Foreword

WELCOME TO LAW REVIEWS*

THE HON JUSTICE MICHAEL KIRBY AC CMG†

[This is a riposte to perhaps the most famous law review article of them all: 'Goodbye to Law Reviews', written by Fred Rodell in 1936. The author acknowledges 'ten deadly sins' committed by law reviews and their contributors. These are: publishing for the sake of it; publishing boring and excessively lengthy articles; writing uncritical, unoriginal articles for law reviews that publish them; establishing an editorial advisory board that does nothing; ignoring economic demands in publication decisions; publishing to gather dust; pandering to mere needs for academic publication; ignoring costs; and failing to embrace electronic publication strategies that are kinder to the trees than the reviews on paper in the past have been. On the other hand, the author points to the special contribution that law reviews can make to the analysis of legal authority, the development of legal principle and the exploration of legal policy. He instances the impact that timely consideration of important legal issues can have where such issues are, or are liable to come, before appellate courts. He illustrates this proposition by reference to the recent decision of the High Court of Australia in Brodie v Singleton Shire Council. *Experience on a law review can also provide good training in legal writing and editing. Most importantly, a law review can help advance new ideas in the law, which contribute to the law's unending search for justice.]*

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I TEN DEADLY SINS

One of the most famous law review articles ever written is Fred Rodell's 'Goodbye to Law Reviews'.[1] It has become such a classic that it was recently reprinted in the *Australian Law Journal*[2] with a commentary by John Gava.[3]

* This foreword is based on an address given to mark the first publication of the *Macquarie Law Journal*, Sydney, 3 August 2001.

† BA, LLM (Syd), BEc (Syd), Hon DLitt (Newc), Hon LLD (Macquarie), Hon LLD (Syd), Hon LLD (Nat Law Sch, India), Hon DLitt (Ulster), Hon LLD (Buckingham), Hon DUniv (SA), Hon FASSA; Justice of the High Court of Australia.

1 (1936) 23 *Virginia Law Review* 38. In 1962, Rodell reworked his theme: Fred Rodell, 'Goodbye to Law Reviews — Revisited' (1962) 48 *Virginia Law Review* 279. For a recent retrospective of reviews, see Bruce Ziff, 'The Canadian Law Review Experience: Introduction to the Symposium' (2001) 39 *Alberta Law Review* 611 and the select bibliography compiled by Tracie Scott, 'The Role of the Law Review: A Select Bibliography' (2001) 39 *Alberta Law Review* 690.

2 Fred Rodell, 'Goodbye to Law Reviews' (1999) 73 *Australian Law Journal* 593.

According to Gava, far from becoming less relevant to the Australian legal scene in the intervening 60 years, Rodell's criticism of the style and contents of United States law reviews in the 1930s has added significance today, especially in Australia.[4] Indeed, John Gava, like Rodell before him, concludes that law reviews have become a 'major problem'.[5]

I want to put forward a contrary point of view. But first let me concede the validity of some of the points of criticism mentioned by Fred Rodell and John Gava. They are what I term the 'ten deadly sins' of law reviews and law journals. Every law school that contemplates a new journal (or persists with an established one) should measure its work against the ten sins. Every board of student editors and every advisory board should regularly check their publication against the ten horrible faults with which such publications can be plagued. Only if the publication manages a credit pass by these criteria should it enter, or remain in, print. Otherwise, it should be reverently interred in the cemetery of discontinued legal publications, along with *Res Judicatae* (newly arisen in this most prestigious *Review*), the *Argus Law Reports*, the *New South Wales Reports*, and other unlamented serials that are no more.

The first sin is publishing for the sake of it. Nowadays, it seems every law school must have a law journal. The problem is that in 1960 there were but seven law schools in Australia. Now there are 28. This represents twice the number per head of population as in the United States. According to John Gava, in 1960, there were nine law journals published in Australia. By 1970, there were 10. In 1980, there were 15. By 1992 this had grown to 42. With this trajectory, John Gava suggests that the prospect of 100 Australian law journals cannot be far off.[6]

To justify a new journal, the publisher must offer something that current journals do not provide. As well, law schools, proliferating in such number, need to differentiate their products. True, offering experience on a law journal may be one way to maximise a student's years at law school. But just because some, or most, schools have a journal, does not mean that all must necessarily do so. To launch a new series is to offer hostages to the future. Those who do it have to be very sure that they can justify imposing such a burden on unknown, and perhaps unborn, writers and readers in years and decades (even centuries) to come.

Secondly, many law journal articles in Australia 'lack originality, are boring, too long, too numerous and have too many footnotes, which are also boring and too long.'[7] This is also somewhat unkindly said about judicial opinions.[8] But that is another story. Judges at least have the right, indeed the legal duty, to state their

[3] John Gava, 'Commentary' (1999) 73 *Australian Law Journal* 597.
[4] Ibid 597.
[5] Ibid 599.
[6] Ibid.
[7] Elyce Zenoff, 'I Have Seen the Enemy and They Are Us' (1986) *Journal of Legal Education* 21, 21 (citations omitted).
[8] See, eg, Justice Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743.

reasons.[9] No one forces authors to write their opinions on the law for general publication.

The tedious style of some legal writing can act as a soporific. For insomniacs that may be a blessing. The passive voice, for example, is much loved by lawyers. Lord Denning tried to teach us the use of the active voice and short sentences. But now he is gone. Sometimes, it is not the author's fault that the hallmarks of bad style creep in. I have had articles accepted by law journals but upon the strict condition that I alter the prose to remove every suggestion that a human being has written the essay. The personal pronoun 'I' is replaced with 'It is the opinion of this author that' (or words to that effect).[10]

This is also a style which is ordained in the United Nations. When I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, I astonished the Secretariat by insisting on writing my own reports. No sooner had they got over that surprise but they turned their hostility toward my use of the personal pronoun 'I'. It had to be deleted. Out the window it went. Every 'I' was replaced with 'the Special Representative observes ...'. Authors of law review articles unite! You have nothing to lose but the chains of impersonality. The direct expression of personal experience, thoughts, feelings and opinions is not alien to the law.[11] Use of the passive voice and the substitution of the third person represent a hankering for the belief that the law is totally objective, fixed, definite, predictable. No Australian law journal should believe that fairytale any more.[12]

Thirdly, a more personal prose style might help authors to avoid the other weakness of much law review writing. I refer to the regurgitation of legislation or judicial opinion without leaving adequate space for speculation, criticism, analysis, reconceptualisation of issues and for the challenge of empirical data about the law's operation.[13]

There is a tendency for the legal mind to accept the law uncritically. This is understandable. But it should be resisted. The lesson of the common law, which speaks in the language of centuries, is that law is constantly in a process of evolution and change. We can leave expostulation of law to the statute books and the authorised reports. A major role of law journals must be criticism. This

[9] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666 (Gibbs CJ); *Fleming v The Queen* (1998) 197 CLR 250, 260–1 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 181 ALR 307, 315–16 (Kirby J).

[10] See, eg, Justice Michael Kirby, 'Modes of Appointment and Training of Judges: A Common Law Perspective' (1999) 41 *Journal of the Indian Law Institute* 147; Justice Michael Kirby, 'Human Genome Project — Legal Issues' (2000) 42 *Journal of the Indian Law Institute* 17.

[11] Eg Justice Michael Kirby, 'Law at Century's End — A Millennial View from the High Court of Australia' (2001) 1 *Macquarie Law Journal* 1.

[12] Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22. See, eg, Justice Michael McHugh, 'The Law-Making Function of the Judicial Process — Part I' (1988) 62 *Australian Law Journal* 15, 16.

[13] Recent examples of writing which have usefully included empirical data include Rob McQueen, 'The Corporate Image — The Regulation of Annual Reports in Australia' (2001) 1 *Macquarie Law Journal* 93 and Alex Steel, 'From "Hard Labour" to *Spies v The Queen*: Prosecuting Corporate Offenders under the *Crimes Act*' (2001) 75 *Australian Law Journal* 479, 499–500.

value-added component must be something that cannot be expected from the law-makers themselves.[14]

Fourthly, law review editors, helped by referees, must also apply a critical eye to the articles submitted for publication. A test should be applied to every article offered for publication. Does it add something new to legal knowledge or understanding? Or will it join the parade of essays that sink like a stone, never to be mentioned again, even by the author? A study of articles published in 46 journals in the United States, in the 50 years before 1986, found that 44 per cent had never been cited at all.[15] Ever. Indeed, 85 per cent had been cited on five or fewer occasions.[16] Writing useless articles of no interest to anyone and, worse still, publishing them, can hardly be justified.

It is a bracing experience for a lawyer to be published by a refereed journal in a scientific discipline. My recent participation with the ethical issues of the human genome project has acquainted me with the more strenuous standards of those publications. Articles must often be cut back on the insistence of anonymous reviewers. Detailed comments of referees are commonplace. They insist that assertions must be supported by references. Space is scarce. Scientific publication is a privilege. It belongs as a right to no one. With so many articles competing for publication in a hierarchy of journals, every author must justify publication by the strict touchstone of utility. Editors who secure no more than five citations for the articles they accept might never be asked to make a decision again.

Today an increasing number of Australian university law reviews accept the discipline of referees. Submissions for publication are 'peer reviewed', often by a double blind procedure.[17] To this extent, referees (who are generally academics in the particular field) share some responsibility for the contents of law reviews. In this respect, Australian law reviews are different from many law journals in the United States about which Fred Rodell was so critical. Perhaps John Gava was insufficiently mindful of this difference. In the United States, the difference tends to encourage the acceptance of articles based on student interest or the prestige of the contributor. Hard-nosed referees are needed in Australia to resist these tendencies.

Fifthly, it is a sin that many editorial advisory boards do nothing. I know, because I am a member of a number of them. One's name graces the frontispiece. All those postnominals and degrees look grand. But what do all these worthies do? In some publications, virtually nothing. There are, of course, exceptions. The *Criminal Law Journal*, for example, convenes its board once every year. The publisher reports on sales trends. The board is encouraged to stimulate the editors with new ideas that will make the journal more useful to

[14] Cf Justice Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling' (2001) 27 *Monash University Law Review* 12, 19.

[15] Hans Holub, Gottfried Tappeiner and Veronika Eberharter, 'The Iron Law of Important Articles' (1991) 58 *Southern Economic Journal* 317, 318.

[16] Ibid.

[17] However, the dangers and weaknesses of peer review in a country with a relatively small academic and legal population cannot be ignored: see, from a Canadian perspective, J E Côté, 'Far-Cited' (2001) 39 *Alberta Law Review* 640, 650–1.

potential readers. Board members are expected to contribute. If they do not, they are dropped. However, most advisory boards do, and are expected to do, nothing. Off with their heads! If it is a charade to give an air of respectability to a publication, why go along with it? Advisory boards can sometimes be pressed into useful service. If they cannot, or will not, they should be sacked.[18]

Sixthly, there is the related issue of economic demand. Rodell suggested that law journals constituted an exclusive form of writing for which there was almost no economic demand. Their readership was confined to academic circles, law offices[19] and (he might have added) the author's loving parents and a dutiful friend or two. A dead giveaway, according to John Gava, is the level of dust on the back issues of a law review.[20] Every editor should scrutinise an offered contribution by reference to its dust-gathering potential. Since Rodell wrote his critique, but before John Gava wrote his, Westlaw and Lexis have adopted the course of publishing journals electronically in their expensive 'for profit' legal databases. This suggests that, as a category, there is still a market for law reviews in the practising profession in Australia. We need to keep it that way.

Seventhly, it is well to remember that there is only so much space in a law library. The terms of trade have turned against Australian law libraries. Every serial is now under reconsideration. Many are cancelled to save costs. As well, there is only so much time in a working day. The amount left over from essential tasks, to be devoted to reading law reviews, is limited. These are reasons why we should be concerned with layout, presentation and user-friendly aids such as abstracts, headings and subheadings. Pages packed with dense prose, disfigured with long footnotes and unrelieved by headings, are likely to attract readers only when absolute necessity requires.

Eighthly, editorial boards should be alert to the danger of turning over their journals to the academic industry. Publication is rightly a prerequisite to academic advancement. But there is no inherent reason to inflict this need on the readership of a law journal. If the essay is on a topic of little general concern, the author might be encouraged to publish it privately as a monograph. Publishing the unreadable to the unready should form no part of the mission of contemporary Australian law journals.

Yet market forces and immediate utility must not dictate the contents of law reviews. Bold ideas in law, as in science, are often new and challenging. Their immediate practical utility may not be obvious. Yet they may be the only way to encourage lawyers to look at old problems with fresh eyes. In my lifetime, I have

[18] Advisory boards are to be distinguished from the editorial boards of most student-run Australian law journals. These are typically made up of students who assume the responsibility of selecting items for publication after peer review, proofing and checking manuscripts and final page proofs, proposing redrafting and resubmission before publication, and raising the funds necessary for such law publications. As many authors will confirm, these student bodies are serious to the extent of pernicketiness in discharging their duties — nowhere more so than in the case of the *Melbourne University Law Review*. Advisory editorial boards might sometimes be used by students for advice and assistance, as one reviewer of this essay suggested. This has not been my experience; but that could be because the boards on which I serve are of commercial or professional publications under firm editorial control.

[19] Rodell, 'Goodbye to Law Reviews', above n 1, 45.

[20] Gava, above n 3, 599.

seen many accepted bastions of the law collapse under critical scrutiny — the death penalty, the Privy Council, homosexual offences, the White Australia policy, gender discrimination and so on. Bold analysis in law reviews can contribute to this process of reform in thinking, whilst doubtless condemned as unreadable 'junk' or impractical nonsense when it first appears. Some such essays will hit the spot. We must be prepared to bear the occasional misfire as the price of intellectual freedom and progress.[21]

Ninthly, turning a blind eye to the costs of legal publication is a sin which must also be avoided. The needless waste of paper and the obligation on libraries to maintain little-used serials should apply a brake upon the selection of mighty tomes for inclusion in a law review. The author might be politely asked to provide a summary version. A diligent editorial committee might even perform that task for itself.

Tenthly, there is the future. Already, some legal materials appear exclusively in electronic form. An increasing number of periodicals now appear on the Internet. One way the Bond Law School accommodates the competition between the High Court's calendar and the School's publishing program, in its publications of commentaries on cases pending in the Court, is to post advance copies of such commentaries on the Internet in the *High Court Review*. All legal publications must be reconsidered in the age of electronic publishing. We are in a phase of transition. Perhaps in a century's time we will truly have said 'goodbye to law reviews' — at least in the form in which they now appear. Publications may be confined to electronic format. When that happens the dusty shelves will be no more. But will electronic journals be read more? That is the question.

II WORDS OF PRAISE

A *The Academic Contribution to Legal Principle*

If rigorous standards are applied, there is no doubt that a law review can contribute greatly to an understanding of the law and even to its development. For this, the times are propitious. The overthrow of the declaratory theory of law has led to the recognition by scholars, practitioners and judges that law is expounded by judges who sometimes have choices that will be made by reference to considerations of legal authority, principle and policy.[22]

The *Constitution* may be obscure. Legislation may afford competing constructions. Legal authority may be ambiguous. The common law may lack apposite precedent. It is in such cases that judges, and especially appellate judges, must choose, and then explain, the operative rule that they adopt. In performing that task, judges today commonly have recourse to essays of analysis and criticism in

[21] See Allan Hutchinson, 'The Role of Judges in Legal Theory and the Role of Legal Theorists in Judging (or "Don't Let the Bastaraches Grind You Down")' (2001) 39 *Alberta Law Review* 657. This is a commentary on Justice Michel Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-Making' (1999) 37 *Alberta Law Review* 739.

[22] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 252 (Deane J); *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

law reviews. I agree with the opinion of Justice Bastarache of the Supreme Court of Canada, who recently said:

> the contribution of academics is invaluable to the development of legal principles and coherent judicial decisions. The nature of the law itself is being transformed. The work of academics serves to provide a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform. No principled approach to decision-making can ignore the role of academics.[23]

Perhaps it is worth pointing out that in Canada there is more movement from law schools to the Bench than in Australia. This may contribute to a more welcoming environment. The same is partly true in the United States. In Australia, there have been notable, and successful, instances of such academic appointments.[24] But usually, careful sanitation by years of service at the Bar has been considered necessary before judicial preferment comes to Australian academics.[25]

Of course, there are contributors to law reviews in Australia apart from academics. They include judges, legal practitioners, students and non-lawyers. Yet in the nature of things, law reviews afford a prime opportunity to legal academics to express succinctly the results of their research and reflections on interesting problems, criticisms of judicial opinions and suggestions for future directions in the law.

I know of no judge who does not welcome criticism of his or her opinions.[26] Sometimes the judge may disagree. But occasionally a well-targeted criticism may engender a change of mind. This is the dialogue of a free society. I distinguish between criticism and insult. However, with a few exceptions, the dialogue amongst lawyers in Australia, at least in law reviews, is civilised and normally constructive.

B *Timely Commentaries on Contemporary Legal Problems*

A well-fashioned law review article can also contribute greatly to the work of a judge. This is because, in the nature of their lives as problem solvers, judges and the advocates who appear before them often lack the time to analyse a legal problem with a full understanding of the history of the relevant branch of the law, the conceptual weakness of past authority, and the social and economic context in which the law must operate. This is where a well-reasoned law review article can have an impact on the direction that the law takes. By this I mean

[23] Bastarache, above n 21, 746. See Neil Duxbury, *Jurists and Judges — An Essay on Influence* (2001) 24–33; Russell Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30 *University of Western Australia Law Review* 1, 9–10.

[24] These include the appointment of Finn J to the Federal Court of Australia; Nygh J to the Family Court of Australia; Judge Rogerson to the District Court of South Australia; and Judges Phegan and Goldring to the District Court of New South Wales.

[25] Examples are Blackburn CJ (Supreme Court of the Australian Capital Territory); Heydon JA (New South Wales Court of Appeal); and Stone and Katz JJ (Federal Court of Australia).

[26] Part of my judgment in *Boland v Yates* (1999) 74 ALJR 209 is criticised in Belinda Baker and Desmond Manderson, 'Counsel's Immunity: The High Court's Decision in *Boland v Yates*' (2001) 1 *Macquarie Law Journal* 135, 140. Matthew Goode's criticism of *Lipohar v The Queen* (1999) 200 CLR 485 is even more direct: see 'Criminal Cases in the High Court of Australia' (2000) 24 *Criminal Law Journal* 370, 373–5.

truly scholarly and well-supported writings, not unverified and unverifiable statements of the author's opinions that may be no better than those of any other stranger to the parties and their cause.[27]

Sometimes, at their best, law review articles will permit exploration of ideas by a judge freed from the constraints of authority that must be obeyed in deciding a particular case.[28] Such an article may succinctly state the position that the law has reached. This is a role that law reform reports also now fill. They are increasingly referred to for that purpose.[29] It is difficult in Australia to wean advocates from old habits, cultivated over the centuries during which the declaratory theory of the judicial function held sway. An advocate might consider that complex social questions will be most safely answered by reference to judicial observations in past authority. Where such authority is binding, those observations may indeed be sufficient for judicial purposes. But often, and especially in a final court, it is necessary to view the problem in a wider context.[30] This may require reflection on matters of history, economics, human rights principles or other considerations. A writer in a law journal is more likely to have insights into such subjects than the average advocate. This is especially true if the writer has moved beyond verbal analysis and collected relevant empirical data on how the current law actually operates and where its essential flaws and inconsistencies may be found.[31]

An illustration of the utility that a well-timed and carefully argued law review article may have for the development of the law is Barbara McDonald's analysis of the former law on highway authority immunity.[32] This examination of past authority, exposing its anomalies, was included in the useful series published by the *Sydney Law Review* in its regular section 'Before the High Court'. (That journal, the *High Court Review* and occasionally others, scrutinise problems presented for the law in cases in which the High Court of Australia has granted special leave to appeal.)

Barbara McDonald's analysis was cited with approval in the joint judgment of Gaudron, McHugh and Gummow JJ in *Brodie v Singleton Shire Council*,[33] and in my own reasons,[34] both for the author's analysis and for the opinions she expressed. As I disclosed in my reasons in *Brodie*,[35] there were powerful arguments in that case why the High Court should leave any re-expression of the

27 Côté, above n 17, 656.

28 Eg Sir Thomas Bingham, 'Should Public Law Remedies Be Discretionary?' [1991] *Public Law* 64. See also Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4.

29 A recent example is *Smith v The Queen* (2001) 181 ALR 354, 366 (Kirby J).

30 Cf *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 181 ALR 307, 318–19 (Kirby J).

31 See, eg, Catherine Dauvergne, 'Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics' (2000) 24 *Melbourne University Law Review* 280.

32 Barbara McDonald, 'Immunities under Attack: The Tort Liability of Highway Authorities and Their Immunity from Liability for Non-Feasance' (2000) 22 *Sydney Law Review* 411.

33 (2001) 180 ALR 145, 172 ('*Brodie*').

34 Ibid 199–200, 208, 210.

35 Ibid 206–8.

law to the legislature. That was a view that I had taken in other recent cases.[36] Ultimately, for reasons that I expressed in *Brodie*, I concluded that the immunity should be abolished and the common law restated.[37] But it was a close run thing. The High Court divided on the point, four Justices to three. A first class law review article can therefore sometimes be very important. Although Professor McDonald's essay was not cited in the minority opinions, each of them also referred to academic writing. In the reasons of Hayne J, there were a number of references to articles from the *Law Quarterly Review*.[38]

In making the foregoing point, I do not fall into the error of assuming that courts are always the centres of the legal universe or that academics are 'lackeys for their judicial superiors'.[39] Scholars, like civil servants and journalists, must keep their distance to guard their independence so that they can criticise the courts when they consider that they have made a 'dog's breakfast of a job'[40] in expounding the law. Legal scholars can certainly 'look elsewhere for their validation and prestige'[41] than to helping judges, even of a final court, in coming to their conclusions on the state and future shape of the law. Academics have their own mission to feed 'the hunger of society for justice.'[42] Sometimes this will require them to think bolder thoughts and to dream more vivid dreams than judges dare. However, that said, it will occasionally be an honourable and worthy contribution of a law review to building justice in society to offer analysis of cases before appellate courts. As *Brodie* shows, doing this well will sometimes be very timely and helpful.

C *Citations of Law Reviews and Judicial Practice*

Not every judge, even in these enlightened times, regards it as appropriate or useful to cite law journals and academic authority.[43] In *Hunter v Canary Wharf Ltd*,[44] a difference of opinion on this point was exposed by the speech of Lord Goff of Chieveley. His Lordship gently took his New Zealand colleague, Lord Cooke of Thorndon, to task for citing too much academic authority. He said:

> I would not wish it to be thought that I myself have not consulted the relevant academic writings. I have, of course, done so, as is my usual practice; and it is my practice to refer to those which I have found to be of assistance, but not to refer, critically or otherwise, to those which are not. In the present circumstances, however, I feel driven to say that I found in the academic works which I consulted little more than an assertion of the desirability of extending the right

[36] Eg *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 401–2; *Lipohar v The Queen* (1999) 200 CLR 485, 561; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (2000) 201 CLR 49, 89–90. Cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 546.

[37] *Brodie* (2001) 180 ALR 145, 208–11.

[38] See, eg, ibid 215, 216, 232.

[39] Hutchinson, above n 21, 661.

[40] Ibid 662.

[41] Ibid 667.

[42] Ibid.

[43] Eg Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995) 224.

[44] [1997] AC 655.

> of recovery in the manner favoured by the Court of Appeal in the present case. I have to say (though I say it in no spirit of criticism, because I know full well the limits within which writers of textbooks on major subjects must work) that I have found no analysis of the problem; and, in circumstances such as this, a crumb of analysis is worth a loaf of opinion.[45]

Somewhere between Lord Cooke's many citations and Lord Goff's severe restraint lies a happy mean. There is no gainsaying the assertion that law review articles — like texts and judicial writing itself — vary in quality.[46] But if they have contributed to the development of a conclusion, some judges, myself included, feel obliged to acknowledge law journals and other writings. Sometimes, for example, the distinction of the author may lend weight to a judicial opinion that the law has taken a wrong turn. But because other judges hold views similar to those expressed by Lord Goff, it would be as well for law review authors and editorial committees to heed the call for analysis and constructive criticism. If these are well-expressed and timely, the writer's influence may be great indeed. Apart from its use to judges, it will have its own scholarly justification as a correction of error, as a contribution to the advancement of truth and in providing new insights that help society in its quest for justice under law.

D *Training for Clear Legal Writing*

In Australia, university law reviews are organised in different ways, according to the traditions of each law school. In some cases, the publication is substantially supervised by the teaching staff. In others, as in this *Review* and several other Australian journals of high repute,[47] the student editors are definitely in charge. Having recruited a number of associates with a background in such journals, it is my experience that they provide fine training for good legal writing and editing. Deletion of repetition. Careful scrutiny of structure. Elimination of erroneous, illogical, irrelevant or immaterial ideas. Checking to see that citations support the textual proposition. Reconsidering unpersuasive assertions.

To the greatest extent possible, undergraduate law students should take an active responsibility for university law reviews. It is an excellent experience and should be given due acknowledgment in the academic program. It may also ensure the selection of articles that avoid the ten deadly sins that I have mentioned. To the extent that undergraduates themselves choose topics and contribute experience on a law journal, this may offer the prospect of more lively writing, freed from the conventions that sometimes come with too many years in the law.

III Good Companions

For me, the law reviews do not lie unread in the High Court library gathering dust. Every month, the new crop is displayed in the Justices' reading room. There, I scan them. I mark some for reading. I immediately pounce upon them if

[45] Ibid 694.
[46] Côté, above n 17, 651.
[47] Eg the *Monash University Law Review* and the *University of New South Wales Law Journal*.

they touch a current case. Their impact is large. In my opinion, it is growing.[48] Advocates know this. With increasing frequency, they now come to court armed with relevant law review articles. This is a change that has come over the Bar during the years of my judicial service since 1975. It signifies a change in the receptiveness of the Bench.

Law reviews can have a value that transcends even the work of the High Court of Australia. They must criticise, cajole and analyse the law. They must question received wisdom and current orthodoxy. Authors must remain free to follow their own star, wherever it may lead. A judge cannot always do this, for a judge is controlled by the *Constitution*, and often by legislation or binding judicial authority.

A well-timed article on a current issue before the courts of Australia will frequently be read by judges considering a problem of the law. This should encourage attention to contemporary issues, and specifically to cases in which special leave to appeal has been granted by the High Court. Such law review articles can make a direct and substantial, even decisive, contribution to the future of the law.

All lawyers should feel privileged to have the chance to advance the attainment of greater justice under law. Do not underestimate the capacity of well-argued law review articles to do this. In my experience, they often do. I value them. They are good companions on the judicial journey. A companion with a lively mind and a clear sense of direction is welcome amongst the company of lawyers as we march together on the road of justice.[49]

[48] For the present and past position in Canada, see Côté, above n 17, and Bruce Ryder, 'The Past and Future of Canadian Generalist Law Journals' (2001) 39 *Alberta Law Review* 625. The latter article features two annexes. The first collects the names of 18 university-based generalist journals in Canada, two of which have been discontinued. The second lists 49 specialist law journals, 13 of which have ceased publication.

[49] See Justice Billings Learned Hand, 'Have the Bench and Bar Anything to Contribute to the Teaching of Law?' (1926) 24 *Michigan Law Review* 466.

IV APPENDIX: AUSTRALIAN LAW SCHOOL JOURNALS AND REVIEWS

Australian National University
Federal Law Review (1964–)
Australian Year Book of International Law (1965–)
Corporate and Business Law Journal (2001–)

Bond University
Bond Law Review (1989–)
Revenue Law Journal (1990–)
High Court Review (1995–) (electronic only)

Deakin University
Deakin Law Review (1994–)

Flinders University
The Flinders Journal of Law Reform (1995–)

Griffith University
Griffith Law Review (1992–)

James Cook University
James Cook University Law Review (1994–)

La Trobe University
Law in Context (1983–)

Macquarie University
Australian Journal of Law and Society (1982–)
Macquarie Law Journal (2001–)

Murdoch University
E–Law: Murdoch University Electronic Journal of Law (1993–) (electronic only)
Asia-Pacific Journal on Human Rights and the Law (2000–)

Monash University
Monash University Law Review (1974–)

Northern Territory University
LAWASIA Journal (1998–)

Queensland University of Technology
Queensland Institute of Technology Law Journal (1985–2000)
Queensland University of Technology Law and Justice Journal (2001–)

Southern Cross University
Southern Cross University Law Review (1997–)

The University of Melbourne
Res Judicatae (1935–57)
Melbourne University Law Review (1957–)
Public Law Review (1990–)
Asia Pacific Constitutional Yearbook (1993–)
Melbourne Journal of International Law (2000–)

University of Adelaide
Adelaide Law Review (1960–)
Corporate and Business Law Journal (1988–2000)
Australian Journal of Legal History (1995–)

University of Canberra
Australian Journal of Corporate Law (1991–)
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University of Newcastle
The Newcastle Law Review (1995–)

University of New South Wales
University of New South Wales Law Journal (1975–)
Australian Journal of Human Rights (1994–)

University of Notre Dame
University of Notre Dame Australia Law Review (1999–)

University of Queensland
University of Queensland Law Journal (1948–)

University of Sydney
Sydney Law Review (1953–)
Australian Journal of Legal Philosophy (1981–)

University of Western Sydney
Macarthur Law Review (1997–2000)
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University of Tasmania
University of Tasmania Law Review (1958–)
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University of Western Australia
University of Western Australia Law Review (1948–)

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