

## E. Harold Hallows Lecture Series

Howard Beale

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# PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF INTERNATIONAL LAW

SIR HOWARD BEALE\*

## *The Lawyer and the Foreign Client*

Speaking as an Australian lawyer to an audience of American lawyers, I think it is necessary for me to begin by explaining one or two things.

First: Americans and Australians share a great common heritage of language and political institutions. There are, of course, some interesting variations between us in both these matters, but nevertheless they are obviously similar, coming as they do from the same English source. But, as well, we are both inheritors of the English common law and principles of justice and legal administration. Yours was brought from England early in the 17th century, and ours from England late in the 18th century. No doubt the 170 or 180 years between Jamestown and Plymouth Rock on the one hand, and Sydney Cove on the other, have made for some differences, because the laws we brought over in 1788 had been developing in England since the early 17th century when you brought yours over; moreover, in both our countries our laws have developed since our foundation to suit local conditions and local national philosophies.

Nevertheless, the differences are relatively small and the main principles remain the same—so much so that I could go into your Supreme Court in Washington (as I often have done) or into your Supreme Court here and imagine that I was in my own High Court of Australia or Supreme Court in Sydney. American case law, especially in constitutional cases, is sometimes quoted as persuasive authority in our courts, and Australian cases are sometimes quoted in your Supreme Court in Washington. Indeed, I have heard both Chief Justice Warren and the late Mr. Justice Frankfurter describe Sir Owen Dixon, until recently the Chief Justice of our High Court, as the greatest common law judge in the English-speaking world. In a word, we are both guided by the same legal principles, the same respect for precedent, similar rules as to the admissibility of evidence, the same adherence to the rule of law and insistence upon public justice, and the right of all parties to be heard—"audi-alteram partem," I think the maxim is.

Again, we both have federal systems of government. Apart from the Australian territories which come under federal control, we have

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six separate states with (like yours) their own courts and systems of justice and administration, all similar, and also a federal authority with its federal courts, especially the High Court of Australia (corresponding to your Supreme Court in Washington). These federal courts hear cases involving the constitution and federal laws as well as, in the case of the High Court, appeals from state courts. Indeed, we modelled our constitution very largely upon yours—a federal parliament and government exercising the powers specified in the constitution, and state parliaments and governments exercising the residue of the powers not so specified, with the High Court of Australia ruling upon constitutionality in case of conflict or clash of laws.

When your Founding Fathers were writing your constitution, they were much concerned to insure for citizens of the new union certain fundamental "rights" that they regarded as part of the heritage which King George had tried to filch from them or which they thought free men ought to enjoy. So they embodied these in a Bill of Rights and in certain constitutional amendments. These rights are also enjoyed by our citizens in Australia, but not in this form. They are either part of our common law or judge-made law, or are to be found in various statutes. In particular, we do not have the 14th Amendment as a formal part of any written constitutional document, and most Australians would probably say that this was a good thing. To be sure, in the absence of guarantees actually written into the constitution, such rights could be taken away from the citizens by an act of the relevant legislature, but no legislature which did this would last long. On the other hand, it is probable that the absence from our written constitution of the "due process" provision, for instance, in the form it takes, may have saved us from some of the long drawn-out multiplicity of appeals which, it seems to me as an observer, have sometimes embarrassed your administration of justice. However, I do not offer this as a criticism of your due process clause because different countries have different needs. Anyhow, perhaps my comment on this matter is irrelevant and a digression.

But since I have sinned once, may I sin just once again with another digression. This relates to the question of how our judges—state and federal—are chosen. In Australia, all judges are appointed by the government of the day. In the case of the High Court and other federal courts, judges are appointed for life—they must be under the constitution—and in all other cases they retire at the age of 70 years. We have no such thing anywhere in Australia as elected judges, and to tell you a secret we do not think much of the idea. Perhaps during the recent election campaign your Chief Justice might have been disposed to agree with me, but no doubt he has no complaints now!

As no doubt with you; all lawyers in Australia are what we call "officers of the court" and are therefore subject to the disciplinary control of the supreme court of their particular state. Unethical conduct often falling short of any illegality may be punished by the court usually by disbarment or at least suspension from practice for a period. A lawyer of course may also be proceeded against in the criminal courts if circumstances justify. In addition, misconduct of counsel in court itself might be punished by the judge presiding by excluding counsel from the case or by referring his conduct to the Full Court of the Supreme Court for disciplinary action there.

The profession itself is somewhat differently organized from yours. In Australia, lawyers are, as in England, either barristers or solicitors. In some states of Australia a lawyer is admitted as both a barrister and solicitor in the first instance, but he usually practices exclusively as either one or the other, and not both, although the solicitor is entitled to appear and conduct cases in court if he wishes. The barrister is the trial lawyer, the man (or woman) who dons the wig and gown and goes into court to conduct cases on behalf of a client; that is, he is the advocate specialist. He is also supposed to be a scholar of the law giving opinions and advice on abstruse, or not so abstruse, legal questions referred to him by the solicitor. He does not deal directly with the client but only through a solicitor. If he is a senior or eminent member of the bar, he may apply to the government to become what we call a "Queens Counsel," which is an honorific of historical origin enabling him to charge higher fees. A solicitor is the office lawyer, the corporation lawyer, the conveyancer, the lawyer dealing with trusts and wills and contracts, and many other kinds of legal work. If litigation ensues or if legal problems of particular difficulty arise, then he goes to counsel, that is, to the barrister, for advice or to brief him to appear for his client in court. There is a good deal to be said for amalgamating the two professional branches completely as you have done here. The barristers would not like this because they value their separate existence and their prestige, but I think it will come in time in all the states, although there would always be specialization with a section of the lawyers concentrating exclusively upon court work.

However this may be, tonight I am treating both branches of our profession as being the same for the purpose of what I have to say, because the professional duty of the lawyer towards his client in Australia is the same irrespective of the branch in which he practices.

What, then, in Australia is the duty of the lawyer acting for a foreign client, and in what respects, if any, are his duties different from those he owes to a client in his own country and of his own nationality? I ignore, by the way, the reverse question, namely, the duty of an Australian lawyer acting for an Australian and in a foreign

country—*e.g.*, in the United States. Here his duty is simple enough: he should get himself a good American lawyer to guide him straight away!

His duty, first of all, is of course to his foreign client who engages and undertakes to pay him and who is therefore entitled to demand the best and most disinterested service of which his lawyer is capable. No considerations of preference, sentiment or even patriotism entitles the lawyer to withhold his best services. If what he is asked to do, while perfectly legal, is however so distasteful that it may impair his judgment, then of course he can terminate the relationship; but short of this he is his client's man and must do his utmost for him.

Needless to say, he may and indeed he should advise an alternative course to what the client may want if he thinks it is in his client's best interests. This sometimes happens with clients such as American corporations who come to Australia seeking to set up some business operation there or to take some business over. There may sometimes be ways of doing these things acceptable in one country but not in another, so that the way the client wants may set people's teeth on edge, with the result that if the client persists in his way he may defeat his own purposes. In such cases, the lawyer should point out what the feeling and sentiment is in Australia, what resistance he might receive from governments, what alternative courses would be acceptable, and so on. I have done this more than once and in the end have been warmly thanked for it. However, this kind of advice is not so much a lawyer's advice as the advice of a good philosopher and friend. I will come to this aspect a little later.

In proceedings in court, counsel is of course in charge of the case, and he has a professional right to conduct it as he thinks best. If the client instructs him to follow a course of action which counsel thinks wrong or dangerous, and if, despite advice, the client still persists, counsel may withdraw from the case, but this is a right which should be exercised with very great restraint, because of the damaging effect it may have upon the client's case in court, especially if there is a jury.

Earlier I used the phrase, "whilst perfectly legal," and this brings me to the second aspect of the lawyer's duty towards his foreign client. This duty is to obey the laws of his own country in which he practices. If he does not do this, and is found out, he will not last long as a lawyer. But, this quite apart, no client is entitled to ask any lawyer to break his professional or legal duty. The foreign client may sometimes think the local law is stupid because it is not the same as the law in his own country, or because it *is* stupid; but there it is, and it must be obeyed, and if the client insists, he must, as I am sure he would be in your country, be told to take his work somewhere else. This sort of problem does not arise very often in Australia because our

laws are so similar to yours, but it sometimes can, say in the field of taxation where our laws may be different and where they may hurt.

On this question—the duty of the lawyer to comply strictly with the laws of his own country—there may sometimes be a grey area, or doubtful cases where perhaps the lawyer could probably get away with it. Here the prudent and reputable course is for the lawyer to err on the strict side. I am sure reputable professional men would take the same stand in this country.

I am told that in this country there is a body of law relating to the duty of the lawyer who has been in government service not to disclose to clients official information which he has learned while he was in the government. We have no such particular body of law although there are conventions about the matter. This situation does not often arise with us, because persons outside politics or the civil service are not as frequently called upon to serve in government as they are in this country. In Australia, Cabinet Ministers, for instance, *must* be members of Parliament, whereas in America they cannot; and our Civil Service, being permanent and politically neutral, is well-organized and equipped to perform tasks which in America might be assigned to outsiders. Moreover, we have an Official Secrets Act which covers most cases that might arise. As an ex-member of Parliament, an ex-cabinet minister, and an ex-ambassador, I for instance would be covered by our Official Secrets Act and by well-known conventions requiring me not to disclose any information which I learnt in my official capacities and which had not been subsequently made public. In cases of doubt, the matter becomes one of discretion and good taste, and in such cases one would be disposed to remain silent even if the client wished and expected one to do otherwise. Occasionally you might suspect that your client had really sought you out because of what he thought you had learnt in your former official capacity and could tell him; but if you suspected this, you might be all the more disposed to keep quiet.

And that, I think, is nearly all that can be said about the duty of the Australian lawyer towards his foreign client; if it does not seem very much, the reason is, I imagine, that the position of the Australian lawyer is not any different from that of the American lawyer in similar circumstances.

But there is another area, of what I might call a quasi-legal relationship, which I should touch upon briefly. To do so I must be slightly autobiographical for a moment. I was a barrister-at-law for nearly twenty-five years, then a member of Parliament for twelve years, and a Cabinet Minister for nine, then Australian Ambassador at Washington for six and a half years. When I resigned and returned to Australia, I was approached to join the board of several foreign, chiefly

American, corporations, and I did so. Two are large conglomerates, two are connected with mining, one is an electronics company, and one an airline company. I am the chairman of several of these and board member of the others. Although I have no doubt that I was chosen because of my matchless quality and sterling worth, I have also no doubt that I was invited to join these corporations partly because I was a lawyer, partly because, having been a politician, I ought to know something about political and economic conditions in Australia, and partly because, having been an ambassador in Washington, I ought to know a good deal about the United States and conditions there. Anyhow, for good or ill, it is this combination of experiences which I have brought to bear upon my work with these corporations.

For the most part, I think it has worked out very well, and most harmoniously. But sometimes problems do occur, and when they do one must speak one's mind frankly. One must do this not as a patriotic duty to one's own country, for that question does not arise, but in the interests of the corporation itself and in compliance with the Australian laws. For instance, many of your large diversified corporations—conglomerates you call them—are organized into various divisions with a central board of directors presiding over all, the divisions being more or less self-sufficient, subject to the general control of the central Board on Policy and Finance. But sometimes when American corporations organized in this way seek to apply the same principles to their subsidiaries overseas, they may run into difficulties. For example, let us take, say, the Smith-Jones Company, Inc., of New York. It has six separate divisions, A, B, C, D, E, and F. When it sets up a wholly-owned Australian subsidiary with similar divisions, one may find that Division A in Australia must report direct to Division A in the United States, and Division B in Australia to Division B in the United States, and so forth, for all practical purposes bypassing the board of directors of The Smith-Jones Company, Australia Limited, except, perhaps on matters of financial supervision. Now this sort of thing won't do in Australia, because our company laws impose real duties upon directors (including the directors of wholly-owned foreign subsidiaries) to direct and control the affairs of their company and to know what each of its components or divisions is doing, not merely formally ratifying what has already been decided somewhere or passing a balance sheet, but in board appointments, taxation matters and financial arrangements, statutory disclosures, compliance with labor laws, and so forth. No doubt heads of divisions sometimes are tempted to be independent of their board by reporting direct to their opposite numbers in the United States, but this is not good. So, in some cases I have been conducting with my head office in, say, New York, a gentle educational campaign to bring to notice the fact that there are Australian laws and

conditions which have to be complied with and which are not necessarily exactly the same as in the United States.

Then there is another illustration, the matter of foreign investment in Australia. We are in the midst of an enormous economic explosion, especially in the fields of minerals and raw materials and industry: we are therefore, as you used to be, a capital-hungry country and very large amounts of American capital have come into Australia. This has been highly beneficial to us, and we would not for one moment wish to diminish the flow. Nevertheless, we have our own ideas as to how we would like this capital to come and to operate. We do not prevent the repatriation of any part of either capital or dividends, or lay down any other conditions. But we do *prefer* that, where possible, capital should be invested in the most valuable fields, *i.e.*, those producing more industry and wealth which, incidentally, are usually the most profitable ones. Also, we prefer that, where possible, Australians should at least be given the *opportunity* of some equity-sharing in the ventures in which this American capital is engaged. Now this latter is sometimes difficult because, not unnaturally, many American investors prefer to have a 100% ownership of any corporation which they acquire, and to operate it either direct from the head office in the United States, or through a wholly-owned subsidiary in Australia. There is no rule against this and there will not be. Nevertheless I, and people like me, are quick to advise our American principals that, where possible, they should permit some sort of Australian equity, no matter how small; not for patriotic reasons, but because this will give them a better image in Australia, make them more acceptable, and therefore enable them to operate more harmoniously and more profitably.

I could go on for quite a long time giving other illustrations concerning this quasi-legal relationship and ways in which the Australian lawyer-businessman can be of service to his American client. But I have talked long enough. I want to conclude by saying that in all my relations—legal or quasi-legal—with American clients, I have found them, almost without exception, remarkably helpful and understanding, tolerant of my parochial (I almost said “colonial”) shortcomings, and anxious to conduct themselves in Australia as good citizens of my country.