

## Australian Bar Association Conference

### Why Rome and not Hong Kong — the Australian Bar at Large

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The metaphor of the global village was born of Rome. Each year at Easter the Pope delivers a benediction to the City of Rome and to the world — Urbi et Orbi. In 1939, James Joyce in *Finnegans Wake*, alluded to that title in two invented terms 'urban and orbal' and 'the urb it orbs'. The puns inspired Marshall McLuhan, a great admirer of Joyce and of *Finnegans Wake*, to coin the term 'the global village'.<sup>1</sup> The Second Edition of the Oxford English Dictionary cites McLuhan's observation, written in 1962, when the internet was a gleam in the eyes of its inventors, and the 'social media' not even a glint:

The new electronic interdependence recreates the world in the image of a global village.

That metaphor was a good deal more elegant than the older linguistic malignancy of 'globalisation' which has metastasized well beyond its reputed primary site in economics and now, according to the Stanford Encyclopedia of Philosophy, refers to:

Fundamental changes in the spatial and temporal contours of social existence, according to which the significance of space or territory undergoes shifts in the face of a no less dramatic acceleration in the temporal structure of crucial forms of human activity.<sup>2</sup>

So the world gets smaller in space and time. So the global lawyers take their iPhones and their Blackberries to dinner where they glow upwards from their discreet repose beneath heads bowed towards the busy legal lap.

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<sup>1</sup> Eric McLuhan, 'The source of the term, "Global Village"' (1996) 2 *McLuhan Studies* (online) [http://projects.chass.utoronto.ca/mcluhan-studies/v1\\_iss2/1\\_2art2.htm](http://projects.chass.utoronto.ca/mcluhan-studies/v1_iss2/1_2art2.htm).

<sup>2</sup> William Scheuerman, 'Globalization', in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/archives/sum2010/entries/globalization>>.

A report recently published by the Australian Government Office for Learning and Teaching on Internationalising the Australian Law Curriculum for Enhanced Global Legal Practice tells the reader what is now apparent to all in the legal profession:

Globalisation has seen a shift in the market place with the growth of 'global law' firms and an increase in international trade in legal services and legal practice operating in a 'borderless environment'.<sup>3</sup>

That was a report which made no separate reference to the Australian Bar. That is perhaps not surprising. The focus of much contemporary discussion about the globalisation of legal services seems to be on services provided by firms, rather than those provided by specialist advocates and advisers. That is a focus which should be broadened.

On the other hand perhaps the Bar should be grateful that the globalisation of legal services has not impacted upon counsel's chambers to the extent that it has on large law firm practices. Legal practitioners in firms engaged in delivery of cross-border legal services live in a global legal village in multiple time zones. The village is never completely asleep. The demands on the providers of such legal services are intense and continuous. Communication is at a premium. Anecdotal evidence suggests that sometimes the use of the medium matters more than its content. If the point of a communication is not to tell the client anything substantive but to be in touch and responsive to its every demand then, borrowing again from Marshall McLuhan, one can say — 'the medium is the message'. That, incidentally, was the title of a book co-produced by McLuhan. He had intended to call it 'The medium is the message'. According to his son, when the book came back from the typesetters it had on the cover 'Massage'. McLuhan said, 'Leave it alone! It's great, and right on target!'.<sup>4</sup>

Those are some of the realities for firms practicing across national borders. This event, however, is a meeting beyond Australian borders of the Australian Bar Association. It represents not global law firms but sole practitioners who act as advocates and advisers. The first question in my title is — why here? What relevance does the Eternal City have for the Bar whose learning capacities and skills many would say are most naturally deployed, and to

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<sup>3</sup> Australian Government Office for Learning and Teaching, *Internationalising the Australian Law Curriculum for Enhanced Legal Practice* (Final Report 2012), 22.

<sup>4</sup> Eric McLuhan, 'Commonly asked Questions (and Answers)', [www.marshallmcluhan.com/commonquestions/](http://www.marshallmcluhan.com/commonquestions/).

their best advantage, in the Australian domestic, legal environment? What can barristers, steeped in the Australian legal tradition, have to say to each other or hear from anyone else in Rome that is likely to be useful to them in a legal services world dominated by international law firms some of whom may have no reason not to offer their own advocacy services in the global market place without the assistance of post nominals, royal or republican, declaring their excellence. Many of these firms will straddle jurisdictions in which advocacy services are naturally offered from within the firm itself. It is to set a framework for thinking about the large issue of the Australian Bar in an international legal environment that I ask the question raised by the title of this presentation — Why Rome and not Hong Kong?

In responding to that question it is relevant to look to Australia's international trade statistics. It would be dangerous to imagine that the question, 'Where should the Australian Bar be meeting?', can be answered simply by reference to trade figures. They do, however, provide a context. In 2012, Australia's principal export markets were China, Japan, the Republic of Korea, India and the United States.<sup>5</sup> It is therefore a statement of the obvious to say that international contractual documents and security instruments, used in those markets, will not necessarily be governed by the common law and statute law of Australia, and that disputes about them will not necessarily be resolved in Australian courts. Australian lawyers must know about, and adapt to, transactional and dispute resolution instruments and processes which cross national boundaries and involve the use of internationally accepted models, and the application of uniform or model laws owing their existence to multilateral conventions and international law making bodies. They must also adapt to the reality that, in the context of dispute resolution, such instruments and laws may be interpreted by courts or arbitrators steeped in legal systems and traditions and methods not necessarily identical to those which would be applied in Australian courts or by arbitrators operating under Australian law. That adaptation is well within the capacity of the profession. The long history of our own legal tradition and legal system, including the Australian Constitution, is one of the untidy growth of different strands and global entanglements. In engaging the legal systems of the world and our region we do not step from a pure stream of Anglo-Australian jurisprudence into a muddy torrent in which common law, civil law and other legal traditions are mixed up together. It is muddiness all round.

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<sup>5</sup> China 24.6%, Japan 16.7%, Republic of Korea 8%, India 5.6%, United States 4.8%; Department of Foreign Affairs and Trade, 'Trade Statistics', <http://www.dfat.gov.au/tradematters/images/aus-lg.jpg>.

In particular, Australian lawyers, thinking about the history and nature of their own legal tradition and system in this larger context should not lightly accept the, sometimes too lightly made, criticisms of the *bien pensant* that they are parochial, or insular or, in the meaningless *bon mot de jour* — exceptionalist. Our legal tradition and legal system have connections in historical time and global space to the legal systems and traditions of other places. In the global village today, those connections grow deeper and become more complex. There are very few areas of the law in Australia which do not have an international dimension. It pervades many of our domestic statutes in fields from crime to commerce, from family law to human rights and can inform the development of the common law — including through the adoption of rules of customary international law.

The most recent example of the application of international law in the Australian domestic context was the decision of the High Court in *Maloney v The Queen*<sup>6</sup>, judgment in which was delivered on 19 June 2013. The Court was concerned with a Queensland law imposing restrictions on possession of alcohol in an Indigenous community and whether the laws were invalid for inconsistency with the *Racial Discrimination Act 1975* (Cth). The case required consideration of whether the restrictions effectively discriminated against Indigenous people in their enjoyment of rights protected by the International Convention for the Elimination of all Forms of Racial Discrimination and, if so, whether the law was a special measure within the meaning of Art 1(4) of that Convention. The case involved interpretation of provisions of the Convention which had been incorporated by reference into the terms of the domestic statute. Examples of such cases in decisions of the High Court in recent years can be multiplied. One of particular interest to the commercial community was the decision of the Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*,<sup>7</sup> which supported the enforceability of arbitral awards made under the *International Arbitration Act 1974* (Cth) which gives effect to the UNCITRAL Model Law on International Commercial Arbitration.

An advocate of Rome as an appropriate venue for this Conference could point to the number of international conventions and instruments that have their genesis or part of their

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<sup>6</sup> [2013] HCA 28.

<sup>7</sup> (2013) 87 ALJR 410.

development here and which affect Australian domestic laws. An organisation worthy of particular mention in that context is the International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT was set up originally in 1926 as an organ of the League of Nations and re-established in 1940 pursuant to a multi-lateral agreement known as the UNIDROIT Statute. There are 63 member countries, of which Australia is one. Amongst its membership from our region are China, India, Indonesia, Japan and Korea. The United Kingdom, the United States and Canada are also members. The function of UNIDROIT is to study needs and methods for modernising, harmonising, and coordinating private, and in particular, commercial law as between States and to formulate uniform laws, instruments, principles and rules to achieve those objectives. Its work has given rise to many important international instruments including Conventions relating to uniform laws for the international sale of goods, international wills, financial leasing, factoring, franchise disclosure and international securities. Of particular importance are its published Principles of International Commercial Contracts, in the preparation and revisions of which, former Australian Federal Court Judge and distinguished legal academic, Paul Finn, has had a continuing involvement. Put simply, the Principles are, as he has described them:

In the nature of default rules which can readily be incorporated into the terms of a domestic contract made in this country.<sup>8</sup>

They have had a significant impact on contract law globally. They are widely accessible in many languages including Chinese, Arabic, Korean and Japanese, and are taught in all major law faculties in civil law and common law jurisdictions. Professor William Tetley, Professor of Law at McGill University and a leading text writer in maritime law, said:

They provide an actual formulation of the norms of the modern *lex mercatoria* in concrete, black letter wording, which can be cited and argued about by practitioners, and applied by judges, around the world, particularly to fill gaps in the law applicable to transnational contractual disputes and international uniform law instruments.<sup>9</sup>  
(footnotes omitted)

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<sup>8</sup> Paul Finn, 'The UNIDROIT Principles: An Australia perspective' (Speech delivered at the UNIDROIT Principles of International Commercial Contracts: What Do They Mean For Australia? CLE Seminar, Sydney, 25 June 2008) 8.

<sup>9</sup> William Tetley, 'Uniformity of International Private Maritime Law: The Pros Cons and Alternatives to International Conventions – How to Adopt an International Convention' (2000) 24 *Tulane Maritime Law Journal* 775, 794–5.

Particular examples of contracts between parties in different Asian countries involve the application of the principles to institutional and ad hoc arbitration clauses and to jurisdiction clauses. In this field Rome's arms stretch around the world.<sup>10</sup>

Putting to one side its direct contemporary relevance, another advocate of Rome as an appropriate venue for this Conference could well argue that there is no better vantage point from which to contemplate the long history of our own legal system and its global connections than here. This city was the capital of an Empire that for about three and a half centuries from 43AD occupied, as its province, the home of our common law tradition. During that occupation, Roman law was applied in Britain, not least by three great Roman jurists: Papinian, Ulpian and Paulus of whom Papinian was counted the greatest.<sup>11</sup> He was, according to legend if not verified history, the quintessentially independent and incorruptible legal adviser who paid the ultimate price for refusing a brief to say that black was white. Professor Wigmore told the story in 1936:

When the ruthless Emperor Caracalla caused the assassination of his own brother who shared the throne with him, and then directed Papinian, his Attorney-General to prepare a legal opinion justifying the deed, Papinian courageously refused, with the memorable words, "I do not find it so easy to justify such a deed as you did to commit it" and for this rebuke Papinian was himself put to death.<sup>12</sup>

The accuracy of that account, which appeared in Gibbon's *Decline and Fall of the Roman Empire* may be doubtful, but it makes a good story for lawyers.

With the end of the Roman occupation of Britain, Roman law was said by some to have departed and to have played no further role in the development of the common law. It is improbable that it departed without trace. In any event its influence was renewed in the middle ages through successive papal appointments to the office of the Archbishop of Canterbury and the role played by and through the holders of that office and their advisers in the teaching and application of Canon Law and, through it and directly, the teaching and application of Roman Law. The influence of Roman law on the development of the English

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<sup>10</sup> Eric Brödermann, 'The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice — The Experience of a German Lawyer' (2011) 16 *Uniform Law Review* 589.

<sup>11</sup> According to the Law of Citations (AD 426) of Theodosius II, Emperor of the Eastern Roman Empire Papinian's opinions were to prevail if there were divisions of view in the writings of the five great jurists, Papinian, Ulpian, Paulus, Modestinus and Gaius.

<sup>12</sup> JH Wigmore, *A Panorama of the World's Legal Systems* (Washington Law Book Co, 1936).

legal system has been much debated. It is a field in which history wars have raged for reasons, typical of history wars, that are not entirely related to the search for accuracy.

Professor Jenks in his *Short History of English Law*, published in 1912, made the incontrovertible observation that it was idle to suppose that the knowledge of the Roman law was not applied particularly in the solution of problems for which ancient customs made no provision. He added:

But the point to be remembered is, that the influence of Roman law became in England secret, and, as it were, illicit.<sup>13</sup>

Through the fog of those wars, it is tolerably clear that Roman and Canon Law were taught at Oxford, first by Vacarius, a distinguished civilian lawyer from Mantua who had taught at Bologna and who was brought to England by Archbishop Theobald in 1143. Law students at Oxford were called pauperists because those who could not afford to purchase copies of Justinian's Code and the Digest purchased Vacarius' nutshell version of the Code called 'A Summary of Law for Poor Students'.<sup>14</sup> He was by no means the last great expositor of Roman and Canon law in England.

The history wars raged across the centuries. Henry Bracton's famous tract setting out the Laws and Customs of England, published in the twelfth century, was attacked by Sir Henry Maine 600 years later as a kind of Roman wolf in the sheep's clothing of the common law. Referring to what he called 'Bracton's plagiarisms', which included Roman law ideas informing English doctrines of bailments and easements,<sup>15</sup> Maine said:

That an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence ...<sup>16</sup>

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<sup>13</sup> Edward Jenks, *A Short History of English Law: From the Earliest times to the End of the Year 1911* (Methuen, 1912) 20.

<sup>14</sup> Edward Re, 'The Roman Contribution to the Common Law' (1961) 29 *Fordham Law Review* 447, 466 citing Ortolan, *The History of Roman Law* (Cutler, 2<sup>nd</sup> ed, 1896) 422.

<sup>15</sup> *Coggs v Bernard* [1703] 2 Ld Raym 900; 92 ER 107; *Re Ellenborough Park* [1956] Ch 131.

<sup>16</sup> Sir Henry Maine, *Ancient Law: Its Connection to the History of Early Society* (1883) 48.

Lord Mansfield was attacked along similar lines by Junius:

In contempt or ignorance of the Common law of England, you have made it your study to introduce into the Court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme.<sup>17</sup>

The great English legal historian, Sir William Holdsworth, more reasonably acknowledged that it was clear that Bracton had resorted to Roman terms, maxims and doctrines 'to construct upon native foundations a reasonable system out of comparatively meagre authorities.'<sup>18</sup> William Blackstone organised his commentaries in categories inspired by Roman law but played down the influence of Roman law on the common law of England. His musings on that topic were dismissed by Professors Pollock and Maitland who observed that while all might admit his great ability as a lawyer and a lecturer:

it is manifest that history was not his forté.<sup>19</sup>

Pollock and Maitland gave credit to the Romans where credit was due:

It is by "popish clergymen" that our English common law is converted from a rude mass of customs into an articulate system, and when the "popish clergymen," yielding at length to the pope's commands, no longer sit as the principal justices of the king's court, the creative age of our medieval law is over.<sup>20</sup>

They were kinder to Blackstone than John Austin who, in his *Lectures on Jurisprudence*, heaped one insult after another on Blackstone saying of his manner of writing:

It was not the manner of those classical Roman jurists who are always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous style, as the tawdry and the flimsy dress of a millner's doll, from the graceful and imposing nakedness of a Grecian statue.<sup>21</sup>

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<sup>17</sup> TE Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge University Press, 1885) 180.

<sup>18</sup> Sir William Holdsworth, *A History of English Law* (Methuen, Vol II, 1903) 285–6.

<sup>19</sup> Re, above n 14, n 31; citing Howe, *Studies in Civil Law* (2<sup>nd</sup> ed, 1905) 112.

<sup>20</sup> Sir Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 1911) 133.

<sup>21</sup> John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law* (John Murray, 1895) 463.

Another area of contest concerned the role of Roman law and its concept of *aequitas* on the growth of equity jurisprudence in England — was this a case of one system influencing another or just great legal minds thinking alike across the millennia? Equity is a field which generates strong feelings in some sections of the Australian legal profession. I shall not venture on to that battle field overgrown as it now is.

The wars to which I have referred are, for the most part, what Wordsworth called, 'old, unhappy, far off things and battles long ago'. Whatever their rights and wrongs, there are concepts of legal architecture, systematic approaches to legal principle, specific doctrines and indeed notions of constitutionalism against State and regal absolutism that have clear connections to Roman law and jurisprudence. And even if all those things are put to one side there are the words of Chief Justice Tindal, in his judgment in *Acton v Blundell* in 1843:

The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe.<sup>22</sup>

That was a very contemporary sounding statement applicable to comparative law in general and a recognition of the kind of interaction of legal traditions and systems which are part of our legal history. An Australian judge could say much the same today of the judicial decisions of other national jurisdictions which are taken into account in Australian courts.

The common law of England bearing acknowledged or unacknowledged the influences of Rome travelled to its colonies. In the American colonies, Blackstone was its prophet and *Blackstone's Commentaries* its scripture. His text, which was published in the 18th century, sold almost as many copies there as it did in England. The United States, however, brought forth its own great texts, in particular James Kent's *Commentaries on American Law* and Joseph Story's *Commentaries on Equity Jurisprudence, Bailments, Conflict of laws, and The Constitution*.

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<sup>22</sup> 12 M & W 324, 353; 152 ER 1223, 1234.

Roman influences were alive and well in the writings of both Kent and Story who frequently cited Roman and civil law sources. Indeed, Story commenced his *Commentaries on Equity Jurisprudence*, published in 1884, with a discussion of the concept of equity under Roman law and the Roman notion of the equitable interpretation of statutes. His texts and Kent's, migrated across the Atlantic to England. Both came to Australia. Bruce McPherson has said of both men:

Between them, Kent and Story not only naturalised English law and consolidated its place in the United States, they also rationalised the use, understanding and teaching of it in the place of its origin.<sup>23</sup>

The High Court has quoted both in recent times. Kent has been cited in relation to water rights and their allocation<sup>24</sup> and in a decision concerning the validity of a Commonwealth tax on the judicial pensions of State judges.<sup>25</sup> The Court has referred to Story in seven recent decisions dealing variously with the equitable doctrine of contribution,<sup>26</sup> the validity of control orders under anti-terrorism legislation,<sup>27</sup> the unpaid vendor's lien,<sup>28</sup> contribution between co-obligors,<sup>29</sup> the common law doctrine of failure of consideration,<sup>30</sup> unconscionable conduct<sup>31</sup> and the notion that guardianship applies to property and not to persons.<sup>32</sup>

Beyond the many strands, including Roman and civil law, that make up the history of the common law of England which, as received in the Australian colonies, evolved into the common law of Australia, our Constitution has its own global entanglement. Important elements of the United States Constitution, the Canadian Constitution and the notion of responsible government under the unwritten constitution of the United Kingdom, are reflected in the Constitution of the Commonwealth of Australia. As Sir Owen Dixon

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<sup>23</sup> Bruce McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007) 493.

<sup>24</sup> *ICM Agricultural Pty Ltd v Commonwealth* (2009) 240 CLR 140, 173 [55] (French CJ, Gummow and Crennan JJ).

<sup>25</sup> *Austin v Commonwealth* (2003) 215 CLR 185, 262 [159] (Gaudron, Gummow and Hayne JJ).

<sup>26</sup> *Friend v Brooker* (2009) 239 CLR 129, 148 [38] (French CJ, Gummow, Hayne and Bell JJ).

<sup>27</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 357 n 199 (Gummow and Crennan JJ).

<sup>28</sup> *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 [21] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

<sup>29</sup> *Burke v LFOT Pty Ltd* (2002) 209 CLR 280, 316 [87], 318 [94] (Kirby J).

<sup>30</sup> *Roxborough v Rothmans of Pal Mal Australia Ltd* (2001) 208 CLR 516, 552–553 [94] (Gummow J).

<sup>31</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 242–243 [93] (Gummow and Hayne JJ).

<sup>32</sup> *Clay v Clay* (2001) 202 CLR 410, 428–429 [37]–[38] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

remarked, in 1942 in an address to the American Bar Association, the Australian Constitution 'roughly speaking' is 'a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions.'<sup>33</sup>

Having regard to the history of our legal tradition and legal system, it is not surprising that decisions of courts from jurisdictions with similar or analogous traditions and legal systems find their place in Australian judicial decisions. The High Court has regularly cited foreign case law in its judgments. That case law has, however, come from a narrow band of jurisdictions, historically, but to a diminishing degree, dominated by English decisions and have included decisions from the United States, Canada and New Zealand. There was, of course, an evolution since Federation in the use of decisions of the Privy Council and the House of Lords to a link, described by former Justice Kirby, in something of an echo of Chief Justice Tindal, as:

Now one of rational persuasion in a context of substantially shared basic legal doctrine.<sup>34</sup>

It is fair to say, however, that there is little citation of case law outside the principal common law jurisdictions and less of non-English foreign case law. Nevertheless, the internationalisation of the law particularly in relation to human rights, commercial transactions and dispute resolution, including cross border insolvency and international arbitration, environmental protection, criminal law, marine pollution, intellectual property and many other fields sets the stage for engagement with legal developments, both judicial and non-judicial, across a much wider range of jurisdictions than was the case earlier in our legal history. To the extent that uniform and model laws and transaction documents draw upon civil law concepts, there may be an element of Europeanisation of private law in the international field. It is against that background that it is useful to return to some statistics.

When the focus upon Australia's international trade statistics is narrowed to legal services, the significance of the Asia Pacific region becomes clear. Australia's legal services

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<sup>33</sup> Sir Owen Dixon, 'Two Constitutions Compared', (Speech delivered to the Annual Dinner of the American Bar Association, 26 August 1942); cited in (1942) 28 *Australian Law Journal* 733, 734.

<sup>34</sup> Michael Kirby, 'The Old Commonwealth: Australia and New Zealand' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords: 1876-2009* (Oxford University Press, 2009) 339, 343-45.

export market was \$709.1 million in 2008–2009. Not surprisingly it has increased most rapidly in the Asia-Pacific region. In 2008-2009, China and Hong Kong, the Pacific region and Singapore and Japan accounted for nearly a third of it representing about \$225 million.<sup>35</sup> Arbitration services represented a minor element.<sup>36</sup> Those statistics, like all statistics, have to be treated with care. What they do indicate is an increasing engagement by Australian lawyers generally with legal systems and traditions, some of which are informed by the common law, some of which are informed by civil law traditions, and some of which represent a mix of legal traditions evolving from particular national histories.

Effective transactional and dispute resolution mechanisms in these differing legal environments require actors in the market to engage on common and mutual comprehensible ground. That engagement may involve the use of model forms of instrument recognised internationally and the application of model or uniform laws based upon international conventions. It also requires an openness by Australian lawyers to the different legal traditions and systems in which those instruments and laws are used and applied. Some solutions to legal problems will involve elements of more than one legal tradition. The long and rather tangled history of our own legal system, including the history of the common law, common law constitutionalism, federal constitutionalism based on the United States and Canadian models, and the growth of statute law giving effect to international conventions reflect many influences. They are influences extended in time and space across national boundaries. Engagement with the legal traditions and systems of countries in our region is a natural historical development in which the Bar, if it is to be relevant to that development, must find its place. It must be a well-educated place, that is, well educated in the history, the law, the culture and customs of the region.

There is much being done to enhance opportunities for engagement by the Australian legal profession in the Asia Pacific region. The involvement of the Australian Bar is included, at least by necessary implication, in the activities summarised in the recent submission by the Law Council of Australia to the Department of Foreign Affairs and Trade

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<sup>35</sup> International Legal Services Advisory Council, 'Australia's international market for legal and related services: 2008-09 FY'  
<http://www.ilsac.gov.au/GlobalLegalServicesandMarketAccess/ILSACStatisticsSurvey/Pages/ILSACs-third-International-Legal-Services-Statistics-Survey-2008-09.aspx>.

<sup>36</sup> Arbitrators, mediators, immigration agents, debt collectors and other participants generated \$27.3 million or 4% of the market. See *Ibid*.

entitled 'Development of Country Strategies for Japan, China, Indonesia, India and South Korea'. The submission, published just over three weeks ago, was a response to the Government White Paper: Australia in the Asian Century. It focused on two topics of importance to Australian lawyers in the region:

- The promotion of the liberalisation of legal services and the reduction of barriers to international trade in those services.
- The promotion of the rule of law and capacity building in the law and justice sector in the region.

The submission gave an account of current initiatives by the Law Council of Australia in each of the countries mentioned and in the South Pacific region. It rewards reading by all members of the Bar with an interest in this area. It lends emphasis to the proposition that the future of the Australian Bar in the countries of the Asian region lies largely in the hands of the Bar itself in conjunction with the rest of the Australian legal profession. Government can be called upon to assist, but it is the profession which must ensure that it has the skills and knowledge and the collective strategies which will, among other things, create opportunities for Australian lawyers to advise, to appear in courts, and before arbitrators, and to act as arbitrators in the region.

The Law Council submission sets out a formidable array of initiatives which have been taken. It is clear that liberalisation of legal services between countries with whom we do business is a long term process in which vested interests and the public interest are involved. It involves reciprocity. Liberalisation, however, is just a first step. From the Australian perspective, it is pointless if we do not have a body of lawyers who have relevant skills to offer in relevant areas of advice and representation, informed by an understanding of the legal traditions and legal systems in which they seek to offer them. In this respect the Law Council's comment on engagement between the legal professions of Australia and China was telling. The submission said:

A large impediment to deepening engagement between the legal professions of Australia and China is the lack of understanding of each other's legal systems. The origins of the Chinese legal system are deeply historical. In some aspects the Chinese

legal system is closer to the legal systems of continental Europe than to the English common law. The Chinese legal system is influenced in other areas by the systems of the Soviet Union. There is also traditional Imperial Chinese law that continues to permeate many areas, both socially and legally. These factors, and the thinking behind them, are a major cause of the gap between form and reality, and between how lawyers study and learn the profession, and how they practice within it.<sup>37</sup>

As the Law Council submission observes, the Australian legal system has a vastly different historical origin from the Chinese. Nevertheless, an historical perspective on our own legal tradition and system should sensitise us to the utility of an historical perspective on the systems of the countries with whom we would engage. It should stimulate self-education about those histories, perhaps organised at a practical level by the organised profession.

For an outward looking Bar, and a Bar that should be looking to the Asia Pacific region, Rome is a good place to start. The title of this presentation can perhaps now be amended by dropping the question: Why Rome? on the basis that there are a number of good answers to it. That leaves the question for next time: Why not Hong Kong or some other major Asian capital?

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<sup>37</sup> Law Council of Australia, Submission No 242 to Department of Foreign Affairs and Trade, *Australia in the Asian Century White Paper: Development of Country Strategies for Japan, China, Indonesia, India and South Korea*, 7 June 2013, 15 [91].