

LAW SOCIETY OF WESTERN AUSTRALIA

HIGH COURT DINNER

WEDNESDAY, 24 OCTOBER 2001

85 JOURNEYS TO PERTH

The Hon Justice Michael Kirby AC CMG

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I

I thank Simon Freitag for his brilliant speech to honour the toast to the judiciary. He is so full of good advice and homilies for the Justices of the High Court that I can assure him we are looking forward with eager anticipation to his appearances so that we can give a little advice of our own in return. His is a name we will certainly remember.

The Court has come here with two equally talented young lawyers from Perth. They and Simon Freitag demonstrate what an outstanding profession is being trained in Western Australia. One of my associates, Bruce Leishman, is the first law graduate from

* Justice of the High Court of Australia. Text for the address to the High Court dinner, Perth, Western Australia, 24 October 2001.

Murdoch University to be appointed an associate in the High Court. Jan Syminton serves as research officer for all of the Justices. She is one of the foundation graduating class of the Notre Dame Law School. With such outstanding talent, the high calibre of the legal profession in Western Australia seems assured.

I have been waiting patiently for an opportunity to speak at this dinner. I have been coming to Western Australia since 1975, when I was first appointed to judicial office. At that time, the Chief Justice was Sir Lawrence Jackson. The judges of the Supreme Court were Justices Virtue, Burt, Lavan, Wickham, Wallace, Jones and Wright. There was no Federal Court, Family Court or Federal Magistrate's service. The judiciary and the profession were smaller.

I could comfort myself about the long delay in receiving this call by the knowledge that Sir Anthony Mason had to wait twenty years before he was invited to respond to this toast. Even a confirmed ego-maniac and narcissist, he said, would draw the inference that he was not held in high regard as an after dinner speaker.

When, at last, his chance came Justice Mason was mortified to be told that he had but two or three minutes - about a minute per decade. Eventually, with the intercession of Justice Toohey, a longer address was negotiated evidencing a flexibility in matters of

time for which the High Court too is justly famous, especially on special leave days.

II

We in the High Court recognise the spirit in which Mr Freitag's speech has been delivered. We have had almost a century to get used to the special way in which the profession in Perth has welcomed our annual visits.

The first sitting of the High Court was held in Melbourne, then the federal capital, in October 1903. At that time, the Court had no permanent facilities. It had to make do with a few rooms in the Supreme Court of Victoria, put aside for its use. Section 12 of the *Judiciary Act* 1903 required that sittings of the Court should be held, as required, in each place in which there was a District Registry. Such a registry was established in Perth. Thus, the prospect of a visit here loomed soon after the Court was established.

Imagine the excitement of the Justices when they heard that, out of the generosity and warm feelings of the profession in Western Australia, a special room had been set aside in the Supreme Court building in Perth which would be dedicated to the High Court. The curiosity of the first three Justices soon got the better of them. Within seven weeks of their inaugural sitting in Melbourne they arrived in Perth to inspect the palace which they believed to be

waiting for them. When you deduct the time spent in the sea travel you will get a measure of the frisson of excitement with which the foundation Justices approached their Perth premises.

Never since the eyes of King Henry VIII first fell upon the unlovely face of Anne of Cleves, so different from the portrait by Holbein which had inflamed his carnal appetite, has a look of such disappointment been witnessed as when Griffith, Barton and O'Connor entered the High Court room in Perth. It was subterranean. It was famous for its rats and cockroaches. No biscuit jar (the small delight of a judge's life) was ever safe from the vermin. In the middle of the room was a large leather armchair, held together by glue, which gave off an aroma of putrid delicacy.

The Justices kept telling themselves: "Be it ever so humble, there's no place like home". Ever since that moment, they have been in no doubt about the particular love in which they are held by the profession in the West.

Chief Justice Mason, ninety years later, described his astonishment in discovering, on his appointment, what he was so ungrateful as to describe as the "meagre accommodation provided for us in the Supreme Court". He even went so far as to say that it was an "exceedingly small room - slightly larger than a dog kennel" into which he and Justices Gibbs and Stephen were bundled. It soon became known that the aroma of that leather chair worked a

spell upon the vermin. It was the glue that did the trick. It seems that a particular variety of glue used in Perth between the years 1932 and 1951 was irresistible to western cockroaches. Alas, the same glue that held together the High Court's leather armchair was used in the binding of the *Appeal Cases* between those years. In the result, half of every page was gobbled up leaving a great void in the collected jurisprudence of this State.

Some scholars have attributed grave legal error to the missing volumes. Just imagine going through life without *Donoghue v Stevenson*? Or *Liversidge v Anderson*? Or the *High Tree Case* and Lord Denning's immortal early prose? Some unkind critics have even alleged that the errors they detect in *Nagle v Rottnest Island Authority* derive from the inability of the High Court to check the applicable principles in *Donoghue v Stevenson* - because the cockroaches of Perth had got there first.

Eventually, upon the appointment of Sir Ronald Wilson as a Justice of the Court, the first from Western Australia, a profound change occurred. In a great march, rivalled only by Napoleon's manoeuvres through the Pripet Marshes, Sir Ronald led the High Court up the grand staircase to new premises adjacent to what is now Courtroom No 4. Full of nostalgia, I leapt up the stairs during this visit to Perth to revisit the place where the Justices were huddled together during the Wilson and Toohey years before the austere Commonwealth Court Building became our humble home.

The room is now occupied by orderlies and computers. It was bigger than a dog kennel; but not much.

III

The first case heard by the High Court in Perth was *Murray v Collector of Customs*. At the Bar were Pilkington, Burt KC and F M Stone, still famous names in the West. It was a case about tariffs. In haste to depart their dungeon, the Justices gave their decision on the spot. The losing party immediately sought a certificate under s 74 of the Constitution to appeal to the Privy Council. This request was refused as were all but one of those that followed.

The second case in Perth was *Backhouse v Moderata*. By this time, a year after the first visit, the Court had picked up some of the habits of the Privy Council. Special leave to appeal was refused with the use of that enigmatic phrase that the decision below was "not attended by sufficient doubt". I never use that formula myself. When, in my days in the Court of Appeal it was used in respect of one of my judgments I lost sleepless nights over its meaning. Did it mean that my efforts were attended by doubt, even a lot of doubt - simply not *sufficient* doubt to engage the High Court's attention?

The third case was *City of Perth v Malley*. Unsurprisingly, this involved a problem concerned with sewers and the drainage of land. You can imagine the alacrity of the Justices as they fell upon that

problem fresh from their sub-riparian accommodation. Needless to say, the City of Perth and the cause of vermin eradication won.

True to the injunction of the *Judiciary Act*, the High Court has been coming to Perth ever since those early days. In 1905, the editor of the *Commonwealth Law Review* asked the Attorneys-General of the States and of the Commonwealth about whether the annual peregrinations should be maintained, given the costs and inconvenience involved. The Attorney-General of Tasmania urged that the journeys should be retained "temporarily at least". Queensland hinted darkly that if they were not, litigants might just as well appeal to the Privy Council. The Attorney-General of Western Australia, W F Sayer, urged that the High Court should hear appeals and other business in the State in which the matter arose. He pointed out that it was desirable for the Court to have the assistance of counsel and practitioners "experienced in the laws of the State". So it proved this week in Perth in an appeal that involved the practice of the courts of Western Australia. Those of us brought up in the barbarous rules of pre-*Judicature Act* practice in New South Wales, often need a lot of help with the rules of other enlightened States.

W B Higgins, who had been Commonwealth Attorney-General answered the enquiry in suitably enigmatic fashion. He said that the judges had ample time for travel around Australia. Then, somewhat contradictorily, he expressed the opinion that they were overworked

and needed immediate enhancement of their number. Blessed with such combined illogicality and solicitude, it was unsurprising that soon afterwards, Higgins found himself appointed to the High Court, sharing in the joys of its Perth facilities.

There have been only two interruptions to the annual visits to Perth. Between 1932 and 1934, the visits were suspended by Order in Council made under the *Financial Emergency Act*. Between 1938 and 1945 there were no visits, for the most part due to the wartime emergency. But they were resumed as soon as the war ended. There was no stronger proponent for the annual pilgrimage than Sir Owen Dixon.

In 1980, when the Queen opened the Court's permanent building in Canberra, Chief Justice Barwick hinted darkly that the annual visits would cease. But he was quickly succeeded by Chief Justice Gibbs, a Queenslander, who resolutely supported the retention of this link with the judges and lawyers of the West. So far as I am aware, there is no danger to this settled aspect of our lives. And so it is that, for the eighty-fifth time, the High Court Justices are back in Perth.

IV

In the centenary year of federation, it is natural that we should look back, and remember, our history in this way, with its mixture of

achievements and failures. The magnificent vista of the city of Perth, which is the backdrop to this dinner, symbolises the most attractive nation that has been built under the protection of the Constitution. The War Memorial, illuminated behind me, reminds us of past and present dangers.

At the closing ceremony of the Australian Legal Convention held recently in Canberra, the President of the Law Council of Australia, Anne Trimmer, reviewed the great changes that had come upon the legal profession in the course of the past century. At its beginning, half of the lawyers of Australia lived and worked in country towns. Now 80% are based in the cities. There has also been a shift to large firms, although the separate Bar remains an occupation for individuals and 50% of all solicitors work in an establishment with fewer than four participants all up. At the beginning of the twentieth century, the staple work was probate, conveyancing and criminal litigation. The century saw the advent of motor cars, factories and the negligence explosion. The future promises the challenge of technology and new opportunities there for lawyers to serve.

But the biggest change that came over the profession in the past century was the arrival of women lawyers. In 1900, in Western Australia and New South Wales, women were unwanted. The courts held that Edith Hayes and Ada Evans were not "persons" for the local *Legal Practitioners' Act*. They could therefore not be

admitted to practice. Now, women are everywhere in the law and their number and influence increase every year.

Some things have remained the same, as Anne Trimmer pointed out. Back in 1842, Governor Gipps in New South Wales attacked the legal profession. Captain James Sterling, arriving at the Swan River with twelve law books in 1829 was equally cautious. Today, it seems, judges and lawyers must live with constant criticism from the Executive, the media and just about everyone else.

Some of this criticism is perfectly justified, as we know only too well. We have all seen colleagues smile at the mistakes of a litigant in person struggling to understand our complex rules. We have all witnessed unrepresented prisoners striving without legal assistance to advance their arguments. No court must ever be indifferent to their entitlement to justice in accordance with law and respect for their human dignity. Sometimes, in the century past, lawyers have been the instruments of oppression and injustice. It was lawyers who devised the rules that at first kept women out of their own profession. It was lawyers who invented the notion of *terra nullius* and denied Aborigines their land rights until, in *Mabo*, lawyers changed the law's direction. It was lawyers who devised and upheld the dictation test and enforced White Australia. It was lawyers who prosecuted the criminal laws against homosexuals.

We all know these things. We know that, as a profession, we have not done enough for law reform or for pro bono work or for legal education.

Yet at critical times in the past century lawyers have upheld the fundamental principles of the rule of law. The High Court did so in the *Communist Party Case*. In *Dietrich*. In *Mabo*. In *Kable*. And in many other cases. And it is necessary to say that when the law went wrong, it was often in judgments that were brief, unanimous and erroneous. The judges who gave them were celebrated. Brevity is good. But justice is better.

Laughter and nostalgia are a potent mix. But an even more important ingredient for a night such as this is a reminder of the importance of our role as judges and lawyers. For we are the alternative model for the world. At this time, and at all times, the choice is there. It could not be more stark. Terror. Brute force. And law. And we are for law. In eighty-five years and eighty-five times eighty five, it will still be so.