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THE AUSTRALIAN LAWYER

E. A. HUNT*

I propose to divide my subject into three parts, the first part consisting of a sketchy outline of Australian history to the beginning of the 20th century, this to give you an appreciation of the matters to be discussed subsequently. Secondly, I will then refer to the development of the present legal system in Australia, and thirdly, will discuss day-by-day activities in a legal office, and thus bring before you the work being done by a practising lawyer in our country and a brief survey of his problems, remuneration and place in the community.

PART I

Australia's history, like yours curiously enough, commences with the Declaration of American Independence. When the authorities in Great Britain found they were having some difficulty with the American colonies they had to seek some other outlet for their surplus population, mainly criminal, their thoughts turned to the eastern coast of Australia which had recently been explored and charted by the great sailor, Captain James Cook.

In May, 1787, an expedition under Captain Phillip sailed from England with a military establishment and compulsory settlers—convicts—and in January, 1788, after first calling at Botany Bay, the whole force sailed into Sydney Harbour, and there established a settlement in Farm Cove, the site of the present Botanic Gardens. Accompanying the fleet was a Judge Advocate and the settlement in the early years was strictly of a military and penal nature. At this stage it should be borne in mind that this was an era when the laws in England and in other countries as well, were extremely harsh. Man's inhumanity to Man—over one hundred offenses were punishable by death, and for quite petty offenses the only penalties were seven, fourteen years and life imprisonment with transportation.

A Supreme Court Judge recently lectured to a gathering in Sydney and said that he had occasion to examine the convict records over the period of one year. This examination showed that four out of every five men and women transported were convicted of offenses of a minor nature—stealing, poaching, etc., such that now would have probably been treated as a first offense, and with a suspended sentence to be of good behaviour.

One lawyer at least came out to the colony from having the hardihood to present to the Court a statement of claim in equity asking the Defendant to account for the proceeds of what was obviously robberies—the result of a dispute between two Highwaymen!

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The total number exported over the whole period has been calculated at approximately fifty thousand. I mention this to show first the convict settlement in its proper perspective, and also secondly to show that when Courts were established it was not long before there was a need for a legal profession.

It wasn't long before exploration extended out to the Dividing Range and the early civil establishment was placed on the westernmost reaches of Sydney Harbour, a place called Parramatta. I mention this because I had the honour to serve as an Alderman on the Parramatta City Council for eleven years and to be Mayor of that city for two years.

At the early part of the 19th century convicts were being released and quite happy to settle in the new land with ample living room, and with the influx of free settlers great development occurred. The Dividing Ranges, which seemed an almost impassable barrier, were crossed and then commenced a period of exploration in the stark, hard land which is an epic of endurance of which our country is very proud.

To get the world picture in the early days of the century—Great Britain was locked in deadly struggle with one of the greatest dictators of all time, Napoleon Bonaparte, and Europe was freed by the victory at Waterloo in 1815. Of this period the great English author, Sir Arthur Bryant writes — “During all this time Englishmen were building homes and schools and churches in the little village of Parramatta, and there establishing a new democracy under the Southern Cross.”

During this period a great Englishman, Captain John Macarthur, having quarrelled with the authorities here went to England and purchased from the King a small flock of merino sheep. These arrived in Australia in 1810 and were grazed at his home property in the little village of Parramatta and I have plucked a sprig from the olive tree planted there on the day when the news of the victory at Waterloo reached our shores.

Gradually a number of important developments occurred. N.S.W., the mother-colony, in due course received her Charter of Justice from the Crown and a legal system was incorporated under the Supreme Court of N.S.W. The English theory of law is a very practical one and the Common Law of England went with every Englishman into his new home; thus the English Common Law became the law of the colony until such time as it was amplified by statute passed by local Legislature. We saw then the establishment of the legal system, the licensing of lawyers to practice under the Supreme Court and naturally when business became sufficient they followed the English tradition of separating into two branches of the profession, Barristers and Solicitors, the former being the specialists, advocates and pleaders and the latter the general practitioners, employing the former.

During this period also, N.S.W. was given self-government under a Legislature which in due course developed so that there was an adult franchise and under the Crown the country received its complete freedom.

About the middle of the century gold was discovered, lands were opened up under the Crown, west of the Dividing Range and after considerable agitation the exportation of compulsory settlers was stopped.

Exploration also involved the establishment of settlements at Brisbane, Melbourne, Adelaide, Perth and Hobart, and then N.S.W. also had rather a bitter experience of finding that its own children wanted to go their own way and sharing some of the feeling earlier experienced by the Home authorities, so six separated states were established, all independent of each other, and independent of the Mother state, comprising N.S.W., Queensland, Victoria, South Australia, Western Australia and Tasmania.

And then commenced an influx into the colony of thousands of free settlers, two separate families of whom were my own grand-people. As the whole of the lands were deemed to be owned by the Crown, titles commenced by the way of a Crown grant, which was the root of all titles and although at the commencement the English Common Law system of conveyances and abstracts of title obtained, you will see that it was not difficult to superimpose the Torrens System which had been inaugurated in South Australia. This, a Government system of guaranteed titles with simplified forms of transfers and mortgages, became established.

Owing to gold discoveries and the development of sugar growing on the tropical north of Queensland, there was an importation into the colony of kanakas from the South Seas and Chinese from Asia. This raised a real problem and our forefathers were not unmindful of how similar problems had arisen elsewhere, hence it became a national concept that we would rather develop slowly than take the economic and social risks involved in importation of cheap labour, hence the Migration Policy which is called by some "White Australia," and which is a fundamental basis to the whole of Australian structure.

The close of the century was marked with some significant changes. In N.S.W there was a period of intense activity in consolidating the various statutes and one of these in particular was the Legal Practitioners Act of 1898. Under this a Bar was established of Barristers specializing in the more technical branches of the law including advocacy, administered by its own "Bar Council." Also the Incorporated Law Institute was established supervising the activities of what is called the "lower Bar," or the lower branch of the profession, the "solicitors and attorneys," both under the jurisdiction and control of the Supreme Court of N.S.W. We followed in this practice the English tradition. In several of the smaller states, where obviously a specialized practitioner would not be practical,

there was a fusion of the two professions, but in the larger states the separation of the two branches was highly acceptable and is unlikely to be altered.

Solicitors and Barristers are gentlemen by act of Parliament and any cases involving the conduct of a Solicitor, which might go before the Court, his rights are protected by being described as "Gent one."

About this time Australians had proved themselves as fighting men by a very competent hard riding 'light horse' contingent which served in the South African war and at the close of the century found Australia with a population of slightly under three million, sure of its destiny and confident of the future.

We claimed to have inherited many of the traditions, and discarded many of the hatreds of the Old World; we enjoy the heritage of the struggle between the Crown and Parliament of the 16th century in which the lawyers took such a leading part. Our ancestors enunciated the principles of "magna carta," incorporated in your Declaration of Independence and Bill of Rights, and we enjoy and respect the position we hold as a free democracy under the Crown.

We are proud to be a British citizen of Australian nationality, and to journey to England and revel in the traditions and history of our race. We honor Westminster Abbey as much as any Englishman we would not for worlds destroy our position of a free democracy under the Crown. Nor would we change the right to appeal to the Queen sitting in her Privy Council to give a final decision in certain matters. We hold ourselves bound to follow decisions of the House of Lords, and English reports always occupy a leading place in the Lawyer's library.

PART II

The turn of the century brought great changes in the Australian scene. The somewhat scrappy legislation of the last fifty years was consolidated into various acts —

The Crimes Act, 1900

The Companies Act, 1900

The Real Property Act, 1901, and

The Legal Practitioners Act, 1898.

The latter Act regularised and confirming earlier Statutes and Conventions, established a Bar of Barristers or Advocates and Pleaders, and a lower Bar of Solicitors or Attorneys. I will refer to the separation of the professions later.

It was a brilliant period for many reasons. One was perhaps because the Judges were not quite so strong, and the State being smaller the lights of brilliant Advocates were able to shine brighter than in a bigger community.

Politically the country had decided against free trade in favour of protection for Australian Industries and the distinction of political thought divided into broad schools —

- (1) Labour and Socialist representing the workers.
- (2) A mixture of Conservative and Liberals representing the balance, possibly the more responsible portion of the Community.

The first named, however, exercised a strong influence and our country, always adventurous, established compulsory voting, franchise for women, adult franchise, with a preferential system of voting to protect the rights of minorities, child endowment, widow and old age pensions, and in 1916, in the middle of the First World War, an almost revolutionary Workers' Compensation Act, and in more recent years a most acceptable Compulsory Insurance Act in respect of motor vehicles. In no country in the world, it seems to me, is there a more equal division of wealth than in Australia, which is largely a working man's country. Its free and compulsory education system coupled with high school, secondary, and university education helped by Bursaries and Scholarships, giving the poorest an opportunity to become a qualified man.

The relations between employer and employee are dealt with by Arbitration Acts in an endeavour to get away from jungle law and to instal a rule of law, and laws are made from time to time and a basic wage calculated in an endeavour to avoid the exploitation of the many by the powerful few.

Returning, however, to the turn of the century, Australians were mindful of the gathering war clouds in Europe and always fearing an upsurge of Japanese Imperialism, State barriers were broken down and in 1901 the Australian Commonwealth was born. Each State gave to the Commonwealth certain of its powers under a Constitution Act; this included defense, postal, telegraph, custom, labour conditions of a Federal nature. Trading between the States was declared free and all other Sovereign powers remain vested in the State under their original Constitutions. Curiously enough, Section 92 of the Federal Constitution relating to inter and intra-state trade which was deliberately drafted in non-legal language to be abundantly clear, has been the subject of more litigation than any other section.

You might be interested to know that twelve years ago the Federal Government, which was then controlled by the Socialist Labour Party, endeavoured to nationalise trading banks and the Privy Council upheld the appeal on the grounds that it intruded on the State's rights under Section 92 of the Constitution.

Retracing my steps, therefore, to the beginning of the century associated with the inauguration of the Commonwealth, the judicial functions were intrusted to the High Court. They exercise an appellent jurisdiction

over the Courts of the various States in many respects and also exercise original jurisdiction under the Constitution Act. A Federal Judge is in charge of the judicial matters affecting the Federal Capital Territory, the mandated territories of the New Guinea and the Australian possessions in Antarctica.

I think I must, to explain the Australian scene, refer to the rise of Australia to nationhood. Mindful of the need for defense in 1910 we commenced to get together quite a considerable battle fleet and instal compulsory training and when the German Armies marched through Belgium in 1914 our Labour Prime Minister cabled to the British Government "we are with you to the last man and the last shilling," and Australian people of approximately four millions declared war on Germany. We immediately occupied German New Guinea, forestalling a Japanese expedition, and on 24th April, 1915, an Australian and New Zealand Force, a combination of letters, Anzac, charged the heights of Gallipoli and won for themselves a reputation for valour of which this country is very proud. After months of gallant fighting and a brilliant withdrawal, the army sailed for France in 1916 and in the first battle, in three days there was a casualty list of approximately seven thousand dead.

During the whole of the campaign in France we maintained a force of fighting troops of between 300,000 to 400,000 men, front line troops with a high reputation for their efficiency and hardihood.

At Dawon on the 25th of April every year, tens of thousands gather at the Cenotaph in Sydney and in other places around the Commonwealth paying tribute to the fallen, and in a march of the Returned Soldiers, numbering many thousands in all capital cities, which always takes place several hours later, pride of place is given to the British personnel as a tribute to the valour and sacrifice of that great country in the cause of freedom during two World Wars.

The war over we struck a boom period and then the 1929-30 depression, during which period my brother and I commenced our own present legal firm of Hunt & Hunt.

Depression brought out some serious weaknesses in our legal system so far as the Solicitors were concerned. There were several very bad financial failures, but the legal fraternity willingly put their own house in order, and at the present time we have a system of Annual Practising Certificates and a Statutory Committee under the Law Institute which examines any complaint against individual Solicitors, and if there is suspicion of anything being wrong with regard to trust funds, the Law Institute has and does employ an Accountant to examine immediately the trust accounts and make a report with a view to action, and Solicitors are dealt with and Practising Certificates refused and their names are struck off the roll if the Committee consider the offense warrants such

punishment. These decisions are subject to appeal to the Supreme Court but usually the Statutory Committee's decision is upheld. In addition, the Solicitors every year pay in an assurance fee and a substantial fund has been established in order to recoup clients affected by a default. The salutary provisions, although they do not always prevent a default, but they prevent it lasting for very long and the fact that the provisions are there is a great deterrent against carelessness.

After the depression and having got to the stage of recovery in 1939, we saw Munich, Poland, and again war. We, of course, allied ourselves with the Motherland and an expeditious force was formed and our armies sent to Egypt and Africa.

Then Singapore, Pearl Harbour, the return of the Australian Army to defend our Australia and counter attack in New Guinea, the Coral Sea Battle, and the turn of the tide in Europe and the Pacific.

It now all seems like an evil dream but from 1938 till the end of the war, Australia's very existence was threatened by a terrible foe. The soldiers then came home and with thankful hearts they were welcomed on their return and so back to work.

The important decision was then to come. Australia unanimously decided to welcome migrants with open arms and an energetic campaign commenced with the result that in the last fourteen years the population of nine million has absorbed into Australia over one million new people, quarter million of these being displaced personnel from Europe.

This was not without its difficulties, but the overall position has been a most satisfactory one for the country and the exciting advance that this country has made in the last twelve years is due to a large degree to the influx of population and to the labour forces that it brought into the country and to the customs, crafts and knowledge that the newcomers have brought into the Australian community.

The last few years have been dramatic in the growth of Australia; our voice is listened to in the Councils of the world which caused your own Consul only recently in a public speech to say "that no nation of its size in the world exercises such an influence as Australia in shaping world affairs."

PART III

Every Court in Australia has been established by some enabling Statute passed by Parliament. Although the Courts are the King's or Queen's Courts, the Crown nevertheless has no prerogative right to create Courts of Justice without legislative authority. Judicial independence from Executive and Legislative control is secured by law and public opinion; and the standard of conduct maintained by both Bench and Bar. The Commonwealth and various States constitutions provide that

Judges of Superior Courts should have fixed salaries and hold office during good behaviour subject to a power of removal by the Crown exercisable on an address from both Houses of Parliament. It can be stated with confidence that except for one isolated instance in South Australia in the mid-nineteenth century, there has been no interference by the Executive or Legislature with the exercise of their judicial functions by the Judges of the High Court or Supreme Court of the various States.

The Judges are chosen on the recommendation of the Attorney General who is a member of the Cabinet of the particular party in power in either State or Commonwealth Parliament, although frequently the advice of the Chief Justice or the head of the Bar Counsel is sought in making such appointments. For particular purposes he is invariably chosen from members of the Barrister's profession.

Right from the beginning we followed the English practice of a separation of the professions into two, namely Barristers or Solicitor or Attorneys. Both are under the control of the Supreme Court and both are ruled from rigid Institutes or Councils; with regard to the Barristers their position was finally defined in the Legal Practitioners Act of 1898. There are about 500 in New South Wales. They are employed exclusively by Solicitors or Attorneys. The outsider is not able to brief a Barrister and their duties in the main consist of opinion, pleadings and the advocacy at the Courts. Solicitors are also able to appear in all these Courts, but in practice find it more convenient to brief a specialist, the actual preparation of the brief, etc., being done by the Attorney. He is also inclined to specialize — some specialize in common law litigation, others concentrate on equity, taxation and constitutional problems. The Barrister usually has his secretary or shares one with two or more Barristers. His chambers are restricted to Phillip Street, Sydney, and he is only permitted to walk along certain streets while robed. If he appears in other Courts where wig and gown are required, he carries them in a blue bag if he is a junior Barrister and changes in the bar room. If he becomes a senior Counsel or Queen's Counsel, he wears a silk gown of different type. He wears a full wig on ceremonial occasions and his Barrister's bag is a red cloth and not blue.

He is able to bind his client by verbal agreement on negotiations for settlement. He has no contractual relationship with the client. He cannot sue his Solicitor for fees but can only draw the Law Institute's attention to outstanding fees. The Solicitors, on the other hand, do the general work of the practice, act in the initial stages of the litigation and prepare briefs for the conduct of the case, the actual advocacy being solely in the hands of the Barrister. A Solicitor is protected against charges of negligence for bad advice if he is supported by Counsel's opinion. In Victoria there was a fusion of the professions some years ago but it did not take long for, by common consent, the two professions to again separate; and it is from

the ranks of the Barristers that the Judges are drawn, as they in reality are specialists.

A word about the women in the profession. For practical purposes there has not been found any place for women in the legal profession in Australia. We have at odd times Solicitors and Barristers being admitted, but with one or two outstanding exceptions they practice little, if at all. They are entitled to be on juries but have to ask to be included in the general jury panel. Very few of the Courts have the accommodation necessary for women jurors. And almost invariably, if a woman is called, she is struck off by one or the other of the parties concerned. Their real place is on the stenographer-secretary level where their work is invaluable to the practising Solicitor.

Most of the litigation provides for the losing party paying the costs of the action. These are party and party costs. Work done over and above the party and party basis is called Solicitor and client costs. The Court keeps a supervision over all Solicitor's charges. There is a Taxing Officer who considers the detailed bill and certifies as to the appropriate amount. The judgment therefore is for £X plus Y taxed costs as certified. This provision as to costs is a deterrent against unnecessary litigation and it also has the effect of keeping control of charges so that the lawyer is supervised in his financial arrangements between himself and his client. This does not apply to special retainers for criminal work or Police Court work, the lawyer usually protecting himself by money in advance before he attends. All general work is the subject of the over-riding right of the client to have his bill checked by a Court Officers and in most litigious matters to avoid any delay caused through taxing, the two parties usually adopt a procedure of assessment of costs, such assessment based on amounts which they are aware are likely to be awarded by a Taxing Officer. Regarding conveyancing and probate costs, these are assessed by way of a lump sum scale of charges approved by the Law Institute. On a conveyancing matter coming into the office, a calculation can be made based on the value and responsibility of the work so that the client immediately knows the amount of his ultimate fee. The Courts have always frowned on payments by results or contingency agreements, but there is nothing to stop a Solicitor taking a deserving case without receiving a fee in advance and he thereby assists in carrying out a private legal aid which is not uncommon.

Although no two States have adopted identical arrangements, generally speaking there is a uniform basic set up with regard to all the Courts in Australian States. In New South Wales we have Inferior Courts such as the Court of Petty Sessions, Small Debts Court presided over by a Magistrate, who deals with the less serious crimes and debts and actions to the limit of £50 jurisdiction. In a number of cases the Magistrate is able to

sentence for periods up to one year with the right of appeal to the District Court Judge.

The Coroners Courts are also held mainly by Clerks of Petty Sessions although in some outlying areas the old fashioned Coroner still exists. Above this is the County Court whose jurisdiction is limited to £1000 in general and the District Court Judges also sit in Quarter Sessions Criminal cases with a jury of twelve and attend on circuits through the country dealing with crimes in the various centres. In general the work is efficiently done, the Crown Prosecutor is a practising Barrister with an independent right of private practice. This has the tendency of tempering police actions as the Crown Prosecutor takes a more or less independent attitude and is not merely a servant of the police.

Crimes of a seriousness involving what was once the death penalty, are dealt with by a Supreme Court Judge, also before a jury of twelve and appeals against findings go to the Court of Criminal Appeal and at times to the High Court of Australia. Over and above all these we have the Federal or High Court which goes from State to State dealing with matters of original jurisdiction as well as the question of appeal from the lower Courts, and above all these again we have treasured the right to go to the Queen in Counsel or the Privy Council where the Law Lord of England and also of other parts of the Commonwealth sit in judgment on important matters. All British subjects, irrespective of creed or colour, enjoy a right of appeal to the Queen for justice who the Law Lords in pronouncing judgment humbly advise her Majesty whether to allow or dismiss the appeal.

Basically it is fundamental to the system of administration and law in Australia that justice should be speedy and justice should be administered publicly. There are exceptions. In Childrens Courts where delinquents and under certain ages, and matrimonial problems involving wife desertion, etc., are heard in camera, but evidence is taken from all these by way of depositions and the record is available. It is considered of fundamental importance that justice should not be merely done but that it should be manifestly and undoubtedly seem to be done.

And what of the lawyer himself? Of recent years since the war he has had to cope with a tremendous influx of business. He has suffered greatly from the rising costs and the inflationary trend which seems unavoidable and one of his chief troubles is that his scale of charges are usually years behind the modern trend of costs. In my own particular practice we have a partnership of six with a staff of about 30. We have found it necessary to separate ourselves into departments. One department almost exclusively handles conveyancing and general property law matters of that description. Another deals with wills and probates, a third does nothing else but workers' compensation and quite a considerable department is also in-

colved in handling litigious matters of all descriptions, ranging from the County Court to the Supreme Court and High Court. Incidentally, at this present time, we have no less than five matters involving claims in certain of the mandated territories of New Guinea and the adjoining islands and these are dealt with by administrators under Commonwealth Ordinances with rights of appeal to the Federal Judge in his original jurisdiction sitting in Canberra in the Federal Capital Territory, who incidentally has a commission as Judge of the Australian Capital in Antarctica. Perhaps you should know that by right of discovery, our country claims a very considerable area of this great land contiguous to our shores. In the country towns the firms are usually of a smaller size, sometimes two or three partners in larger country towns. They lead a more leisurely life than we do and probably make as much money. Our experience being that as a firm grows the overhead costs in proportion to the total income rises with greater rapidity. Our tax level is high and not likely to decrease for the reason that we have fought two wars with tremendous sacrifices of treasure as well as man power and with a rapidly developing country all our resources are being strained to provide for the vital developments that are necessary. It had been hoped that after the last war we would have been able to completely disarm but these hopes have been dashed and a large proportion of our annual budget is spent in defence. There is one very important feature I would like to stress and I am dealing now with the Solicitors and Attorneys of the profession.

The depression years found weaknesses and there were several dramatic failures of well known Attorneys with the result that the regulations were tightened up and the Law Institute is able without notice to employ an Accountant to attend on any Solicitor's practice and examine his books, particularly his trust accounts, to see if he is satisfying the requirements of keeping proper records and obeying the very strict regulations of his profession. The fact that this remedy is available has prevented any bad cases developing and carelessness from this respect is a subject of drastic action. More than one solicitor has lost his practising certificate and gone into outer darkness temporarily or permanently, according to the seriousness of the non-professional conduct. The result has been that of recent years the standard has improved and the legal man throughout Australia is in the main in receipt of and deserving of the best respect from his fellow citizens. He has a tendency to be interested in public affairs, his training makes him a leader as you can see when I tell you that the present Prime Minister is a lawyer, the Deputy Prime Minister is a lawyer, for many years a Leader of the Opposition was a lawyer and the present Deputy Leader of the Opposition was a lawyer in the Federal House. Some of the Australian lawyers have satisfied their urge for public duty by securing election on city and town councils or other local government bodies, and that was the position so far as was concerned when for eleven years I was Alderman of the City of Parramatta,

two years a Mayor on full time, all purely honorary, and if I may say so at considerable sacrifice.

This type of conduct is not unusual in the Australian scene although curiously enough the lawyer is not usually a popular person for reasons for which are no different here than in your country.

Basically, however, the lawyer in Australia and I think in your country, stands for more than the formal administration of justice to setting out the rights between man and man. We stand for the continuity in this land of the Common Law of England and the traditions of the profession, its independence and its sense of duty to serve the citizens and assist in the maintenance of the rural law. The Common Law is not merely for us a set of particular rules or principles to be found in the decision of past judges, great and important as the Common Law is in that sense. For us the law represents rather than an attitude of mind and insistence on the dignity and worth of the individual and a passion for freedom; and for equal obedience to the law by high and by low, by Governments and by citizens alike — a creed ill-suited to totalitarian government.

The belief in the supremacy of law is the foundation of our Constitution. The development of this truth ended the turbulence of the middle ages and over the centuries has made true liberty possible.

Notwithstanding all the conflicting forces, true freedom can only be maintained either, by men who love justice and liberty, who respect law and order, have a passion for fair play and an ideal of equal justice between man and man and independent judiciary and a fearless advocacy is an essential in maintaining this rule of law in our midst.

So long, therefore, as the rule of law is maintained. So long as Judges and Lawyers serve with a spirit of independence. So long as the supremacy of law is maintained against tyrannous democracies as it was in the past against tyrannous Kings. So long as it is maintained against combines of employers and unions as well as unions of employees as it was of old against mighty subjects as well as Kings. So long as the Judges are maintained in their independence and impartiality and the lawyers in their fearless search for truth and justice. So long are we free and no longer.