

Freehills' Litigators' Dinner
Melbourne, 11 September 2006
"Post-Modernism and The Law"

Thank you very much for the invitation tonight. Litigation, like many things in life, is here to stay, but it changes constantly as a result of both external and internal pressures. No litigator would say the landscape of the law is the same towards the end of a working life as it was at the beginning. The adversarial process itself has had to adapt in recent times to a great deal of social and technical change.

We all understand the rule of law as a platonic concept. But, it is also a rule which permeates our working lives. It is expressed at the abstract level of legal principle but it also affects litigation in many practical ways. For example, the rules of evidence, and other procedural rules, have as their basis the core value of fairness which was hammered out after the English constitutional struggles of the 17th century. Having said that, the rule of law is both an ideal and a practical driver of fair conduct in litigation.

Two recent High Court decisions illustrate the way in which the rule of law is expressed at the level of principle and at the level of

practical application in changing social circumstances. In *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* [2006] HCA 41, a majority of the Court determined that the particular litigation in question did not engage the relevant NSW Supreme Court Rules regarding certain representative proceedings; however, *all* members of the Court found that the litigation nevertheless did *not* amount to an abuse of process, by virtue of the role played by a "litigation funder".

Commentators have reflected on the consequences that this decision may have for future representative proceedings which are mobilized and managed by litigation funders and calls for regulation of litigation funders have been made. More recently, in *Forge v Australian Securities and Investments Commission* [2006] HCA 44 a majority of the High Court rejected a challenge to the appointment of acting judges to the Supreme Court of New South Wales, where acting judges have been appointed since the early days of that Court to meet the demands of changing caseloads and resources.

There are many subtle contemporary challenges to previous conceptions of the rule of law and the legal system which are worth thinking about. These are easy enough to observe. However, what I would like to do tonight is not so much describe the challenges, as a matter of observation, but say something about their intellectual

pedigree - that is where do the challenges come from and why do we have them now? There is a major contemporary challenge to the rule of law expressed as an attack on lawyers and judges.

Law governs society in finally resolving disputes and determining punishment for crimes. There is an inescapable relationship between the law and the wider organisation of society. The judiciary is the third arm of government, together with legislators and the executive. For the system to work, court decisions must command consensus in the community, that is, they must strike the community as fair and just, and must also be grounded in legal principles. To achieve this, a court must have authority, and that, in turn, depends on the judges, the rules or norms they apply from the common law and statute, and the proper operation of the court system. The court system is, to a significant extent, in the hands of litigation solicitors who manage much of the preparation of cases for court.

Broadly speaking, there are at least two strands or repeated themes in the public attacks on lawyers and judges. First, there is the concern about the costs of justice which is very important but is not the theme I want to speak about tonight. The second theme in the attacks is what I would call the theme of "de-authorising the law". I'll say

something about the intellectual genesis of the idea, that the law should be de-authorised, in a moment, but first let me acknowledge how this theme is expressed.

Today, the perception of lawyers and judges that is propounded in a good deal of public discussion is that the group is well-off, remote from "ordinary concerns" of "ordinary people" - putting aside what that means exactly for one minute - and is determined to maintain such privileges and power as are presently enjoyed. It seems to be thought lawyers enjoy too much prestige and influence and the press has often taken up the cudgels in this regard. By way of contrast, the perception some fifty years ago was that lawyers, like doctors, had admirable professional skills which were of benefit to the whole of society, including the least well-off. They were seen as playing an important role in civil society. What happened in the meantime?

Two broad points can I think be made. The first is that once it became clear that governments could not, or would not, support the model of society sometimes called "the welfare state" or "nanny state" model, out of tax revenues, something had to be done about medical costs and legal costs as recurrent expenses in the community. You are all familiar with what happened in the medical and health system

which was to leave that to be run according to the welfare state paradigm, but to make all kinds of changes to ensure the costs of the system were not simply borne by governments but were spread through insurance and other mechanisms. The end result was a hybrid of the "welfare state" paradigm with a distribution of costs between the State and the private sector.

Broadly speaking, in the legal system, prior to the institution of legal aid bodies in the early 1970s, the profession itself bore the brunt of providing services free of charge where needed when those who needed them could not afford them. When it became clear that legal aid on a "welfare state" model was too expensive in the late 1980s early 1990s, as you all know, legal aid in civil matters was cut off so that the funds available were exclusively used to provide legal services in criminal matters and family law matters. The profession stepped back in when I was Chairman of the Victorian Bar and I'm glad to acknowledge the Law Institute of Victoria and the Victorian Bar worked as one with that initiative. That, I think, was the commencement of a radical new path for *pro bono* work. The point has now been reached that *pro bono* services are thoroughly integrated into many practices, both large and small and in both solicitors' firms and at the Bar.

Simmering behind these developments was an important struggle; it was a struggle between the public and private sector as to which sector would provide the true helmsmen of Australian society in the future. That was not a struggle peculiar to Australia - in fact, it emerged clearly in England before it was felt here. There were, of course, able and energetic people in both sectors but certain energy in the public sector would no longer be required if the philosophy of government which I'll call for convenience "Thatcherism" predominated. From that time we have seen a great rise in close bureaucratic involvement in almost all aspects of the justice system. Much of what is styled law reform commences its life with a policy maker in the public sector. Although I have touched on a broad and parallel social reason why that happened, another broad development needs to be mentioned. That is the influence of post-modern social critique. If that sounds portentous, I apologise. The fact is post-modern thinking, as it is styled, has an influence which has gone beyond the universities and is certainly to be felt in the law.

What is post-modernism? It is a wide-ranging cultural movement which rejects, or is sceptical about, many of the assumptions and principles which have underpinned Western thought and social life since the Enlightenment, the Enlightenment being what

a post-modernist would call the commencement of the "modern" view of life. The Enlightenment or modern view is that humankind inevitably progresses in every area of human endeavour - science, morality, law. The Enlightenment or modern view believed in the power of reason to achieve progress and resolve difficulties or strife. The individual enjoyed a special place in modern thinking. The rule of law as we know it is tied to a belief in the power of reason and the ability of national legislators to pass laws for the good of the community. Judges publish reasons for their decisions and that process of publishing their reasons, is a demonstration of the power of reason operating on a matter for decision. That process is linked to the authority of judges in our society.

I'll leave to one side the artistic credo said to be part of post-modernism. Post-modernism is a reaction to the modern view of life which I have no more than touched on. Post-modernism is an attitude of mind which rejects the assumptions about human progress and the power of reason, and perceives the law as a repository or expression of authoritarian power about which scepticism should be encouraged. A post-modern view is that the law has escaped analysis

and scrutiny because of its perceived position at the centre of our social order¹ which should be displaced or curtailed. Post-modernism is credited with encouraging diversity as a reaction to having any homogenous group exercising power. Post-modernism is said to be the source of relativism, ie the view that no single viewpoint is correct or "true" a challenge in itself to many forensic rules used in trials. In fact, ultimate post-modernism dicta include the view that there is no such thing as "truth" - truth is a bourgeois fiction. Naturally enough, many assumptions in the law have been deconstructed under the post-modern gaze.

An interesting example of such deconstruction is the call for greater involvement of the victim in the criminal law process. Before the 19th century, prosecutions were undertaken by complainants. The 19th century saw the rise of the idea that unworthy motives such as revenge should be removed from the process. Professional police forces came into being in the first half of the 19th century and

¹ (Helen Kennedy QC reviewing David Rose's, *In the Name of the Law* (1996)).

eventually many prosecutions were passed over to police or to professional offices such as Directors of Public Prosecution.

However, in our time we have seen great pressure to re-introduce the victim into the process through victim impact statements. This development may have many advantages. It is too early to really assess the re-introduction of the victim into the criminal process. However, certainly in the United States where meetings can occur between victim and perpetrator it has been reported back that the process is mutually beneficial: it gives the victim some closure and assists rehabilitation of the offender. There is, of course, always the need to ensure it does not reintroduce revenge in to the criminal process. I am pointing out that the post-modern view that any method of social control, or expression of power through authority, should be scrutinised and deconstructed and reorganised, is at work here with this development. The next most recent suggestion is that juries should be involved with sentencing: you can see how the direction of such change involves deconstructing what was once exclusively the judicial preserve of sentencing.

Another example of the phenomenon of which I speak is the new Judicial Commission in England. Before describing that, I should

mention that post-modern thinking has been co-opted by policy makers in the public sector. That co-option has occurred in tandem with the rise of greater bureaucratic involvement in many aspects of human endeavour once left more exclusively to the private sector. This includes the law. The new Judicial Commission in England is a good example of the results of that process of co-opting post-modern theory. The Judicial Appointments Commission has been set up under the Constitutional Reform Act 2005. It has the responsibility for the judicial appointments process up to making a recommendation to the Lord Chancellor for judicial appointment. The Chairman of the Judicial Appointments Commission must be a person without legal qualifications. Baroness Usha Praslan who currently fills this role has a most distinguished record of public service. Of the total of 15 members of the Commission, the Chairman and five others must not have legal qualifications - they must be lay persons. Of the balance, there must be five judicial members, one tribunal member, one magistrate, one barrister and one solicitor. The task with which the Commission is charged is described thus:

"Our roles it to select judicial office holders. When the Courts or Tribunals need a judicial office holder to fill a vacancy we seek to attract a wide range of candidates who meet the requirements

of the position and provide outreach opportunities for them to learn about the role".

All positions for judicial appointment are advertised. As might be expected, a considerable bureaucracy is required to support the work of the Commission. The senior members of that bureaucracy have had long distinguished careers in the public sector in advising government and carrying out important roles in government instrumentalities.

The reasons for the creation of the Judicial Commission are expressed thus:

"The [Commission] is the result of a drive to maintain and strengthen judicial independence from the Executive and the Legislature.

In July 2003, Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs, announced:

'In a modern democratic society, it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister. For example the judiciary is often involved in adjudicating on the lawfulness of actions of the Executive. And so the appointments system must be, and must be seen to be, independent of Government.'

In addition, the Judicial Appointments Commission was set up to review an appointments process which was perceived as failing to attract applications from a broad enough range of candidates. It has been given a statutory duty to encourage diversity in the range of persons available for selection."

The Australian position was described by Gleeson CJ in *Forge's* case:

"Judges are appointed by the Executive Government in the exercise of powers conferred by Parliament. Judges are not appointed by the judicial branch of government. They are appointed by the political branches of government, and decisions as to appointment are subject to political accountability."

It is not easy to see how involving a greater number of former government employees in the process of judicial appointments is going to lead to a perception of independence from Government. It is also not easy to see why other judges should be so directly involved in choosing new judges. Justice Kirby has pointed out the dangers in that process. However, a task once done by the Lord Chancellor with private consultation has been transferred across to persons some of whom once - and I intend them no disrespect - would not have been perceived by society or indeed themselves, as qualified for the judicial appointments tasks they have now been given. This is a profound

change to the law - it involves de-authorising the system as it was and de-authorising the Lord Chancellor at the head of the legal profession whose responsibility once included selecting judges. It is no longer "acceptable", to use the language of the current Lord Chancellor himself, that he should do this. You can see the employment of post-modern discourse - it is said the process must be "clearer and more accountable", and "diversity" must be encouraged, and all that is achieved by the much greater involvement of outsiders to the law, supported by a significant bureaucracy.

Whether and to what extent this is an improvement on the previous system is the food for thought I give you tonight. It may simply transform the judiciary in some way, almost certainly in the direction of "Europeanising" the judiciary in the United Kingdom. That is, it would seem likely to make the career of judge a career distinct from the career of an advocate. I express no views about whether these developments are welcome or not - I merely wish to identify the fact that this development, like many others in the law, is part of a wide cultural movement to which litigators and judges cannot be oblivious.

I certainly think post-modernism can be accepted in simple terms as being like a spring clean. You throw up the windows and let

in some fresh air. All new ideas are oxygen to the life of the mind. You just need to make sure the windows are not left open so wide and for so long that when the hurricane arrives everything of value is sucked away. I thought I should stop at that point since I understand my brief tonight is to touch lightly on something of interest without presuming to offer any conclusions. I have tried to do no more than suggest much of what is happening in the law, seen by some as radical change and welcomed by some but not by all, has an intellectual pedigree in a wide cultural movement which we ought to understand.