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Law: Business or Profession

Conference of Regulatory Officers
Keynote Address

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SECTION 1. LAW AS COMMERCE

1. WELCOME

May I join the Honourable John Quigley, Attorney General for this State (and, briefly, my former boss), and the members of the Legal Practice Board of Western Australia in wishing you a warm welcome to this annual Conference of the Regulatory Officers of Australasia.

In a conference which has a number of diverse strands, reflecting a number of challenges that the legal profession faces technologically, sociologically and perhaps culturally it is very appropriate to hold the conference in a museum dedicated to voyages of exploration, over long distances, in uncharted and often rough waters.

2. APPROACH TO THIS ADDRESS

When I was approached to give a keynote address I have to confess a certain initial reluctance. A keynote speech serves to set the underlying tone and summarise the core messages of an event. It presents a number of challenges. A number of questions immediately present themselves:

(a) why me, or perhaps even "what have I done wrong";

(b) what is the theme, message and importantly the "takeaway" not only from the speech but perhaps from the conference as a whole?

The programme helped, but only a little: over the course of two days you are going to consider the "#MeToo" movement and its implications in the legal workplace, the interaction between legal practice and the ageing population that we face (including perhaps a legal workforce which culturally seems to have some issues with longevity of practitioners in practice); cyber security and risk; the interaction between negligence and competence as a matter of professional conduct; the perennial (as I will return to later) issue of lawyers behaving badly; an immensely embracing session on "the future of law" and in what will be undoubtedly the culmination of the conference (because I have been to his talks mixing popular culture and important issues with immense humour on a number occasions), a post note on Legal Ethics As A Habit Of Being from our new Chief Justice Peter Quinlan.

On reflection, "why me" was probably answered when I recalled looking at the website of what is now my firm, for the first time. For those of you who may not be familiar with it, it looks like this:

LITIGATION IS A ZERO SUM GAME.

THERE IS A WINNER AND A LOSER.

WE KNOW HOW TO WIN.

(That's actually from the "About the Firm" page – the opening screenshot is slightly more tame).

For comparison I thought I would check out my commercial alma mater, what is now Herbert Smith Freehills:

Collaborate and diversify

connectivity in the digital age

Both seek to project a consciousness of business imperatives, in a way to which I will return later, but taking different approaches. Neither is what one would classically identify as the restraint and rectitude of the modest, discreet, professional image which we somehow, I will contend incorrectly, associate with lawyers of an earlier age.

So maybe that was it: a representative of the brash American firm, the face of vulgar modern commerce in the practice of law.

We will see.

The question of whether the practice of law as a business or profession intersects with many of, if not all of, the specific sessions. How, I will hopefully come back to later. But let's start with a little bit of information, and from that a proposition.

3. SOME INFORMATION – WHO DO YOU REGULATE?

The information is a snapshot of the legal profession in this state, extracted from the database that the board helpfully makes available through the law almanac. That information shows 6416 certificated practitioners in this state as at the date it was last updated.

Now, accepting that there may be some data integrity issues because the board largely allows practitioners to self classify when they renew their practising certificates, let's see what looks like – who are these practitioners?

In this State:

(a) 45% are employees of private practices;

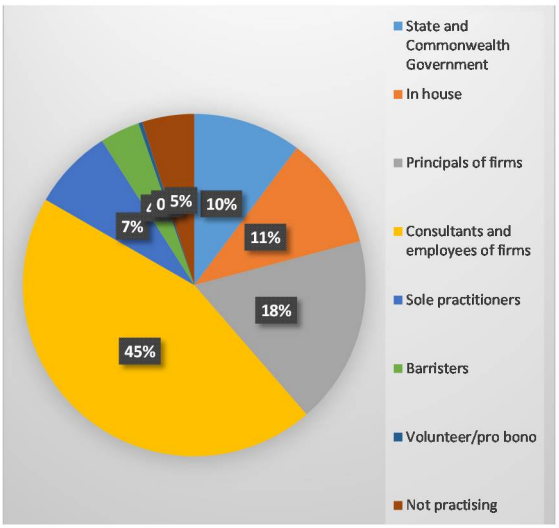
(b) 36% are principals or sole practitioners;

(c) 11% are in house counsel;

(d) 10% are State and Commonwealth Government counsel;

(e) 4% are barristers;

(f) 5% are not practising.



That is broadly comparable to the National profile.[1]

4. A PROPOSITION ABOUT THE REGULATED

Now the proposition that comes (in part) from this information (and in part from common sense): the practice of law is for almost the entirety of the practising profession their principal or only means of earning a living, supporting their families, paying taxes, contributing to charitable causes and saving for their retirement.

For the majority of the practising profession (the 75% in one or other form of private practice) that practice is conducted by choice or necessity in an environment in which they must sell their services to someone, on some basis, on terms that:

(a) those who buy their services rarely have any obligation to use those services at all, or on any ongoing basis (and indeed can terminate the retainer at any time, an option they are not be able to reciprocate);

(b) depending upon the nature of their practice, there may be considerable volatility in their flow of work, and therefore in the requirement for the inputs which must be provided to perform at work (the labour of more junior lawyers and support staff, the production of documentation, the procurement of third-party services);

(c) there is often considerable financial risk associated with the ability of the client to pay, at all or in a timely manner;

and because of that they must necessarily adopt a "business mindset". If they do not, to be blunt, they starve.

Whether they wish to be or not, the vast majority of legal practitioners are "in business" for themselves or others. There are only a happy few still in practice they can engage in the law as a passion, freed from the necessity of deriving income from it.

There is a wider question as to whether that evident necessity means the adoption of the structures and practices of a "modern business" and what that means, but let's come back to that later.

5. A QUESTION?

Now that then takes me to this question: is this new?

Who here empathises with this proposition?

> *"[T]he typical law office ... is located in a maelstrom of business life ... .In its appointments and methods of work it resembles a great business concern ... . The most successful and eminent at the Bar are the trained advisors of businessmen ... [The Bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honour ... [F]or the past 30 years it has been*

[1] Urbis, 'National Profile of Solicitors 2016 Report' (Report, Law Society of New South Wales, 24 August 2017).

> *increasingly contaminated with the spirit of commerce which looked primarily to the financial value and recompense of every undertaking."*[2]

Who recognises it – as any student of the (admittedly prolific) writings of Justice Kirby might?

The first point to note is that the period to which the writer was referring was the period of 30 years from the conclusion of the American Civil War.

The second is that it focusses on these elements:

(a) The method of organisation and work;

(b) For whom the work is performed;

(c) An alleged consequence – lack of independence, learning and "dignity".

Because of the "spirit of commerce", which is described not in terms of what lawyers do but what commerce does to lawyers.

6. A PERSPECTIVE

Was there ever a time when law has not been, at least to some degree, a business? And if so what are the implications of that?

The short answer that question is perhaps yes, but only a limited degree, a very long time ago and likely without much benefit to law or lawyers.

There have been lawyers of a kind for as long as there have been laws - and of course the first we know, properly, of laws are those of Hammurabi in Babylonia before 1500 BCE.

But the first lawyers of which we know much, are those of Rome from about two and half thousand years ago. In Rome, however, it was revered, and the precepts of Roman law still inform, and in some cases still attempt to govern, significant aspects of common and civilian law across the western hemisphere. Roman concepts of property law, agency, contract are still invoked in our highest courts, on occasion, to explain the philosophical precepts of some of our more knotty legal problems featuring for example in the judgement of the High Court in *Andrews v Australia New Zealand Banking Group Ltd*[3] in relation to penalties; *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue*[4] in relation to novation and *Palgo Holdings Pty Ltd v Gowans*[5] in relation to bailment.

We know that in the Roman Republic there was a class of jurists, known as the *juris consults*, esteemed as the highest rank of the legal profession. They were gifted amateurs, who studied the law for the level it, and advised principally upon the formation of legislation, and the passing of opinions on issues of Roman law. To have the time to be gifted amateurs

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[2] Editorial, (1895) *American Lawyer*, 84-5, cited in Justice Michael Kirby, 'Billable Hours in a Noble Calling? Ethics in the Australian Legal Profession' (1996) 21(6) *Alternative Law Journal* 257, 259; Justice Michael Kirby, 'Legal Professional Ethics in Times of Change' (1996) 14 *Australian Bar Review* 170, 175-7.

[3] *Andrews v Australia New Zealand Banking Group Ltd* [2012] HCA 30.

[4] *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* [2012] HCA 6.

[5] *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28.

they were, universally, members of the aristocracy, usually of high senatorial rank. They studied by apprenticeship under more senior *juris consults*, and in turn took in young men, for they were all then men, to be educated in the law.

But not only as amateurs, but to become professionals – those who assisted litigants in curial proceedings through the procedural steps and ultimately at trial, as advocates or orators, for reward.

Perhaps the most celebrated, if not the greatest, such was Marcus Tullius Cicero. While he was best regarded as an orator, and therefore otherwise on the lowest in the rungs of esteem amongst legal professionals in Rome (because they were regarded principally as orators, and for many any actual skill in the law was an accident at best), he had apprenticed in the house of a great *juris consult*, and actually knew the law.

For him, the combination of the practice of the law, together (it has to be said) with a good marriage and its dowry and shameless self-advancement, was the pathway to senatorial status, and ultimately a consulship (although also disgrace, exile, and near penury). For Cicero, like many of the great orators, became wealthy from what we would call advocacy at a time when men of senatorial rank were not supposed to earn income from a trade or profession, and a fee for acting as an advocate was not recoverable by legal claim.

But under the system of client patronage which allowed advocacy to flourish in the late Republic, clients' "gifts" to their patron advocate could be kept and spent wisely (or in Cicero's case probably imprudently in amassing a multitude of properties).

The prevalence and effect of that practice was such that the value of those gifts were limited (to what extent we now do not know) by a law passed in 204 BC in the first recorded restraint on legal costs (although such limitation did not make an excessive gift unlawful and void).[6]

What we know from this is that the Roman legal profession of this time comprised several distinct classes, and that amongst those classes, the "profession" of the law was carried out with a decided eye to the generation of revenue. And a calculating eye, likely, to the costs and risks (very real in that time) of the representation of particular clients. If reward follows risk, then Cicero's famous prosecution of Veres for the despoliation of Sicily must have been lucrative indeed.

How lucrative, other than somewhat apocryphal information as to Cicero's personal fortune is hard to measure, and perhaps like the Banks Nationalisation case in this country at the end of the 1940s, that is not a benchmark but an outlier. Still, there were many similarities between the largest cases of the Republican era, and of our own. As many as 6 orators might be retained for a single trial. Supporting them would be the advocates, those who actually knew the law. A significant Roman court case was, likely, as expensive then in relative terms as now.

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[6] See Marius Jonaitis and Inga Zaleniene, 'The Concept of Bar and Fundamental Principles of Advocates and Activity in Roman Law' (2009) 3(117) *Jurisprudence* 299, 299-312.

Suffice to say that by the early days of the Empire, under the Emperor Claudius, sufficient concerns have been raised about the monetisation of legal practice a statute was passed limiting the legal fees recoverable by an advocate (the roles of advocate and orator by then having blurred) in any case to 10,000 sesterces. At the time, it appears, that was enough to buy two good horses or slaves or pay the salaries of 10 legionaries for a year. Those fees were recoverable only after the conclusion of the proceedings. The fees could not be contingent, and might be set by the trial court. Many of those features we recognise today.

It also appears that the statute was not well enforced, indeed likely widely ignored. It certainly did nothing to limit the development of the legal fraternity in Imperial Rome as a profession with many of the features we know today:

(a) The bar was a corporation, participation which was mandatory to practice in the imperial courts. Advocates were attributed to certain courts and the activity supervised by officials of the imperial administration.

(b) By the year 460 CE legal education had become a compulsory requirement the least for appearance in the higher courts. By 469 CE the constitution of the Emperor Leon solemnly affirmed the importance of the role of the lawyer in Roman society and its successor, the constitution of the Emperor Anastasius in 506 CE recorded that the legal profession was *"worth praising and necessary in people's life",* and also provided for the execution of those duties to be *"rewarded with the highest pay"*.

(c) Professionalism, recognition and regulation were accompanied by the development of prescriptive ethical rules – the constitution of the Emperors Valentinian and Valens in 368 CE provided a number of rules that we would recognise today in our professional conduct rules: restraint, respect the other party, expedition rather than delay, all obligations enforceable by disciplinary proceedings having consequences including suspension from practice.

Like the modern era, also, the Rome of the late Republican and early Imperial period also had its government lawyers, the Treasury advocates charged with protecting the revenue, and his participation in some kinds of proceedings was mandatory.

The importance of lawyers performing that function, is something I will return to later.

7. THE DEVELOPMENT OF REGULATION INTO THE MODERN ERA

The hiatus the dark ages interposed between the end of the Empire in the West, and the Renaissance in Western Europe presents complexities too numerous to mention, though the civil law flourished in the churches but for our purposes let us leap forward a thousand years to the profession in England. By the 17th century a legal profession was well established in England, and had been for some hundreds of years. The Inns of Court are well established, legal education in the civil law was well entrenched, though only nascent in the common law – Blackstone was not to commence teaching the common law at Oxford until 1758 as the first Vinerian Professor, and the precedence of the advocate over the solicitor or attorney is well established (although civil lawyers were generally more respected than

common lawyers, for the better education). In this era, as in the late Republic, education was mostly by attachment to a senior and established practitioner, tightly focused on practicality and the skills required for a particular field of endeavour, rather than comprehensive legal learning, And that form of education was already in decline, and would remain such until the responsibility for legal education moved to the Universities.

For the attorneys and solicitors, both those who briefed the barristers and those who drew instruments, requirements for education and qualification were scant, and abuse rife. The legal profession, at least below the level of the Serjeants law was (for many) not a an honourable and noble calling.

So much so that in 1605, the statute of 3 James I chapter 7 was *"An Act To Reform The Multitude And Misdemeanours Of Attorneys And Solicitors at Law"*,[7] and sought to rein in excessive fees and other *"unnecessary demands"* by which *"the practice of the just and honest sergeant and counsellor at law. Was greatly slandered",* basically intended to ensure that counsels' fees were recouped from the client only in the amount actually payable and requiring a "true" bill of costs in relation to disbursements (also regulating excessive delay) with a penalty of recovery of the costs and treble damages, and disbarment. More importantly, the second article of the statute recorded that *"to avoid the infinite number of solicitors and attorneys"* none were thereafter to be admitted as attorneys in any of the kings courts of record without express admission by those courts and after having been found *skilful* and of *honest disposition*.

In that statute can be seen the three concerns that underpin the regulatory regime that we have today (in statute and regulations which now exceed well over a thousand principal clauses):

(a) admission to practice based upon, honesty and competence;

(b) the control of costs; and

(c) consequences of professional misconduct

all, also, dealt with a thousand years previously in the statutes of the Roman Empire.

But the real genesis of the regulatory regime we have today is to be found 120 years later, a composite between regulation by the Society of Gentlemen Practitioners (now the Law Society of England and Wales) and regulation by the courts of law and equity under the ambit of comprehensive legislation for the regulation of attorneys and solicitors, passed in 1728 (2 George II chapter 23) which required, amongst other things:[8]

(1) a candidate for admission to:

(i) have been articled for five years;[9] and

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[7] *An Act to Reform the Multitude and Misdemeanours of Attorneys and Solicitors at Law 1605*, 3 Jac I, c 7.

[8] *Attorneys and Solicitors Act 1728*, 2 Geo II, c 23.

[9] Ibid ss 5, 7.

(ii) be examined for their fitness to admission by the judges of the court admitting them;[10]

(2) a limitation upon the number of articled clerks with any pupil master;[11]

(3) it also created, effectively, a cartel by limiting the number of appointments.[12]

It also provided for the enrolment of practitioners by the courts; detailed provisions for the assessment and payment of costs, some of which persist to this day (requirement for a month to pass before the bill could be subject to action, the bill to be in writing, and in detail, signed by the practitioner and subject to taxation by the court with allocation of responsibility for the payment of the costs of taxation on a basis which still informs the rules in many courts today.

Over succeeding decades those regulations were passed on, successively, to the other courts of the United Kingdom, who, directly, in English and colonial legislation of the late 19th century which set the framework of professional regulation which exists today. In this State that culminated with the *Legal Practitioners Act 1893*,[13] which subsisted more than a hundred years, and which when passed comprised 53 short well crafted provisions constituting the unified regulatory body, and structure of professional regulation (that still characterises our legislation today); professional regulatory body constituted from the profession but operating under the authority of the Act; the registration of articled clerks; the admission of practitioners following articles; professional discipline; costs and the rights and privileges of practitioners.

Section 30 made explicit provision for salaried law officers of the Crown, and for practitioners acting for a person, corporation or company on a fixed annual salary.[14]

The provisions as to the exclusivity conferred upon the profession are of particular interest because they go to the heart of an issue to which I will turn shortly:

> *46. No person other than a practitioner shall in the name of himself or of any other person directly or indirectly sue out any writ or process, nor commence, carry on, solicit, defend, or appear in any action, suit, or other proceedings in any Court whatever of civil or criminal jurisdiction in Western Australia, nor act as a barrister, solicitor, attorney, or proctor of the Supreme Court of Western Australia in any cause, matter or suit, information or complaint, civil or criminal, wheresoever and before whomsoever the same is to be heard, tried, or determined, or under any commission for the examination within the Colony of witnesses, or others issued by any Court in or out of Western Australia: Provided that nothing*

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[10] Ibid ss 2, 4, 6, 8.
[11] Ibid s 15.
[12] Ibid s 11.
[13] *Legal Practitioners Act 1893* (WA).
[14] Ibid s 30.

> *herein contained shall prevent a party from appearing or defending in person as heretofore, nor to prevent any person from addressing the Court by leave under the provisions of section thirty of The Small Debts Ordinance, 1863;*[15]
>
> *47. No person other than a practitioner shall directly or indirectly perform or carry out or be engaged in any work in connection with the administration of law, or draw or prepare any deed, instrument, or writing relating to or in any manner dealing with or affecting real or personal estate or any interest therein or any proceedings at law, civil or criminal, or in equity : Provided that nothing herein contained shall be construed to affect public officers acting in discharge of their official duty, or the paid or articled clerks of practitioners, or any person drawing or preparing any transfer under The Transfer of Land Act, 1899.'*[16]

The two provisions deal with the overlapping issues as if they were separate topics:

(A) exclusivity in relation to representation in curial proceedings; and

(B) exclusivity in relation to work "in connection with the administration of law" in the preparation of documents in relation to that function (unless carried out by government officials, or paid employees of a practitioner.

By the time of its replacement by the "modern" more uniform regime, the 1893 Act had grown to a more flabby 132 sections with additional detail on costs and their taxation, and professional discipline. But the definition of legal work reserved to the profession, by now in section 76 and 77 remained almost identical in its terms, and identically in substance say for the addition of the (obvious) qualification relation to work authorised by another statute, and the (new) qualification in relation to work for which no payment was promised or expected. Reincarnated as the 2008 *Legal Profession Act*,[17] it is now a corpulent 637 sections supported by Regulations and at least 3 sets of Rules, but the essence of the reservation of legal work to the admitted practitioners is preserved in the slightly curious section 12, which defines legal work:[18]

> *legal work means —*
>
> *(a) any work in connection with the administration of law; or*
>
> *(b) drawing or preparing any deed, instrument or writing relating to or in any manner dealing with or affecting —*
>
> *(i) real or personal estate or any interest in real or personal estate; or*

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[15] Ibid s 46.

[16] Ibid s 47.

[17] *Legal Profession Act 2008* (WA). I will skip over the unlamented *Legal Practice Act 2003* (WA) and its 273 sections, though its provisions provide a transition from the earlier, to the current, regime.

[18] *Legal Profession Act 2008* (WA) s 12.

(ii) any proceedings at law, civil or criminal, or in equity;

And then goes on to regulate the conduct of "legal practice". While section 12 has been on a diet (in comparison to the rest of the Act) its origins in sections 47 and 77 of the previous Acts is clear.

8. COMMON FEATURES OF THIS HISTORICAL EXCURSUS

So, for more than four centuries we have regulated legal practice upon the basis of a number of characteristics:

(a) first, in the Anglo Australasian jurisdictions, upon the basis of some level of differentiation between work in court, and work out of court (captured in the provisions of the legal practitioners acts of the last two centuries to which I referred before);

(b) secondly, upon the basis of admission to and supervision by a superior court, with requirements for the demonstration of professional competence and good character as a precondition to admission;

(c) thirdly, by the regulation of a number of matters reflecting the asymmetry of information and sometimes power between practitioner and client (and other parties who may be affected by the conduct of the practitioner) that is:

(1) the regulation of costs;

(2) the regulation of trust monies;

in exchange for the conferral of a measure of exclusivity in the undertaking of legal work upon those who comply with those requirements.

That field of exclusivity, the bounds of which continue to be tested as the ingenious but unqualified attempts to find new ways to intrude upon it, is justified, and only justifiable, on two bases:

(A) first, consumer protection – that is the need to ensure that, in the same way as we wish to ensure that our electrical fittings and plumbing fixtures work as intended, and are installed and maintained and our health is looked after by people with certain minimum levels of training, and demonstrable competence, advice and representation in relation to liberty and economic well-being

(B) secondly, that the law in some way serves some higher "public" purpose, the underpinning rationale for the provisions of our ethics rules which require us to give primacy, over and above the interests of our clients, to our obligations to the court relation to our dealings before the courts, or which may affect proceedings before the courts.

The first consideration, of course, is applicable to any potentially harmful undertaking – as much to plumbing and electrical contracting (both of which have implications for health and human safety) as to law or medicine. And one has to say, even in the application of that as

an overarching construct there are glaring omissions in our approach regulation – the profession of engineering, for example, is not subject to overarching statutory regulation except in Queensland, other than in relation to construction and compliance certification in relation to "buildings" under various State building acts, and very granular and area specific regulation in other areas (such as aircraft engineering, and mining engineering) nor as the profession of accounting other than in aspects of tax. That is a profession which seems to thrive without a legislated consumer protection framework.

The second, while undoubtedly important, calls attention to a particular subset of overall legal practice. Likely, more than two thirds of legal practitioners will enter a court *only* on the day of their admission, or interact with a court process in any material way in the course of their careers. That does not mean that they do not need to be cognizant of aspects of the curial process, or the obligations that go with the conduct of court proceedings, but for the majority of practitioners issues relating to advocacy, and matters pertaining to courts, will be distant from their day-to-day practice.

9. THE CONSUMER PROTECTION IMPERATIVE

The consumer protection imperative is not unique to law, any other profession, or most trades. The way in which we approach regulation of consumer protection in law is quite unique: no other profession relies upon a specifically codified regime for the regulation of costs, or as complex a regime for the regulation of professional interactions with clients, regardless of the nature of those clients, as the law.[19] By contrast, see the AMA Code of Ethics provision in relation to fees:

> *2.7.1 Set a fair and reasonable fee having regard to the time, skill and experience involved in the performance of your services, the relevant practice costs and the particular circumstances of the case and the patient.*
>
> *2.7.2 Recognise the importance of informed financial consent, ensuring that the patient is informed of and consents to your fees prior to the medical service being provided, where possible. Where a service you provide is in conjunction with other doctors or hospitals who will charge separate fees, advise the patient of this and how they can obtain information on those separate fees.*
>
> *2.7.3 Encourage open discussion of health care costs with the patient.*

Our regulatory model, doubtless with an eye over its shoulder to the Fleet and Wapping solicitors, many of whom were derided in the literature of the time as failed tradesmen,[20] the target of the Acts of 1603 and 1729 has adopted a more prescriptive approach to the regulation of legal practice, drawing only (and only in some jurisdictions clearly) between the practice of solicitor and barrister.

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[19] Australian Medical Association, 'AMA Code of Ethics' (Code, Australian Medical Association, 2004, Editorially Revised 2006, 2016). A truly self-regulatory code; a scant seven pages long and is for the most part advisory rather than prescriptive or proscriptive.

[20] See William Holdsworth, *A History of English Law* (Methuen & Co Ltd, 1st ed, 1909-52) vol 12, 54.

That regime continues to evolve as new areas for prescription or proscription emerge, and are codified.

This no regulatory regime, however, can prescribe or proscribe venality, incompetence or sheer lack of common sense (or whatever combination of factors led to the stinging rebuke by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*)[21] other than the broad and encompassing criteria of unprofessional conduct and professional misconduct, by which we periodically must undertake the Darwinian process of weeding the unfit from the gene pool, in the interests of consumer protection (and our own peace of mind). In that we differ not at all from any other profession, nor many trades.

10. IS THIS A PROFESSION?

So we know that law has been carried on with at least a significant objective of making money for millennia. Is it a profession, or more generally what is a profession in the modern age? That is a question that external and internal critics of the legal profession (and other professions) have wrangled with over recent years.

By historical definition a profession is narrower than vocation, characterised by "trained expertise" and "selection by merit. a selection made not by the open market but by the judgment of similarly educated experts."[22] Professionals are, to a degree, self selecting. Sociologists, adding elements of utility, include altruism – that is a sense of service to the general community; regulatory autonomy or self regulation and acceptance by the general public of the privileged role of the professional.[23] Those factors lead the Australian Council of Professions to define a "profession" as:

> *"… a disciplined group of individuals who adhere to ethical standards and who hold themselves out as and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others.*
>
> *It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services*

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[21] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46.

[22] Harold Perkin, *The Rise of Professional Society: England Since 1880* (Routledge, 1989), cited in Steve Mark, 'Re-imagining Lawyering: Whither the Profession?' speech delivered at the Australian Academy of Law Symposium, Melbourne, 25 July 2008.

[23] Andrew Abbott, *The System of Professions: An Essay in the Division of Expert Labor* (University of Chicago Press, 1988); Joseph Sciniecca, 'Conflict Resolution in the United States: An Emerging Profession?' in Kevin Acruch, Peter Black and Joseph Sciniecca (eds), *Conflict Resolution: Cross-Cultural Perspectives* (Greenwood Press, 1991).

> *provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community."*[24]

Many professions fall under this broad umbrella provided by this definition. Law today, though from what we have covered not always, shares these characteristics. But unevenly. We agonise about the availability of legal assistance for the great majority of the population. Most of today's lawyers, like yesterdays lawyers, provide their services principally to that part of the public that can pay for their services. The element of public service is not illusory, and that any person is assisted to navigate the perils of our legal system safely is a public good, but we should not pretend that now, or ever, the majority of members of the legal profession have provided the majority of their services altruistically.

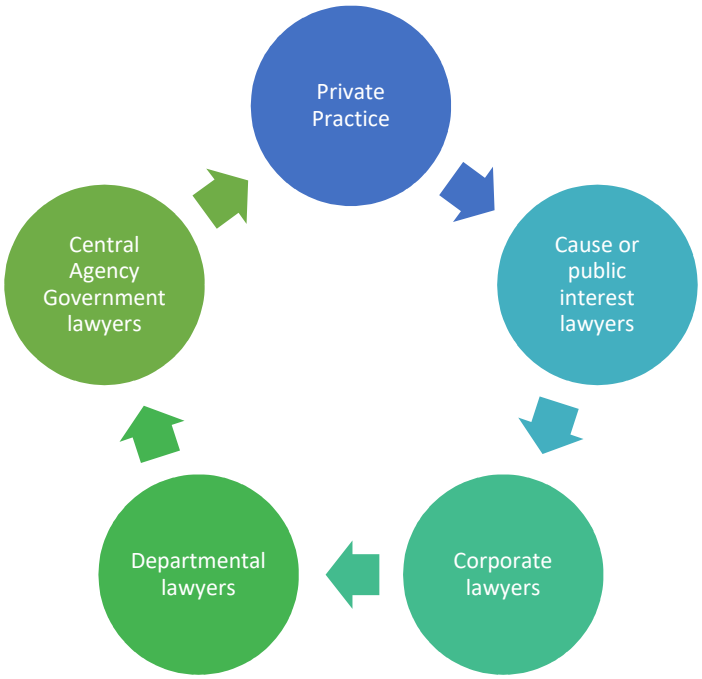
A second component of the definition may also be breaking down, if it has not already: the burgeoning number of graduates from our law schools (now found seemingly at every University, regardless of it provenance) means that there are very many, and ever increasing, numbers of individuals who have the same foundational legal training as an admitted member of the profession but who are not admitted, or if admitted do not practice in the profession as we have traditionally recognised it.

They also have access to tools and resources for exploring and understanding the law undreamt of only a few years ago, and these are proliferating. Those tools undermine the exclusivity of knowledge which has been a hallmark of professions in many fields, medicine notably amongst them, where Dr Google has empowered consumers but also spread alarm and misinformation. Knowledge, or at least a little knowledge, is now democratised in many fields, and law is not immune from that process.

In parallel with that the profession has fragmented not along the lines of the production line (the traditional roles of conveyancer, solicitor and advocate) but in alignment with different parts of the economy and polity.

Let's consider it this way:

[24] Australian Council of Professions, *What is a Profession?* (2018) Australian Council of Professions <http://www.professions.com.au/about-us/what-is-a-professional>.



That is not new, the Romans had the *advocatus fisci* as permanent government lawyers.

I will say at the outset that all of those practising in these different modalities are currently admitted practitioners subject to a common ethical regulatory framework:

(a) The private sector lawyer is the archetype for regulation and the conventional view of the legal profession. They are dependent upon more or less transient clients for their purpose, and remuneration.

(b) The Central Agency Government lawyer

I draw a sharp distinction between central agency government lawyers and departmental government lawyers, because on a spectrum departmental lawyers are closer to corporate lawyers than central agency lawyers.

Central agency lawyers tend to be long term, tenured practitioners who have a duty to constitutional government which embraces the multiple facets of:

(1) The paramount duty to present cases on behalf of the Crown before the Crown's courts;

(2) The duty to provide frank and fearless advice to executive government to endeavour to keep the executive government of the Crown on the straight and narrow; and

(3) Dealings with third parties as representatives of the Crown (whether in the criminal or civil sphere) with the highest level of integrity and dispassion.

(c) Departmental lawyers

Departmental Government lawyers have an alignment to the mandate of their Department rather than central government, with which they interact on behalf of their Department. While they may be tenured employees of Government they are answerable to, and run the risk of capture by, that Department. That is one of the imperatives for that part of the Legal Services Directives issued by the Commonwealth Attorney General under section 55ZF of the *Judiciary Act 1903*[25] which restricts the undertaking of litigation by Departmental Officers without the consent of the Attorney, and also requires notification of all significant litigation to the Attorney.[26]

(d) Corporate lawyers

At least 15% of practising lawyers are employees of corporations. They have only one client, also their employee. They may act exclusively as lawyers, or assume additional roles. They must maintain their professional independence (not the least to preserve privilege) but face the reality of being an integral part of the organisation that employs them. The Association of Corporate Counsel (formerly ACLA) does much to foster the professional independence of in-house counsel, and publishes a useful Charter for adoption at board level, to protect and promote that independence.

(e) Public interest or "cause" lawyers

Most interesting (at least to me) are what I will call "cause" lawyers because of the question of whether they have, in fact a client in the conventional sense.

Not all "not for profit" lawyers are "cause" lawyers, working in community legal centres and the like, but a very small number act for the defence of the environment, and civil rights and similar causes, where the object of representation is the cause, and the client is, often, a vehicle to achieve the cause often if not usually supported and paid for by others than the (nominal) client. In that there are some similarities between the cause and Central Agency lawyer.

I draw these distinctions because there are, in the modern environment, many different styles of practice with many different types of relationship between the practising lawyer and those who they represent.

11. IMPLICATIONS FOR REGULATION

So what does this mean for you as regulators?

We have a regulatory regime which, while it has grown in size and detail (as modern legislation is want to do) still cleaves to essential principles of regulation of law as a profession which go back 400, or even 1400, years.

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[25] *Judiciary Act 1903* (Cth) s 55ZF.

[26] See Department of the Attorney General (Cth), *Legal Services Directions*, 2 July 2018, sch 1 para 5 in relation to in-house lawyers and 3 and 4 as to notifications and directions.

And that raises the question: is that regulatory regime apposite in the modern era?

Which takes us to complexity, the modern business environment and how the profession responds to it.

(a) First to complexity: it is trite that at least for business, but in particular for larger businesses, the regulatory environment is complex and growing more so in many dimensions:

(1) In the volume of legal rules;

(2) In the burgeoning notion of the "social licence" to operate which imposes further constraints on business conduct, informed by (but not simply conformant to), those legal rules;

(3) In the impacts of social phenomena including mass social movements, of which #metoo is an example of the mobilisation of the application of the law in areas where the law was present but perhaps not previously observed;

(4) In scale, both of operations and the information that those operations generate, whether required by legal norms, driven by commercial imperatives, or derived from the tools used by business (whether wanted or not).

(b) Secondly, the responses to that complexity:

(1) The first of which is specialisation, with a profession that has specialised far beyond, and often far earlier, than in earlier generations;

(2) The second, related, is the adoption of business methods in both private and a large part of public law practice which have some of the aspects of Henry Ford's production line (which was of course based on specialisation);[27]

(c) Thirdly, we have competition between legal practitioners, and those who might substitute for them as providers of legal services in a large, very diverse and very competitive professional services market. That occurs against a background of national competition policy which as we all now know seeks to minimise cost and maximise quality by liberating to the greatest extent the interplay of competitive forces, freed of extrinsic and "unnecessary" restraints. Those include all forms of barriers to entry, and in the view of some such unnecessary things as ethics, to quote the report of a former Legal Services Commissioner in New South Wales:

> *"Concerns arise when a rigid view of costs is adopted as only relating to financial or monetary cost. For example, early*

[27] Steve Mark, 'What is Legal Work? – A Regulator's View' speech delivered at the LAWASIA Downunder Conference, Gold Coast, 21-24 March 2005.

> *discussions in relation to the application of competition policy to the legal profession resulted in a finding in at least one agency's view that the greatest barrier to competition in the legal profession was its ethics. This was due to the belied that a profession with ethics would have higher financial costs (to the consumer) than a profession without ethics."*[28]

A view which rather ignores the "quality" dimension of competition, and the basic tenet that all forms of consumer protection for any type of good or service impose costs.

(d) Fourthly, we have the pressures imposed by clients, particularly larger clients which are sophisticated purchases of legal services, often with their own internal legal teams which fulfil a diversity of roles including as both complimentary and competitive advisors, project managers and cost controllers.

There are doubtless more complexities. The reality of that environment compels a form of speciation within the legal profession to meet its various needs, or at least some of those needs. For individuals and small to medium-sized enterprises, small to medium-sized firms, from sole practitioners to small partnerships or incorporated practices may meet the great majority of the legal services needs whether they be once-in-a-lifetime interactions with the law, the frequent but mundane, or the occasionally specialised (where the availability of additional assistance from the bar may supplement any limitations in the skill set of the small to medium-sized practice).

For larger corporations, which tend to suffer exponentially greater regulatory burdens, greater exposure to litigation and more frequent and higher value commercial interactions, the services of one or many large firms, complemented by boutique or mid-sized firms and internal legal functions may be required to meet the diversity of their needs. Industrial economics, in Coase's Theory of the Firm,[29] tells us that reliance upon such a level of integration is rational where the transaction costs and risks of market activity sourcing individual services from multiple sources, are higher than the costs of integration (either internally, or externally).

Economic thinking also tells us that as one moves from larger and more sophisticated counterparties dealing with each other, to smaller counterparties (and worse, counterparties of different size), there are greater difficulties in effecting economically efficient transactions: in particular, there are asymmetries of information and a reduced ability to effectively compare and evaluate the cost and quality of the good or service being acquired. Those who transact infrequently, and who are unable to test the market efficiently, are vulnerable to those who are better informed, and skilled. That is a dilemma of professionalism generally, where the mastery of an organised body of knowledge,

[28] Ibid.

[29] Ronald Coarse, 'The Nature of the Firm' (1937) 4(16) *Economica* 386.

hitherto relatively inaccessible, fosters dependence based upon limited ability to assess the application of that knowledge in a particular case.

That dependence is of course the very foundation of fiduciary obligation.

But of course that type of dependence, and the requirement to protect the "consumer" from the "supplier", does not exist (or at least does not exist in the same way) in the relations of a large part of the profession with its clients today – in the relationship between central agency lawyers and government, departmental lawyers with their departments, in-house lawyers with the corporations that employ them, or "cause" lawyers with the objects that they advance or defend.

Nor do many of those lawyers engage in many of the activities which are the subject of our regulatory regimes: many of those lawyers, and indeed many private practitioners, will not handle trust funds; most will never appear in court or be involved in curial proceedings; some will never even engage with another practitioner. Many aspects of our regulatory regime will simply be, to them, irrelevant.

Now to add a final layer of complexity, not for today, but for the future. All the modern statute law, and all the modern case law, from the key jurisdictions with which we are concerned is now marshalled and assimilated into vast databases. Historical information is being progressively assimilated and will eventually be incorporated, in its entirety. Large publishing organisations devote considerable resources to systematising, summarising, and interlinking that information. At present that information is sold, with a level of analysis, on a subscription or fee-for-service basis, principally to the legal profession, although for a price it is available to anyone. A significant, if less polished, part is already free.

In other fields of economic and social endeavour large databases now increasingly attract the attention of increasingly sophisticated tools, able to achieve a measure of understanding of natural language, and use inductive or heuristic reasoning to extract patterns from imperfect datasets and extrapolate rules from those patterns. They are not yet ready to read and understand the law, though some are already trying, first in providing assistance, or triage, for legal professionals.[30] The last two years have seen a flood of articles, some more sensational than others, canvassing the prospect of increasingly automated legal advice. This is not a new prospect – an attempt to reduce the law to a series of formulae can be seen in Lee Loevinger's 1949 paper, 'Jurimetrics: The Next Step Forward',[31] which sought to reduce the laws of mathematics or logic, and the *British Nationality Act 1981*[32] was codified by the Logic Programming Group at Imperial College shortly after its enactment. The Common Law Library, in many of its seminal volumes, long

[30] See The University of Melbourne's recently published its discussion paper (which despite the date was no April Fools' Day joke): Judith Bennett et al, 'Current State of Automated Legal Advice Tools' (Discussion Paper No 1, The University of Melbourne Networked Society Institute, 1 April 2018. Appendix A listed 11 different types of computer aided legal advice facility, with multiple examples for each type.

[31] Lee Loevinger, 'Jurimetrics: The Next Step Forwards' (1949) 33(5) *Minnesota Law Review* 455.

[32] *British Nationality Act 1981* (UK) c 61.

ago attempted to reduce the common law to a series of formal propositions of Aristotelian logic, illustrated by specific case examples.

Ray Kurzweil, director of engineering at Google, predicts that by 2029 human intelligence will be matched, and swiftly surpassed, by machines (and in particular the machines that Google is building plans to build).[33]

"When" algorithmic law will truly be a significant factor in legal services we cannot exactly tell but the prospect is doubtless real. And for you the question posed, then is: how are you going to regulate legal advice given by an algorithm? Even if not wholly given by an algorithm, how are you going to allocate responsibility where for efficiency reasons (internally or externally sponsored) at least part of a lawyers work product is dependent upon algorithmic analysis?

For some (and I'm old enough that I should probably count myself amongst them) that prospect may be professionally terrifying. But the democratisation of the law, and its increased accessibility raises the prospect that a very large unmet legal need that exists in our community may in the future be addressed, at least in part by tools that are always available, near instantaneous in response, delivered at a price which reflects the allocation of the capital and maintenance costs of a large database socialised over many users, rather than many small "databases" of individual or collective knowledge socialised a very few. With that may well go a variety of new means of intermediation, to add an "human" element to the delivery of legal services including but not limited to, utilisation of the very large pool of the legally educated who lie outside the current profession.

The 2005 paper by Legal Services Commissioner Steve Mark culminated with the suggestion that we move away from the core predicate of "person" based regulation – defining who is and who is not a person who can be a legal practitioner and then according to them the monopoly rights enjoyed by the profession, and progress instead to activity-based regulation – requiring those who seek to provide certain identified services to comply with a regulatory regime otherwise applicable to a legal practitioner.

I would go further and contend that in an appropriately risk based regime, specific types of activity rather than specific persons, should be regulated according to the risks that those activities pose within an overall probity framework focused upon the most basic ethical concepts, which I would reduce to only four:

(1) independence of thought and action;

(2) honesty;

(3) candour; and

(4) courtesy.

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[33] Legal Business, *Deep Blue Sky Thinking: The Cutting Edge of Legal AI* (2018) The Legal 500 <https://www.legal500.com/assets/pages/client-insight/deep-blue-sky.html>.

The hallmarks, I would like to say of the lawyers of the central government agencies of this State, and of the firms of which I have been, and am, a member.

With those concepts, law may still be practised as a profession, while operating as a business, even by an algorithm.

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