

AN AUSTRALIAN RESTATEMENT?

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"Simplify. Simplify." Henry D Thoreau "Walden" Ch.2. 1854

"Everything should be as simple as possible, but not simpler." Albert Einstein

"Seek simplicity and distrust it." A N Whitehead "Concept of Nature" 1920 p. 163

"You never know what is enough unless you know what is more than enough." William Blake
"Proverbs of Hell", "The Marriage of Heaven and Hell" (1790)

"I have made this letter longer than usual, only because I have not had the time to make it shorter." Blaise Pascal "Lettres Provinciales" 1657 xvi

"Let us settle ourselves, and work and wedge our feet downward through the mud and slush of opinion, and prejudice, and tradition, and delusion, and appearance, that alluvion which covers the globe,..... through poetry and philosophy and religion, till we come to a hard bottom and rocks in place, which we can call reality and say, This is, and no mistake" Henry D Thoreau "Walden" Ch.2. 1854.

"Mr Prin... did discourse with me... about the laws of England, telling me the many faults in them; and among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort; and as he lives, and Parliaments come, get them put into laws, and the other statutes repealed, and then it will be a short work to know the law, which appears a very noble good thing." Samuel Pepys, "Diary", April 25, 1666

"It seems to me very important that the statute laws should be made as plain and intelligible as possible, and be reduced to as small a compass as may consist with the fullness and precision of the will of the legislature and the perspicuity of its language. This, well done, would, I think, greatly facilitate the labors of those whose duty it is to assist in the administration of the laws, and would be a lasting benefit to the people, by placing before them, in a more accessible and intelligible form, the laws which so deeply concern their interests and their duties." Abraham Lincoln, Annual Message to Congress, 3 December, 1861, in "Collected Works of Abraham Lincoln" 5:42 (Roy P Basler ed. 1953)

*"Justinian's Pandects only make precise,
What simply sparkled in men's eyes before,
Twitched in their brow or quivered on their lip,
Waited the speech they called but would not come."*
Robert Browning, "Ring and the Books: Count Guido Franceschini"

"Law is often in very truth a Government of the living by the dead."
Dean Roscoe Pound "The Causes of Popular Dissatisfaction with the Administration of Justice"
(40 American Law Review 729) (1906).

"The reverence for the deeds of our ancestors is a treacherous sentiment. Their merit was not to reverence the old, but to honour the present moment; and we falsely make them excuses for the very habit which they hated and defied." R W Emerson "Works and Days" 1870

1. **Introduction**

The foundation stone of the edifice we call civilisation rests on respect for the law. For there to be respect for the law, the law itself must deserve respect. Unfortunately, and possibly dangerously, many of our laws do not engender respect. Unduly onerous ones are often evaded. Many Income Tax laws have come to be seen in this way. Laws seen as absurd are flouted. For example, many people still grow marijuana for their own private use. Needless complex laws are disobeyed through ignorance.

Judge Jerome Frank wrote in USA in 1930:- *"The law as we have it is uncertain, indefinite and subject to incalculable changes. This condition the public ascribes to the men of law; the average person considers either that lawyers are grossly negligent or that they are guilty of malpractice, venally obscuring simply legal truths in order to foment needless litigation, engaging in a guild conspiracy of distortion and obfuscation in the interest of larger fees. ("Law and the Modern Mind" p.5-6)*

It is no longer acceptable for laws to be complicated, jargon ridden, verbose and physically accessible only by means of the very latest in technology. It is time the lawyers of Australia adopted a large project in keeping with the idealism mounting for the start of the new millennium. Lawyers would do both Australia and themselves a great good turn if they initiated an Australian Restatement of the Law. The American Restatement which began in 1923, and took 20 years to complete, was initiated by a group of prominent American Judges, Lawyers and Law Teachers who together determined to do something about the law's two chief defects - *"Its uncertainty and its complexity."* We now have, in addition to those two defects, its enormous bulk, its tendency to change rapidly, and its unreadability for ordinary folk.

A Restatement is an unenacted summary of the law with examples. It is like Halsbury and the Butterworths Australian Halsbury, but with far fewer case references and with a short statement of facts illustrating each principle of law. As G K Chesterton observed, an example will sometimes fit into a crack too small to hold a definition.

This paper aims to set out in more detail what a Restatement is, and how the American Restatement was originated and accomplished, and why Australia could benefit greatly from having one. This is not a rigorous, tightly argued philosophical and jurisprudential justification for a Restatement. The traditional issues of common law versus statute law, and the advantages and disadvantages of codification are not here reargued. What follows is a loosely connected collection of thoughts put together in a unashamed attempt to arouse enthusiasm for a large concerted effort to improve our legal system by embarking on the project of an Australian Restatement. The idea deserves more careful and thorough explication than I can give it, but here is an attempt to start discussion and hopefully action.

The best way forward is for the Commonwealth Government to give a reference to the Australia Law Reform Commission (ALRC) for investigation and report on the feasibility of an Australian Restatement, and on the best method of proceeding with it. There are many very able retired lawyers; Judges, barristers, solicitors and academics, as well as many who have not yet retired who could contribute to this project. The law in America has been greatly improved by their Restatement. The present generation of lawyers can and should make a concerted effort to improve the laws in Australia in the same way.

The other two topics of contemporary importance which this paper has a fresh look at are:-

- (a) The different basic methods of legislating (Part 6 “An Excursus on Different Ways of Legislating”).
- (b) How necessary it is for law and morals to be brought closer together (Part 7 “An Excursus on Law and Morality”).

2. What is a Restatement?

A Restatement is an authoritative, comprehensive and condensed statement of the main principles of the law, both statutes and the common law in reported cases, with an explanation linking the law with the policy underlying the law, and with simple examples of how the law works in practice.

The Oxford Companion to Law, under the heading of "Restatement of the Law" states as follows:-

"An attempt made by the American Law Institute to have formulated in propositions rather like the articles of a code what are deemed to be the best doctrines and principles on the main branches of the law of the U.S., particularly the branches still mainly dependent on case-law. The first edition appeared in 1932-57. The volumes are legally unauthoritative and a purely private compilation, though having the substantial authority of the very eminent jurists who acted as Reporters for the various subject and their committees, and differ from text-books in not citing case-law and in putting forward not the settled or predominant view on any point but what seemed the most rational view. The volumes of the Restatement, though unauthoritative, have been frequently referred to in the courts and have had persuasive influence on judicial decisions. The volume The Restatement in the Courts shows in what judicial decisions of which States an

article of the Restatement has been cited and adopted, distinguished or rejected. A new edition, the Restatement Second, was undertaken in 1952." (David M Walker Clarendon Press 1980 p. 1065)

Some important distinctions need to be made.

- (a) A Restatement is not enacted and not binding and is therefore not a code, and it is not a substitute for fuller legal texts with numerous case references. A Restatement is an attempt to make law less unwieldy for lawyers and understandable and physically accessible for non-lawyers.
- (b) A Restatement is not a disguised scheme to restate the law in journalese or newspaper language although it is, of course, an attempt to state the law in a plain legal English which is understandable by most literate people. It is not some sort of popularised Readers Digest condensed books version. It is more like a fresh translation and summary of Tolstoy's "War and Peace" in current English. It is a concentrated and pure distillation.

A Restatement is an attempt to bring law back into the public arena so that it becomes part of our community's shared knowledge. Too often now we hear people making the excuse that they did not know the law. For example, a few years ago Tony Packard, a Liberal member of the NSW Legislative Assembly, asserted that he did not realise that it was illegal to eavesdrop by means of hidden microphones on customers discussing the possible purchase of a second hand car from him. Of course, many laws will continue to be misunderstood. For example, many people wrongly believe that if you die without a Will your Estate will go to the government. Some laws are bound not to ever become generally known. For example, it is doubtful whether it will ever be popularly understood that divorce revokes only those parts of a Will benefiting the former spouse and leaves the remainder of the Will valid.

Codification is possible and desirable in many areas of law. For example it has worked well in many areas of the law in England last century and Australia is still benefiting from these:-

- * Wills Act 1837
- * Bill of Exchange Act 1882
- * Partnership Act 1890

* Sale of Goods Act 1893

Sir Samuel Griffiths drafted a criminal code which has lasted well in Queensland and Papua New Guinea. Recently Evidence Law has been rewritten, and so has the Corporations Law. Uniform Defamation Law has not been enacted yet, but there are good prospects for that to happen. The Law Council of Australia prepared a draft Criminal Code for the Australian Territories in February 1969 and a committee of the Standing Committee of Attorneys-General produced a discussion paper in August 1996 for part of a model Criminal Code covering non fatal offences against the person. Bruce Donald's helpful article "Codification in Common Law Systems" (April 1973 47 ALJ 160-177) concludes with dismal pessimism,

"One of the greatest benefits of codification is that it can make the law far more accessible to the profession. There seems to be a substantial risk that in pursuing lay accessibility rather than professional accessibility, any code would be so defective as a piece of law as to render it unacceptable... Anglo-American jurisprudence has never been sufficiently stable to allow the formulation of an acceptable set of basic principles of law." (p. 174)

These bleak comments contrast starkly with all the successful efforts at codifying particular areas of law.

Dr John M Bennett's article "Historical Trends in Australian Law Reform" (1970 9 Western Australian Law Review 211-241) is characteristically positive and thoroughly researched. His conclusions are worth recording:-

* *"It is still true, at least at the political level, that reform of a specific law is most likely to be achieved if promoted by an influential individual."*

* *"Adjectival Law... is the key to the success of all reform..."*

And he refers to Goodhart

"It is the procedure of the law which itself introduces the greatest uncertainty" (33 ALJ 137)

* *"Since the later nineteenth century the pattern of reform in this country has been generally moved by the spirit of tested experiments in England, America or New Zealand."*

* *"The public have a right to comprehend the principles of the laws which govern them..."*

* *"The advocates of codification argue for its certainty, clarity and economy of time,*

labour and costs. The opponents rely on the continuity and reflexivity of the common law, and denial of codification's alleged certainty."

Here he refers to Lord Denning

"The law is not static. It is developing continually. Those who emphasize the paramount importance of certainty in the law delude themselves." ("The Changing Law" 1953 p. 78)

* *"The greater work of building a reformed legal system to apply reformed laws will be the contribution of the next century."*

(J M Bennett op.cit. p. 238-241)

There have been at least four famous attempts to codify the law. First there was Moses with the 10 Commandments, then Hammurabi, then the Roman Code of Justinian which was imitated by the code Napoleon which is now the basis of law in France and Germany. Very often a code is imperfect, but a great improvement on previous confusion. When the complexity of laws reaches a certain level, laws cease to be effective. This is one of the major limits on the effectiveness of laws. When people can't understand laws they abandon hope, and stop trying and they put their energies into evasion and avoidance. For instance, if obtaining Development Approval from a Council is seen to involve too much complexity and bureaucracy, people will often take the law into their own hands, as it were, and build without any approval.

Condensing and explaining laws is, when you think about it, an everyday occurrence. For example, lawyers are forever summarising and explaining laws to clients. It is almost as if lawyers were bilingual and understood both legal language and everyday language. Head-notes of reported cases summarise the decision and state, very often highly accurately, the essence of the law made by the decision. Preambles of Acts can be helpful by providing the context within which the operative clauses can best be understood. The preamble to the 1536 Statute of Uses is a good example and one I find amusing as well,

"Where, by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin..., yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses,

intents, and trusts, and also by wills and testaments sometime made by... words, sometime by signs and tokens, and sometime by writing...; for the extirping and extinguishment of all such..."

Bills of Parliament are accompanied by explanatory notes, and politicians have the benefit of hearing the Second Reading Speech which explains the legislation in terms of policy in a language register which even second hand car selling politicians can understand.

The great American Judge Learned Hand wrote in 1929,

"There is something monstrous in commands couched in invented and unfamiliar language; an alien master is the worst of all. The language of the law must not be foreign to the ears of those who are to obey it." ("Is There a Common Will" 28 Michigan Law Review 46, 52)

Similarly the Honourable Justice Michael McHugh has observed,

"Where citizens do not understand their rights and obligations, the law suffers. Lack of understanding can lead to an undermining of the legitimacy of particular laws and indeed of the law in general. ...The rule of law is meaningless unless people know their rights and duties in the spheres in which they choose to act." (69 ALJ p. 40 and 41)

And again Philip K Howard asked,

"How can law function as a guide to action if almost no one knows it?" ("The Death of Common Sense - How Law is Suffocating America" 1994 Random House New York p. 30)

I think if Leunig were drawing a picture of what we call the "Legal System" he would show two fire hoses labelled Commonwealth and State Legislation emptying into a trough, with a number of other taps also full on, labelled Reported Cases from the Supreme Court, Federal Court and High Court as well as sundry other Courts and Tribunals such as the Land & Environment Court. There would be a crowd of lawyers all coming in to drink from the trough. They would all be looking for some particular information and trying to ignore the contamination of the irrelevant, much like animals, with no concern for the messy mixture in the trough, or the way in which it is being filled. Many would be shown coming away with a cynical scorn for the disorderly and confused flood which cannot be fully comprehended or contained in any way.

A Leunig cartoon of individual lawyers would I think have them with heads under a car bonnet like mechanics, totally preoccupied with present pressing details, and seldom emerging to survey the overall orderliness and accessibility of the whole system.

Most lawyers seem to be in a state of denial about the bulk, obscurity and complexity of our laws. When they do comment, however, they sometimes do so in a colourful way. For example, the former Chief Justice Sir Anthony Mason wrote in 1992,

"Oscar Wilde... would have regarded our modern Corporations Law not only as uneatable but also as indigestible and incomprehensible... The vast magnitude of our corporations legislation is a wonder to behold. Its Byzantine complexity is a testimony to the subtlety of mind of those who brought it into existence." ("Corporate Law: The Challenge of Complexity" 2 Australia Journal of Corporate Law p. 1)

In 1990 Hill J in the Federal Court commented on a section of the Income Tax Assessment Act 1936 which provides,

"A disposal of an asset that did not exist (either by itself or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset for the purposes of this Part..."

Then he expressed the opinion that the subsection was,

"... drafted with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms." (Commissioner of Taxation v Cooling (1990) 22 FCR 42, 61)

Both these examples are in the Hon. Justice Michael McHugh's article "The Growth of Legislation and Litigation" January 1995 69 ALJ 37.

In short, there is no method of quality control of our laws beyond particular references to Law Reform Commissions. There is no "international best practice". There is no consistent and determined attempt to keep the legal playing field clear of rubbish. A Leunig cartoon of a law case would look very like a mud wrestle, with no shortage of mud, but with the participants largely oblivious of the mess.

Here are two examples of what an Australian Restatement might look like.

Extract from "An Australian Contract Code" Law Reform Commission of Victoria Discussion written by MP Ellinghaus and EW (Ted) Wright Paper No. 27 September 1992 p. 15

Article 12

A party is excused from performance of a contract to the extent that it would be unconscionable for the other to insist on it.

Article 13

It may be unconscionable for a party to insist on performance if -

- * *that party has breached the contract*
- * *advantage was taken of the other party*
- * *the other party made a mistake*
- * *performance was conditional on something happening or not happening*
- * *it was agreed that the other party did not have to perform*
- * *circumstances have changed since the contract was made*

Article 14

It may not be unconscionable for a party to insist on performance if that party -

- * *cannot be restored to the position the party was in before the contract was made*
- * *would lose an interest in property acquired under the contract*
- * *was led to assume that the other party would not exercise a right to refuse performance*

The Draft Code of Civil Wrongs prepared by Sir Frederick Pollock between 1882 and 1886 for the Government of India and published in his "The Law of Torts" 13th Edition 1929 p. 618-686

Harm from voluntary exposure to risk.

23. *A person is not wronged who suffers accidental harm or loss through a risk naturally incident to the doing, by any other person, of a thing to the doing of which the first-mentioned person has consented, or at the doing of which he is voluntarily present.*

Illustrations.

1. *A. looks on at a fencing match between B. and C. In the course of play B.'s foil breaks, and the broken end flies off and strikes A. No wrong is done to A.*

2. *A. goes into a wood to cut down a tree, and B. goes with him for his own pleasure. While A. is cutting a tree the head of his axe flies off and strikes B. A. has not wronged B., unless the axe was, to A.'s knowledge, unsafe for use.*
3. *B. and C. are letting off fireworks in a frequented place. A. stops near them to look at the fireworks. A firework explodes prematurely while B. is handling it, and the explosion injures both C. and A. B. has not wronged either C. or A., though B. and C. may be punishable under sect. 286 of the Indian Penal Code. (p. 639)*

3. **The American Restatement**

The American Restatement was produced by the American Law Institute (ALI) and has been a huge and positive influence in the improvement of law in America. It is difficult to assess its full impact from this distance but there is a bit of an indication in the income derived from publication sales in 1998 expected to approach US\$1.5 million ("The American Law Institute, 1923-1998" by John P Frank 26 Hofstra Law Review 615 at 632).

The ALI was incorporated on 23 February, 1923. Among the "founding fathers" of it were Justice Benjamin Cardozo and Judge Learned Hand. They were members of the original committee of 35 who decided on the Restatement programme. Their report *"set forth the need for an institute to deal with the deplorable state of the law. First and foremost, there was the 'great volume to the annual increase of the already overwhelming mass of reported cases', which the report accurately concluded, 'cannot be directly checked by any action which may be taken by the profession'. That profusion was, of course, as nothing compared to the flood 75 years later. But the report continued that, in addition to the proliferation of cases, 'badly drawn statutory provisions and the unnecessary multiplication of administrative provisions' caused great uncertainty and complexity. In the mind of the originating committee, the ultimate problem was the 'lack of agreement among lawyers concerning the fundamental principles of the common law' and 'the lack of precision in the use of legal terms'. The committee concluded that these 'two causes of uncertainty and complexity are precisely those over which the legal profession has the greatest control'. The cure, the committee believed, was a 'Restatement of the law', a source 'to enable a lawyer to learn without the necessity of consulting further authority, the simple and certain matters of the law'. The committee concluded the specific task of the Institute should be to create a 'Restatement of the*

law'... the original committee report declared that the object of the Restatements 'should not only be to help make certain much that is now uncertain, to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the law to the needs of life.'" (Frank, op.cit. p. 617)

They had a system of Reporters who prepared drafts for particular areas of law, like Contracts completed in 1932 with Professor Williston as Reporter, and Torts completed in 1939 with Francis H Bohlen of Pennsylvania as the lead Reporter. Then Advisers suggested improvements to the Reporter.

Between 1923 and 1947 William Draper Lewis was the Director of the Institute and during that time the Institute produced nine Restatements comprising nineteen volumes and four model statutes, three relating to criminal matters and the fourth, the Model Code of Evidence (Frank op.cit. p. 622).

Chief Judge Benjamin Cardozo of the New York Court of Appeals and Vice President of the Institute said in 1930 of the American Restatement:-

"My subsidiary conviction is still strong and unabated that no project so important for the simplification of our common law and for its harmonious development has been launched during all the years of its history upon the soil of the new Pavlovian World." (Frank op.cit. p. 621)

In 1984 when the then Director Wechsler retired from the Institute he said that it was a principle of the common law

"that courts have a responsibility to reconsider and rework decisions of the past to serve new values and to meet emerging needs." (Frank op.cit. p. 624)

The American Law Institute had the benefit of receiving various large benefactions for its work. For example it received \$510,000.00 from the Rockefeller Foundation to produce a Model Penal Code and a grant from another foundation of \$750,000.00 for the Uniform Commercial Code (Frank op.cit. p. 632).

Frank concludes his history of the Institute by stating,

"When William Howard Taft and Charles Evans Hughes incorporated The American Law Institute in 1923, they were thinking big. They and their associates believed that American law was in serious disarray and that the bar, the bench, and the schools, by working together through the Institute, could achieve uniformity at least in the common law through Restatements. To a remarkable degree, that vision has been realized.

In one important respect, the game has changed. The founding fathers of the Institute were mainly concerned about the common law, and today's flood of statutes was never contemplated. Even with regard to statutes, however, the Institute has had enormous successes. The two greatest have been the Uniform Commercial Code (with the National Conference of Commissioners on Uniform State Laws) and the Model Penal Code.

But in the common law target area, the success of the Institute has been immense. In some States, where there is no conflicting statute or earlier case law precedent, the Restatements are the law.

... The effect of the Institute on court decisions, on advocacy, on scholarship, and on continuing legal education has been simply immense. The complaints of 1923 about the scattered nature of the common law are now rarely heard. The vision of the founders has been realized." (p.638-639)

The original report of the committee which proposed the establishment of the American Law Institute gives us an insight into the idealism of the founders who initiated the extraordinarily successful and influential Restatement.

"[It] must be more than a collection and comparison of statutes and decisions, more than an improved encyclopaedia of law, more than an exposition of the existing law... There should be a thorough examination of legal theory. The reason for the law as it is should be set forth, or where it is uncertain, the reasons in support of each suggested solution of the problem should be carefully considered... [it] should also take account of situations not yet discussed by courts or dealt with by the legislatures but which are likely to cause litigation in the future... [it] should make clear what is believed to be the proper rule of law... the changes proposed [should] be either in the direction of simplifying the law... or in the direction of better adaptation of the details of the law to the accomplishment of ends generally admitted to be desirable." (Quoted by N E H Hull in his article "Restatement & Reform: A New Perspective on the Origins of the American Law Institute" Law & History Review Spring 1990 8n1. p.55 at p.83)

4. Why Australia Needs a Restatement

If a school teacher reported on the condition of Australian Laws the report would probably say that those who make them and use them are not trying hard enough, and that with some effort they could be made much tidier and much less unwieldy. A doctor's report on the legal system would probably say it is congested, overburdened and even constipated with complexities.

There is a constant and unavoidable process of compressing the law and extracting the best parts of the best decisions. The problem is that this process which can be likened to composting, is far too slow, given the huge volume of laws we have. Mr Justice Michael McHugh has written of this in his article "The Growth of Legislation and Litigation January 1995 69 ALJ 37. He provides plenty of evidence of the accelerating increase in the bulk of legislation. For instance, he writes:-

- * *The Commonwealth Parliament passed 221 Acts in 1973, but only 216 in 1991. Yet while the 221 Acts passed in 1973 took up 1,624 pages of the statute book, the 216 Acts passed in 1991 took up no less than 6,905 pages of the statute book, an increase of 325%.*
- * *In New South Wales statutes enacted in 1989 occupied three times as many pages as statutes enacted in 1972.*
- * *In 1980 in New South Wales, rules, regulations and by-laws took up 1,658 pages of the legislation book; by 1990 they had almost doubled to 3,138 pages.*

He concludes that,

"The melancholy truth is that individuals and groups often cannot know their rights and duties because the law cannot be found or is so complex that they cannot understand it." (op.cit. p.42)

Our judges grind away at decisions with insufficient help, and are more and more being criticised for their delays in producing judgments. Academics analyse small areas of law and publish their results, but it is all uncoordinated and randomly done. What we need is a method to reduce the mass of laws, and to remove the mysteries of laws and to keep, as it were, the legal stables clean.

T H Huxley calculated early this century that if cab horses were to continue in London without any campaign of cleaning up after them, in a few years Londoners would be walking around up

to their knees in horse manure. That is clearly the sort of fear that the founding fathers of the American Law Institute had about laws in 1923. Our present troubles come partly from the complacency of lawyers and partly from their preoccupation with making money. G K Chesterton's simple insight is still true today:

"The horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it." (1909 "Tremendous Trifles")

5. **Some Advantages of having an Australian Restatement**

The most obvious advantage would be for practising lawyers, solicitors, barristers and Judges, to have ready access to the main basic principles of the law written in a language everyone can understand.

The second main advantage would be a consequence of this first advantage. With legal research made so much easier, legal costs would fall. Clients could be given better and faster solutions to their problems and answers to their questions.

The third main advantage is less tangible but equally important. The Restatement would bring the law closer to policy and to morality and to popular understanding and to life. Law after all is not an end, but a means. It is there to serve society by maximising freedom while maintaining sufficient orderliness to ensure the exercise of that freedom. There is a tendency for law to come adrift from the rough social policies which generated it in the first place, and to appear as if it is a monolithic stand-alone wall of words which somehow manages to impede enterprise and innovation. Laws seen as separated, if not divorced, from social policy, become arbitrary technicalities to be avoided in verbally technical ways. A granny flat is called a play area to obtain Council approval.

6. **An Excursus on Different Ways of Legislating**

There seem to be three different broad approaches to legislating.

(a) The Rules Method

This is, generally speaking, the method we are most familiar with which provides for as

many fact situations as can be imagined and then provides specific and as certain consequences as possible. Inevitably there are some gaps, which Courts very often refuse to fill. Virtue of rules is their certainty, and their disadvantage is inflexibility and therefore lack of fairness. They are most appropriate for commercial matters. Rules can be very precise. They can set standards everyone can understand.

(b) The Principles Method

These are broader statements of the law couched in language closer to the policies and perceived social benefits which generated them. They seek to balance certainty and fairness. This method of legislating has been more advocated than implemented. For example:-

* Lord Scarman has written,

"The statutes are elaborate to the point of complexity; detailed to the point of unintelligibility: yet strangely uninformative on matters of principle... An Act of Parliament should declare a principle, which should govern its specific provisions. It should envisage the making of statutory rules and orders by government departments in line with its principles. It should not shrink from leaving particular applications to the courts to work out, thereby encouraging the courts to accept a vital role in the development of the law." (Need the Law be Obscure? "What's Wrong with the Law?" BBC 1970 p.10-14)

* Mr Justice E W Thomas of the High Court of New Zealand has written persuasively in his article "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993 Victoria University of Wellington Law Review 1-76). He writes,

"Ingrained in every judge's thinking is the precept that he or she should not just do justice, nor just apply law; their obligation is to do justice according to law. Indeed, that is their judicial oath. But law which is discerned from a principle-oriented approach is no less the law than that which some other judge has earlier proclaimed to be the law. The function of administering justice is common to either approach; in the former, however, law and justice are brought into closer conjunction." (p. 75)

(c) The Justice Method

Examples of this method used in the Commonwealth Trade Practices Act 1974 Section

51AC and the NSW Contracts Review Act 1980 Section 9 and the NSW Retail Leases Amendment Act 1998, are each referred to in more detail below. The advantage of the Justice Method is that it allows the Judge to use discretion in deciding what is fair and just and what accords with conscience. With this method fairness is rated ahead of certainty in importance.

Dean Roscoe Pound articulated the dilemma in methods of legislating with typical clarity,-

"When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise in a middle course between wide discretion and over-minute legislation. In reaching this middle ground some sacrifice or flexibility of application to particular cases is inevitable. In consequence the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals." ("The Causes of Popular Dissatisfaction with the Administration of Justice" 1906)

The trouble is that consumers expect more and more to have it both ways. Much as they expect a cancer free cigarette, they want the law to be both certain and fair. There is therefore mounting pressure to find a balance between the law following tradition and treating like cases alike, and as they have always been treated, and, on the other hand, the law meeting present needs generated by social changes. Courts, with their doctrine of binding precedents, have tended to follow tradition too much. Parliament responding to pressure groups have tended to change the law too often and too radically. An Australian Restatement of Law in form of principles, could discourage these excesses. It is as if the fabric of our law is being pulled constantly too hard in different directions by Courts and by legislation.

The competing virtues of certainty and justice are similar to the political polarity between principles and pragmatism. Much as we want our laws to be both certain and just, we want our politicians to be both principled and pragmatic. R W Emerson pointed out that we do what we think is best, and then justify it. The American lawyer Jerome Frank has pointed out that typically a Judge will decide on a just result and then back fill with reasons for that judgment. That is typically how we stay both principled and practical. Frank wrote in 1930:- "*Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.*" ("Law and the Modern Mind" p.109)

George Eliot has remarked on the dilemma we all have between following a general rule and allowing specific facts to determine outcomes.

"All people of broad, strong sense have an instinctive repugnance to the men of maxims; because such people early discern that the mysterious complexity of our life is not to be embraced by maxims, and that to lace ourselves up in formulas of that sort is to repress all the divine promptings and inspirations that spring from growing insight and sympathy. And the man of maxims is the popular representative of the minds that are guided in their moral judgment solely by general rules, thinking that these will lead them to justice by a ready-made patent method, without the trouble of exerting patience, discrimination, impartiality - without any care to assure themselves whether they have the insight that comes from a hardly-earned estimate of temptation, or from a life vivid and intense enough to have created a wide fellow-feeling with all that is human." ("The Mill on the Floss")

Lawyers can relate easily to this because they have a long history of being suspicious of maxims. For example:-

* *Lord Esher M R "I need hardly repeat that I detest the attempt to fetter the law with maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them".* (Yarmouth v France (1887) 19 Q B D 647 at 653)

- * *Holmes L J "A young Lawyer might think it was a case for applying the rule of caveat emptor; but with more experience he would know that a Latin maxim goes but a short way towards solving legal difficulties". (Wallis v Russell (1902) 2 I R 585 at 630)*
- * *Lord Wright "These general formulae are found in experience often to distract the Court's mind from the actual exigencies of the case, and to induce the Court to quote them as offering a ready made solution". (Lissenden v Bosch (1940) A C 412 at 435)*

John Stuart Mill in his 1837 Fragment on Aphorisms pointed out,

"It is given to no human being to stereo type a set of truths, and walk safely by their guidance with his mind's eye closed."

R W Emerson similarly asserted,

"The world is enigmatical, - everything said and everything known or done, - must not be taken literally but genially." ("Works and Days" 1870)

This is not however to deny the usefulness of aphorisms and maxims. For example:-

- * *The law becomes flawed,
When the defendant's insured.*
- * *Long cases are made,
Out of Legal Aid.*
- * *Pretty faces,
Make hard cases.*

There seem to be a mounting number of calls for a determined effort to be made to improve our laws. For example:-

- * Charles Sampford "The Disorder of Law - A Critique of Legal Theory" Basil Blackwell 1989
- * Philip K Howard, "The Death of Common Sense - How Law is Suffocating America" Random House New York 1994
- * Richard Epstein "Simple Rules for a Complex World" Harvard University Press

1995.

If improvement of our laws means anything at all it means bringing law and justice closer to each other. Justice is a product of private conscience and public opinion. Laws which are not close to justice are seen as arbitrary technicalities.

The present law is often unclear like frosted glass. What we need to do is to replace it with clear glass. A Restatement is like scaffolding which will help with the rebuilding of antiquated parts of our legal system. Inevitably a Restatement will be an approximation and a provisional statement of the law from which better approximations will evolve.

Law makes the world safe for people to live the good life. It makes the world safe for personal experimentation, innovation, inventiveness, creativity, resourcefulness, ingenuity, imagination and so on. Laws enable people to adapt and grow to the greatest extent possible, given the interests of others in doing the same. Clearly then, the more people there are, the more important laws become. Laws do not however have to become impossibly complex. The principles of law which protect the freedom of people in a small group remain much the same for people in a large group. It simply becomes progressively more important that these principles are sound and well understood, accepted and respected.

7. **An Excursus on Law and Morality**

A Restatement would enable the inevitable gap between law and justice to be narrowed. Dean Roscoe Pound put it well when he wrote:-

"Justice, which is the end of law, is the ideal compromise between the activities of each, and the activities of all, in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellow so as to accord with the moral sense of the community." ("The Causes of Popular Dissatisfaction with the Administration of Justice" 1906.)

Law has become more important as morality is untaught, largely unmentioned, and often sidelined by euphemisms, like President Clinton's admission of "inappropriate behaviour" with Monica Lewinsky. Law has become so intrusive, and morality so subjective that people now habitually consult their lawyer before they consult their conscience. Alexander Solzenitsyn has pointed out what an awful dehumanising influence this tendency has.

"People in the West have acquired considerable skill in using, interpreting and manipulating law (though laws tend to be too complicated for an average person to understand without the help of an expert). Every conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be entirely right, and urge self-restraint or a renunciation of these rights, call for sacrifice and selfless risk; this would simply sound absurd. Voluntary self-restraint is almost unheard of: everybody strives towards further expansion to the extreme limit of the legal frames. ... I have spent all my life under a Communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man. A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyses man's noblest impulses. And it will be simply impossible to bear up to the trials of this threatening century with nothing but the supports of a legalistic structure."
(Speech at Harvard University 8 June, 1978)

Morals fuel the legal system. They generate law reform and motivate clients to go to court in civil matters. Without morals there would be no moral indignation or moral outrage, and next to no litigation. Lawyers are experts at side-stepping moral dilemmas. They translate insolvable moral conflicts into solvable legal conflicts. There has been a tendency in recent times for morals to be, as it were, privatised. That is to say, what is right or wrong is seen as a matter of personal preference rather than something which passes or fails a morality test. So with morals becoming vaguer people logically turn to laws which appear to provide at least certainty if not moral satisfaction.

Michael Leunig has written that conscience is

"... increasingly regarded as a sentimental or primitive impediment in a smart and rational world.

Yet the recultivation of conscience is our most important civic and personal work. Conscience needs to be reimagined in order to appreciate its ordinary practical value and its sheer, benign brilliance. A broader vision might describe conscience as our deepest, most valuable and secure

knowing; the font of personal authenticity, reality, creativity and moral life; the indelible and reliable sense of one's unique natural goodness; the alert, overriding and underlying clairvoyance that navigates and locates us most rightly and felicitously in the visible and invisible world.

Such a vivacious conscience cannot be instilled. It exists as an innate potential in the newly born and awaits intelligent, sensitive recognition and devoted nurturing. It is apprehended and set in developmental motion through an imaginative, compassionate, sustained maternal presence. The intensity of such care seems only possible through the unique nature of maternal love, supported and protected by the family and the wider community - but it is possible!" (Bulletin 31 December, 1996)

The point is that as we recultivate consciences and return to the realisation of the importance of the shared morals which underlie everyday decency, there will be an increasing insistence that laws more closely approximate to morals. The closer laws can be to morals, the more readily understandable they are, and the more likely they are to be obeyed. An Australian Restatement could help to reduce the growing gap between what we know is right and decent, and what the law, in the interests of certainty, allows people to get away with.

It is worth reflecting on the paradoxical attitudes of practising lawyers to morality. Typically a lawyer will say to a client something like this:-

"I'm not being paid to advise you about morals, and I would never purport to do so. It is up to you entirely what you do. I am a lawyer and do not pretend to have any expertise about morals. You are not bound to proceed with the sale/purchase even though you have given your word. You have not signed anything, and the Statute of Frauds requires land contracts to be in writing. You are free in law to sell to someone else. Whether you decide to do so or not is totally your decision."

To their clients, lawyers are constantly disqualifying themselves as experts in morals, and are often asserting in a variety of ways that they are indifferent to, and inexpert in, matters of conscience. When it comes to advising a client lawyers are conveniently amoral.

When it comes to the behaviour of a client's opponent, or opponent's lawyer, or the Judge's reasons, or the law, lawyers are suddenly sharply aware of any moral shortcomings and very

willing and able to express them. Even though a course in morals was not included in any Law School Curriculum, every lawyer, (for all purposes other than questioning the morality of something their client has done or wants to do), is very well equipped indeed to make a moral judgment and mount an argument based on morals. There is scarcely a lawyer who would admit to not knowing what is meant by unconscionable, unethical, unfair, unjust, immoral, corrupt, dishonest, fraudulent, treacherous, wicked or just plain wrong. Assessing the merits of a case mostly involves having regard to the basic morality of it.

F E Dowrick put it well in his book "Justice According to the English Common Lawyers" (Butterworths 1961),

"The common lawyer is prone to talk about the 'merits' of a case, a term which involves the morality of the subject under discussion. In practice the above terms are used in their negative forms even more frequently: the justice or rightness or reasonableness of a thing is more likely to be passed over in silence than its injustice, wrongness or unreasonableness. But the invocation of a standard of moral justice in a legal context is not always heralded by any such terminology; as often as not it is concealed in a judgment or an argument or in some cryptic choice of alternative authorities or interpretations." (p. 74)

Oliver Wendell Holmes, the great American Judge, observed that businessmen seldom disclose their major premise. Lawyers have a similar tendency not to be explicit about the particular moral convictions which are influencing their judgment.

These things are all easy for lawyers to understand. It is only sensible to be courteously quiet about the moral qualities of your client's actions or plans when they are borderline or suspect. It is also justifiably expected of us to be vociferous and confident about the moral shortcomings of anyone else, or of the law itself. Lawyers are in fact very good at labelling immoral behaviour. When necessary they will point out that the opponent is malicious, venomous, rancorous, mendacious, barbarous, misanthropic, Satanic, spiteful, fiendish, diabolical, evil minded, villainous, depraved, vicious, degraded and a rascal, swindler, knave and so on.

Somehow non-lawyers get confused about this, and make hurtful jokes about lawyers being prepared to do and say anything for money. Our image is of people

totally uninhibited by morals. Lawyers are seen as morally inert or neutral, and prepared to do the best for their client whether it is moral or not. Some see us as ruthless, unscrupulous and unprincipled because we refuse to judge our clients as immoral.

There is, however, a real problem for lawyers in this inconsistency and many lawyers are largely unconscious of the problem. The problem is to decide where the limit should be on what a lawyer is prepared to do for a client. Some cases are obvious. If a client on criminal charges gives you a brown parcel to hand to a person in authority, it would not be wise to do this without knowing more about it. If a client in gaol gives you a message "give the baby to Bill" or even less plausibly "take the waste paper to Westpac", then again there is no real dilemma. It is well settled that a lawyer has a duty to the Court. This entails not knowingly deceiving Magistrates and Judges. In some circumstances this can mean the lawyer must disclose a client's prison offences if the Court would otherwise be misled. (*Tuckiar v R* (1934) 52 CLR 335) It is a much larger and more difficult question however to decide when a lawyer has a bigger duty to society in general, than to a particular client. For example, should a lawyer advise someone of the countries with which Australia has no extradition treaty, knowing that the client wants to go to another country in order to avoid having the face Court proceedings? Lawyers are, after all, citizens of a society, as well as members of a profession. Laymen have always had trouble understanding how a lawyer can retain complete integrity while acting for a client who is guilty. That so called problem seems to have been worked out satisfactorily for a long time. What has yet to be worked out satisfactorily are questions like the following:-

- * Is it acceptable for a lawyer to advertise and promote a service of helping people to transfer assets in order to pass the means test in order to qualify for a pension?
- * Is it acceptable for a lawyer not to inform the Police if a murderer, such as Ivan Milat, the Backpack culprit, calls on the lawyer and confesses, but says he wants time to do a few things before going to the Police?

It is surprising more has not been written about the causes and consequences of the tendency of legislation to require Judges to be moral guardians of the community by requiring their decisions to conform to current community standards of our collective conscience, at a time when many doubt whether such a collective conscience even exists. For example:-

- * The Commonwealth Trade Practices Act 1974 Section 51AC provides that in specific circumstances a person (whether a body corporate or natural person) must not, in trade or commerce, in connection with the supply (or possible supply) or acquisition (or possible acquisition) of goods or services engage in conduct that is, in all the circumstances unconscionable.
- * The NSW Contracts Review Act 1980 authorises the rewriting by the Court of Contracts falling within the statutory definition of "unjust". Section 9 provides that in determining whether the Contract is "unjust", and in consequence in determining whether to exercise its rewriting powers, the *"Court shall have regard to the public interest and to all the circumstances of the case"*.
- * The Chief Justice of the High Court, the Honourable Murray Gleeson, has written *"There is strong support for the view that there is now one over-arching doctrine of estoppel by conduct and there is a tendency towards a general principle that equity will afford a remedy in any case where it is unconscionable for a person to decline to honour a promise or representation, even though no Contract has been entered into."* ("Individualised Justice - The Holy Grail" June 1995 69 ALJ 421, p. 426)
- * An amendment to the NSW Retail Leases Act 1994, effective from 1 March, 1999 provides in Section 62B Sub-sections 1 *"A lessor must not, in connection with a Retail Shop Lease, engage in conduct that is, in all the circumstances, unconscionable."* Sub-section 2 requires the same standard of a Lessee.

In many ways our society is cruising along unconscionably squandering resources built up by earlier generations. We are not only using irreplaceable fossil fuels, but we are using up community spirit, or community capital, which is that fund of willingness, charitableness, honesty, decency and goodwill that exists in the community from days when mutual help was necessary for survival. Not only is this a diminishing resource but we are positively discouraging mutual help by making competition compulsory so that co-operation, sharing and mutual caring and concern are not as valued as business acumen and commercial, trading, bargaining and marketing skills. We are calloused by competition, much as we have become desensitised to violence by a surplus of it in the media and in movies. In a sense we are still riding the wave of community spirit generated by the wars and the rebuilding after them, when people simply had to help each other. We are profligate in our affluence. For example, we torch

cars and trash houses, as if there was an endless supply of them. People tend to use other people, rather than to care for their welfare. All this has led to us ignoring the problem of maintaining morale in the helping professions.

It was one of Lord Denning's great achievements that he habitually brought law closer to life. His obituary in the London Times of 6 March, 1999, following his death aged 100 observes, *"It needed no sixth sense to detect that his approach to archaic precedents was less than reverential... He... emerged as a courageous and controversial opponent of what he regarded as legal obscurantism."*

8. Conclusion

It is interesting to speculate whether the state of our laws is responsible for the proliferation of lawyers, and of law suits, and of endless increases in legal costs and court fees.

If we are to have a great civilisation, and not simply a good one, we must have an efficient system of redressing wrongs. In order to redress wrongs we need to know the law. If the law is unascertainable, or needlessly hard to ascertain, then we end up with the rule of people, and not of laws. Maintenance of the rule of law is therefore essential if we are to progress as a society.

An Australian Restatement would also do a lot for the morale of the legal profession. It would greatly reduce the time taken now in finding out what the law is, and thus enable lawyers to return to their true task of using prudence and practical wisdom to guide clients in a way that at the same time solves or dissolves their legal problem and contributes to the overall welfare of our society. Anthony T Kronman has written very positively and fruitfully about the current crisis in the American legal profession and this clearly now applies also to the Australian legal profession.

"The crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up. Disguised by the material well-being of lawyers, it is a spiritual crisis that strikes at the heart of their professional pride. This crisis has been brought about by the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers. At the very center of these values was the belief that the outstanding lawyer - the one who serves as a model for the rest - is not simply an accomplished technician but a person of prudence or practical wisdom as

well. It is, of course, rewarding to become technically proficient in the law. But earlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique - a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. They understood this wisdom to be a trait of character that one acquires only by becoming a person of good judgment, and not just an expert in the law. To those who shared this view it seemed obvious that a lawyer's life could be deeply fulfilling... But in the last generation this ideal has collapsed, and with it the professional self confidence it once sustained." ("The Lost Lawyer - Failing Ideals in the Legal Profession" Belknap Press 1993 Introduction p. 2-3)