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**PROFESSIONS AND FEDERATION:
THE EMERGENCE OF A NATIONAL
MARKET IN LEGAL SERVICES AND
A NATIONAL LEGAL PROFESSION**

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PROFESSIONS AND FEDERATION: THE EMERGENCE A NATIONAL MARKET IN LEGAL SERVICES AND A NATIONAL LEGAL PROFESSION

As we approach the mid point of the Centenary of Federation, the fine speeches about the emergence from separate squabbling colonies, each a market in itself protected by customs barriers, into a strong nation based on a single economy, ring in our ears. The same theme repeats itself, both in reprints of the speeches from Melbourne in 1901, and in the remarks of contemporary political leaders. Our weekend newspapers and colour supplements have shown us quaint photographs of the customs houses that stood on the banks of the Murray River as a barrier to those who would dare to trade across colonial borders. As Deakin said, in his guise as the anonymous reporter for the *London Morning Post*:

In our history, so far, the separate tariffs of the Colonies have been the chief sources of intercolonial bitterness. They have been the weapons of warfare employed by each to benefit its own and injure its neighbour's trade. The Custom House then was the symbol and sign of disunion: now it is the one Federal Department, will be the chief foundation of Federal influence, and has become the very symbol and at present the only sign of the Union.¹

If the establishment of a national uniform market was the chief goal, besides common defence under the imperial umbrella and a now-discredited desire for uniform restrictive racially based immigration laws, why has it taken nearly one hundred years for a genuine national market to emerge for professional services. The rules of admission for practice to the profession of law, in common with the rules and requirements for admission to practice in other professions, were matters for the states. No doubt there were strong concerns in the smaller states that opening an unrestricted market for legal services would see the dominant bars of Sydney and Melbourne overwhelm the other states. I understand that for many years the admission rules in Queensland, which made it particularly difficult for a person whose practice was based in Sydney, were referred to as the '*dingo fence*'.

Perhaps lawyers did not contemplate the concept of a national market. We have, despite federation, traditionally looked at state borders in legal terms as being almost as significant as national borders. This was supported by high authority, with Brennan, Dawson, Toohey and McHugh JJ saying in *McKain v R W Miller & Co.*²

To describe the States, as Windeyer J once described them, as "separate countries in private international law" may sound anachronistic. Yet it is of the nature of the federation created by the Constitution that the States be distinct law areas whose laws may govern any subject matter subject to constitutional limitations.

Indeed, the error in this approach was only recognised recently in *John Pfeiffer Pty Ltd v Rogerson*.³ We now know that the concepts of private international law are inappropriate in considering the interaction between the various 'law areas' within the Australian federation.

The prevailing view until Pfeiffer, however, was dominant. Chief Justice Mason in *Breavington v Godleman*⁴ was effectively in dissent when he asserted that: 'Australia is one country and one nation. When an Australian resident travels from one State or Territory to another State or Territory he does

¹ A Deakin, *Federated Australia: Selections from Letters to the 'Morning Post' 1900-1910* (1968) 22.

² (1991) 174 CLR 1, 36.

³ [2000] HCA 36, (2000) 172 CLR 625.

⁴ (1988) 110 CLR 162.

not enter a foreign jurisdiction'. For the purposes of admission to practise law, we remained a set of isolated and distinctly separate fiefdoms.

Although to the uninitiated it might seem that the guarantee of freedom of interstate trade commerce and intercourse in s 92 of the Australian Constitution, championed as the basis of a single market, would have been the basis of a national market in professional services, this has not proved to be the case. State restrictions on interstate legal practice were never as crude as a customs barrier, or physical dingo fence. Rather, there were residential requirements for admission to practice. The profession of law has remained largely regulated by the courts, with admission to practise granted by the Supreme Court of a State or Territory. A requirement that a person be a resident of that state in order to apply for admission was the norm. The practice of the law for fee or reward within a state is restricted by state legislation to those persons admitted to practise laws (whether as barrister, solicitor or amalgam) in that state. So the barrier was not in terms of 'thou shalt not practise law across a border'. Rather, eligibility for admission was restricted to a resident of the state. A person could leave Victoria and settle in South Australia and so be eligible for admission. But they could not hope to be admitted if they remained a resident of Victoria. So the High Court decided in *Henry v Boehm and others* in 1973.⁵ Mr Henry was a Melbourne practitioner of long standing who sought admission in South Australia. The board of examiners of the South Australian Supreme Court, chaired by the Master, Mr Boehm, ruled him not eligible for admission on the basis that he remained a resident of Victoria. This ruling was challenged on the basis that the rule infringed s 117 of the Constitution, which provides:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The majority of the High Court held that the residence requirement (being a requirement that an applicant for admission to practise in South Australia must have resided constantly in South Australia for three months prior to the application) did not offend s 117 because it applied to all: that is, all persons, whether they lived in Melbourne or Adelaide, had to show that they were resident for three months before admission. Stephens J was in dissent, but the dingo fence was secure. The very narrow construction of the apparent right conferred by s 117 contrasted markedly with the High Court's then approach to attempts to evade commercial rights such as ss 90 and 92 and 117 was generally seen as an ineffective constitutional guarantee.⁶

Perhaps the reason for the push for a national legal profession is best explained by economic and commercial developments. The legal profession in Australia developed from its English antecedents in each state during colonial times, and acquired certain characteristics that may have been seen as particular to that jurisdiction. Training was originally by apprenticeship through articles of clerkship, but the universities emerged in the later part of the nineteenth century.⁷ The first law school was established at Sydney University in 1855, followed by Melbourne (1857), Adelaide (1883) University of Tasmania (1893), University of Western Australia (1927) and University of Queensland (1935).⁸ Local differences emerged in the way law graduates then entered the profession: exemplified perhaps in the quaint sounding term 'apprentice at law' retained until very recently in Tasmania.

Technology was no doubt one factor limiting the push for, or indeed the realisation of the possibility of, a national legal profession. It is hard to see how a business could be effectively run providing legal services across a large nation in the era before air transport, facsimile and now e-mail communications. Commercial factors were also at play: only 20 years ago a look at the legal directory would still have

⁵ (1973) 128 CLR 482.

⁶ see L Zines, *The High Court and the Constitution* (2nd ed, 1987) 332.

⁷ J Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 *UNSWLR* 111.

⁸ Council of Australian Law Deans, *Studying Law in Australia* (2000) (2001).

shown the same firms, large but not enormous in Sydney and Melbourne, broadly holding the same positions in their respective markets as they would have 50 or 60 years previously. At the upper end of the corporate market, the firm that helped the bank or insurance company establish itself in the nineteenth century was probably still handling that bank's or insurer's legal affairs.

A law graduate joining that firm 20 years ago would have had the expectation that, with years of diligent and competent work, they would rise to partner in that firm, a course of career progression that would have been familiar to that graduate's father or grandfather. At least 20 years ago gender issues were beginning to improve in terms of entrants to the profession.⁹

This is of course no longer the case. Major corporate clients now bid for the provision of legal services, and the firms jostle for access to the preferred provider panels for the major consumers of legal services. Practitioners, from junior to senior, move across the firms. While a degree of movement was not uncommon in the earlier stages of a career, it seems fair to observe that the norm now is that partners, to the most senior level, will move about as the major firms rearrange their priorities. And, with better communications and technology, the firms have begun to emerge as national entities, first as loose 'confederations' of state-based law firms, and more recently as single national partnerships.

The emergence of the large mega law firms was clearly market driven, and preceded the successful opening up of the national market in terms of ease of admission to practise. In this it has mirrored developments overseas, particularly in the United States, where the development of the very large firm began. The transition from local, relatively small, partnerships to mega firms is part of a transformation of the culture of the American legal profession that has caused considerable scholarly debate.¹⁰ Interestingly, the emergence of the mega firm has occurred in a market where admission to practise is regulated by individual states, and mutual recognition as we know it is yet to develop.

By the end of the 1980s the narrow state-based residence requirements for admission to practise were becoming anachronistic. The move towards the large national firms was gathering pace, and the first winds of what has come to be known as National Competition Policy were stirring. The time was ripe for a challenge to the restrictive rules, and in *Street v Queensland Bar Association*¹¹ the High Court reversed itself on *Henry v Boehm* and ruled that s 117 did operate to strike down the residence requirement in the Queensland admission rules.

Interestingly, the case also challenged the rule on the basis that it infringed s 92. The majority thought that it was unnecessary to rule on this point, the challenge to the Queensland rule based on s 117 having been successful, but it is worth noting that the summary of argument in the Commonwealth Law Reports shows that it was vigorously submitted that s 92 could have no bearing on the regulation of the business of barristers, because the law was a profession, far above mere 'trade and commerce'. Mr Davies QC argued:

The meaning of trade and commerce was not frozen at 1900. But if the phrase has a popular meaning, it does not apply to doctors or lawyers. A man in the street would not consider his doctor to be engaged in trade or commerce. In trade one maximises ones profits.¹²

⁹ Something of a snapshot of the legal profession in Australia at this time is provided in M Sexton and L Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982). The list of major firms in Sydney and Melbourne shows no common firms, but many 'halves' of what are now recognised as the big national name firms.

¹⁰ Mary Ann Glendon, *A Nation Under Lawyers, How the Crisis in the Legal Profession is Transforming American Society* (1994), Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

¹¹ (1989) 168 CLR 461.

¹² *Ibid*, 474.

No doubt no man in the street would dare to suggest doctors or lawyers engaged in such a tawdry exercise.

This argument found favour with Justice Dawson, who expressed the view, albeit dicta, that a barrister was not at 1900, and indeed was not in 1990, engaged in commerce or trade, but rather in a profession.¹³ Very upstairs downstairs, one might think, but it seems hard to believe that, if argued again, and particularly in the context of the practise of law as a solicitor in a major national firm, that the court would not recognise the provision of professional services for fee as falling within the confines of trade and commerce.

The successful challenge based on s 117 did not itself suddenly create a free national market in legal services. It did create a right to apply for admission, but various peculiarities in local rules could still create practical barriers. No doubt the inventive imagination of lawyers could have come up with all sorts of difficulties to maintain the dingo fence in a way that did not obviously infringe s 117. By the time of Street, however, there was a change in the climate of opinion. The late 1980s saw the emergence of the economic rationalist to centre stage in the public-policy debate, with National Competition Policy embraced vigorously by all major political parties and by governments at Commonwealth and State and Territory levels.

The legal profession, through the Law Council of Australia, was farsighted enough to see that the emergence of a national profession was desirable. The profession at its peak level has worked with State and Territory admitting authorities on the development of uniform admission standards. The publication in 1994 of the *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services*¹⁴ clearly mapped out simplified uniform admission procedures, and pointed the way to a regime whereby practicing certificates and indemnity insurance could have Australia-wide recognition. From at least this time the official policy of the profession, through the Law Council of Australia, supported a single national market. The Australian Chief Justices had earlier established a committee, chaired first by Chief Justice Street and then by Justice Priestly, to work cooperatively towards more uniform admission standards across Australia. This committee progressed slowly during the 1980s.

While the lawyers on the shore of Lake Burley Griffin found the question of whether a barrister could be said to be engaged in trade and commerce a complex and difficult question, the economists advising governments had no such difficulty, and the legal profession was included in the so-called Mutual Recognition regime of the early 1990s, a significant aspect of co-operative federalism, which so far has not been subject to the same critical scrutiny in the High Court that the cross-vesting scheme, another claimed success for co-operative federalism, has been.¹⁵ The issue of the validity of the *Mutual Recognition Act 1992* (Cth) and the related State Acts has been considered twice by the Full Court of the Federal Court, with the Act being upheld on both occasions: *Sande v Registrar, Supreme Court of Queensland*¹⁶ and *Board of Examiners under the Mines Safety and Inspection Act 1994 (WA) v Lawrence*.¹⁷

In 1992 the Commonwealth Parliament, at the request of the States and Territories, enacted the *Mutual Recognition Act 1992* pursuant to s 51(xxxvii): the reference power. This Act aims to promote 'freedom of movement of goods and service providers in a national market in Australia' (s 3). The States and Territories have passed identical legislation, referred to as the Mutual Recognition (Name of State or Territory) Act. In the ACT the relevant Act is the *Mutual Recognition (Australian Capital Territory) Act 1992*.

¹³ Ibid, 537-539.

¹⁴ Law Council of Australia, July 1994.

¹⁵ *Re Wakim, Ex Parte McNally*, [1999] HCA 27, (1999) 198 CLR 511.

¹⁶ (1996) 134 ALR 560 (Davies, Lockhart and Spender JJ).

¹⁷ (2000) 176 ALR 305 (French, Lee and Carr JJ).

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The Mutual Recognition scheme creates an entitlement to carry on a profession across state borders, not a mere ability to apply; sub-s (1) provides:

a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:

- a) to be registered in the second State for the equivalent occupation; and
- b) pending such registration, to carry on the equivalent occupation in the second State.

From 1992 there has thus been an ability for lawyers to achieve local admission based on this entitlement. This has been the spur to the States and Territories to move towards uniform standards for admission, because it follows from the scheme that the 'weakest link' could prove an attractive place for persons to seek first admission. The Mutual Recognition scheme can only work if all States and Territories have confidence in the standards set down in other states. The Mutual Recognition scheme also extends to New Zealand.¹⁸

The scheme talks of 'equivalent occupation', and this can create some issues in the legal profession, where different parts of Australia have different methods of regulation. Although vigorous independent bars exist in every State and Territory, it is only New South Wales and Queensland that maintain a formal legislative division in the sense of admission as either a barrister or solicitor. Throughout the rest of Australia a person is admitted as a barrister and solicitor, or a legal practitioner. This creates a method for leap-frogging local admission requirements where there exists, as there does in Queensland, scope for admission as a barrister after graduation by doing a shorter so-called 'summer bar readers course'. A person thus admitted as a barrister in Queensland could not apply for admission as a solicitor in New South Wales (or Queensland), as barrister and solicitor are not equivalents, but they could apply for admission in an amalgam jurisdiction, such as the ACT. The ACT barrister and solicitor could then apply for admission under Mutual Recognition in New South Wales, where a solicitor is an equivalent to a barrister and solicitor.

The recognition of these problems further strengthened the push for cooperative work between the State and Territory Supreme Courts to establish uniform admission rules. A committee, chaired by Justice Priestley of the New South Wales Court of Appeal was established by the Council of Chief Justices, to advise on uniform rules. The Committee achieved substantial consensus during the early 1990s. Originally established as the Consultative Committee of State and Territory Law Admitting Authorities, and now continued as the Law Admissions Consultative Committee, with an expanded membership to include the Law Deans and the providers of practical legal training, the committee is most widely known simply as the 'Priestley Committee'.

It is probably fair to observe that there was a widespread recognition that, unless a cooperative approach delivered a national scheme, governments would move to legislate uniformity, which would probably involve a substantial change to the traditional concept of a person admitted to entering the legal profession by way of first admission as a practitioner of the Supreme Court in a procedure under the control and responsibility of the Court.

There has been agreement now in every jurisdiction for uniform academic requirements for an undergraduate degree which is to form the basis for admission as a legal practitioner. This has been prompted, both by the Mutual Recognition scheme, and also by the explosion in law school numbers in Australia, particularly since the Pearce Report which in 1985 recommended no new law schools.¹⁹ At the time of this review there were 12 Australian University law schools, up from six in 1960. By 2000 this had grown to 28, with two more due to commence soon.²⁰ Whereas once the State Admission

¹⁸ Trans Tasman Mutual Recognition Act 1997 (Cth), implemented in the ACT in s16A of the Legal Practitioners Act 1970.

¹⁹ D Pearce, *Australian Law School: A Disciplined Assessment for the Commonwealth Tertiary Education Commission* (1991).

²⁰ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*,

Board could be expected to have a familiarity with the degree program offered by 'the university', it would now be very difficult for any State Admission Board to be familiar with the range of courses on offer. While universities retain freedom to offer any combination of subjects in a Bachelor of Laws degree, a person who seeks admission will need to show that they have completed a course of study which includes the 'Priestley 11', being:

- Criminal Law and Procedure
- Torts
- Contracts
- Property, both Real (including Torrens system land) and Personal
- Equity
- Administrative Law
- Federal and State Constitutional Law
- Civil Procedure
- Evidence
- Company Law
- Professional Conduct (including basic trust accounting).

These rules have now been accepted throughout Australia, and there seems little controversy. There has been no push to review the rules, and while rigorous debate may occur within a faculty over whether, say, International Law or Jurisprudence ought to be made a compulsory part of undergraduate study, it is accepted that, if a student wishes to apply for admission to practise, they ought to undertake the prescribed subjects. This is not to say that the system is perfect and differences can emerge in the way individual State admission authorities interpret the 'Priestley 11' requirements. Perhaps a further refinement would be to adopt a broader, competency-based method of describing the minimum academic requirements. The State and Territory admission authorities are working together to improve communications and avoid inconsistency.

The weakness in the current model is that there is no overall monitoring or enforcement mechanism. State and Territory admitting authorities take on the role of accepting or otherwise a degree program, but in reality they are heavily reliant on a certification from the Dean of the relevant law school that the course satisfies the 'Priestley 11' requirements. The authorities do not have the resources to undertake substantive evaluations themselves. The move towards a more commercial mode of delivery of legal education also poses a challenge, as the Dean is, in effect, both marketing a product in a competitive environment and certifying that product's compliance.

The Law Council Blueprint called the establishment of a National Appraisal and Standards Committee to accredit Australian law schools and, having regard to course content, assessment procedures and infrastructure, to 'assess whether Australian law courses comply with the areas of study specified in ... the Uniform Admission Rules'.²¹

Report No. 89 (1999) 117.

²¹ Law Council of Australia, above n 14, 16

This proposal was supported by the Priestley Committee and the Council of Australian Chief Justices, and was placed on the agenda of the Standing Committee of Attorneys General in 1997 but found no support.²²

This highlights a weakness of the Priestley system, which depends on the cooperation of the State and Territory admitting authorities, which are agencies of the State and Territory Supreme Courts. The executive arm of State Government has no direct role, and the Commonwealth has no role at all. There is thus no direct political responsibility and no political support for resources to monitor compliance.

This is not to say that a National Appraisal and Standards Committee would solve all problems. The potential for conflict between the legal profession's goal for legal education and the university's goal is apparent, and there was concern expressed by the Council of Australian Law Deans. The Australian Law Reform Commission has recommended the establishment of an 'Australian Academy of Law' to bring together relevant stakeholders.²³ While this falls short of a National Appraisal Committee, it may prove capable of obtaining political support.

The alternative approach, which has never been seriously advanced in Australia, would be to move to an American model, where standards are set by a State bar examination, which is in effect open to all. This leaves the student with a broad choice of education, but in order to practise law, they know they will have to sit for and pass a set of standardised examinations.

While the undergraduate component of legal education requirements is now uniform, there remain a variety of methods for the graduate to complete the practical legal training, although work is well advanced on uniform rules to set out the content of practical legal training.

The need for a degree of uniformity on pre-admission training of law graduates has been forced, in large measure, by the success of the Mutual Recognition regime. States that have traditionally had long periods of articles as the basis for admission are finding that the bigger law firms will recruit the best graduates, fly them to a jurisdiction where admission can be obtained in six months, train them, have them admitted, and fly them home. The aspiring lawyer who continues to undertake the longer period of local training understandably sees this as unfair. It is interesting to observe that this reality seems to have reduced the traditional resistance of some jurisdictions to changes to traditional pre-admission training.

Technology also plays a part here, as, undoubtedly, does cost. The reality is that the practical legal training courses are now mostly user-pay, and for the student and would-be lawyer, the cheapest and fastest way to the ability to earn a salary is obviously attractive. The trend seems to be away from full-time instruction, and in favour of a course that can be delivered via e-mail and the net, often to a law graduate working in a firm, although not yet admitted. The Legal Workshop at the Australian National University has been at the forefront in developing innovative distance learning, and it seems this will continue to grow.

The approach being adopted by the Priestly Committee for common standards for practical legal training has benefited from close work with the Australasian Professional Legal Education Council. It is proposed that a course will need to demonstrate that a student meets prescribed competency standards in the following areas:

²² ALRC 89, 125.

²³ ALRC 89, 137.

Skills

- Lawyers Skills
- Problem Solving
- Work Management and Business Skills
- Trust and Office Accounting

Practice Areas

- Civil Litigation
- Commercial and Corporate Practice
- Property Practice

one of:

- Administrative Law Practice
- Criminal Law Practice
- Family Practice

and one of:

- Consumer law
- Employment and Industrial Relations
- Planning and Environmental Law
- Wills and Estates

Values

- Ethics and Professional Responsibility

It will be seen that this formula will provide a degree of flexibility, allowing students to begin to specialise in areas in which they hope to practise. Each area of training will be described in a competency standard, and the State and Territory Admission Authorities will monitor compliance within their jurisdiction. It is expected that minimum times will be prescribed for the completion of such a course of instruction.

When these standards are adopted, it should be possible to say with confidence that an admitted lawyer throughout Australia will have had the benefit of a course of training, both as to the academic study of the law and practical legal training, that should equip them to competently handle a client's affairs.

There has been a further development that has taken the concept of a national legal profession even closer to reality. The Mutual Recognition scheme allows a practitioner to obtain interstate admission, but this still involves some administrative effort, time and expense. Most significantly for the practitioner, however, it only entitles them to admission, and it remains their obligation to comply with the relevant requirements of the other jurisdiction in relation to obtaining a practicing certificate, and the professional indemnity insurance that goes with that certificate. This is a very expensive item.

In 1997 a scheme was devised for a further form of interstate mutual recognition, involving the recognition of the practicing certificate and indemnity insurance of a practitioner for the purposes of another jurisdiction. These provisions are to be found in Part 15A of the *Legal Practitioners Act 1970* (ACT), and equivalent provisions in other participating States: (eg Part 3B of the *Legal Profession Act 1987* (NSW), s 55 and following, *Legal Practice Act 1996* (Vic), Division 3A of the *Legal Practitioners Act 1981* (SA), Part XI A of the *Legal Practitioners Act* (NT). The effect of these provisions is that, for the participating states, presently New South Wales, Victoria, South Australia, the ACT and the Northern Territory, a practitioner from one state may set up an office and practise in another participating state and, provided proper notice is given of that interstate office, the home state practicing certificate and professional indemnity insurance is taken to meet the practicing certificate and professional indemnity insurance requirements of that state. Tasmania joined the scheme on 1 June 2001.

While formal admission is now recognised, as well as practicing certificates, attention needs to be directed to harmonising attitudes to restrictions on practicing certificates. These are issued by the Law Society or equivalent body rather than the admission authority. I understand that the Law Council is mindful of this issue, and also that there is a proposal to establish a secure website on which all states

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can maintain a roll of practitioners as well as details of practicing certificates and any restrictions on those certificates.

Once Queensland and Western Australia come on board with this national scheme, it will be correct to say that the profession of law in Australia really is national. A practitioner in good standing in their home state, that is to say, with an appropriate practicing certificate and professional indemnity insurance cover, can merely by notifying the regulating authority in another state, practice law in that state on the basis of their home state practicing certificate and insurance. Mr Henry would today be able easily to practise in Adelaide from his home in Melbourne, by simply notifying the South Australian authorities of his relevant address in Adelaide, and the details of his practicing certificate and insurance. After 100 years, the trade in legal professional services across state boundaries is becoming free.