

# BETWEEN THE IDEA AND THE REALITY FALLS THE SHADOW

John Briton, ANZLEC-5, Melbourne, 4 December 2015 \*

## Introduction

This paper draws on a longer paper which tells the story of the first decade of the life of Queensland's Legal Services Commission and extracts some lessons about how to better regulate lawyers and their provision of legal services to consumers.<sup>1</sup> It summarises those lessons as I see them and by necessity more bluntly and provocatively. I am trying to articulate some big ideas in a small space.

I learned four key lessons, viz., that:

- The persistence and prevalence of billing practices which should shame the profession demonstrates longstanding and continuing regulatory failure;
- The professional bodies should have no role to monitor and enforce their members' professional standards in practice - that is to say, to deal with complaints or to conduct trust account investigations or compliance audits. All three functions should be performed by independent statutory bodies, and by one and the same statutory body in each jurisdiction;<sup>2</sup>
- Regulators will best protect consumers and promote high standards of conduct only when they are equipped with powers they can use proactively and have the will and imagination to use proactively to favour prevention over cure - powers to require and assist law firms to continually review and strengthen their ethical infrastructure and in that way as far as possible to get in first, to nip potential problems in the bud, before they occur;<sup>3</sup> and
- The *Legal Profession Uniform Law* (LPUL) which commenced in Victoria and New South Wales in July this year is a great improvement in one key respect on the *Legal Profession Acts* (LPAs) which are based on the National Model Law; takes one step forward but two steps backwards in another; and is already past its use by date in a third - and was past its use by date even before its ink was dry.

## The role of the professional bodies in regulation

There have been episodic debates over decades now about the proper role if any that the professional bodies should play in regulating the affairs of their members - debates driven by disenchantment with their performance and sometimes by scandal - and the State legislatures have incrementally chipped away at the traditional self-regulatory structures. The issue was hotly debated in Queensland, for example, in the *Caesar judging Caesar* scandal in the early 2000s which saw the Queensland Law Society (QLS) stripped of its role to deal with complaints in 2004 and the creation of an independent Legal Services Commission for that purpose.<sup>4</sup>

It is an issue which has never been fully resolved whether in Queensland or elsewhere. One thing for sure: while the Queensland LPA (the Queensland Law) and the other LPAs based on the National Model Law and enacted across the country in the mid to late 2000s have 'harmonised' legislation across the country, and the LPUL which commenced in Victoria and

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New South Wales earlier this year goes one better by establishing uniform legislation in at least those two states, there is nothing harmonised or uniform about the regulatory architecture under which any of that legislation is administered anywhere across the country, not even in Victoria and New South Wales.

There has been instructive debate in England and Wales also. The traditional self-regulatory framework there has been dramatically reformed in recent times following upon the Clementi Review in 2004.<sup>5</sup> The *Legal Services Act 2007* created the Legal Services Board to be the *independent oversight regulator*. It allows the Board to ‘*approve*’ the professional bodies to be ‘*front-line regulators*’ and in that capacity to deal with disciplinary complaints, for example, but only under the Board’s general oversight and control.<sup>6</sup>

The Law Society of England and Wales commissioned Lord Hunt to review the reforms in 2008. He noted in a masterful understatement in the report of his review that the government had created the Board ‘*expressly to address concerns that self-regulatory bodies have been more responsive to practitioners’ concerns than those of the general public.*’ Now I can’t comment on the performance of the self-regulatory bodies in England and Wales but there is absolutely no doubt for reasons I will give as I go along and it is central to my argument that the organised profession in this country - and I stress that I am talking of the organised profession - has long *been more responsive to practitioners’ concerns than those of the general public.*

Lord Hunt explained further that ‘*professional autonomy has given way to accountability... An integral part of modern professionalism is the acceptance that we should be subject to public scrutiny. Lawyers can no longer rely on the public universally and unquestioningly endorsing a perception of them as a peculiarly selfless breed... motivated solely by a strong ethos of service, deserving of automatic respect and capable of being left to regulate their own affairs... The era of unquestioning acceptance - or deference - is over and those few remaining diehards who still hark back to the days of total professional self-regulation had better wake up to that fact.*’<sup>7</sup>

Nicely put. He is absolutely right in all this, in my view, but not everyone gets it. Not everyone who has been elected to leadership positions in the QLS in recent times gets it, for example, or comprehends the true meaning of the Caesar judging Caesar debacle and the subsequent reforms.<sup>8</sup> The Queensland public got it, however. It understood full well if not exactly in these terms that the debacle consisted at the end of the day not merely in a catastrophic failure of complaint-handling competence that the QLS with good management and good luck might potentially have put right but in a matter of fundamental principle. It understood that regulation exists to serve and protect the public interest; that the QLS exists to serve and protect its members’ interests; and that these two purposes and the states of mind and heart which are required to achieve them are fundamentally and irreconcilably conflicted.<sup>9</sup>

The public interest and lawyers’ self-interest are hardly mutually exclusive, of course, and in fact overlap more than some cynics allow, but nor do they coincide, and the divergence while it is not confined to this is nowhere more obvious than in relation to lawyers’ billing practices and costs.

Furthermore and however the conflict is characterised, lawyers have an image problem which bears directly on how it might best be resolved. Surveys conducted by reputable researchers show year after year, sadly, that only 1 in 3 people or thereabouts believe that lawyers are honest and ethical. That number compares very poorly indeed with the more than 4 in 5 who believe that nurses, pharmacists and doctors are honest and ethical, and poorly even with the

1 in 2 and 2 in 5 or thereabouts respectively who believe that accountants and bank managers are honest and ethical.<sup>10</sup>

This may well be unfair to lawyers but there you have it. No wonder the public has little confidence in lawyers' representative bodies to deal with complaints about their members fairly and impartially.

But it is not just the system for dealing with complaints which is riven by conflicts of interest when it is administered by a professional body but equally the systems for conducting trust account investigations and compliance audits. They are all of them equally vulnerable in the hands of the professional bodies to being and being seen to be exercised in ways that are *more responsive to practitioners' concerns than those of the general public*, no more so than when they are being exercised in the very space where the conflict between a professional body's regulatory and membership functions is at its sharpest and most obvious, deciding the merits of its members' billing practices and costs.

They should all of them for this reason and as a matter of fundamental principle be exercised independently of the profession and its representative bodies, by independent statutory bodies, and, for reasons I will add to as I go along by one and the same independent body in each jurisdiction. One thing for sure: even uniform much less harmonised legislation across state and territory borders will deliver disparate regulatory outcomes when it is administered by disparate regulatory authorities.

And in this context I make the following observations:

- First, the National Legal Profession Reform Taskforce recognised the matter of principle, or seemed to. The draft National Law it gave the Council of Australian Governments (COAG) and published in December 2010 required that responsibility for dealing with complaints and conducting trust account investigations and compliance audits be vested with independent statutory bodies, albeit that it allowed the independent bodies to delegate the exercise of some or all their powers to the local professional bodies subject to their general oversight and control.

Sadly the National Law when it finally emerged had beaten a retreat. The Law which was dated 31 May 2011 (but published in September 2011) and which Victoria and New South Wales have since enacted as the LPUL requires only that the complaints-handling function be exercised by an independent statutory body. This came as a surprise to many of us who had contributed to the reforms. Neither the Consultative Group nor stakeholders more generally were given any opportunity to have a say. We had been led to believe that the draft Law which was given to COAG in December 2010 after extensive consultation would be amended only to fix any remaining technical glitches. This amendment crosses that line - one sure sign that the profession was *more responsive to practitioners' concerns than those of the general public*.

- Second, the amendment being a fait accompli, Victoria and New South Wales went their own ways. Neither went the same way as Queensland. None of these three states vests responsibility for all three functions with the one regulatory body, much less an independent body:
  - The LPUL as it has been enacted in Victoria (the Victorian LPUL) creates *neither* the Law Institute *nor* the Bar Association as relevant regulatory authorities. The LPUL as it

has been enacted in New South Wales (the New South Wales LPUL) creates *both* the Law Society and the Bar Association as relevant regulatory authorities. The New South Wales LPUL in this respect mirrors the Queensland LPA (the Queensland Law).

- The Laws in all three States give **responsibility for dealing with complaints** to their Legal Services Commissioners but the similarity ends there:
  - The Queensland Law allows the Commissioner to delegate complaints to the professional bodies *for investigation but not for decision* – it reserves that power to the Commissioner. The Commissioner as a matter of practice long delegated roughly half of all disciplinary complaints to the professional bodies but has recently decided to delegate complaints *only* to the Bar Association. Thus the Law Society is excluded from any role in dealing with complaints about its members and the Commissioner decides what action, if any, to take on complaints about barristers – hence the great majority of disciplinary complaints are dealt with completely independently of the profession and the small minority that are not are dealt with only under very tight independent oversight and control.
  - The Victorian and New South Wales LPULs allow the Commissioners to delegate complaints to the professional bodies *for both investigation and decision*, but subject to the Commissioners' general oversight and control.<sup>11</sup> But the similarity once again ends there. The Victorian Commissioner has decided as a matter of practice to delegate *only some* of his powers - his powers *to investigate but not to decide* disciplinary complaints - and *only* to the Bar Association. Thus in practice if not in Law, the arrangements in Victoria largely replicate the arrangements in Queensland.

The New South Wales Commissioner on the other hand has decided as a matter of practice to continue the longstanding arrangement in that State in which the Commissioner delegates the large majority of disciplinary complaints to *both* professional bodies and delegates his powers *both to investigate and decide those complaints*. The Commissioner has no further role in relation to those complaints but to review how the Law Society or Bar Association dealt with a complaint upon the request of a party to the complaint. Hence the vast majority of disciplinary complaints about lawyers are dealt with by their membership bodies under only limited independent oversight and control.<sup>12</sup>

- The Victorian LPUL gives **responsibility for conducting trust account investigations** to the Legal Services Board but allows the Board to delegate the responsibility to the Law Institute, and it has, but under the Board's general oversight and control. The New South Wales LPUL and the Queensland Law on the other hand give *direct* responsibility for conducting trust account investigations to their Law Societies.
- The Victorian LPUL similarly gives **responsibility for conducting compliance audits** to the Legal Services Board and allows the Board to delegate the responsibility to the Law Institute, and it has, but under the Board's general oversight and control. The New South Wales LPUL and the Queensland Law give *direct* responsibility for conducting compliance audits to *both* the Commissioners and the Law Societies.<sup>13</sup>

Thus only Victoria provides for all three functions to be exercised either independently of the profession or under independent oversight, albeit by different independent bodies.

There is *some* independent oversight of the exercise of *some* of these three functions in all three states, however, and it could be said then, to the extent that this is true, that the independent bodies are 'independent oversight regulators' something like the Legal Services Board in England and Wales.<sup>14</sup>

- Third, and to the extent they play the role, Australia's independent oversight regulators are very different in character from their British counterpart. The regulatory framework in England and Wales embraces consumers in a way the frameworks here do not.

The reforms in England and Wales were driven by the Clementi review in 2004 and the government's response in a report under the title, tellingly, *The Future of Legal Services: Putting Consumers First* (emphasis added).<sup>15</sup> The *Legal Services Act 2007* requires the Legal Services Board to be chaired by a lay person and to have a lay majority and it establishes a Legal Services Consumer Panel to advise the Board. The panel is comprised entirely of lay people and has a dedicated secretariat and a meaningful research capacity. Notably the Board 'approves' the professional bodies to exercise day to day 'frontline' regulatory responsibilities only if it is satisfied they have entirely separate arrangements for the governance of their regulatory and membership or representative functions.<sup>16</sup>

But none of the statutory regulators in Australia much less the professional bodies engage with consumers in any but an ultimately tokenistic way - another sure sign that the profession continues to be *more responsive to practitioners' concerns than those of the general public*. Consumers have little if any mandated role to play in the regulation or the oversight of regulation of the provision of legal services in Australia. And so it is that:

- The LPUL does not require *any* of the 5 members of the Legal Services Council to be lay people much to less represent consumers, only that 2 of its members have expertise *either* in the practise of law, the regulation of the profession, financial management *or* consumer protection;<sup>17</sup>
- The Victorian LPUL requires that at least 1, but not necessarily more than 1 of its 7 members is appointed to '*represent the interests of consumers*';<sup>18</sup>
- None of the Victorian, New South Wales or Queensland Laws require that the Legal Services Commissioners be lawyers, but they almost invariably are;<sup>19</sup> and
- The professional bodies in all three States are governed by Councils elected by their members. None of Victorian, New South Wales or Queensland Laws require their professional bodies *either* to include lay people in their governance structures *or* to have separate governance arrangements for the performance of their regulatory as opposed to their representative or membership functions.

We should not be surprised. The reforms which resulted in 2004 in the Model Law and in 2011 in the National Law were driven on both occasions primarily by a desire to achieve a more rational and efficient national legal services market, not to make fundamental structural reforms, much less consumer protection reforms or to *put consumers first*.

- Fourth, while the profession's failure to engage with consumers is one sure sign that it has been (and remains) *more responsive to practitioners' concerns than those of the general public*, this says more about the regulation of the legal services sector than it does about regulation in Australia more generally. Most other industry regulators routinely engage

with industry specific and broader consumer advocacy organisations and/or have established consumer advisory panels to advise and assist them in their work.<sup>20</sup>

No doubt the failure to engage is explained in large part by the absence of any established organisations which represent consumers in this space and which insist upon it, but this is hardly novel.<sup>21</sup> There was no established organisation representing the interests of users of legal services in England and Wales, either, and that is precisely why the Legal Services Consumer Panel was created in statute to fill the vacuum. It is an initiative legislators and legal services regulators in Australia would do well to emulate. It would mitigate the lack of public confidence in the profession and intractable, deep-seated concerns that it is *more responsive to practitioners' concerns than those of the general public*.

### The system for dealing with complaints

A well designed system for dealing with complaints gives consumers an effective and efficient means of redress for complaints and the system established under the LPUL does just that. It is a great advance in this respect on the LPAs but that is hardly a cause for celebration: the reforms were long overdue.<sup>22</sup> They do no more than give users of legal services the same rights of redress against lawyers who have let them down as users of financial, telecommunications and energy services have had available to them for some years now against the banks, financial planners, telephone and internet service providers, electricity, gas and water suppliers who have let them down. They do no more than allow regulation of the provision of legal services to catch up. And it had a lot of catching up to do.<sup>23</sup> Sadly the 2004 Model Law was designed either in ignorance of or with disregard for repeated calls over a decade and more both in Australia and overseas for reforms to give consumers an effective means of redress for complaints - more evidence that the profession has long been *more responsive to practitioners' concerns than those of the general public*.<sup>24</sup>

Progress is progress, however, and thankfully the system for dealing with complaints that is established under the LPUL is a vast improvement on the systems established under the LPAs. Crucially, however, while it gives consumers an effective means of redress for complaints, it gives no means of redress for the many more consumers who may equally be owed redress but have not made complaints – and there are many more consumers, and I say many tens if not hundreds of times more consumers who have cause for complaint than actually complain.

Now to be fair, I cannot claim to **know** this to be true. It is an empirical question, ultimately, and a question which demands to be answered with rigorous inquiry. I know however if I were a betting man how I would be placing my bets. I would start with the obvious fact in the legal services context like any other that an unknown but probably large number of disgruntled consumers decide not to complain - for want of confidence in the system, for fear of repercussion, because they have got better things to do with their time or just can't be bothered. And from there I would reason as follows:

- Clients who benefit from their lawyers' misconduct are hardly likely to complain about it - clients whose lawyers have colluded with them or otherwise withheld unhelpful evidence from 'the other side' or the court, for example. These things happen. Regulators get occasional complaints about conduct of these kinds but only ever third party complaints, and only after the third parties come upon it by chance discovery. How widespread is such conduct? Not very, probably, but who knows - and we will never know if we are relying on the system for dealing with complaints to alert us.

- Complaints are motivated by grievance. There is no one to be aggrieved by misconduct which is hidden or disguised, at least until it comes to light, if indeed it ever does. It will not come to attention through complaints. Trust account fraud is not the only but the most obvious example. It rarely if ever comes to attention through complaints but most often through audits conducted by regulatory authorities, quite often audits conducted at random. How widespread is this sort of misconduct? Who knows - but we will never know if we are relying on the system for dealing with complaints to alert us.
- More interestingly, however, misconduct can be hidden in plain view, and most worryingly not only occasional misconduct but misconduct of a more systemic kind. I am referring for example not only to one-off or occasional overcharges which result from lawyers carelessly or even dishonestly calculating their costs but systematic overcharges which are the product of the billing practices they have adopted as standard operating procedure. The Commission was alerted over the years to all the following billing practices, all of which took on multiple forms and all of which appeared to be at least relatively widespread:
  - Billing undisclosed mark-ups or 'secret profits' on outlays;
  - Billing costs in excess of the amounts permitted under the '50/50 rule' - a statutory rule in Queensland which caps a lawyer's costs in speculative personal injury matters at half the judgement or settlement amount after deducting refunds and outlays.<sup>25</sup>
  - Billing in 6 minute (or sometimes 10 minute) units of time '*or part thereof*' and proceeding to bill consumers for many such units of time over the life of a file for work that took much less than 6 minutes, significantly inflating the stated hourly rate;
  - Charging the maximum 25% uplift fee allowed to compensate lawyers for accepting the risk that can be inherent in speculative matters in matters which expose them to little if any risk;
  - Charging an uplift for 'care and consideration' (often of 20%, sometimes 30% or even 50% and more) on top of time-costed bills, sometimes routinely and sometimes 'at the law firm's absolute discretion';
  - Substituting an itemised bill in a higher amount for an earlier lump sum bill if and when consumers exercise their entitlement to ask that the lump sum bill be itemised; and
  - Charging a 'cancellation fee' for time that was set aside to work on a matter but which turned out not to be necessary, because the matter unexpectedly settled early, for example, and using that time to do other paid work without waiving or reimbursing the fee, effectively 'double-dipping' by charging the same time twice.

There are three things to note about conduct of these kinds:

- It is rarely if ever 'named' in complaints. The Commission came upon it more often than not in the course of investigating broader, non-specific complaints about costs or for that matter complaints about other matters altogether - yet it was there to be seen in the bills the complainants had been issued, and often in the costs agreements they had signed;

- It exposes lawyers potentially to disciplinary action for charging excessive legal costs and/or costs to which they are not entitled, and to being required to compensate or reimburse the complainants the amount of any overcharge;<sup>26</sup> and
- It is conduct which by its very nature is likely to be their standard operating procedure in calculating their costs and, if so, it exposes them to being required to compensate or reimburse not only the complainants but potentially large numbers of their other and unsuspecting clients also, few if any of whom ever make complaints.

And why would they make complaints? A lawyer's professional obligations from a consumer's perspective are typically little more than 'secret lawyers' business', not least how the broadly stated obligation to charge no more than fair and reasonable costs applies to the bills their lawyers give them. They figure that their lawyers must know the ropes, and they have little choice in the absence of some more straightforward reason for doubt but to put their faith in their lawyers not to charge them what they shouldn't.<sup>27</sup>

And fair enough: do we really expect consumers ordinarily to be in a position to complain that their lawyers have charged them undisclosed mark-ups on their outlays, for example, or breached the 50/50 rule in speculative personal injury matters or wrongly charged them for care and consideration on top of time-based bills or double-dipped by charging them a cancellation fee? How would they know? Why ordinarily would they be suspicious?

Exactly how then if we are relying on complaints to alert us to them are we expected to identify and scope these and like practices and take appropriate remedial action? Do we really believe if against the odds we do in fact receive a complaint and the complaint establishes that the complainant is owed redress that there aren't many tens, if not hundreds of the lawyer's other clients who may also be owed redress? Do we really believe that lawyers who calculate their costs in these and like ways do so as anything other than standard operating procedure? Do we really believe that these practices are confined to the lawyers who have come to attention more or less accidentally in the ways I have described and that there aren't other and unidentified lawyers who have similarly adopted them as standard operating procedure? I think not.

- Furthermore there are whole categories of lawyers who are only rarely troubled by complaint when we have no good reason to believe they are commensurately immune to behaving badly, not least by adopting problematic billing practices of the kinds I have described. The system for dealing with complaints directs regulatory attention disproportionately to lawyers who practice 'retail' law in small law firms, so much so that lawyers who practise more commercially oriented law in medium sized and larger law firms are only nominally subject to this kind of regulatory scrutiny.<sup>28</sup>

Now do we really believe that lawyers who practise more commercially oriented law in medium-sized and larger law firms are commensurately more ethical and less inclined to sharp billing practice than their retail and small firm peers? I think not. Why not? Because:

- The empirical evidence which has been reported in the academic literature, scant and mainly North American though it is, gives no cause for optimism: quite the contrary.<sup>29</sup>
- The local hard evidence, even more scant though it is, paints the same bleak picture. And so for example the Commission asked all personal injury lawyers in Queensland in 2011 to audit their files going back to the commencement of the 50/50 rule in 2003 to



identify any consumers they had overcharged in breach of the rule and to reimburse them the amount of any overcharge plus interest. Notably 34 law firms reimbursed more than 200 clients amounts totalling almost \$400,000 - and yet only 1 of those more than 200 consumers had made a complaint.<sup>30</sup>

- The results of the Commission's ethics checks similarly paint the same bleak picture.<sup>31</sup> The Commission invited all medium-sized and larger law firms in Queensland in 2010 and all their employees to complete in total anonymity an on-line 'billing practices check'.<sup>32</sup> More than half the lawyers in 11 of the 25 firms which participated in the survey reported that they had concerns about the billing practices of other lawyers in their firm. More than 1 in 5 of the lawyers in 11 of those firms and more than 2 in 5 of the lawyers in 5 of them reported that they had actually observed lawyers bill padding in their firm. They said in other words that they had seen their colleagues charge excessive legal costs and/or costs to which they were not entitled.<sup>33</sup> The survey results were not reflected in the Commission's complaints data. Medium sized and larger law firms, remember, are only disproportionately rarely subject to complaint.

Subsequently the Commission invited small law firms and their employees to complete a similar 'billing practices check'. Only slightly fewer than 1 in 5 of the 177 lawyers who completed the survey reported that their firm's bills '*not infrequently*' exceeded the initial costs estimates *by more than 50%*, and more than 1 in 10 of them reported that their firms '*only sometimes*' gave their clients revised estimates. They said in other words that their firms routinely breached their costs disclosure obligations. Those results were not reflected in the complaints data, either.

- The anecdotal evidence is similarly telling. It is striking for example when you ask lawyers questions about the propriety of the billing practices I have described that they give such very different answers. I asked solicitors at various workshops in recent years whether it is ever, and if so when it is fair and reasonable to make a charge for care and consideration on top of a time-costed bill. Their answers highlighted striking differences of opinion among the lawyers in those rooms. Some of them saw no issue of principle and moved promptly to debate the circumstances which justify such a charge. Others disagreed, and vehemently so. They argued that to charge 'care and con' on top of a time costed bill is never acceptable and, as one of them put it, is '*all con and no care*'. I got similarly divergent answers to questions I asked barristers about the circumstances which might justify charging a cancellation fee.

It is extraordinary, is it not, that lawyers give such varying and even diametrically opposed answers to questions which, from whichever way you look at them, are fundamental questions that go to the very heart of their ethical and fiduciary obligations to their clients.

- Even more telling are the extraordinarily candid things that lawyers including senior lawyers and members of the judiciary say about lawyers' billing practices almost every other week in lawyer's magazines and the legal affairs pages of the Friday national newspapers. The stories they tell are shocking, even allowing for hyperbole, and so too the many galling stories lawyers including costs lawyers tell each other in hushed tones every other day about billing practices they see in the course of their work, stories many of them have told me during my time as Commissioner and since.<sup>34</sup>

The evidence all points to a systematic regulatory failure to rein in rapacity. This is a conclusion which is widely acknowledged behind closed doors but only rarely uttered in public and which wins you no friends when it is - and it is yet more evidence that the profession has been *more responsive to practitioners' concerns than those of the general public*.<sup>35</sup> Thankfully however I am not alone.<sup>36</sup>

So while I can't claim to know it to be true I am prepared to bet it to be true that even the best-designed system for dealing with complaints systematically underreports conduct which entitles consumers to redress or should otherwise come to regulatory attention and by a factor of many tens if not hundreds of times.

Furthermore even the best designed system for dealing with complaints will be entirely reactive, inevitably so. It will be premised on the merest of mere minimum standards, the standards below which disciplinary action comes into frame. It will achieve little by way of prevention but for an uncertain deterrent effect. And it will direct regulatory attention almost exclusively to the conduct of individual lawyers and only incidentally to underlying cultural issues in the law firms where they work, as if contrary to all the empirical evidence workplace cultures play little if any role in shaping workplace behaviours – as if, say, unreasonable pressure to meet unrealistic billing targets is somehow or other ethically neutral.<sup>37</sup>

It follows that even the best-designed system for dealing with complaints, while it will give a window on problematic conduct within the profession, gives a window with only a very narrow view. It is, on its own, a highly ineffective and inefficient means to protect consumers and to promote, monitor and enforce high standards of conduct in the provision of legal services. It is all tip and no iceberg.

Even the best designed system for dealing with complaints will contribute meaningfully to achieving these purposes only when it is supplemented with, and exercised in tandem with tools which can be used proactively; which identify and engage regulators with the lawyers most at risk of non-compliance with their professional obligations, not merely the sub-set who find themselves subject to complaint; which favour prevention over cure; which encourage and help lawyers to do the right thing as much as police and punish them for doing the wrong thing; and which direct regulatory attention to the conduct not only of individual lawyers but also the law firms where they work - their management systems and supervisory arrangements; their ethical infrastructures; their workplace cultures.

### **The system for conducting trust account investigations**

The system for conducting trust account investigations fits those criteria to a tee. It is ideally suited to proactively identify misconduct which is unlikely ever to come to attention through complaints, or to come to attention only haphazardly - and not only the occasional fraud but also and specifically billing practices of the kinds I have described which appear to be standard operating procedure in more than a few, but an unknown number of law firms.

It could hardly be better designed to identify any costs that *any particular law firm* may have charged its clients but was not entitled to charge, and hence any redress they may be owed, and for the obvious reason that they pay the firm the costs they have been charged through its trust account. Not only that but a carefully targeted, proactive program of trust account investigations is equally well suited to identify and scope problematic billing practices *across whole classes of law firms* - firms which practise succession law, for example, to test claims that some of them may be charging grossly disproportionate costs in speculative family

provision matters in ways that are eerily familiar to the grossly disproportionate costs which some lawyers charged in speculative personal injury matters in Queensland in the early 2000s and which prompted the enactment of the 50/50 rule.<sup>38</sup>

That is because the LPAs across the country and the LPUL all give the relevant regulatory authorities unfettered discretion to conduct a trust account investigation, a discretion that has long been exercised sometimes in response to intelligence that a law firm or class of law firms may be non-compliant with their professional obligations but more often than not by random selection. There is no requirement under either the LPAs or the LPUL that a trust account investigation be initiated in response to a complaint or like an own motion investigation only on '*reasonable grounds*'.<sup>39</sup>

Thus the system for conducting trust account investigations is ideally suited to complement the system for dealing with complaints, not least in identifying potentially large numbers of unsuspecting consumers and giving them a means of redress for wrongs of which they will otherwise be totally unaware. And it strikes me as obvious, this being the case, that the two systems will achieve their purposes most effectively and efficiently if responsibility for both functions is consolidated under a single management structure - to leverage the synergies and to facilitate the sharing of human and knowledge resources, information and perspective to better identify the law firms most likely to put consumers and the public at risk and, as needs be, to craft appropriately targeted remedial action.<sup>40</sup>

But that is not the way it is anywhere along the eastern seaboard, as noted already. The regulatory frameworks in Victoria, New South Wales and Queensland all give responsibility for dealing with complaints to independent Legal Services Commissioners and responsibility for conducting trust account investigations to the local Law Societies.

Of course there is nothing to stop two agencies cooperating and indeed the Laws in all three states contemplate the Commissioners *asking* the Law Societies to conduct trust account investigations and to be given investigation reports on their completion.<sup>41</sup> But inter-agency cooperation invariably promises more than it delivers, if only because agencies will inevitably have competing priorities within their ongoing programs of investigation. More fundamentally however effective cooperation requires a shared sense of purpose and that is unlikely, all the more so when investigations venture into the space where the public interest in keeping lawyers' costs in check and the membership bodies' interest in ensuring their members are well remunerated come most readily into both real and perceived conflict, lawyers' billing practices and costs.

### **The system for conducting compliance audits**

The system for conducting compliance audits ***as it is configured under the LPAs***, like the system for conducting trust account investigations, fills all the gaps in the regulatory framework that are left open by even the best designed system for dealing with complaints, and even more completely. That is hardly surprising: it is simply the system for conducting trust account investigations writ large - a system for auditing not only that sub-set of a law firm's management systems and supervisory arrangements which govern its handling of trust money but its management systems and supervisory arrangements more broadly. It should similarly be packaged under a single management structure alongside the systems for dealing with complaints and conducting trust account investigations, and for all the same reasons. But again, as noted already, that is not the way it is anywhere along the eastern seaboard.

Indeed I have long argued as have others that the single most effective reform that could be made to better protect consumers and better promote, monitor and enforce high standards of service in the delivery of legal services would be to extend the power the LPAs give the relevant regulatory authorities to conduct a compliance audit of an ILP to all law firms, incorporated or otherwise.<sup>42</sup> The recent round of national legal profession reforms which resulted in the LPUL was a golden opportunity.

Sadly however the LPUL botched it. The LPAs authorise the relevant regulatory authorities to conduct a compliance audit of an ILP, **but only of an ILP**, and authorise it to do so *‘whether or not a complaint has been made in relation to the provision of legal services by the practice.’* The LPUL for its part authorises the relevant regulatory authorities to conduct compliance audits **of all law firms**, incorporated or otherwise, **but only if there are ‘reasonable grounds to do so based on the conduct of the law practice or one or more of its associates or a complaint against the law practice or one or more of its associates.’**<sup>43</sup>

Thus the LPUL extends the power to conduct a compliance audit to all law firms but at the same time narrows it in a way which robs it of its greatest strength as a regulatory tool, its capacity to be used proactively - and in a way which is entirely unnecessary to protect law firms from the possibility that they may be subjected to an unjustified, additional regulatory burden.<sup>44</sup> It shrinks the broad, unfettered discretion the LPAs give the relevant regulatory authorities to conduct a compliance audit of an ILP, albeit only of an ILP, to a discretion which is properly exercised only in response to conduct which is suspected to have occurred in the past - conduct which inevitably comes to attention only haphazardly, in ways which under-report conduct which ought attract regulatory scrutiny by many tens, if not hundreds of times.<sup>45</sup>

The consequences are all bad. The effect of the LPUL will be to prevent the relevant regulatory authorities using the compliance audit power imaginatively to *‘identify the roots of potential problems in advance’* - by requiring law firms to participate in on-line ethics checks, for example, and by inventing and deploying other like tools. Certainly it will prevent them even from continuing much less extending to all law firms the program of self-assessment audits that has proved so successful with ILPs.

The LPUL was designed in this respect either in ignorance of or disregard for the evidence that self-assessment audits have achieved what Lord Hunt has described as *‘extraordinary cultural change’*.<sup>46</sup> He was referring to the well-documented evidence that ILPs which have completed a self-assessment audit are two-thirds less likely to be subject to complaint than ILPs which have not, evidence which has been complemented more recently with similarly well documented evidence that the large majority of the directors of ILPs which have completed a self-assessment audit acknowledge that the process prompted their firm to deliver improved client service.<sup>47</sup> So much for evidence based policy - and another sure sign that the profession has been *more responsive to practitioners’ concerns than those of the general public*.

And I note with some irony that while the LPUL takes Australia backwards in this respect there is forward momentum elsewhere, momentum premised in no small part on the Australian experience in conducting compliance audits and that very same evidence.<sup>48</sup>

### **The framework for testing the fairness of costs agreements**

The LPUL makes costs disclosure the centrepiece of its consumer protection framework in relation to costs. It describes its overarching purposes to include *‘empowering clients of law*

*practices to make informed choices about the services they access and the costs involved'. It describes the purposes of its costs regime to be 'to reduce complaints about legal costs by emphasising the importance of informed consent by consumers, to ensure that clients of law practices are able to make informed decisions about their legal costs and the costs associated with pursuing those options, and to provide that law practices must not charge more than fair and reasonable amounts for legal costs.'*<sup>49</sup>

The LPUL like the LPAs requires lawyers to fully and frankly disclose their costs or the basis on which their costs will be calculated before they enter into a costs agreement with a consumer and to update any previous disclosures if and when circumstances change. It presumes if those requirements are met that a consumer has given his or her informed consent to an agreement and allows it to be enforced *'in the same way as any other contract'*.<sup>50</sup> Thus the LPUL like the LPAs tests the fairness of a costs agreement between a lawyer and a consumer by reference to the circumstances in which the agreement was made. It seeks to protect consumers from being treated unfairly in relation to their costs by requiring that lawyers ensure that the *process* by which they enter into a costs agreement is fair.

But this methodology falls well short of contemporary consumer protection best practice. It is the same test of the fairness of a consumer contract which applied under the now superseded state and territory fair trading laws which were reformed in 2011 by the *Australian Consumer Law* (the ACL). The ACL applies a different test of the fairness of consumer contracts, including costs agreements between lawyers and consumers.<sup>51</sup> It prohibits *'unfair terms'* in standard form contracts for the provision of goods and services to consumers - terms which cause a significant imbalance in a provider's and a consumer's rights and obligations under the contract or cause consumers a financial detriment. Thus it tests the fairness of a consumer contract, and hence a costs agreement, by reference not to the *process* by which the agreement was entered into but its *substance* - to the fairness of the agreement *in its terms*.<sup>52</sup>

The ACL was reformed to protect consumers from unfair terms in contracts precisely because procedural fairness alone is inadequate to protect them from being treated unfairly - because, in short, real world consumers behave very differently from the ideally competent and rational contracting parties envisaged in classical contract theory.<sup>53</sup> And that is the legal fiction which underpinned the now repealed 'fair trading' regimes and continues to underpin the legal profession legislation even in its most recent incarnation, the LPUL - a fiction in which consumers are deemed to have assessed the risks and made an informed decision to enter into a contract freely and fairly provided only that they were under no undue pressure and were given all the information an ideally rational and competent person would require to come to an informed decision.

But consumers all too often lack the legal or technical expertise they require to understand and critically analyse standard form contracts they are given to sign or to negotiate terms or resist their enforcement. We knew it anyway, it seems to me, but ordinary observation supported by extensive consultations with consumers and the evidence revealed by empirical behavioural economics research demonstrates conclusively that costs disclosure by itself is insufficient to protect consumers from signing up to unfair consumer contracts for the provision of everyday goods and services.<sup>54</sup>

And if that is true of consumer contracts in the marketplace more generally, then it is certain to be true of costs agreements for the provision of legal services.<sup>55</sup> That is because, as Lord Hunt puts it, *'activities such as medicine, financial services and the law are so inherently complicated and specialised, and require so much specific knowledge on the part of the*

*practitioner, that significant asymmetry of information and understanding inevitably exists, between provider and patient, customer and client.' Thus 'regulation must artificially restore the balance.'*<sup>56</sup>

So it is that the ACL takes both common sense and real world evidence on board to protect consumers from unfair contract terms. The LPUL does not. Its costs disclosure provisions are premised on a legal fiction which works very much to the advantage of lawyers but which is known in fact to be false.<sup>57</sup> It was designed either in ignorance of or disregard for contemporary consumer protection best practice. So much once again for evidence based policy.<sup>58</sup>

And notably the ACL was based on the recommendations of a review of consumer protection laws across the country conducted by the Productivity Commission in 2008.<sup>59</sup> It was enacted across the country in 2010, well before the National Legal Profession Reform Taskforce gave COAG the proposed National Law in December of that year. It commenced early the following year, well before Victoria and New South Wales enacted the National Law as the LPUL in 2014 and well before it commenced only earlier this year. That is why the LPUL was past its use by date in this respect even before its ink was dry.

Of course the ACL includes a range of measures other than its unfair terms provisions to protect consumers not least consumer guarantees and provisions prohibiting unconscionable conduct and undue harassment and coercion.<sup>60</sup> Importantly it prohibits component pricing - it prohibits a person who makes a representation about the price of a good or a service from representing the price without also and at the same time prominently specifying the total, all up price someone must pay to obtain the good or service. It similarly prohibits misleading and deceptive conduct and, notably, defines misleading and deceptive conduct to include conduct which is 'likely' to mislead or deceive whether or not it is intended to mislead or deceive or in fact misleads or deceives.<sup>61</sup>

Now it has never been acceptable for lawyers to engage in misleading and deceptive or unconscionable conduct, for example, and it may be that the LPAs and the LPUL disallow much of the conduct that costs agreements purport to authorise through unfair terms by their requirement that costs agreements be both fair *and* reasonable.<sup>62</sup> Similarly it may be that the LPUL by authorising regulators to order lawyers to give fair and reasonable redress to consumers they have let down does much the same job as consumer guarantees.

Maybe, maybe not - time will tell how the inconsistencies play out but the prospect that the LPUL and the LPAs expect less of lawyers in their dealings with consumers than the ACL expects of business people and traders in their dealings with consumers in the economy more broadly should embarrass and trouble the profession. It is yet to be meaningfully tested in cases involving lawyers but it would come as no great surprise if they do.

The LPUL like the Model Law was designed primarily to achieve a more rational and efficient national legal services market, not consumer protection reform. It was drafted like the Model Law before it largely by lawyers for lawyers, in the closest possible consultation with their representative bodies and to the all but total exclusion of consumers.<sup>63</sup> It comes as no great surprise, then, that just as the Model Law was drafted in the early 2000s either in ignorance of or disregard for repeated calls over a decade and more both in Australia and overseas for reforms to give consumers a better deal, the LPUL was drafted in the late 'noughties' either in ignorance of or disregard for contemporary consumer protection best practice - more

evidence that *the profession has long been and remains more responsive to practitioners' concerns than those of the general public.*

The ACL on the other hand was designed specifically to better protect consumers and it was drafted in close consultation with consumers and consumer advocates. The prospect that it is more *responsive to consumers' concerns* than the Model Law, the LPAs based on the Model Law and the LPUL is entirely unsurprising. It would be a surprise if it wasn't.

Now I am speculating, and as always in these matters it might take the right cases in the right courts and on a good day, but it would come as no great surprise putting all this together if courts were to find that terms in costs agreements which purport to allow solicitors to charge consumers a discretionary '*uplift*' for care and consideration on top of a time-based bill are unfair - and similarly terms which purport to allow solicitors to '*reserve their rights*' to withdraw a lump sum bill and to replace it with another bill in a higher amount if a consumer exercises his or her lawful entitlement to request that the lump sum bill be itemised. Indeed it would come as no great surprise if courts were to find terms in costs agreements which purport to authorise *any* of the billing practices I have described to be unfair. All of them at least on the face of it appear to cause a significant imbalance in a lawyer's and a consumer's rights and obligations and to cause consumers a financial detriment.

Nor would it come as any great surprise if courts were to find that the conduct of lawyers in charging consumers over the life of a file multiple 6 minute units of time for work that took much less than 6 minutes is misleading and deceptive. Indeed it would come as no great surprise if courts were to find a lawyer's conduct in charging a consumer costs calculated pursuant to *any* of the problematic billing practices I have described to be misleading and deceptive, or for that matter a lawyer's conduct in charging excessive legal costs *however* the costs were calculated, on the basis simply that lawyers who issue a bill represent in so doing that the costs they are claiming in the bill are properly chargeable - that they are entitled to those costs when in fact they are not.<sup>64</sup>

The prospect that the ACL will better protect consumers than the LPUL and the LPAs in these or like ways should be thoroughly explored and put to the test. Sadly, that seems to me to be unlikely. Who will do it? Aggrieved consumers could do it, by taking their complaints not to the Legal Services Commissions and their counterpart bodies elsewhere but to the generic fair trading regulators - the Australian Competition and Consumer Commission (the ACCC) or their local Office of Fair Trading (OFT) - but it is hard to see that happening short of a concerted campaign championed by committed consumer advocates who are already far too busy dealing with a multiplicity of other consumer issues.

It would require even then that the ACCC and/or the OFTs have the resources, the expertise and the will to take up the cause, and that is unlikely - they no less than consumer advocates have enough on their plate already. Alternatively some enterprising lawyers or legal academics could research the issue and publish their findings, and I hope some do, although that exercise would be far less likely to cause lawyers to change their ways than decisions of the courts.

So it might be an academic rather than an actual prospect for these most practical of reasons but it should shame the profession nonetheless. It should be a given that consumers are entitled to expect no less in their commercial dealings with lawyers than in their dealings with any other supplier of goods and services. Clearly it is not a good look for lawyers if the generic consumer protection framework under the ACL requires higher standards of them in their dealings with consumers than the legal profession specific laws which for all practical purposes

regulate their behaviour, even in their most recent incarnation, the LPUL. Yet sadly that is almost certainly true of the unfair terms provisions under the ACL and it may well be true of its misleading and deceptive conduct and component pricing provisions and other provisions also.

Notably in this regard lawyers are already playing catch-up with bankers, stockbrokers, financial planners, telephone and internet service providers, and electricity, gas and water suppliers in giving consumers an effective means of redress for complaints in every state and territory but for New South Wales and Victoria, the only two states which have enacted the LPUL. And if it is true that the ACL better protects consumers than the LPUL, which is a great improvement on the LPAs, then lawyers will similarly be playing catch-up with shop-keepers and tradespeople as well - and right across the country.

That should be embarrassing enough, but an even greater embarrassment for members of a profession so given to celebrating its high ethical standards vis-à-vis other, mere *'run of the mill commercial enterprises'*. The legal profession would be well advised to live up to its rhetoric, to get its house in order and to keep up with the game.

### **In hope against hope**

Australia had a golden opportunity in the latest round of national legal profession reforms to get the regulatory framework right. Sadly while the LPUL is a vast improvement on the LPAs in relation to complaints it goes backwards in relation to compliance audits and was past its use by date even before its ink was dry in relation to testing the fairness of costs agreements.

It is a hope against hope, perhaps, but the LPUL requires only three relatively straightforward amendments to make up almost all the lost ground. They are amendments designed:

- To give the relevant regulatory authorities the same unfettered discretion to conduct a compliance audit of a law firm that they have and have always had to conduct a trust account investigation, i.e., the same unfettered discretion they have or in Victoria and New South Wales, used to have under the LPAs to conduct a compliance audit of an ILP (subject of course to adequate protections against regulatory overreach);
- To require that responsibility for dealing with complaints and conducting trust account investigations and compliance audits be exercised by just the one regulatory authority in each jurisdiction and, as originally intended, by an independent statutory body; and
- To replicate the unfair contract terms provisions in the Australian Consumer Law (ACL).

That would be a good start, but the amended legislation and the rules made pursuant to the legislation should then be bench-marked against the ACL - not least against its prohibitions of component pricing and misleading and deceptive conduct - and further amended as needs be to ensure that consumers of legal services are no less well protected under the LPUL and related rules than consumers more generally are protected under the ACL.

But a framework is one thing and its implementation another thing altogether. We should hope against hope that the regulatory authorities would see their way clear within that framework to use their powers innovatively and imaginatively and proactively - to use them with *'an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted.'*<sup>65</sup>



That would build on the good start, and it would be built on even further if legislators, policy makers, regulators, the professional bodies, the disciplinary bodies and the courts, legal educators and practitioners could see their way clear:

- To acknowledge and debate the persistence and prevalence within the profession of rapacious billing practices, accept that it demonstrates a longstanding regulatory failure to adequately protect consumers, especially ordinary retail consumers who have little if any meaningful bargaining power in their dealings with their lawyers, and take it on board as the most fundamental of all the ethical challenges confronting the profession;
- To cease to put such undue reliance on ordinary consumers to blow the whistle on conduct which should come to regulatory attention - on the capacity and willingness of consumers to identify and report conduct which sells them short or contravenes typically arcane professional obligations known only to their lawyers, lawyers they have little choice but to take on trust;
- To engage constructively with consumers and consumer advocates, including in the absence of established consumer organisations by creating other ways and means to include and embrace consumers as legitimate partners in overseeing the regulation of the provision of legal services in the public interest; and
- To insist that policy development and regulatory design in this space be better informed by evidence, and in the absence of evidence be willing to commission research and/or to partner with legal researchers in doing it.

Members of the public will then have reason to be confident that lawyers and their provision of legal services are being regulated in ways which protect consumers and which promote, monitor and enforce appropriately high standards of conduct in the provision of legal services.




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#### Endnotes:

<sup>1</sup> The story has a historical relevance locally and possibly a wider relevance also as a case study of the evolution of like regulatory bodies both elsewhere in Australia and overseas – thus the longer paper while it goes under the same title as this shorter version is sub-titled *A Case Study in Lawyer Regulation*. I will refer to the more detailed arguments in the longer paper as needs be to unpack the abbreviated arguments in this shorter version. *A Case Study in Lawyer Regulation* will be published as a Melbourne Law School Working Paper, forthcoming, 2016.

It is a story I tell from first-hand experience. I was appointed to be Queensland's inaugural Legal Services Commissioner just prior to the commencement of the *Legal Profession Act 2004* (the LPA) on 1 July 2004 and I remained in the role for the maximum 10 years the Act allows. I note because it is relevant to my argument that I was appointed in that capacity to be a member of the Consultative Group to the National Legal Profession Reform Taskforce in 2009-10. I note also for what it is worth that the LPA does not require the Commissioner to be a lawyer and I am not a lawyer.

I am indebted to Simon Cleary, Professor Jeff Giddings, Ronwyn North, Bill Potts and Roger Quick for their valuable feedback on earlier versions of both this and the longer paper. They are both much better papers for their input. None of them bear any responsibility however for any remaining errors and omissions, much less for my opinions.

I should add that I use the term *consumer* throughout both papers in preference to the term *client*. That is because it marks out the subset of clients who most need regulatory protection - ordinary folk who go to lawyers only occasionally and often in times of considerable personal distress and who are in the main poorly equipped by

knowledge and experience to protect their interests in their dealings with lawyers. Of course the same could be said of many small business operators and I use the term *consumer* loosely to include those clients also.

<sup>2</sup> I am prepared to concede a role for the professional bodies in monitoring and enforcing their members' professional standards, albeit only reluctantly, but only if they perform the role under strict independent oversight and control; only if they implement entirely separate arrangements for the governance of their regulatory and membership or representative functions; and only if the governance of their regulatory functions includes meaningful and structured input from consumers and consumer advocates. I note however that effective oversight and control doesn't come cheap. It involves a lot of double-guessing and hence the necessary resources.

<sup>3</sup> Lord Hunt argues in his recent review of the regulatory arrangement in England and Wales, absolutely correctly in my view, that '*there is a role for regulators of leadership and guidance and not just policing and punishing*'; that regulators should '*move away from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted*'; and that '*effective regulation of legal services must in future concentrate far more on promoting good governance arrangements*' in law firms. He advocates, again absolutely correctly in my view, '*a dual approach, with regulation of both individuals and entities. It is no longer a question of which is better. It is a question of how best the two types of regulation can complement each other, whilst remaining proportionate and avoiding double regulation*' - the Rt. Hon. Lord Hunt of Wirral MBE, *The Hunt Review of the Regulation of Legal Services* (the Hunt Report), October 2009, at pages 77-78, 47 and 59-60 respectively.

<sup>4</sup> The local and national media, especially the print media, ran numerous, perhaps hundreds of highly critical stories about lawyers and especially their billing practices during the 1990s. The long-running and damaging publicity peaked in what the newspapers famously dubbed the *Caesar judging Caesar* scandal in the early 2000s, referencing the fact that the regulatory regime at the time required the Queensland Law Society – the body which represented lawyers, their 'union', if you will - to deal with complaints about its members. The scandal centred on the Society's failure as the relevant regulatory authority at the time to deal adequately with a litany of complaints about the conduct of one of its members who charged his clients costs in 'no win no-fee' personal injury matters which approximated and in at least one spectacular matter even exceeded the amount he had 'won' for them in judgement or settlement amounts. See *A Case Study in Lawyer Regulation* at Part 2.1.

<sup>5</sup> See the *Review of the Regulatory Framework for Legal Services*, Sir David Clementi, December 2004, and the government's response, *The Future of Legal Services: Putting Consumers First*, Department of Constitutional Affairs, October, 2005.

<sup>6</sup> The Act created the Legal Ombudsman to deal with service or consumer complaints, also under the Board's general oversight and control.

<sup>7</sup> The Hunt Report (op. cit.) at pages 26-32.

<sup>8</sup> Many do, including those of them who decided in 2011 that the QLS should relinquish responsibility for dealing with complaints and auditing law firm trust accounts. Some don't, including those of them who reneged on that decision in 2012 and continued to dream their misty-eyed dreams of the good old days of self-regulation – see *A Case Study in Lawyer Regulation* at Parts 5.3 and 6.1.

<sup>9</sup> The bottom line, as Paul Keating reminded us not so very long ago and as the public understands full well, is that a betting man (sic) always puts his money on self-interest in a race with the public interest because, while it won't always win, you can be absolutely sure it is always in there trying, giving it a red hot go. The conflict is obvious, and sometime even explicit. The incoming President of the QLS argued in February 2010 in its monthly magazine *Proctor*, for example, that '*we [the QLS and its leaders] have to continually challenge what we do and make sure that whatever we do satisfies the question 'is it in the members' interests?' If that test is applied, we will always be successful.*' Now that is an entirely laudable objective for a representative body but deeply troubling coming from a body which has concurrent and significant regulatory responsibilities.

<sup>10</sup> See the Roy Morgan Image of Professions Survey 2014. The number who believe lawyers are honest and ethical compares favourably but without giving any great comfort to the profession with the number who believe that financial planners and journalists are honest and ethical - approximately 1 in 4 and 1 in 5, respectively. The Roy Morgan results are largely replicated in the Readers Digest Trusted People Survey 2014 which similarly and consistently ranks nurses, pharmacists and doctors in the top 7 most trusted professions and ranks lawyers on a par with clergy (and wait for it) tow truck drivers and charity collectors as the equal 36<sup>th</sup> most trusted professions, just below financial planners (35<sup>th</sup>) and bankers (34<sup>th</sup>).

<sup>11</sup> The Victorian LPUL at section 30 requires the Board '*to ensure the effective regulation of the legal profession and the maintenance of professional standards, to address the concerns of clients of law practices and legal practitioners through the regulatory system and provide for the protection of consumers of legal services, and to ensure the adequate management of trust accounts.*'

<sup>12</sup> The Queensland Law allows the Commissioner to refer complaints to the Law Society and Bar Association for investigation and gives the Law Society and the Bar Association *a duty to investigate* any complaints the Commissioner chooses to refer to them and *to recommend to the Commissioner what action, if any, the Commissioner should take on those complaints*. It gives the Commissioner sole power to *decide* what action, if any, to take on a complaint and sole power *to initiate and prosecute disciplinary proceedings*. The Commissioner ceased to refer complaints to the Law Society from 1 September 2015.

The Victorian LPUL allows the Commissioner to delegate some or all his powers to the Law Institute and the Bar Association, but the Commissioner has chosen to delegate only *some* of his powers and only to the Bar Association, viz., his powers to *mediate and decide consumer matters* and his powers to *investigate disciplinary matters*. He has quite specifically *not* delegated his powers to *decide disciplinary matters or to initiate and prosecute disciplinary proceedings*. Thus the Commissioner (like his Queensland counterpart) is required to review every investigation conducted by the Bar Association in order to decide what action, if any, to take on those complaints.

The New South Wales LPUL allows the Commissioner to delegate some or all his powers to the Law Institute and the Bar Association and the Commissioner has decided to continue the longstanding practice under the (now repealed) LPA in which his Office deals with most if not all *consumer matters* itself but delegates the majority of disciplinary matters to the Law Society and the Bar Association.

<sup>13</sup> The Queensland Law gives both the Commissioner and the Law Society the discretion to conduct a compliance audit (but only of an incorporated legal practice) but by convention and agreement it has only ever been exercised by the Commission.

<sup>14</sup> The cross-jurisdictional Legal Services Council fits this description also. The LPUL gives the Council and overarching responsibility *'to monitor the implementation of the LPUL'* and to ensure that the framework under the LPUL *'remains efficient, targeted and effective and promotes the maintenance of professional standards'* and *'appropriately accounts for the interests and protection of clients of law practices'* - see LPUL section 394.

<sup>15</sup> The Government's response to the Clementi review (see endnote 3, above) concluded that *'the professional competence of lawyers is not in doubt... but despite this, too many consumers are finding that they are not getting a good or a fair deal. The case for reform is clear, and reform is overdue... The proposed regulatory framework sets the framework within which firms can deliver consumer focussed legal services... Our vision is of a legal services market... that is responsive, flexible, and puts consumers first.'*

<sup>16</sup> For more information, go to [www.lsb.org.uk](http://www.lsb.org.uk) and [www.legalservicesconsumerpanel.org.uk](http://www.legalservicesconsumerpanel.org.uk).

<sup>17</sup> The LPUL requires that the Legal Services Council be chaired by a person who has been both nominated and approved by both the Law Council of Australia and the Australian Bar Association and otherwise comprises 1 person recommended by each of the Law Council and the Bar Association in addition to the 2 people who have expertise *either* in the practise of law, the regulation of the profession, financial management *or* consumer protection.

<sup>18</sup> The Victorian LPUL requires that the Board comprises a Chairperson who may or may not be a lawyer; 3 lawyers who are elected by the profession; and 3 appointees at least 1 of whom has expertise in financial and/or prudential management and at least 1 of whom represents consumers.

<sup>19</sup> My appointment in 2004 is the only exception to date to my knowledge, and I don't doubt that it was an exception to the rule brought about by the Caesar judging Caesar scandal which preceded it.

<sup>20</sup> Thus the Australian Competition and Consumer Commission has a Consumer Consultative Committee, for example; the Australian Securities and Investment Commission has a Consumer Advisory Panel; the Financial Ombudsman Service has a Consumer Liaison Group and liaises regularly with a range of consumer advocacy organisations including the Consumer Credit Legal Service and Financial Counselling Australia; and the Telecommunications Industry Ombudsman liaises regularly with the Australian Communications Consumer Action Network.

<sup>21</sup> It was true not too long ago of Australia's energy sector, for example, and so the Productivity Commission went out of its way to establish a consumer group, Energy Consumers Australia, specifically *'to empower energy consumers'* to contribute to debate about regulatory issues in that sector.

<sup>22</sup> The LPAs based on the Model Law give the relevant regulatory authorities inadequate powers to provide consumers a means of redress for complaints, especially when they are owed redress as a result of a lawyer's honest and minor mistake or poor standards of service and the like which call out not for any disciplinary response but simply to be put right. Thus the Queensland Law makes all but entirely voluntary redress wholly contingent on a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct. It gives the Legal Services Commissioner no obligation to try to help the parties to a consumer dispute resolve the dispute by mediation, merely a power to *'suggest'* to the parties that they *'enter into a process of mediation'*, much less the

power to determine what redress, if any, may be owed and to require the lawyer to provide that redress and/or to take such other remedial action as may be appropriate. The (now superseded) New South Wales and Victorian LPAs for their part gave the Commissioners in those two states the power to *require* the parties to enter into a process or mediation and, if a complainant was entitled in all fairness to redress but the parties fail to agree how the complaint should be resolved, at least some, albeit strictly limited powers to determine the outcome.

The LPUL fixes the problem by defining a consumer complaint (a *consumer matter*) to be a complaint which can be satisfactorily resolved '*whether or not the complaint also involves a disciplinary issue*' either by the parties voluntarily agreeing how it should be resolved or, failing that, by the relevant regulatory authority determining how it should be resolved. It requires the relevant regulatory authority to try to negotiate a satisfactory resolution but, crucially, if the parties fail to negotiate in good faith or fail to agree, it authorises them to make orders which caution or reprimand the lawyer or law firm or require the lawyer or law firm to apologise or to make good their mistake at no cost to the consumer, to reduce or waive their fee, to undertake further training or be counselled or supervised, to pay compensation of up to \$25,000 or to do whatever else they determine to be fair and reasonable in all the circumstances of the complaint – see the LPUL, Chapter 5.

<sup>23</sup> The Financial Ombudsman Service, the Telecommunications Industry, the Credit Ombudsman Service and other like bodies all have an obligation under their respective industry schemes to help the parties to consumer complaints resolve them by mediation and the power if mediation fails to decide a fair and reasonable outcome and to bind the parties to that outcome.

The system for dealing with complaints that is established under the LPUL is a great advance on the Queensland Law and the other LPAs in a number of other respects also. Most notably it defines *consumer matters* to include client/lawyer costs disputes where the total costs payable are less than \$100,000 or the amount in dispute is less than \$40,000. This would be a terrific reform in Queensland where the current mechanism for dealing with client/lawyer costs disputes is costly, protracted, lacking in transparency and quite incomprehensible to all but legal insiders in a way which exaggerates a consumer's already significant disadvantage in dealing with a lawyer. Importantly, too, the LPUL authorises the relevant regulatory authorities subject to review to make findings of unsatisfactory professional conduct (but not of professional misconduct) and in that eventuality to make any of the orders they are authorised to make in relation to consumer matters; to reprimand the lawyer; to require the lawyer to do or redo the work subject to complaint; to reduce or waive their fee or to pay compensation of up to \$25,000; to pay a financial penalty of up to \$25,000; and to recommend that a specified condition be placed on the lawyer's practising certificate. This sensible reform would spare the parties considerable time and trouble and cost, not least in the case of respondent lawyers the costs of defending themselves in a hearing before a disciplinary body, costs which not infrequently exceed any financial penalty that is ultimately imposed – see *A Case Study in Lawyer Regulation* at Parts 5.1 and 5.2.

<sup>24</sup> The professional bodies were largely responsible for the designing the Model Law in the early 2000s and the LPAs based upon the Model Law. Yet the American Bar Association's Centre for Professional Responsibility argued as early as 1992 in its report *Lawyer Regulation for a New Century – the Report of the Commission of Evaluation of Disciplinary Enforcement*, that '*the overwhelming majority of complaints allege minor incompetence, minor neglect or other minor misconduct [or that lawyers] behaved in ways that are unfair to the client [and that] many of them state legitimate grounds for client dissatisfaction [but that] the public is left with no practical remedy [because] the system for regulating the profession is narrowly focussed on violations of professional ethics.*' Similarly the New South Wales Law Reform Commission argued as early as 1993, in its *Report 70: Scrutiny of the Legal Profession - Complaints About Lawyers*, that '*there is a profound gap between what angers clients (and others) sufficiently to go to the trouble of complaining and what lawyers and their professional associations see as important enough to merit serious attention, disciplinary action or compensation.*' Similarly a Trade Practices Commission *Study of the Legal Profession* argued in 1994 that '*measures should be introduced to improve the effectiveness and public accountability of the discipline and complaint handling systems in each [of the Australian states and territories], including the provision of redress where consumers have suffered harm in their dealings with legal practitioners.*'

<sup>25</sup> The Queensland Parliament enacted the 50/50 rule following the Caesar judging Caesar scandal in the early 2000s, initially in the *Queensland Law Society Act* and subsequently the *Legal Profession Act 2004* (at section 347). It is an important consumer protection, to be sure, but a sad necessity and a recognition that it is not enough simply to expect lawyers to understand and honour their obligation to charge no more than fair and reasonable costs and to give them little if any further guidance.

<sup>26</sup> It is well settled in law and no-one seriously disputes that lawyers should charge no more than fair and reasonable costs but there is a paucity of case law which spells out how that broad principle applies to these and like practices. Some of them are more straightforwardly problematic than others but in my view they are all problematic.

<sup>27</sup> Mahoney JA put it this way in *Veghelyi v The Law Society of New South Wales* (unreported, 4057 of 1991): '*clients are, or may frequently be, in a vulnerable position vis-à-vis their solicitors. They are ordinarily not in a position to*

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know... what work must be done and what charges are fair and reasonable. They ordinarily assume that the solicitor will only make such charges... Solicitors are, on the other hand, informed, or in a position to inform them-selves, of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust.' See *A Case Study in Lawyer Regulation* at Part 4.2 especially footnote 57.

<sup>28</sup> See *A Case Study in Lawyer Regulation* at Part 4.2 especially footnotes 58 and 59.

<sup>29</sup> See *A Case Study in Lawyer Regulation* at Part 4.2 especially footnote 60.

<sup>30</sup> For more about these audits, see *A Case Study in Lawyer Regulation* at Part 4.2 and footnotes 65-66.

<sup>31</sup> For more about the ethics checks, see *A Case Study in Lawyer Regulation* at Part 4.4.

<sup>32</sup> For more about the billing practices checks and the Commission's other on-line ethics checks, see *A Case Study in Lawyer Regulation* at Part 4.4.

<sup>33</sup> Dr Christine Parker and David Ruschena analysed the results of the survey and published their findings in *The Pressure of Billable Hours: Lessons from a Survey of Billing Practices inside Law Firms*, University of St Thomas Law Review, 2011, 9(2), 618-663.

<sup>34</sup> The partner of a large national law firm was quoted in the *Lawyer's Weekly* on 11 November 2005, referring to the pressure many lawyers are under to meet unrealistic billable hours targets, as saying that *'the temptation, and worse than that, the common practice is to mask such inhumane pressure by inflating time sheets, undertaking unnecessary work, exaggerating the need to review everything during discovery, undertaking overzealous due diligence processes and other practices readers will be familiar with. In other words, we lie and cheat to make ends meet. We act dishonestly as a matter of course. Everyone does it.'* Another senior practitioner was quoted more recently in the Legal Affairs pages of the Australian Financial Review of 12 April 2013 as saying *'I was always pretty bad at filling in my time sheet... so I became adept at 'rounded' entries. As one of my partners used to joke, he always liked the sound of 11 units as an averaged time entry because it didn't look as obviously arbitrary as 10... We learned that 'conferring' with colleagues was a no-no but that 'reviewing' covered all kinds of sins. And we all had a great laugh when someone managed to record 28 hours in a single day... Yeah sure, that was just me, everybody else is scrupulously honest. Bull. Time-sheet padding is endemic in our profession.'* It may be of course that claims like these are exaggerated - I just don't know - but they are fully consistent with the empirical data, scant thought it is, and fully consistent with the results of some of the Commission's own empirical work and made with striking frequency.

Many senior members of the judiciary agree. Western Australia's Chief Justice Martin was reported in *Lawyer's Weekly* of 19 May 2010 as saying that *'time sheet forgery is running rife in the profession'*. Various Chief Justices including Chief Justice Gleeson, Spigelman and Bathurst are on record repeatedly warning against the behavioural consequences of *'the tyranny of the billable hour'* and *'the remorseless mercantilisation of legal practice.'* Another Chief Justice told me in a private conversation that *'costs are the Achilles heel of the profession'*, a view several other judges have also expressed privately in the course of recounting horror stories they witnessed from the bench.

Costs lawyers have told me many stories (but quite properly without any identifying detail) about bills and billing practices that have crossed their desks which have made them feel ashamed and embarrassed for their profession, and so too lawyers too numerous to mention in private conversations over the years. I recall speaking at a family law conference about a lawyer's costs disclosure obligations and making the obvious point that they are as honoured in the breach as the observance. I spoke later with the conference organisers - senior practitioners all of them - one of whom said he never gave his clients an estimate of his costs until he knew who was acting for the other side. He told me with his colleagues nodding vigorously in agreement that he routinely multiplied what would otherwise have been his estimate by several times depending who it was. Think of it. I subsequently repeated that story at numerous continuing legal education events where almost invariably one of the lawyers present would say 'and it's not only family law'. Similarly I was told quite independently by several succession law practitioners that just as the last big scandal arose in the early 2000s from lawyers rorting 'no win-no fee' personal injury litigation, the next big scandal in waiting is lawyers' rorting speculative family provision litigation. They told me eerily familiar stories of consumers having 'won' their claims only to be little better or even worse off for 'winning' than they would have been if they had made no claim at all, the only big 'winners' being their lawyers. Now I have no idea if these stories were true - certainly they were not reflected in complaints - but that is what I was told, and told in all seriousness by credible people well-positioned to know.

Those examples all refer to lawyers' billing practices and costs but it doesn't stop there. I was told numerous stories about unreported misconduct of other kinds, many of them by senior lawyers, which described (once again without any identifying detail) fact situations revealed to them by junior lawyers who had sought their confidential ethical advice - fact situations which involved significant misconduct but was never brought to the Commission's attention. I was told similar stories by members of the judiciary also.

I note also that Chief Justice Martin reminded the Conference of Regulatory Officers in Perth in 2009 that the Chairman of the US Securities and Exchange Commission had rhetorically asked members of the American Bar Association at the time of the Enron collapse *'where were the lawyers? What were the lawyers doing?'* He went on to describe the highly critical comments made by the Commissioners in Australia's HIH and James Hardie Industries Royal Commissions about the advice their legal advisers gave those companies which helped them in their respective falls from grace. The same could be said about the lawyers who advised the Australian Wheat Board as it immersed itself in an international bribery scandal and the lawyers in both this country and the US who *'devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege'* (see *McCabe v British and American Tobacco* (2002) VSC 73 and *USA v Philip Morris* (2006) WL 23800650). I could go on.

<sup>35</sup> Let me give a specific example. The Queensland Law Society published a comprehensive Costs Guide for the benefit of its members in 2013 and, useful though that document is, it had very little if anything to say about any of the billing practices that the Commission had described in its annual reports and elsewhere and that I have described earlier in this paper. It was totally silent, to give just one example, about the circumstances if any in which a solicitor can properly make a charge for care and consideration on top of a time costed bill.

<sup>36</sup> A Victorian barrister, Stephen Warne, published a paper several years ago in which he said this: *'I have a practice in lawyer-client disputes, and in one arm of it I deal with extraordinary instances of clients being taken for the most spectacular rides by lawyers in whom they placed unwarranted trust.'* He gives some examples and goes on to say - and it matches my experience almost exactly - that *'even making due allowance for the skewed perspective my particular practice brings, I feel that rapacity in the form of overcharging is rife; that outside of judges' extra-judicial speeches, there is little serious discussion of it; that it is not recognised within legal ethics circles as the great legal ethics issue; and that in not enforcing the obligation not to overcharge and to comply with costs disclosure obligations, the complaints investigation and disciplinary systems are a joke. Costs lawyers know all this well, but many charge a pretty penny themselves, keep their arcane law shrouded in mystery and can be shy of biting the hand that feeds them.'* Warne's paper, *On Rapacity*, was commissioned by the Australian Lawyers Alliance and published in its journal *Precedent*, Issue 110, May/June 2012. See also *A Case Study in Lawyer Regulation* at Part 7.2.

<sup>37</sup> See *A Case Study in Lawyer Regulation* at Parts 4.2 and 5.1.

<sup>38</sup> I have heard repeated claims to this effect and from credible sources - see endnote 34, above.

<sup>39</sup> See *A Case Study in Lawyer Regulation* at footnote 87.

<sup>40</sup> See *A Case Study in Lawyer Regulation* at Parts 5.3, 7.1 and 7.4.

<sup>41</sup> See for example the LPUL at section 440.

<sup>42</sup> See *A Case Study in Lawyer Regulation* at Parts 4.5 and 5.1.

<sup>43</sup> See the LPA at section 130 and the LPUL at section 256. Importantly however the LPUL gives the relevant regulatory authorities an entirely new (and welcome) power provided there are *'reasonable grounds to do so'* to give a law firm a *'management systems direction'* requiring it to implement management systems which enable it to comply with its professional obligations - see section 257.

<sup>44</sup> Interestingly, while it shrinks their power to conduct a compliance audit, the LPUL preserves the unfettered discretion the LPAs give the relevant regulatory authorities to conduct a trust account investigation - see the LPUL at section 163 and, for example, the Queensland Law at section 263.

<sup>45</sup> The National Legal Profession Taskforce had already envisaged in its *Business Structures* Consultation Paper dated 25 November 2009 narrowing the unfettered power to conduct a compliance audit of an ILP under the LPAs to a power to conduct a compliance audit of a law firm incorporated or otherwise if the relevant regulatory authority *'considers it necessary to do so.'* The power was narrowed further following the ill-informed scare campaign waged by the professional bodies and the large law firm group which argued that even that power would expose law firms to an *'intrusive'*, *'unnecessary'*, *'clearly unwarranted'* and *'unjustified'* additional regulatory burden, to the extent even that it would risk create *'significant access to justice issues'* by causing *'small businesses in remote, regional and regional parts of Australia to close their doors.'*

This is patent nonsense. One need only ask, if this were true, why it is that so many firms, most of them small firms, have opted to incorporate under the LPAs since that option became available to them, why incorporation so quickly became and remains the business structure of choice for start-up law firms, and why they haven't complained - and why the research shows that their leaders acknowledge the positive impacts compliance audits have had on their business.

The risk that regulators might abuse the power by conducting unjustified and unnecessary compliance audits could easily be managed short of throwing out the baby with the bathwater. The LPUL Law could easily and should in any

event include principles which require regulatory authorities never to impose any needless regulatory burden on low risk law firms but always to direct their regulatory resource to where it is most needed and can have the most beneficial impact in the public interest. It could easily and should include principles which require them to exercise the power (and indeed any of their coercive information gathering powers) in such a way, and to be able to demonstrate that the power has been exercised in such a way, as to keep the compliance costs to law firms proportionate to the value of the information sought to be obtained. The inclusion of principles to this effect would reflect regulatory best practice (see Report No.48 of the Administrative Review Council, *The Coercive Information Gathering Powers of Government Agencies*, May, 2008).

<sup>46</sup> I was struck when this issue was being debated in the Consultative Group to the National Legal Profession Reform Taskforce that all but one of the senior practising lawyers agreed with the argument that the compliance audit power is 'intrusive', 'unnecessary', 'clearly unwarranted' and an 'unjustified' additional regulatory burden - see endnote 45, above. It is telling however that none of these senior lawyers worked for ILPS which had completed a self-assessment audit - and none of them could so much as describe either the self-assessment audit process or the broader program of compliance audits that had been undertaken for some years at that stage by both the NSW and Queensland Legal Services Commissioners. It is equally telling that the one senior practitioner on the Consultative Group who was a legal practitioner director of an ILP and whose firm had completed a self-assessment audit supported extending compliance audits to all law firms, provided only (and entirely reasonably) that the Law included safeguards against regulatory overreach.

<sup>47</sup> See the Hunt Report (op. cit.) at pages 74-75 and *A Case Study in Lawyer Regulation* at Parts 5.1 and 5.2.

<sup>48</sup> The regulatory authorities in several Canadian provinces - the Barristers' Society in Nova Scotia and the Law Society of Upper Canada, for example - are actively considering adopting what they call 'pro-active entity based regulation'. I note with some irony that its proponents are making the argument in no small part on the back of the success of the self-assessment and broader compliance auditing programs that were pioneered in Australia in relation to ILPs that the LPUL has now all but completely dismantled - see *A Case Study in Lawyer Regulation* at footnote 114, especially the reference to Susan Saab Fortney's paper, *Proactive Regulation of Law Firms: Proof and Possibilities*.

<sup>49</sup> See the overview to, and then Part 4.3, section 169.

<sup>50</sup> See the LPUL at section 184.

<sup>51</sup> The ACL applies to the provision of legal services in every state and territory but for Western Australia. It forms Schedule 2 to the Commonwealth's *Competition and Consumer Act 2010* and was incorporated into State and Territory law by way of amendments to their local *Fair Trading Acts* (or like Laws). The majority of its provisions commenced on 1 January 2011. It applies to 'any business or professional activity' and it follows, unless a State or Territory explicitly provides in its local *Fair Trading Act* that legal services are excluded, that it applies to the provision of legal services. Western Australia is the only State or Territory that has specifically provided in its *Fair Trading Act* that it does not apply to the provision of legal services.

Parts of the ACL apply to the provision of services across the board (the sections dealing with misleading and deceptive conduct, for example, and unconscionable conduct and component pricing) while other parts apply only to the provision of services to *consumers* (the sections dealing with consumer guarantees and unfair terms, for example). It defines *consumers* to be individuals who acquire services 'wholly or predominantly for personal, domestic or household use or consumption' and businesses which acquire services up to a value of \$40,000. Thus the unfair terms provisions apply to lawyers only in their dealings with consumers, including their dealings with consumers in relation to personal injury, family and criminal law, wills and deceased estate matters, residential conveyances and the like, but do not apply to lawyers in their dealings with corporate clients in relation to banking and construction law, for example, or large scale commercial disputes. For a more detailed discussion of how the ACL applies to lawyers and to legal costs, see *Quick on Costs*, Thomson Reuters, 2015, Chapter 7, *Costs Agreements*, sections [150.490]-[150.830] and [150.620]-[150.820].

<sup>52</sup> The ACL at sections 24-26 defines unfair terms to include terms which cause a significant imbalance in a lawyer's and a consumer's rights and obligations under an agreement; terms which are not reasonably necessary to protect the lawyer's proper interests; and terms which would cause a consumer financial or other detriment. It envisages that courts will have regard to the transparency of the contract as a whole in determining whether a term or terms in the contract are unfair, and how easy it is for a consumer to understand - that courts will have regard for example to the extent to which a contract is written in 'legalese' rather than plain English or allows what are in reality key terms to become lost in the 'fine print'. It puts the onus on the party who is advantaged by a term in an agreement to demonstrate why the term is necessary. Importantly the 'unfair terms' provisions in the ACL are replicated in the *Australian Securities and Investments Commission Act 2001* to protect consumers in financial product and service contracts.

<sup>53</sup> See Patterson J, *The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts*, Melbourne University Law Review, 2009, Volume 33(3), 934-956.

<sup>54</sup> Behavioural economics research demonstrates how ‘consumers are limited in their ability accurately to assess the risks in a transaction... ; become less adept at decision-making the more factors there are to consider... and tend to focus on a few key factors... such as price, quantity or warranties... ; and are not merely unlikely to read the terms of those contracts but will often imperfectly process even the information they do acquire...[including] terms found towards the end of a contract and expressed in technical legal language.’ Thus ‘while measures designed to better inform consumers about the terms of their contract are important, they do not resolve concerns about the substantive unfairness of those terms.... Such measures may not ensure that these terms become part of the decision to enter into a standard form contract in any meaningful sense.’ See Patterson J, (op. cit.). See also Zumbo F, *The Case for Enhancing the Federal Unfair Contract terms Framework*, (2009) 17 TPLJ, 276; *Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind*, (2005) 13 TPLJ 70; and *Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria*, (2007) 15 TPLJ 84.

<sup>55</sup> There may not have been any research into the behaviours of consumers of legal services as opposed to consumers more generally but it is a good bet that the presumption that consumers of legal services give their informed consent to costs agreements they enter into with their lawyers provided only that their lawyers have complied with their costs disclosure obligations which would all but entirely dissolve if it were to be tested by rigorous empirical scrutiny. I do not doubt for a minute that empirical research would more than amply demonstrate the ‘information asymmetry’ and comparative lack of bargaining power which so obviously characterises a consumer’s dealings with his or her lawyer and which has not gone unnoticed judicially (see endnote 26, above, and *A Case Study in Lawyer Regulation* at Part 4.2 especially footnote 57).

<sup>56</sup> The Hunt Report (op. cit.) at page 14. Notably regulation has to restore the balance not only to protect consumers but small businesses. The Commonwealth and State and Territory Governments have recognised that small businesses, like consumers, can equally lack the time and expertise to understand and analyse contracts they are offered and the bargaining power to negotiate terms or resist their enforcement and, like consumers, are particularly vulnerable to the detriment that arises when an unfair term is relied upon. Legislation extending the unfair contract terms protections to businesses with fewer than 20 employees passed both Houses of the Commonwealth Parliament on 20 October 2015 – see the *Treasury Legislation Amendment (Small Business and Unfair Contract terms) Bill 2015*.

<sup>57</sup> The LPUL’s costs disclosure provisions advantage lawyers for the obvious reason that lawyers negotiate costs agreements every other day - costs agreements, contracts and other legal documents are their stock in trade. Thus the ‘significant asymmetry of information and understanding’ between lawyers and consumers makes it only too easy for rapacious lawyers to blame the victim - to produce the signed copy of the costs agreement if they are challenged about their costs and to point to the signature: ‘that’s your signature, isn’t it? You signed it.’ End of discussion; buyer beware.

<sup>58</sup> I noted in *A Case Study in Lawyer Regulation*, at Part 5.4 and in footnote 139, that there is a lot of talk in matters of lawyer regulation about protecting the public interest but a conspicuous absence of any meaningful effort to engage with members of the public to learn how they see their interests best being protected. I was pleading for policy in this area to be better informed by evidence, by empirical research. I made a similar point earlier in this paper and in *A Case Study in Lawyer Regulation* at page 58 lamenting the LPUL’s narrowing of the hitherto unfettered discretion to conduct a compliance audit despite the evidence of its effectiveness in reducing complaints and improving client service. The same is true here.

<sup>59</sup> Productivity Commission Inquiry Report 45 (2008), *Review of Australia’s Consumer Policy Framework*.

<sup>60</sup> The consumer guarantee provisions (sections 60-62) mean for example that providers of goods and services including lawyers guarantee to consumers that the services they provide will be rendered with due care and skill, will be reasonably fit for purpose, and will be supplied within a reasonable period of time.

<sup>61</sup> The ACL prohibits component pricing at section 48 and misleading and deceptive conduct at section 18. Notably the courts have already found lawyers to have contravened the misleading and deceptive conduct provisions in their dealings with third parties (people other than their clients), in the manner in which they promoted their services and in representations they made in debt collection letters and notices – see *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 CR 112, *Nixon v Slater and Gordon* (2000) 175 ALR 15, and *ACCC v Slater and Gordon* [2011] FCA 1165, respectively. For more information about the application of the ACL to the provision of legal services, see *Quick on Costs* (op. cit.).

<sup>62</sup> There is a well-established principle in common law that lawyers are not protected from disciplinary action for charging a client excessive legal costs on the basis simply that they charged the client consistently with their costs agreement with the client – see *D’Allesandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198; *Re*



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*Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138. See also *Council of Queensland Law Society v Roche* [2003] QCA 469 in which Chief Justice de Jersey observed that ‘the circumstances that a solicitor’s right to exact certain charges is enshrined in an executed costs agreement will not necessarily protect the solicitor from a finding of gross overcharging.’ He went on to cite Kirby P in *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 to the effect that ‘no amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and overcharging where it goes beyond the bounds of professional propriety.’ On the other hand, the Supreme Court of Western Australia noted recently in *BGM v Australasian Lawyer Group Pty Ltd* [2014] WASC 290 at [100] that ‘what the legislature has done is focus on the need for disclosure. What it has not done, and it could never do, is ensure a client actually reads a costs agreement. So, the position every law practice finds itself in is this. It must make full disclosure in conformity with the Act, irrespective of whether the client actually reads the costs agreement or not. If full disclosure is made, if all the requirements of the Act are complied with, then the costs agreement will hold. Otherwise, a law practice runs the real risk of having the agreement set aside.’

<sup>63</sup> The Model Law resulted from a project initiated under the auspices the Law Council of Australia (the LCA), the peak body of the professional bodies across the country, and that was taken up subsequently the Standing Committee of Attorneys-General (SCAG) in close consultation with the LCA. The LPUL resulted from a project initiated by the Council of Australian Governments (COAG) but prompted by the LCA and its constituent bodies, and it was drafted in close consultation once again with the LCA and its constituent bodies and representatives of the profession more broadly and with only limited consumer input. I note for example that there was but 1 consumer representative among the 18 people appointed to the Consultative Group which assisted the National Legal Profession Reform Taskforce. See *A Case Study in Lawyer Regulation* at Parts 2.2 and 5.2 respectively.

<sup>64</sup> Warne (op. cit. at endnote 36) notes that ‘interesting avenues in misleading and deceptive conduct for challenging bills have been opened up in the Keddies’ litigation. So, for example, in Mr Lui’s case, damages were awarded for a misleading and deceptive representation said to have been inherent in the giving of a bill, namely that the lawyers were legally entitled to the fees charged in the bill’ - see *Lui v Barakat*, unreported, District Court of NSW per Curtis J, 8 November 2011.

<sup>65</sup> See endnote 3, above. Let me give some concrete examples of what I mean by an *active mindset*. A regulatory authority which is dealing with a complaint might choose to deal *only* with the issues that are specifically identified in the complaint. It might if it has a more *active mindset* take the opportunity whilst investigating those issues to review the client’s file, for example, and to keep an eye out for and depending on what it finds to broaden the investigation to identify any other conduct on the part of the lawyer in his or her dealings with the complainant that was less than satisfactory. It might depending on what it finds broaden the investigation even further to identify any similar conduct on the part of the lawyer and his or her law firm in their dealings with their clients more generally. And depending again on what it finds, it might if it has an *active mindset* broaden out the investigation even further, to identify any similar conduct in a whole class of like law firms, firms which have speculative personal injury or succession law practices, for example - see endnotes 35 and 39, above. And it might look not just to identify the conduct but the underlying root causes of the conduct - gaps and weaknesses in the law firm’s governance and supervisory arrangements, for example. These increasing levels of proactivity might well involve the regulator in using its complaint-handling powers including its powers to commence own motion investigations in tandem with its powers (if it has them) to conduct trust account investigations and/or compliance audits.

Similarly a regulatory authority might choose to use its unfettered discretion to conduct a compliance audit of a law firm (if it has an unfettered discretion) only in the way that is envisaged under the LPUL – only if there are reasonable grounds to do so based on a complaint about the law firm. That may very well help to identify *the root of the problem* and so prevent a reoccurrence - good. But the authority might if it has a more *active mindset* ensure, for example, that its database alerts it to law firms which have been subject to multiple complaints in any given period and then as a matter of policy in those circumstances conduct compliance audits of those firms to identify *the roots of the problem*. It might if it has a more *active mindset* routinely require all start up law firms to conduct self-assessment audits on or soon after they go into business, just as the New South Wales and Queensland Legal Services Commissioners under their LPAs required all start up ILPs to conduct self-assessment audits, whether or not they have been subject to complaint. It might if it has an *active mindset* choose to test the truth of whispers that some succession law practices for example may be charging disproportionate costs in speculative family provision matters by devising and conducting compliance audits of all firms with succession law practices. It might devise and require them and all their employees to complete a tailor-made on-line billing practices check, for example (see page 9, above and endnotes 31-33), identify the firms if any that are most at risk of being non-compliant with their professional obligations and subsequently conduct more intensive compliance audits of those firms by reviewing their policies and procedures, inspecting randomly selected client files, interviewing its employees and the like.

Regulatory authorities make choices whether to go down these paths depending on their powers, their resources from time to time and of course their mindset - their will and imagination. Obviously if they have an active mindset

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they should guard against overreach. They should always direct their scarce regulatory resource to where it is most needed and can have the most beneficial impact in the public interest and, crucially, they should always exercise their powers so as to keep the compliance costs to law firms subject to investigation proportionate to the value of the information they are seeking to obtain (see endnote 46, above).