Advocacy Training in Adversarial Systems

and

Some French Influences on Australian Law

The Honourable Justice James Douglas,
Supreme Court of Queensland
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Speech to the École Nationale de la Magistrature in Paris

I wish to say something about training lawyers in techniques of advocacy, or persuasion in the court-room, principally in the adversarial common law systems, and also, and separately, to mention some areas of substantive law where French and European civil law has had an influence on the development of Australian law, particularly in the areas of copyright and contract. One conclusion possible to draw from these separate issues is that some of the procedural differences between our systems may be more entrenched than the differences in substantive law.

Advocacy training

The differing structures of our legal systems place contrasting demands on the investigation of disputes and the conduct of trials in the court-room. From my limited understanding of your system of procedure I believe there is a much greater focus on the compilation and understanding of the pre-trial dossier by police and examining magistrates in criminal cases, especially at the lower level, and by the court and the parties in civil disputes, and perhaps less on the technique of interrogation of witnesses by the parties' lawyers in the court room.

As I understand it your judges have the principal role in calling evidence and examining witnesses and that is reflected in some of the training that students undergo at the École Nationale de la Magistrature although much of the interrogation is performed by police officers in the first instance and recorded in the dossier. As much of your system relies on the written record I understand that the oral hearing is designed more to test the accuracy of the dossier than to tell the story to the court deciding the case as occurs in our system.[1]

By contrast ours is a system based historically on the presentation of evidence orally to juries. Although there is a significant use of pre-trial disclosure and investigation the traditional model of trial procedure focuses on oral questioning by the parties' lawyers rather than by the judge. The story is thus unveiled to the judge or judge and jury by the lawyers and the parties' witnesses in a way that assumes no prior knowledge by the court of the evidence being presented to it. I understand that in a Cour d'Assises, however, that is how the evidence is revealed to the jury, although the judges have access to the dossier as well.

The International Criminal Court and International Criminal Tribunals for Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon use more adversarial methods based on the common law systems but ones that have also been influenced by their judges trained in the civil law systems. As the official languages of those bodies are French and English I expect that some of you may be interested in their

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[1] There are several useful articles comparing and contrasting the French and Australian systems published in Australian journals by Bron McKillop of Sydney University Law School: *What can we learn from the French criminal justice system?* (2002) 76 ALJ 49; *The position of accused persons under the common law system in Australia (more particularly in New South Wales) and the civil law system in France* (2003) 26(2) UNSW Law Journal 515 and *Review of convictions after jury trials: the new French jury court of appeal* (2006) 28 Syd Law Rev 343.

work and in learning more about common law techniques of examining and cross-examining witnesses. Lawyers appearing there need training in the techniques used in the ICC and the various tribunals. The English bar has been providing such training since 1999 and I would be interested to discover whether the profession in France provides similar training.

To assist the common law process of leading the evidence there is a developed body of substantive law dealing with its admissibility and the method of its presentation, whether by the examination of a party's own witnesses or by the cross-examination of the opposing party's witnesses. Our law of evidence is a major study in its own right so I shall simply say a little about the objects of examining and cross-examining witnesses by the parties' lawyers.

Examination and cross-examination of witnesses

The object of examination of witnesses is to obtain testimony in support of the version of the facts in issue or relevant to the issue for which the party calling the witness contends. The testimony must be based on personal knowledge — on what the witness saw, heard, felt, touched or tasted. It must be testimony as to facts, not inferences. Testimony as to opinions or inferences or beliefs may, exceptionally, be permitted if the rules as to opinion evidence are satisfied, or if a contrary course would be over-pedantic. Generally speaking witnesses may not be asked leading questions, ones which suggest an answer, and, although a witness may refresh memory by referring to documents previously prepared by that witness, a witness cannot usually be asked about former statements of that witness with a view to their becoming evidence in the case or in order to demonstrate the consistency of that

witness. A party may call a second witness to contradict a first witness called by that party who has given unfavourable evidence with regard to a fact in issue or relevant to the issue, but a party may only discredit a witness called by that party if the judge considers the witness to be hostile.[2]

Cross examination is a different skill. Recently a leading Australian judge, dealing with a criminal case where the prosecutor had transgressed seriously in his cross-examination of the defendant, described some of the rules governing that process in these terms:[3]

> "[119] They are rules which necessarily developed over time once it came to be established that oral evidence should be elicited, not by means of witnesses delivering statements, and not through questioning by the court, but by means of answers given to a succession of particular questions put, usually by an advocate, and often in leading form. A cross-examiner is entitled to ask quite confined questions, and to insist, at the peril of matters being taken further in a re-examination which is outside the cross-examiner's control, not only that there be an answer fully responding to each question, but also that there be no more than an answer. By these means a cross-examiner is entitled to seek to cut down the effect of answers given in chief, to elicit additional evidence favourable to the cross-examiner's client, and to attack the credit of the witness, while ensuring that the hand of the party calling the witness is not mended by the witness thrusting on the cross-examiner in non-responsive answers evidence which that witness may have failed to give in chief. To this end a cross-examiner is given considerable power to limit the witness's answers and to control the witness in many other ways."

I understand that a lawyer here has very little ability to limit a witness's answers.

The Australian judge went on to describe the rationale for the rules prohibiting offensive questioning, the making of comments rather than the asking of questions, asking compound questions which simultaneously pose more than one inquiry and call for more than one answer. Such questions, as his Honour said, present two

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2 See *Cross on Evidence* (Aust. ed.) at [17140].

3 *R v Libke* [2007] HCA 30 at [119]-[133] per Heydon J

problems. First, the question may be ambiguous because of its multiple facets and complexity. Secondly, any answer may be confusing because of uncertainty as to which part of the compound question the witness intended to address. Nor may a cross-examiner cut off answers before they are completed or ask questions resting on controversial assumptions; nor should questions provide merely an invitation to argument. What is wanted from the witness is answers to questions of fact. The rule against argumentative questioning as with the other rules touched on rests on the need not to mislead or confuse witnesses.

His Honour concluded as follows:

> "[132] It is not unique in the law of evidence to find that the more closely the rules for admissibility are complied with, the greater the utility of the testimony from the point of view of the party eliciting it. It is certainly the case in this field. The rules permit a steady, methodical destruction of the case advanced by the party calling the witness, and compliance with them prevents undue sympathy for the witness developing. It is perfectly possible to conduct a rigorous, testing, thorough, aggressive and determined cross-examination while preserving the most scrupulous courtesy and calmness."

As I have often said when training advocates, forget what you see on television, the art of cross-examination is not the art of examining crossly. (Please forgive the jeu de mots.)

If lawyers transgress these rules then the trial judge has a responsibility independently of objections to prevent this type of questioning being employed. It is also the role of advocacy training to try to teach advocates how to follow the rules and become effective examiners and cross-examiners. It is one reason why many judges like to take part in such training. It helps improve the conduct of trials in our courts.

Development of performance skills

Traditionally there was little pre-admission training in our systems in the development of the practical skills of examining or cross-examining witnesses or of making persuasive arguments to judges or juries. Law students were taught what evidence was admissible but not how to present it or prove it effectively. Those skills were normally expected to be developed in practice by observation and imitation and sometimes by reading a limited number of books offering practical hints or tips on advocacy. In the last three to four decades, however, there has been a developing practice in the common law world of the provision of skills training in those areas to young lawyers during their degrees and by the lawyers' professional bodies before they begin the practice of litigation. Such training is also offered to more experienced lawyers to help them retain and develop their skills.

The techniques being developed have benefited considerably from international discussion and cooperation among the various common law jurisdictions and have extended to systems based on Roman or Roman-Dutch law, such as Scotland and South Africa, where there are groups of specialised advocates within the legal profession. Earlier this month I attended an international conference held in Prato in Italy of lawyers in several such jurisdictions who conduct similar training courses. I attended the first conference of that type about 10 years ago in London. There have been marked developments in the nature of the training offered, particularly in England, over that period.

In Australia one of the early providers of such training was the Australian Advocacy Institute (AAI). It was established in 1991, 20 years after the National Institute for

Trial Advocacy was established in the United States of America. That Institute, NITA, was established at least in part in response to remarks by Chief Justice Warren Burger of the United States Supreme Court. He was critical of the quality of advocacy displayed by American lawyers, particularly in comparison with English barristers who specialised as advocates.

With typical American energy, the lawyers who created NITA rapidly established useful techniques for teaching advocacy as a performance skill. With significant help from academic lawyers, they developed practical exercises with accompanying teaching materials to assist American lawyers to hone their skills as advocates. NITA's workshops in America are normally conducted in conjunction with law schools, with most teachers drawn from the practising profession. There are many law schools in America which provide courses on trial advocacy whose teachers are also active in helping develop materials for the workshops. Their problems are often of a high standard and highlight issues that can be made the focus of useful teaching techniques by the practitioners who run the workshops.

I have taught in Australia and at some NITA workshops and formed the view that the workshop method was very effective, especially for inexperienced advocates. It is used to assist those commencing in practice as well as the many lawyers in the United States who are not specialist advocates, particularly in civil trials. Their limited exposure to the courtroom encourages them to hone their practical skills in these mock hearings.

The driving force for advocacy training in Australia, before the AAI was established in 1991, was the recognised need to teach new barristers the skills they would need when they entered the courtroom. In Queensland, where I come from, the Bar Practice course commenced in 1983, not long after similar courses had been established in Victoria and New South Wales. I shall talk about the Bar Practice courses first and then provide some more detail about the AAI and other similar training for lawyers already in practice.

Bar Practice courses

The aim of the Bar Practice courses is to provide effective training for barristers about to commence in practice. We retain a system similar to the English of dividing functions between solicitors and barristers although the system of initial training and admission to practice is the same for both branches of the profession. Graduates in law are required to undergo practical training to qualify as legal practitioners and then choose whether to have a barrister's or solicitor's practising certificate. Completion of a Bar Practice course is a prerequisite for an admitted legal practitioner who wishes to take out a practising certificate as a barrister. In other words, such a practitioner will already have completed approved practical legal training but not the specialised training designed to assist practice as a barrister.

Such courses differ from State to State in Australia but will normally be conducted by the legal profession, sometimes in conjunction with a university. The teaching is conducted by members of the Bar, solicitors and the judiciary but the university staff play a significant role in assisting students in their learning and in co-ordinating the course. Students may be required to pass examinations in evidence, procedure and

professional ethics before they can commence a Bar Practice course. Those requirements reflect the need for barristers to have high ethical standards and a well-developed knowledge of the rules of evidence and procedure.

The teachers in each course should have undergone teacher training. It is important too that the teachers are aware of the objectives of the courses and of how to use their teaching techniques to achieve those ends. Because the teachers are volunteers, and often change identity from course to course, it is difficult to ensure consistency of teaching techniques, even accepting that there are many different ways of being a good barrister.

The general aims of the various courses are to facilitate adjustment by new barristers to life at the bar and to develop their understanding and performance of the basic skills required of barristers, for example, to develop an understanding of their role and responsibilities as barristers, to acquire basic skills in drawing pleadings, preparation of cases for hearing, settlement negotiation, the presentation of cases before various courts and tribunals and to enhance their understanding of aspects of the social environment which are relevant to their work as barristers.

Each of the courses assesses the progress of students and reserves to itself the right to fail them. There is a need, in my view, to develop better techniques to define the standards students are expected to reach throughout the courses and to measure their performances against those standards. That has become an issue in England and has

been addressed in reports prepared for their Bar Council.[4] They referred to the need for assessment in the public interest to ensure that there was no danger of barristers representing the public in court whilst not yet competent in advocacy. Assessment of these practical skills now occurs before barristers may commence to practise.

My observation of the materials used in some of the Australian courses is that most of them are not at a level of sophistication sufficient to challenge more experienced practitioners. Many of them are helpful for students or new practitioners but would benefit from review to see how best they may be used to meet the teaching objectives of the courses. Practitioners have difficulty in setting aside the necessary time to do that work. In the United States, much of that work is done by academic lawyers in consultation with practitioners. If it is to be done well it deserves to be paid well. That will be more likely to happen with a national approach to develop further useful practical problems designed to achieve particular teaching aims. That is beginning to happen through the nationally organised Australian Bar Association.

Teacher training is already offered by the AAI and is sometimes delivered by the individual Bar Associations to their own members. There is a developing role for the Australian Bar Association to co-ordinate and supervise the provision of teacher training on a national level. Each of the major courses in Australia, conducted in New South Wales, Victoria, Queensland and Western Australia, benefits from developments in other States, something which the Australian Bar Association attempts to monitor. The Australian Bar Association also offers an annual week-long live in advanced course.

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[4] See, in particular, the Advocacy Working Party, *Report on Assessment of Advocacy*, February 2004.

Once new barristers begin to practise it remains important to support them by providing access to further training in advocacy through the professional associations. The most realistic hope for such training is that fewer barristers will make obvious errors in the conduct of the cases entrusted to them. Those who would have been outstanding advocates in any event will represent their clients better than they might have without training and are probably more aware of why they do what they do. The professional associations have begun to offer such training as part of their continuing legal education programs. The AAI, which is an offshoot of our national representative legal body, has, historically been important in that role. The Australian Bar Association is now providing more of a focus for specialised training for barristers.

Australian Advocacy Institute and the workshop method of training developed by NITA

The AAI's programs are used more to assist lawyers who are not barristers. It focuses on teaching skills through a workshop method of performance and instruction "in a manner akin to coaching rather than by observing and acquiring information and experience." The coaching can, in some ways, be likened to training for a sport like tennis where the coach breaks the skill down into steps and then demonstrates and drills the student in their performance. The techniques are very similar to those employed by NITA.

Workshop method of teaching

The workshops are normally held over a weekend and include an introductory lecture on the approach to good advocacy and workshop sessions comprising analysis, preparation and performance by the student advocates with demonstrations by instructors. Reviews are conducted before each group, normally consisting of about eight students and two teachers with video reviews of individual performances one-on-one. The group reviews focus on the mastery of substantive skills in examination, cross-examination, the making of addresses and applications. They deal less with the presentation of legal argument than with the making of factual submissions and normally will include a workshop on the making of pleas in mitigation in criminal cases.

They include overview sessions focussing on such topics as methods of preparation, organisation of evidence, techniques of examining in chief and cross-examining as well as structure in the making of addresses and legal argument. There is a significant focus on the development of communication skills in general. The AAI also provides advanced workshops dealing with appellate advocacy, jury advocacy, the examination and cross-examination of expert witnesses and other more advanced trial techniques.

The workshops are usually conducted in court rooms. Normally more than 20 workshops take place each year in a number of cities throughout Australia. The AAI also conducts training for organisations such as the Offices of Directors of Public Prosecution, Government Solicitors' Offices, Legal Aid Offices and private firms of solicitors.

The workshop system consists of short individual performances by students in front of their peers. They are video taped. The performance might last for no more than four to five minutes. Normally each participant would perform at least three tasks in a weekend. Each would be reviewed. The students will also observe reviews of the other members of their group and see demonstrations by the teachers of different techniques to use in court. There is a particular technique of instruction used by the teachers who are normally experienced advocates trained in this method.

- *Headnote*

First there is a review of questions of substance arising from a student's courtroom performance. One of the two teachers conducting a class will enunciate a "headnote". This will identify "what needs help" by the selection and identification of a specific point to review. It may be as simple as pointing out that the student persistently asks leading questions in examination in chief, something contrary to our rules. The headnote provides a focus and flags to a student what the review is about. One issue per student is normally more than enough to raise. If a teacher tries to tell a student all of his or her faults, very little will sink in. Instead the student will end up confused and probably in despair. Different issues should, however, be raised with different students. That gives embarrassment the chance to change into schadenfreude.

- *Playback*

After identifying the headnote, the teacher will then "playback" what the student did, if possible in the student's own words, to pinpoint, illustrate and focus the point to be reviewed. The teacher should do that from a note of what the student said.

- *Rationale*

A "rationale" is then provided to establish why it is better to do what the student did differently: to make sure, for example, when dealing with the desirability of using open questions in examination in chief, that the witness tells his own story persuasively and without prompting. The teacher should relate the performance of the student to one such principle of advocacy, providing the reason to perform the task differently.

- *Prescription and repetition*

There follows a "prescription" (how to do it differently). The teacher illustrates, advises, demonstrates and models how to do the task differently next time. This requires the teacher to be a good advocate and role model for the student. It will often be useful to ask the student to perform part of the task again to reinforce the message that has been taught.

These reviews before the other students in the class focus on questions of substance and deal with the principles of persuasive advocacy as applied in our courts.

- *Individual Video Review of Style*

After that review there is a video review conducted individually. It focuses more upon issues such as communication skills and style and again requires the teacher to demonstrate how the student can behave differently. These reviews are done individually because most students are embarrassed about seeing themselves performing in public and benefit more from the teacher's feedback than if the review were done before the whole class. Students generally are more critical of themselves

on video than the instructors are. The videos are retained by the students for personal review later. In my experience it is remarkable to observe the improvement in students from the beginning of such a workshop to the end as recorded on the videos.

Students also learn during the group reviews from the substantive points made by teachers about the performances of other students. As I have said, the object of the teachers in a group review should be to focus on one or at the most two points per student and to deal with a number of possible issues during a session so that all the students learn from each other's performances.

Much more could be said about the teaching techniques used and about the workshops' focus on the development of good communication skills to enhance the analytical skills used in developing arguments. It can be seen, however, that the focus of these courses is the improvement of the standard of advocacy of lawyers already admitted. Its existence has encouraged better analysis of the techniques of persuasion used in Australia and greater awareness among practitioners of how best to prepare for performance in our courts.

Australian Bar Association

As I have said, the Australian Bar Association offers a live-in week long course each year focused on the development of skills at a higher level for barristers. It is partly modelled on a similar course offered annually by the Bar of England and Wales for its members at Oxford. Other shorter courses are conducted on weekends by individual State based bar associations again focusing on the development of skills by barristers at a higher level based on more difficult practical examples in particular jurisdictions

such as criminal trials or applications or appeals in civil matters. The course attempts to be realistic while delivered in a collegiate and supportive surrounding.

French influences on Australian substantive law

I wish now to leave my comments on advocacy training and to speak about two different examples of circumstances where French substantive law has influenced Australian law. The first is direct and exemplified by the introduction of the concept of the moral right into our law of copyright ("le droit des auteurs"). The second is indirect and focuses on how the civil law systems may influence us to imply into certain commercial contracts the idea that they should be performed in good faith – a basic requirement of French law through Art 1134 of the Civil Code.

Copyright – direct reception

Until 2000 Australian copyright law concerned itself simply with economic rights. In that year we introduced the idea of a moral right into our legislation. The origin of that right can be traced directly to French law now found in the *Code de la Propriété Intellectuelle*, Art L121-1 to Art L121-9 and developed in France, as I am sure you know, from Art 1382 of the Civil Code: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

One of the major rights it protects is the right to respect the work so that the owner of the copyright in a film may prevent it from being modified, for example, by being transformed from black and white into a coloured version. These French ideas were received into international intellectual property law through the Berne Convention and

from there into Australian domestic law in a form described by a French commentator as comprehensive, detailed and close to the European system but more pragmatic, as she said the common law often is, with a defence of fair use and the expressed desire to take account of differing interests.[5] Those are probably benefits that we have derived from considering the work of French lawyers and courts in this area.

I have yet to see any Australian court deal with this development in our statute law by reference to its French origins but the commentators now refer to French decisions and I expect that our courts will also in cases where there are appropriate parallels.

The "droit de suite" or resale royalty right found in Art L122-8 of the *Code de la Propriété Intellectuelle* has also been suggested as a right suitable to be introduced into Australian copyright law. So far that possibility has been rejected. The idea of introducing it was considered again recently because of a particular problem facing Australian indigenous artists. With the rapid rise in popularity of Australian aboriginal art in the last few decades, works sold initially at low prices would, not long afterwards, be resold for much higher prices with none of the profits going to the artists. A committee investigating this issue recommended the adoption of the "droit de suite" some years ago but nothing has come of that so far.[6] With the recent change in the political composition of the Australian government that position may well vary.[7]

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5 Élisabeth Logeais, "The Introduction of Moral Rights in Australia: A French Perspective" (2001) 47 Intellectual Property Forum 32, 41.

6 Department of Communications, Information Technology and the Arts, Myer Report on Contemporary Visual Arts (2002), recommendation 5, p 170.

7 See http://www.austlii.edu.au/au/journals/ILB/2006/21.html

By the way, if you wish to see some exciting examples of Australian indigenous art just take a trip to the Musée du Quai Branly. In the administration building in particular there are several fine works displayed.

Good faith in contracts – indirect influence

Let me then say something about the view that contracts should be performed in good faith. The traditional view of the common law limiting any contractual obligation to act *bona fide* was expressed in another Latin phrase, *caveat emptor*, "let the buyer beware", but even the Romans were not so sure that that was the correct approach.[8] Nor are the Americans, influenced by the discussion in *Pothier, Contrat de Vente*[9], and by the reception of an obligation of good faith into American commercial law through s.1-304 of their *Uniform Commercial Code*, under the influence of the partly German educated American realist Professor Karl Llewellyn. The use of the idea of good faith in the draft for the proposed European Civil Code, to a limited extent in the Vienna Convention on the International Sale of Goods as well as in the UNIDROIT principles of the law of international commercial contracts has allowed some to argue that an obligation to perform commercial contracts in good faith may eventually be imported into the common law through international commercial law or the application of equitable maxims to the common law.

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8 Cicero, *De Officiis*, Book III [50]-[53] translated by Walter Miller, Loeb Edition, Cambridge: Harvard University Press, 1913 reproduced at http://www.stoics.com/cicero_book.html and at http://www.thelatinlibrary.com/cicero/off3.shtml in Latin.

9 See the discussion in *Laidlaw & Co. v Organ* (1817) 15 US 178 at 193-194. Both the passage from Cicero and this decision are discussed in Dafydd Walters, *The Concept of Good Faith in Anglo-American Law* in B Glansdorff and ors, *La Bonne Foi*, Cahier No. 10, Centre de Recherches en Histoire du Droit et des Institutions, Facultés Universitaires Saint-Louis Bruxelles 1998 at pp. 131-141.

For example, a judge of a State appellate court in Australia said in 1992 that:[10] "there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States."[11] Especially in his home State, New South Wales, his views rapidly seemed to become almost the new orthodoxy. They were influential elsewhere also. Within seven years a judge of our Federal Court was able to say that: "recent cases make it clear that in appropriate contracts, perhaps even in all commercial contracts, such a term will ordinarily be implied; not as an ad hoc term (based on the presumed intention of the parties) but as a legal incident of the relationship."[12]

Our High Court, our highest appellate body, has shown no real enthusiasm to take up the debate. Five years ago it sidestepped the issue.[13] Two of the judges of that Court have expressed particular views that a general implied contractual term appeared to conflict with fundamental notions of *caveat emptor* inherent in common law conceptions of economic freedom and to be inconsistent with the law as it has developed in Australia in respect of the introduction of implied terms into written contracts which the parties have omitted to include.[14] The High Court has not revisited the debate since then. Such discussion as there was in that Court does not

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10 Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 263-264.

11 His Honour had written extrajudicially on the topic in greater detail; *Contract – the Burgeoning Maelstrom* (1988) 1 JCL 15.

12 *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR 41-703 at 43,014 [34], referred to in this context by TM Carlin, *The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia* (2002) 25 UNSW Law Journal 99, 100-101.

13 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 [40], [86]-[87] and [155].

14 Kirby J at [87] and see Gummow J when a member of the Federal Court in *Service Station Association v Berg Bennett & Associates Pty Limited* (1993) 45 FCR 84 at 91-98.

encourage the conclusion that it will soon imply such a general term in Australian contracts.

Our law does, however, imply such a term in a number of particular types of contracts, such as insurance contracts, pre-award contracts dealing with procurement from a Government authority[15], through rights arising under statute law and through the application of some equitable doctrines to the construction of contracts.[16] As a well-informed francophone commentator has said:[17]

> "L'apport du droit anglo-saxon à la réflexion qui nous est proposée est tout aussi instructif. Je le résumerais volontiers en une phrase. La méfiance des jurists anglo-saxons à l'égard de la notion générale de bonne foi n'a d'égale que l'imagination qu'ils ont mise à multiplier les concepts particuliers qui en tiennent lieu tout en aboutissant aux mêmes resultats. Aujourd'hui, les besoins nés des échanges internationaux à dimension de la planète amènent les jurists de la tradition continentale et ceux de la *common law* à confronter leurs habitudes les plus enracinées pour en tirer les nécessaires conciliations exigées par la pratique. A lire la dernière contribution de notre volume, on s'apercoit que le travail est d'ores et déjà entrepris et il y a tout lieu de penser que la voie est ainsi ouverte à des contacts fructueux qui, un jour sans doute, autoriseront une nouvelle synthèse."

Or, to précis that in English: "The mistrust of Anglo-Saxon jurists for the general concept of good faith is equalled only by the imagination which they put towards multiplying particular concepts which lead to the same results." Thus do ideas infiltrate from one system to another.

Conclusion

I am sure that there are many other areas where we could benefit from discussing with each other how our systems work.

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15 *Hughes Aircraft International v Air Services Australia* (1997) 76 FCR 151 at 191-194.

16 *O'Neill v Phillips* [1999] 1 WLR 1092, 1100-1101, per Lord Hoffmann, originally trained in South Africa under the Roman Dutch system. See also Bingham LJ in *Interfoto Picture Library v Stiletto Visual Programme* [1989] QB 433, 439.

17 Prof. Jacques-Henri Michel in *La Bonne Foi*. at (x):

In Queensland we have recently modified our rules about expert witnesses to make them more like the European models, such as under Art 264 of the *Nouveau Code de Procédure Civile*. We now encourage the parties to use one witness, often a court appointed witness, rather than to engage their own witnesses, whose views are normally likely to support the positions taken by the parties. Expert witnesses are supposed to be impartial between the parties but there is a view in our system that some experts have become "guns for hire". Where the system is otherwise adversarial, however, and where there are often genuine differences of opinion among experts, I remain sceptical of the efficacy of this attempt to graft this feature of the "inquisitorial" or official inquiry system onto ours. I would love to discover how your system deals with the cases where there are genuine differences of opinion among experts. Does the court readily then appoint more than one expert or rely on the parties to call other expert witnesses themselves? What role do the judges have in resolving such differences of opinion?

Another area that interests me is the role of juries in the Cours d'Assises in helping determine the penalty to be imposed on a guilty defendant. In our system juries have no role at that stage of a trial – it is something done by the judge alone. That is not the case in some American states and, recently, the Chief Justice of our largest State, New South Wales, has proposed the idea that there could be a role for juries at that stage of our process also. One objection to the proposal in Australia is that such sentences would be potentially inconsistent with sentences imposed by judges alone, as, in the vast majority of cases, defendants plead guilty before a judge without a jury and do not require a trial. Again, I would like to discuss that issue with you.

As I said at the start, my impression is that many of the procedural differences in our systems are more entrenched culturally than the differences in substantive law and may be more difficult to harmonize. The development of the ICC, the international criminal tribunals and international arbitration in commercial disputes is already leading to significant change in these areas and to the need for more contact and exchange of ideas between judges and lawyers with practical experience of our differing systems.

Thank you for the invitation to speak and I hope that there can be many more fruitful discussions between our colleagues from Australia and you.