`Convocation and the University as a Community of Scholars

Convocation Ordinary Meeting

The Hon Robert French AC

17 March 2017, Perth

I want to say something about history and change in relation to the governance of this University and in doing so to draw upon apposite observations in relation to the law and legal institutions. There is a tension between historical concepts of the university as a community of scholars and its capacity to respond effectively to the practical economic pressures bearing upon it today. In that context, I also want to say something about the history and functions of Convocation.

My contribution to these topics as a judge has been somewhat ambivalent. In 2001, I was part of a Full Court of the Federal Court of Australia which heard the case of *Quickenden v O'Connor*.[1] Dr Terry Quickenden, who died in July 2005, was a long-serving lecturer and researcher in medical chemistry at this University. He was also an elected academic staff member on the University Senate. He was fondly remembered by generations of medical students under the sobriquet of 'Quickie'. The Western Australian Medical Students Society honoured his memory with the Terry Ivan Quickenden Award for WAMSS Person of the Year. And in 2014, the University of Western Australia Academic Staff Association made him the posthumous recipient of one of its centenary awards. He was also a keen litigant. In 1988, he initiated proceedings against the Federated Australian University Staff Association, which had something to do with the application of Dawkins Reforms. More significantly, in the late 1990s he initiated proceedings in the High Court, which were remitted to the Federal Court, in which he argued that he should not be bound by a certified agreement made under the *Workplace Relations Act 1996* (Cth) between the University and the National Tertiary Education Union. The *Workplace Relations Act* made certified agreements binding on staff who were members of the Union and also on those who were not members. Dr Quickenden

1 (2001) 109 FCR 243.

argued that the Act, and therefore the certified agreement, only applied to trading or financial corporations within the meaning of s 51(xx) of the Constitution and that the University was not such a thing. The University argued, however, that it was a trading or financial corporation. Its argument was accepted at first instance by Justice Malcolm Lee and upheld on appeal by a Full Federal Court of three judges of which I was one. Justice Lee, who is a graduate of the Law School of the University, had remarked rather dryly in his judgment that:

> When the elements of constitutional law were taught in the Faculty of Law of the University 40 years ago, it would not have occurred to the Dean of the Faculty, who delivered those lectures, that the institution assisting students to seek wisdom was a trading corporation, much less that the University would assert that it was.[2]

The *Quickenden* decision reflected the constitutional character of the University sixteen years ago. There is no reason to suppose that that has changed. Its characterisation as both trading and financial corporation reflects an aspect of the tension between the pressure on the University to derive commercial benefits from its activities and its historical concept of a university. What some might describe as part of the fossil record of that character could be found in Acts of Parliament establishing a number of Australian universities. Those Acts typically say that a university consists of the Senate (or Council as the case may be), the Convocation or Alumnus body, the academic staff, graduates and undergraduate students. That formula has its ancestry in a Statute of 1571 relating to Oxford University. The staff, students and Alumni are not simply employees, customers and former customers of a corporation providing educational services for a fee. They are the university. That equation, evokes the idea, however imperfectly realised in historical practice, of a community of scholars extending to its own Alumni.

The point came up more acutely in 2008, when I held in *University of Western Australia v Gray*[3] that, absent an express agreement, the University did not automatically acquire intellectual property in inventions developed by members of its academic staff. UWA appealed the decision to a Full Court of the Federal Court. The Full Court consisted of Justices Kevin Lindgren, Paul Finn and Annabelle Bennett. Justice Lindgren in a former life had been a law academic at the Newcastle University. Justice Finn, before his appointment,

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2 (1991) 91 FCR 597, 605 [40].

3 *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603.

was a Professor of Law at the Australian National University. Justice Bennett, who had a PhD in bio-chemistry was, for a time, a Pro-Chancellor of the Australian National University and now serves as the Chancellor of Bond University. Their judgment, dismissing the appeal, encapsulated the tensions between the historical roots of universities and the economic pressures to which they are subject today. They said of the University:

> We accept that [the University] has not been immune from the forces, financial and otherwise, that are forcing changes in the character of the university sector in Australia ... [the University] has engaged in commercial activities, as have done 'most, if not all, universities' ... What is notable for present purposes is that there is nothing in the evidence to suggest that those commercial activities have displaced, either totally or if in part to what extent, [the University's] traditional public function as an institution of higher education in favour of the pursuit of commercial purposes (if it lawfully could do so under its Act). Its function, in other words, was not limited to that of engaging academic staff for its own commercial purposes. Accordingly, we agree ... that on the evidence Dr Gray was not required to advance a commercial purpose of [the University] when selecting the research he would undertake.[4]

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

> To define the relationship of an academic staff member with a university simply in terms of a contract of employment is to ignore a distinctive dimension of that relationship.[5]

Special leave to appeal against the decision of the Full Court was refused by the High Court.

Critics of the decision said it embodied an ‘anachronistic’ or ‘19th century’ view of universities. It would be my hope however, that those who govern, manage, teach and research at universities, as well as those who study there, should not go quietly into the dark night of managerial commodification of education abandoning

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4 *University of Western Australia v Gray* (2009) 179 FCR 346, 388 [184].
5 Ibid 388 [185].

altogether the aspirational ideal of a community of scholars just because somebody formulated that ideal in the 19th century or even a lot earlier.

In thinking about the tension between history and contemporary realities as they affect university governance, it may be helpful to reflect for a moment upon an analogy taken from the law and legal institutions — not least because while it is not exactly what anyone would call a 'comfort zone' it is a field to which I have had long exposure. The institutions and doctrines of the law, like universities and the principles informing their governance, have emerged from a long, untidy, organic evolution. The famous American jurist, Oliver Wendell Holmes Jnr said about the common law in an often quoted passage:

> The life of the law has not been logic: it has been experience … The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[6]

He was referring to the judge-made law developed incrementally through decisions made over centuries in England, the common law of England and subsequently that of the American colonies and the States which they became. The common law of England travelled to Australia and brought with it the core institutional concept of public courts as the authorised interpreters of the law which they administer.[7] So it underpins our developed understanding of the nature of the judicial process namely what our courts do and their evolved historical relationship with parliaments and executive governments. That history of course was joined with another in our adoption of a written national Constitution based, in its federal character and strict separation of judicial from legislative and executive powers, on the Constitution of the United States with a grafting of the British tradition of responsible government.

Those historical roots affect the ways in which we interpret and understand our Commonwealth and State Constitutions and the laws made under them. As former High Court Justice Michael McHugh said in a frequently quoted passage in a judgment delivered in 1994:

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6 Oliver Wendell Holmes Jnr, *The Common Law* (1881) 1.

7 Sir Frederick Pollock, *The Expansion of the Common Law* (Sevens & Sons Ltd, 1904) 51.

> The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.[8]

That general point is relevantly illustrated by reference to the *University of Western Australia Act 1911* (WA). Its first operative provision is s 3 which provided, and still provides:

> There shall be from henceforth for ever in the State of Western Australia a University to be called 'The University of Western Australia' with such faculties as the Statutes of the University may from time to time prescribe.

That section established the University of Western Australia. Importantly, it established it as ***a*** 'university'. That is a generic word which carries with it a good deal of history. History was plainly in the minds of the founders of the University of Western Australia. The opening passages of the Report of the Royal Commission which led to its establishment quoted a number of notable sources on the purposes and benefits of universities. They were said to show 'how great a part a modern University plays in the development of the Community …'.[9] *The Spectator* magazine was quoted for the proposition that '[t]he ground of truth and reason on which all law must rest is not only the business but the one supreme business of a University.' The Commissioners opined that the time had come for Western Australia to have 'that higher teaching in Literature, Science, and Art that a University alone can supply.'[10] It is not necessary to be a crude originalist to understand that historical ideas of the nature and purposes of a university still infuse the word itself and therefore the *University of Western Australia Act* in which it appears.

The model of governance identified for the University in 1911 followed a model adopted in the Eastern States. It involved a 'double-chambered constitution'. Under the draft Bill proposed by the Royal Commission the primary Chamber, the Senate, was to be the repository of the executive power and to have the right of initiating university legislation. The secondary Chamber, designated Convocation, was to form an electoral constituency for

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8 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 196.

9 Western Australia, Royal Commission on the Establishment of a University *Report* (1910) 11.

10 Ibid 12.

two thirds of the members of the Senate and at the same time be a Chamber of review for proposed legislation. One third of the Senate was to be appointed by the State.[11]

The term 'Convocation' as its Latin roots suggest, describes a calling together or assembly of people. In the medieval Oxford University, its precursor was the Major Congregation of Regent and Non-Regent Masters which became referred to as the 'Convocation' from the 16th century on. It was the legislative body, the parliament of the university, while the lesser Congregation of Regents became the chief administrative body. The role of the Convocation was set out in the Laudian Statutes of 1636. They included the enactment and modification of laws and university statutes. Convocation was the supreme governing body of the Oxford University until the enactment of the *Oxford University Act 1854* following a Royal Commission in 1850. Thereafter, the Convocation could not originate propositions. They had to come to it from Congregation. Nevertheless, Convocation retained a general control over the governance of the university and could adopt or reject proposed university statutes.

Convocation's powers diminished over the 19th century and were further reduced in the 20th century. From 1926 it retained the power to elect the Chancellor, the Professor of Poetry, the Public Orator and the Keeping of the Archives, and to confer honorary degrees. It could still accept or reject legislative proposals from Congregation but only subject to certain conditions and limitations. After the Franks Commission in 1966, the Convocation at Oxford lost all control over the statutes of the University although it could still elect the Chancellor and the Professor of Poetry.[12]

The *University of Western Australia Act* as enacted provided in s 4 that the University should consist of a Senate, Convocation, graduate and undergraduate Members. The governing authority of the University consisted of the Senate ***and*** the Convocation. Convocation was made up of members of the Senate past and present, all Masters and Doctoral graduates and all other graduates with three years standing. There were other categories of persons including representatives of societies or associations of 50 or more which had made an annual contribution to the University of ten pounds or more for two years prior to appointment of their representative.

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11 Ibid 14–15.

12 *History of Convocation and Congregation*, (Oxford University Archives, 2016).

The power to enact University statutes reposed in the Senate. Convocation had no power to originate them but could suggest amendments to proposed statutes. In the case of a deadlock, s 32 of the Act required a conference between the Senate and the Warden, and if agreement could not be reached, allowed the Senate to pass the disputed statute by a two-thirds majority. In 1929, the composition of Convocation was expanded to encompass all graduates of the University who had attained the age of 21 years.

In March 1941, Justice Albert Wolff of the Supreme Court of Western Australia was issued with a Royal Commission to inquire into the administration of the University. He recommended that the Senate be reconstituted with six members appointed by the Government, three elected by Convocation, one elected by the University Colleges, three co-opted, the Director of Education, the Chairman of the Professorial Board and the Vice Chancellor ex-officio.[13]

Justice Wolff noted that the constitutional structures of the Australian universities had been patterned to some extent on those of the Scottish system of university government. He considered, however, that what he called the 'outlook' of the Australian universities more closely resembled that of the modern English provincial universities and that it was useful to consider some details of their Constitutions. One feature of those universities was that Convocation had a purely advisory function.[14] There were submissions before Justice Wolff that Convocation should be abolished. There were other submissions that it should have no role in relation to statutes. Convocation itself submitted that its powers should be expanded to include initiation.

Wolff found a number of criticisms of Convocation to be 'only too true'. They included difficulty in getting its statutory quorum of 25 and the unnecessary expense involved in the printing and distribution of proposed statutes before its meetings.[15] He saw no useful purpose in retaining Convocation's powers in relation to proposed statutes. Wolff said:

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13 Western Australia, Royal Commission into the Administration of the University of Western Australia, *Report of the Royal Commissioner, the Hon Mr Justice Wolff* (1942) 13.

14 Ibid 11.

15 Ibid 17.

> It is not much use allowing the graduate body a voice in the government of the institution if a minority, and a very small minority at that, is sufficiently interested to elect representatives to the Senate and to consider proposed statutes.[16]

He pointed to an instance in which the Warden of Convocation had taken objection to submissions put to the Royal Commission that Convocation supplied nothing useful in the life of the University and that it was dominated for the most part by a noisy element and had difficulty in getting together a quorum. The Warden had issued a notice for a general meeting referring to a threat to the very existence of Convocation and the need for it to prove that the allegations against it were wrong. The notice concluded 'I therefore urge you to show, by attending the next meeting that you do not agree with the adverse opinions expressed.'[17] Justice Wolff himself had received a copy of the notice. He also read a copy of the minutes of the meeting. It turned out that only 28 members attended, including seven members of the staff, one of whom was the Warden. At that time the number of members of Convocation who could have attended the meeting was 745. Wolff said:

> If ever there was a practical illustration of the supine condition of a body this is one. In a matter of life and death, as it was put, only 21 members apart from staff show enough interest to come along to the meeting.[18]

That being said, he observed in a more constructive vein:

> in spite of the shortcomings which Convocation has displayed in the past, there should be a large body of constructive thought amongst graduates of the University which, if properly held together, could benefit the University in many ways. In America, associations of alumni do much towards the support of their universities in thought and in deed. I consider it would be a drastic step to wipe out Convocation in its entirety. There is something in what Dr Somerville says, that Convocation is an anachronism, but the anachronism could be 'brought up to date.' It is a pity not to give an opportunity for thought to well up from the bottom.[19]

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16 Ibid 18.
17 Ibid.
18 Ibid.
19 Ibid.

An interesting phenomenon immediately post-war was that there was a generation of students who came back to the University doing second degrees. Their standing as graduates enabled them to become members of Convocation and, through Convocation, to stand for election to the University Senate. The phenomenon is discussed by Professor Fred Alexander in his history *Campus at Crawley*. When I read that piece of history in the late 1960s, Convocation had an image problem among students interested in university governance. It was regarded as antediluvian. It is fair to say there were people involved in it who had been there for a very long time, although it is also fair to say they gave a long and thankless service to the University through their participation in the Standing and Statutes Committee of Convocation. As a student completing a second degree, I joined Convocation and that Committee. I wrote a piece for the student newspaper, *Pelican*, to remind student politicians of the Guild of Undergraduates about the forgotten history of their close connection with Convocation. To make the piece a little more persuasive and not appear to be a mere apologist for the institution, I opened with a disarming quotation from a 19th century poem about Italy written by Felicia Hemans:

> The home of the arts! Where glory's faded smile
> Sheds lingering light o'er many a mouldering pile.

My objective was to engage student readers in a serious reflection upon the possibilities of strong relations between the students and the statutory Alumni body of the University. Despite my poetic honey trap, I think the article was largely unread except by some members of Convocation who were probably offended by it.

Today s 4 of the *University of Western Australia Act* provides simply '[t]he University consists of a Senate, Convocation, staff and students'. Now, however, the Senate alone is the governing authority of the University as s 5 provides. With amendments that came into force in January of this year, the Senate is now to consist of 12 persons appointed or elected, two of whom are members elected by Convocation. There is also provision for the co-option of up to five persons as members.[20]

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[20] *Universities Legislation Amendment Act 2016* (WA), s 135.

The composition of Convocation has been simplified, comprising members and past members of the Senate, graduates of the University and persons whom the Senate may admit to be members of the Convocation. The functions of the Convocation are those in statutes made by the Senate.

Convocation retains a role in the review of statutes. It can propose amendments.[21] If the Senate refuses to consider an amendment proposed by Convocation the Senate must call for a conference with the Warden with a view to reaching an agreement. The Senate, however, has the final say and may make a statute without any special majority. However, it must report the matter in the next Annual Report.[22]

Convocation, which was initially a component of the 'governing authority of the University' enjoys much reduced substantive powers. In a way that history rather echoes the history of the Convocation of the Oxford University to which I referred earlier. Nevertheless, the *University of Western Australia Act* and the governance institutions it creates continue, like so many of our laws and institutions, to be the vessel of important history which cannot be discarded as simply irrelevant today. That history is to be found embedded in s 3 which speaks of the University as 'a University' and in s 4, which declares that the University consists of the Senate, Convocation staff and students. In that latter description there is the essential element of a community of scholars past and present — a community which extends into the wider society in which the University is embedded. It is a concept which embraces all those who have graduated from the University as well as those who teach, research and study there today. The representative role of Convocation on the Senate, although it has been reduced, and its continuing review function in relation to University statutes, maintain the status of the Alumni as a continuing part of the University. It is, of course, up to the Alumni to ensure that through activities relevant to the University's mission and through its own ongoing renewal, Convocation does not fall into the category of a vestigial organ which can be removed without great harm to the body of which it is a part. One important role of Convocation in this respect is public advocacy for the importance of the University, to the West Australian and Australian communities and explanation of the ways in which it is important.

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21 *University of Western Australia Act 1911*(WA), s 31(3)

22 *University of Western Australia Act 1911* (WA), s 31(4B).

It must be accepted that exposition of the idea of a university in Australia is not uncontested. An exchange that illustrated the point took place through the pages of *Meanjin* a couple of years ago between the Australian philosopher, Raymond Gaita and the Vice-Chancellor of Melbourne University, Professor Glyn Davis. Gaita argued for the need to preserve what he called 'the unworldly space in which university teachers are able to reveal to their students what it means, most deeply, to devote one's life to an academic vocation.' So they would reveal to their students, he argued, a value in their education which would nourish them more deeply than the kind of liberal education that many people praise. He acknowledged that vocational and professional courses had always been important to universities. He complained, however, that:

> Never before, however, have they determined the idiom, set so much of the tone, transformed the language and set the goals of the institution to whose essential identity, if not their attractions and prestige, they had previously been marginal.[23]

In response Davis argued that the unworldly university has always been rare. He observed that professional training dominated Australian universities from their earliest expression. While students enrolled in the liberal arts and academics engaged in public debate had always been important on campus, the dominant tradition had been pragmatic and vocational. He contested what he called the 'commonly encountered narrative of decline and loss in universities.' He argued that there has been significant continuity and that foundation ideas have shaped that pattern. The continuity, however, has been affected by market forces which have turned students into customers and universities into enterprises. Because reliance on public funding to sustain them is no longer feasible, universities have had to make market decisions introducing 'a new logic into the choice of disciplines, selection criteria for entry, even the economics of commuter versus residential students'. Universities differ in their strategic approaches, some preferring large offshore operations, others operating an onshore strategy working with feeder schools, international agencies and foundations. Markets have therefore ended the incentives to uniformity. One may agree or disagree with Professor Davis in whole or in part. So far as I am aware, and it has not been suggested by any protagonist, the idea of a community of scholars should be discarded.

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[23] Glyn Davis, 'The Australian Idea of a University' (2013) 72(3) *Meanjin* 32.

That idea however tenuous it may seem in today's world, it still serves the long term interests of the University. It says to those who work and study here as well as those who have done so that they have not only been engaged in gaining qualifications or making a living as teachers and researchers. They have been, and continue to be part of a higher human endeavour, that of the generational transmission of human knowledge and the expansion of its boundaries.

That endeavour has deep historical roots. They should be nourished. The political, economic and regulatory environment may require that the University be a trading and a financial corporation. Fidelity to its historical origins and purposes means it should always be able to say that it is considerably more than that.