WESTERN AUSTRALIAN CIRCUIT

LAW SOCIETY DINNER SPEECH

Your Honours, ladies and gentlemen, as I recall, the last time I was in this room was some four years ago for the celebration of the sesquicentenary of Supreme Court of Western Australia. It was a grand occasion. It did not occur to me then, however, that I should be back here so soon; still less in this capacity.

Of course, I am very pleased that it has turned out as it has, on both counts, but I do understand that what may be cause for one's delight is not infrequently the basis of another's disappointment. For example, just last week in Canberra, the Court lunched with a respected Canberra-based female academic who, when my appointment was announced late last year, went into print with a vigorous denunciation of the enormity that Justice Crennan's replacement would not be a woman. Then, not to be outdone by his female colleagues as it were, some months later, a respected Queensland-based male academic put out a tolerably well-reasoned piece on why, given that the Government was taking the opportunity of replacing Justice Crennnan with a man, my appointment should be viewed as a lamentably wasted opportunity. It is also fair to assume that there would also be similar, as well perhaps additional,

shall I say, territorially based, regrets expressed on this side of the country; and, being as objective as I can, who am I to gainsay them.

Moreover, looking back to when I was at the Bar, and from time to time had the good fortune to be briefed to appear here, I am reminded of some essential differences between Eastern and Western Australian legal practitioners' attitudes to Western Australian litigation.

For example, ask a Sydney lawyer about Western Australian litigation and they are likely say that the main thing wrong with it is that the parties did not choose to litigate their dispute in the Supreme Court of New South Wales. Ask a Victorian or perhaps Queensland lawyer, and they will probably tell you that the only thing wrong with Western Australian litigation is that it is such a long way to get here. But, ask a Western Australian lawyer, and the most common response in my experience is that the main thing wrong with Western Australian litigation is that the smarties from the East think that they can come here and run the show.

Now, as you know, the majority of the High Court are not from New South Wales and I suspect that we of the majority are as unexcited by Sydney centricity as any Western Australian. And, as to regarding Perth as being a long way away to come, even you who are here would have to allow that that is fair. But, as to coming here intent on running the show, contrary to what you might think,

there are in fact very few of us from the East who would even begin to dare. Young players might make that mistake for a while, but one soon learns to respect the ferocity of the local combatants.

Much as with the rules of ancient warfare, one learns that Western Australian litigation depends largely on custom and, in the words of Hornblower and Spawforth, "to show a constant conflict between the standards of optimistic theory and the harsher standards permitted by actual usage".[1] Thus, just as in ancient warfare, so also in Western Australian litigation, one learns that passion and expediency not infrequently cause fundamental rules to be violated.

Just as in ancient warfare, where the temptation to profit from a surprise sometimes led to the opening of hostilities without a declaration of war, so too in Western Australian litigation, one notes a strong predilection for quick and dirty Friday afternoon Marevas, Anton Pillars and other such forensic delights.

Just as in ancient warfare, where it is said that plundering and the destruction of crops was regarded as legitimate, so too in Western Australian litigation, there is evidence of a propensity to appoint receivers and liquidators to pick over corporate carcasses

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1 Hornblower and Spawforth (eds), *The Oxford Classical Dictionary*, 3rd ed (1996) at 1618.

and then to litigate on the back of the takings 'til the fund has run dry.

And just as in ancient warfare, of which it is has been said that that what was practised during the Hellenistic age became more humane, but that standards once more deteriorated with the wars of Rome and Philip, one sees here a modern day parallel in the progression in Western Australia from the one time enthusiastic embrace of the relative ruthlessness of *SPC v Sali*,[2] to the later more caring and sharing beneficence of *J L Holdings*,[3] and now, under the guidance of an evidently reinvigorated High Court, a return to the to the stark post-modern reality of *Aon Risk Services*.[4]

More seriously, however, just as in ancient Rome, where it has been said that technical expertise for battle order, command and control resided with the legions, especially at centurial level, and that a continuous tradition of skill was developed and passed on; so too in Western Australian litigation, the expertise to prosecute proceedings both large and small surely resides in a justifiably proud Western Australian legal profession where a continuous tradition of skill has been developed and is constantly improved.

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2 (1993) 67 ALJR 841; 116 ALR 625.

3 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.

4 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

Enough, however, of litigation. Western Australians may not often think about it but, for those of us who come from elsewhere, this State presents as an extraordinary part of the country. As we know, it occupies more than a third of the land mass of the continent, and yet it holds little more than a tenth its population; it is responsible for more than half the country's mineral and energy exports, and just under half of Australia's total exports, and yet the majority of its land mass is either semi-arid or desert; it comprises some of the hottest locations in the country and yet it produces some of the best wines in the world; and, most remarkably, it is vastly over-represented amongst the ranks of Australia's high achievers.

One thinks for example of the great state politician, and federal founding father, John Forrest, without whom Western Australia might now be a foreign country. Then there are latter day statesmen and politicians like Sir Paul Hasluck, Bob Hawke and Kim Beazley. In other walks of life, there are wonderful contributors like the great present day physician and noble laureate Barry Marshall, renowned epidemiologist Fiona Stanley, eminent neuroscientist Lyn Beazley, authors like Tim Winton, more controversially, the authoress and sometime communist, Dorothy Hewett, and perhaps best known of all, the legendary Olympians Shirley Strickland and Herb Elliot.

Western Australia's contribution to the law is still more remarkable. Even in my time in the profession, there have been three outstanding Western Australian Chief Justices: the great Red Burt, the very scholarly and dignified David Malcolm and now Chief Justice Martin, against whom I had the pleasure to appear when we were both at the Bar. Then there is the striking depth of legal talent at other levels of the Western Australian judiciary of which, to name but a few examples, I have had the privilege of seeing at first hand judges like Geoffrey Kennedy, Howard Olney, William Pidgeon, Paul Seaman, David Ipp, Neville Owen, Christopher Steytler, James Edelman, and Eric Heenan.

So too, in the High Court, Western Australians have made an inordinate contribution. Granted, it took a little longer than it should have for the first Western Australian to be appointed. But there has been no looking back since then.

Sir Ronald Wilson was not only a fine judge but also an exemplary human being. Lay churchman, Human Rights Commissioner, advocate for recognition and advancement of indigenous Australians and refugees. Arguably, his contribution would in aggregate be unsurpassed by any other judge of the Court to date, and that is even more remarkable than it would otherwise be in view of his humble and difficult beginning and brave wartime service as a Spitfire pilot in Great Britain. How many of us would have had the strength of character to undergo all that and then come

back to a post-war law degree from the University of Western Australia, followed by a Fulbright Scholarship and a Master of Laws degree from Pennsylvania, advancement to Crown Prosecutor and then Solicitor-General, and finally appointment to the Court in 1979?

Given that Sir Ronald was a Western Australian, it is fitting that, with the possible exception of Justice Callinan, he was also one of the High Court's great federalists – and for that reason, too, his judgments in Constitutional cases, not to mention other areas of law, are of continuing potential significance.

The late John Toohey, whose service to the Court we commemorated on Monday, was a man of a different generation and of a different kind, but certainly of no lesser stature. And, like Sir Ronald Wilson, and a disproportionately large number of other eminent Western Australians, he was a powerful contributor to the advancement of indigenous Australians.

As the Chief Justice recalled on Monday, Justice Toohey had a first class private law mind and yet at the same time an innate sense of public right. As such, he was a central constituent of the Mason Court and therefore central contributor to what may be considered some of the greatest advances in judge-made Australian private and public law since federation. One may think of *Verwayen*,[5] *Mabo*[6]

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5 *The Commonwealth v Verwayen* (1990) 120 CLR 394.

and *Kable*[7] as marking out the boundaries of the large land mass of legal advancement in which Justice Toohey was powerfully influential.

In passing it might also be noted that the last of those cases, *Kable*, could not have occurred but for the work of yet another Western Australian, Walter James, who, much earlier in this country's history, initiated the autochthonous expedient of investing state courts with federal jurisdiction.

For obvious reasons, I shall not say much of the third Western Australian to be appointed to the High Court, the present Chief Justice, Robert French. Decorum demands that we wait at least for some years until after his Honour is forced to retire at the statutory age of senility before we say what we really think of his Honour's contribution to the jurisprudence. But may I observe, I trust without embarrassing him, that, quite apart from his contribution as Chief Justice, his record really speaks for itself: almost 22 years as a judge of the Federal Court, including four years as President of the Native Title Tribunal and before that three years as Chairman of the Westralian Aboriginal Legal Service, three years as a member of the Westralian Legal Aid Commission, three years as Commissioner of the Australian Law Reform Commission and a time as an Associate

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6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

7 *Kable v New South Wales* (1996) 189 CLR 51.

Member of the Trade Practices Commission, to name only some of the many of his roles comprising a lifetime of dedicated and distinguished service to the law at the highest level.

I shall say even less of the fourth Western Australian to be appointed to this Court, my sister Gordon, because I know that she would excoriate me if I were to say any more. I content myself with the observation that when my colleagues and I at the Victorian Bar first encountered her as a young solicitor freshly arrived in Melbourne, still short of 30 years ago, we had no doubt that she was bound to go very far very fast. That she has gone as far and as fast as she has is not the least surprising.

As it happens, my father was a Western Australian, albeit that he left here for Melbourne during the 1950's and thereafter spent a large part of his life in Melbourne and Canberra. Like some other Western Australians are wont to do, however, he retained the habit throughout his life of referring, a little derogatorily I think, to Eastern state residents as "wise men from the East" and he held fairly firmly to the view that any Western Australian who was inclined voluntarily to migrate from West to East must be of such diminished mentality compared to fellow sandgropers that the migration would likely increase the average IQ in both places.

Having a foot in both camps, as it were, I am not inclined to express a concluded view on the validity of that proposition. But,

given the extraordinary volume and quality of this State's contribution to the advancement of the nation in just about every worthwhile walk of life, it would be difficult to deny that there is more than a little in it.

As you know, the Court no longer follows the practice of coming to Perth on Circuit once each year. Nowadays we come only when there is sufficient work to demand it and, for the time being, that is proving to be to be less often than before. Worse, only a few months ago, the intensity of the dispute about this State's share of GST revenue, and the consequent renewed threat of secession, seemed to reach a point where one wondered whether we would ever get here again. But happily that impasse seems to be behind us for the time being and, as citizens of this Commonwealth, may we all hope that it continues to be so.

Your Honours, ladies and gentlemen, I have spoken for long enough and I have possibly said too much. On behalf of all members of the Court, we are honoured to share this evening with you and we are indebted to you for your gracious hospitability.