KEYNOTE ADDRESS AT THE INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA 5th NATIONAL BANKRUPTCY CONGRESS MELBOURNE, 13 MAY 2004

It should come as no surprise to learn that there are very few cases about personal bankruptcy that come to the High Court of Australia. After all, the premise for such litigation is that a debtor is unable to pay his or her debts as they fall due from his or her own money. Creating more debts by appellate litigation must necessarily be justified, and it could be justified only rarely. It is hardly surprising then that the last 60 volumes of the Commonwealth Law Reports, covering more than 20 years work of the Court, contain less than 15 cases that are indexed under the heading "Bankruptcy".

In these circumstances, you may legitimately ask why I accepted the invitation of the organizing committee to deliver this keynote address at your Conference. Diverse as the litigious diet of the High Court is, bankruptcy is not one of its staples. In my time on the Court, the only appeal in which I have sat and which comes to my mind as having dealt directly with issues concerning personal bankruptcy is Cook v Benson[1], a case concerning the application of s 120 of the Bankruptcy Act 1966 (Cth) to some transactions concerning superannuation. But of course there have also been company cases like G & M Aldridge Pty Ltd v Walsh[2] and Sheahan v Carrier Air Conditioning Pty Ltd[3] which have required consideration of the preference provisions of the Bankruptcy Act.

As a trial judge, in the Supreme Court of Victoria, I did encounter some cases raising questions about personal bankruptcy. Pyramid Building Society (In liq) v Terry, which went on appeal to the Full Court, and thence to the High Court[4], was one such case. But again, bankruptcy cases did not form a staple part of the diet of a trial judge in the Supreme Court of Victoria, even one who sat for a time in the commercial list of that Court. Rather, the insolvency questions which I faced were usually those presented in connection with companies in financial distress. As Judge in charge of the corporations list I spent a lot of time dealing with questions arising out of creditors' windings up and deeds of company administration. Then, however, questions of personal bankruptcy that were litigated were dealt with in the Federal Court of Australia. Now, of course, they are dealt with in that Court and the Federal Magistrates Court. The litigation of bankruptcy questions was treated by many as an area for particular specialisation.

This has been the case for many years. The federal Parliament's power to make laws with respect to bankruptcy and insolvency (the power given by s 51(xvii) of the Constitution) was first exercised with the enactment of the Bankruptcy Act 1924 (Cth). That Act, the 1924 Act, occupied the field previously occupied by State bankruptcy legislation. The different State regimes were described, in the Second Reading Speech for the 1924 Act, as "a distinct hindrance to trade and commerce, especially between the residents of one State and another"[5]. The new "uniform bankruptcy law [it was said, would] facilitate commercial relations between the United Kingdom and overseas Possessions" because, as Judge Moule, the Victorian Judge in Insolvency, had said:

"If the Insolvency Court is working properly there is little danger to the commercial prosperity of the country, as this Court is the guide which stops it from going astray. ... If the Insolvency Court is not in a vigorous state there is a chance that the community will slip into a state of commercial dishonesty."

Uniform bankruptcy law was seen, even then, as central to the commercial well-being of the country. UNCITRAL's work in relation to Cross-border insolvency is, no doubt, inspired by similar principles.

Notwithstanding the perception, in 1924, of the desirability of uniform bankruptcy laws, the Commonwealth did not straight away establish a federal court to exercise jurisdiction in matters arising under the Bankruptcy Act. Rather, provision was made[6] for the investing of federal jurisdiction in State courts and the courts of Territories. Some of the consequences of that legislation were examined by the High Court in Le Mesurier v Connor[7]. Not until the enactment of the Bankruptcy Act 1930 (Cth) was provision made for "a federal court of bankruptcy, which shall be a Court of Record and shall consist of a judge or judges, not more than 2, who may be appointed by the Governor-General by commission"[8]. Thereafter, with a specialist court established for the determination of bankruptcy matters, the emergence of bankruptcy law as a recognised speciality was assured.

May I take a moment to reflect on some questions which specialisation presents?

It is now more than 35 years since I was admitted to practice as a barrister and solicitor of the Supreme Court of Victoria. During that time, I have seen many changes in the ways in which the law is practised. One of the most notable of those changes has been the increasing specialisation of practitioners. When first I went to the Bar in 1971, there were many barristers who could, and did, appear in a very wide variety of cases. There was talk, of course, of the division between the common law and equity practitioners (the "shouters" and the "whisperers" as some tended to call them) and no doubt there were many members of the Bar whose practice did not extend much, if at all, beyond one of those broadly defined categories. Even so, that was a time when a barrister taking silk was expected to do at least one murder trial on instructions from the Public Solicitor, no matter whether that

barrister's practice had previously been dominated by questions about the construction of wills or the application of the Income Tax Assessment Act, or the like. To that extent, and in that way, the tradition of the generalist practitioner survived. Now, 30-odd years later, generalist practices at the Bar or among senior solicitors are almost unknown. Rightly or wrongly, everyone is expected now to specialise in a particular field.

There is no point at all in my expressing a view about whether these changes are desirable. They have happened. No doubt the change has brought advantage and disadvantage. But again, there is no point at all in my attempting to strike a balance between them. Nevertheless, there is, I think, some benefit in trying to identify some of the disadvantages of this change. There is benefit in doing that if, as a result, the disadvantageous consequences can be identified and, at least, minimised if not eliminated. To do so will make the change that has happened even better (if you think it has been a change for the good) or reduce its malign influence (if you are of a mind to see the glass as being half empty rather than half full).

Increasing specialisation can, but need not, bring with it two related but distinct difficulties. First, it may mean that developments in areas of legal practice not immediately related to the area of specialisation are ignored by the specialist. Secondly, it may mean that pockets of L-O-R-E develop and applicable principles of L-A-W are ignored. Folklore may come to supersede the law.

Specialisation does not relieve the practitioner of the need to keep abreast of developments that will affect the particular area of specialisation. In the area of bankruptcy, that will require a very wide field of view.

It is, or should be, self-evident that an understanding of the law of property is central to the proper application and administration of the law of bankruptcy. But stop to consider what a remarkably wide field is encompassed by that description "the law of property". Some sense of the breadth of the subject can be gathered by looking at some of the Court's decisions concerning questions of native title. In Yanner v Eaton[9], in the joint reasons of four members of the Court, it was pointed out that although the word "property" is often used to refer to something that belongs to another, there are many contexts in which the word describes a legal relationship with something rather than the thing itself. This idea, recognised by Jeremy Bentham centuries ago[10], and in more recent years developed by Professor Gray[11] (that it is necessary to distinguish between the subject-matter in which property exists and those rights which, together, constitute property in that subject-matter) tends to reveal the breadth of the subject encompassed by reference to "the law of property". It does that because it draws attention to the very many and very different kinds of legal right which a person may have in relation to a particular subject-matter and which may properly be considered to be an item of property. More particularly, since the emergence and common adoption of arrangements like discretionary trusts[12], unit trusts, and other investment arrangements of the kind once described as prescribed interests, but now called managed investment schemes[13], it is self-evident that familiarity with diverse areas of the law will often be necessary if the law of bankruptcy is rightly to be administered. All of these areas may be brought under the umbrella of the law of property but, to take but one example, you cannot begin to understand some managed investment schemes without detailed knowledge of the Corporations Act and without a proper understanding of the law of trusts. And it follows that one must try to keep abreast of what is happening in those areas. That is no small task.

I suspect that one of the areas in which these kinds of problem will emerge acutely (if they have not already emerged) is in the area of superannuation. It will be recalled that Cook v Benson was a superannuation case and it seems possible, indeed probable, that new problems will emerge about the intersection of insolvency law and the law relating to superannuation entitlements. The federal Parliament has already considered the intersection between family law and superannuation. See the Family Law Legislation Amendment (Superannuation) Act 2001 (Cth) and the Family Law (Superannuation) Regulations. That Act and those Regulations may be thought to give some indication of the complexity of the problems that may arise in the field of bankruptcy, but only time will tell whether that is so. What is clear, however, is that there can be no understanding of superannuation without regard to the law of trusts and without an understanding of the application of what is now a very detailed and elaborate system of statutory regulation.

In these circumstances, it is wrong to see the law of insolvency as a very confined area of specialisation. It is not. It requires an understanding of a very wide area of law. Gaining that understanding is a task which is not always assisted by knowing that almost every decision of every court of record is now accessible even if it is no more than a decision applying known and accepted legal principle to the particular facts of the case. Yet it is a task which must be undertaken by those who would specialise in this area. Only if the specialist is aware of what is happening in the law of property (in all its forms) can the law of bankruptcy be properly applied.

May I, in connection with this question about the consequences of specialisation, make some further points which, although blindingly obvious, may not always be observed. They are points that have application to many

areas of the law, not just bankruptcy. So although I will speak of these matters in connection with bankruptcy they are matters having much wider application.

The law of bankruptcy being governed by statute, it is the Act which must be the first port of call in considering any problem. Experience dictates, however, that this is not always where those confronting a problem which is governed by statute will begin. Indeed, experience suggests that the first port of call for many practitioners is not the relevant Act, but some secondary source such as a decided case or a commentary on that Act. And when there is an intersection between (say) the law of bankruptcy and some other area regulated by statute, it is necessary to begin considering any problem by examining all of the applicable legislation, not just the Act with which the inquirer is most familiar. And even before looking at the relevant Acts, one must identify the form of the Act which applied at the relevant time. Only then will it be useful to start considering secondary sources like commentaries and decided cases.

That is not to say that these secondary sources are unimportant. Far be it from a judge to say that the reported decisions of cases are unimportant. But there can be no proper appreciation of what the case decides, and there can be no proper understanding of whether what the case decides has application to your problem, unless and until you have first looked at the applicable statutory provisions. All too often, however, examination of a problem or argument of a case in court proceeds by reference to some quotation from a judgment or some quotation from a commentator. All too often these quotations are snatched from their context without regard to the effect of that context on the meaning of what is written.

This in turn leads to the second problem I identified earlier - the development of L-O-R-E rather than L-A-W. Every specialist discipline develops its own language. Where technical concepts are applied, jargon has a proper place in exchanges between those who are familiar with the technical concepts being discussed. It is important, however, not to allow the use of jargon to obscure the content of the rules that the jargon is intended to encapsulate. It is particularly dangerous to allow the use of jargon to dominate examination of a particular problem. To do so may lead to the elementary error of arguing from the content of a word or expression used to encapsulate a rule to the content of the rule itself. We are all familiar with the difficulties that emerge when formal and technical English is translated into a foreign language. A moment's thought reveals the difficulties that are likely to be encountered when the text created in the foreign language is retranslated and then used as the basis for discussion. Yet that is exactly what is done when some jargon is allowed to drive debate about the application of the relevant legal principle. It is exactly the same process that occurs when the shorthand expressions adopted by specialists are allowed to develop to the point where they become the L-O-R-E of the area. What must be applied is the L-A-W, not the L-O-R-E.

What I have said so far is offered from the perspective of a judge. Contrary to the view that is often put forward, judges, in their professional lives, are not insulated from the real world. Sitting in a Court of Criminal Appeal for a few weeks exposes you to many aspects of the real world which you would wish did not exist. Sitting as a trial judge, you see an endless parade of witnesses of all sorts. Sitting as an appellate judge, particularly as a Justice of the High Court of Australia you see features of the lives of individuals, of problems of government, of the doings and misdoings of all kinds of people and all this against a background of the resolution of live controversies between individual and individual, individual and government, or polity and polity.

All that being said, however, a judge's view of the law is dominated by the resolution of disputes. By far the bulk of the work which a judge does is concerned with cases in which there is a dispute about the applicable law or about the facts to which that law is to be applied. Necessarily that work focuses upon what has happened not upon what should happen in the future. Necessarily the work is done by reference to the law as it is then understood to be and, apart from the particular position in which the High Court must necessarily stand, most judges will, in most cases, resolve them by applying known and accepted principles to the facts as they are found to exist or to have occurred.

I mention these things because they provide a useful contrast with one feature of the development of the law to which I want to draw attention this morning.

The problems we see in the courts represent a very small proportion of cases in which the law is applied every day. The cases we see in the courts are, as I say, cases in which the focus of the parties and the Court is most often upon the past. But by far the greater field for the application of the law lies outside the courts. That is a field in which the focus of the parties and the advisers will most often be upon the future, not the past. The question is "What should I now do?" not "what are the consequences of what I have done?".

That has some important implications for the way in which our law, particularly our written law, develops. Often, the application of the law will require much greater understanding and technical expertise than a citizen

requires to understand the biblical injunction "thou shalt not kill". Not all legal rules can be formulated in a way that makes their content immediately apparent to every reasonably informed reader. After all, over these past several centuries, even the injunction "thou shalt not kill" has been embroidered by the common law and, later, by the legislatures, with doctrines of provocation, insanity, diminished responsibility, and the like. I therefore do not pretend that insolvency law, the area with which you are most concerned, can be reduced to a series of propositions, the content of which can be conveyed on a single sheet of A4 in basic English. It cannot. It cannot, because the problems are more subtle and difficult than a solution of that kind would admit. Human experience is not capable of reduction to such a series of propositions. It by no means follows, however, that this, or any other area of statute law, can be expressed only by chains of definitions, each more opaque than the last, or by reference only to flow charts and diagrams, or by the use of algebraic formulae. What is required is clear thought followed by clear drafting.

I note with interest that your website says that the purpose of the Insolvency and Trustee Service is "to provide a personal insolvency system that produces equitable outcomes for debtors and creditors, enjoys public confidence and minimises the impact of financial failure in the country". If these purposes are to be achieved, the law of personal bankruptcy must be an area in which the person at the centre of the process, the debtor, is able to understand what is happening, why it is happening and what consequences follow. Equally, the creditors of that debtor must be able to understand the consequences that will follow for them if their debtor becomes subject to the operation of the Act. Unlike debtors, however, the creditor will be better able to obtain legal advice about its position. In most cases, the debtor will not be able to do that.

There is, then, an evident need for clear articulation of the principles to which the law is intended to give effect. The rules that are to be applied, must, so far as possible, be capable of ready and clear statement. Only then will the debtor be able to understand what is happening, what is to happen, and why.

That has important consequences for the drafting of applicable legislation. If the relevant principles are clearly articulated, the drafting of legislation will often follow very easily. If the drafting does not follow easily, may this not suggest that the underlying thought is unclear or confused?

Do not misunderstand me; I am not suggesting that particular provisions of existing legislation are open to these criticisms. My comments are not directed to the present form of any particular piece of legislation; they are directed to those among you who will have occasion to consider proposing changes to the present law of bankruptcy and insolvency. And what I am saying is that problems which the courts now encounter with some forms of legislation may not be problems about the way in which the legislation is drafted, so much as problems about the clarity of thought that has underpinned the proposal for change.

Inevitably there will be proposals for change in the law which provoke debate. Reasonable minds may differ about, not only the form which a change might take, but also the substance of the change itself. Hardly surprisingly, then, compromises are struck and those compromises may even go so far as to paper over some of the underlying difficulties. If that is done, it is inevitable that there will come a time when the courts must struggle to see how the difficulties are to be resolved. One particular way in which difficulties may be obscured is to defer resolution of the problem by giving decision-makers discretions which are informed only by conclusory terms like "fair" and "just". The decision-maker may set aside a transaction in any case where it would be "fair and just to do so". To make such a provision defers resolution of the problem which underlies it, which is, what are the considerations that are to inform the assessment of what is fair and just? No doubt, over time, a body of decisions will emerge which reveal the kinds of considerations that are thought to be relevant. But that takes time and resources. To follow that path may not always be the best solution available, if only because it delays the solution of the problem to another day and shifts responsibility for the solution to whoever is charged with the task of deciding what is "fair" or "just" or "reasonable".

Again, do not misunderstand me. I am not offering this as a particular example of any particular legislation or offering any criticism of some particular provisions. My point is a more general one. It is that clear and simple drafting can only be done when there is a clearly defined proposal that is to be translated into legislation. And the clarity of the proposal may not always be enhanced by using terms that are value laden (however desirable may be the values with which they are laden) unless the criteria to be used in applying those values are sufficiently articulated. This will usually be the most difficult step to take when formulating any proposal for change that will give any choice to the decision-maker if the problem presented by the change is to be solved by the drafter, rather than deferred for later consideration by a series of subsequent decision-makers.

You may say that all of what I have said to you this morning is blindingly obvious. You may therefore ask why I take the liberty of offering these thoughts at the commencement of what should be a conference that stimulates

and informs you all. The reason I do so is very simple. You meet in this conference to develop your knowledge, to develop your skills, to meet and to discuss problems of common interest to you all. Those are tasks which underpin the proper practice of every profession. And all of the matters that I have mentioned are intended to be informed by principles articulated by Francis Bacon 400 years ago in his preface to the work entitled Maxims of the Law. He said:

"I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves, by way of amends, to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected; but much more is this performed if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance."

Bacon's language was of the time of the first Elizabeth. When we hear it now, we must work a little harder to follow what he was saying. We must put aside our reaction to his assumption that only men would practise a profession. But when we do that, what do we find? We find that each of us who practises a profession owes more to the profession than it owes to us. To pay that debt we must be "a help and ornament thereunto". We do that when we perform our task honestly and properly. But much more than that is required if we are to pay the debt that we owe to the calling we follow. We must, as Bacon said, "be able to visit and strengthen the roots and foundation of the science itself". If we do that we grace our calling "in reputation and dignity" but, in addition, we amplify it "in perfection and substance".

That is why you meet together in this conference. You meet "to visit and strengthen the roots and foundation" of the work you do "thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance". In order to do that effectively, more than mere technical expertise is required. What is required is the opportunity and the willingness to reflect upon fundamental questions, which both affect and inform the tasks which you undertake in your day-to-day work. That is why I have taken the liberty of reminding you all of some matters which are basic to the work you do. May I wish you well in your deliberations during the rest of the conference. Treat it as an opportunity "to visit and strengthen the roots and foundation of the science itself".

[1] (2003) 77 ALJR 1292; 198 ALR 218.
[2] (2001) 203 CLR 662.
[3] (1997) 189 CLR 407.
[4] (1997) 189 CLR 176.
[5] Australia, Senate, Parliamentary Debates (Hansard), 7 August 1923 at 2196.
[6] Bankruptcy Act 1924 (Cth), s 18(1).
[7] (1929) 42 CLR 481.
[8] Bankruptcy Act 1930 (Cth), s 4, inserting ss 18A to 18D in the Bankruptcy Act 1924.
[9] (1999) 201 CLR 351 at 365-367 [17]-[20].
[10] Bentham, An Introduction to the Principles of Morals and Legislation, ed by W Harrison (1948) at 337, n 1.
[11] Gray, "Property in Thin Air", (1991) 50 Cambridge Law Journal 252.
[12] In re Baden's Deed Trusts [1971] AC 424.
[13] Corporations Act 2001 (Cth), Ch 6C.