

LAW SUMMER SCHOOL 2009
UNIVERSITY OF WESTERN AUSTRALIA

**"In praise of breadth" – A reflection on the virtues of generalist
lawyering**

Chief Justice Robert French
High Court of Australia
20 February 2009

Before he studied law, my eldest son studied aviation science with a view to becoming an airline pilot. Part way through the course he discovered that he did not like flying planes. However, he finished the degree and enrolled in graduate law. After completing his law degree he applied for articles. In one of the interviews he was asked the standard – do you have any questions? – question. He asked, how do you coordinate the provision of legal services from different sections of the firm to a new client with a variety of needs? He got the job. No other applicant had asked such a question. Why did he? Because in his aviation science course he had studied flight crew management – the art and science of bringing together people with different skills in pursuit of the common goal of getting the plane up, keeping it up, keeping the passengers happy and landing it safely.

The story gives rise to the following disparate propositions:

1. No learning is ever wasted.
2. Specialisation gives rise to management issues.
3. The best specialist is also a generalist.

These propositions inform my broad message that there is value for all legal practitioners in maintaining general legal competencies. Recognition of that value has underpinned the long tradition of the Annual Law Summer School as a non-specialist CLE event and an opportunity to learn about new and developing areas of the law and to enhance understanding of existing areas.

There is another dimension to that message. The Commonwealth Government, the Council of Australian Governments and the Law Council of Australia are all committed to the examination of regulatory reform of the legal profession at a national level. In any such examination there must, in my opinion, be careful and rigorous consideration of the issue of specialisation within the profession. That examination should aspire to a better generic understanding of the concept than presently exists, the criteria for defining particular specialties and the interests served and objectives advanced by their recognition and regulation.

I must declare a bias. My views about general and specialist practice have been shaped by my experiences as a practitioner and as a judge. Those experiences have also informed my views about specialisation within the Court system.

I did my articles in a small Perth law firm in 1971 and 1972. The firm had a strong rural conveyancing practice through its major client, a firm of accountants with branches throughout regional Western Australia. As an articled clerk and young practitioner I drafted farmer's wills and leases and contracts for the sale of property, often to the farmer's own family to minimise the incidence of estate duty. Partnership formations and dissolutions and the incorporation of companies were all part of my standard fare. The firm had a litigation practice covering, inter alia, commercial disputes, building disputes and personal injury claims. I was active in those matters. As an employed solicitor and then as a partner in that firm and later in my own firm, I also developed a criminal practice appearing frequently in Petty

Sessions and the District and Supreme Courts and on judicial review of the decisions of Magistrates. The nature of the legal work to which I was exposed in my early years as a lawyer was diverse. Statutory interpretation played an important role in much of that diversity. But the techniques were the same whatever the subject matter. Close scrutiny of the statute applicable to a case, even the most unpromising criminal case, often yielded unexpected benefits. As my practice developed it extended to taxation, public law, intellectual property and trade practices, the latter in the area of misleading or deceptive conduct under Pt V of the *Trade Practices Act* and anticompetitive conduct under Pt IV. All of these are areas in which statutes play a dominant role but in which there are almost always intersections with common law and equity and sometimes, of course, with the Constitution.

My experience was not unique nor were the benefits it conferred. As former Justice Michael McHugh said of his wide-ranging practice at the New South Wales Bar, which covered, crime, industrial law, intellectual property and constitutional law, among other things:

"... ideas acquired in one branch of the law are transferable to other branches of law. Practical examples of the working of the law in one of its branches frequently provide persuasive analogies in other branches. The wider the scope of the lawyer's practice, the better lawyer he or she is likely to be."¹

Those who practice across a variety of subject areas will often observe recurring patterns of principle and technique particularly in relation to statute law.

¹ The Hon Justice M McHugh AC, "The Growth of Legislation and Litigation", (1995) 69 *Australian Law Journal* 37 at 41.

The same phenomenon is true of the judge-made law although it is affected by the untidy realities of the historical development of particular bodies of doctrine. Recognition of recurring patterns allows for cross-fertilisation of areas from one sector of the law to another. So a broad knowledge of developments in the law generally can be an important resource for advisor, negotiator, transaction maker and litigator.

While diverse practice yields benefits it may suffer some disadvantages as against specialist practice in terms of efficiency and the marketability of the legal services to some classes of client. The specialist practice can offer benefits to both practitioner and client in this respect. But there are risks if the practitioner fails to keep abreast of the general law where it intersects with his or her specialty. This requires the practitioner and those who would regulate specialty practice to confront from the outset the fundamental question – how does one define the limits of a specialty? Even before that it is necessary to have a generic concept of specialty as a class of legal practice.

The generic definition of "specialty" has not received close analysis in the literature about legal practice. Those writing about the subject have tended to concentrate on questions of advertising and accreditation, anti-competitive effects and social science aspects. In 1955, Charles Joiner a Professor of Law at the University of Michigan in an article published in the American Bar Association Journal said:

"All that is meant by specialization is the concentration of a lawyer's practice within less than all of the fields of law. As a result, he expects to be more

proficient in the particular fields of his practice than if he had devoted his time to all fields of the law."²

In a substantial study about the prestige attaching to different kinds of legal specialisation, published in the American Bar Foundation Research Journal in 1977³, the authors passed over definition quickly:

"As we use the term 'specialty ' in this article, it refers only to an area or field of law practice that has a more or less distinct content or set of tasks. We do not mean to imply any particular degree of specialization in the area – ie, that lawyers who perform that sort of work tend to do it to the exclusion of any other."⁴

In the following year in Australia Roman Tomasic and Cedric Boullard published a preliminary report for the Law Foundation of New South Wales entitled "Lawyers and their Work in New South Wales". They replicated elements of the American Bar Foundation study on the prestige attached to different specialties. They did not embark upon definitional analysis and may be taken to have worked upon the same generic definition as the American investigators. However, the specialty designations they studied indicate the breadth of the concept as they saw it. The list included the following as the highest scoring specialties for prestige:

² Joiner, "Specialization in the Law: Control It or It Will Destroy the Profession" (1955) 41 *American Bar Association Journal* at 1105.

³ Laumann and Heinz, "Specialization and Prestige in the Legal Profession: The Structure of Deference" (1977) *American Bar Foundation Research Journal* at 155.

⁴ *Ibid* at 165.

1. Equity.
2. Taxation and stamp duties.
3. Civil litigation (Supreme and High Courts).
4. Commercial law matters.
5. Trade practices law.
6. Constitutional law.
7. General commercial.
8. Securities.

At the bottom of the prestige heap were:

1. Workers compensation (for respondent)
2. Family law matters.
3. Workers compensation (for applicant).
4. Criminal law matters.
5. Industrial law (act for union).
6. General legal aid work.
7. Landlord/tenant.
8. Civil litigation (Petty Sessions).

The generic definition did not advance far in later years. The potential for confusion between specialty defined by reference to choice of practice on the one hand and superior expertise on the other, had not gone unnoticed. An article published in the Australian Law Journal in 1981 observed that "specialisation" has

two distinct albeit related meanings⁵. One refers to a limitation of activity to a particular area of practice. Another refers to the acquisition of knowledge and skills in a particular area by special study and training. Plainly these two ideas are not synonymous. A lawyer of modest competence may sensibly carry on a practice limited to areas which he or she finds familiar and relatively undemanding. Whether such a lawyer would justify the designation of "specialist" may be questionable. Another lawyer of high skill and capacity may decide to offer a narrow band of services to a narrow range of clients in an area of great complexity and difficulty. As the author of the Australian Law Journal article observed:

"It is necessary when talking about specialisation to be clear which of these two meanings is intended."⁶

There is nevertheless a degree of overlap between the two meanings. The New South Wales Law Reform Commission in its 1981 Discussion Paper on Advertising and Specialisation in the Legal Profession pointed out that:

"In common parlance, specialisation is often used to mean a substantial degree of concentration of work in a particular field. But concentration in a field often leads to expertise in it and, accordingly, specialisation is commonly used to connote a substantial degree of both concentration and expertise."⁷

⁵ Morgan, "Specialisation", (1981) 55 *Australian Law Journal* 663.

⁶ Morgan, "Specialisation", (1981) 55 *Australian Law Journal* 663 at 665.

⁷ New South Wales Law Reform Commission, *The Legal Profession Discussion Paper No 5 Advertising and Specialisation*, 3.

Recognition of specialisation in practice and accreditation schemes for that purpose are well established in Australia and are administered by State-based law societies. In July 1994 the Law Council of Australia presented a blueprint for the structure of the legal profession including a proposed scheme of national accreditation⁸. The Law Council's blueprint was a response to the adoption of the National Competition Policy in February 1994 by the Council of Australian Governments. The Law Council proposed to develop a national specialist accreditation scheme and to support the creation of a national body comprising representatives of its constituent bodies. The national body would endorse the model of specialist accreditation which had already been adopted by Victoria and New South Wales. Its proposed characteristics included a requirement that accredited specialists should undertake legal education in the specialist area on a yearly basis and should be reaccredited on a regular basis.

The current Victorian scheme applies to designated specialist areas including "Business Law", "Commercial Litigation", "Criminal Law", "Immigration Law", "Wills and Estates" and "Workplace Relations". Accreditation is by application to the Specialisation Board of the Law Institute of Victoria. Subject to a special discretion of the Board accreditation requires that the applicant shall have practiced for at least three years at the equivalent of 25% of the time applicable to a fulltime practice, in the relevant area.

⁸ Law Council of Australia, "Blueprint for the Structure of the Legal Profession: A National Market for Legal Services" (1994).

In Western Australia specialist accreditation is limited to family law practitioners although I understand that accreditation of legal practitioners offering their services as mediators is planned.

The Professional Conduct Rules of the Law Society of Western Australia deal with specialisation but only in relation to the use of the term "specialist" in advertising. The Rules point out that like the term "expert" the term "specialist" can mean different things to different people. Consumers may construe it as implying expertise, while in fact it may refer to nothing more than a preferred area of practice.

At present there is no national scheme in place. In 2001, the then Attorney-General for the Commonwealth, Daryl Williams, noted that at that time the approach to specialisation had been left to individual legal professional associations. He added:

"However it does appear that there are discernible advantages in the development of uniform schemes. This is especially so in areas such as criminal law and family law. These issues have not been dealt with in any great detail, and until they are, progress in the reform of legal business structures is likely to be slow."⁹

Recently the question of national regulation of the profession has been placed back on the national agenda. On 3 February 2009, the Prime Minister announced that:

⁹ Attorney-General's Speech to the 32nd Australian Legal Convention, October 2001.

"... legal professional reform will form part of the Government's ongoing micro-economic reform agenda to strength the Australian economy in the face of the global financial crisis."

While acknowledging the regulation of the legal profession in Australia had been the subject of valuable changes in recent years, the Prime Minister said:

"... regulation remains overly complex and inconsistent and each jurisdiction maintains its own regulatory structure."¹⁰

The Prime Minister's statement was welcomed by the Law Council of Australia¹¹. And on 4 February 2009, the Council of Australian Governments agreed to add legal professional regulation to its micro-economic and regulatory reform agenda.

To the extent that national regulation of the profession seeks to deal with specialisation, it should do so on the basis of some useful understanding of what that concept means. The lack of precision and potential for confusion in current usage should be addressed. Added to the need for a generic definition is the need for criteria by which to define particular subject areas as areas of specialisation. This is apparent from the list of specialty areas set out in the work of Tomasic and Boullard

¹⁰ Joint Statement, Attorney-General and Minister for Finance and Deregulation, 3 February 2009, Legal Profession Reform to Strengthen Australian Economy.

¹¹ Law Council of Australia Media Release, "Prime Minister clears path for a truly national profession", 4 February 2009.

in 1977. The same might be said of the designations used by the Victorian Law Institute. Their generality, although it no doubt accords with usage within the profession, illustrates the difficulty of defining what they cover as specialties.

At the heart of the problem of limiting an area of practice and describing it as a specialty is the reality that proper advice or representation by the practitioner will often require consideration of legal issues notionally falling within another designated area of specialty practice or the general law.

This raises the question whether accreditation schemes for specialist practitioners should be designed to ensure not only that the practitioner maintains appropriate levels of expertise in relation to the accredited area of practice, but that he or she is also maintaining the necessary awareness of developments in the general law intersecting with and affecting the specialist practice. In this respect compulsory continuing legal education programs will serve not only to support the maintenance of appropriate levels of knowledge among general practitioners, but necessary levels of knowledge for specialist practitioners.

It is not my purpose in these remarks to engage in a critique of specialisation within the legal profession. However difficult the generic and specific definitions of "specialty" and "specialisation" necessary to any sensible discussion of the phenomenon those terms represent a well established response to perceived market needs. The problem in today's complex legal environment is that the law is not able to be divided conveniently into segments. Any apparently discrete section of legal practice cannot avoid the pervasive influence of other areas which are of general application. A leading example is found in the public-private law interface. There are few aspects of economic activity in our society that are not supervised by some kind of statutory regulator with a variety of powers and discretions. These may cover the grant, withholding, suspension or cancellation of licences to carry on

various kinds of commercial activity and powers to approve or not approve particular transactions. The business press frequently carries stories of intersections between these regulators and the private sector. The Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Takeovers Panel and the Australia Prudential Regulatory Authority are good examples. In the field of intellectual property, the Commissioner of Patents and the Registrar of Designs and Trade Marks have the power to make important administrative determinations affecting valuable intellectual property rights. They describe themselves, in the Australian Patent Office Manual, as an "an administrative tribunal"¹². Then there are the large numbers of Ministers, officials and tribunals, Federal and State, whose decisions can affect the occupations, welfare and opportunities of countless individuals and organisations. As I have remarked elsewhere, administrative law is the ether in which private law moves in a regulated society. In such a society no legal practitioner, however specialised, can afford to be unaware of the salient features of administrative law¹³.

Merger and acquisition lawyers, or those hardy ones still standing in the current economic climate, must deal with the requirements of the *Corporations Act 2001* (Cth) in respect of Pt 6 takeovers or Pt 5 schemes of arrangement. But in any acquisition an array of other areas of law may come into play as those familiar with the due diligence process will know. It is necessary in overseeing large mergers or acquisitions to have an appreciation of the extent to which the position of the target

¹² Australian Patent Office Manual of Practice and Procedure – Oppositions, Court, Extensions and Disputes, November 1995 Pt 1.

¹³ French, "Administrative Law in Australia: Themes and Values" in Groves and Lee (eds) *Australian Administrative Law – Fundamentals, Principles and Doctrines* (2007) at 16.

company, including its asset position and earning capacity, may be affected by rights and liabilities arising under a number of different legal regimes. These may include mining law and native title in relation to mining and resource companies, taxation, workplace relations, intellectual property, contract and perhaps tort and insurance law. Tort liabilities, including so called "long tail" liabilities, may arise out of particular products or activities carried out by the company in the past and affecting individuals or classes of person. Competition law issues may need to be considered, including the attitude of the regulator and the substantive law underpinning the regulator's approach. The ability of the company to market a particular product may depend upon the approval of a regulator. In the area of telecommunications acquisitions there is an additional regulatory regime involved in the acquisition or transfer of licences.

Intellectual property law is frequently designated as an area of special practice. Its primary focus is on the rights and liabilities created by the relevant intellectual property statutes. But intellectual property rights are a species of property. They are choses in action. They can be the subject of contract and of equitable obligations. They may arise in the context of an employment relationship and so intersect with employment law. They may, in some cases, intersect with competition law.

There is something of a tradition among some practitioners in the field of criminal law that resort to legal argument is a form of affectation. I remember on occasions as a young practitioner being looked at askance because I took law books into the Court of Petty Sessions. The criminal law, as we all know, involves issues of statutory interpretation and may intersect in a variety of ways with the general law. It is useful, for example, to know something about property law when dealing with stealing or other property offences. This is true for both prosecution and defence lawyers.

Many years ago I defended a man on a charge of arson arising out of the burning of his cray boat moored 400 metres from low water mark in Jurien Bay. Upon close examination of the *Criminal Code of Western Australia* my good academic friend, Peter Johnston and I constructed an argument to support a plea to the jurisdiction. The proposition was that, as a matter of statutory interpretation, the *Criminal Code* had a lacuna in its application between low water mark and the high seas. There was no statutory definition of the "high seas" so we resorted to the common law concept of "where great ships come and go". We thought it reasonably arguable that 400 metres off low water mark in Jurien Bay was not a place where great ships came and went. We were also ready to run with arguments, based on the law of the sea, that Jurien Bay was not part of the internal waters of Western Australia and was not an historic bay. In the event, we pleaded to the jurisdiction and also pleaded not guilty. We secured a directed verdict of acquittal based upon the inadequacy of the prosecution case. Our arguments were never put to the test but it was good to have them in the armoury.

Quite apart from the importance of statutory interpretation and other intersecting areas of the general law, the criminal law, from time to time, attracts constitutional questions. It is at least necessary for a practitioner in the field to know whether there might be a constitutional question in the case. The Commonwealth Law Reports are replete with cases involving constitutional issues arising out of the criminal law. There may be a question, for example, whether in Federal jurisdiction the law of the State in which the case is being tried provides for trial by jury as

required by s 80 of the Commonwealth Constitution¹⁴. Recently the High Court considered whether the offence of using insulting words in a public place breached the implied freedom of political communication¹⁵. Another case raised the question whether the continuing detention of a serious sexual offender offended against the Kable principle¹⁶ by imposing on a State court functions incompatible with its institutional integrity. Laws prohibiting sexual relations with minors outside Australia were challenged and found to be supported under the external affairs power¹⁷.

A short article in the journal "Legal Practice" written by a senior associate at a Melbourne law firm in April 2007 made the point quite well in relation to the field of workplace relations. The author was an accredited workplace relations specialist. He wrote of the interaction between that field and such fields as trade practices, corporations law, intellectual property and migration law. He made reference to the importance of cultivating a commitment to a broad legal education as a support for any specialisation and said:

¹⁴ *Byrnes v The Queen* (1999) 199 CLR 1; *Brownlee v The Queen* (2001) 207 CLR 278; *Chen v The Queen* (2000) 203 CLR 248; *Cheung v The Queen* (2001) 209 CLR 1; *Re Colina; ex parte Torney* (1999) 200 CLR 386.

¹⁵ *Coleman v Power* (2004) 220 CLR 1.

¹⁶ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

¹⁷ *XYZ v Commonwealth* (2006) 227 CLR 532.

"The benefit of considering the workplace relations area from different practice perspectives may lead to clearer instructions, more focused research and the provision of effective advice to the public."¹⁸

All of this raises a large question. That is, given the extent of overlap between different areas of the law and the inability to quarantine specialist areas from that overlap, how are the specialist practitioner and his or her clients to be protected from a dangerous narrowing of competencies? And how is the profession to be protected from fragmentation? If specialisation is to be supported and protected by accreditation, the objective of accreditation must ultimately be directed to serving the public interest and not just the commercial interests of the subset of lawyers who hold themselves out as specialists. Whatever system is devised ultimately it must recognise the disadvantages of specialisation and seek to mitigate them in particular deskilling in the areas of law outside the specialist's practice area.

There is another issue related to that of specialisation within the profession and that is the ongoing pressure for the creation of specialist courts or specialist divisions within courts. There are rational arguments which can be mounted for such measures, but there are disadvantages as well which require that such measures be approached with a degree of caution. There is a need for close scrutiny of the interests which it is sought to advance by the creation of such courts or divisions.

There has been advocacy from time to time of judicial specialisation in intellectual property, competition law, human rights, tax, native title and industrial

¹⁸ Jackson, "More of a generalist, more of a specialist", (2007) *Legal Practice*, 58 at 61.

relations. These pressures sometime seem to reflect a human need for membership of small clubs of like minded persons restricting access by speaking to each other in arcane shorthand allegedly in the interests of efficiency. Sometimes competitive pressure between courts of concurrent jurisdiction can lead to the establishment of special panels or lists. That can be healthy so long as it does not distort the court's institutional objectives. However in judging, as in the practice of the law, the capacity of counsel and the judge to integrate different areas of the law that may be applicable to the problem at hand and to cross-fertilise concepts and approaches from one area to another is a great strength. Specialisation can raise the risk of intellectual inbreeding and the development of excessively comfortable relationships between judges and members of the relevant specialist Bar.

This is not a case against all forms of specialist court, tribunal, panel or list. Rather, it proposes a cautious, if not sceptical, approach to their establishment. It also suggests that rotation of judges through such specialist courts, panels or lists may mitigate some of the disadvantages that attend their establishment.

In specialist courts in areas in which decision making may be informed by policy choices, there is the risk that one particular philosophy or approach may come to dominate the court. This was highlighted by Judge Richard Posner who wrote about the disadvantages of specialised anti-trust courts. Noting the extent of social and economic judgment involved in anti-trust law he said:

"A 'camp' is more likely to gain the upper hand in a specialised court ... not only would most appointments to a specialised anti-trust court be made from the camps; but experts are more sensitive to swings in professional opinion than an outsider, a generalist would be."

As to the appearance of uniformity in disposition from such a specialised court, he said:

"The appearance of uniform policy that would result from domination of the specialised court by one of the contending factions in anti-trust policy would be an illusion; a turn of the political wheel would bring another of the warring camps into temporary ascendancy."¹⁹

Conclusion

It is important in considering specialisation in both the profession and the courts not to get locked into fundamentalist positions. It is necessary, however, to make sure that neither the profession nor the courts evolve into a kind of archipelago of islands of expertise separated by a sea of unknowing. These developments should be the subject of careful thought, rather than ad hoc responses to the pressures of the day and the advocacy of special interest groups. In particular the value of maintaining a high standard of general continuing legal education across all specialties and areas of practice should be upheld.

¹⁹ Posner, "*The Federal Courts Challenge and Reform*" (1985) and (1996) at 251.