Book Launch:
Privatising the Public University The Case of Law
by Margaret Thornton

Chief Justice Robert French AC

4 October 2012, Australian National University, Canberra

It would be an interesting exercise to put to a range of university students today the following passage and ask them what it describes:

> a place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth ... a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed by the collision of mind with mind, and knowledge with knowledge.

How many, I wonder, would take the passage as a description of Wikipedia. How many would recognise it as John Henry Newman's description of a university in 1858. Not many students, it would seem, and even fewer public policy makers and university managers, if one accepts the general thesis of Margaret Thornton's book, which it is my privilege to launch this evening.

The book is well written, eminently readable and engaging and reflects a degree of focussed and intelligent anger about the growing disconnect between the contemporary university and law school and the ideal of a community of scholars reflected in John Newman's idea of a university. It projects not only the author's strongly held personal views, but is informed by survey results and pithy quotations from a variety of respondents, which illustrate and give life to the general points being made throughout the book. One of my favourite quotations attributed to an anonymous male Dean from a Sandstone University somewhere in Australia is 'I am audited out of my brain.'[1] That quotation opens a section in Chapter 5 entitled 'Research in the corporatised university', which deals with the effect of auditing on research productivity in Australia and, in particular, in law schools. The

[1] Margaret Thornton, *Privatising the Public University The Case of Law* (Routledge, 2012) 185.

serpentine coils of process which can squeeze the life out of any institution are illustrated by reference to the comings and goings of different ways of auditing research. At page 186 Professor Thornton writes:

> The initial research data collection exercise was primarily a quantitative one, but the Research Quality Framework (RQF) (2006) included quality and impact. However, given the notorious susceptibility of higher education policy to the political whims of the day, the RQF was replaced with the ERA in 2008 following a change of government so that impact was out and journal rankings were in. Conversely, in the UK, a focus on quality in the Research Assessment Exercise (RAE) has been upstaged by quantification and impact (HEFCE 2009). The criteria are constantly changing, not only because of political change, but because of the propensity of the subjects of audit – universities in this case – to manipulate whatever criteria are in vogue. Academics are therefore perennially beset with uncertainty and insecurity arising from the need to reinvent the self. The instability of the criteria also precludes long-term monitoring of the auditing process.

In the opening chapter of the book, 'The political economy of higher education' Professor Thornton observes:

> While the *idea* of the university as a community of scholars engaged in the dispassionate pursuit of truth may never have accorded precisely with the reality, any semblance of the *idea* now seems to have gone forever as the market assumes centre-stage and governments seek to deploy universities for instrumental ends. Inevitably, the transformation has profound ramifications for the legal academy – what gets taught and how it is taught, and the relationship between the institution, academics and students.[2] (emphasis in original)

This account of the Australian university today and law schools in particular is framed by reference to what the author calls the 'market metanarrative' which is said to have induced governments to abandon, or at least dilute, redistributive and social justice policies in favour of wealth creation. The author refers to the Dawkins' reforms of the 1980s which brought an end to the binary system of higher education in Australia and, according to the author, 'signalled the beginning of the end of the *idea* of the university as envisaged by Newman, and its replacement with the idea of the university as a business.'[3]

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[2] Thornton, above n 1, 2.

[3] Thornton, above n 1, 16.

In a chapter entitled 'The market comes to law school', Professor Thornton refers to what she calls the 'commodification of higher education and the application of competition policy' and its effect upon the legal status of universities. She mentions the case of *Quickenden v O'Connor*,[4] a decision of the Full Court of the Federal Court on which I sat in 2001. In that case a long-serving academic staff member of the University of Western Australia, who lectured in medical chemistry, brought proceedings in the Federal Court arguing that he should not be bound by a certified agreement made under the *Workplace Relations Act 1996* (Cth) between the University and the National Tertiary Education Union. Dr Quickenden was not a member of the Union. The Act made certified agreements binding on non-members. One of his arguments was that the *Workplace Relations Act* could only validly apply to trading and financial corporations under the Constitution and that the University was not such a thing. The University argued that it was a trading and financial corporation. Its argument was accepted at first instance by Justice Malcolm Lee and upheld in the Full Federal Court. Justice Lee who is a graduate of the Law School of the University of Western Australia had remarked rather dryly in his judgment that:

> When the elements of constitutional law were taught in the Faculty of Law of the University 40 years ago, it would not have occurred to the Dean of the Faculty, who delivered those lectures, that the institution assisting students to seek wisdom was a trading corporation, much less that the University would assert that it was.[5]

That observation exemplifies the kind of change to which Professor Thornton refers in her book.

The *Quickenden* decision reflected the position of the University of Western Australia some ten years ago. However, UWA's position was not unique. Its characterisation as both trading and financial corporation underpinned the tensions between its traditional role and the pressure to derive commercial benefits from what it did. What some might describe as part of the fossil record of the idea of a university in Australia may be found in the statutes establishing some of our universities. Those statutes say that the university consists of the Senate (or Council as the case may be), the Convocation or Alumnus body, the academic staff, graduates and undergraduate students. That is a formula which has its ancestry in the

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4 (2001) 109 FCR 243.

5 (1991) 91 FCR 597, 605 [40].

Statute of 1571 relating to Oxford University. The staff, students and alumni are not simply employees, customers and former customers of a corporation. They are the university. That is an equation which evokes the idea, however imperfectly realised in historical practice, of a community of scholars.

The statutory formula, in its application to the relationship between the university and its academic staff played a part in litigation in the Federal Court in 2008 and 2009 between the University of Western Australia and one of its medical academics, Professor Bruce Gray. It concerned his entitlement as an academic staff member to intellectual property rights derived in part from research which he had carried out while at the University. In the decision at first instance, I rejected the application of case law concerning the relations between employer and employee to academic staff engaged at the University. The University appealed to the Full Court. The Full Court consisted of Justices Lindgren, Finn and Bennett. Justice Lindgren was at one time an academic at the Newcastle University. Justice Finn was a former Professor of this University. Justice Bennett was, for a time, a Pro-Chancellor of this University. Their judgment, dismissing the appeal, encapsulated some of the issues which are covered by Professor Thornton in her book, although expressed in a slightly more optimistic spirit. They said of the University:

> We accept that [the University] has not been immune from the forces, financial and otherwise, that are forcing changes in the character of the university sector in Australia ... [the University] has engaged in commercial activities, as have done 'most, if not all, universities' ... What is notable for present purposes is that there is nothing in the evidence to suggest that those commercial activities have displaced, either totally or if in part to what extent, [the University's] traditional public function as an institution of higher education in favour of the pursuit of commercial purposes (if it lawfully could do so under its Act). Its function, in other words, was not limited to that of engaging academic staff for its own commercial purposes. Accordingly, we agree ... that on the evidence Dr Gray was not required to advance a commercial purpose of [the University] when selecting the research he would undertake.[6]

Their Honours went on to point out that a further distinctive feature of many, but not all universities, is that their academic staff are part of the membership that constitutes the corporation, a membership which is integral to their status and place in the university:

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6 *University of Western Australia v Gray* (2009) 179 FCR 346, 388 [184].

> To define the relationship of an academic staff member with a university simply in terms of a contract of employment is to ignore a distinctive dimension of that relationship.[7]

Distressed officers of commercialisation departments in universities and even the occasional Law Dean were heard to refer to the decision as embodying an 'anachronistic' or '19th century' view of universities. It would be my hope, although it is a faint one, that those involved in public policy making and those who govern, manage, teach and research at universities, as well as those who study there, should not go quietly into the dark night of managerial commodification of education and abandon the aspirational ideal of a community of scholars just because somebody stated it in the 19th century.

Professor Thornton's book suggests that even if night has not fallen, the twilight is rapidly deepening. She engages with a wide variety of issues affecting universities at large and law schools in particular. In a chapter entitled 'Jettisoning the critical', she discusses the currently contentious topic of law school curricula and the impact upon those curricula of what she sees as the neoliberal market metanarrative. She throws down the gauntlet in the opening of Chapter 3 with the observation that:

> Legal doctrine is privileged because it is functional and knowledge of the rules is a prerequisite for admission to practise. This approach is almost exclusively concerned with what the law *is*, with little regard for critique, reflective analysis or what the law *ought to be*. Positivism, the legal philosophy underpinning the doctrinal approach, seeks to draw a line between law and morality, law and the social and law and all other forms of knowledge. By and large, positivism is a self-referential system in which the authority of law is law. It allows legal rules to be dealt with formalistically without regard to their effect.[8] (emphasis in original)

She contrasts this emphasis with the centrality of reason to John Newman's model of liberal education in which knowledge is pursued for its own sake.

The issues which Professor Thornton ventilates in her Chapter about law school curricula are reflected in the development of threshold learning outcomes for the discipline of

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7 (2009) 179 FCR 346, 388 [185].

8 Thornton, above n 1, 59.

law which are necessary to meet the most recent form of university quality assessment. There is an ongoing tension between the requirements of competency for legal practice, the economic pressures which drive students to focus on particular outcomes and the need for students to encounter as part of their university education, a broader and critical view of the place of law in our society. Plainly competency in the law coupled with broader perspectives on the place of law in society are necessary attributes of any lawyer.

The book explores questions of governance. One quotation which I enjoyed reading opens Chapter 6. I imagine and hope that it is a fictional memorandum which is quoted in the following terms:

> On behalf of all the members of the management team may I, therefore, thank you all for showing such admirable passivity throughout the year. Your readiness to sit back in silence and take anything that was thrown at you is greatly appreciated. The Vice-Chancellor (signed in his absence by Mrs GW Dobson).[9]

Despite all the challenges and frustrations there is a positive side to life as a legal academic. Professor Thornton observes at page 218 in her concluding chapter:

> Despite the general decline in morale arising from the market embrace, the overwhelming preponderance of legal academics interviewed felt privileged to be part of the academy. This is the paradox of academic life. A passion for academic ideas – a belief in the freedom to think, to pursue interesting lines of inquiry, to write, to engage with and influence future lawyers – and to change the world – compelled them to remain ...

This book is a book which has the capacity to open and widen perspectives to all who are engaged in university governance and teaching and particularly the teaching of law. I congratulate Professor Thornton on it.

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[9] Thornton, above n 1, 207.