OPENING OF THE CENTRE FOR COMMERCIAL LAW

AUSTRALIAN NATIONAL UNIVERSITY

BY THE HON. JUSTICE K.M. HAYNE

WEDNESDAY, 12 MAY 1999

Being asked to launch the Centre for Commercial Law reminded me how often we resort to maritime references in this area. Boards of directors are said to be "rearranging the deck-chairs"; CEO's are said to "jump ship"; companies "sink"; shareholders "mutiny". Should I, then, in launching the Centre, break a bottle of champagne over some thing or some one? Is the Centre to slide down the slipway to the incantation of ritual phrases about the safety of all who sail in her? If I am not careful the metaphor may take over and lead me one knows not where. It is as well to put it aside.

The importance of commercial law in this country is, or should be, self-evident. It takes its importance as much from the ordering of small transactions and small enterprises as it does from the more spectacular forays into regulation that some of the more imaginative and what then appeared to be larger enterprises of the 1980s called forth. But the most commonplace of transactions occur against a background of that body of law that can be called commercial law. Without that body of law, the society in which we live would be very different.

I wonder whether the importance of the area is sometimes taken as a justification for increasing the volume of regulation. In physical terms that increase can be seen when it is remembered that the 1961 Uniform Companies legislation occupied about 335 pages whereas the present Corporations Law and associated statutes and regulations occupy 3 volumes still cast, for the most part, in the inimitable style of the Commonwealth drafter. It seems that the increase in complexity (and perhaps volume) has been seen as undesirable for we have now had the Corporate Law Simplification project for some years.

Whatever may be the rights and wrongs of debates about the volume and complexity of regulation, the importance of commercial law to this country is such that it warrants the application of the very highest standards of scholarship to its study. The foundation of this Centre is therefore an important and very welcome development for it will encourage scholarly work in the area.

Those of us who work in the courts tend to see only what might be called the pathology of an area: we see, generally, only those cases where some thing has gone wrong and attempts to right it or resolve the consequent dispute have failed. Necessarily, then, judicial decisions reflect that fact and, of course, reported cases are an even narrower sample of such matters, comprising, as they do, only those few cases in the post-mortem room which exhibit some feature sufficiently unusual to require its report.

It is to be hoped, then, that the work of the Centre will take a broader view than is possible in the courtroom. May I illustrate what I mean? In many commercial cases the resolution of the immediate problem by a court depends upon the application of statute. Often, of course, the court will be faced with various choices in that process but very largely the outcome of the litigation is dictated by the statute and the purpose of that statute. The way the courts deal with the statute may well attract scholarly interest and comment. And so it should. But there is, I think, considerable scope for scholarly endeavour at the

logically anterior point of identifying what the regulation ought to be as opposed to considering whether the regulation that was made was properly construed and applied.

Drafting legislation is an extraordinarily difficult task. But it is a task that is much more difficult, perhaps even impossible, if it does not begin from a clearly understood framework of principle and a clearly stated set of objectives. It is in the identification of the framework of principle and the statement of possible objectives that there is much work to be done. And that work requires the intellectual rigour and honesty that the scholar can bring to bear as well also as that time for reflection that everyone (except academics) think that scholars have.

The point was well made by Tadgell J in a judgment given, more than 10 years ago, in the very different context of the criminal law. He said[1]:

> "Official publicity has recently been demanded for the notion that law-makers and practising lawyers should now strive to speak in so-called 'plain English'. The ideal of unmistakably clear verbal expression is admirable but surely not new. To vaunt it as though previous generations had overlooked and neglected it is to risk the mistake of substituting conceit for zeal. It is another mistake to suppose that clarity of expression can be an end in itself. Plain English alone achieves nothing. To be useful it must run in tandem with clear thought. After all, English speech - in the law at least - is a vehicle for the conveyance of ideas. A feeble or wandering idea will not become strong and precise merely because it is dressed in plain, homely language: it will remain simply a poor idea, and perhaps more obviously and emphatically so because it is plainly expressed. A bright idea, on the other hand, is likely to find its own expression and thereby to make itself understood. Statutes, if I may say so, do not commonly contain many naturally bright ideas that speak for themselves, especially those parts of them that seek to create indictable offences. They need to work hard in order to make themselves clearly understood, if only because there are persons whose interests are served by trying to misunderstand them."

As his Honour was later to say[2]:

> "Simple and individually comprehensible words, if carelessly and inconsistently deployed, are not likely to produce readily comprehensible phrases, sentences, paragraphs or sections in a statute."

The point I now seek to make, however, is not a point about legislative drafting. It is a point about the need for what Tadgell J referred to as "clear thought" that will produce an idea that is "bright", not "feeble or wandering". That requires the widest understanding of principle, the clearest understanding of what it is that underpins the law in a particular area. It is that task that I suggest is undertaken by this Centre in its field of interest - a field that, as I say, touches the lives of all of us and greatly affects the society in which we live.

Now is not the time to discuss some of the difficult questions that arise from certain criticisms of the legal system that are sometimes made by members of the commercial community. No doubt, however, the Centre will give consideration to those criticisms in the course of its work. In doing so, I would hope that it will be recalled that one of the difficulties confronting any judge in any litigation, be it litigation about commercial questions or other litigation, is that a complicated series of events and transactions must, in the end, be reduced to the simplest of results in which one party wins and the other loses. And those who win or lose will see the legal process through the prism of that result. Often enough, they will do so without paying close attention to the reasons that are given for that result or the principles that have been applied in arriving at it.

Similarly, of course, the time that is taken to arrive at that result is often the subject of comment. Such comments invite the closest attention to how that time has been spent and by whom it has been expended. As to the suggestion that courts cannot react quickly enough in commercial disputes it is, perhaps, as well to recall one dispute that traversed the whole court system last year. The last of the key events giving rise to that dispute occurred on 7 April 1998. Injunctions were granted by a single judge of the Federal Court of Australia on 21 April 1998. An appeal to the Full Court of the Federal Court against those orders was dismissed on 23 April 1998. An appeal to the High Court of Australia was allowed in part by orders made on 4 May 1998 accompanied by extensive reasons for judgment delivered that day. That is, the orders of the High Court were made less than one month after the events that gave rise to the litigation. I refer, of course, to the litigation between Patrick Stevedores and the Maritime Union of Australia[3]. And, as any judge who has sat in a commercial or companies list would attest, many other, less dramatic, but no less telling examples could be given. When required, the courts can and do deal with disputes very quickly.

No doubt the criticisms that are made of the legal system will intrude on at least some aspects of the work of the centre. No doubt, also, the validity and cogency of those criticisms will be examined in the course of that work.

For reasons that do not now matter, I had occasion recently to look at the Home Page of the Faculty of Law in the University of Oxford. Its author was Professor Peter Birks, well known to all of us for his work in Restitution. He said that:

> "The business of a great university is to extend knowledge and, so far as possible, to save humankind from wasteful ignorance and error . A history of outstanding achievement is useful so far as it presses each generation to outdo the standards of its predecessors."

The Australian National University has a long history of outstanding achievement in many fields including, in particular, the law. I hope that that history presses this generation "to outdo the standards of its predecessors". To my mind, the purpose of this Centre must be to extend knowledge and, so far as it can, save this society from wasteful ignorance and error. That is a very large ambition but the task is worthy of it and I am sure that those who undertake it will prove to be so. I wish you all well on the journey.

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1 *R v Roach* [1988] VR 665 at 669-670.

2 *Halwood Corporation Ltd v Roads Corporation* [1998] 2 VR 439 at 445.

3 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873; 153 ALR 641.