Cause for Celebration

Law Council of Australia 75th Anniversary Dinner

Chief Justice Robert French
19 September 2008

The Law Council of Australia was established by the First Conference of the Legal Societies of Australia which was held in Sydney on 18, 19 and 20 April 1933 and was convened at the instigation of the Law Society of South Australia. Sir John Latham who was then Commonwealth Attorney-General acted as President of the Conference. It adopted a draft Constitution for a Law Council of Australia. In the "Current Topics" section of the Australian Law Journal of 15 May 1933 some of the purposes behind the project were set out. They disclosed a largeness of vision that has informed the work of the Law Council since that time. The editorial writer said:

> In addition to the general advantages of co-operation, there are many specific spheres, such as law reform, statute law uniformity, the study of comparative legislation, legal education, reciprocal provision, for the admission of practitioners, the consideration of Federal legislation in the manner in which some of the State bodies now consider State legislation, and the like, in which such co-operation will be of benefit both to the public and the profession.[1]

In opening the Conference, Sir John Latham pointed to some of the matters upon which the proposed Law Council might be of assistance to the public. He covered many topics including one which, in the event, took quite a long time to sort out. He said:

> I would like to see a little bit more professional examination of the Constitution. Take s 92 of the Constitution for instance. Did anybody ever see anything like it in all the world? … I could refer you to many decisions of the High Court as to the interpretation of these plain and clear words. First of all there is one decision given, then it is over-ruled and then re-established and the like. The people of Australia as a whole are not aware of these difficulties in the Constitution and there is work which a lawyer could do in examining these problems and qualifying from a legal point of view some of these difficulties.[2]

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1 (1933) 7 ALJ 1 at 2.
2 (1933) 7 ALJ 1 at 17.

Importantly he said of the proposed Council:

> It is not the formation of a legal trades union. I can see that you have assembled from all the States of Australia not for the purposes of your own personal interests but to consider how the legal profession may make contribution to the welfare of the community and therefore towards the profession itself.[3]

Thank you, Mr President, for the invitation to speak on this auspicious occasion. The first official dinner organised by the Law Council, of which I can find a record, was held on 30 October 1935. This was on the occasion of the first Australian Legal Convention which was convened by the Law Council and met in the Presbyterian Church Hall, Russell Street, Melbourne. A program for the Convention was set out in the Australian Law Journal on 15 October 1935. It stated, inter alia:

> The only expense involved will be that of the dinner, which will not exceed fifteen shillings, exclusive of whatever liquid refreshment the individual may consume.[4]

> In the report of the proceedings of the Convention it was said:

> The Chair was taken by The Chief Justice of Australia (Sir John Latham), who was supported on the platform by Sir Frank Gavan Duffy (former Chief Justice), Mr Justice Evatt, Judge Foster (Victoria), and Judge Sheridan (New South Wales).[5]

The support was presumably moral only and the opening remarks made prior to the dinner and its liquid refreshments.

In opening the Convention, Sir John appeared to be mistaken about the name of the organisation of which he was president. According to the Australian Law Journal, he said, inter alia:

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[3] (1933) 7 ALJ 1 at 17-18.
[4] (1935) 9 ALJ 209.
[5] (1935) 9 ALJ Supp 1.

> The object of the Australian Law Council, under the auspices of which the Convention is being held, is, inter alia, to advance the study of the law and to improve and develop the law …[6]

It appears to be clear that from its outset the organisation was known as the Law Council of Australia as appeared from its Constitution adopted at the Legal Societies Conference. The name "Australian Law Council" was proposed and appeared in the Constitution for a few days but was replaced by the title which the organisation has born since that time. Being Chief Justice of Australia, Sir John was no doubt permitted some leeway in the recollection of the names of the organisations of which he was president.

By Australian standards, 75 years is a long life for any organisation. The period that the Law Council of Australia has been in existence marks it as a body that met accurately judged needs and continues to meet such needs, albeit their priority and content has changed over time. Its history coincides with the greater part of the history of the Australian federation. The creation of that federation, which predated the birth of the Law Council by 32 years, was, of course, a remarkable achievement. Australia stands today as one of the world's most durable and successful democracies. It is proper that while acknowledging historical shortcomings and challenges ahead, we celebrate that success. In similar vein, it is right to celebrate the 75th anniversary of the formation of the Law Council.

The creation of the Law Council required a vision on the part of its founders. The idea of a national profession is one which we tend to accept as an established reality today. It does not follow that it would have seemed quite so obvious in 1933. Yet the reference to reciprocal admission suggests that the germ of that idea was present and was one of the initial purposes of the organisation. Being federal in character of course the Council, as expounded by its founders, also respected the autonomy of its member bodies.

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[6] (1935) 9 ALJ Supp 1.

The idea of a single national profession has developed and strengthened since that time in conjunction with the broader evolution of the legal system in Australia. The growth of Commonwealth power which can be attributed to political phenomena as well as to judicial decisions, has been an important factor. The scope and diversity of the subject matters, particularly in connection with the regulation of economic activity, covered by the laws of the Commonwealth is extensive. So too, as an expression of cooperative federalism, are uniform and harmonised laws and interlocking networks of Commonwealth, State and Territory laws covering areas unable to be reached by Commonwealth law alone. The number of laws made by referral of powers from the States to the Commonwealth has increased significantly over the past 20 years. One of those referred laws, the *Mutual Recognition Act 1992* (Cth), has been an important factor in facilitating admission by legal practitioners in one State or Territory on the strength of their admission in another.

One of my sons who graduated from Notre Dame Law School in Fremantle last year is working in a large national law firm in Perth. When he is admitted to practice next month he will be admitted in New South Wales and then, under mutual recognition arrangements, in Western Australia. The firm for which he works put him and his fellow graduates through a pre-admission course provided by the New South Wales College of Law. He and many of his colleagues will find that many of the advices they are called on to give have a cross-border character to them. They may have to refer to case law from all Australian jurisdictions. Indeed, the international dimension of much economic activity now requires advice to deal with matters well beyond the boundaries of the Australian legal system.

Another contributor to the idea of the national profession has been the recognition of the essential unity of the Australian legal system. As the High Court said in *Lange v Australian Broadcasting Corporation*:[7]

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[7] (1997) 189 CLR 520 at 564.

> The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form "one system of jurisprudence".

In particular, the judge-made or common law is the same throughout Australia. As McHugh J said in *Kable v Director of Public Prosecutions (NSW)*[8] in a passage later approved by the joint judgment in *Lipohar v R:*[9]

> Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State.

Related to the evolution of the national legal system is the concept of a national judiciary which incorporates Federal, State and Territory judges. The idea has been nurtured by successive annual conferences of Federal and Supreme Court judges over the years and similar national gatherings of District Court judges and magistrates. It has been given additional impetus in recent times with the acceptance, at least in principle, of the idea of judicial exchange between courts. The development towards a national profession, uniform laws and indeed a national judiciary can be seen to have been to some degree imagined or implicit in the imaginings of those who founded the Law Council of Australia all those years ago.

Today Australia's population comprises 21 million people. This is the population of New York State. It seems ridiculous to think of anything less than a national profession and a national judiciary, albeit within the framework of a working federation which retains a useful pluralism. A national body to represent the concerns of the profession is logical and indeed necessary. The question is – what are the legitimate concerns of the profession? Is there a tension between those concerns and the public interest? The public interest is often defined according to the perspectives and interests of the person doing the defining. However the profession is, I think, able to perceive that what serves the long term public interest such as maintenance of the rule of law and

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[8] (1996) 189 CLR 51 at 112.
[9] (1999) 200 CLR 485 at 505 (Gaudron, Gummow and Hayne JJ).

fairness and efficiency in access to justice, also secures the long term interests of the profession. No system or institution, however venerable its traditions, is entitled to immortality if it fails to meet the legitimate requirements of the community it is supposed to serve. The founders of the Council recognised this as appears from the passage I have already quoted from the opening remarks of its first President at the Australian Legal Societies Conference.

It is also recognised in the stated objectives of the Law Council. The first objective set out in the Constitution, which was added sometime after the Constitution was first adopted, is:

> to promote and defend the rule of law in the public interest;

The second objective is to "promote the interests of all lawyers on national and international issues". There is no reason, applying a long term perspective, that the two objectives should conflict even if the priority of the first is observed.

The development and promotion of legal education programs and the professional standards of practitioners and of insurance and assurance schemes, also mentioned in the Constitution of the Council, are plainly in the interests of both the profession and the public. So too, is the promotion of the administration of justice and the development and improvement of the law throughout the Commonwealth.

The Law Council has taken a leading role in all of these areas. Sometimes it has found itself in conflict with governments in the positions that it has taken. I recall serving on a Law Council Working Party in 1985 or 1986 and preparing submissions in relation to proposed legislation under which specified matters of fact would be presumed in certain classes of prosecution where an appropriate certificate was provided. We locked horns with the then Attorney-General, who I think was Gareth Evans. The bureaucratic and political imperatives of the day meant that we lost that battle. There have been many cases in which the Council has taken unpopular positions in the public interest. Whatever

the rights and wrongs of particular debates in which it has engaged, it has amply fulfilled the vision of those who created it. I think Sir John Latham would have reason to be proud of what he and his colleagues started.