

# What Lawyers Need to Know What Lawyers Need to Be Able to Do: An Australian Experience

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## *Introduction: Managing Justice*

In 2000, the Australian Law Reform Commission (ALRC) completed its four-year inquiry into the federal civil justice system, culminating in the publication of its report *Managing Justice* (ALRC 89, 1990).<sup>2</sup> A central focus of the inquiry was the efficiency and effectiveness of the case management systems, practices and procedures in the federal courts and tribunals. Among other things, the Commission also looked at aspects of legal and continuing judicial education; judicial accountability; lawyers' professional practice standards; government legal work, alternative dispute resolution, the costs of litigation; the provision of legal aid and other forms of assistance; and the utilisation of expert evidence and witnesses.

The breadth of these issues provides an indication of the Commission's approach to reform of the civil justice system—it is not only a matter of focusing on the technical aspects of courts and tribunals, but also on the other actors and systemic factors which contribute to the character of the legal and judicial 'cultures' which permeate that system.

The reasons for undertaking the inquiry were linked to public concerns about the costs of the system and limited access to justice, delay within the courts, and standards of legal professional representation.<sup>3</sup>

In order to address these concerns, the Commission consulted with many hundreds of lawyers,<sup>4</sup> judges and tribunal members (federal and state),

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2. The full text of the Report may be downloaded from the ALRC's website, at <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>

3. The Commission's work in this area follows, among other things, that of the ad hoc federal Access to Justice Advisory Committee (AJAC), which reported its concerns and recommendations in *Access to Justice: An Action Plan* (1994), and the two reports which emerged from 1991 Costs of Justice Inquiry (COJI) conducted by the Australian Senate's Standing Committee on Legal and Constitutional Affairs.

4. These included a good mix of solicitors and barristers, generalists and specialists, large and small firm private practitioners and those employed by legal aid authorities and community legal centres, urban and rural/regional practitioners, and so on, representing the breadth of practice styles and experience.

court and tribunal staff, litigants, and interest groups to discuss their experiences and their suggestions for change. The Commission received about 400 written submissions from various organisations and individuals with an interest in the review, as well as countless phone calls from individuals who wished to relate their experiences (usually ‘bad’) of the courts or tribunals.

To support this anecdotal evidence, the Commission engaged in the largest and most comprehensive empirical study of the courts ever undertaken in Australia, involving the coding, examination, and statistical analysis of about 4000 case files of Federal Court, Family Court, and tribunal matters, with follow-up surveys of the lawyers and parties concerned.

The information taken directly from case files provided the Commission with a detailed snapshot of the federal civil justice system and solid data relating to: the types of parties and cases; how and at what stage cases were resolved; the duration from commencement to resolution; the outcomes achieved; the number of represented parties and the effect representation had on case processing and case outcomes; and differences among the various registries around the country.

The information gained from the responses to self-administered questionnaires sent to party representatives or to unrepresented parties included details about the cost of proceedings, how these costs were funded, and the changing practices and arrangements associated with them. Information also was solicited about a range of other issues, including the use of legal representation and other forms of assistance, the dispute resolution processes used (including out-of-court ADR efforts), the factors working for and against settlement, and experience of the pre-trial case management procedures used by the courts and tribunals.

The results of all of this empirical analysis have been published,<sup>5</sup> and have not only strongly influenced the Commission’s own work, but also have aided court reform efforts elsewhere (such as in Hong Kong).

The Commission’s final report makes 138 recommendations for reform (many of which contain multiple proposals), covering a wide range of issues and current problems, aimed at the variety of participants and institutions which influence the general quality, and the particular practices and procedures, of the federal civil justice system. However, it was possible to identify a number of broad themes that emerged from the Commission’s work.

For the purposes of the ALWD Conference, two of these themes are of particular significance:

### **1. Effective reform requires a holistic, collaborative approach.**

In the Commission’s view, it is a mistake to focus reform efforts entirely upon the formal rules and processes of the courts and tribunals. Justice systems are large, complex, organic creatures. Effective reform, therefore, requires a holistic approach and a collaborative effort from all of those actors

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5. The Commission used a number of social science and statistical experts to design and implement the study, analyse the data, and then later analyse the data again. See ALRC 89, para 1.28.

and stakeholders involved.

Thus, the Commission's recommendations were directed not only to the federal courts and tribunals under review, but also to: the Attorney-General, the federal Government, and Parliament, which make laws and are able to divert government resources to particular kinds of research or programs; federal departments and agencies, which undertake research, administer policies and programs affecting the justice system, and make recommendations to government about new policies and programs; the Standing Committee of Attorneys-General, which coordinates activity in the legal area across the Commonwealth and the various states and territories in the federal system; the Law Council of Australia, the peak body for lawyers, and also the various professional organisations in each state and territory, which set standards, influence and monitor the behaviour of individual lawyers; the legal aid commissions that administer legal aid funds provided by the government; and the institutions that provide legal and judicial education, conduct research, and help to shape the future of the legal profession.

## 2. A healthy legal culture is critically important.

Perhaps the most significant conclusion drawn by the Commission was that while it is obviously *important* to put in place the right structures, rules, practices, and procedures, it is absolutely *essential* to ensure that these are underpinned by a healthy legal culture.

In the Commission's view, a healthy legal culture is characterized by its:

- honest, open, and self-critical nature;
- respect for, and effective communication among, stakeholders;
- willingness to adapt and to experiment (or, put another way, lack of resistance to change);
- commitment to lifelong learning as an aspect of professionalism; and
- deep ethical sense and commitment to professional responsibility.

The Commission heard a great deal of evidence about the relative health of the legal cultures of the various institutions within the federal civil justice system. What became clear to us is that those institutions with strong and positive cultures are able to manage change effectively by bringing together key stakeholders, genuinely listening to what they have to say, brokering through the needed changes (sometimes against immediate self-interest), and then exerting the kind of leadership which engenders the degree of shared commitment necessary to get past the inevitable teething problems and to make the new processes work.

Institutions with healthy cultures can overcome procedural deficiencies, while those with unhealthy cultures regularly subvert good systems and frustrate even well-intentioned efforts at reform.

As a consequence of this—and no doubt also the extensive academic experience and interests of the members of the Commission—the ALRC devoted a great deal more attention in the final report to matters of legal and

judicial education than originally was planned.<sup>6</sup> Among other things, the Commission recommended the establishment of an Australian Academy of Law, to promote a more active collegial relationship among judges, practising lawyers, legal academics, and law students in aid of higher standards of conduct and learning.<sup>7</sup>

The Commission also called for the re-articulation of the curriculum in the university law schools, away from the dominant focus on mastering bodies of substantive law, and towards the development of high order professional and problem-solving skills (such as more effective oral and written communications, negotiation, advocacy, client interviewing, and conflict resolution).<sup>8</sup> In substantial part, this argument proceeded from the Commission's description of the changing nature of legal practice in Australia.

### *Three Periods of Legal Development in Australia*

It is possible to identify three distinct periods in the development of the Australian legal professions—at least since advent of European settlement and colonisation in 1788. The first era, from 1788 until the early 1960s, was 'long and languorous'; the second period, from the mid-1960s until the late 1970s, may be described as 'brief but frenetic'; and finally the third era, from the 1980s through to the present, is one of 'continuous, dynamic change'.

#### **(a) From 1788 until the early 1960s**

During this period, the Australian legal profession was almost entirely a private one, with only a limited place for public sector lawyers in direct government service (*e.g.*, in Attorney-General's Departments, land registries, etc.).

The private profession was divided formally in the English fashion, with lawyers admitted as either solicitors or barristers. Legal practice was organised around a small separate Bar and a large number of small, usually solo, firms of solicitors. These firms survived—and many thrived—on a staple diet of monopoly work (guaranteed by statute) in the areas of real property conveyancing, probate, and personal injury. The high level of fees earned for routine conveyancing work, determined on an *ad valorem* basis rather than on the duration or complexity of the matter, effectively served to cross-subsidise other less lucrative work.

Matters of any real complexity or requiring other specialised knowledge were referred to the relatively small number of members of the separate Bar, who typically comprised about 10% of the total number of lawyers and operated out of chambers in the legal districts of the capital cities. The Bar was clearly the 'senior branch' of the profession in terms of hierarchy and status, and virtually all judicial appointments were drawn from among the ranks of barristers. About 10% of the Bar was further distinguished by appointment as 'Queen's Counsel' (or King's Counsel, depending from time

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6. See ALRC 89, chapter 2.

7. ALRC 89, Recommendation 6.

8. ALRC 89, Recommendation 2.

to time upon the gender of the British monarch)—an honorific which signified official (and peer) recognition of particular eminence as an advocate, as well as carrying certain restraints on practice which mandated a significantly higher level of fee.

Practice was very much limited by political geography—admission to practice was a matter for each State and Territory, and law firms rarely if ever strayed across these boundaries.

Even individual Australian lawyers demonstrated very low levels of mobility—most went to university and then practiced law in the city in which they were raised. For example, a 1975 survey found that 93.5% of solicitors and 94.7% of barristers practising in New South Wales received their legal education in that State, and another 3% in each branch were educated in the enclave of Canberra, the Australian Capital Territory.<sup>9</sup> The remaining lawyers were much more likely to have been educated in the United Kingdom than intra-state. Anecdotal evidence suggests that while there may be somewhat more mobility now, it is still at relatively low levels, particularly as compared with the United States.

There were relatively few lawyers during this period, both in absolute numbers and in terms of the population-to-lawyer ratio. Women constituted only a small percentage of the practising profession—at least as qualified lawyers, although much of the staple work in law firms actually was done on a daily basis by women employed as ‘conveyancing clerks’ or legal secretaries. In 1911, there were only six women lawyers in Australia, constituting 0.2% of the profession. This grew slowly to 1.1% in 1933, and 2.6% in 1947.<sup>10</sup>

In the British tradition, apprenticeship dominated as the mode of entry into the legal profession well into the Twentieth Century (whereas universities dominated in Continental Europe from a much earlier period). Although it is now very unusual for someone to be admitted without a university degree in law (and indeed, usually two or more degrees overall), the balance between admission through apprenticeship and admission through university qualification only tipped in the latter direction for the first time in the late 1970s.

There were only six university law schools in Australia through 1960, one in each of the State capitals. However, in this period, university legal education was a relatively low-key affair. Most of the law schools operated with a skeleton staff of full-time faculty, supplemented with a large number of part-time lecturers drawn from the practising profession and the judiciary. Similarly, most students were employed as articled clerks in firms of solicitors during the day, and came to law school afterwards for evening lectures.

The pedagogical method at the university law schools rarely involved any active or experiential learning, nor even much use of the Socratic method; instead, the principal mode involved the transmission of the lecturer’s notes to large groups of students through a formal lecture, with assessment involving only a formal, written, closed-book final examination.

The focus of university legal education was entirely on the mastery of bodies of substantive (doctrinal) law, mainly in the core common law areas.

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9. Weisbrot 1990, at 66.

10. Weisbrot 1990, at 85, Table 5.

There was little emphasis on legal research, other than the ability to follow the thread of case law through the published law reports (English and Australian), and little or no emphasis on legal writing or the development of other professional skills.

Perhaps the ultimate expression of the worship of doctrinal law can be found in the early history of colonial New South Wales. Samuel Terry, an emancipated convict turned successful merchant, managed to obtain the only up-to-date copy of *Blackstone's Commentaries*—which meant that he had literally cornered the market on legal knowledge.<sup>11</sup>

### **(b) The mid-1960s to the late 1970s**

The nature of the Australian legal profession and the organisation of legal work began to change dramatically from the mid-1960s—indeed, one could say much the same about Australian society in general.

The ‘minerals boom’, the massive inflow of investment capital from transnational (especially United States and United Kingdom-based) corporations, and the associated general growth in Australian business activity led to the emergence of larger, American-style corporate law firms in the financial centres of Sydney and Melbourne.<sup>12</sup>

After a long period of conservative political rule, the ‘crash through or crash’ style of the (short-lived, 1972-1975) Labor Government, led by Prime Minister Gough Whitlam and Attorney-General Lionel Murphy (both Sydney barristers), led to fundamental changes in the nature of the Australian legal system, both internally and with respect to the way it related to the rest of the world.

Among other things, this government was responsible for:

- the creation of the federal court system (below the level of the Constitutionally-mandated High Court of Australia), with the establishment of the Federal Court of Australia, the Family Court of Australia and the Administrative Appeals Tribunal);
- the major assertion of Australian judicial nationalism, with the termination of appeals from the High Court of Australia to the Privy Council in London;
- the creation of major national institutions dealing with socio-legal issues, the environment, human rights, government accountability, and the regulation of the market economy, with the establishment of the Australian Law Reform Commission; the Australian Heritage Commission; the Institute of Family Studies; the Institute of Multicultural Studies; the Australian Institute of Criminology; the office of the Commonwealth Ombudsman; the Human Rights Commission (now the Human Rights and Equal Opportunity Commission); the Trade Practices Commission (now the Australian

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11. D Weisbrot, *Australian Lawyers* 165 (Longman Cheshire, 1990).

12. O Mendelsohn and M Lippman, *The Emergence of the Corporate Law Firm in Australia* 3 University of New South Wales Law Journal 78, 79-83 (1979).

Consumer and Competition Commission); and national inquiries into poverty, human relations, and related matters;

- Australia's entry into international conventions on labour, human rights, racial discrimination, and world heritage, as well as the Optional Protocol to the statute of the International Court of Justice (accepting the compulsory jurisdiction of the ICJ);
- the federal take-over of responsibility and massive increase in funding for national health care (through the establishment of Medicare), and for universities; and
- the federal take-over of responsibility and massive increase in funding for legal aid services, through the establishment of the Australian Legal Aid Office, the recognition and funding of the Aboriginal Legal Service, and the support and funding for the development of the Community Legal Centres movement.

The number of qualified lawyers and law students increased dramatically during this period, with the population-to-lawyer ratio in Australia dropping from 1750:1 in 1947, and 1600:1 in 1968, to only 1000:1 in 1977 (and then to just under 700:1 by 1985).<sup>13</sup> The number of law students doubled between 1950 and 1965, then tripled between 1965 and 1980.

The number and proportion of women lawyers also grew rapidly during this period.<sup>14</sup> By 1971, women represented 6% of the practising profession, and by 1986, 17.2%—although the proportion of women at the Bar (as opposed to solicitor's offices) lagged behind (*e.g.*, 2.0% in 1965, 3.0% in 1975 and 5% in 1981). The number of women law students began to rise more sharply, growing from 11.4% in 1960 and 12.4% in 1968, to 22.1% in 1974, 29.1% in 1977, 33.3% in 1980, and 41% in 1984.

The number of university law schools doubled during this period from six to twelve, with a second wave of law schools established in Sydney, Melbourne, Brisbane and Canberra. The second wave law schools—especially the University of New South Wales and Macquarie University in Sydney, and Monash University in Melbourne—pioneered a sea change in Australian legal education, stressing a more critical, socio-legal, and inter-disciplinary approach to teaching and scholarship, experimenting with new modes of delivery and assessment, and developing clinical programs. As a general matter, these law schools also followed the American pattern in reducing the number of compulsory subjects, and developing extensive and specialised elective programs.

However, despite the evidence of an emerging cosmopolitan sensibility, in practice Australian lawyers remained firmly anchored to the locality. As late as 1979, when I first arrived in Australia, there was not a single law firm which had branches in *both* Sydney and Melbourne—and I was told very confidently that there *never* would be a law firm which could breach this

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13. Weisbrot 1990, at 63, Table 2.

14. Weisbrot 1990, at 85-86, Tables 5-6.

‘cultural’ divide, so powerful was the rivalry. Instead, firms in each city used an associated—but formally unrelated—correspondent firm to do the necessary work on inter-state legal matters.

### **(c) The 1980s to the present**

There is little doubting that the current era is characterised by continuous, dynamic change for the Australian legal profession. Notwithstanding the optimistic view of legal and consumer activists in the 1960s and 1970s, most of this change has been driven by external factors, including:

- the application of competition policy;
- the globalisation of the economy, including the trade in services;
- the government push for greater privatisation and de-regulation;
- the explosion of legislation, regulations, and process;
- the IT/communications revolution;
- the drive for greater accountability/transparency of public (and major private) institutions;
- the drift away from the pre-eminence of litigation towards alternative forms of dispute resolution (ADR); and
- the blurring of the distinction between law firms and rival ‘expert business services’ or ‘knowledge corporations’.

### ***Increased Competition***

#### **The application of competition policy.**

The traditional view of law as a ‘profession’, rather than a ‘mere occupation’ or service industry, no longer has legal force in Australia. Changes to competition/antitrust laws now mean that legal services are subject to the full force of competition law and oversight by regulatory authorities, especially the Australian Consumer and Competition Commission (ACCC).

As a practical matter, this has had most effect in the sweeping away of lawyers’ traditional monopoly rights over some forms of staple work, such as property conveyancing, and the abandonment of restrictions on lawyers’ advertising. The entry into this field of non-lawyer conveyancers, and the advertising of fees in local newspapers, has meant that this area is now the site of intensifying competition and falling fees. Solicitors still command a significant proportion of this work in many States (especially those which have been late to introduce competition in this area), but the profits have been significantly diminished, with the previously lucrative *ad valorem* scales of fees abandoned in favour of flat fees and low margins.

For barristers, the application of competition policy has meant, among other things, relaxation of the previously absolute bans on ‘touting’ for work and the end of restrictive practices under which a client *never* could access a barrister directly (without the intervention of an instructing solicitor), a

Queen's Counsel could not appear in court without a 'junior' counsel (also paid for by the client, notwithstanding the size or level of complexity of the particular matter), and the junior counsel had to be paid two-thirds of the fee paid to the QC. Solicitors now have rights of appearance in all courts, up to the High Court of Australia (but it remains standard practice for barristers to be briefed in the superior courts).

### Rising numbers.

Despite the conclusion of a national review of Australian legal education in 1986 that *no* new law schools ought to be established beyond the then-existing twelve—having regard to the population, the demand for lawyers, and the poor resourcing of existing law schools—the number of law schools has shot up to thirty, so it is now the case that most Australian law schools have been in operation for only about a decade! This growth is unparalleled elsewhere in the western world—during the same period, for example, only a small number of new law schools have been created in Canada, the United Kingdom, New Zealand, and the United States.

Not surprisingly, then, lawyer numbers have continued to grow, leading to greater intra-professional competition (particularly when combined with advertising and other changes). There are now over 30,000 practising lawyers in Australia, distributed across about 10,000 legal practices with a population-to-lawyer ratio of about 600:1.

These practices generated \$5.6 billion from the provision of services during the 1995/96 financial year.<sup>15</sup> In the large Eastern States of New South Wales, Victoria, and Queensland, the legal profession is still divided in the English fashion (*de jure* or *de facto*), with solicitors forming the bulk of the profession and a separate Bar comprising roughly 10% of practitioners. In the other States and the Territories, most practitioners operate as barristers and solicitors (amalgams), although a small 'voluntary' Bar operates in each jurisdiction.<sup>16</sup>

Nearly three-quarters of lawyers are located in New South Wales and Victoria, which are the two most populous States, but account for only about 60% of the general population.<sup>17</sup> New South Wales (including the enclave of the Australian Capital Territory) has 36% of the Australian population, but accounts for 41% of the practices, and generates 45% of the total income and 41% of the total employment for the sector—reflecting the increasing importance of Sydney as a regional financial and commercial centre, with strong links to Asia and the Pacific.<sup>18</sup>

Women lawyers have continued to rise steadily in number and proportion, with women now constituting about one-quarter of lawyers and more than half of all law students. However, women continue to be

15. According to the latest available figures from the Australian Bureau of Statistics (ABS).

16. See D Weisbrot, *Australian Lawyers* (1990) 59-62, 164-230.

17. *Ibid.*, at 63.

18. See the report of the International Legal Services Advisory Council (ILSAC), an advisory body to the federal Attorney-General, *Australian Legal Services Export Development Strategy Outline 1999-2002* (June 1999), which may be found at <http://www.ag.gov.au/aghome/advisory/ilsac/exportreport/exportreport.html>.

significantly under-represented at the Bar, among equity partners in law firms, and on the Bench—indicating clearly that the rise in numbers and the passage of time will not naturally of themselves bring equality of treatment, and that there are still powerful structural barriers to career advancement.

#### **The contestability of government work.**

In recent years, the federal government in Australia (as well as other levels of government) has embarked on a major program of opening up legal work previously reserved only for lawyers in the public service. While some work must remain in-house for reasons of sensitivity and confidentiality, most of the broad general and commercial legal advisory work once done exclusively by the Attorney-General's Department, the office of the Australian Government Solicitors, and other departmental lawyers (such as those involved in contracts, procurement, litigation, and enforcement) is now contestable by private lawyers, usually through tender processes. This in turn has led to the development of significant Canberra offices by many of the leading law firms in Australia, where once this was regarded as unnecessary.

#### **The demise of client loyalty.**

An incident of the more competitive commercial environment is the declining level of 'loyalty' among corporate clients. Twenty years ago, it was possible to match with confidence all of the major business houses (and some large publicly-owned entities, such as airlines, telecommunications companies, power companies, local government councils and planning authorities, etc.) and the major law firms which traditionally handled all of their legal work.

This is certainly no longer the case. Many corporations have developed their own powerful in-house legal departments to handle a great deal of their own work—as well as to assist in securing external advice, but on a more advantageous cost basis. Tendering for the provision of legal services is now commonplace. Companies also are more likely to split services; for example, seeking advice on tax planning from one firm, but regulatory compliance from another. Companies also are more likely to follow favoured lawyers who shift firms, or who establish their own 'boutique' practices in specialised niche areas.

#### **The increase in client demands, sophistication.**

The flip side of the above is an increase in client sophistication in the use of lawyers and in bargaining over fees or the level and quality of services. For example, corporate clients are much more likely to query the provision of legal services by junior associates in law firms whose inexperience is not reflected in the charge-out rates. Individual clients are more likely to query bills that seem excessive, or are not transparently set out, or contain common red rags (high charges for photocopying, return of phone calls, 'perusal of documents', etc).

### **Globalisation**

As noted above, until relatively recently it was unimaginable for Australian lawyers to organise their work on a *national* basis. However, great strides have been made in recent years, largely through the efforts of the Law Council of Australia (the rough equivalent of the ABA), to move towards a system that effectively delivers mutual recognition and reciprocal practising rights for all Australian lawyers.<sup>19</sup>

More remarkably, however, in relatively short order Australian lawyers increasingly have begun to organise their work on an *international* basis—so the addition of Melbourne, Perth, Brisbane, and Canberra offices to a formerly ‘Sydney’ firm quickly has been followed by the establishment of branch offices in London, New York, Singapore, Hong Kong, Jakarta, Paris, and Beijing.

There is also a growing awareness of the potential for using the new information technology to supply ‘virtual legal services’ on a global basis. Thus, it may be possible to market round-the-clock legal services in Europe or North America with the proposition, based in complementary time zones, that ‘our lawyers are working while your lawyers are sleeping’. (The danger of the contrary proposition does not yet seem to have sunk in, however.)

Australian lawyers are very fortunate in that the recent emergence of a de facto ‘World Law’ governing international trade and commerce is based on either (or a synthesis of) New York law or London law—and is conducted in English, giving Australian lawyers an important comparative advantage (as against, say, Brazilian, Argentinean, or Austrian lawyers).

Long a leading exporter of primary products (predominantly agricultural and mining), Australia dramatically has increased its trade in professional and technical services in recent times—with legal services (A\$156M in 1996-97, up from \$74M in 1987-88) second only to engineering services (A\$205M) in gross earnings, and leading the sector in net balance of trade terms, well ahead of such other areas as management consulting, advertising, surveying, auditing and accounting, and architectural services.<sup>20</sup>

These practice developments are well-supported by an Australian legal culture which increasingly manifests an international and comparative sensibility. All Australian law students and lawyers are familiar with American, British, New Zealand, and Canadian legal materials—and many, if not all, with South African, Indian, Singaporean, Hong Kong, and European. Australian appellate court judgments routinely canvas case law, statutes, and other materials (such as Law Reform Commission and Royal Commission reports) in other comparable jurisdictions, and the same is true (perhaps even to a greater degree) of Australian legal scholarship.

Sydney University has long had International Law as a compulsory subject for all law students—originally an artifact of the influence of the great

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19. Each state and territory retains its own professional admitting authority, however, usually dominated by judges.

20. See the report of the International Legal Services Advisory Council (ILSAC), an advisory body to the federal Attorney-General, *Australian Legal Services Export Development Strategy Outline 1999-2002* (June 1999), citing Australian Bureau of Statistics’ figures. The ILSAC report may be found at <http://www.ag.gov.au/aghomes/advisory/ilsac/exportreport/exportreport.html>.

legal philosopher and teacher Professor Julius Stone, but since retained as an aspect of the importance of international law and an emerging global sensibility.

By way of contrast, it must be said, the narrow provincialism of American judicial writing, legal scholarship, and legal educational materials (casebooks and treatises) is very stark. Other than those relatively few judgments, articles, or books which expressly take a comparative approach, it is rare to find American legal writing that looks outside the borders for ideas, inspiration, or even examples.

### ***The rise of mega-lawyering and multi-disciplinary practice***

Small practices still dominate the Australian legal profession, with 95% of practices comprised of fewer than twenty lawyers, and most of these operating at the local level. However, those 95% of practices account for only 54% of employment in the sector, delivering less than half (49%) of the operating profit before tax for the sector.<sup>21</sup>

The most important trend in the legal profession is the emergence of large ‘mega-firms’ with 100 or more partners engaged in corporate law practice. While as late as the early 1980s there was not a single major law firm which operated in both Sydney and Melbourne, the major financial and commercial centres, it is now the case that all major firms operate across State—and increasingly across international—boundaries.<sup>22</sup> The 1% of practices (sixty-four firms) in Australia which employ 100 or more persons account for 21% of sector employment and 30% of operating profit before tax.<sup>23</sup>

For a relatively small country in terms of population (about 19 million), Australia has spawned a significant number of mega-firms. The *International Financial Law Review’s* 1999 rankings show that of the world’s forty largest law firms, six are from Australia—with twenty-two from the United States, nine from the United Kingdom, only three from continental Europe, and one from Canada (which has a population 50% larger than Australia). In the Asia Pacific region, large Australian firms dominate the scene, comprising eleven of the top fifteen firms in 1996.<sup>24</sup>

Unlike the United States, Australia also has opened itself to the establishment of multi-disciplinary practices—something the legal profession itself came to support (with varying degrees of caution and enthusiasm), but which in any event probably could not have been stopped, due to market pressures as well as to official competition law and policy.

In the early debates, Australian lawyers assumed that, in the natural order of things, multi-disciplinary practices (MDPs) would be law firms, or at least lawyer-dominated firms, which also employed a number of persons with complementary skills and expertise—some accountants and financial planners, perhaps some management experts, perhaps even an architect (for expertise in building cases), a psychologist (*e.g.*, for family law cases), and a

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21. *Ibid.*

22. Weisbrot 1990, at 257-266.

23. ILSAC Report.

24. *Ibid.*

doctor (for personal injury and other forensic medicine matters).

This completely ignored the fact that most of the rival 'expert business services' or 'knowledge corporations', as they are variously described in the organisational behaviour literature, have been 'massifying' and competing on a global basis for many years now. For example, think about the Big Eight—now the Big Four—accounting firms; the international management consulting enterprises such as McKinsey's or Andersen Consulting (now Accenture); the international public relations operations such as Hill & Knowlton; the international advertising agencies; and so on. I vividly remember the shock of one senior Australian lawyer who reported seeing a huge billboard on the way out of Orly Airport in Paris, which trumpeted 'KPMG: Europe's largest firm'.

And, thus, it is not at all surprising that the Australian MDPs are essentially major accounting firms which have added a legal department—PricewaterhouseCoopers Legal, Andersen Legal, KPMG Legal. The international Chairman of PricewaterhouseCoopers Legal (known as 'Landwell' in most countries), which has more than 1500 lawyers in thirty-five countries, said recently that the major challenge for running a successful MDP is 'to harness the traditional dominance of accountants with the traditional arrogance of lawyers'.

### *A Tale of Two Professions*

The modern development of Australian legal practice, as described above, appears to be pointing inexorably towards a bifurcation in the organisation of legal work.

#### **Law as a small business.**

At one end of the profession, law increasingly will take on the nature and trappings of small business. Success will be dependent upon managing to deliver high volume, low margin services in a highly competitive environment (sometimes described as 'McLaw').

A key to success, then, will be the routinisation of legal work to facilitate turnover and to keep costs down. The smart use of information technology to develop forms and precedents obviously will assist in this regard, as will the traditional use of para-professionals (a trap for which women will have to remain alert).

Increased standardisation of some classes of legal work should lead to greater predictability of fees and costs, which finally might make actuarially viable the development of a significant market for individual or group legal expense insurance products.

Government subsidy of certain types of work also will be essential—whether this is a direct subsidy (legal aid) for the representation of disadvantaged persons in court proceedings, or an indirect subsidy in the form of government support for information systems and infrastructure (e.g., interactive land title registries) which help to keep private legal costs down.

As noted above, legal work at this end will be highly competitive, involving competition among the increasing numbers of lawyers, competition

with non-lawyers (*e.g.*, conveyancing agents, tax agents), and competition with virtual providers (*e.g.*, websites, do-it-yourself kits, and so on).

As with all small businesses, success ultimately will require—beyond a good product or service—strong management skills, adept strategic planning, and effective marketing. And as with all small businesses, unfortunately, these are skills that are often lacking because the practitioners concerned have received little or no training.

### **High-end legal practice: customised advice and problem-solving.**

At the other end of the practice spectrum stand the mega-firms, the MDPs (and other-knowledge corporations), the specialised boutique practices (almost always break-aways, sometimes temporarily, from the mega-firms), and the members of the senior Bar.

For these lawyers, professional life will consist mainly of providing high-level strategic planning and advice (including such advice in relation to regulatory compliance) and representation for clients (governments, corporations, institutions, and some wealthy individuals) that can afford to pay for complex, individually customised advice and problem-solving.<sup>25</sup> Such lawyers will be heavily involved in ‘law-shaping’ (issues management, policy development, lobbying, law reform work) to support their clients’ interests, as well as in more conventional forms of offering legal advice and representation.

The working orientation of such lawyers will feature a global outlook (and multicultural sensitivity), multi-disciplinary approaches, team-work, and a premium on ‘soft skills’—especially communications.

### **The consequent challenges.**

The radically changing organisation of legal work in Australia—which has strong parallels to the situation in the United States—naturally presents a number of important challenges for lawyers, policymakers, and others, including:

- the need to reshape legal education, in order to prepare lawyers more effectively for this changing environment;
- the need to reshape legal ethics for the new paradigm(s) of legal practice;
- the need to preserve some sense of professional identity and solidarity, or risk the fragmentation and demise of ‘the legal profession’; and

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25. Other less affluent clients may be able to gain some access to these services if the legal profession’s traditional acceptance of the ‘service ideal’ and support for pro bono services is not compromised by the new emphasis on competition and business-like practices. See *The Report of the National Pro Bono Task Force to the Commonwealth Attorney-General* (14 June 2001). The Report may be accessed via the Australian Attorney-General’s website, at [www.law.gov.au](http://www.law.gov.au)

- the need to develop the most efficient and effective ways to utilise the limited (and, in most countries, declining) public subsidy for legal aid and the justice system.

The balance of this paper addresses the first of these important issues.

***Reshaping Legal Education in The Image of the Emerging Profession: Taking Skills Seriously***

Having described the dynamically changing working environment of Australian lawyers, the Commission was critical of the relative stasis in legal education, which appeared frozen in time.

Over the same period in which the organisation of legal work in Australia has changed radically, there has been an emerging awareness of the importance of skills training and some growth in the development of clinical programs, but doctrinal law still dominates law school teaching and curriculum, and there is disappointingly little reaction to the changing environment or reflection about the implications of all of this for education and scholarship.

I suspect that if Professor Langdell walked into a contemporary law school in the United States or Australia—and the rapid advances in genetic technology and cloning may soon make this possible—he would feel right at home. Although the elective programs at modern law schools have expanded enormously and become ever more specialised, and clinical electives are now available, the nature of the core curriculum, the dominance of doctrine, and the basic approach to pedagogy have changed very little. (Contrast with this the likely bafflement of a Nineteenth Century professor of medicine, architecture, engineering, or chemistry who strayed into a modern program in his or her discipline.)

In *Managing Justice*, the ALRC was particularly critical of the deadening influence of poorly conceived professional admission requirements on the development of Australian legal education. The Consultative Committee of State and Territorial Admitting Authorities, headed by Mr Justice Lancelot Priestley of the New South Wales Court of Appeal, has endorsed a list of eleven compulsory doctrinal areas for academic legal study, colloquially known as ‘the Priestley 11’, which individuals must complete in order to fulfil admission requirements.

Although this list does not purport to prescribe directly the curriculum of any law school, universities are under considerable practical pressure to comply with the list so that students can proceed smoothly towards admission. The list does include ‘Professional Conduct’—as in traditional case-based legal ethics—but otherwise does not contain any professional skills subjects. Recent discussion actually has involved *expansion* of the list to include additional doctrinal subjects, such as taxation law and family law.

Among other criticisms, the Commission questioned the ‘solitary preoccupation with the detailed content of numerous bodies of substantive law’ and the arbitrary imposition of a set of ‘core’ areas of substantive law.

As the Commission noted,<sup>26</sup>

There is little doubt that the core must include constitutional law, criminal law, contracts, torts, and property law. Some generations ago administrative law was barely recognised and conveyancing was a staple of the profession. Some important and high profile areas—such as family law, environmental law, taxation and trade practices—are popular with students, but are rarely compulsory in law schools. Globalisation suggests that public international law and conflicts of law (private international law) could be seen as within the modern ‘core’, but few law schools make these compulsory. In the United Kingdom, a recent joint statement by the Law Society and Bar Association (awaiting the approval of the Lord Chancellor) emphasised the importance of intellectual lawyering skills, and listed only about a half-dozen ‘core areas of knowledge’, including European Community Law.

Second, a requirement that students must ‘master’ (or at least ‘know’) large bodies of substantive law ignores the stark reality that this substance changes dramatically over time—sometimes in a very short time. Where once it was possible to trace the slow and careful development of the common law, and identify with either the ‘bold’ or ‘timorous’ judges of the English superior courts, Justice Paul Finn has described Australians as ‘born to statutes’.

Justice Michael McHugh has noted that

[l]egislation is the cornerstone of the modern legal system. For a long period in the history of the Anglo-Australian legal system, the rules of the common law, as modified by the great system of equity jurisprudence, were the basic instruments of public and private law. But throughout this century, successive Parliaments have legislated to control more and more social and economic conduct. As a result, the rules of the common law and equity are constantly being modified by statute law. The growth of legislation appears to have reached almost exponential levels. However, the increase has not been so much in the number of Acts passed as in the length of legislation passed.<sup>27</sup>

Thus, a student who ‘masters’ taxation law or environmental law or social security law, but does not then work in these areas for a time, would find the substance of the law almost unrecognisable a decade later; and a practitioner who relied significantly on what he or she learned in law school would soon, if unwillingly, become acquainted with the law of professional negligence.

By way of contrast, the Commission noted that whereas the MacCrate

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26. Managing Justice Report, paras 2.82-2.84.

27. M McHugh, ‘The growth of legislation and litigation’ 69 *Australian Law Journal* 37, 37-38 (1995).

Report<sup>28</sup> in the United States and the Canadian Bar Association's 1996 Task Force Report on Systems of Civil Justice both focus

on providing law graduates with the high level professional skills and values they will need to operate in a dynamic work environment, and assumes that lawyers will keep abreast of the substantive law as an aspect of professional self development, the equivalent Australian list—the 'Priestley 11'—focuses entirely on specifying areas of substantive law.<sup>29</sup>

Instead, the ALRC advocated the re-orientation of legal education

around *what lawyers need to be able to do*, [rather than remaining] anchored around outmoded notions of *what lawyers need to know*.<sup>30</sup>

In order to assess progress in this area and facilitate development, the Commission suggested that

law schools should make explicit the nature and extent of their skills development programs (whether as separate units, as modules within substantive units, or in clinical programs), and how they examine these skills.<sup>31</sup>

The Commission acknowledged that,

[i]n calling for greater attention to be paid to broad, generic professional skills development, [we do] not seek to minimise the need for students to receive a solid grounding in core areas of substantive law, the historical organisation (and divisions) of the common law system, the language and key concepts of core areas of law, and the nature of the relationships as between the state, the courts and the individual.<sup>32</sup>

However, the Commission also cautioned against perpetuating 'a false polarity between substantive knowledge and professional skills', noting that it

does not wish to perpetuate a false polarity. It is obviously important to provide law students with a basic grounding in the major areas of substantive law, especially 'building block' areas such as contracts and public law, and to acquaint them with how these areas developed over time—that is, to provide an appreciation of the common law method. Nor is it possible to teach legal professional skills effectively in a substantive vacuum, or in a

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28. Robert MacCrate et. al., *Legal Education and Professional Development – an Educational Continuum* (American Bar Association 1992), (the "MacCrate Report").

29. Managing Justice Report, para 2.21.

30. *Id.*

31. Managing Justice Report, para 2.80.

32. *Id.*, para 2.81.

manner which does not promote intellectual analysis and reflection on law as an art and a social science as well as a technical or professional service.<sup>33</sup>

Rather, the Commission emphasised that intellectual refinement should be the aim of skills training in universities:

properly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility.<sup>34</sup>

In other words, it is important to make very clear to all stakeholders (the legal profession, the judiciary, the legal academy, law students, the rest of the university, etc.) that, for example, ‘skills training’ does *not* mean practising *elocution* (however much that may assist most lawyers), but rather the focus will be on a deep understanding of *communications* in the professional context—with all that implies in terms of communications theory and practice, genres, advocacy, power relations, and so on.

It appears that Australian lawyers and law firms are now beginning to recognise the need to reshape legal education to provide the skills needed for success in practice. The Centre for Legal Education’s periodic surveys of law graduates and employers<sup>35</sup> indicate that while they rate as ‘important’ the acquisition of doctrinal knowledge, the skills they identified as the most frequently used in practice were oral and written communication, computer, time management, and document management skills.<sup>36</sup>

Finally, much of my own research and writing in recent years has focused on the regulation of the Australian legal professions, including matters of professional competence and discipline. During the period 1990-1994, I was the principal Commissioner at the New South Wales Law Reform Commission (NSWLRC), the NSWLRC undertook a major review of the much-criticised self-regulatory regimes for handling complaint about lawyers in that State.<sup>37</sup> Among other things, the NSWLRC did a survey of many hundreds of complaint files, looking at both the substance of the complaints and the efficacy of the complaint-handling processes.

One of the most striking conclusions was that very, very few of the complaints resulted from a poor understanding or misreading of doctrinal law; rather, the overwhelming run of complaints related to lawyering skills and professional behaviour—especially:

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33. *Id.*

34. *Ibid.*, para 2.85.

35. In law or ‘law-related’ fields.

36. C Roper and S Vignaendra, *Australian Law Graduates Career Destinations* 39 (Sydney: Centre for Legal Education 1998). (At that time, the Centre was based in Sydney and supported by the NSW Law Foundation; it has since moved to the University of Newcastle.)

37. See New South Wales Law Reform Commission, *Complaints Against Lawyers* (Discussion Paper No. 26, 1992), and *Scrutiny of the Legal Profession: Complaints Against Lawyers* (Report No 70, 1993).

- (a) communications with clients (and to a lesser degree, communications with other lawyers, with the courts, and with regulatory authorities);
- (b) management of client relations and files (ensuring that matters progress towards resolution; maintaining full and accurate files, including appropriate file notes; billing records and practices; meeting deadlines; and so on); and
- (c) proper handing of funds held under trust and related accounts.

Essentially, *none* of these are matters to which much time or attention is devoted in the traditional law school curriculum—yet, working backwards from the disciplinary experience, these are in practice matters that require the most urgent attention.

Among many other things, the NSWLRC recommended that: (a) there be regular ‘feedback from the disciplinary process to the profession in order to remedy common problems and improve the standards of the delivery of legal services’;<sup>38</sup> and (b) university law schools upgrade their commitment to the teaching of legal ethics and professional responsibility,<sup>39</sup> and do this in the proper spirit and context:

The Commission wishes to make clear its view that it is inadequate to teach legal ethics and professional responsibility as if these are matters of etiquette which must simply be transmitted, committed to memory and recalled on the appropriate occasions (such as at the examination). Rather, these are matters which are bound up in the fundamental nature and essence of lawyering and legal professional *practice*, which necessitates a *process* or *problem-solving* approach to the subject. Ideally this involves a clinical approach, and certainly the opportunity for reflection and discussion, but in any event we regard the ‘large lecture’ as an unsuitable pedagogical technique (and the large lecture hall an unsuitable venue) for creating a professional sensibility and developing a thoughtful and lasting commitment to ethical conduct.<sup>40</sup>

### ***Constraints to Integration***

All of the foregoing makes plain the Commission’s—and my—strong view that there is a powerful disconnect between the typical, doctrinally-focused curriculum of law schools and what it is that new lawyers actually now do in practice, and what intellectual/professional skills and approaches they need to do these things effectively. This disconnect is equally strong and unsatisfactory whether a new lawyer is going into the high volume/low margin end of legal practice, or into the customised, problem-solving high

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38. Report No 70, Recommendation 63, and accompanying text at paras 5.26-5.31.

39. *Ibid*, Recommendation 62, and accompanying text at paras 5.20-5.25.

40. *Ibid*, para 5.24.

end of legal practice, as described above.

However, stressing the importance of remedying this disconnect is not to minimise the difficulties involved. Major constraints to achieving integration of skills training include:

- **Admission requirements** – as noted above, the long list of substantive law subjects which serve as prerequisites for admission to practice in Australia (‘the Priestley 11’) serves to anchor the focus of legal education on the mastery of doctrine rather than on the development of an array of intellectual skills and approaches, and concomitantly reduces the time and resources available for professional skills training. In the United States, the system of formal State Bar Examinations provides a parallel set of constraints.
- **Staff resistance** – given the strong tendency towards self-replication within institutions, the traditional law school curriculum is also a problem in relation to the training of new law *teachers*, since most will have achieved success through (and thus view success as lying in) the mastery of doctrinal subjects, and few will have experienced the benefits of a well-integrated, well-executed skills program. Law professors who themselves have little experience of law in practice may lack the requisite skills and confidence to engage in skills training. Other hurdles include the common complaint of doctrinalists that ‘as it is there’s not enough time to teach everything I need to cover in this subject, so how can I add skills components’, and the related phenomenon of inertia.
- **Student resistance** – I have to admit that while I anticipated staff resistance to integration during my time as Dean of Law at the University of Sydney, I severely under-estimated the degree of resistance from, or at last ambivalence among, law students. In retrospect, however, this should not have been so surprising. As is the case with law professors, law students also have achieved relative success and reached their current position by being better than their peers at digesting large bodies of information and engaging in forms of textual analysis, and then in demonstrating this mastery via written papers and examinations. And as successful individuals, as measured by their grades to date, law students worry about suddenly shifting the ground on which they are to be assessed (interviewing? negotiation??), and worry about being dragged down by others if skills work is assessed on a team or group basis. Faced with a new discipline and new bodies of doctrine, they also worry whether there is sufficient time and space in the curriculum for skills training, and gravitational forces are no less pronounced upon a mass of students.
- **Resources** – there is no United States Law Dean who does not worry constantly about resources, and American law schools are lavishly funded by the standards of Australian universities. As is the case with clinical teaching, skills training requires lower student-staff

ratios to be done effectively—the literature typically suggests 8:1 or 9:1. There are various strategies for reducing costs somewhat (buzz groups, peer teaching, using voluntary adjuncts, and so on), but ultimately there is no escaping the fact that skills training is more resource intensive, and therefore more expensive, than traditional, doctrinal, large-group teaching.

### ***Initiating Integration***

Given the length and strength of the doctrinal tradition and the constraints described above, careful thought needs to be given to establishing the right conditions for initiating an integrated approach to skills teaching.

In my view, the state of skills teaching is relatively more advanced in Australia than in the United States, and that this has several causes, including that:

- there are relatively few clinical programs in university law schools, mainly for reasons of funding, so that the drive to provide students with practical skills and experience has focused much more squarely on skills teaching;
- the enforcement of a ‘caste system’ in American law schools (described in the other keynote address by Dean Kent Syverud)—under which skills teachers are too often relegated to a lower caste, with less secure tenure and fewer opportunities to move back and forth between skills courses and doctrinal courses—is less pronounced in Australia; and
- there are many new law schools in Australia—indeed, as detailed above, *most* law schools in Australia are new.

The latter factor has two aspects to it. First, the better new law schools have recognised the competitive need for innovation and development of niche identities, with unique strengths in areas of teaching and research. Second, those that have seized on a skills-focused curriculum have been able from the beginning to recruit staff with that in mind, and thus are less likely to meet entrenched staff opposition.

So it is no surprise that the Australian law schools most associated with success in integrating skills teaching are mainly ‘fourth wave’ law schools established in the last decade, including: Bond University (also Australia’s first private university); Newcastle (which operates a *fully* clinical ‘professional program’ for about one-third of its students, the others undertake a more traditional program but with significant clinical opportunities); Wollongong; Griffith (in Brisbane); Murdoch (in Perth), and others.

Restructuring a traditional law program, with a traditional faculty, to accommodate a greater role for skills development may be more of a challenge, but it is by no means impossible. Conservative old law schools such as Sydney, Queensland, Melbourne, and Western Australia, have taken major steps in this direction in recent years, and Queensland University of

Technology (QUT), a second generation school, has become an interesting centre for thinking and innovation in this regard.

(Of particular interest to American skills teachers will be the fact that Melbourne and Queensland law schools have developed new degree programs as the vehicles for integration of skills training, using the American 'Juris Doctor' (J.D.) nomenclature—and running in parallel with their 'normal' Bachelor of Laws (LL.B.) programs. The Australian J.D. programs are specifically marketed on this basis, and the tuition fees are significantly higher, in order to support the necessary intensive, small group teaching.)

The drive to restructure a more established law school may be assisted by a shock to the system which leads staff to question the wisdom of continuing eternally with the status quo – this might involve the publication of poor rankings or surveys, declining numbers or quality of applications for admission, and so on.

Although there is no direct equivalent in Australia of the *US News & World Report's* annual rankings of American law schools, there is nevertheless increasing competition and publication of various comparative data. The Australian federal Department of Education and Youth Affairs (DETYA) also conducts an annual survey of recent university graduates across all disciplines (the 'Course Experience Questionnaire' or CEQ), asking six questions about their satisfaction with the quality of the teaching in the degree program. From the published data, 'league tables' are quickly compiled in each of the various disciplines, including law, showing which are considered (by their own graduates) to be the 'best' teaching institutions.

At Sydney (and Queensland and Western Australia), the shock involved poor CEQ ratings, which confirmed disappointing in-house teaching surveys. Sydney's traditional position as the first choice among prospective law students also came under serious challenge in recent years from the University of New South Wales, largely on the strength of the latter being seen as a law school which takes teaching more seriously and delivers a better teaching program (including a clinical option). Sydney also had struggled for some years to come to grips with a major internal review of curriculum and teaching—which led many staff to conclude that the problem was not with the array of core course and electives, but rather with the teaching method.

Informed debates within the law school also highlighted the degree to which Law was being left behind by other professional disciplines, such as Medicine, Dentistry, and Architecture, which had radically revamped their teaching and curriculum to emphasise skills training, the use of information technology, sensitivity to client needs, and so on.

Even for predominantly doctrinal teachers, a more integrated approach held the promise of greater opportunities in the classroom for considering ethical dilemmas, policy analysis and law reform, and comparative approaches. Finally, there were strong arguments that integration would enrich the context of doctrinal subjects and thus promote better appreciation of the subject matter. For example, students who experience the process of actually negotiating and drafting a contract would not only gain those practical skills but also be able to read *cases* about contracts with greater insight and understanding.

The focus of the review then shifted towards redirecting resources in

such a way as to rationalise and restrain the growth of the elective program; reduce class sizes across the core courses; and expressly provide teachers with the space, freedom, and official encouragement and support to innovate with respect to teaching methods, integration, and assessment. (It is important to make clear to staff that this also involves the freedom to experiment and *fail*, at least sometimes, since real innovation invariably involves some risk taking.)

The promotion of skills teaching in particular was supported strongly by:

- allocating resources in accordance with this commitment;
- undertaking a major fundraising effort to support ‘the Teaching Revolution’—which had the multiple aims of raising money and raising consciousness among alumni and sponsors (mainly the large law firms), maintaining staff morale, and raising expectations in the law school and wider community;
- establishing a tenure-track position of Director of Clinical and Skills Programs to provide leadership in this area, with a special brief to develop new stand-alone skills courses (such as Client Interviewing and Negotiation) as well as to develop ‘drop-in’ skills modules which teachers in doctrinal subjects could seize on in an effort to integrate substantive law and skills training. For example, a skills module on ‘negotiating’, say, could be dropped into a course on Contracts; a skills module on ‘dispute resolution’ could be adapted for use in Torts; a skills module on ‘client interviewing’ could be utilised effectively in Criminal law or Family Law, and so on;
- actively headhunting top skills teachers from other law schools—this brought to Sydney leaders in the field, such as Dr. Penny Pether (who had been at Wollongong University, and is now at American University) to head up and thoroughly revamp the research and writing program, and Associate Professor Les McCrimmon (who had been at Bond University), to take up the new position of Director of Clinical and Skills Programs;
- establishing the position of Director of Teaching Development in the law school (equivalent to an Associate Deanship), with special responsibilities in this area, and also for lifting teaching quality generally, developing an appropriate orientation program for new staff, and other related matters;
- enlisting the support of the University’s teaching and learning centre to design and offer a series of how-to seminars, featuring leading skills teachers from within the law school, from other law schools, and from other disciplines (such as medicine), as well as highlighting and making available literature on the theory and practice of skills teaching; and

- creating an annual Excellence and Innovation in Teaching Award in the law school, with a \$3000 prize.

### ***Models for Skills Integration***

As described above, the traditional law school program in the English-speaking world contained little or no emphasis on professional skills training. The more progressive modern law schools now typically offer an array of skills development courses, but usually in the form of stand-alone subjects. Sometimes these are compulsory units (*e.g.*, legal research and writing; perhaps moot court), but much more commonly the skills (and clinical) courses are electives (*e.g.*, trial advocacy, appellate advocacy, dispute resolution) that only a portion of students opt to do.

There are a number of possible models for greater integration of skills training into the curriculum for law schools considering this direction. The threshold question for law schools is whether to bite the bullet and pursue a fully-integrated ‘matrix’ approach, in which the requisite professional skills are identified, and then each is assigned to a particular core doctrinal subject (or subjects), which takes on responsibility for ensuring that the skill is taught and developed within that context.

The Teaching and Curriculum Committee at Sydney Law School developed a draft matrix (with eight skill areas assigned to eight compulsory subjects) and recommended this approach—but met with resistance from many doctrinal teachers who were not willing and able to do skills training—or at least were not happy with the particular skills assigned to their subject. After long debate, a compromise position was adopted under which the matrix was abandoned and replaced with a regime (described above) which encourages and supports skills teaching—that is, lots of carrots, with just a little stick.

However, a number of Australian law schools have been more successful in moving towards full integration. I will highlight two of the more interesting programs here, from Bond University and QUT.

### **The Bond University Skills Matrix.**

As noted above, Bond University was the first private law school in Australia.<sup>41</sup> From the commencement of teaching in 1989, it had a strong commitment to professional skills training, and it hosted a major conference in January 1994 to encourage other law schools to do the same. As a new law school, it had the relative luxury of being able to recruit all of the academic staff with the priority and ethos of ‘developing programs which combine substantive law with practical skills’<sup>42</sup> already in place, rather than having to convert traditional doctrinal teachers to the cause.

In addition to the typical array of core doctrinal subjects,<sup>43</sup> Bond also has

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41. There is now a second private law school at the University of Notre Dame in Fremantle, Western Australia (which has an affiliation with the University of the same name in the United States).

42. *Bond University Handbook 1999* at 46; available on the web at [www.bond.edu.au](http://www.bond.edu.au)

43. Bond also includes among its compulsory courses Legal Skills/Legal Reasoning, and Legal Ethics and Professional Conduct—which are common in Australian law schools—and Bookkeeping and Trust Accounts—which is not.

established four 'core clusters' of skills and values offered as stand-alone subjects or integrated within the core doctrinal subjects in the LL.B. program. These involve:

- *Cluster 1: Communications* – either Communications Skills or Public Speaking;
- *Cluster 2: Information Technology* – a choice of one of two IT subjects;
- *Cluster 3: Values* – either Cultural and Ethical Values or Contemporary Issues in Law and Society; and
- *Cluster 4: Organisations* – either Strategic Management or Entrepreneurship.

Bond also has a number of elective courses in the skills area, including among others Alternative Dispute Resolution, Trial Advocacy, Appellate Advocacy, and Legal Drafting.

However, it is the fundamental integration of skills and doctrinal teaching for which Bond is primarily known. The matrix on the following page shows the way in which the core skills are matched with doctrinal subjects.<sup>44</sup>

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44. Thanks to Professor Kay Lauchland of Bond University for providing this information.

***Attachment A: BOND UNIVERSITY SKILLS MATRIX***

<b><i>Legal research and analysis</i></b>	<b><i>Legal writing and drafting</i></b>	<b><i>Information technology</i></b>	<b><i>Negotiation and dispute resolution</i></b>	<b><i>Advocacy and oral presentation</i></b>	<b><i>Client interviewing &amp; communications</i></b>
Australian Legal System	Australian Legal System	Principles of Contractual Liability	Australian Legal System	Criminal Law and Procedure	Business Associations
Legal Reasoning	Civil Remedies	Administrative Law	Civil Remedies	Principles of Tortious Liability	Civil Procedure
Property Law	Personal Property Transactions  Civil Procedure		Land Law	The Law of Obligations  Civil Procedure	

### **The QUT Skills Matrix.**

Concluding that ‘that the traditional content-based approach of law school curricula has not adequately prepared graduates for the changing legal workplace’,<sup>45</sup> the Queensland University of Technology (QUT) recently has moved towards a thoroughly integrated approach, with the following philosophy:

[S]kills must be embedded within the process and content of learning to ensure that learning objectives are met and that teaching and learning approaches and assessment methods are desirably developed in students in an authentic learning environment. Therefore, the aim of the framework is to develop an authentic learning environment for students through the adoption of appropriate learning objectives, teaching and learning approaches and assessment methods which take into account the global workplace, social and ethical values and the development of life long learning skills. Through such a learning environment, students will be given the opportunity to develop both the generic and specific legal professional skills and ethical framework they will need to practise as reflective practitioners in changing and challenging work environments. The level of performance of nominated skills in each unit will form part of the assessment for the unit. This will include equipping students with the appropriate level of skills to enable a seamless transition from the academic to the professional environment. The teaching team for each unit has nominated particular skills to be practiced in the context of the substance of that unit and therefore the skills required vary from unit to unit.<sup>46</sup>

The level of thinking and research which supports the integrationist reforms at QUT is probably the most advanced in Australia.<sup>47</sup>

The Skills Matrix adopted at QUT is quite sophisticated, with a range of skills/attributes identified, and each skill is broken into three broad levels of progression or competency, developed throughout the core curriculum.

The full program is set out on the ALWD website, but to provide a basic illustration for these purposes I have distilled the QUT matrix in this way:

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45. See *Embedding Graduate Attribute in Law*, at 1, available on ALWD’s website at [www.alwd.org](http://www.alwd.org).

46. *Ibid*, at 2.

47. At present this document is on the QUT intranet, but is not accessible to persons outside the University. My thanks to Associate Professor Sharon Christensen for providing this material and for granting permission to make it available on the ALWD website.

<b><u>Core Subject</u></b>	<b><u>Assigned Skill</u></b>
Torts	Client interviewing
Contracts	Negotiation
Equity & Trusts	Teamwork
Criminal	Trial advocacy
Real Property	Drafting, research
Constitutional	Problem solving
Legal Research & Writing	Information literacy
Law, Society & Justice	Ethics, social justice

### ***Conclusion***

I believe that the body of this paper documents the powerful disconnect that has emerged between the focus of teaching and learning in most law schools in Australia and the United States—that is, the mastery of a large number of bodies of doctrinal law—and the generic professional skills and attributes which law graduates require to succeed in the increasingly dynamic work environment in which they find themselves.

Although appellate case exegesis (in one field of doctrinal law after another) is one important skill for lawyers, it is by no means the *only* professional skill which law students and young lawyers need to acquire, nor is it arguably even the *most* important.

For what it is worth, my own preferred core set of skills would include:

- high order oral and written communications (including an appreciation of different genres and contexts—legal and legislative drafting, transactional, advocacy, scholarly, etc.);
- negotiation and dispute resolution;
- listening (not typically a strength of most lawyers);
- fact-finding;
- problem solving and law shaping;
- an international and comparative orientation;
- management, project management and teamwork skills;
- multi-disciplinarity; and
- an appreciation of the need to be sensitive to the client's experience (whether this means the corporate boardroom, the science laboratory, or poverty).

In my first newsletter as Dean of Sydney Law School I wrote to staff students and alumni—and I still very firmly believe—that

in a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a deep moral and ethical sense of the role and purpose of lawyers in society.

There are welcome signs in Australian law schools of a growing

recognition of the importance of developing high order professional skills and of exciting efforts at implementing greater integration of skills training and doctrinal law. No doubt this will require a greater commitment of resources—or at least a reallocation of funding priorities. However, I don't believe that we can afford *not to* move purposely in this direction: the choice for law schools is either to continue to prepare lawyers for the 1950s, or to prepare them for the challenges of operating successfully in the modern profession and the global economy.