OPENING ADDRESS

AUSTRALIAN LAW LIBRARIANS' ASSOCIATION CONFERENCE[*]

by

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In Xenophon's "Chyropaedia" (The Education of Cyrus), the author, who you will recall was, after Plato, Socrates' most famous disciple, tells a story of an occasion when his young hero, Cyrus, was left in charge of the other pupils in his class by the master.

It was a very cold day. One of the pupils was a very big boy with a very small cloak. He was shivering with the cold. In the class there was a small boy with a very large cloak. Cyrus took the large cloak from the little boy and gave it to the big boy. And he gave the big boy's small cloak to the little boy who was perfectly well covered and comfortable with it. When the master returned and found out what had happened, he returned each cloak to its owner and gave Cyrus a sound thrashing.

Xenophon says that the master was right to do so because, while what Cyrus had done was a perfectly reasonable solution to a problem, it was not justice according to law.

Over the last four decades there has been, in many of the law schools where the common law is taught, a shift in emphasis which favours the development of problem solving skills and critical reasoning over the inculcation of an appreciation and understanding of the historical development and the actual content of rules of law.

When I studied law at the University of Queensland in the 1970s, Legal History was a compulsory subject. Now, Legal History is not a compulsory subject at any of Australia's law schools. At some, it is not offered at all; it is currently not offered at my alma mater. But happily that is about to change.

No doubt this shift has produced lawyers skilled in the arts of legal argument; perhaps more skilled in this regard than those who have preceded them. But in the workaday world of the courts, sound solutions to legal problems do not emerge from the application of logical and rhetorical skills of even the most talented of debaters as if the exercise is a matter of first impression.

The practical resolution of a legal problem between the State and a citizen or between citizens is not a process that starts afresh each time a lawyer is called upon to address a

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legal problem. Indeed, as Xenophon's anecdote illustrates, it is not even a process which begins afresh for each generation.

No doubt the law must evolve, but a fundamental principle, which informs the rule of law and is at least as old as Aristotle, is that justice requires that like cases should be treated alike. The rules of "stare decisis" serve the pragmatic values of certainty and access to justice by lessening demands on judicial time and energy; but they also serve the high principle of equality of treatment of all citizens before the law.

It will be obvious to you that I think that this shift in legal education is to be regretted. I think that the intellectual lives of our young lawyers are much the poorer for it. I would even venture the suggestion that they may be less effective lawyers because of it. A knowledge of where the law has come from is essential to the enterprise of seeking to argue about where the law ought to go, at least if legal development is to respect the high value of equality of treatment. And our young lawyers, and the communities in which they live and work, will be the poorer for the want of that knowledge.

I propose to offer some examples of what I mean before I deal with the ramifications of this state of affairs for the profession of law librarians.

Queanbeyan

In *Queanbeyan City Council v ACTEW Corporation Ltd,*[1] the High Court was concerned with a challenge to the validity of charges imposed on an agency of the ACT government under a law of the ACT in respect of water supplied by the agency to Queanbeyan City Council (the Council). There was an agreement between the agency and the Council whereby the Council agreed to reimburse the agency for the charges imposed by the ACT.

The basis of the challenge by the Council was that the charge levied by the ACT on its own agency was a tax in the nature of an excise within the meaning of s 90 of the Australian Constitution; and hence beyond the competence of the ACT Parliament.

The Council's argument took as its starting point the description of a tax given by Latham CJ in *Matthews v Chicory Marketing Board (Vic)*,[2] where it was said that a tax is a compulsory exaction of money by a public authority for public purposes enforceable by law, which is not a payment for services rendered. Now this description conveys the important idea that a tax is an exercise of the power of the government lawfully to take from the governed. It is no exaggeration to say that the circumstances in which taxes may be raised and spent has been the most dynamic force in the constitutional history of the English-speaking peoples.

[1] (2011) 281 ALR 671.
[2] (1938) 60 CLR 263 at 276.

This aspect of the constitutional settlement following the 17th Century revolutions in Britain has been the principal element in our conception of parliamentary democracy. One might venture the suggestion that representative, and therefore benign, government and a populace willing to pay its taxes are the mutually dependent conditions of the success of the Anglophone democracies. In contrast, for example, with Italy, where the notorious unwillingness of the populace to pay taxes is almost certainly linked to the historical memory of most of the populace that government meant foreign or mercenary soldiers who burned your farm and stole your food.

However that may be, in the long history of Anglophone law since the 17th Century, it has never been thought that the internal financial arrangements made within the government or its agencies are a species of taxation.

The imposition by the ACT of a charge on its own agency did not exhibit this essential hallmark of a tax, that is, the taking from the governed by the government.

This point was not raised by the lawyers for the parties and remarkably, it was not raised by the lawyers for the ACT who might reasonably have been expected to be able to deploy some sort of institutional memory by way of explanation for the terms in which the ACT's legislation had been structured.

The High Court ultimately decided the case on this point, the point having been raised, but necessarily not determined, in the lower court.[3]

The case illustrates the point that even a passing acquaintance with legal history is likely to make a modern lawyer a more effective lawyer.

Hashish v The Minister for Education of Queensland

Another example can be found from Queensland.

The provisions of s 34 and s 39 of the *Constitution Act 1867* of Queensland gave the representatives of the colonists in their Parliament the exclusive responsibility for raising and spending taxes.[4] They echo the constitutional settlement achieved after the civil wars of the 17th Century.

The substance of ss 34 and 39 is still with us.

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[3] *Queanbeyan City Council v ACTEW Corporation Ltd* (2009) 178 FCR 510 at [51].

[4] Section 34 provided relevantly: "All taxes imposts rates and duties and all territorial casual and other revenues of the Crown … from whatever source arising within this colony and over which the present or future Legislature has or may have power of appropriation shall form one consolidated revenue fund to be appropriated for the public service of this colony in the manner and subject to the charges hereinafter mentioned." Section 39 provided relevantly: "… all the consolidated revenue fund … shall be subject to be appropriated to such specific purposes as by any Act of the Legislature of the colony shall be prescribed in that behalf."

These provisions may not always operate so as to leave one comfortable that justice has been done. They prevent excessive taxation by a tyrannous executive; but they also prevent acts of benevolence and decency which the parliamentary representatives of the taxpayers have not explicitly authorised.

The decision of the Court of Appeal in *Hashish v The Minister for Education of Queensland*[5] is an example of such a case. It is understandable only by reference to the ongoing importance of the political settlement which these provisions commemorate.

Mr Hashish, a young man who, "together with other disabilities, has the great misfortune to be unable either to see or hear",[6] was excluded by the Minister for Education from the Narbethong School for the Visually Handicapped because he had turned 18 years of age.

By virtue of the *Education Act*, a student at a special school who turns 18 ceases to be a "disabled person" for the purposes of the *Education (General Provisions) Act 1989* (Qld).

The question which arose for determination was whether the exclusion by the Minister was unlawful discrimination against Mr Hashish or whether, under s 106(1)(a) of the *Anti-Discrimination Act* 1991 (Qld) his exclusion was "an act that is necessary to comply with … an existing provision of another Act", and, therefore, not unlawful discrimination.

Section 12 of the *Education Act* provided that "for every student attending a State educational institution … there shall be provided a program of instruction … of such duration as the Minister [for Education] approves that … takes account of and promotes continuity of the student's learning experiences …". Section 13 of the *Education Act* provided that the Minister "may establish, maintain and carry on State schools that the Minister considers necessary".

The Court of Appeal, by majority, with Fitzgerald P dissenting, held that the Minister had no discretion to provide Mr Hashish with further special education after he had turned 18. The decision of the majority was based on s 34 and s 39 of the *Constitution Act of 1867*. McPherson JA, with whom Thomas JA agreed, said, in a passage which deserves citation at some length:

> "It is convenient to approach the question in issue on this appeal by deciding first whether the exclusion of the applicant is, within the meaning of s. 106(1)(a) of the *Anti-Discrimination Act*, 'an act necessary to comply with … an existing provision of another Act' …
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> A Minister (whether or not incorporated) of the Crown therefore has only such powers of establishing, maintaining and carrying on schools as are conferred by statute, which in this instance is the *Education Act*.

[5] [1998] 2 Qd R 18.
[6] [1998] 2 Qd R 18 at [26].

For the purpose of exercising his statutory powers to conduct schools, the Minister needs access to the consolidated funds of Queensland, which are or become available only as a result of Parliamentary appropriation. It is a fundamental principle of representative government in the form in which it has been received in Queensland that 'not a penny of revenue can be legally expended except under the authority of some Act of Parliament'. The quotation is from A.V. Dicey, *The Law of the Constitution*, at 313 (7th ed., 1916), which was adopted and applied in the Full Court of Queensland in *Australian Alliance Assurance Co. v. Goodwin* [1916] St.R.Qd. 225, at 253(Lukin J.); see also at 272 (Shand J.) … The issue under consideration is not one of appropriation as such, but of the purposes for which appropriated funds may be applied by the Minister. As to that, Professor Enid Campbell is surely correct in saying (vol. 4 (1991–2) *Adelaide L.Rev*. 145, at 162) that when what is done towards provision of a service by government 'cannot legally be done without distinct legal provisions authorising it to be done, then clearly a mere vote of money for the purpose cannot give the requisite power'. The question here is whether a payment made or to be made is within the limits of the statutory authority to make it…The point may be thought sufficiently obvious not to warrant such extensive discussion; but the question was not presented in precisely that form on appeal. In my opinion, the question whether the respondent's action in excluding the applicant from the School was, or is, in terms of s. 106(1)(a) of the *Anti-Discrimination Act*, an act 'necessary to comply with an existing provision of another Act' must be determined in the context not only of the *Education Act* itself but of the constitutional framework under which the Minister establishes, maintains and carries on schools pursuant to that Act. If it is outside the statutory power of the Minister to permit the applicant to remain at Narbethong School, then the exclusion of the applicant is in terms of s. 106(1)(a) 'necessary to comply with … an existing provision of' that Act.

…

Permitting the applicant to remain at a State school which he is not authorised by the *Education Act* to attend unavoidably involves the use by the Minister of public revenue for a purpose to which it has not been appropriated by Parliament. The critical provisions of ss 34, 35, 39 and 40 of the *Constitution Act* are still in the form, or substantially in the form, in which they were considered by the Court in 1916. They are, within the meaning of s. 106(1)(a) of the *Anti-Discrimination Act*, existing provisions of another Act with which it is necessary for the Minister to comply in administering the *Education Act* and carrying on State schools under it. I therefore find myself unable to accept the submission of Mr Garde Q.C. that there is no provision in another Act on which s. 106(1)(a) is capable of operating."[7]

[7] [1998] 2 Qd R 18 at[27] – [29].

We might describe this view as representing the Roundhead position.

The Cavalier perspective on the problem was expressed by Fitzgerald P. His Honour dissented on the basis that there was no express exclusion from the State education system of people in Mr Hashish's position. On that basis, his continued attendance at special school was dependent on the exercise of a discretion on the part of the Minister for Education to provide him with special education. The exercise of that discretion was controlled by the *Anti-Discrimination Act*.

Some may think that the view of the majority reflects a mean-spirited view of the business of government; but it is a decision framed by the historical perspective which has shaped the prevailing understanding of our governmental institutions since the constitutional settlement of the 17th Century.[8]

These provisions form the historic legal context within which all Queensland legislation (and Commonwealth legislation) must be understood: they stand behind every piece of legislation which empowers action by the executive government. Within that context, acts of grace and favour by the executive government for the benefit of its cronies are precluded, but so are acts of generosity or compassion to relieve hardship unprovided for by the legislation, whether that hardship be unforeseen or not.

One can lose sight of this context. The argument which prevailed in *Hashish* seems, again, to have emerged at the prompting of the Court when, not surprisingly, it was embraced by the successful party. That fundamental proposition is that, with public moneys, the legislature may be generous, but not the executive. Nor may the judiciary.

Dietrich v The Queen

Dietrich v The Queen[9] illustrates this point by reference to the right of an accused to legal representation. In that case, the argument put for Mr Dietrich was that "an accused person charged with a serious crime punishable by imprisonment, who cannot afford Counsel, has a right to be provided with Counsel at public expense".[10] The High Court held that no such right existed.

The majority of the judges held that the power of the courts to ensure a fair trial of a criminal charge extended to granting a stay or adjournment of the trial where representation of the accused is essential to a fair trial as it is in most cases where an

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[8] As E.G. Whitlam said in 1955: "Parliament has been our great liberating force … There is no freedom without equality. To redistribute and equalise liberty has been one of the principal functions of Parliament. Parliament alone can give equality of opportunity and thereby increase liberty for all. If we are to have economic equality of opportunity, which is the next stage in the advance of liberty, we must have effective parliamentary government and, accordingly, dispense with fetters on Parliament rather than contrive them." Cited in Andrew Moore, "A mace to swat two blow-flies: interpreting the *Fitzpatrick and Browne* privilege case" (2009) 55 *Australian Journal of Politics and History* 32, 33.

[9] (1992) 177 CLR 292.

[10] (1992) 177 CLR 292 at [293].

accused is charged with a serious offence. The majority view was based on the proposition that the judicial power should not permit itself to be deployed in an unjust process.

For present purposes, the point is that the argument that the individual enjoys a right to be provided with Counsel at state expense was always bound to fail for the reasons explained by Brennan J. His Honour said:

> "Although the desirability of according an entitlement to legal aid is manifest, the critical legal question in this appeal is whether this Court can and should translate the desirability into a rule of law or, if there be any difference, into a rule of practice governing the conduct of criminal proceedings. In my respectful opinion, this Court cannot properly create such a rule.
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> The common law has never recognized such a rule.
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> In this case, the legitimacy and the scope of the judicial function of changing the common law call for consideration. There is no common law entitlement to legal aid. Should there be? How can such an entitlement be enforced? Who is to pay for it? The issues to be considered go beyond the question of an entitlement to legal aid; they touch the legitimacy of judicial legislation ...
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> To accord the postulated entitlement to legal aid, public funds must be appropriated to pay for representation or counsel must be required to appear without fee. The courts do not control the public purse strings; nor can they conscript the legal profession to compel the rendering of professional services without reward. The provision of adequate legal representation for persons charged with the commission of serious offences is a function which only the legislature and the executive can perform. No doubt, demands on the public purse other than legal aid limit the funds available. If the limitation is severe, the administration of justice suffers. The courts can point out that the administration of justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of justice, but the courts cannot compel the legislature and the executive government to provide legal representation. Nor can this Court declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. In my opinion, to declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions."

These are all examples, not of cases where fairly arguable competing views have been resolved in one way. They are examples of cases where one or both sides have altogether missed crucial points about the nature of the rights of subjects within our Parliamentary democracy.

And it will not have escaped you that there is a broader point to be made than the improvement of our lawyers as champions of their clients' causes. An appreciation of the history of the development of our institutions of government explains why proposals for bills or charters of rights which seek to protect individual rights must come to grips with the fundamental point that it is one thing for a charter of rights to operate in a negative way, that is to protect liberties by denying the validity of legislation inconsistent with such liberties; and it is another thing for a charter of rights to provide for positive rights, e.g. to adequate education or to necessary health care where the expenditure of public funds raised by taxation is necessary to vindicate such rights.

There is another aspect to this consideration of the importance of an appreciation of historical context. In this age of rights, how could any lawyer worth his or her salt not want to have some appreciation of the parameters of the debate as to whether Australian courts should use international human rights conventions to interpret domestic legislation? And, if so, whether that means that Australian courts should engage in a balancing or proportionality analysis in order to determine which rights are too fundamental to be trumped by insufficiently explicit legislation legality?[11] And how could such a lawyer not want to know that there is a view that within the common law tradition the English notion of legal freedom can be traced to the decision of Lord Mansfield in *Somersets Case*,[12] the famous decision that slavery was not a status recognized in English law, and that this decision was based on the idea of the status of any individual present in the realm as a political subject.[13] On that view, of course, fundamental liberties are not seen as the free gift of heaven or as the product of international agreement, but as an incident of the common law relationship between sovereign and subject.[14]

And what does all this have to with the profession of the law librarian?

In a recent article in the *New Republic*,[15] David A Bell wrote:

> "Libraries are … sources of crucial expertise. Librarians do not just maintain physical collections of books. Among other things, they guide readers, maintain catalogues, develop access portals for electronic sources, organise special programs and exhibitions, oversee special collections, and make acquisition decisions. The fact that more and more acquisition

[11] See Dan Meagher, "The Common Law Principle of Legality in the Age of Rights" (2011) 35 *Melbourne University Law Review* 449, 452.
[12] (1772) 98 ER 499.
[13] George Van Cleve, "Somerset's Case and Its Antecedents in Imperial Perspective" (2006) 24 *Law and History Review* 601, 636.
[14] See *Potter v Minahan* (1908) 7 CLR 277 at [288]-[289], [299], [306]-[307].
[15] David A Bell, "The Bookless Library" *The New Republic*, (Jul 12, 2012).

> decisions now involve a question of which databases to subscribe to, rather than which physical books and journals to buy, does not make these functions any less important. To the contrary: the digital landscape is wild and woolly, and it is crucial to have well-trained, well-informed librarians on hand to figure out which content to spend scarce subscription dollars on, and how to guide readers through it.
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> Communications technology will increasingly allow a single expert in a subject … to advise several institutions at once – but it is one thing to share expertise and another to eliminate it entirely. And moves toward elimination are taking place precisely the moment when the sheer glut of information available online has made the expertise more necessary than ever.
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> The experience of working in such concentrated storehouses of knowledge, which collectors and librarians brought together with intelligence, energy, and love, cannot be matched by online browsing, however complete the process of digitization, and however good the guides to online sources. These collections are indeed far more than the sum of their parts."

The point that Bell makes is most compelling in relation to the work of law librarians.

Law librarians are not only the guardians of the treasures of legal history; they are also the professionals best placed to ensure that those treasures are put on display for the benefit of those who need them.

As the education of our lawyers at universities becomes less focused on content and context while they are at University, and as our lawyers become more narrowly specialized when they enter practice, the role of law librarians in legal education and the ongoing professional development of lawyers is more and more important.

Librarians have a role to play in educating the lawyers so that they are lawyers with well-furnished minds and not absent-minded rhetoricians. Importantly, at a time when specialisation is becoming ever more narrow – especially in the large law firms – they have a role to play in ensuring that highly specialised lawyers don't become mere mechanics.

Treasure is only valuable if it can be recovered. It is the daily experience of judges that earnest young advocates press upon them bundles of cases taken from online services in support of their submissions. Almost always these bundles consist of single judge decisions which merely illustrate a particular principle. This is of course no use to the

judge, just as handing up twenty copies of the Courier-Mail does not make its stories more true.

And often the cases in the bundles are unread by the earnest young lawyers who thrust them at the Court. The unorganised information overload is a blight on the administration of justice.

Law librarians are the professionals best placed to winnow and collate the super-abundance of cases which have become an embarrassment to the administration of justice.

The only antidote to information overload is the application of critical intelligence to sift the wheat from the chaff and to collate and digest what is valuable in terms of the development of legal principle. The natural allies of the law librarians in this endeavour are the law journals. The law journals do a great job of keeping up with the legal developments and explaining how the trees fit into the wood. And it is by ensuring that practising lawyers are fed a steady stream of the best law journals that law librarians can provide and come to the rescue of the profession and the Courts.

Librarians need to take the initiative here. People don't know what they don't know. And busy practitioners have neither the time, training or energy to find out what they don't know.

Some law libraries are already active in supplementing the institutional memory and legal education of the judges. The Supreme Court of Queensland Library and the Federal Court library in Brisbane, to speak only of institutions with which I am personally familiar, both provide excellent law journal update services which keeps judges up to date with developments in the wider legal world of ideas. This ensures that we can get a grip on the context in which legal decisions are made, not as novel revelations from a wilderness of single instances, but as manifestations of historical processes within the intellectual system of the common law tradition.

Law librarians within private firms or government offices should play a similar role in providing much of the institutional memory which is in danger of being lost. But as I say, you must take the initiative. The lawyers may be resistant or lukewarm at first, but they will soon appreciate being kept in tune with the world of ideas.

Might I also make the respectful suggestion that the other natural ally of law librarians in this task are the Councils of Law Reporting which operate in Australia. The most valuable work performed by the Council is the sifting of the important cases from the unremarkable examples of the application of well-recognised principle. Secondly, they provide the benefit of the application of critical human intelligence by articulating the point of principle in a headnote. And thirdly, they provide a very valuable service when they include summaries of the arguments presented by Counsel.

I would respectfully urge closer engagement and collaboration by law librarians and the Councils of Law Reporting.

If I can just expand a little on the third of these points: those law reports which publish summaries of the arguments presented by counsel are enormously valuable in the education of young lawyers. The Commonwealth Law Reports offer many illustrations of compelling presentations of legal argument by the likes of Sir Garfield Barwick QC, Nigel Bowen QC, F.G. Brennan QC and N.M. Gleeson QC. A young lawyer facing his first appeal can learn a lot from seeing how the masters marshalled their arguments.

Sometimes the summaries of argument at first instance can be real gems. In *Raysun v Taylor Pty Ltd*,[16] B.H. McPherson QC set out in seven propositions a synthesis of the decided cases bearing on the termination of contracts for the sale of land upon the failure of a condition subsequent to the contract. In my opinion, this argument remains an invaluable aid to organising the legal analysis of any problem in the law of vendor and purchaser involving conditional contracts.

Conclusion

Both public lawyers and the private profession need to recognise the benefits available from the work of the librarians they employ. As the examples I have spoken of show, at the practical level, if a practising lawyer can get a handle on what is driving the trends in judicial thinking, he or she may have a better chance of fashioning an argument which can harness that dynamic. And more generally, in an age of ever narrower specialisation, the exercise will produce a much richer and happier intellectual life for the individual lawyer – and most likely a more effective citizen as well.

It is to your profession that the legal profession must look to make good a learning deficit which, if it continues to grow unchecked, will leave our lawyers, and courts and community, much the poorer.

I wish you every success for your conference.

[16] (1971) QdR 172.