

Illogicality rules?

By Mark Blumer

A good example is the recent referral by the NSW attorney-general of personal injury advertising to the Standing Committee of Attorneys-General. The NSW laws are the most restrictive in the country; they attempt to make all advertising by personal injury lawyers, about personal injury claims, illegal.

In 2003, in an attempt to further restrict advertising by PI lawyers, the NSW government submitted a report to the National Competition Council on the application of competition policy in NSW. It was necessary to submit such a report because of the anti-competitive nature of banning advertising by personal injury lawyers. Among other things, the report said:

'The New South Wales restrictions on advertising personal injury services were introduced in response to the problem of reduced access to affordable public liability insurance....

'The New South Wales Government considers that one of the reasons for the growth in small claims is that advertising by some lawyers encourages people to make personal injury claims....

'If pressure on insurance premiums and rates of litigation are alleviated by the national process of reform presently underway, including tort law reforms at New South Wales level, the need for these advertising restrictions can then be reviewed.'

If you read those three paragraphs, you will see a simple logic: (1) The problem is the unaffordability of public liability insurance. (2) One of the causes of the problem is that PI advertising leads to more claims and greater unaffordability of insurance. And (3) If public liability insurance again becomes affordable, the

advertising bans won't be necessary.

What happened to insurance company profits from the time of the introduction of the ban (about 2002), to the present? Go to: www.apra.gov.au/Statistics/Quarterly-General-Insurance-Statistics.cfm.

The insurance industry has had a very profitable time over the last seven years. In NSW, the insurers of the motor vehicle third party scheme receive approximately \$1.4 billion in premiums per year and pay out approximately \$400 million.

Surprisingly, however, the advertising ban remains in place!

Now, not satisfied to bask in their own State of Perfection, the NSW government wants the rest of the country to join in, catch up and chill out.

With luck, the other attorneys-general will see the lack of fairness in the NSW scheme. If logic prevails this time, a national scheme will not outlaw personal injury advertising. It is clearly an issue of access to justice. As Kirby J said in *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; 224 CLR 322; 79 ALJR 1620; 219 ALR 403 (1 September 2005):

'Unless persons affected may be informed about the existence of such rights, and how they may go about enforcing them, the rights will in many cases be entirely theoretical. They will be unknown or, if known, unenforced because of ignorance, uncertainty or fear of the costs and other difficulties of attempting to turn the rights into remedies.' (At para 313.)

The Report by the Access to Justice Taskforce, attorney-general's department, titled *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009), says some relevant things:

'Access to justice is an essential element of the rule of law and



supports democracy... Continuing improvements in access to justice are important to maintaining a strong rule of law.' (Page 2, under the heading 'Why is access to justice important?') and:

'There is anecdotal evidence that people often do not see a lawyer because they are perceived to be too expensive. In many cases, seeking professional legal advice can be relatively inexpensive, and the cost of not seeing a lawyer can be much higher....'

'Lack of information about the cost of legal services means that many consumers are not in a position to make informed decisions about legal issues. Increased information on legal fees, through advertising, will provide a more accurate picture of the true cost of legal services. It may also increase competition between legal firms, thereby driving legal costs down.' (Page 124, under the headings 'Transparency – Legal Fees' and 'Advertising'.)

Unless something very irrational happens, I don't see how the NSW position can prevail nationally.

Does illogicality rule? ■

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