Chapter 12

Australia's Contribution to the Common Law*

I am honoured by the invitation to address your distinguished Academy. The topic was suggested to me at the time of the invitation. I was happy to take up the suggestion but conscious that my response was likely to reflect a personal, although I hope not idiosyncratic, view. Any judge, or practitioner, or law teacher, asked to assess Australia's contribution to the common law is bound to be selective and subjective. As to selectivity, I have chosen to concentrate on aspects of the work of the High Court of Australia. There are many decisions of intermediate courts of appeal, and of individual judges, that qualify as important contributions to the law. Some of Australia's finest and most celebrated judges never sat on the High Court. Australia has produced eminent legal scholars and teachers. Australia's work in legislation and law reform has produced notable exports. The most familiar example is our Torrens system of land title, which has been taken up in other places including Singapore. I have confined my attention to the work of the High Court because that is an obvious place to look, and because it is a source of more than sufficient material for my purpose. As to subjectivity, I am sure that aspects of the work of the High Court other than those I have chosen would be seen by many lawyers as more significant.

What amounts to a judicial contribution to the law is itself a question upon which opinions differ. There are some commentators who divide the judicial world into two parts, "progressive" and "conservative", and award congratulations according to the use of such labels. To those who admire "progressive" judges, a contribution is a decision that changes the law. The greater the change, the greater the contribution. To others, a contribution is a decision that reasserts established principle, although some change, preferably minimal or "incremental", is accepted. Opposing camps adopt slogans, designed, like medieval battle colours, for easy recognition of friends and enemies. A description of a change in the law as "radical" may be a signal for applause or hostility, according to taste. Yet most Australian judges accept Sir Frank Kitto's view that, in the waters of the common law, they have no more than riparian rights.[1] They may disagree about what pollutes, or purifies, the waters, but they have a strong sense of custodianship of their common law heritage, and of the threats to that heritage posed by both the illegitimate use of power and unwillingness to develop the law where necessary.

My purpose is to illustrate the work of the High Court, by giving examples which show it acting sometimes creatively and sometimes traditionally, sometimes boldly and sometimes cautiously, but in all cases consistently in the application of a judicial method that I believe to be in the mainstream of the common law tradition. I have

* An address to the Singapore Academy of Law, 20 September 2007.

1 *Rootes v Shelton* [1967] HCA 39; 116 CLR 383 at 387.