

A National Legal Profession, Quantum Computing, Standard Gauge Railways and Dingo Fences

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My thanks to the Legal Services Council for this opportunity to address the 2026 Uniform Law Conference. My remarks are designated in the program as a ‘Keynote Address’.

The term, ‘keynote’, is often attached to opening speeches at conferences. It is almost as popular as the term ‘networking opportunity’, which now denotes what we used to call ‘morning tea’, ‘afternoon tea’ and ‘lunch’.

A famous keynote speech was given by the late, great, American physicist, Richard Feynman, at the California Institute of Technology in 1982. He refused to be bound by the implied constraint that it should set the scene for what was to follow. He began by saying:

On the program it says this is a keynote speech—and I don’t know what a keynote speech is. I do not intend in any way to suggest what should be in this meeting as a keynote of the subjects or anything like that. I have my own things to say and to talk about and there’s no implication that anybody needs to talk about the same thing or anything like it.¹

He went on to give what became a most celebrated address on the ways in which computers might be used to simulate physics. He suggested that classical computers could not simulate physical reality. A new technology was required which he called quantum computers capable of simulating quantum systems. His speech is widely considered to have initiated the field of quantum computing.

Despite the temptation to follow Feynman’s contrarian example, there is no prospect that my speech on anything I felt like would have any impact. So I’ll try to relate what I have to say to what you have to say and talk about.

Let me begin with a few keynote statistics.

¹ Richard P Feynman, ‘Simulating Physics with Computers’, (1982) 21(6/7) *International Journal of Theoretical Physics* 467.

The population of Australia is approaching 28 million. It has roughly 97,500 solicitors and 6,000 barristers servicing that population — 103,500 in all. The State of New York, one regulatory jurisdiction, has a population of about 20 million people, including 180,000 active attorneys over an area of 141,000 km². There is thus one lawyer for every 106 persons and 0.7 km² Australia has one lawyer for every 270 persons and 74 km². So we have a population a little bigger than that of New York with a much lower lawyer density and, until relatively recently, eight State and Territory regulatory jurisdictions. Those figures alone are indicative of the faintly ridiculous notion of maintaining separate and diverse systems for admission to legal practice and the regulation of legal practitioners.

Legal practitioners today carry on their work in a landscape thick with laws — Commonwealth, State and Territory laws, and innumerable regulations, bylaws and rules. The sources of those laws, regulations, bylaws and rules are Commonwealth, State and Territory Parliaments, Commonwealth, State and Territory Ministers and Public Authorities and Local Governments spread across the land. Many of our domestic laws have national, cross-border or even international pedigrees.

Technology and particularly generative AI is bringing unprecedented change to society and to the profession at large. There is even the spectre of legal services being provided online by offshore AI providers. A State by State response to such developments is not going to meet the challenge they present to the maintenance of high standards of competence and integrity in the delivery of legal services within Australia.

The plethora of laws and regulatory authorities administering them require ongoing rationalisation to reduce unnecessary compliance costs and to optimise economic efficiency in business and in the provision of professional services which operate across Federal, State and Territory jurisdictions and to meet emerging challenges to the standards and integrity of professional services to which Australians have access. In this context, what we call cooperative federalism is not just a virtue, it is a necessity. The Uniform Law Scheme is a work in progress of regulatory rationalisation through co-operative federalism. Its progress seems to have been delayed for reasons which remain elusive, but no doubt have something to do with local legal cultures and attitudes to what might be seen as centralisation of regulatory power. The reality of the Uniform Law Scheme appears to accommodate local diversity and, in particular, the traditional roles of the Supreme Courts of the States and Territories and their local regulators in relation to those who practice in their jurisdictions.

Co-operative federalism is the constitutional context in which the Uniform Law Scheme sits. Co-operative federalism was once described in the High Court as “a political slogan” and “not a constitutional term”.² That was an observation made by Justice McHugh in a case in which the Court held that State Parliaments could not validly confer jurisdiction under State laws on Federal Courts, even when there was an intergovernmental agreement between the States and the Commonwealth to provide for such a conferral.

In my respectful opinion, however, co-operative federalism, despite Justice McHugh’s observation, refers to an attribute of a federation by which its governments routinely engage in co-operative action with a view to achieving common objectives. Such co-operation can be legislative, administrative, judicial or a mixture. It can be vertical involving central and regional governments or horizontal involving regional governments only. It can use joint decision-making mechanisms or a single decision-maker operating under a consultative regime. It can underpin national regulatory arrangements, including regulatory arrangements relating to the professions.

The High Court has long acknowledged that the *Australian Constitution* leaves space for extensive intergovernmental co-operation.³ As Justice Starke said in 1939 in *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd*:

Co-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve that is often the end and the advantage of co-operation.⁴

The States between themselves may enter into cooperative arrangements on topics within their general legislative power. A standard gauge railway is an example of cooperative federalism between the States. The Uniform Law Scheme is another.

It takes us a while to get round to national co-operative arrangements. Our national rail system began in 1917 with the Trans Australia Railway connecting Kalgoorlie to Port Augusta. It was not until 1995 that the mainland capital cities were fully connected.

The history of corporations regulation in Australia provides a case study for a succession of different co-operative arrangements put in place with a view to achieving national

² *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, [54].

³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82–83

⁴ *Deputy Federal Commissioner of Taxation NSW v WR Moran Pty Ltd* (1939) 61 CLR 735, 774.

regulatory consistency. There was a *Uniform Companies Act Scheme* in 1961 under which each State Parliament passed a *Companies Act* which mirrored the terms of the *Companies Act* of every other State. It was succeeded by a scheme in which each of the States enacted a *Companies Code* reflecting the provisions of the *Companies Act 1981* of the ACT — a law of the Commonwealth. The Commonwealth tried to go it alone in 1989 with the *Corporations Act 1989* which was held to be invalid in its application to the incorporation of companies.⁵ Its successor was another Commonwealth Act — the *Corporations Act 1989* (Cth) and the *Australian Securities Commission Act 1989* (Cth). The States passed their own statutes applying the provisions of those Acts. The most recent co-operative solution adopted was the referral by the States to the Commonwealth of legislative power to make laws in terms of the text of a proposed *Corporations Act 2001* and an *Australian Securities and Investments Commission Act 2001*.

The Uniform Law Scheme is a good deal simpler in its history and in its implementation. Nevertheless, it is still incomplete, as was the vision of a national rail system until 1995. Unlike the regulation of corporations where there seems to have been a commitment to a co-operative uniform approach since at least 1961, a general national commitment to a uniform law for the profession is yet to be achieved. That is not for want of recognition by leaders in the profession of the desirability of a national scheme. A few historical remarks about the Australian legal profession make the point.

For much of its history, the legal profession in Australia was regulated according to the description given in the High Court in *APLA Limited v Legal Services Commission (NSW)*:

Legal practitioners are admitted to practise by the Supreme Court of a State or Territory. Each State or Territory has its own regulatory regime, commonly involving a principal statute and rules made pursuant to that statute... Generally speaking, the right to practise, and the right of audience in a State or Territory court, depends upon admission by a State or Territory Supreme Court and the holding of a current practising certificate ... In each State or Territory, the inherent power of the Supreme Court to discipline legal practitioners is preserved.⁶

An early move towards a vision of the Australian legal profession as a national profession was the establishment of the Law Council of Australia (LCA) at the first conference of the Legal Societies of Australia held in April 1933 and convened by the Law Society of South Australia. Sir John Latham, then the Commonwealth Attorney General, acted as

⁵ *New South Wales v Commonwealth* (1990) 169 CLR 482

⁶ *APLA Limited v Legal Services Commission (NSW)* (2005) 224 CLR 322, [2].

President of the conference which adopted a draft constitution for a Law Council. He espoused a national vision of the proposed Law Council:

It is not the formation of a legal trades union. I can see that you have assembled from all the States of Australia not for the purposes of your own personal interests but to consider how the legal profession may make contribution to the welfare of the community and therefore towards the profession itself.⁷

In the ‘Current Topics’ section of the *Australian Law Journal* of 15 May 1933, some of the purposes behind the project were set out. The editorial writer said:

In addition to the general advantages of co-operation, there are many specific spheres such as law reform, statute law uniformity, the study of comparative legislation, legal education, reciprocal provision, for the admission of practitioners, the consideration of Federal legislation in the manner in which some of the State bodies now consider State legislation, and the like, in which such co-operation will be of benefit both to the public and the profession.⁸

From the beginning, the LCA campaigned for common standards for the legal profession across the country. The foundation President, Herbert Mayo QC, said in a speech to the Australian Legal Convention in 1939:

There can be no racial reason, nor, so far as I’m aware, any climatic necessity, why the grade for qualifying, or the rules for admission, should vary throughout Australia.⁹

The 1967 President, Dr Howard Zelling, later a judge of the Supreme Court of South Australia, spoke about the diverse admission requirements across the country and said in a speech to the Australian Legal Convention that “State boundaries are meaningless relics of the colonial past.”

Peter Brinsden, LCA President in 1973 and later a judge of the Supreme Court of Western Australia, said in the *Australian Law News*:

As criticisms of our profession are spilling over State boundaries, we should be thinking on Federal lines on such matters as admission and the right of practice.¹⁰

Restrictions on interstate practice were progressively removed in the last quarter of the twentieth century. An important development was the decision of the High Court in *Street v*

⁷ (1933) 7 *Australian Law Journal* 1, 17–18.

⁸ Ibid 1, 2

⁹ Gordon Hughes, *The Law Council of Australia: The People, The Profession and the Institutions* (2013, Halstead Press) 181.

¹⁰ Ibid.

Queensland Bar Association.¹¹ This judgment was delivered in 1989. Rules relating to the admission of barristers of the Supreme Court of Queensland had required that a person who applied for admission based on admission to practice in another State, become a resident of Queensland, and cease to practice in the other State. In an amended form, they required such a person to have an intention of practicing principally in Queensland.

These restrictive rules in relation to interstate practitioners were known colloquially in Queensland as ‘the dingo fence’. The dingoes presumably referred to legal practitioners not resident in Queensland and perhaps largely those practising in Sydney. The rules were struck down by the High Court as inconsistent with s 117 of the *Constitution*, which provides that a subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Mason CJ observed about s 117:

The very object of federation was to bring into existence one nation and one people. This section is one of the comparatively few provisions in the Constitution which was designed to enhance national unity and a real sense of national identity by eliminating disability or discrimination on account of residence in another State. In this respect the section should be seen as a counterpart to other provisions in the Constitution which prohibit discrimination between the States in matters of taxation, trade and finance (ss. 51(ii), 92 and 99).¹²

Mason CJ went on to observe that the United States model reflected in Art 4 s 2 of the US Constitution had an influential impact on the framers of the *Constitution* to the extent of illustrating the need for a provision which by guaranteeing to out of State residents an individual right to non-discriminatory treatment would bring into existence a national unity and a national sense of identity transcending colonial and State loyalties.¹³

The idea of a single national profession has developed and strengthened over the years in conjunction with a broader evolution of the legal system in Australia. The growth of Commonwealth power attributable to political trends and judicial decisions dating back to the *Engineers’ Case*¹⁴ have been important drivers. A factor underpinning the idea of a national

¹¹ (1989) 168 CLR 461.

¹² Ibid 485.

¹³ Ibid.

¹⁴ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

profession has been judicial recognition of the essential unity of the Australian legal system. The High Court in *Lange v Australian Broadcasting Corporation*, observed that:

The *Constitution*, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form ‘one system of jurisprudence’.¹⁵

The judge-made or common law is the same throughout Australia. As Justice McHugh said in *Kable v Director of Public Prosecutions (NSW)*,¹⁶ in a passage later approved in the joint judgment in *Lipohar v R*:¹⁷

Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State.¹⁸

Central to the evolution of this national legal system is the idea of a unified national judiciary incorporating Federal, State and Territory judges. That concept has progressed through successive annual conferences of Federal and Supreme Court Judges over the years and similar gatherings of District Court Judges and Magistrates.

In 1992, at the Supreme and Federal Court Judges Conference, Justice Richard McGarvie of the Supreme Court of Victoria and Justice Ian Sheppard of the Federal Court raised the possibility of a body to represent the common interests and concerns of judges. The proposal was for the establishment of an Australian Judicial Conference with a mandate to be “constantly vigilant and committed to assuring the preservation of a strong and independent judiciary” and that it be open to all judges and magistrates. The Judicial Conference was created and was incorporated on 16 December 1993 under the initial chairmanship of Justice Ian Sheppard. Its title was ‘The Judicial Conference of Australia’. That became ‘The Australian Judicial Officers Association’ in March 2021.

The perception of the Australian judiciary as a national judiciary has also been supported by the creation of the Council of Chief Justices, which brings together the Chief Justices of the various States and Territories and of the Federal and Family Courts of Australia under the chairmanship of the Chief Justice of Australia. They have developed common approaches on a number of important topics, including communications and relationships

¹⁵ (1997) 189 CLR 520, 564.

¹⁶ (1996) 189 CLR 51.

¹⁷ (1999) 200 CLR 485, 505 (Gaudron, Gummow and Hayne JJ).

¹⁸ (1996) 189 CLR 51, 112.

between the judicial branch of government and legislative and executive branches, legal education, judicial education and judicial ethics.

If I may be permitted to repeat what I said on the occasion of the 30th Anniversary of the Australian Judicial Officers Association in 2023:

Our colonial heritage and federal system has given us six States and two Territory judicial systems, together with a system of federal courts. Those systems are in a constitutional sense united by the role of the High Court as the final court of appeal from all of the Australian courts and the determinant of the one common law of Australia. Inter-jurisdictional dialogue occurs through the many decisions on legal issues which are common across the continent. Parochial notions of an archipelago of distinct judiciaries are the vestiges of a vanished past. When the judges of Australia come together in conferences and colloquia and judicial further education, they are substantively a body whose members share the fundamental values which underpin our *Constitution* and the common law in which it is embedded.¹⁹

Those remarks can readily be applied to the Australian legal profession. Parochial notions of an archipelago of distinct State and Territory based professions are the vestiges of a vanished past.

Culture, of course, is a powerful factor in progress towards unification. The Queensland ‘dingo fence’ stood in stark contrast to the Western Australian profession’s attitude to t’othersiders in the late 1970s and early 1980s. Cross-border admissions were welcomed and increased in number as local law firms became part of national law firms and interstate counsel were briefed to appear in Western Australian courts. It might be said that Western Australians had a psychological perception of a barrier to entry into the legal market in the form of the Nullarbor Plain. In fact, however, they were quite relaxed about the volume of interstate admissions in the 1970s and 1980s and beyond. And of course, in today’s online world, even the Nullarbor has almost become irrelevant.

There was no regulatory concern about interstate admissions on the part of the Western Australian regulatory body. Each admission in Western Australian of an out-of-State practitioner required payment of a handsome fee. The regulatory body at the time was the Barristers Board, later replaced by the Legal Practice Board of Western Australia. The flood of cross-border admissions swelled its revenues considerably. The Board, I might say, was a very collegial body. Six of the nine elected members, of which I was one, had the first name

¹⁹ Robert French, ‘A Voice for Judges: 30 Years on Truth to power in a post truth era’ (Speech, Australian Judicial Officers Association, 16 June 2023, Sydney) [33].

‘Robert’. The Solicitor-General, the late Kevin Parker, who chaired the Board, would sometimes conclude debate by saying “I agree with Bob” and consensus would reign.

For a time there was a non-binding convention that interstate Senior Counsel appearing in Perth would use local juniors. As the juniors might be practising as both solicitors and barristers in our fused profession, this was a useful adaptation to local circumstances. It was certainly beneficial to the local Bar to appear with and against leading counsel from other States.

There was a rule in some of the Eastern States Bars that a junior counsel should charge two-thirds of the fee of Senior Counsel leading him (and it was mostly him at that time) in the case. As junior counsel to the late JD Merralls of the Melbourne Bar — the long-time editor of the *Commonwealth Law Reports* — I was sternly reminded to adhere to the rule with the admonition — “we don’t want any cut rate juniors”.

Cross-border admissions were facilitated by the *Mutual Recognition Act 1992* (Cth), adopted by various States including Western Australia, with the *Mutual Recognition (Western Australia) Act 1992* (WA). This was an example of a species of cooperative federalism which utilised mirror legislation as between Commonwealth and States. The scheme applied to a range of licences and qualifications and was not specifically directed to the legal profession, but it certainly facilitated cross border admissions.

As all present at this conference are aware, the co-operative scheme for the establishment of a uniform law for a national legal profession commenced in 2014 with the enactment in Victoria and New South Wales of the *Legal Profession Uniform Law Application Act* and was followed by the like legislation in Western Australia in 2022.

A Legal Services Council and Commissioner for Legal Services were established and provisions made for the creation of uniform rules covering a variety of aspects of legal practice.

At the time that the Scheme was being discussed I was Chief Justice and convenor of the Council of Chief Justices. There were obvious sensitivities about the role of the Supreme Courts in the admission and disciplining of practitioners admitted to practice in those Courts and the role of State and Territory regulators and the role of the Commissioner in the making and interpretation of rules. Compromises were built into the Scheme which reflected acceptable localisms under the overarching concept of a national profession. It would not be a good use

of my time in this audience to expand upon the operation of the Council and the Commissioner. The fact that my own State has joined the Uniform Law Scheme is a very welcome development and it is to be hoped and, I think expected, that others will do likewise.

The adoption of the Uniform Law Scheme depends to a degree on the culture of the State and Territory based professions throughout Australia and the extent to which the proponents of the Scheme can ensure that it is seen to recognise and accommodate the diversity of the profession.

Patience, flexibility and acceptance of diverse perspectives are necessary. The flexibility of the Scheme is in the Western Australian legislation and the inter-governmental agreement between Victoria, New South Wales and Western Australia signed in 2019. As the then Attorney-General John Quigley said in the Second Reading Speech for the *Legal Profession Uniform Law Application Bill 2021*:

In September 2019, the Victorian Legal Profession Uniform Law Application Amendment Act 2019 was given royal assent. That act officially accommodates Western Australia's entry into the uniform law scheme in line with the intergovernmental agreement. The amendments made by the act to the uniform law scheme enable Western Australia's participation in the scheme's governance arrangements.²⁰

As he went on to point out, there were minor modifications in the Western Australian law concerning professional indemnity insurance and provisions supplementing and complementing the legal profession uniform law in the same way as in the Victorian and New South Wales application Acts. Many of the existing features of the Western Australian Legal Profession Act 2008 were retained to the extent that they were compatible with the Legal Profession Uniform Law. As the Attorney-General remarked:

This is because the uniform law scheme accommodates local variations in the way in which participating jurisdictions operate. The local variations are accommodated in this bill.²¹

The important devolution of regulatory functions reduces the risk that the Scheme can be seen as the repository of a distant power over the lives and work of legal practitioners in the States and Territories. Advocacy of the Scheme, which emphasises co-operative federalism, is

²⁰ Western Australia, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 'Legal Profession Uniform Law Application Bill 2021, Wednesday, 23 June 2021 (Mr J.R. Quigley, Attorney-General)).

²¹ Ibid.

likely to be helpful. So too, is its recognition of the diversity of the profession. On the other hand it provides a mechanism for national responses to national issues affecting the legal profession generally, including the uncertain futures generated by the rise of generative and possibly agentic artificial intelligence.

Conclusion

In a time in which civil society is increasingly under polarising stresses and offshore challenges are emerging that may impact upon the integrity and standard of legal services offered to Australians, the advancement of a sense of identity for the profession as an Australian profession and the creation of tools for responding to national and international issues affecting the profession, is a goal well worthy of energetic pursuit.