

Cross-Border Lawyer Regulation in Australia

Reid Mortensen
Centre for Public, International and Comparative Law
TC Beirne School of Law, University of Queensland

Autonomous responsibility

Australia comprises six States that, when self-governing British colonies, agreed from 1901 to federate under a limited, central Government. Each of these colonies had its own legal profession, and after Federation these remained organised under State law and a State responsibility. Until the 1980s, the separate State professions grew differently. In some States the professions were divided between barristers and solicitors branches; in others the profession was fused. In some it was sufficient to be admitted as a lawyer to practise law in the State; in others an admitted lawyer also needed an annual practising certificate to engage in private practice. There were differences in regulation (and even in the 1980s some State professions were completely unregulated), differences in the disciplinary systems, professional rules, educational standards and training requirements. Australia also has a number of federal territories, which also had **autonomous responsibility** for their own legal professions and added even greater variety to this mix. (And I should add that, when I mention the ‘States’ in this paper, I include the federal territories – although legal professions are only found in the Australian Capital Territory, the Northern Territory and Norfolk Island).

Shaping cross-border regulation – the period of preferential recognition

That period of the State’s splendid isolation, of autonomous responsibility for the legal professions, is over, and my purpose in this paper is to explain the beginning in 2004 of a

period of **cooperative federalism** in the regulation of Australian legal professions and to sketch the new scheme of cross-border regulation of lawyers. However, mindful of this session's theme of 'Reshaping the profession', I'll first mention three factors that have shaped **cooperative federalism** for Australian legal professions.

The first factor was **limited constitutional recognition** of rights of cross-border practice. Through the later 1980s and into the 1990s, the constitutional adjudication of the High Court of Australia developed an enhanced appreciation of the Australian federation as a single economy. This recognised constitutional bans on States imposing protectionist measures at their borders, and the ways the States were to relate to each other's sovereignty. The legal profession featured in these developments, specifically in *Street v Queensland Bar Association*.¹ I should mention that most cross-border problems in Australia mainly involve the perimeters of its most populous State – New South Wales: its southern border with Victoria; the small ACT, which NSW surrounds completely; and most commonly of all, its north-eastern border with Queensland's populous and urbanised south-east corner. The Queensland legal profession had a long tradition of protectionism: *one* means, originating in colonial times, by which it kept interstate lawyers out of the State was a requirement that anyone who wanted to be admitted as a barrister or solicitor had to be *resident* in Queensland. This limited all legal work in the State to Queensland residents. In *Street's case*, the High Court ruled that the Queensland residence requirement violated the Constitution's ban on States discriminating against interstate residents. The immediate consequence was that interstate lawyers could be admitted in Queensland, and (as they had done for some time in other States) form partnerships across State borders.

The second factor was **competition policy**. The Hilmer Report of 1993 included recommendations for untangling restrictive trade practices in the legal and medical professions. Of more immediate interest, it clearly stated an objective of developing ‘a *national* market in legal services’ and, so, of removing any impediments to the creation of that *national* market.

This was related to the third factor, which was a regulatory objective of **improving standards** in the legal profession; namely, standards of entry, service, ethics, and accountability. This had been a matter of concern in some States, and the NSW Law Reform Commission’s four reports on the legal profession in the early 1980s² must be recognised as a watershed in growing government interest in the regulation of lawyers. However, once the Hilmer Report initiated a push for a *national* market for legal services it was evident that improved standards had to be relatively *uniform* across the States.

Preferential Recognition

In retrospect, for the legal profession the period after *Street’s case* and before 2004 was a time of intensive and comprehensive review - by federal and State law reform commissions, competition agencies governments, and lawyers’ professional associations. And it is in this time of **preferential recognition** that legislative experiment in cross-border regulation saw the refinement of some basic institutions that became important for the new scheme of **cooperative federalism** that began last year. For instance, the uniform State and federal *Mutual Recognition Acts* promoted **competition policy** in small respects. Without undermining States’ autonomous responsibility for their legal professions, the *Mutual Recognition Acts* made it easier for lawyers to get on the rolls of

lawyers in other States through a system of registration with court bureaucracies, rather than by in-court applications for admission. New Zealand was incorporated into this scheme in the later 1990s. A much larger step in promoting **competition policy** was the Law Council of Australia's plan for 'portable practising certificates', under which a lawyer who was admitted and held a practising certificate in one State was, with some qualifications, automatically given the right to practise in another State.³ In fact, this has become the centrepiece of the new cooperative scheme, and I'll say more about it later. The development of the Uniform Admission Rules over the 1990s also saw the emergence of national standards relating to the academic and training requirements needed to be admitted as a lawyer. For instance, the so-called Priestley 11 - 11 areas of academic knowledge that were recommended for any person wishing to be admitted as a lawyer in an Australian State – promoted **competition policy** in forcing Queensland to dismantle its onerous lists of 22 subjects for aspiring barristers and 19 (somewhat different) subjects for solicitors – another restrictive trade practice. And it **improved standards** for some States, where academic requirements for admission did not require any understanding of, say, company law, or where practical training for some lawyers had been as short as 6 weeks.

Despite these developments, a number of problems persisted. First, the *Mutual Recognition Acts* did not undermine the need to be separately enrolled in each State in which a lawyer wanted to practice, and the persistence of multiple admissions, where different States sometimes applied different standards, sometimes led to confused admission proceedings. For example, in *Re Del Castillo*,⁴ Mr Del Castillo was admitted as a legal practitioner in NSW in 1998. He seems though to have planned to practise in

Canberra and also sought admission in the ACT. After he'd been admitted in NSW, the ACT Supreme Court raised the question why, in seeking admission, Mr Del Castillo had not disclosed that he had been prosecuted but *acquitted* of murder seven years before. That was not only a novel matter expected in disclosure, the ACT Supreme Court, despite having been the first court to raise an acquittal as a matter of character, then refused actually to *decide* that question until the acquittal was brought to the attention of the Supreme Court of NSW and decided there. And *that* scenario has potential to degenerate into a *danse macabre*, where courts defer to each other like Alphonse and Gaston bowing to each other before either will take the first step.

Secondly, while the system of portable practising certificates promised to avoid the need for multiple admissions and certification for lawyers who wanted to practise in more than one State, Queensland and Western Australia, true to their traditional scepticism towards centralised and cooperative arrangements, refused to participate.

Thirdly, even in States where the system of portable practising certificates was in place, there were still significant costs for lawyers - just because they wanted to practise in another State. Specifically, States required interstate lawyers to pay full sums for compulsory indemnity insurance and fidelity cover, even if they were fully insured and covered in their home States. In other words, significant start-up costs had to be paid again for every State in which a lawyer wanted to practise, which meant that the scheme failed to remove large financial disincentives to cross-border practice.

And fourthly, cross-border discipline was faulty. There is an endless number of cases in Australia of lawyers who held multiple admissions being disbarred in one State, but remaining on the roll in another. There are even cases of lawyers being disbarred in

one State and, without disclosing that, later being admitted to practise in another State.⁵ The dangers of this are evident in the *Smith* disciplinary cases. Harry Smith was a solicitor in Coolangatta – which is on Queensland’s Gold Coast - but only just - as it sits right on the NSW border. In 1996, Smith was struck from the roll of solicitors by the Queensland Court of Appeal for forging endorsements on trust account cheques, and in the course of investigations in Queensland it was also discovered that Smith had misappropriated \$6 million from clients over a period of 13 years. There are few places in Australia where a lawyer is as likely to be engaged in daily cross-border practice as Coolangatta, but no one in the Queensland Law Society thought of telling the NSW Law Society about Smith’s strike off. He was found practising in NSW two years later. He’d pocketed a further \$2.8 million of client money. Naturally, Smith was then struck off the roll in NSW, and was prosecuted to conviction in both States. However, *Smith*, above all, shows how dangerous border-hopping could be without effective information sharing and cooperation between State disciplinary systems.

Cooperative federalism

The scheme of **cooperative federalism**, that is now in the process of adoption, is based on *Model Laws* finalised by the Standing Committee of federal and State Attorneys-General in April 2004. They are now in force in Queensland,⁶ and have been adopted in statutes passed in New South Wales⁷ and Victoria⁸ that are yet to commence. The Attorneys’ agreement should see them adopted in all States. The *Model Laws* seem to adapt the patterns of other examples of **cooperative federalism** that have worked successfully in Australia, especially the scheme for allocating civil jurisdiction between

the States' courts. In a nutshell, the scheme sets common rules for identifying *which* State can certify that the lawyer has the right to practise law but, once that one State *has* certified someone for legal practice, that person can *without more* practise law in any *other* State of the federation. It is a refinement of the portable practising certificate scheme that had been in place before 2004.

Let me unpack some of the elements of the scheme that enable this to happen.

First, the legislation regulating the profession remains State legislation, but is largely uniform across the States and is based on the *Model Laws*. These require textual uniformity for *some* aspects of practice: for example, the rules for certification and trust account management.

Secondly, the distinction between *admission* and *certification* is to be maintained across all States. *Admission* remains in the province of each State Supreme Court, and creates a lawyer. It confers professional status, and makes the admitted lawyer an officer of that Supreme Court. However, an admitted lawyer must be subsequently *certified* before he or she has a legal right to the private practice of law. The cooperative scheme nevertheless only requires a lawyer to be admitted by one (and *any* one) State Supreme Court, and the *renvoi* that arose in *Del Castillo* is avoided.⁹

Thirdly, interstate differences are allowed, and will exist with some States allowing barristers to be certified with rights of practice limited to advocacy, different roles for professional associations, and different disciplinary systems.

The system of cross-border regulation sits on that platform. As I mentioned, the cooperative scheme sets common rules for identifying *which* State can certify that someone has the right to practise law, but they can only issue a practising certificate to a

lawyer who is either (1) resident in the State, (2) principally practises in the State, or (3) lives overseas. Interestingly, this introduces a residence requirement for certification. However, the residence requirement in the new scheme can't be said to lead to discrimination against interstate residents - the reason why the residence requirement in *Street's case* was invalid - as lawyers who live interstate, and are certified interstate, have equal rights of practice in the State to those who have been certified in-State.

The other branch of the scheme is that, once taking a practising certificate in any one State, a lawyer can *without more* practise law in any *other* State of the federation, but also falls under the supervision or disciplinary processes of any other State. This needs a little more explanation.

First, the cooperative scheme deals with *one* of the problems of the previous 'portable practising certificate' scheme, which required lawyers, when practising interstate, to incur extra costs in additional fidelity fund contributions. It only allows States to impose fidelity cover levies on lawyers who want to be certified in the State,¹⁰ or who operate a trust account in the State.¹¹ And it limits compensation claims - against a fidelity fund - to the fund in the State in which the thieving lawyer was certified.¹²

Secondly, State authorities can undertake investigations into any lawyer practising in the State, and the State tribunals and courts can exercise discipline over any lawyer who was admitted in the State, or certified in the State, or who was certified out of the State but in relation to conduct that took place in the State.¹³ The innovation is that tribunals are not limited to dealing with locally admitted lawyers, but can now deal effectively with *any* lawyer practising in the State.

Thirdly, State disciplinary tribunals now have effective extraterritorial powers. A tribunal in NSW, say, dealing with a lawyer admitted and certified in Victoria, cannot in itself make an order to remove the lawyer from the Victorian roll of barristers and solicitors, or suspend the Victorian practising certificate - but it can recommend that that be done. If the order is to recommend removal (that is, disbarment), the Victorian Supreme Court *may* strike the lawyer from the roll.¹⁴ But if a NSW order is made recommending to suspend the practising certificate, the Victorian authority *must* suspend the lawyer's rights of practice.¹⁵ That effectively gives *any State* tribunal coercive power throughout *the country as a whole*.

Fourthly, the scheme introduces extensive mechanisms for sharing responsibility, for cooperation, and for exchanging information between the different States' regulators, fidelity fund administrations, tribunals and Supreme Courts.¹⁶ The scheme provides for mutual notification by the different State admissions boards of the names of people applying to be admitted to practise law,¹⁷ and, obviously to avoid the recurrence of the *Smith* problem, of those struck from the rolls of lawyers.¹⁸

Remaining issues

In general, the cooperative scheme promises to be a significant improvement in the cross-border regulation of lawyers in Australia. Lawyers have less capacity to use the federal structure as a means of avoiding responsibility, and it should become cheaper to practise across State borders. So, while in conclusion I mention several problems with the cooperative scheme and we are yet to see how it works in practice, I emphasise that the scheme seems on the whole to be a salutary development.

The **first** of the continuing problems is indemnity insurance. Unlike its response to fidelity funds, the cooperative scheme does not resolve the problem of lawyers having to pay full compulsory indemnity insurance if wishing to practise in another State. The *Model Laws* explicitly recognise that a solution to higher indemnity insurance premiums for interstate practice still has to be developed.¹⁹ This will undoubtedly be coupled with a uniform scheme of professional standards legislation that may help to reduce professionals' exposure to liability for economic loss, and will no doubt take some time to settle. Until then, it is possible for States to set regulations requiring interstate lawyers to obtain additional indemnity insurance.²⁰

The **second** problem is the downside of cooperation. Cooperation can itself be anti-competitive: rather than allowing the States to be laboratories of legislative experiment, cooperation can bind them to cartels of uniform but substandard regulation. There are aspects of the scheme that might betray this. For instance, it adopts the NSW rules for the management of client money, which could hardly be said to be national best practice. As happens in Australia, they were probably just adopted because of the clout that NSW has in forums that develop national standards. However, I don't detect this as a problem in the cross-border arrangements of the cooperative scheme that sit on top of the platform of uniform regulation.

And **finally**, what about the Kiwis? Recall that reform since the Hilmer Report has significantly been about developing a single *national* market in legal services. However, as people in this country are probably more keenly aware, for Australia it is impermissible myopia to aspire only to a *national* market. The free movement of people and services across all of Australasia is the objective of the CER transnational market

area. While New Zealand lawyers do have the benefit of the trans-Tasman *Mutual Recognition Acts*, and so enjoy better access to the practice of law in an Australian State than others, the cooperative scheme gives, say, a Sydney lawyer easier access to practice in Melbourne than an Auckland lawyer would have. *That* probably violates the spirit, if not the letter, of the CER Treaty, and *that* is probably a good place for an Australian to end a Legal Ethics Colloquium in Christchurch.

¹ (1989) 168 CLR 461.

² NSW Law Reform Commission, *General Regulation and Structure* (1982); *Complaints, Discipline and Professional Standards* (1982); *Advertising and Specialisation* (1982); *Solicitors' Trust Accounts* (1984). The NSW Law Reform Commission first reported on the legal profession in 1966.

³ *Legal Practitioners Act 1970* (ACT) s 191D; *Legal Profession Act 1987* (NSW) s 48Q; *Legal Practitioners Act* (NT) s 134G; *Legal Practitioners Act 1981* (SA) s 21(1)(a)(ii); *Legal Profession Act 1993* (Tas) s 55A(1); *Legal Practice Act 1996* (Vic) s 55.

⁴ (1999) 89 FCR 120.

⁵ *Re Evatt* [1987] ACTSC 80.

⁶ *Legal Profession Act 2004* (Qld).

⁷ *Legal Profession Act 2004* (NSW).

⁸ *Legal Profession Act 2004* (Vic).

⁹ Under all of the earlier arrangements, State laws required a person to be *admitted* in the State before he or she could take a practising certificate in that State. So, a Queensland solicitor wishing to practise in Sydney would have to be separately admitted as a legal practitioner by the Supreme Court of NSW or be registered as such under the NSW *Mutual Recognition Act*, and then, and only then, could she take a practising certificate from the NSW Law Society to practise as a solicitor in NSW. Under the *Model Laws*, a lawyer who is admitted by *any* State Supreme Court has the basic qualifications for certification in any State, and so separate admission in each State where the lawyer wants to practise is no longer required. Secondly, it necessarily assumes that *admitted* lawyers in all States will have satisfied similar academic and practical training requirements. In fact, these academic and training standards were developed in Australia through the 1990s, and the *Model Laws* will see them adopted in all States. Thirdly, the scheme demands that *all* States make certification the pre-condition of private legal practice. This brings a change to barristers in Queensland, who, on admission, were entitled to practise as barristers and for whom there was no certification system, and indeed, who were completely unregulated until the *Model Laws* were adopted in that State.

¹⁰ *Legal Profession Act 2004* (Qld) s 156.

¹¹ *Legal Profession Act 2004* (NSW) s 430; *Legal Profession Act 2004* (Vic) ss 6.7.24-27.

¹² *Model Laws* s 807(2)(b). The claim can also be made against the fund maintained in the State where the misappropriation (ie withdrawal from the trust account) occurred: s 807(2)(a).

¹³ *Model Laws* ss 1107-1108.

¹⁴ *Legal Profession Act 2004* (Vic) s 4.4.37(2). If an order recommending removal is received by the Queensland Supreme Court, the Registrar *must* remove the legal practitioner from the roll: *Legal Profession Act 2004* (Qld) s 307(2).

¹⁵ *Legal Profession Act 2004* (Vic) s 4.4.37(1).

¹⁶ Thus, if a misappropriation involves lawyers in different States, or transactions that cross State borders, the cost is borne by the different State fidelity funds equally or as they agree: *Model Laws* ss 834-835. Furthermore, the administration of one State's fund can make recommendations in relation to claims made against another State's fund (*Model Laws* s 841), have another State's authorities undertake investigations for it (*Model Laws* s 843), or undertake investigations as agent for another State's fund administration:

Model Laws s 844. There are similar arrangements for investigations conducted by State disciplinary authorities: *Model Laws* ss 1166-1172.

¹⁷ *Model Laws* s 604(2). This is reinforced by a duty on a person who has been struck from the roll in another State or country to notify the Supreme Court of any other State in which that lawyer was admitted, and for the first time this duty of personal disclosure is backed by a criminal penalty: *Model Laws* s 604(2). The certifying authorities – law societies, bar associations and practice boards – are to notify each other of decisions to refuse, suspend or cancel practising certificates: *Model Laws* ss 605-6.

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¹⁹ *Model Laws* Part 9.

²⁰ Eg, *Legal profession Act 2004* (Qld) s 74.