OCCASIONAL ESSAY

THE COMMON LAW: WHITHER OR WITHER?
OCCASIONAL ADDRESS TO AUSTRALIAN LAWYERS ALLIANCE ACT BRANCH CONFERENCE, 24TH JUNE 2011

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Every year, and normally between Christmas and New Year, I find myself asking, sometimes family members, sometimes friends, whether they happen to have caught that year's broadcast of the Queen's Christmas message. The forms of the answers vary from the exasperated through the scornful and incredulous to the frankly obscene. The substance of the answers is, as of course you have divined, in general, no. Yet, if there is one lesson that a life in the law teaches, it is, surely, that there is always something new to learn albeit sometimes from a source that seems at first blush to be less than promising.

So it was that several years ago, and during the course of that year's Christmas Message, the Queen recounted some advice that had been given to Her Majesty early in her reign and by her first Prime Minister, Sir Winston Churchill. It seems that Churchill gave this advice: 'Always remember that the further back you can look, the further forward you can see.'

I imagine that one could be confident that both Churchill, when he gave that advice, and the Queen when Her Majesty received and later recalled it, did not advert in any particular way, indeed probably did not advert at all, to the Common Law. Yet it has always struck me that Churchill's aphorism explains simply and comprehensively the essence of the Common Law; the technique of the Common Law; the durability of the Common Law and the continuing relevance of the Common Law.

When I was provided with the first draft of the Conference agenda and asked whether I would be the first speaker at the Conference, I could not but notice that a good deal of the programme is to be devoted to a

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panel discussion about what their proponents are pleased to call 'reforms' of the Common Law in connection with certain categories of compensatory damages in civil cases and in connection with the current law respecting workers compensation. I felt that it was not quite appropriate for one who might be described as a blast from the past, and a New South Welshman at that, to plunge enthusiastically into the particular controversy. I did perceive, however, that it might be useful to set the scene for what is to follow in the panel discussion, by saying something more general about the Common Law in the 21st Century.

The unashamed Common Lawyer, of whom I am certainly one, who takes the Churchillian advice and looks back, can see in fact a very long way. He/she can see a continuum in the development of the Common Law that begins, to take a convenient starting point, in 1154 when Henry II succeeded to the English throne. The measure for present purposes of the reign of Henry II is summarised thus by Mr WJV Windeyer, (later Sir Victor Windeyer, a Justice of the High Court of Australia), in his lectures on legal history:

> [H]e established a permanent court of professional judges who were royal servants. This made the administration of justice the task of the central authority in the kingdom and thus led to the uniform development of a true common law, common to all Englishmen, whether of English or Norman ancestry, and common to all England.[1]

From that initiative, and continuously throughout the 850 years that separate Henry II from us, there has developed a system of Common Law that is one of the greatest achievements of Western civilisation and that is as much a part of our Australian history, culture, identity and inheritance as it is of English history, culture, identity and inheritance.

It is, of course, not possible to discuss in any decent detail the highs and the lows of that 850 years of development of the Common Law. It is, however, possible to attempt a summary of the principal legacies of that development. Professor A R Hogue in his work *Origins of the Common Law* is admirably succinct: 'The rule of law, the development of law by means of judicial precedents, the use of the jury to determine the material facts of a case, and the definition of numerous causes of action – these form the principal and valuable legacy of the medieval law to the modern law.'[2]

[1] WJV Windeyer, *Lectures on Legal History* (Law Book Co, 2nd ed, 1949) 53.
[2] Arthur R Hogue, *Origins of the Common Law* (Liberty Fund Inc, 1986) 246-247.

Let us take the first of those four topics and think for a few minutes about what we can see when we turn from looking back and look to the present and to the immediate future. It is useful to begin by borrowing again from Professor Hogue:

> What is required in the 20th century is a much wider understanding of legal rights, how they have been gained and how they may be lost. For programmes promising social justice and economic justice are certain to be unfulfilled unless the programmes can be translated into legal rights protected by courts free to apply known rules. Many lawyers understand this; many laymen do not …. Problems of the government of complex industrial societies present serious threats to the continuance of the common-law system. The doctrine of the supremacy of law now confronts competition with a doctrine of government regulation by administrative orders. In the 20th century many European nations have shown how easily 'statism' can replace the rule of law. It is a peculiar quality of the Anglo-American legal system that it still retains respect for due process and for courts administering known rules.[3]

What, still looking forward, are the factors respectively favouring and not favouring that last proposition? There are, I suggest, obvious factors against. They concern: first, society generally; secondly, government and public administration; thirdly, the Courts themselves; and, finally, the legal profession.

As to the current condition of society, as good an assessment as any other is that of Aleksandr Solzhenitsyn: 'hastiness and superficiality are the psychic disease of the twentieth century.'[4] They are fully as much a psychic disease in the 21st century; indeed more so as more and more people become more and more addicted to more and more electronic gadgets which are destroying whatever concentration span has been left by television, while retreating ever more into a state that is at once wired up and fenced off.

That state of affairs offers a golden opportunity to those legislators, political hangers-on and troublingly ambitious senior bureaucrats, all of whom seem to get their only true pleasure and fulfilment out of an unremitting determination to micromanage other people by means of programmes that are said to be works of social inclusion but are in

[3] Ibid 252.

[4] Gore Vidal, *Point to Point Navigation* (Random House, 2006) 223 quoting Aleksandr Solzhenitsyn, 'A World Split Apart', Commencement Address Delivered at Harvard University, 8 June 1978.

truth works of social engineering. Underlying those programmes is, at least as it seems to me, a truly poisonous concept, namely that there is no standard, no principle, no value, the worth of which cannot be expressed in bare dollar terms. We should never forget in that connection something said by one of my own all-time favourite jurists, Mr Justice Brandeis of the US Supreme Court, in a celebrated dissenting judgment:

> Experience should teach us to be most on our guard to protect liberty when the purposes of government are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[5]

It is a cosmic insight. It is to political science what God and Adam touching fingers on the Sistine Chapel ceiling are to art and the opening chords of Beethoven's Fifth Symphony are to music.

As to the Courts themselves it cannot be denied that in many instances, although of course by no means all or as yet even most, appointments are now made upon the basis that the Courts should be turned into some kind of social laboratory in which breadth and depth of learning in and practice of the law, and a sound judicial temperament, are fine as optional extras but are not to be preferred over the remaking of the Bench in the image of some ideological fantasy of social inclusion. This is not an approach likely to produce much needed modern successors to the great Common Law Judges of the past.

And what are we to say of the profession itself when in far too many instances, although of course not by any means in all instances, professional pride and professional commitment deriving in large part from a living awareness of the mighty inheritance of the Common Law, have been hollowed out by the billable hour and the overarching obligation to 'make budget'?

All of these matters are, I suggest, matters that demand the urgent and resolute attention of, in particular, the Judges and the members of the practising profession. To the extent that those concerns remain uncorrected, then to that extent the Common Law and the protections which it has built up over the centuries for all of us, are very much at risk.

[5] *Olmstead v United States*, 277 US 438, 479 (1928).

There are, however, two great forces available as weapons for those of us who will not simply lie by while the achievements of the centuries are shredded by people whom no correctly functioning society would let within touch of the levers of power, much less endow with a licence to operate those levers.

The first force is that sufficient of the great Common Law Lawyers have always been both willing and able to speak truth to tyranny whether actual or threatened. We can go, for example, to the beginning of the 17th Century and listen as Lord Chief Justice Coke tells James I, the very embodiment of the doctrine of the divine right of kings, that the King is subject to the law and so may not approach the Courts save as a litigant like any other.[6]

We can jump forward 150 years or so and listen to another Chief Justice, Lord Mansfield. He is telling James Somersett, a fugitive black slave who is being held in chains on a ship moored in the Thames en route to Jamaica from Virginia, that he will not be deported back to slavery because, property or no property, sale or no sale, contract or no contract, no man who is within the protection of the Common Law of England even if formally a slave, will be forced to abandon that protection against his will.[7]

We can move a little further forward and listen to a conversation between Lord Ellenborough and John Erskine, already one of the best advocates of the time and destined to become a Lord Chancellor. Erskine has accepted the brief to defend Thomas Paine, the pamphleteer and polemicist, on a charge of treason arising from things said in his now celebrated treatise The Rights of Man. Lord Ellenborough, a courtier close to the Sovereign, George III, tells Erskine that the King is 'much displeased' with Paine and that Erskine must not take Paine's brief. Erskine at once replies: 'I have taken it and, by God, I will hold it.' Erskine correctly perceived that to do otherwise would compromise his professional integrity and independence, and notwithstanding that his refusal was virtually certain to cost him the plum appointment, which he then held, of Attorney General to the Prince of Wales.[8]

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[6] JH Baker, *An Introduction to English Legal History* (LexisNexis Butterworths, 4th ed, 2002) 98.

[7] See *R v Knowles, ex parte Somersett* (1771-72) 20 State Tr 1 as discussed in JH Baker, above n 7, 476.

[8] For the Erskine incident, see Mr Justice John Phillips (later Phillips CJ) of the Supreme Court of Victoria in John Phillips, *Advocacy with Honour* (Law Book Co, 1985) 1, 2.

The second force is that the Common Law has never been fazed by change. It is true that the Common Law has not always been in the vanguard of change; but the Common Law has always been both able and willing to accommodate change, change being understood in the celebrated statement of Disraeli, not himself a lawyer but somebody who knew a thing or two about how the real world operates:

> In a progressive country change is constant; and the great question is not whether you should resist change which is inevitable, but whether that change should be carried out in deference to the manners, the customs, the laws and the traditions of a people, or whether it should be carried out in deference to abstract principles and arbitrary and general doctrines.[9]

The first of those options is the way of the Common Law; the second is the way of modern legislative and bureaucratic interference with the Common Law. At the turn of the 19/20th Centuries one of the US Senators for New York, a man with the arresting name of Roscoe W Conkling, said 'When Dr Johnson described patriotism as the last refuge of the scoundrel, he was unconscious of the then - undeveloped capabilities of the word "reform".'[10] Quite.

In New South Wales the Rules of the Supreme Court now contain an overarching requirement that litigation be conducted at every stage of its course in such a way as will achieve the just, quick and cheap disposal of the litigation. Gleeson CJ once commented that the most important part of that Rule was the comma separating the word 'just' from the words 'quick and cheap'. In like vein, when you ask, as I have this morning invited you to do: 'whither the Common Law?', keep in mind that the most important part of the question is the first aitch.

[9] Benjamin Disraeli, 'Speech on Reform Bill of 1867' (Speech delivered at Edinburgh, 29 October 1867).
[10] Matthew Parris, 'Patriotism', *Features*, *The Times* (London), 29 June 2006, 23.