

"...TO GO OUT OF YOUR MIND OR INTO THE NIGHT" - BB KING — THE CHOICE!

You get a suspicion the world really is a wacko place when your newly teenaged son asks for the Jimmy Hendrix Anthology as a birthday present. Things just get worse when you find that your collection of Lead Zeppelin CD's has gone missing. Suddenly you experience the pumping cords of *Whole Lotta Love* as they thunder forth from a bedroom occupied by a crowd of newly pubescent humans.

Where, you think, did the new bands like "Killing Heidi" or "Powderfinger" go? You are about to mouth the words of your father *Turn that bloody thing down* but you let the awful moment pass. The past is crashing into the future. The music allows some moments to reminisce. Summers spent chasing girls who had the good sense not to get caught. Huddling on Victorian beaches in January as rain squalls scooted across the grey surf. Memories. I was a bit older when I started looking for the source.

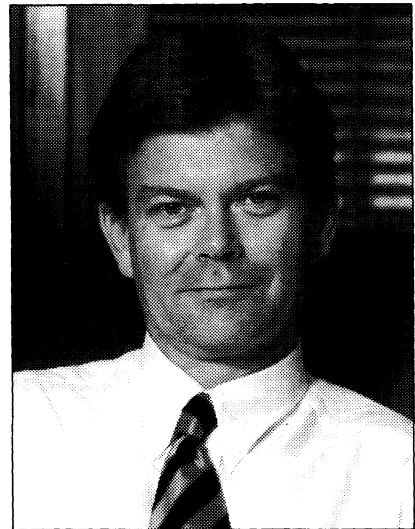
The search took me to the sounds of Blind Lemon Jefferson, Junior Johnson, Huddy Leadbetter, Muddy Waters, BB King and John Lee Hooker. The strength and resonance of the music of the blues men came from the fact that they embraced a heritage which they have honoured in the practice of their art. They were and are professional musicians. It is unlikely they would find a description of themselves as practitioners in a "musical services market" as edifying or apt. What people believe they are will generally determine what sort of future they fashion for themselves.

So is the practice of law a profession or is it a fraternity of marketeers in a "legal services market"? A profession is defined as a vocation requiring knowledge of a department of learning or science. Traditionally there were three recognized professions: theology, law and medicine. It has taken centuries for the precepts of

the professions to coalesce. For the most part that has been to the benefit of the broader social good. There will always be the "saw bones" and the "shysters" amongst them not to mention the priests with their hands up somebodies skirt or down somebody's trousers. However a well organized profession is able to expose and deal with the Vandals and Visigoths within its ranks. That is not something other occupations generally purport to do. A profession recognizes a responsibility to people who are either deprived of or who don't have the knowledge and skills necessary to find a solution to problems that become part of their lives and which it alone is equipped to tackle. A profession has a collective social conscience.

The activities of a marketeer are solely orientated to economic success. Like the privateers who stalked the shipping lanes of the Spanish Main marketeers are economic pirates. The end justifies the means. Ruthless indifference to the needs and difficulties of others and the exercise of power for sheer self interest are the hallmarks of their trade. Some lawyers fall into that category but to my mind they are not professionals. I like to think they have just managed to navigate the prerequisites of entry into the legal profession and their exposure is merely a function of time.

The things that has lead me to consider the issue of what lawyers are and what we may become are two in number. The first was the requirement of the Law Society to develop a response to the government questionnaire regarding competition policy and the "Legal Services Market". The second is my reading of a document prepared by the Law Council of Australia entitled "Report of the 2010 Task Force". The latter document is still in draft form and the subject of an embargo. In neither case, however, is the fundamental issue of whether the practice of law should



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remain to be regarded as a profession addressed. The Law Council paper seeks to answer the question of what the practice of law will look like in the year 2010 and goes on to consider how the Law Council can prepare for that event. The inquiry by government appears to be all about opening up the practice of law, or parts of it to "para legals" and other characters like "community advocates". The purpose it would appear is to provide greater competition. Somehow the idea of competition has become synonymous with the public good. It seems to me very much like the religion of economic rationalism. It looks great on paper and like "globalization" and before that "Marxist economics" it is supposed to work in practice. But what about the people. How does it affect them?

The paper "Report of the 2010 Task Force" may ultimately become a valuable reference tool for further discussion. But without seeking to define or outline what lawyers are, it is hard to arrive at a conclusion about what lawyers will become, or more to the point should become, ten years into the future. The venerable occupation of navel gazing sometimes does have benefits. It provides an opportunity to take time out to consider the practice of law in panorama. Whether anything comes of it is a matter for considerable conjecture. Changes in the way the law has come to be practiced, brought about by technological innovation, can overshadow the very thing that distinguishes the law as a profession rather than a business. That thing is integrity. Despite all the criticisms

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leveled at the legal profession the Australian legal system is probably as good as if not better than any other in the world. Judges and lawyers do not take bribes. Impartial decision making is a canon of judicial reasoning. There is transparency of justice. Pro bono work is carried out by most lawyers on a regular basis. Legal services cater for large numbers of people who would otherwise be unable to satisfactorily cope with the system. Access to the courts is better now than it has ever been. There is and probably will always be a need for improvement.

The problem is that increasing numbers of lawyers see the practice of law as a business with an unhealthy emphasis on profit. Tension between the making of money and the application of ethical standards is not new. Lets face it — an income is very important and there is nothing wrong with making money, lots of money. The practice of law as a “profession”, however carries additional responsibilities, one of which is the protection and maintenance of the institutions of justice. That in turn engenders respect for those institutions in a broader context. Without respect the authority of the courts and the public regard for the decisions they make is undermined. What follows is the erosion of the paradigm that a modern democratic state is founded on the rule of law.

There will always be criticism. Constructive criticism of the courts is welcome. Unfortunately in the Northern Territory the regular bedlamite ravings of galoots who write to the *NT News* complaining about courts and judges have been described by equally misguided poons as justified criticism. Sometimes I wonder if that is likely to change by the year 2010. A “legal profession” will respond by acknowledging that there is work to do to develop a better understanding in the community of how the justice system works.

Professionalism and commercialism need not be mutually exclusive. It is just a question of which one governs the other. The body of professional conduct rules is a constant reminder to the great majority of practitioners that the business of the practice of law is subject to the honour and standards of carrying on a profession. Some clients don't want ethical lawyers. The objective of those people is to win at all costs. Lawyers who find it hard to distinguish between a

client's interests and a client's wants are bound to fall foul of the ethical rules of practice sooner or later. A legal profession does not tolerate such behaviour. The businessman is more likely to focus on the result. If the other party gets screwed through a process of underhanded but lawful deals then so be it. The commercial world is an environment of tooth and claw. The underlying principle is survival of the fittest. It is not an environment that requires the exercise of moral courage. The law of equity has developed in response to a need for some types of otherwise lawful commercial transactions to be infused with moral accountability.

The Northern Territory University abandoned the Faculty of Law as a distinct entity in favour of a Faculty of Law, Business and Arts. I understand the reasons for doing so were economic in nature. It conveys the message, intentionally or not, that the study of law has devolved into preparation for carrying out an occupation rather than entry into a profession. When judges speak of an independent legal profession they are speaking about responsibilities that go well beyond the carrying on of a business. They are describing a vocation of moral character that is as important to the quality and dispensation of justice as the courts themselves. There is nothing elitist about the argument that lawyers continue to regard themselves as a profession although the practice of law is open to such disparaging remarks. Rather it is the manner in which some lawyers go about the practice of law that subjects the profession to justifiable attacks of elitism.

In the end the choice of whether lawyers continue to regard the practice of law as a profession or whether we allow ourselves to be beguiled by fashionable economic imperatives will depend on what we want to be. I have often heard practitioners going on about the fact that the discussion of history in the course of dealing with immediate issues is either boring or irrelevant. I see it differently. In law nothing comes to us without history. A knowledge of history is a fundamental

tool for modern lawyers. It tells us what we are. It can often determine where our responsibilities lie. It provides a perspective from which we can evaluate change and assess the benefit of “new ideas”.

Efficiency has become a catch cry. It is laudable to be efficient. Efficiency is often used interchangeably for professionalism. In fact things have become so efficient in recent times you can spend whole days taking directions over the telephone from disembodied voices that tell you which buttons to press to achieve an outcome for your enquiry. The problem is your enquiry does not fit into the range of alternatives provided. All you want to do is speak to another human being. Where have they all gone? I have learned from such experiences that the modern telephone is a well constructed instrument that can withstand significant physical insult.

The other economic mantra that we have been belted around the ears with over the last few years is “service”. For example, once upon a time there were flight attendants on aircraft now they have become “customer service representatives”. The “in flight announcements”, however, have not changed. They are still delivered without intonation in a very special language that resembles English but is absent of any of the defining grammatical features usually associated with English.

A profession must offer the economic imperatives of service and efficiency but it will always place them behind ethical considerations. A lawyer is an officer of the court. That entails a duty which must come before all else. That is the source.

The inquiry into national competition policy challenges many of the precepts underpinning what lawyers would understand as our profession. If we are to remain a profession we have to be prepared to argue for their retention in the public interest. When the Law Council's “Report of the 2010 Task Force” is available for distribution I recommend practitioners read it carefully. It has important things to say about what lawyers may become.

In the end the choice will be yours. Choose wisely.