Beyond our Borders:
A Judiciary and Profession Looking Outwards

Australian Bar Association/Victorian Bar
National Conference

Chief Justice Robert French AC

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The emergence of a legal profession as a feature of a society governed by law has a long historical pedigree. In the tribunals of Athens where parties pleaded their own causes, it was not unusual to have their speeches prepared for them, for a fee, by persons who specialised in forensic oratory. The complex taxonomy of the lawyers of ancient Rome included the patronus causarum, whose function was analogous to that of the contemporary barrister and the juris consultum, frequently an adviser on legal questions. The idea of advocates and advisers as important to the social and legal order was acknowledged by Emperor Leo I who reigned over the Eastern Roman Empire in the 5th Century AD. In his Constitution he equated advocates who do battle with their words and keep alive the hope of the oppressed with those who fight for the State with sword and armour.[1]

What was written by Leo I is reflected in the *Charter of Core Principles of the European Legal Profession* adopted by the Council of Bars and Law Societies of Europe in 2006. The Charter provides 'Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in Society.'

Alexis de Tocqueville, in his perceptive and still relevant study *Democracy in America* published in 1835, in a chapter devoted to the legal profession, said of American lawyers of the time:

> I am not ignorant of the defects inherent in the character of this body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I

[1] Marius Jonaitis and Inga Žalėniéno, 'The Concept of Bar and Fundamental Principles of an Advocate's Activity in Roman Law' [2009] 3 *Jurisprudencija* 299, 305.

> question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people.[2]

Lawyerly sobriety, in the high abstract sense in which de Tocqueville used it, is not always welcomed by those whom it constrains. When it calls into question executive or legislative action, it may be regarded as obstructive or against the public interest. An example of the latter perspective occurred in 2001. The Commonwealth had succeeded on an appeal to the Full Court of the Federal Court in establishing, by majority over the dissent of Chief Justice Black, that its executive power extended to preventing asylum seekers on the Norwegian vessel, Tampa, from entering Australia.[3] Chief Justice Black and I had been on opposite sides of that primary question. Subsequently, the Commonwealth applied for a costs order against the respondents. Chief Justice Black and I found ourselves on the same side of that question holding that the public interest dimension of the case, in which the plaintiffs had for the most part been represented pro bono by members of the Victorian Bar, warranted a departure from the usual rule that costs follow the event.[4]

The decision was of interest for the argument, which was advanced by the Commonwealth, that the litigation was not a matter of public interest in any relevant sense. The Commonwealth submitted that it had been exercising an aspect of executive power central to Australia's national sovereignty. The litigation was 'therefore an interference with an exercise of executive power analogous to a non-justiciable act of State'. Chief Justice Black and I observed in our joint judgment:

> It is not an interference with the exercise of Executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope.[5]

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2 Alexis de Tocqueville, *Democracy in America* (Francis Bowen trans, Cambridge Sever and Francis, 1862) Vol 1, 352-3 [translation of: *De la Démocratie en Amérique* (first published 1835/1840)].

3 *Ruddock v Vadarlis* (2001) 110 FCR 491.

4 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229

5 Ibid 242 [30].

That was a proposition deeply rooted in Australia's Constitution and in particular s 75(v) which confers original jurisdiction on the High Court in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. Edmund Barton said, when he formally moved its insertion at the insistence of Andrew Inglis Clark, that its words could not do harm and might 'protect us from a great evil'.[6] The provision has rightly been called 'a bulwark of the rule of law'.[7] As a general proposition, those who invoke it in litigation usually do so with legal advice and are frequently represented by barristers.

Despite its long history in England and in this country, the Independent Bar is not an inevitable outgrowth of the existence of a legal system or legal profession. The structure of the legal profession in different parts of the world is a product of particular histories, cultures and constitutional frameworks. That being said, a strong independent Bar supporting a strong independent judicial system which repeatedly and publicly affirms and reaffirms the rule of law in countless decisions large and small, provides a fundamental support for what we can properly call the legal infrastructure of our representative democracy. So the Australian Bar Association properly claims as the first of its stated objects 'to maintain and promote the rule of law'. In similar vein, the Constitution of the Victorian Bar has as one of its purposes:

> 'to promote, foster and develop within the executive and legislative arms of Australian Governments and within the general community, an understanding and appreciation that a strong and independent Bar is indispensible to the rule of law and to the continuation of a democratic society.[8]

That high purpose, shared by Bar Associations around the country, should not cause them to be depicted as halls of valour populated by heroic figures who spend their lives 'speaking truth to power', as the saying goes. Reflecting a thin or minimalist concept of the rule of law as societal infrastructure within which people go about their lives and conduct their affairs, the Bar serves the powerful and the powerless, the great and the good, the not so

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6 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1876.

7 Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 67.

8 Constitution of The Victorian Bar Incorporated, 5 March 2015.

great and the morally ambiguous, if not plain wicked, as well as the injured, the oppressed and the put upon.

It is consistent with the purposes of their Associations that barristers serve, among others, the holders of legitimate public and private power. The availability of high quality legal advice about the scope and limits of such power is as important to the rule of law as the fearless representation of those adversely affected by its exercise. And beyond all that, access to advice and representation in the countless quotidien dealings and disputes between public authorities and their publics, between corporations and business entities large and small and the consumers of their products and services, and between ordinary citizens, is the warp and weft of our legal system.

Accordingly, it is good to see that the program for this national conference reflects the wide range of subjects with which barristers are concerned as advocates and advisers in the domestic legal system, albeit with a proper reflection of the international dimensions of much of our law and the increasing international connections of our judiciary and profession.

As advocates you are, of course, closely concerned with the working of the courts, of which you are officers. On matters of any complexity, the courts without the assistance of competent counsel, do not work as effectively as they can with such counsel. The organisers are therefore to be congratulated for having persuaded the Chief Justices of the States and Territories of Australia and of the Federal Court and the Family Court to join in one panel in the next session to speak of national and international developments in modern litigation and courts practice. Their collective presence at this conference is an acknowledgement of the significance of the Bar to the judicial process. It points up the national character of our judiciary even though it is organised into federal courts and geographically disparate State and Territory courts. That national character is also demonstrated in a practical way by the existence and work of the Council of Chief Justices of which all on the panel are members and which it is my privilege to chair.

The inclusion of international developments in court practice in the next session accords with the engagement of the Australian judiciary with the judiciaries of other countries in our region and beyond. That engagement extends to the exchange of ideas and information relevant to the conduct of litigation, the use of information technology, ways of

measuring court performance, co-operation between courts in relation to transnational litigation, particularly transnational insolvency, judicial education and court administration.

There are many areas of international engagement in which Australian judges and legal professionals with relevant expertise can both give and receive. Competition law is one such area. A number of competition law regimes have emerged relatively recently in our region. Hong Kong's *Competition Ordinance* came into effect in December 2015. Many of the concepts in the Hong Kong Ordinance would be familiar to Australian practitioners and judges. There are interesting differences including a Competition Tribunal which has a judicial function extending to judicial review of regulatory decisions. Listening to discussion at a conference on the Ordinance which I addressed in Hong Kong in November last year, I was struck by the emphasis on the information gathering policies and powers of the regulator. It took me back a few decades to the earlier years of our own *Trade Practices Act 1974* (Cth). The point of my observation is that we have had a long learning curve in the development of our competition law in Australia. We now have a profession and a judiciary with significant expertise in the field. Plainly there are opportunities for the Australian Bar in this field and in other areas of commercial law including regulatory laws which bear similarities to Australian law. I suspect, however, that those opportunities may not be able to be explored and exploited to their fullest extent by the Australian Bar Association or individual Bars acting on their own. Any serious program of engagement is likely to require the involvement of the Law Council of Australia and the support of Australian law firms, a number of which have a significant presence offshore.

As a general proposition, an outward looking Bar and an outward looking judiciary will also develop a greater awareness of the rich sources of comparative law from which they can draw to enhance the quality of their advocacy and advice and the judicial development of Australian law, particularly in areas of practice which have a transnational character. Obvious examples of such subject areas in your program are intellectual property law, international commercial arbitration and the legal challenges of terrorism and international human rights. Comparative law embraces the decisions of foreign courts including, but not limited to, those which share our common law heritage, the writings of academics, leading practitioners and judges and authoritative publications such as the Restatements of the American Law Institute, which the High Court has cited on a number of occasions. The careful and discriminating use of comparative law material may suggest answers to particular

legal questions, or lines of development of common law principle or modes of reasoning which can be adopted in or adapted to the Australian context.

Some comparative law may be considered, only to be distinguished and put to one side. An example was in the decision of the High Court in 2014 in *Commonwealth Bank of Australia v Barker*[9] against the implication of a term of mutual trust and confidence in employment contracts. The House of Lords had taken a different approach in *Malik v Bank of Credit & Commerce International SA (in liq)*.[10] The regulatory history of the employment relationship and of industrial relations in Australia differed significantly from that of the United Kingdom which played a part in engendering the implication in that country. As Justices Bell, Keane and I observed in that case:

> Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must 'subject [foreign rules] to inspection at the border to determine their adaptability to native soil'. That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law.[11]

On the other hand in *McCloy v New South Wales*,[12] four Justices of the High Court, in a joint judgment, adopted a structured approach of the kind used in German courts in applying a long established Australian proportionality criterion for determining the validity of a New South Wales law prohibiting political donations by property developers, which was said to infringe the implied freedom of political communication. The structured approach in *McCloy* referred to specific criteria of suitability, necessity and adequacy in balance in determining whether the law under challenge satisfied the general criterion that it was reasonably and appropriately adapted to advance a legitimate purpose. That general criterion has been applied to alleged infringements of the freedom of political communication for a long time and has been used for an even longer time in determining the validity of laws made under purposive and incidental powers and laws which are said to infringe constitutional guarantees or immunities. The structured approach was treated by the joint judgment as a

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9 (2014) 253 CLR 169.
10 [1998] AC 20.
11 (2014) 253 CLR 169, 184–85 [18] (footnote omitted).
12 (2015) 89 ALJR 857.

mode of analysis applicable to some cases within the general proportionality criterion, but not necessarily all.

Speaking of comparative law, I noted with interest the session on the topic of Declaratory Relief in Tax Cases. The topic is interesting and timely. On 19 October 2016, the Supreme Court of the United Kingdom decided an appeal in relation to judicial review proceedings claiming declaratory relief against the Commissioners for Her Majesty's Revenue and Customs.[13] The plaintiffs, Ingenious Media Holdings plc and its principal, claimed a declaration that a decision of the Permanent Secretary for Tax to give an off-the-record briefing to journalists from *The Times* newspaper reflecting on the company's film investment schemes was unlawful. The disclosures to the journalists were said to have contravened the confidentiality provisions of s 18 of the *Commissioners for Revenue and Customs Act 2005* (UK). There is an exemption under s 18 for disclosures made for the purposes of a function of Revenue and Customs. The Supreme Court held that the Permanent Secretary's disclosures were not authorised under the exemption. It was read down using the principle of legality so as to protect a principle of the common law that 'where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes'.[14] Of interest to Australian readers is the use of the judicial review process to seek a declaration as to the unlawfulness of the action by Her Majesty's Revenue and Customs and the application of the interpretative principle of legality.

There are many benefits to be derived for the administration of justice in Australia from a judiciary and a Bar fully cognisant of, and engaged with, international developments in law and practice and with the international judicial and legal professional communities. A recent example of our institutional engagement is Australia's membership of the Asian Business Law Institute, which was launched in Singapore in January this year at the instigation of Chief Justice Menon and with the administrative support of the Singapore Academy of Law. Its object is to promote the convergence of commercial law in our region. Its members, apart from ourselves, are China, India and Singapore. Chief Justice Warren and

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13 *R (Ingenious Media Holdings plc) v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 54.

14 A principle sometimes referred to as the *Marcel* principle — *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225.

I are members of the Board of Governors along with Kevin Lindgren, the President of the Australian Academy of Law. The current President of the Law Council of Australia, Stuart Clark, is a member of the advisory committee. The first project on the agenda for the Asian Business Law Institute is to assess regional practice in the recognition and enforcement of foreign judgments. There are likely to be a number of projects which will offer opportunities for Australian judges and practitioners to contribute to the convergence of important areas of commercial law and in so doing to deepen their associations in the region and with these important participants.

It is to be hoped that further opportunities for international engagement will arise out of a delegation which I led to the Supreme People's Court of China last month, at the invitation of its President and Chief Justice. That Court is reaching out in a systematic fashion. There have been more than 30 delegations from the judiciaries of other countries which have been invited to Beijing this year. The President of the Supreme People's Court and I signed a joint letter providing for continuing exchanges in which the Council of Chief Justices will be involved. It is likely that a delegation from the Supreme People's Court, including the President, will be able to visit Australia next year. Even allowing for the very great differences that exist between the political and legal systems of China and Australia, the deepening of contacts creates opportunities for the delivery of legal services by Australians within the framework of the recently signed China Australia Free Trade Agreement. There is a long way to go and the road ahead is uncertain. Nevertheless, this is a promising development. I should add that the members of the delegation, apart from myself, were Justice Kiefel of the High Court, Chief Justice Allsop of the Federal Court of Australia and Fiona McLeod SC, the President-Elect of the Law Council of Australia and past President of the Australian Bar Association. We were accompanied by Mr Andrew Phelan who is the Chief Executive and Principal Registrar of the High Court and serves as the Secretary of the Council of Chief Justices and by way of further international engagement, as the Secretary of the Asia Pacific Judicial Reform Forum, the secretariat of which is convened by Justice Bell of the High Court.

This conference rightly focuses upon important matters of substantive domestic law and practice but, in a number of its topics, does so with an eye to their international environment. An outward looking Bar and an outward looking judiciary can only enhance the quality of Australia's legal system and the standing of Australian legal services and the

Australian judiciary internationally. I thank you for the opportunity to address you at this conference and wish you well in the sessions to follow.