

Australian Law Students' Association Conference

The future is not what it used to be

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For persons of advanced age in the law it is always an energising experience to be present with law students and those who are about to graduate and to experience their optimism, their questioning, their perspectives, their potential for innovation and for making important contributions to the future of Australian society. That potential may find its realisation in a variety of fields. One to which many aspire is legal practice in Australia, in the public or private sector, in large international law firms, in suburban, regional and rural law firms, in community legal service centres or in non-government organisations focused upon public interest law of various kinds. It is a reality that there are now more law graduates than there are opportunities for employment in legal practice. Legal practice, however, is just one among many ways of applying the skills and knowledge first acquired in a law degree. A law degree today, generally coupled with another tertiary qualification, confers on its bearer an important kind of literacy in the social infrastructure of our society. That literacy can be applied in many different settings, public and private, for profit and/or for the public good. Importantly, the narrow view of a law degree as a precondition to the grant of a ticket to practice law is no longer valid.

The only other occasion on which I have addressed this event was in 2005, also in Perth. I was asked to stand in for the preferred speaker, Bob Hawke, who was unavailable. The topic of my presentation then was 'Law and Rocket Science'. The gravamen of the message to your predecessors eight years ago was the need for flexibility in the application of your skills and particularly the interdependence of different areas of the law and the dangers of letting yourselves be trapped too early in specialist silos. I told your predecessors that to specialise too early, or for too long, would rot their brains. That message met with general approbation. However, when I returned to the official table one of the students at the table, who was about to graduate, told me that she expected to practice initially as a tax generalist

and only later to specialise in GST. Dinner table politeness masked my inner despair. Fortunately the soup was not deep enough for me to consider drowning myself in it.

The message I gave your predecessors on that occasion I renew with added emphasis. There is no area of the law today which is not entangled with other areas. To that I would add there is no area of the law as it is that is not entangled with the law as it was.

Let me take as an example of the law's entanglement with itself an unexciting sounding field — let us say superannuation law. On its face it sounds like a narrow field of practice. In truth it requires a generalist's skills. It straddles private and public law. It involves the application of equitable doctrines, particularly the law relating to trusts and fiduciary obligations. It involves contractual relations between employers and employees and is affected by statutory regimes specific to superannuation and of more general application. Its development has been linked to that of industrial relations law. From time to time it engages with the Constitution. Overlapping regulatory arrangements affect the administration of superannuation funds and impact on the rights and duties of trustees and beneficiaries. The relevant regulators include the Australian Prudential Regulatory Authority, the Australian Securities and Investments Commission and the Commissioner of Taxation. The exercise of their powers may attract the application of that branch of administrative law which involves judicial review.

The graduate today who wants to specialise in superannuation law or in human rights, crime, corporations, taxation, intellectual property, competition law or any other field must be committed to cultivating at least an awareness of the way in which his or her chosen field intersects with the law generally. The understanding and application of the law in any of these fields also requires an understanding of its history. There are not many statutes which do not have a history which can strengthen an understanding of the language of the statute and the purpose which it serves and thus its correct interpretation. There are not many doctrines of the common law or equity which do not have a history that stretches back over hundreds of years. There are not many provisions of the Constitution which do not have a history which can be traced to that of similar provisions in the United States Constitution or to the mechanisms of responsible government in the United Kingdom.

What I have said about specialisation does not deny the demands of the legal services market for people who have the requisite knowledge and skills in a particular field to enable them to identify quickly the issues for resolution in a legal problem presented to them and to advise reliably upon the options available to the client and the outcomes of choices which the client might make. The simple point which I have made remains, namely, that the competent specialist must have a suite of generalist skills which will, at the very least, enable him or her to identify the interaction of a legal problem in his or her field of specialisation with other areas of the law.

The emphasis on specialisation in contemporary legal practice, which has a longer history in the United Kingdom, marks a difference between legal practice today and in the time of my generation of young graduate lawyers in the 1970s. I had the good luck to secure Articles with a firm which gave me the opportunity to appear in courts at all levels in this city and in the country. Early appearances in lower courts in particular were an unforgettable introduction to the untidy realities of the justice system at work. In criminal matters the burden of proof was not always uppermost in the minds of those before whom I appeared. Particularly memorable observations from the Bench in those days included:

Your client wouldn't be here if he hadn't done something.

And:

I have listened carefully to the evidence of the prosecution and the defence and where the defence evidence conflicts with that of the prosecution, I prefer the prosecution evidence.

On one occasion when trying to wake a magistrate who had fallen asleep during my client's evidence, I said loudly — Your Worship, it is possible you have not heard some of my client's evidence over the sound of the transcript typewriter. To which His Worship responded:

I have great faith in the transcript.

Since that time, of course, the standards of the magistracy and their legal qualifications generally have improved beyond measure.

My early experiences in those courts engendered an awareness of the importance of statutory interpretation. Many of the minor cases involved the application of criminal statutes including the *Criminal Code 1913* (WA), the *Police Act 1892* (WA) and road traffic laws. The statutory procedures under the *Road Traffic Act 1974* (WA) for the operation of the breathalyser in those days were a lawyer's delight. There were many steps required. Every step was a potential argument and a potential source of a dismissal.

Those cases conveyed a lesson which remains valid to this day and is applicable to legal practice across the board from the smallest to the largest matters. There are very few legal transactions or disputes which do not involve the application of some statutory text. There are very few advices which do not involve consideration of some statute. In the area of personal injuries litigation, which is grounded in tort, the law has been modified by Civil Liability Acts in various States. In cases in which personal injury results in death, there may be an intersection with fatal accident legislation and, if the death is caused by personal injury in the course of employment, it may be necessary to consider workers' compensation legislation. Modes of practice have changed a lot since the 1970s, but the importance of a whole of law approach to the resolution of legal problems, including a recognition of the importance of statutory modifications of the unwritten law and of the relevant aspects of legal history remains.

So far I have been talking about Australian domestic law. But domestic law and legal practice are increasingly entangled with international law and commonly used mechanisms of international trade and commerce, including uniform and model instruments and laws. In a report recently published by the Australian Government Office for Learning and Teaching on Internationalising the Australian law Curriculum for Enhanced Global Legal Practice, the reader is told 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'.¹

The effects of globalisation of legal services are not just felt in legal practice in large international firms. International law informs many important Australian domestic statutes affecting criminal law, human rights, commercial law, intellectual property law, competition law and many other fields.

A very 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*,² judgment in which was delivered on 19 June 2013. In that case the Court dismissed a challenge to the validity of a Queensland law which imposed restrictions on the possession of alcohol in an Indigenous community. The law was said to be invalid for inconsistency with the *Racial Discrimination Act 1975* (Cth). The Court had to consider whether the restrictions imposed by the Queensland law 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 Article 1(iv) of that Convention. The case required the Court to interpret provisions of the Convention which had been incorporated by reference into the *Racial Discrimination Act*. There are many examples of such decisions in recent years.

It is relevant to notice the internationalisation of Australia's legal services market and its focus in the Asia Pacific region. Australia's legal services export market was \$709.1 million in 2008–2009. 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.³ 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

¹ Australian Government Office for Learning and Teaching, *Internationalising the Australian Law Curriculum for Enhanced Legal Practice* (Final Report, 2012) 22.

² [2013] HCA 28.

³ 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>.

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 in our region require actors in the market to engage on common and mutually 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 reflects 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 Australian legal profession 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.

Australian society is changing. The public expectations of those who exercise public power, be it legislative, executive or judicial, are high. Decision-making affecting rights and freedoms and private interests is expected to be lawful, fair, rational and intelligible. There are many mechanisms for the review and scrutiny of such decisions. The economic efficiency of public institutions is under scrutiny. The benefits conferred by the legal profession are weighed against their costs, both economic and non-economic and sometimes the benefits are found wanting in the balance.

In the field of litigation within Australia the courts and the profession have been grappling for some decades now with ways of making their processes more efficient and less expensive. There is still a long way to go particularly in relation to litigation involving large volumes of documentation and electronic communications. We have seen the rise of the litigation funders and of large scale class actions. Dispute resolution mechanisms such as arbitration and mediation have become more prominent as alternatives to judicial dispute

resolution. To the extent that these mechanisms offer speedy and economically efficient means of resolving disputes, and perhaps means which do not leave relationships between the parties permanently fractured, they offer obvious benefits. Those benefits, however, come with a price tag. The greater the incidence of dispute resolution by private means, which are not reviewable in the courts of the land, the less visible the working of the rule of law in our society becomes. The point was made well many years ago in an article in the *Yale Law Journal* entitled 'Against Settlement', in which Professor Owen Fiss said of the judiciary:

These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.⁴

That principled scepticism about alternative dispute resolution may have been at odds with the prevailing conventional wisdom then and may be at odds with it now. But the point that was made about the essential character of the judicial function is still valid.

Courts have also had to grapple with changes in the functions conferred upon them and upon judges of the courts by legislatures. Some of those functions have raised questions of a constitutional nature about the essential and defining characteristics of courts. There is undoubtedly ongoing pressure on a variety of fronts for institutional evolution and change. It is important that the profession be responsive to those pressures without yielding on the fundamentals of the importance of the judiciary as an independent branch of government and of a strong and independent legal profession providing affordable access to justice. That being said, I expect that there will be in your professional lifetimes substantial changes in the way in which law is practiced and the range of people who can practice it.

The future is not what it used to be. It bristles with new challenges. Your generation with all its energy, questioning, new perspectives and potential for innovation is well placed to meet those challenges. I wish you all well.

⁴ (1984) 93 *Yale Law Journal* 1073, 1085.