**CLOSING COMMENTS FOR THE CONFERENCE ON
PRIVATE LAW IN THE 21ST CENTURY
ORGANISED BY THE TC BEIRNE SCHOOL OF LAW
15 December 2015**

My judicial colleagues, professors, ladies, gentlemen …

It has been a great pleasure to attend this conference and to receive so many ideas for this still young century from leading legal thinkers. For those of you who thought that it was actually a tutorial from Brasenose College held by the Brisbane River – welcome to the subtropics and thanks to Professor Kit Barker and his co-organiser Professor Ross Grantham. May I also congratulate Professor Sarah Derrington for successfully steering the law school through the shallows of Moreton Bay out into the deeper seas of international legal scholarship.

Part of my brief was to reflect on the conference from a judicial perspective but let me begin by reflecting on some more general ideas. The shallows have been one of the themes of the conference. I shall pass quickly over Professor Warren Swain's tribute to our local lawyers as representing the shallow end of the gene pool by reminding him that Auckland is only a short hop across the Tasman and that retribution awaits him.

Let me wade out a little deeper into the mangrove swamps and mud-flats of Moreton Bay.

I thought the answer of the conference came from Professor Oliphant to what may well have been the question of the conference from Professor Getzler; what he described as a "Neo-Maoist" question. From recollection it was a very deep and learned question about rights, the duty of care and interests. Professor Oliphant's answer was a classic:

> "We owe it to the public to be more shallow than that!"

That reflects a common theme of the conference - how best we may respond to increasing complexity in society and legislation by ensuring that our private law remains clear, concise and coherent. The opening keynote address by Professor Burrows dealt with his interest in keeping private law alive and interesting through principled and creative development by the judges, anticipating and sometimes pre-empting legislative change and making the common law more accessible through restatements. Professor Oliphant's own paper was a thought

provoking discussion about possible solutions for the lack of coherence in torts law. Similarly Justice Edelman's discussion of vindicatory damages examined the need to develop a more coherent theory for the law of damages in general. Should damages be confined to compensation for wrong done to a victim or should it extend to the eradication of other consequences of the wrong?

One of Professor Burrows' and others' concerns was how best to respond to society's increasing complexity. Is the common law or legislation best placed to respond to that increase in complexity? The papers by Professors McDonald, Stevens and Assistant Professor Bonython dealt specifically with that issue. One of the common themes was the need for legislation to fit coherently into our legal systems, not to be just reactive to a specific social problem. This was revisited by Dr Bell and Professor Barker when dealing with the Ipp changes to the system of tort law by our Civil Liability Acts.

Dr Jensen dealt with the possible loss of subtlety in a legal system by statutory change - in his case relating to the rather narrow topic of the role of constructive trusts in the Marshall Islands. His paper was of more general interest in his discussion of the role of statutes when the common law has reached a dead end or in setting up the apparatus of government, preserving markets and changing the distribution of benefits and burdens in society. He too discussed the role of restatements, codification and statute law.

Professor Getzler was also concerned about the capacity of interested parties, such as credit agencies, to influence legislation affecting them but in a manner that was against the public interest. He argued that lawyers and judges could expose misbehaviour by such agencies in litigation and questioned the nature of their role in the economic system.

Professor McDonald also discussed restatements while potential codification was dealt with by Professor Hogg and Professor Swain - positively from Professor Hogg in the Scottish context, more sceptically from Professor Swain who also discussed possible developments in the law of contract such as the recognition of an obligation of good faith in the performance of contracts and a more contextual approach to interpretation. The focus on clarity and simplicity by advocacy for codification or restatements reflects the perennial quest for clarity and consistency of principle in the system as a whole.

Professor Smith reminded us of equity's role in solving problems of complexity and uncertainty in dealing with those who try to game the system, cases, for example of

constructive fraud. He also expressed concern about equity's continuing relevance in the USA as a result of a misconceived approach there to fusion between law and equity.

One other concern, associated with the talk of codification and the creation of restatements, was that the legal system needed to be explicable to the general public. I have heard some sceptical responses to that ideal from people exposed to too many vexatious litigants in person. Who from the general public needs to know so much about the law – and won't they get it wrong deliberately anyway?

My response is the reminder that much of our private law, on the common law side, was originally designed to be explicable to civil juries, a system that still exists in some cases here and generally in the USA and which applies a healthy discipline to those whose obligation it is to explain the law to lay people. As a judge who has to explain our criminal law to jurors I thoroughly appreciate the existence of the Queensland Criminal Code, drafted by one of our early Chief Justices, Sir Samuel Griffith, and influenced by Stephen's model penal code for India, the Field code from New York and the then modern Italian Penal Code from the 1890s. It is a great aid to clear expression of our criminal law – except about self-defence!

In a future where the numbers of courts, tribunals and other forms of dispute resolution are only likely to increase, as are the numbers of decisions available freely on the internet, a coherent system facilitating the search for and clear expression of principle will remain a necessary goal. If part of the system goes below the radar as a reaction to the vanishing trial discussed by Carlo Giabardo that will create its own problems. They are surfacing already in areas such as the assessment of damages for personal injuries where statutory change and the rise of mediation has led to a dearth of comparable awards.

Another issue I have noticed, perhaps more recently, from experience as a judge over the last 12 years, is what seems to me to be a decline in emphasis by barristers on how particular submissions about the law fit well into our overall system. The focus of most submissions is upon the elaboration of principle through the cases. That process can be enhanced greatly, in my view, by anchoring the discussion of principle more firmly into the overall structure of the legal system.

Let me say something more about that by going back to 1968 when I began to study law at the University of Queensland. There has always been a tension in the common law between ensuring that the expression and development of legal principle remains coherent and the

tendency to lose sight of overarching principle among the wilderness of single instance decisions created by the common law. That wilderness existed when I began to study but was reigned in to some extent by the system of authorised reporting in most common law jurisdictions and less ready access to unreported decisions. That reduced the number of decisions one needed to access to more manageable proportions. Most of the decisions then were also briefer but the problem was still real.

The technique of research then in use also encouraged a principle-based search for authority through the digest classification system. So much research now seems to be based on the use of case citators. Now, the taxonomy in the common law's digests was criticised by Professor Birks, for example, as alphabetical rather than conceptual, unlike the Roman law model adopted by civilian codified jurisdictions. Once one had identified the category of the problem, however, the conceptual structure of our digests usefully led one along a path of inquiry focussed on the elaboration of basic principle into more detailed subcategories. One learnt to think conceptually but also to read around a topic and place the decisions in a greater overall context.

Another reflection from my early days as a student is that I fairly rapidly discovered the distinction between students' textbooks on a subject and practitioners' works. My father was a judge with an extensive library which was more accessible than the law school library around exam time. At that time, Australian law was more closely linked to English law and the English classical works such as Chitty on Contracts, Bowstead on Agency, Benjamin's Sale of Goods, Clerk and Lindsell on Torts, Charlesworth on Negligence, McGregor on Damages and other components of the common law library series, were frequently used in practice here. Less so now.

The approach of such works to the statement of principle developed by editors with deep common experience of the academic and practical approach to the law provided not only a useful starting point, but an overall framework of principle within which a legal problem could be conceptualised and, very frequently, readily answered.

The absence of such books until recently from the legal research facilities available on line may be one of the factors leading to an overemphasis in practice on the analysis of individual decisions at some remove from the basic principles from which they are derived.

Is there a large project here for Australian academics to help create more leading Australian practitioners' works for the 21st century, proposition and principle based, rather like a Restatement, focussed on the existing law but pointing to how it may develop?

Many of the papers also dealt with how private law can respond to changes in society, including changes in technology. Professor Getzler asked quite sceptically whether the common law had been shown to be good for finance compared to the civilian systems, given the global financial crisis. Dr Cutts dealt with how the system can respond to the use of Bitcoin and asked if it mattered whether Bitcoin should be characterised as money. Associate Professors Goold and Douglas discussed a "public property" approach to human tissues and Assistant Professor Mik dealt with loss of privacy and loss of autonomy. Professor Chamberlain discussed how snooping as a breach of privacy could be assessed in damages.

Other areas of interest included Professor Dietrich's discussion of accessory liability in private law, Professor Vine's discussion of the relationship between tortious liability in negligence combined with the effect of insurance while Doctors Grant and Burns discussed the interrelationship between injury compensation and social security laws. Professor Tettenborn discussed whether the common law recognised a right to suspend or withhold contractual performance when faced with breach by the other side.

Time precludes me from traversing all the many fascinating papers, only some of which I could hear delivered.

Let me then remind you very briefly of Professor Dagan's closing plenary address and his stimulating discussion of the challenges facing private law in developing a "genuinely liberal group of doctrines as a framework for respectful interaction between self-determining individuals who recognise one another as genuinely free and equal agents".

Another area not particularly dealt with in the papers, where one can imagine some exquisitely difficult legal issues arising this century, may be those related to the use of autonomous vehicles. Who will be responsible for accidents involving them? What if the software, faced with an inevitable accident, chooses the lesser of two evils, the death of a law professor in the middle of the road rather than that of a mother and three infants on the footpath? Was that the right decision? I expect some future judges will have to decide these and many other unpredictable problems.

From a judicial perspective, one can see that these novel problems that we are certain to face will require a principled approach to their resolution. Whether that resolution is achieved simply by judicial decision or by a combination of judicial decision and legislation, will depend very much on the nature of the issue and how clear it is that society will need to respond to it legislatively at an early stage. The autonomous vehicle problem has already provoked a variety of legislative responses in several American jurisdictions as well as in South Australia.

The developments of the law of tort and contract over the 20th century, often responsive to consumer concerns or the increase in motor traffic accidents and work related accidents, provide examples both of judicial and statutory responses. There was some debate here about whether judges or legislators are best placed to respond to modern and complex changes in private law. Professor Burrows touched on that in his opening address and urged us judges not to shirk the task of developing the law in a principled and coherent way.

If the first response to social change is likely to be by a judge rather than a legislature, one thing that can be said is that, even if the judge's decision is regarded as incorrect, it is likely to help provide some guidance and stimulus for legislative change. Lord Denning's judicial career provides several examples of such a result.

To perform their duties best, judges will need to keep a clear eye on the development of the law coherently having regard to the structure of the existing legal system, but they will also need to continue to develop an awareness of social and technological change. We need to be capable of understanding the issues likely to arise from such change. We also need to develop a sophisticated approach to statutory construction to deal with the mass of legislation, both existing and likely to exist in the future in response to our rapidly changing society.

It is why, from a judge's point of view, attendance at a conference such as this can be so rewarding. May I thank the organisers, particularly Professors Kit Barker and Ross Grantham, for assembling such a stimulating group of speakers and giving us the chance to reflect on how private law may develop later in this century.