Academy of Law: A Sense of Common Purpose

I acknowledge the traditional custodians of the land on which we meet, the Gadigal people of the Eora Nation and pay my respects to their elders past, present and emerging.

Welcome to everyone to the Court in person and online.

It is an honour and a privilege to speak this evening at the launch of Professor David Barker's History of the Australian Academy of Law, A Sense of Common Purpose. The author has been deeply involved in the origins and work of the Academy from the very beginning.

The recording and discussion of the growth of the Academy from the earliest discussions in the Council of Australian Law Deans (CALD), the impetus given by Professor David Weisbrot in the Australian Law Reform Commissions Report on Managing Justice, the crucial support of the first patron Chief Justice the Hon Murray Gleeson, and the energy and enthusiasm of the founding fellows and leaders, especially the Hon Robert Nicholson and the Hon Kevin Lindgren were tasks manifestly worth undertaking.

The aim of the Academy is well expressed in Recommendation 6 of Professor Weisbrot's ALRC Report:

> to Serve as a means of involving all members of a legal profession – students, practitioners, academics and judges – in promoting high standards of learning and conduct and appropriate collegiality across the profession.

After discussion of the gestation of the Academy for some years, the book then describes the launch of the Academy in 2007 and the laying of the foundations for the Academy's future work.

In 2009, in Perth, it conducted its first major symposium. Fittingly, the subject was one that remains critical today (perhaps to use an overworked expression: existential in its character) for the law and the legal profession: Professionalism and Commercialism in Legal Practice.

The energy and variety of work of the Academy since the early years are described by Professor Barker: the Roundtables, Symposia, the development of the website, the institution of the Patron's address, the institution in co-operation with Charles Darwin University of the Austin Asche Oration and many other events. The number, variety and importance of the events and work of the Academy are too numerous to list.

By 2017, after a decade's work, there was a richness and variety to the work of the Academy reflective of the energy of its leaders, Robert Nicholson and Kevin Lindgren, which is being carried on today by the Honourable Alan Robertson.

Activity proceeded unabated with new initiatives: the Academy prize for a student at the Australian and New Zealand Law Honours Student Conference, the annual essay prize, panels, conferences, symposia and more roundtables.

The remarkable conference on the future of Australian Legal Education in 2017 over three days marked the 10th anniversary of the Academy and the 90th anniversary of the Australian Law Journal. The book of the conference contains an important and enduring record of deeply thoughtful contributions by many fellows and participants.

Professor Barker's work carefully and meticulously describes the achievements of the organisation and initiatives of the Academy and its fellows. It was unabated even in the pandemic, as the Academy, like the rest of the legal community, came to terms with the need for remote communication: symposia and roundtables were held throughout 2020 and 2021.

The final chapter: in retrospect - A Sense of Common Purpose looks both back to the Academy's achievements in the past and forward into the future.

Professor Barker records the great achievements of the Academy in bringing together the profession, the judiciary, and the academy, including students: as I have said, in lectures, essay prizes, roundtables, symposia, major conferences, and publications. The richness and variety of the activity, local and national in its presentation reflects our federal structure and is fuelled and sustained by the diverse energy of the fellows and the directors.

The American Law Institute (ALI) had its remit in reform and the production of coherent modern restatements of the law given to it by its circumstances. It was the chaotic jungle of American jurisprudence by the absence (notwithstanding the 90 year initiative of Joseph Story in *Swift v Tyson* (1842) 41 US 1 until ended brutally by the Supreme Court in *Erie Railroad Co v Tompkins* (1938) 304 US 64, with the exception of the general maritime law of the United States) of a common law of the United States and the co-ordinate absence of a United States' final court of appeal, other than a constitutional, federal or maritime appeal court. The ongoing work of developing and updating restatements provides its own solid work program for the ALI.

Of course, there is no chaotic jungle in America if one seeks to examine the law of a state or federal law. One is greatly rewarded by understanding what the New York Court of Appeals, or the Supreme Judicial Court of Massachusetts, or the Second Circuit Court of Appeals has said over the years about a topic. But the development of coherent principle and the provision of structure to a reformed expression of general principle by the ALI is of deep importance to the overall fabric of American law and the administration of justice in the United States.

With an Australian common law, no such body of restatements is required. But there may be on-going work projects that the Academy, rather than the Australian Law Reform Commissions (ALRC) is best able to propound.

I have made one suggestion previously. There may be many others.

Looking to the future and Australia's place in an international dispute resolution system comprising national courts, international courts, arbitration institutions, ad-hoc arbitration, and other ADR mechanisms our federal system has its inhering handicaps (and strengths). Its strengths are the richness and variety of the multiple commercial and legal centres. The handicaps include an absence of an "Australian law". There is one common law, but no law of Australia: rather the law of New South Wales, Victoria, South Australia et cetera. The lack of a recognisable body of law (statute and general) that Australia can project to the world as able to regulate international transactions may be seen to be a problem. Anyone who has tried to explain the Australian federal compact to a foreign

client with the integration of state and federal statute, with one common law and the place of sections 79 and 80 of the *Judiciary Act 1903* (Cth) understands the problem.

The creation of a bespoke, but variable by choice, Australian commercial law: statute and common law for the adoption into international commercial contracts would provide a transparent and clear foundation for the projection of the Australian legal system to the world.

It would be an ongoing project that might be achieved by the methodology employed by the ALI in the creation and revision of the Restatements.

Other projects may present or suggest themselves.

The recency of one Australian common law is often not remarked upon. It was only in 1987 that section 80 of the *Judiciary Act 1903* (Cth) was amended to remove the expression "the common law of England" and to replace it with "the common law in Australia" as the default general law in federal jurisdiction.

The development of the common law *of* Australia was the work of the High Court from then on.

Perhaps, it is time to recognise a role for the Academy in helping shape that development of the common law of Australia by a work program on particular topics that trouble the profession because of cost or prolixity.

Perhaps, further, the Academy may play a role in legal language and drafting. The deeply troubling prolix abstracted particularisation of some (not all) statutory drafting is a subject important enough to attract the attention of the Academy. The issue is one of conceptual approach to the expression of meaning. It is of great significance for society as a whole: the removal or abstraction of whole ideas and human conceptions and their deconstruction into multifarious parts each expressed abstractedly and laid out exhaustively has two consequences: a lack of clarity, and a draining of the human or moral norm that was embodied in the whole idea or conception and which has now been leached out by the complex abstracted bureaucratised language. I referred to this problem in the Patron's address that I gave last year in discussing the important work of the British neuroscientist and thinker, Dr Iain

McGilchrist and how that work could give insight into legal thinking. This is not just a question of style; it is a question of the wholeness and legitimacy of law to people.

In its 15 years of operation, the Academy has been responsible for a vital, energetic and richly varied body of work and activity, binding the profession, the judiciary and the Academy to the common purpose of which Professor Barker so eloquently speaks: the enriching and deepening of Australia law, its teaching and its administration, in a way that binds in a collegial fashion those who think about, practice in and administer the law.

Professor Barker is to be congratulated for this important work of record.

May the Academy continue its most important work into the future.

James Allsop
Sydney
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