1969 TURNER MEMORIAL LECTURE*

'The Illusion of Protection'

delivered by

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To listen to the lyrical speeches of lawyers on the occasions of legal conventions, one is forced to conclude that their general view of the law is optimistic, that they still regard the administration of the law with veneration and set it round with a mystique which but little accords with the experience of the average client or litigant. Sir Edward Coke said: 'Reason is the life of the law; nay, the common law itself is nothing but reason . . . How long soever it hath continued, if it be against reason, it is of no force in law.' And Sir John Powell is often quoted as saying in *Coggs* v. *Bernard*: 'Nothing is law that is not reason.' How very pleasant it would be if that were so, but for the average citizen the law which controls the major commercial transactions of his life is a law made by legislators, operated by lawyers and passed upon by judges, and any examination of it reveals that the appreciation, by those responsible for making and working of the law, of the limits within which the average citizen is able to act, is gravely defective. Reading the law, one would expect that every citizen must be effectively literate, able to assess forms of a quite complicated nature and to appreciate information set out in a manner unusual to him, constantly able to move about and to have the money to do so, affluent enough to command not only the assistance of lawyers but of a whole number of other people whose services are required for him to make effective use of the provided remedies when anything goes wrong. Such a picture of the average citizen is absurd.

The majority of citizens in our community have a rate of comprehension of what they read far below what would seem minimally satisfactory to most school teachers. Forms worry them and even the simplest of these which are designed to convey information do not do so effectively because people are unable to appreciate the information which the forms purport to convey. The citizens who most need the protection which the law relating to the various commercial transactions with which I shall deal in a moment provides, are usually not affluent and if they are in difficulty and needing to use the protection of the law, quite often they are not mobile either. While the

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common law, as it has developed over the last two and a half centuries, presumes that a citizen is able to protect himself from cheats, it seems not to be remembered these days that the citizens about whom that was assumed were, until recent date, that minority of citizens who possessed something worth cheating them out of, and in consequence those who by inheritance, thrift, or care, had been able to gain something worth protecting and to have some sort of training as to how to protect it. In this century more and more people have come to have something worth protecting, but hand in hand with that development has gone a greater expertise amongst the frauds and cheats. Nevertheless our legislators have plodded stolidly on, blithely oblivious of the fact that it would be wiser if they took a course of psychometrics instead of providing protections which cannot be worked by those they are designed to protect.

In the last century, the law on Lands Title meant that the process of obtaining title to land was extremely complicated and expensive and could provide the greatest uncertainties as to title. In South Australia, a new system of land registration was devised—the Torrens Title System. This was designed to see that titles to land and any charges or encumbrances on land were publicly registered and thereby an adequate protection would be given to a bona fide purchaser for value without notice of any defect or registered charge or encumbrance. This was a great step forward. It was believed by Colonel Torrens that any simple workman or artisan would then be able cheaply to obtain the registration of a title to land which he had purchased and that he would be able to do so with security, and in order to protect himself all he needed to do was to search and see what interests, if any, were registered upon the title to his land before he purchased it. This system has swept Australia, and what is the result to the average citizen? In those States where it is compulsory to use the legal profession to prepare and lodge applications for registration of changes in title, the cost to each citizen is out of proportion to the work done and adds a very considerable margin to the cost of his purchase of land. He does, of course, for the considerable sums he pays, obtain the protection of the professional advice of those engaged in a profession subject to close discipline and upon whom the penalties for defalcation or negligence would be severe. But such a service is dearly bought. Elsewhere, where it is not necessary to employ members of the legal profession for this purpose, there is quite inadequate protection. The average citizen entering the Lands Title Office to make a search, is faced with a Certificate of Title the effect of which he cannot understand. He may employ a lawyer to make the search and interpret the title to him, but most do not, and the reason is not merely that most citizens hold to the adage: 'Doctors purge the body, Preachers the conscience, and Lawyers the purse,' but the average citizen is approached when wanting to buy a house by a land salesman or land

agent who is keen to get a sale. The agent uses the techniques of modern persuasion to fire the enthusiasm of the purchaser and to urge him into signing a contract in order that this prestigious bargain should not be snapped up by someone else eager and anxious to obtain it himself. When a citizen comes to making a purchase which is probably the most expensive he involves himself in during his life—the purchase of a home—he and the members of his family are eager to conclude a business which will provide them with something for which they had planned and about which they had thought for many years. It is the object itself and not the pettifogging details of the transaction which fire his imagination. The fact that he may obtain protection by searching a title or having somebody competent of doing it for him, is for the most part unknown to him. Since land agents and salesmen are licensed, he considers that these people are under sufficient control and they will not be allowed to take him down. If he finds that he has purchased mortgaged land and that the mortgagee is about to foreclose because of the vendor's or agent's default, what is his remedy? To sue a bankrupt vendor for damages for fraud; to sue a land-broker for damages for negligence in not informing him that the land was mortgaged? Since the land-broker is often associated closely with the land agent, he may find him as much a man of straw as the agent who has defaulted, and a judgment is cold comfort in place of a roof over one's head when obtained at the expense of throwing good money after bad.

If, however, a citizen has successfully negotiated the purchase of a block of land and decides to build a house, he enters into a contract with a builder. If the builder is competent, qualified and efficient, he may have no problems, but outside Western Australia there is no effective law requiring qualification of builders, and it is common to prescribe in building contracts a clause requiring that disputes be settled by arbitration. The unsuspecting home builder, if he reads this clause at all before he blithely signs the document, assumes or is told, if he asks, that arbitration is a much more simple, cheap and effective means of settling disputes than to have recourse to the courts, for as Thomas Deloney has said: 'To go to law is for two persons to kindle a fire at their own cost to warm others and singe themselves to cinders.' But in fact a private arbitration is far more time-consuming, costly and frustrating of effective decision than a law suit. Arbitration Acts in Australia date for the most part from the last century. There is no means of ensuring a rapid hearing. The costs of employing an adjudicator do not fall, as with the courts, on the general community but upon the contestants, and because of lack of procedural rules, an arbitration may prove to be an enormously lengthy process. To try disputes between a builder working to imprecise specifications and the whims of the home owner, and the unfortunate home owner trying to get what he wants from a builder, often bedevilled by difficulties with sub-contractors and problems of supply of materials, would more

than try the patience of Job, and many a home owner gives up in despair and cuts his losses by engaging an architect and another builder to get himself out of the mess he has got into.

At times, legislators have tried to avoid the difficulties by bringing financial pressure to bear upon builders. A classic example of the lack of understanding of problems by a legislature is a provision of the South Australian Parliament in 1953; the Building Contracts Deposits Act. This provided that any building contract must provide that the construction, alteration or addition must be commenced within the time stated, and that any sum paid prior to the undertaking of work must be paid into a Special Purpose Account in a bank in the joint names of the owner and builder and that if these things were not done, the owner might avoid the contract at any time before work commenced. It also provided under penalty that the builder should within three days pay any deposit moneys into a Special Purpose Account. The whole thing didn't work because it had not been ascertained by the proponents of the measure whether any banks in South Australia would operate accounts of the kind prescribed, and in fact none, including the banks owned by the State, would do so. So while the remedy remains on the Statute Books, it is completely useless. What is more, since the time which it prescribes is not a time within which a building owner would be likely to discover that a builder had defaulted, and since most building owners had no idea of the provisions of the Act anyway and there was no requirement for them to be notified, the remedy was unworkable and has never been available. But let us assume that our average citizen has managed to purchase his land and has built his home. He is then likely to undertake the purchase of furniture and of a motor car, and encouraged by our commercial enterprises he is likely to purchase at least some of these items on credit. Today the major amount of credit in this country is through the fringe banking institutions—the Hire Purchase companies—and the most usual means of providing credit is through that extraordinary fiction, as unreal as the fictions of the original actions for simple contract debt about which Dicey spoke so pungently—the Hire Purchase System.

Now, in the last decade, the difficulties which were so constantly arising with the extension of this kind of credit in Australia, led to the uniform Hire Purchase Agreements Acts which are certainly not uniform. The Standing Committee of Attorneys-General of the States and the Commonwealth, met in solemn conclave and, apart from the similarly un-uniform Companies Act, this was their major achievement. Let us say that our average citizen goes off to purchase a second-hand motor car under a hire purchase agreement. The Hire-Purchase Agreements Act provides that he will be given a document whose contents are prescribed as follows.

Mr. Dunstan read out s. 2 of the Hire-Purchase Agreements Act 1960 and also the Second Schedule to that Act and then continued:

In addition to the amounts which are compulsorily set forth in the Hire Purchase Agreement, there is likely to be a full page of small type of which the average citizen can make no sense whatever, and it is a rare citizen who can understand what is set out in the compulsory section of it. All he knows is that he gets a complicated form which he has to sign in order to get his car. Well then, if he falls ill, he may find he is on reduced wages, workers compensation, or social service benefit, and is unable to maintain his payments and is running up other bills anyway, and is confined to home. So he receives a notice that the lender of the money to him intends to repossess and in due course, since he is unable to raise his arrears, he receives a notice in the form of the Fourth Schedule.

Mr. Dunstan then read out the Fourth Schedule.

The crowning kindness of these processes is contained in the next to final note on the form which follows the provisions of s. 15 1 (*a*) (2). The unfortunate hirer may require the owner to sell the goods to any person introduced by the hirer who is prepared to purchase the goods for cash at a price not less than the estimated value of the goods set out in the notice in the form of the Fourth Schedule. How does he achieve this? Somehow or other the unfortunate hirer, without the goods to show to any potential purchaser, confined at home by illness, unable, even if he can get about, to travel about much because of stringent means which have caused the trouble in the first place, must discover a cash buyer willing to purchase at more than the price stated by the owner. To suggest such a process, of course, is simply to ignore the realities of the situation completely. A remedy of that kind is a piece of useless window dressing. It simply cannot be availed of by those for whom it was ostensibly designed.

Let me take another example. In the fiction of Hire Purchase Agreements, the hirer is not supposed to be designing to purchase the particular article in question until, by the last payment of an instalment, he exercises an option to complete the purchase. So he may voluntarily terminate the hiring beforehand. He may suffer some penalty in doing so because the payout amount may still involve him in cost, but owners are rather reluctant to accept return of goods. If no place has been agreed for the return of the goods and the hirer cannot get agreement, he may apply to the Court but as quite often his reason for deciding to return the goods is that he cannot afford to continue with the hiring, the costs involved in getting a Court Order in the circumstances are likely to deter him from making the return of the goods.

The Hire Purchase Agreements Act has carefully provided remedies which might have been devised for people sufficiently knowledgeable and affluent enough not to need to use the Hire Purchase System at all but has shown abysmal ignorance of or lack of concern for problems facing those in the community who will use hire purchase as a means of financing domestic transactions.

The stresses and strains of financial difficulties in the home produce matrimonial disputes of distressing frequency and it is not rare that those who have been in difficulty in some of the matters which I have mentioned eventually turn up in the maintenance courts. Now some of our legislatures have provided an elaborate and flexible series of remedies for the obtaining of maintenance orders and for their enforcement. These include summoning of the defendant before the court to show cause why an order for a suspended warrant should not be made for his imprisonment, *i.e.* suspended while he pays the order; for attachment of earnings; for the registration of the amount of outstanding arrears upon a title enabling the sale of the property in satisfaction of the judgment, the registration of the arrears of maintenance as a judgment debt in a civil court, and the use of Warrants of Execution or Unsatisfied Judgment Summonses or even bankruptcy procedure to enforce the payment. In cases of emergency it has been provided in some instances that a wife can maintain an *ex parte* order by rushing before a magistrate where her husband is threatening to flee the jurisdiction, change his name, and hide himself amongst the wilds of the Queensland Gold Coast or Barrier Reef, to escape the burdens of maintaining his wife and family. In the States where some Governmental assistance is provided to wronged spouses, these remedies are minimally used. The staff of such departments is overworked and concentrated in city areas, the case load is too great, and the use of the more rapid and sophisticated remedies is not open, simply because it often takes two or three weeks to get an appointment with a Prosecuting Officer and the courts have a considerable waiting list of cases to be disposed of. In the State where no such help is given, the poor unfortunate wife (or husband for that matter) is not in a position usually to obtain Law Society Legal Assistance Scheme help, and must cast himself on the mercies and limited knowledge of the Court Clerk and issue proceedings to enforce his rights accordingly. In either case the remedies which our legislature has provided for the most part simply cannot be used by those whom they were designed to protect. If the wife is unsuccessful in enforcing maintenance, she may find she is unable to keep up payments on the matrimonial home and be forced into rental accommodation.

In some States some rent control has operated since the war. A prime example of providing completely illusory protection again occurred in South Australia in 1962 when control of the rental of premises generally ended and an Act was passed entitling a tenant to apply to the Court for an order controlling the rental of premises where the tenant could prove that the rent was excessive. The tenant, of course, had to take a gamble on the application to the Court that the Court would decide that the rent was excessive and that would be determined on the Court's assessment of the value of comparable premises. The Court could protect the tenant in occupation where it decided the rent was excessive by an order preventing the landlord from evicting the tenant

for a period of up to one year, but that again was in the discretion of the Court, and if the Court refused to make an order, especially if it had been decided that the rent was not excessive, then the tenant might well be out in the street. Needless to say the gambles for tenants were too great and rather than inflame a landlord during a period when accommodation was in short supply, as it almost uniformly has been in the metropolitan area since the war, no tenants made applications. Now, one may well say: 'Well, what does one do? Lawgivers since the beginning of time have endeavoured to make laws apposite to their age and have sometimes succeeded but as often have failed, and this will go on simply because of the fallibility of human nature and the fact that we obtain the benefits and protections of Parliamentary institutions often at the expense of legislative efficiency.' I don't think that kind of excuse is good enough. It is more than time that in providing legislation in relation to our commercial transactions, the remedies we provide could be worked by those for whom they are provided and we should not waste the enormous amount of time and money which has so far been thrown away in putting Statutes on the books which are of no avail. This is an area in which we must demand greater efficiency from our legislators because the efficiency of the cheats and frauds is increasing daily. The techniques of fraudulent salesmen far exceeds those previously known. Let me read to you the handbook from which salesmen of burial plots in Australia are now taught:

> 'THE PROCEDURE'
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> *We look sharp and now we are ready to enter the home.*
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> Some say, make your entry as if you were paying a bill or imagine you have just found a wallet on the street with $500 in it and imagine you are entering the home to return it. Would you be timid? Act like a buyer and not a seller. Don't be apologetic or defensive.
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> We speak at the same time the prospect sees us. So, while he is getting the picture of us in his mind's eye, he is also getting a recording. So, what he sees and hears gives him the full story immediately.
>
> We briskly knock on the door or ring the bell with authority. Then, step back in a position that will force the prospect to open the door fully to see us and our smile. No matter if husband or wife comes to the door, we will always ask for the opposite party. We don't want to show our hand unless both are home. We say, if husband comes to the door:
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> "Good evening, Mr. . . . My name is. . . . Is Mrs. . . . home this evening? Fine, I have the Family Portfolio I promised her I'd bring by. May I come in?" (These are the four magic words, never forget them.)

> We say if the wife comes to the door:
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> "Good evening, Mrs. . . . I'm. . . . Is Mr. . . . home this evening? Fine. I have your Family Portfolio. May I come in?"
>
> We have found that this simple, straight-forward, positive approach will favorably get us in most homes. We identify ourself completely as if we were sent by a friend. We do not tell where we are from. If we say, "I'm from Evergreen Memorial Park," it lays us open for an objection that we will have to overcome before we can get into the home. In this straight-forward approach, the prospect has nothing to object to, he doesn't know where we are from. He has an open instead of a closed mind.
>
> One sure way to start the approach wrong is to be apologetic. The prospect will know he has the upper hand and can turn you away. You have no reason to be apologetic because we have "Australia's Greatest Value" . . .'

While citizens are subjected to the techniques of salesmen in used car lots and at the doors of their houses in the sale not only of burial plots but of stainless steel kitchenware, great books of the world, and sick persons' crucifixes, children's encyclopaedias and white ant exterminators; while the door to door sales legislation is evaded by having companies registered in one State purporting to sell goods in another but subject to the laws of the State in which they are registered, and then using their commercial power to bludgeon citizens by suing in the State of their registration and obtaining a judgment so that the poor unfortunate purchaser can only defend himself either by instructing solicitors interstate and having his evidence taken on commission or endeavouring to beat them to the gun in his own State by obtaining a declaratory judgment subject to his own State's legislation, we are simply not doing our job. So, first of all, we must demand of the legislators more efficiency, more appreciation of the real problems, the practical difficulties, the physical and mental limits facing the citizens for whom they are legislating. Secondly, we must at last face the fact that the costs to the average citizen of endeavouring to settle disputes over his daily transactions by the present process of litigation, which depends on the private engagement of legal practitioners, are far too great and the means of protection are grossly ineffective and inefficient.

The overhead costs of a practising lawyer today are such that he cannot economically afford to charge for profit cost time at less than about $12 an hour in order to derive anything approaching an income comparable with other professions which require the same degree of skill and training and exercise of responsibility. When you combine this cost with the cost of outgoings and with the inconvenience arising from normal delays of private litigation and from the fact that everywhere in Australia the legal profession is understaffed, it must be clear

that the average citizen can't use the present system of litigating disputes in courts of law effectively for the kinds of transactions which I have mentioned and which are those which will most concern them.

Is there some other way of ensuring adequate protection to a citizen from the depredation of cheats, small and large, or from the decisions contrary to his interests made by those with greater money power who can afford the cost of protecting themselves much more than he can?

In South Australia, after the defeat of the referendum for the amendment of the Commonwealth Constitution to empower the Commonwealth to make laws relating to prices, charges and rents, we enacted a Prices Act which still remains in operation and which constitutes a Prices Commissioner who has wide powers of investigation of any commercial transaction and to compel answers on any question relating to any transaction. The Government may declare goods or services to be subject to the Act and any goods which are subject to the Act may then be the subject of an order by the Minister fixing maximum prices, and, in some cases, minimum prices. The Act is not merely operated as a means of effecting ceiling prices. It has also been a means of ensuring adequate standards of service and seeing to it that overcharging and unfair prices on the basis of misrepresentation or fraud do not occur. Citizens widely have complained to the Prices Commissioner in cases of unsatisfactory dealings by vendors of goods or services. The Commissioner has investigated and has often obtained remedies for individual citizens by threatening to recommend the invoking of the powers of declaration or fixing of prices under the Act if the vendor did not rectify the wrong done to the purchaser.

Now one may say that this is an administrative practice which might well lead to grave abuse since it provides for no judicial processes but in fact no-one in South Australia can claim that it has led to abuse. With the one possible exception of charges for plumbing services, about which there has been a dispute, it can be claimed that very great service has been rendered to very many citizens by what is essentially an administrative process involving not just a general keeping of the lid on prices but ensuring fair standards in contracts of sale or service. From the South Australian experience, I believe that there would be considerable advantages to every State in Australia in having similar administrative means of assisting its citizens, but that the work of such a Commissioner could well go further by allowing the Commissioner, in cases where administrative action is inadvisable, to take action in the courts to enforce fair dealing. That could not occur unless new remedies were given. The need for the courts to have wider power to re-write contracts to ensure fairness of contractual relationships was discussed in relation to contracts of adhesion by Mr. Justice Bright at the 14th Legal Convention of the Law Council of Australia. As was pointed out then, the 'boundaries of an appropriate definition of the term "contract of adhesion" were marked by

the two factors that one party has fixed unalterable conditions in advance, the other party either in ignorance or out of necessity submits to them,' and it was advocated that it was proper, to some extent at any rate, for Parliament in respect of such contracts to protect citizens from the consequences of ignorance or oppression. It was suggested at that time by the Chief Justice of South Australia that it would be proper to enact a law in the following terms to give the courts power to protect those who needed protection:

> Where there is a contract which appears to be in a standard form adopted by the proferrer or his agent and either (a) there appears to have been no real bargaining or negotiation as to its terms or the relevant terms, or (b) it appears that the customer did not advert to its terms or the relevant terms, or (c) the customer had no choice but to adhere to its terms or similar terms, if he wanted to procure from anyone the goods, services or advantages in question—then and in any such case the court is empowered, if it thinks it just and equitable to do so, (a) to apply the doctrines of law or equity normally applicable to a transaction of the type in question or implied therein, notwithstanding that such doctrines may be excluded by the terms of the contract and (b) to ignore any breach, non-fulfilment or non-observance by the customer of any of the terms of such contract, whether in the nature of conditions precedent or otherwise, if it is of the opinion that no real prejudice has been caused to the proferrer thereby, or that it would otherwise be just and equitable to do so.

Simply to provide that the courts might do this in cases of the kind adverted to does not necessarily mean that we are providing an effective remedy. The Moneylenders Acts in Australia have, for a long time, provided that in the case of excessive interest or unconscionable contracts the courts may reopen the contracts and in effect re-write them, but how many cases have there been, despite very high interest rates and very burdensome provisions in some money lending contracts, of applications being made to the courts by a private borrower to re-open a moneylending contract? Virtually none, because a borrower who needs protection is the very sort of person who is in no position at all to take the gamble involved in attempting to exercise such a remedy.

Again, to give the courts a general power to re-write contracts of adhesion, or other contracts, may well be to provide quite illusory protection simply because those who are to be protected cannot use the remedy, but if we were to give a public authority with adequate powers of investigation the duty as well as the right of taking matters before the courts at public expense to ensure adequate standards of commercial transactions, and to do this without depriving any private citizen of his normal rights at law, then we might well be taking a step which could provide some additional protection.

If the Torrens system of lands title is to form an adequate protection for the average citizen, then the States should provide, as is sometimes done elsewhere, that the citizen may obtain a search of the property done for him by a qualified employee of the Registrar of Titles which will clearly explain in simple terms the effect of the search, but in addition we must provide that no contract for the sale of land and no transfers or transactions consequent on it or into which the contract will merge will be valid unless a search has been done and the purchaser has the search document in his hands. This still will not cover all cases but it will be possible to provide a simple search report much less confusing than the forms to which I have referred earlier in this lecture.

As far as building contracts are concerned, it will be a much greater protection to citizens if we require the licensing of all builders and that the Licensing Commission insist on the issuing of a licence, showing adequate qualification to undertake the work, and be able to enforce adequate standards of work and fair dealing with the public on pain of cancellation or non-renewal of the licence, than if we leave the settling of building disputes either to private arbitrations or to litigation.

It is vital to revise the whole of the law relating to credit sales in Australia and much of the law relating to sale of goods, but it will be essential in re-writing the law that the mistakes, which have hitherto been made arising from lack of appreciation of the problems of the citizens legislated for, be not repeated.

In the obtaining and enforcement of maintenance orders it will be essential to provide additional Social Welfare staff in every part of Australia. At the moment our Social Welfare services are hopelessly inadequate and very much less than those available in most comparable countries. It is more than time that Australia adopted for Social Welfare purposes the adage upon which welfare services in countries like Israel are based and that is that 'disease means dis-ease,' and where there are social problems then there must be community assistance to solve them.

The legislatures have so far proved themselves woefully inadequate in protecting the citizens whom they have previously thought it necessary to protect. Reform of the kind suggested is vital and urgent. It will keep the State Parliaments in Australia busy for many years.