outcome of national processes. It does not have other reforms to its legal services legislation in place, however, because it intends to implement these in conjunction with the national model laws developed through SCAG. Finalisation of this process is beyond the direct control of the ACT Government. Nevertheless restrictions on business structure relating to corporate legal practices remain. The ACT advised that it sought Commonwealth amendments to the *ACT (Self-Government) Act 1988* to allow it to enact nationally-agreed provisions to deal with this matter, but the Commonwealth has not yet made the required amendments.

The Northern Territory

The Northern Territory completed reviews of the *Legal Practitioners Act* and the *Legal Practitioners (Incorporation) Act,* but neither review considered the provisions relating to professional indemnity insurance. The Government has deferred the NCP review of the legislative provisions relating to professional indemnity insurance pending a re-assessment of what the insurance market is able to deliver once the national model laws project is finalised.

The Legal Practitioners Act review found that practising certificates, fidelity fund requirements and the reservation of title are necessary and provide a net public benefit, but that other significant anticompetitive provisions in the Act could not be justified in the public interest. It recommended that:

- areas of work reserved for legal practitioners should accord with areas of work that are reserved on a national basis (that is, appearances in court, probate work and the drawing up of wills and documents that create rights between parties, except conveyancing);

- the provisions that prohibit barristers from acting independently of one another should be repealed, but barristers should continue to be subject to regulations suitable to that kind of sole practice;

- there should be no significant differential treatment of lawyers forming incorporated practices and multidisciplinary practices; and

- controls over fees for work conducted outside of the courts and tribunals are not justifiable.

The review also found that rules on the number of articled clerks, the appointment of Queen's Counsel, trust monies, auditing and the disciplinary system, while necessary, should be reformed to reduce their anticompetitive and efficiency effects.

The Northern Territory Government accepted the review recommendations and decided to implement the reforms in conjunction with the national model laws being developed by SCAG. The Government asked the Department of Justice to work with the Law Society to develop an implementation plan for the reforms. It also announced that, subject to progress made by the national model laws project, legislation would be introduced during the October 2003 sitting of the Legislative Assembly. In August 2003, the Northern Territory advised that the reforms are not likely until 2004, but this still depends on the implementation of the national model laws.

The Legal Practitioners (Incorporation) Act review found a need to ensure business structures do not compromise lawyers' adherence to their legal professional obligations, but considered that there are less restrictive ways of achieving this objective than restricting the ownership and business structures of legal firms. The review recommended removing business structure and ownership restrictions, and replacing them with:

- a requirement that incorporated legal practices nominate at least one solicitor director to be responsible for ensuring the firm delivers legal services in accordance with professional obligations and for dealing with unsatisfactory professional conduct by employees; and

- a negative licensing scheme, under which firms found guilty of crimes, or with a history of employing people found guilty of unsatisfactory professional conduct, can be prohibited from providing legal services.

The Government accepted the review recommendations. The Attorney-General introduced the Legal Practitioners Amendment (Incorporated Legal Practices and Multi-Disciplinary Partnerships) Bill into Parliament on 30 April 2003, which will repeal the Legal Practitioners (Incorporation) Act. The Bill was passed on 20 August 2003.

Assessment

The reforms implemented to repeal and replace the Legal Practitioners (Incorporation) Act comply with CPA obligations. The reforms recommended by the reviews of the Legal Practitioners Act are also consistent with CPA principles, but are yet to be implemented pending the outcome of national processes.

Table 4.1: 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 —which must not be false, misleading or deceptive — and mandatory continuing legal education)	Review was completed in 1998. Recommendations included allowing the incorporation of legal practices and allowing competition in professional indemnity insurance.	Reforms have been completed except for issues related to the national model laws project and professional indemnity insurance. Restrictions on incorporation and multidisciplinary practices have been removed. Legislation providing for voluntary membership of professional associations, accreditation of training schemes and automatic recognition of interstate lawyers has been implemented. New regulations prohibit advertising for all personal injury legal services.	Review and reform incomplete
Victoria	*Legal Practice Act 1996*	Licensing, registration, entry requirements, the reservation of title and practice(including legal aspects of conveyancing), disciplinary processes, business conduct (including monopoly professional indemnity insurance)	Review completed in 1996. Two reviews of professional indemnity insurance arrangements were subsequently conducted. The first (by KPMG) recommended removing the monopoly. The second (by the Legal Practice Board) recommended retaining it. The Government released its response to the second review for comment in November 2000. It also commissioned a general review of legal profession regulation. The report, released in November 2001, recommended changes to the regulatory structure, focusing on the complaints and disciplinary system.	Victoria implemented the *Legal Practice Act 1996*, which removed the distinction between solicitors and barristers, allowed clients direct access to barristers, allowed incorporation of legal practices, removed binding fee scales, abolished compulsory membership of professional associations, permitted nonlawyer property conveyancing, but retained restrictions on preparing documents that create, vary, transfer or extinguish an interest in land, or to giving legal advice. The Government decided to retain the Legal Practice Liability Committee's monopoly over the provision of professional indemnity insurance for solicitors, but has delayed implementation so this issue along with any national scheme developed by SCAG.	Meets CPA obligations (June 1999) Review and reform incomplete (professional indemnity insurance)

(*continued*)

Table 4.1 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 professional indemnity insurance and advertising)	Queensland has completed a general review of legal practitioner regulation, and announced proposed reforms in December 2000. Subsequently, it commenced an NCP review in the fourth quarter of 2001, releasing an Issues Paper in November 2001. The review has been completed, but the report has not been released publicly.	Queensland implemented the *Personal Injuries Proceedings Act 2002*, which restricts lawyers from advertising personal injury services. Queensland expects to introduce a Bill in 2003 to implement the reforms emanating from the NCP review and national model laws project.	Review and reform incomplete
Western Australia	*Legal Practitioners Act 1893*	Licensing, registration, entry requirements, the reservation of title and practice, disciplinary processes, business conduct (including monopoly professional indemnity insurance, trust accounts, fees, advertising)	Review was completed in June 2002. It recommended reserving core areas of legal work; allowing practitioners who have made suitable alternative arrangements to opt out of the Law Society's professional indemnity insurance scheme; and removing restrictions on incorporated practices and multidisciplinary practices.	The Government introduced advertising restrictions similar to those in Queensland through the Civil Liability Act 2002. The Legal Practice Bill was passed in the Legislative Assembly on 24 June 2003. The Bill clarifies the standards required of, and regulation of, legal practitioners; modernises the structure and function of the Legal Practice Board, the complaints committee and disciplinary tribunal; enables the creation of incorporated legal practices and multidisciplinary partnerships; and introduces national practising certificates into Western Australia. Further reforms may be introduced following the outcome of the national model laws project.	Review and reform incomplete

(*continued*)

Table 4.1 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
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 was completed in October 2000. It recommended considering opening up further areas of legal work to competition with nonlawyers, monitoring national developments in relation to business structures and retaining the professional indemnity insurance monopoly.	The former Government indicated that it would monitor developments regarding multidisciplinary practices over the next two years and retain the professional indemnity insurance monopoly. A Bill to implement other reforms lapsed at the State election. In July 2001 the Government adopted the review recommendations in full. The recommendations (except for the issue of multi-disciplinary practices, which is being progressed as part of the national model laws project) have been incorporated into a draft Miscellaneous Amendment Bill for introduction in September 2003.	Review and reform incomplete
Tasmania	*Legal Profession Act 1993*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including monopoly professional indemnity insurance, the operation of mandatory trust accounts and the power for the Law Society to make rules on advertising)	Regulatory impact statement, released in April 2001, made preliminary recommendations to: remove the reservation of conveyancing; remove advertising and ownership restrictions; retain civil fee scales; improve the disciplinary system; and allow legal practitioners to arrange their own insurance. Review was completed in August 2001.	The Government is reconsidering the review in light of the current SCAG review of possible national laws. The Government will soon consider a proposal in relation to conveyancing. It is reconsidering the remaining review recommendations in light of the March 2002 agreement by Attorneys-General to prepare and adopt uniform national laws for the legal profession.	Review and reform incomplete

(*continued*)

Table 4.1 continued

Jurisdiction	*Legislation*	Key restrictions	Review activity	Reform activity	Assessment
ACT	*Legal Practitioners Act 1970*	Licensing, registration, entry requirements, disciplinary processes, the reservation of title and practice, business conduct (including professional indemnity insurance, ownership, advertising by locally-registered foreign lawyers)	Two-stage review by the Department of Justice and Community Safety commenced in 1999 but has now ceased in view of the decision of SCAG to prepare uniform national laws for the legal profession.	The Government amended the Act to introduce a second approved insurance provider in 1999, as an interim measure pending the full NCP review. The SCAG process is expected to develop model legislation before the end of 2002.	Review and reform incomplete
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)	Review was completed. Recommendations included reserving core areas of legal work; removing restrictions on incorporated and multidisciplinary practices; and removing controls on fees for worked conducted outside of court. The Government has delayed its NCP review of professional indemnity insurance given recent insurance market developments and the outcome of the national model laws project.	The Government has delayed responding to the review until completion of the national model laws project. It anticipated, however, introducing legislation into the Northern Territory Legislative Assembly in August 2003.	Review and reform incomplete
	Legal Practitioners (Incorporation) Act	Business structure and ownership	Review completed in November 2001. It recommended allowing multidisciplinary practices, but providing for the disqualification of corporations found guilty of serious offences or with a history of employing persons found guilty of unsatisfactory professional conduct.	The Government has accepted the recommendations. The Legal Practitioners Amendment (Incorporated Legal Practices and Multi-Disciplinary Partnerships) Bill, which will repeal the Legal Practitioners (Incorporation) Act was passed on 20 August 2003.	Meets CPA obligations (June 2003)