

Can Australian lawyers of the future afford not to be internationalist?

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Introduction

I graduated from the University of Sydney Law School almost 35 years ago. I was fortunate to have some very fine lecturers and tutors. Some were full time academics. Quite a few were practising barristers or solicitors. We received a solid grounding in the core subjects necessary for 1980's practice: contracts, torts, equity and trusts, property, criminal law, evidence, constitutional law and the emerging public law. Electives were available only in final year. I took Industrial and Commercial Property and Roman Law. The only international law on offer was compulsory conflicts of laws, and a final year semester option in public international law for which I did not have room. After graduating, I was fortunate to study a BCL at Oxford, in Jurisprudence, Restitution and English Criminal Evidence.

Once I hit practice, initially as a solicitor in a large Sydney firm and later at the NSW Bar, I found that my University education had given me strong technical skills, but left me well short in understanding how practical legal problems were emerging in Australia. In part, this was because, as most young lawyers find, matters did not arrive in the neat boxes that we studied at University. A contract problem was also usually a tort problem and sometimes also equity problem. Section 52 of the then *Trade Practices Act (TPA)* was starting its inexorable march into almost every piece of commercial litigation. Moreover,

many real life commercial problems engaged parts of the law which had hardly yet made it onto the curriculum. The *Takeovers Code*, Part IV of the TPA, *Consumer Protection Law*, and so on. A vast amount of law had to be learnt from scratch on the job, at the expense of the employer or sometimes, I fear, the client.

As the 1980's wore on, and the 1987 stock market crash left its indelible mark on litigation for more than the next decade, I began to see, dimly at first, that something deeper was occurring in practice, something which also went beyond a typical 1980's university education. Many, although not all, subjects at University were taught with a strong emphasis on the law and practice of the State or Territory in which the University found itself. For example, property law, real or personal, tended to be highly State specific. Equity, at least as taught at Sydney University, clung to a purist view of the separation of law and equity which was not shared in most other States.

The forms by which lawyers were admitted to practice, and later regulated, observed these strong State distinctions. In 1985, I was admitted as a solicitor of the NSW Supreme Court and of the High Court. The same in 1989 when I became a barrister. To get admitted in additional States or Territories was a big deal. Time, cost, forms, often personal attendance required. Employers did not do it lightly with employees.

Large changes were underway in practice. Corporate clients were starting to operate more frequently on a national rather than just a State basis. Law firms sought to keep up by merging across State boundaries. A young lawyer was expected increasingly to be able write an accurate memorandum on the statute or common law of another State, even if that law differed from that of his or her own State, and even if he or she was not admitted to practise in that other State.

Barristers started appearing more regularly in the courts of other states, particularly in corporate and insolvency disputes.

These strong nationalising, and centralising, forces on Australian law were aided by our Parliaments, Executives and the Courts. The federal Parliament took advantage of the expansive view taken by the High Court of the heads of federal legislative power – particularly, the trade and commerce, corporations and external affairs powers – to enact more and more statutes which would then prevail over inconsistent and varying State law regimes. The Federal Parliament also expanded progressively the size and scope of jurisdiction of the Federal Court, and that of federal agencies with powers to regulate much corporate and commercial life in Australia, such as ASIC, the ACCC and the Takeovers Panel. In many areas, the new necessities of national economic life lead States to enact uniform legislative schemes across the nation, or to refer legislative power to the Commonwealth so it could enact a single law on a topic.

The Executives of the nation joined this trend, by regulating many areas of trade and commerce through intergovernmental agreements which brought further national unity to the law.

The High Court played its own central role, by laying down that there was now a single common law for Australia; a single set of principles for interpreting statutes, whichever polity passed them; and that deference should be shown between intermediate appellate courts in all matters of statutory or common law. Important constitutional provisions like s 90, 92, 99 and 117 were reinterpreted as protective of the development of the national economy.

My impression is that legal education in Australia, through the 1990's and into this century, has sought to keep pace with these fundamental changes, but

without full success. The entry of young lawyers into practice often still requires a substantial re-tooling on the job, to enable young lawyers to think and practice with a truly national perspective.

A deeper challenge?

My question then is whether there is an even larger transformation now occurring in the demands of practice - in the firms, at the Bar and beyond - a challenge behind which legal education in Australia lags even further. I would argue that what our young lawyers need from their university education to succeed in practice is a perspective that the effective resolution of most legal problems invites resort to, and reflection upon, foreign, international or transnational law, and on larger international and cultural perspectives. International and comparative law perspectives should not be left as optional add-ons late in the university curriculum. Rather, they should they be integrated into the teaching of virtually every subject.

Some illustrations of my thesis

Let me illustrate my thesis of how successful modern practice demands this very different type of education with the experiences of some hypothetical recent graduates.

Clare: invited onto an international commercial arbitration team

Clare has recently graduated and won a job with a top international law firm working in its Melbourne office. Her first matter is as a junior lawyer assisting on an international commercial arbitration. An Australian corporate client is being sued in contract by a Chinese supplier. The contract was entered in

Australia but governed by English Law. The seat of the arbitration is in Singapore. Arbitrators have been chosen from China, Australia and Germany. The Australian client has most of its assets held in investments in the United States.

Clare's Australian client wishes to set aside the contract for misrepresentation, if possible invoking the successor to s 52 *TPA* because of its expansive approach to remedies. Alternatively, it wishes to argue that English law does not recognise an obligation of good faith in contract, and that any remedies should be limited to damages. Finally, her client wishes to take prudent steps to shift some its US assets to a jurisdiction which is not subject to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*.

Clare's boss says "You're young and smart with good university marks. Write me a skeleton of our memorial, and a draft opinion for the client on the proposed asset shifting." Would Clare's studies at most Australian universities equip her for these tasks? I would like to think yes, but I suspect no. Clare will fail in her task unless her education has inspired in her a perspective in which contracts, trade practices law, private international law, dispute resolution, and indeed legal ethics, are subjects which intersect with each other and know no fixed national boundaries.

Her contracts lecturer needs to have taught Clare to think about each issue in contract law comparatively. First, Australian law identifies certain grounds to attack the entry of the contract; these may be more expansive than grounds in other key jurisdictions. Secondly, while the current Australian law attitude to implying obligations of good faith into contracts remains tentative, in other key jurisdictions it is more liberal. Thirdly, while Australian law has taken a

restrictive approach to gain-based remedies to date, some judges may be more liberal and more attracted to follow developments in jurisdictions moving in a more civilian direction.

Clare need not leave her contracts course as an expert on the modern law of contract in England, let alone in every one of our major trading partners; but she needs to know enough about where and how the laws of these countries might differ from Australian law, and how she can get ready access to the most reliable and up to date foreign materials, so she can write this part of the memorial.

Next, Clare's private international law course needs to have gone beyond the traditional boxes of jurisdiction, governing law and enforcement of judgments. She needs insight into how an arbitral panel instructed to apply English law would approach a claim that an Australian statute should be given effect to where it regulates entry of a contract made in Australia. Do English private international law rules create an arguable basis to characterise the misrepresentation claim as a suit for a wrong anterior to the suit on the contract, and thus governed by the law of Australia as the law of the place of the wrong? How should such an argument be framed to appeal to arbitrators trained in the German or Chinese tradition?

Finally, will Clare be equipped to write a draft opinion on the efficacy, or indeed propriety, of the proposed asset-shifting? In a remedies course, she may have been taught about the Australian law of Mareva injunctions or Anton Pillar orders. In dispute resolution, she may have been taught about the duties that parties and their lawyers owe to an Australian court, and how Australian law conceives of abuse of process. Here she is going to need much more: how to adapt these learnings to the problem of a client acting outside Australia in a way

which may frustrate a future international arbitral award. What remedies might this provoke from the arbitral Tribunal itself; from a court of Singapore as the seat; from a US court as the forum where the assets are located; or from an Australian court acting in personam? Does her training in legal ethics equip her to know whether she is crossing a line with her advice?

Tom: landing an international investment arbitration

Clare's closest university friend Tom has landed a job at a boutique Perth firm. It markets itself cleverly to overseas firms and clients as independent of the big Australian firms that have gone international. Tom's firm wins a referral from a Singaporean firm which to date has also resisted international takeover. They have a Singaporean client who is devastated that an investment they made in Australia has been cancelled by what appears to be some combination of federal and State action. Tom's boss gives him a deceptively simple task: "Write up an advice on whether an Australian constitutional claim is available under s 51(xxxi), and do a bit of research on the *Singapore-Australia Free Trade Agreement 2003*. A 24-hour turn-around on this one please."

Tom will be struggling unless his constitutional law lecturer has inspired him to take the widest possible comparative law approach to s 51(xxxi). He needs to be skilled in the orthodox Australian approach that reduces acquisition of property cases to a characterisation exercise: a law has the just terms protection of s 51(xxxi) if but only if it has the character of a law with respect to an acquisition of property. Tom also needs to know the accepted cases on when what appears to be an acquisition by a State, not burdened by s 51(xxxi), can be sheeted home to the Commonwealth because of joint federal-State action. However, he needs to go beyond these domestic law skills. Are there any broader elements from the "takings clause" jurisprudence in the United States that might help fashion the

claim in a way attractive to an Australian judge wanting to rethink s 51(xxxi) jurisprudence?

If an international investment claim goes ahead, it will be led by the Singaporean firm. Tom's firm stands to earn a role as secondary counsel on Australian law matters if it can demonstrate a "value add". Value means, in this case, navigating the interface between Australian domestic law and the international law principles which will govern the possible arbitration.

If Tom has learnt something of the international jurisprudence at university, he will have a head start on this opinion. He needs to have an entry level understanding of what is meant under international investment law by expropriation, and by the fair and equitable treatment obligation which lies at the heart of most of these claims. He needs to know how these differ from parallel domestic concepts so he does not make the error of importing false domestic analogies. Importantly, he needs to know how international law uses the concept of proportionality – substantively or procedurally – to measure the validity of government action. His constitutional and public law lecturers may have implanted in his mind a strong seed of caution, even suspicion, about this foreign-sounding concept of proportionality. Yet Tom needs to know how and when to use it, as well as when to reject it.

Paul: a young General counsel confronting a global supply chain

Paul graduated a few years before Clare and Tom. He was always business-minded and went straight into an in-house legal team with a small Australian start-up company. The company had won a hugely valuable contract with Apple to supply a key part for the upcoming I-phone 9. A stock-market listing or a handsome private equity buyout beckoned.

Apple now has Paul's company over a barrel. The contract was a take-it-or-leave-it Apple stipulation. Arbitration in New York is the exclusive dispute resolution mechanism, subject to a bar that no arbitration may be commenced until one year after the successful release of the I-phone 9. Apple has withheld further payments to Paul's company, alleging that the key part is of dubious quality. Apple has most of the major Australian law firms on retainer. Paul's company is desperate, indeed on the precipice of bankruptcy. The listing or buy-out is now a distant dream.

Paul faces no easy task to navigate a way through for his company. To have a chance, he needs to see this as a challenge, as a chance to put into practice the international vision he acquired from university. He must be able to discern where the legal issues may lie, even if the answers are not obvious. Can the "contract now/arbitrate later" provision of the Apple contract be attacked on public policy grounds under the law of an available forum? Can good faith doctrines of the civil law be invoked to bring Apple to heel?

More practically, Paul needs to be thinking of his representation options. The Australian solicitor firm market seems largely closed to his company, so are there any specialists at the Bar here that he could use? What firms or counsel should he go to outside Australia? Is his best bet Singapore or London, or should he be going straight to a French or German based firm that might, through a civilian approach, be able to worry Apple which is currently resting comfortably with its New York jurisdiction superiority?

Ultimately, Paul may need to be equipped to give instructions in a proceeding in a forum quite foreign to a common lawyer. If a civilian type approach is adopted, the nature of the pleadings, how the witnesses give evidence and the

ability of the tribunal to use its own knowledge to find the facts and law will differ very much from an Australian domestic court. Paul needs to open to and curious about these possibilities, and well placed to handle them.

Yasmin: the young government lawyer

Unlike Paul, Yasmin never liked commerce much. She was thrilled to get a job offer at the Crown Law Office in Hobart. Public law and constitutional law are so fascinating. Quickly Yasmin finds legal challenges she did not expect.

Tasmania has a new conservative Government which has passed a law banning protestors from entering a 150m bubble zone of abortion clinics. The law is challenged as offending the implied freedom of political communication under the Australian Constitution. The Tasmanian legislative drafters have modelled it on laws in certain conservative US states that so far have survived challenge in US State Courts.

Yasmin is asked to draft observations to counsel on two questions. One, should Tasmania argue for remittal of the matter from the High Court to the Federal Court for a full trial on the facts? Two, what evidence, if any, should Tasmania be marshalling in defence of the law?

Yasmin will be in good stead if her training in Australian Constitutional law has pushed her in various directions beyond our shores. She needs to be broadly across First Amendment jurisprudence to pick up quickly whether the decisions from the US State Courts are representative of the trend of US law and potentially transferable to the Australian context. Given the Australian High Court's current interest in proportionality in this area of law, Yasmin needs also to be well versed in European approaches, particularly if they might illuminate

the evidentiary task of proving that Tasmania did not have available alternative less restrictive means of pursuing its legislative end.

Pete: at the frontline in a Community legal centre

Pete always put social justice first. He is down to earth and likes using the law to help the most vulnerable in society. Working in a community legal centre, he needs a strong working knowledge of a targeted area of statute law, namely federal and state statutes that govern the entitlements without which his marginalised clients could not survive. Most of his time is spent trying to get the facts straight from his clients and devising practical solutions for their pressing problems. Pete does not have much time or need for an international perspective, or so it seems.

Pete starts to see large numbers of his clients coming in with the same type of complaint. The government is sending out threatening letters with the Australian Federal Police logo on them demanding clients repay what are said to be overpayments of social security. The demands are based on a flawed computer program. Pete starts thinking of a possible class action against government but is struggling to formulate the cause of action. He needs the skills to tap quickly into US law to see whether in like circumstances proceedings are starting to push the boundaries of tort law, administrative law and fiduciary law against governments using superior power over vulnerable citizens.

Serafina: working in house at a University

Meanwhile, Pete's colleague from university days, Serafina, has landed a job in the legal office of a University. Most of her work is employment-related based,

on domestic statutes and the common law. Like Pete, she does not seem to have an obvious need for international law perspectives.

Without notice, the Government announces a radical change to the skilled visa migration rules. There will shortly be a minimum stay of four years in Australia to get a visa. Serafina's boss requires her to prepare an urgent submission to the Minister to oppose the change. Unless the decision is reversed, her University will struggle to attract young talent from overseas to do post-doctoral work here.

Serafina needs to master, with little time, the key parts of the *Migration Act* and *Migration Regulations* of Australia. That will be a challenge as she steered deliberately well clear of this option at University. More than that, to present a compelling submission, she will need to be able to get a quick yet accurate handle on the equivalent migration rules of the key countries currently supplying these valuable post-doctoral students to Australia. This will enable her to draft a persuasive argument that the new policy is bad for Australia because its lack of reciprocity risks retaliation which will harm the prospects of young Australians seeking to continue their education overseas.

Serafina cannot be expected to have left University with the actual answer to this precise problem. It could not have been predicted. But she needs the skills and perspective to be able to know where and how to do the research so she can draft a strong, legally informed, submission to Government.

Maggie: an early passage to the Bar

From early on at University, Maggie was attracted to the Bar. She revelled in mooting, and the chance to compose a legal argument that fitted the facts and

authorities seamlessly together in advance of a client's interests. After a few short years in a Government legal service, she has arrived at the Bar, specialising in constitutional and public law, with a dab of commercial law thrown in.

Australia has suffered a spate of election cases in recent years. Politicians are falling over like ninepins under s 44 of the Constitution, for failure to renounce their citizenship of a foreign power before standing for election. Maggie is called in on short notice to help defend a politician who has decided to run the gauntlet of a High Court challenge. His defence is that he could not have been expected to renounce his foreign citizenship because his mother obtained it for him as an adult without telling him. The stakes have been raised because the Commonwealth has threatened that if he does not go quietly it will seek an order for the repayment of all his parliamentary entitlements to date.

If Maggie has been well trained at University, she will appreciate immediately that she must extend her research into the historical roots of s 44 at the time of Federation in Australia to understand its true purpose and the scope of any implied exceptions to it. Beyond this, she may need to develop an argument that seeks to limit the scope of s 44 by placing it in the larger tradition of representative government from the United Kingdom and the United States. Further still, Maggie needs to view this as more than just an election case. The threatened claim for repayment of monies invites a cross claim by her client for a quantum meruit, or in modern terms a claim in restitution, for the reasonable value of services freely accepted. This may well become a test case for how far Australian law should go in embracing the modern UK approach to restitution. Maggie will need to get a handle on this comparative law exercise very quickly.

Some provisional conclusions

The examples I have just given represent variants on real life matters from recent years. They are not fanciful examples, nor isolated in the daily practice to which our young lawyers are exposed. They illustrate that lawyers practising in Australia need to approach most legal problems as potentially inviting resort to the foreign, international or transnational law, for any one or more of a variety of purposes.

First, a foreign or international legal system may well supply a *forum* in which matter is to be litigated, whether in addition to or in the alternative to an Australian forum. Second, such a system may, irrespective of the chosen forum, supply the *governing law* or *procedural rules* for dispute resolution. Third, even where matters proceed wholly within the domestic courts or arbitral bodies of Australia, foreign or international laws or procedures may be *transformed* into Australian law, or provide an *inspiration* for its development. Fourth, and conversely, matters of Australian domestic law may, by a process of *renvoi*, be brought into dispute resolution occurring internationally. More generally, matters engaging Australian lawyers will frequently involve clients, or witnesses, on one side or the other, from different cultures and legal traditions. Our young lawyers need to be truly cosmopolitan in understanding these varying perspectives and devising arguments or solutions that match them.

Proposal for the way forward

In summary, I believe that Australian legal education cannot continue, as it currently does in most cases, to consign international and comparative law perspectives to optional add-ons late in the university curriculum or in post-graduate studies. What I am proposing is this:

- 1 A minimum of 20% of teaching and assessment in *every* University course should engage directly international or comparative law.
- 2 In the first year of study, students should be taught the basic tools and methods of international and comparative law, so they can work effectively with the international and comparative materials that will be presented within subjects in following years.
- 3 International and comparative law courses should remain separately on the curriculum, for those who wish to study them in more depth.

Answering some possible objections

Let me anticipate and respond to some possible objections to my proposal. One objection might be that this form of training is not needed for all Australian lawyers. For example, a student who goes on to be a criminal lawyer, a family lawyer or a conveyancer may not need these skills at all or often enough to justify placing them front and centre in the undergraduate curriculum. A second objection might be that, even if the idea has some merit, there are too many other more pressing priorities, particularly for the undergraduate curriculum. These matters can best be left for those who wish to pursue them at post-graduate level, here or overseas. Third, it might be said that the proposal is too ambitious because it will place yet another intolerable burden on already overworked academics. The necessary re-skilling of academics, and redesign of courses, to implement it will undoubtedly be substantial.

My answer to these objections is as follows. First, the form of education that I am advocating is and will be indispensable in almost all areas of practice. The domestic *criminal* lawyer, for example, must be educated in the common law

and statutory law of crime, the domestic law of evidence and traditional domestic jury procedures, no doubt. But where the law presses at the boundaries, such as reception of DNA evidence, or use of algorithms to predict or measure behaviour, much can be learnt from what is happening in overseas jurisdictions. Next, the domestic *family* lawyer must undoubtedly be skilled in the *Family Law Act 1975*. Yet, important parts of that Act depend on the *Hague Convention* which the lawyer must have a ready facility to interpret and implement. Many family law disputes now have cross-border implications, as it notorious from custody cases. Finally, the *conveyancer* may seem like the example, par excellence, where legal knowledge can be localised and confined. Yet it is also an example where the challenge to the lawyer's monopoly is at its greatest, and where few young lawyers could safely predict a lasting career could be made out.

As to the second objection, my suggestion is that it fails to grapple with the seriousness of the issue. We are talking here not just about the futures of many young lawyers individually, important as that is. We are talking about the skill base into the future of an important part of Australia's workforce and economy. We are being left behind by our trading partners in many areas. Here is one area where the raising of the skill base for our young lawyers as whole will substantially aid the prospects of Australia as a nation.

As to the third objection, I do not have a complete answer to it. I sympathise with the onerous and ever increasing demands being made on our academics. They cannot be asked to do everything, certainly not everything at the same time. Prioritisation is critical, and this conference has been important in identifying what should stay, what should expand in the curriculum and what must, even if reluctantly, be jettisoned. But I believe that when our academics are pushed to conceive of their teaching, and their research, in the broadest

possible international and comparative frame, its quality, benefits and indeed efficiency will only increase.