FRAGMENTATION OR CONSOLIDATION ? – FOSTERING A COHERENT PROFESSIONAL IDENTITY FOR LAWYERS

AUSTRALIAN ACADEMY OF LAW SYMPOSIUM
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JUDGES AND ACADEMIA – BUILDING BRIDGES

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1 A few years ago, I presided at a special sitting of the Federal Court in a remote part of Western Australia near the Rudall River National Park and made a consent determination of native title in favour of the Martu People. The area covered by the determination was the size of Belgium. It lies to the east of the furthest reach of historical pastoral activity in the state. It is occupied by a few hundred people.

2 It occurred to me then, as it does now, that we are a small nation – 21 million people - for the most part smeared around the edges of a vast territory. The Academy faces the challenge of that physical distance in building the legal community to which it aspires. It is not just Western Australian paranoia which leads me to say that creative thought is necessary to ensure that it is not just an East-coast community. That creative thought may embrace such things as the internet, national chat rooms, video link seminars, and the like.

3 It is, however, distances other than the physical which have brought this organisation into existence. They are defined by differences in outlook, objectives, and methods between legal academics, the practising profession, and the judiciary. It is the bridging of those distances that is a major project of this Academy. In the short time allocated, I wish to focus on one aspect of the project and that is the interaction between the courts and academia.

4 At one time legal academics had little influence on the work of the courts. Speaking

of the position in England in the first half of the twentieth century, in its 2005 report entitled The Legal Professions Sector Interaction Study, the Arts and Humanities Research Council of the United Kingdom (AHRC) and the Economic and Social Research Council said that:

> The relationship between academic lawyers and the judiciary in England has traditionally been remarkably distant. With few exceptions the status of the academic lawyer was, at least until the mid-late twentieth century, generally low, and until recently it would have been rare for a judge to cite the work of a living academic author. [1]

5 Since the middle of the twentieth century, things have changed remarkably in both England and in Australia. For the period 1996 to 2004, there were more than 250 cases in the House of Lords, the Court of Appeal and the High Court in which pieces of work undertaken by academic lawyers had been quoted in the judgments. Indeed it may now be a matter of complaint from the English Bench that counsel has failed to refer to academic writings in the relevant area. So in 1995, Lord Steyn in *White v Jones*[2] complained that the judges "were not referred to a single piece of academic writing on *Ross v Caunters"*.

6 The rationale for judicial reference to academic writings was enunciated by Justice Bastarache of the Supreme Court of Canada in a passage quoted by Justice Kirby in his 2002 paper Welcome to Law Reviews:

> The contribution of academics is invaluable to the development of legal principles and coherent judicial decisions. The nature of the law itself is being transformed. The work of academics serves to provide a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform. No principled approach to decision-making can ignore the role of academics.[3]

This endorsement of judicial reference to academic writings has been criticised, not surprisingly by an academic, John Gava, who wrote that:

> … judges are making more use of academic writing because many of them have forsaken the traditional common law method in favour of an ill advised

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[1] Citing Duxbury N, Jurists and Judges, An Essay on Influence (2001)

[2] [1995] 2 AC 207

[3] The Hon Justice Michael Kirby, Welcome to Law Reviews (2002) 26 Melbourne University Law Review 1 at 7 citing Justice Michael Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-making" (1999) 37 Alberta Law Review, 739 at 746

move to instrumentalist decision-making.[4]

"Instrumentalist" is, I think, a non-journalist's word for "activist".

7 There are of course different kinds of legal academic writing. The most valuable will offer thoughtful doctrinal analysis and perhaps synthesis and will acknowledge competing considerations affecting choices in the interpretation of statutes or the development of principle in the Common Law. The least valuable will take a judgment the result of which is approved or disapproved on policy grounds and reverse engineer an argument to support or criticise the decision as the case may be. Let me speak now of what it is that judges have to do and how academic perspectives can assist them in their task.

8 At the risk of being denounced as a judicial activist, I observe that judges are required by their office to do things. The principal thing they do is to hear and decide cases within their jurisdiction. The simple model of that function has the judge identifying the relevant rule of law, finding the facts, applying the rule to the facts, declaring rights and liabilities which result and awarding remedies or not as the case may be.

9 The simple model covers a range of cases which judges hear. However, in today's complex and highly regulated society courts are often called upon to construe and apply frequently amended statutes with the benefit of little in the way of a body of case law to guide them. They are often confronted with plausible alternative constructional choices. Those choices when made and particularly at the level of the final appellate court, may be called legislative in character for they determine the shape of the rule thereafter or until the rule is changed by parliament.

10 The courts are also frequently confronted with statutes which use very broad language and leave it to the judges to develop the law within the framework of that language. This is law making which parliament asks the judges to do. A kind of common law process is followed case by case giving shape to the ways in which that broad language can be applied. A good example is the prohibition on misleading or deceptive conduct in the *Trade Practices Act* and the *Fair Trading Acts* of the States. Another example which is more recent and yet to be fully developed, is the prohibition on unconscionable conduct in s 51AC of the *Trade*

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[4] Gava J, Law Reviews: Good for Judges Bad for Law Schools (2002) 26 Melbourne University Law Review 560

Practices Act which is not confined to existing equitable doctrines. These examples can be multiplied many times. One particular example which is so multiplied is the term "good faith" which appears in over 150 Commonwealth statutes.

11 As the judges develop the case law in these areas the academic writings will foreshadow, analyse and criticise it and suggest future directions. They may place a particular area of the law in a larger context of wider bodies of law or in the context of policy considerations which might inform choices yet to be made. Provided the process of reference to their writings is transparent and explicit in the judge's reasons it is a valuable partnership in the coherent development of the law. The writings themselves will be more valuable if they are informed by a practical understanding of the judicial function.

12 The establishment of this Academy provides an opportunity for the development of greater understanding by legal academics of the kinds of jobs that judges have to do and a greater awareness by the judges of the way in which academics see their roles. The provision of opportunities for informal exchanges such as seminars involving academics, practitioners and judges, visitations by judges to universities, academics working with practitioners on particular cases or being invited to observe cases of interest during hearings, are among the things which the Academy can do in the pursuit of its objectives. In all of this of course it will be remembered that there is a sense in which we are at arms length from each other. Our collegiality therefore may be a little wary. But the great common enterprise of developing and maintaining excellence in the administration of justice in Australia can be greatly enhanced if we make and take those opportunities.