

AFTER DINNER SPEECH FOR ALAN GOLDBERG

MELBOURNE, 28 JULY 2010

Susan Crennan

Friends of Alan Goldberg, I join Peter Jopling in thanking Freehills for arranging this dinner tonight. Damian Grave told me that what I should do tonight is to "say a few words after dinner to thank his Honour for his contribution". He did not confine me to Alan's contribution to the law.

At Alan's exceptional and overflowing farewell ceremony from the Federal Court on 30 June 2010 we were all reminded of the contours of Alan's outstanding life in the law, commencing with his achievements in University days — including his Fullbright travel fellowship scholarship to Yale. This was followed by 30 brilliant years at the Victorian Bar (nearly 20 as Queen's Counsel), then 13 and a half years as a judge of the Federal Court — as Chief Justice Keane said, "as a model of judicial conduct". In present company, I thought it might be appropriate not to repeat all the richly deserved tributes to Alan on his public life but rather to say something about Alan's personal qualities, through the prism of recollection.

Alan and I had a quite unusual experience going overseas in relation to a Victorian patent case in the late 1980s. It involved the

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Supreme Court of Victoria taking evidence on commission in Southampton, England. The local Southampton newspaper, The Echo, had a headline which screamed "Aussie judge here to quiz city egghead". The Aussie judge was Mr Justice King. As you might expect, the arrangements were elaborate and they involved the solicitors acting for both parties having to attend to many administrative matters such as organising payment of the judge's stay while working on the case in England.

One morning in London, Alan thought it was such a beautiful day that he would go for a good walk. For these purposes, he dressed himself in a battered t-shirt, a pair of old torn shorts, and sneakers which had seen better days. Shortly after his walk, as he was planning to change, he received an urgent telephone call from the articled clerk helping our instructor.

Regrettably, I have to say, the solicitors had somehow failed to organise the telegraphic transfer for the payment of the judge's hotel bill. Without delaying to change, Alan immediately dashed across to the Savoy Hotel with his American Express card firmly in the pocket of those torn footy shorts. He saw through the doors that Mr Justice King and his wife had been "bailed up". The staff at the Savoy had separated the judge and his wife from their luggage, which was being heavily guarded by several bell boys, the better I suppose to prevent the judge's possible dash for the door without paying. Alan requested the doorman to let him through. He stood

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on his tiptoes in those decrepit sneakers to speak to the doorman who was about 6 feet 5 inches tall, and wore a top hat, and stated that he was a Queen's Counsel on very urgent business at the Savoy. Secure in the knowledge that no Queen's Counsel would appear thus attired in the city — no bowler hat, for one thing — the doorman drew himself up to his full height, looked down his nose, shook his epaulettes and refused, point blank, to accept Alan's story. He folded his arms firmly across his broad chest: entry was barred. Definitely. It was only a speedily supplied reference from the judge which persuaded the incredulous doorman to relent.

This occasion demonstrated a lot about Alan: his unflagging good humour, his lack of pretension, his generosity and, most importantly, the speed with which he always moved to solve a problem for solicitors.

So famous was he for his alacrity in solving problems that everyone knows of the occasion when he dived under his desk in his chambers to check if his phone was unplugged because it hadn't rung for all of two minutes. Many of his former juniors swear that this happened while they were in the room.

Alan and I had many cases together in the days when the Practice Court was a very busy place. In about the mid-1980s we had a series of cases for a client who ran an alternative music store. She was very hip, in fact so hip that she did not own a skirt. If

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there was any danger she would be wanted for cross-examination Rachel Goldberg would make an emergency dash into chambers bearing a skirt. We were always opposed to Alan Archibald appearing for the large record companies alleging copyright infringement against this client. Alan (Archibald, that is) was like a surgeon with a busy operating list. He would dissect our affidavits, probe around a bit then stitch us up with some remarks about the paucity of our defences. By 11 o'clock or so he would have obtained several injunctions and a few draconian collateral orders for good measure and we would all be out of there.

Our client came to understand and appreciate the power of the injunction so much that eventually we went on the offensive seeking an injunction and other relief against one of the major record companies. It was alleged that it was engaging in restrictive trade practices in suing our client for copyright infringement when the copies were genuine but were not brought into the country by the record company itself (presumably because the commercial interest in them was minimal). The word "megillah" crept into our submissions and I think even found its way into the reasons of Mr Justice Nathan. To me it sounded as though Alan was urging that there was a "book" of pro-competition theory and law and the judge should "throw the book" at the record company. Instead of our normal sparring partner, Alan Archibald, who was unavailable, Cliff Pannam turned up. He didn't worry about dissecting our affidavits or commenting on our submissions. He was completely fired up

about the injustice of our application. There was no possibility of getting away by 11 o'clock. Cliff was just building up a head of steam on the "balance of convenience" at 10 to 1. This made Alan just a little bit terse. It is the only occasion on which I have ever seen that happen. Alan said to me as we were leaving court that he wouldn't be back after lunch as he had a number of conferences lined up. I wanted to discuss what I thought would be the good points to make in reply. Alan then sought to demonstrate the improbability of our position. It was a Jewish man to Irish woman sort of remark. He said something like: "Don't worry. If we get this injunction I'll dance a jig in Bourke Street." I telephoned Alan at 3:30pm. "Are you still in conference?" "Yes". "Well there's a large crowd gathering in Bourke Street."

Our triumph was short lived. Alan Archibald was available for the expedited appeal. When he finished his submissions in reply we had an experience similar to what many of you may have had at that time. The presiding judge thanked Alan Archibald, spoke briefly to the colleagues on the other side, took the top off his pen and proceeded to uphold the appeal ex tempore. To answer the thought bubble over everyone's head, yes it was indeed Mr Justice Brooking.

Last week I was having dinner in Aspen, Colorado with a Rabbi from Pittsburgh. I explained tonight's occasion and enquired whether I could practice my pronunciation of a few words I might need to use. He readily agreed. I tried out "tachless". He laughed

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and said "tachsless — brass tacks — right?" This word was always employed by Alan when giving exquisitely ambiguous guidance in circumstances where Ron Merkel was on the other side, trying to settle. Alan would say "Under no circumstances speak to Ron unless he's ready to get down to tachsless and if he is ready to get down to tachsless don't speak to him anyway, just let me know."

I mention this because working with Alan gave limited but privileged access to the things he valued — his family, his culture and his religion. Then there was music and his love of other performance and visual arts — all of which he shared.

At the Tricontinental Royal Commission, Peter O'Callaghan and Alan appeared for parties with similar interests. As you might expect, they generally kept their own counsel. However, on the rare occasions when they intervened, they practised what I will call "duet advocacy".

Such interventions always started with Peter getting to his feet and directing a handsome compliment to counsel assisting. This was the soothing preliminary to a submission that some evidence which had just emerged under the cross examination of counsel assisting should be completely disregarded because it was inadmissible whichever way you looked at it. This would be followed by Alan respectfully adopting everything said by Peter, then expressing heartfelt sympathy for the Commissioners for the

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complexities of their task. I've given up trying to recall whether there was ever an occasion on which this duet advocacy failed to work.

As Bob Baxt has mentioned, Alan's snatching of a forensic victory as an intervener in *Queensland Wire* is well-known. There was another occasion when Alan was appearing with David Shavin to seek special leave in the High Court in *WA Pines*, a matter concerning s 155 of the *Trade Practices Act 1974 (Cth)* — something the Court had only recently looked at in another case. Alan's opponent made the mild and, one would think, reasonable submission that special leave should not be granted because the Court had only recently considered the points Alan was making. "Yes", said Chief Justice Mason, "but no-one has made the points quite as Mr Goldberg has." Special leave was granted.

I think such recollections are sufficient to remind everyone of what a pleasure it was to work either with Alan or opposed to him. He was a barrister who was uncommonly resourceful intellectually. He had an inexhaustible capacity to consider all sides of a case including the funny side.

Turning to his work as a judge, Alan was always calm, courteous and scholarly. One of his greatest legacies was that losing parties could leave his court feeling that they were treated with unfailing politeness and abundant fairness. This is an

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inestimable contribution which a trial judge can make to the administration of justice. As president of the Competition Tribunal Alan also showed tremendous leadership through his capacity to balance private and public interests as they must be balanced in the competitive economy of a modern democracy. Much of what he did there was groundbreaking, with great consequences for the community.

Alan's enormous contributions to public life — contributions of his time, his mind and his benevolence — are captured succinctly in the citation made when he was honoured in 2005 by being made an officer in the Order of Australia. It read:

"For service to the judiciary, particularly in the areas of competition law and equity, and to the community as a contributor to debate on human rights and civil liberties, and as a supporter of the arts."

Let me finally touch on Alan's contribution to the lives of us, his friends. Alan is a person whose manifold talents are coupled with a warm and generous personality. He is always across the zeitgeist; it is no accident that he was one of the first barristers at the Victorian Bar with a manbag. His supple and resourceful mind is never closed to new ways of thinking about things. Accordingly he is a great conversationalist, witty or grave as the occasion demands. Adversity is not unknown to Alan but his sunny temperament never falters. Friendship with him is life-enhancing. He is one of those persons to whom it is possible to pay the highest compliment by

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saying "I'm glad to share the earth with him." On that note can I ask you to join me in a toast to Alan.