

**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT**

Friday 25 March 2011

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE TOBIAS AM RFD
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

1 **SPIGELMAN CJ:** I take as my text a poem by the late Peter Porter, one of Australia's greatest contemporary poets. The poem bears the title which some might regard as incongruous: "Tobias and the Angel". It is based on the visit of the Angel Raphael to the righteous Tobias. The Book of Tobias is part of the Catholic and Orthodox biblical canon, albeit not accepted in the Hebrew Old Testament. Appropriately, however, Porter's poem is about departure.

2 The first two lines are:

"When I play the sad music my conscience urges,
I hear through the great summary of our loss
..."

3 The penultimate stanza of the poem is:

"I shall get home one day or if I die instead,
An Insurance Angel will tell my waiting wife,
His grave is furnished by his good upbringing,
His habits were proper, his doubt all to the good;
From his warm orthodoxy melancholy shrinks,
He did what he was told, obedient and sane."

- 4 But for the reference to obedience, these are words that can be applied to Justice Murray Tobias: “good upbringing”, “proper habits”, ‘purposeful doubt’, “warm orthodoxy” and, underlying it all a fundamental ‘sanity’.
- 5 I know I speak on behalf of all of the judges of this Court, when I highlight at the outset, the contribution you have made to the collegial atmosphere of the Court. We have all been the beneficiary on a personal basis of your generosity of spirit, your intelligence, your thoughtfulness and your compassion. These personal characteristics are also reflected in your conduct during hearings and in your judgments.
- 6 Your principal professional characteristic, which I wish to emphasise is your rigour. As many of your judicial colleagues experienced at the bar, often to their cost, and on the bench, always to their benefit, your Honour approached every legal task in a meticulous, conscientious and complete manner. There were no gaps in your preparation, nor in your judgments.
- 7 You brought to the Court the wealth of experience acquired by a silk who had been at the top of the profession for over two decades. This Court has had the benefit of that experience across the entirety of its civil and criminal appellate jurisdiction. There are two particular features of your contribution which I wish to highlight.
- 8 First, your Honour has an extraordinary capacity to deal with complex fact situations and to ensure that all of the varied elements of a case were properly assessed and placed in their correct sequence and relationship. These skills explain in large measure your Honour’s extraordinary success in planning and environment law at the bar. It is a field which always involves multiple interrelated variables. This was a skill set that you successfully deployed in the full range of civil appeals in this Court. Your colleagues who sat with you in complex fact cases always appreciated the thoroughness of your preparation and of your judgments.

- 9 Secondly, although your legal learning was broadly based, your depth of knowledge and understanding of every aspect of planning and environment law and of administrative law was simply unsurpassed.
- 10 Your Honour has delivered influential judgments which will continue to be relied upon in the future on a wide range of areas of the law. This includes native title, estoppel, rectification, indefeasibility, easements, jurisdictional facts, procedural fairness, legal professional privilege, delay in proceedings under the *Corporations Act*, indemnity costs in untenable appeals, directors and officers insurance, workers compensation, exemplary damages, unconscionability in contracts, the application of development standards, the validity of local environmental plans, development consents, local government notices, conditions on a development consent, and of a purported delegation of council powers.
- 11 Your Honour brought to the Court of Criminal Appeal relevant experience acquired in criminal trials in the Navy, where you appeared as prosecutor and defence counsel whilst head of the New South Wales Reserve Legal Panel and later presided over such trials as Judge Advocate. In the Court of Criminal Appeal you presided over conviction appeals raising complex issues of evidence law which appear in virtually every conviction appeal, conduct by the Crown, inconsistent verdicts and a wide range of sentencing issues.
- 12 In addition to this formidable output of judgments, your Honour has made further contributions to the administration of justice and to the legal profession as a judge.
- 13 You have always manifested a concern for the maintenance of professional standards. This was a product of your personal sense of fairness and also of your strong belief in the traditional professionalism of the bar. You brought with you to the bench a firm commitment to maintaining the symbiotic relationship that has always existed between the bar and the bench requiring mutual respect. The strength of your

commitment to the fundamental ethical principles of the profession is manifest throughout your judicial service.

- 14 Your sense of courtesy, particularly to counsel, has ensured that the atmosphere in the courtroom was proper and appropriate. On one occasion that I heard about at the time when you were presiding in the Court of Criminal Appeal when a judge, now a former judge, of this Court was engaged in a somewhat vigorous exchange with counsel, you adjourned the Court for a few moments and during the adjournment you informed the judge that you were not prepared to preside in a case in which counsel was treated so rudely. On return, the conduct stopped.
- 15 You have served for four years as Deputy and then Presiding Member of the Legal Profession Admission Board. To this role you brought your deep commitment to the profession as an institution and to the importance of maintaining its ethical standards, promoting its competence, preserving its independence and reinforcing its integrity.
- 16 There were two developments of particular significance for the future of the legal profession to which you made a critical contribution during your tenure of this office.
- 17 During the period a national set of Uniform Principles was adopted with respect to the admission of overseas lawyers to practise in Australia. In many respects these Principles were over engineered to say the least. They reminded me of an earlier time when the Commonwealth government was seeking to corral all of the States to adopt a system of uniform censorship, so that material then regarded as salacious by some, which was permitted to be imported into Australia, would not be banned in some States. The then Attorney General of the State of Victoria, Sir Arthur Rylah, sought to protect the morals of, as he put it, his teenage daughters. I recollect a cartoon in *The Bulletin* which depicted Sir Arthur sitting in a chair encased in a straight jacket. The caption read, "Of course I believe in uniform censorship and I will supply the uniform."

- 18 The Uniform Principles for admission of overseas practitioners had a somewhat similar quality. They would have been applied so as to exclude overseas practitioners of considerable experience and skill. Under your Honour's leadership the Board ensured that this straightjacket was removed, leading to a change to the Uniform Principles, to the great advantage of the administration of the law throughout this nation.
- 19 The second matter I wish to acknowledge in this respect is the critical contribution your Honour has made in the deliberations to establish a uniform regulatory system and, thereby, create a national legal profession. With your Honour's usual thoroughness and attention to detail you served as a member of the National Legal Profession Consultative Group. Your efforts were always directed to ensuring that the reality of an independent profession would be maintained by this new regime. In some respects this was a reprise of your Honour's significant contribution when you were President of the New South Wales Bar Association in an earlier period of comparable legislative change.
- 20 I relied on your advice in these respects for my own involvement in this issue including in the deliberations of the Council of Chief Justices. I am particularly grateful for your assistance in this respect. The legal profession owes a great deal to your diligence during this period.
- 21 The strength of your commitment to the profession is a product of your personal history both as a barrister, as a silk, as an elected member of the Bar Council with some interruptions from 1976 until your election as President in 1993, of your family background as the son of one of the most esteemed solicitors in the city who worked as a solicitor for 58 years and of your education at the University of Sydney Law School and at Oxford. You are a great example of the tradition of the common law and of the bar which traces its roots to England as you have always understood, maintaining to this day a number of your connections to Oxford and with your fellow students in the BCL course.

22 For that reason perhaps it is appropriate for me to end as I began with a poem from Peter Porter, who lived most of his adult life in England, but still reflected his Australian roots in his poetry.

23 Porter's poem *The Last of England* concludes:

"Sailing away from ourselves, we feel
The gentle tug of water of the quay -
Language of the liberal dead speaks
From the soil of Highgate, tears
Show a great water table is intact.
You cannot leave England, it turns
A planet majestically in the mind."

24 So it has been with your Honour. England has turned majestically in your mind, to the great advantage of the legal profession of this State and of this Court.

25 **MR T BATHURST QC, PRESIDENT, THE NEW SOUTH WALES BAR ASSOCIATION:** It is my privilege to have the honour to speak on behalf of the Bar today. I was going to say that I was delighted to do so but thought that might be misinterpreted. Your Honour's retirement is in truth a great loss to the Court and to the community generally. Today marks another milestone in a career notable for its service to the law and community. I do not propose to dwell on your Honour's early years at the Bar except to remind everybody that you read with one of the great Equity lawyers in this State of recent times, Mr John Kearney, as his Honour then was. The late Justice Kearney was a man of great learning coupled with charm and humility, a truly great judge. Your Honour has shown those qualities throughout your Honour's career both at the Bar and on the Bench.

26 Your Honour's career from a highly skilled junior to one of the undoubted leaders of the Bar is well known. For many years you were the silk of choice in the Land and Environment Court. The skills which the Chief

Justice has referred to provide ample testimony to why that was so. Your Honour was also across many other jurisdictions. Your Honour was always in demand in appellate advocacy and brought unparalleled knowledge to the area of administrative law, particularly in fields such as local government.

- 27 Notwithstanding the extent of your Honour's forensic skill you will be most remembered for the service you gave to the Bar and the legal profession outside the confines of the courtroom. As the Chief Justice has said, your Honour was President of the Bar in 1994 and 1995, a time of real turbulence for the Bar and the profession. The interaction of the national competition laws with the zeal of some reformers made that period a turbulent and difficult time. Your Honour's skill and determination produced an outcome in the interests of the Bar and preserved the integrity of the profession. It was not easy as some of your Honour's comments at the time illustrated. Writing in the winter edition of Bar News of 1994 your Honour commented dryly:

"Those elected to high office are usually permitted 100 days when they can do no wrong. Everything runs smoothly and without aches. I wish I could say that had been my experience."

- 28 Things did not improve. At the end of the year your Honour wrote:

"I commented upon my first 100 days in office referring to it as a period of some considerable turmoil. The following 265 days have not been any easier."

- 29 Notwithstanding this gloom your Honour's dedication to the task produced a result and enabled the legal profession to sail into what might be described as relatively calm political waters until the last couple of years.

- 30 Your Honour served the community in many other ways. You were a member of the Casino Control Authority and chaired an Inquiry into the grant of a licence for the new casino. That of course again was a controversial matter. Your Honour there, as always, never shy from

controversy although you never courted it. You served with distinction in the Royal Australian Navy Legal Reserve as Judge Advocate including defending officers in relation to the grounding of HMAS Darwin in Hawaii which was one of the many matters that your Honour did on behalf of the Reserve. Your services to the New South Wales Bar Association, the Australian Bar Association and military law were recognised with membership of the Order of Australia in 1998.

31 Those who knew you, or thought they knew you, thought you would never go to the Bench but we underestimated the persuasive powers of the Chief Justice in that regard. You have been a model appellate judge, a pleasure to appear before, courteous but incisive in argument and your judgments have been a model of clarity and learning. However, you were not content merely with participating in the work of the busiest court in the country. In 2008 you replaced Justice Windeyer as presiding member of the Legal Profession Admission Board. Once again you dealt successfully with matters relating to the independence and competence of the profession. For example, as the Chief Justice has mentioned, your Honour resisted considerable pressure to remove the Board's discretion to exempt eminent overseas legal practitioners from certain academic and professional training requirements under the *Legal Profession Act*, something which has preserved the openness of this profession and increased its interaction with overseas practitioners and its own ability in that regard.

32 As I said, as President of the Bar Association in 1994 your Honour battled hard and successfully to preserve the integrity of the profession in the face of proposed reform. In 2009 you had to start to do it all over again. As the Chief Justice said, you were appointed in that year to the National Legal Consultative Group, a group intended at least to be consulted on the proposed national profession reform. In that capacity you have worked tirelessly and fearlessly to preserve the integrity of the profession and the rule of law. At first it may have seemed against the odds but your work has contributed significantly to the landscape being altered from one where the independence of the profession was under a very real threat to

one where the draft bill to a very significant extent has preserved the independence and integrity of the profession. I know your Honour is not fully satisfied with the result and I will be surprised if your Honour does not say so but you should take great satisfaction in what you have in fact achieved in that regard.

33 It remains for me on behalf of the Bar to thank you for your outstanding contribution to the legal profession and the community generally. I know you will continue to play an active role in public life but you take with you our very best wishes in whatever you choose to do.

34 **MR S WESTGARTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** “The true gentleman is the man whose conduct proceeds from goodwill and an acute sense of propriety who speaks with frankness but also with sincerity and sympathy and who appears well in any company a man with whom honour is sacred and virtue safe.” I quote from John Whalan’s definition of a true gentleman as published in the *Baltimore Sun* newspaper in 1899. That newspaper had run a competition for the best description of a true gentleman and I have quoted part of the winning entry. Judging by the accolades that have been forthcoming on the occasion of your Honour’s retirement from the Bench it is clear that we are indeed saying farewell to a gentleman in the truest sense.

35 Your Honour, it gives me great pleasure to add my valedictory remarks on behalf of the solicitors of New South Wales. At the time of your swearing-in to the Court of Appeal in 2003 there was some speculation as to why your Honour had waited so long to leap to the judiciary. When you did make that leap it was without any prior experience as a puisne judge, a measure of the high esteem in which your Honour was held by all in and associated with the profession. Whatever the reasons the profession and the public have benefited greatly from your contribution whilst on the Bench. Your Honour did have a practice run as a judge magistrate in 1994 in the case of *R v Askew* where Mr Askew was found not guilty of arson associated with the bushfire at Peats Ridge. Your Honour may not

readily recall this case perhaps because it related to the finals of the Law Society's thirteenth mock trial competition which attracted some 4500 secondary school students and the assistance of 700 lawyers. One aspect of the mock trials that your Honour and many in this Court would appreciate were the time limits which were imposed for reading witness statements, cross-examinations, opening and closing addresses, all up a maximum of three hours. With more than 1200 students competing in the same competition this year should your Honour wish to volunteer your expertise again your contribution would be most highly regarded.

- 36 Your Honour, as I anticipated, the preceding speakers have already poached the highlights of your illustrious career, but I must add that your Honour took to the bench like a duck to water. Indeed, you thrived in the community of judges. Commending your Honour's contribution to the Court, the President, Justice Allsop, has said the following.

"It has been one of the delights of being President of the Court of Appeal to have dealt with Justice Tobias at a personal and professional level. His intellect, conscientiousness and personal warmth have made my job much easier than it might otherwise have been."

- 37 Likewise, your decision to poach a most loyal and wonderful assistant, Eva Adams, from Selborne Chambers, undoubtedly made your Honour's job that much easier. Unfortunately, the benefits of computer technology have continued to elude your Honour and your reputed propensity for loquaciousness - that is not my assessment - has not abated. Of considerable sorrow is that an imminent birthday will of course by force of statute cause your Honour's brain to immediately atrophy. One can only hope that consistent with the appointment of Acting Judges in recent times, your keen intellect and work ethic will not be left to languish long.

- 38 From an early age, there was no doubt that your Honour would pursue a career in the law. In awe of your late father, Raymond, a highly respected solicitor whom your Honour noted at your swearing-in speech in this Court,

continued to hold a practising certificate until his eighty-sixth year, you were from an early age passionate about the law and totally focused on becoming a lawyer. Likewise, your younger brother, Robert, chose to join the legal profession. It remains to be seen if either son can top their father's years of service.

39 Like your father before you, your Honour attended both Sydney University and Oxford. As well as many Prime Ministers, famous writers, actors and academics, Oxford boasts twelve saints. Your Honour is not one of them, although your peers at Exeter College who witnessed your solo crossing of the quadrangle on those freezing frosty mornings to take a winter shower may wish to disagree. Your Honour has maintained strong links with Exeter College and last year helped organise a dinner for old members and friends at St Paul's College, Sydney University.

40 While the law has been a lifelong passion, your Honour's interests are much broader. You care very deeply about social issues and your loyalty to family, friends and colleagues is second to none. Your generosity of spirit is evidenced in the number of charities you support, in particular the Children's Hospital at Westmead. Rumour has it that your Point Piper unit was rented out to the American actress Kate Bosworth during the filming of the movie Superman Returns. Once your Honour had ascertained that the young man you apprehended wandering around those premises was none other than Orlando Bloom, you promptly invited them to stay at your Mittagong home and also to visit the children at Westmead, which they apparently did. If this story is true, this must be one of the few times that that unit was not undergoing extensive renovations. Being someone who needs a project, I am informed that your Honour has never quite grasped the fact that projects tend to have a beginning and an end. Perhaps your Honour has become overly enthused by the Supreme and Federal Court renovations.

41 Your term as President of the Bar Association from 1993 to 1995 grappled with the then ongoing proposals for the restructure and reform of the legal

profession and, as we have heard, was a period of relentless pressure. In 2009 you were given the chance to directly influence the subsequent reform process when there was an announcement that the Honourable Justice Murray Tobias AM, RFD, Justice of the Supreme Court of New South Wales and presiding member of the New South Wales Legal Profession Admission Board, was appointed to the consultative group charged with advising and assisting the Australian government's task force on the reform of the legal profession. However, your Honour's record in eliciting government action is not encouraging. In your Honour's judgment in the 2005 case of *Westpac v 789Ten Pty Limited* which concerned the question of whether solicitors' letters to auditors were protected from disclosure because they were privileged communications, your Honour said, "There is obviously a problem which requires legislative intervention. Five years on we still await that intervention".

- 42 While some may not have shared your views on matters of artistic merit, your strong sense of justice and strength of character in addressing complex issues won great respect and indeed admiration. Your Honour's commitment has particularly been noted by the women you directly and indirectly have championed over the years in both public and private life. The Honourable Justice Margaret Beazley AO, whom your Honour tutored, has publicly reported on her early difficulties of obtaining briefs in a male dominated profession where women were subject to significant discrimination on the basis of their gender. Your Honour was persistent in persuading people to brief her and fought long and hard for rightful recognition. Another colleague from sixth floor, Selborne Chambers, and now a judge of this Court, described your Honour as "the last true gentleman with a heart of gold and the warmest, kindest person I have ever worked with".
- 43 In the early days of your Honour's career, former New South Wales Children's Magistrate, author and long time friend Barbara Holborow, said that as a clerk at a firm of solicitors in Burwood, she briefed your Honour almost exclusively because you were very thorough, knew your law, and

she was very confident in your abilities. Subsequent sojourns to her popular Bowral residence named Zot with the late Barry Robiason made for some wonderful weekends and lifelong memories. Such was the impact on Barbara that she duly named her two cats Tobias and Barry. I hope your Honour is suitably chuffed by this revelation.

44 The solicitors of New South Wales wish you well in your future endeavours and trust that your Honour's departure from this Court will herald yet another rewarding and fulfilling stage of life. As the Court pleases.

45 **TOBIAS JA:** Chief Justice, your Honours, Mr Bathurst, Mr Westgarth, my wife and family, members of the profession, my dear friends from Wunulla Road and other friends, ladies and gentlemen.

46 When I was appointed to this Court on 28 April 2003, I commenced my remarks by referring to my well-founded fear that if I was ever appointed to this Court, upon entering this vast Courtroom I would see nothing but row upon row of empty seats. The same fear enveloped me when I was asked by the Chief Justice, nay told by the Chief Justice, that I would be having a farewell ceremony this morning. It was one of the reasons why I was extremely reluctant to partake in one. I cannot tell you how grateful I am that I have once more been relieved of that fear by so many of you who have taken the time to honour me with their presence today.

47 In particular, I would like to express my appreciation to all those retired and current members of the High Court, Federal Court Supreme Court and the Land and Environment Court, who have also honoured me with their attendance this morning. I have known many if not most of them for up to forty years and I look forward to joining them on the side benches of this Court on future ceremonial occasions. I acknowledge in particular the presence of my dear friend Brian Cohen. Brian was a member of my floor for many years before he became a member of this Court. He was articled to my father's partner as I recollect, and he has known me since I was a

little boy in short pants, which could not have been of much assistance to him.

- 48 Thank you, Chief Justice, for your very kind and generous remarks with respect to my relatively short career as a member of this Court. When some weeks ago you asked me to list for you what I thought were my leading judgments as a member of the Court of Appeal, I indicated to you that there were none, or at least none I was prepared to, or even could, recollect. The fact that your researchers have been able to unearth decisions on the disparate topics to which you have kindly referred, somewhat embarrasses me for I have never thought of myself as being other than in the rearguard of the Court of Appeal's contribution to the jurisprudence of this State. In fact, I can only think of one decision that I thought might fall into that category and it received short shrift in the High Court. It was *Say-Dee Pty Ltd v Farah Constructions*, decided in December 2005 in which I wrote the lead judgment with which the then President, Justice Mason, and Justice Giles were careless enough, as it turned out, to agree. In that decision I adopted what was referred to by Justice Hansen of the Victorian Supreme Court in a 1998 case as the principle of recipient liability under the first limb of *Barnes v Addy* and more colloquially known as the doctrine of unjust enrichment.
- 49 You will appreciate from what I have just said that it was not entirely my original idea. It had its genesis not only in Justice Hansen's judgment but also in English academic writings and some curial and extra-curial comments by some distinguished judicial members of the House of Lords. What was referred to in one article as a safari into the exotic world of unjust enrichment received, as I have said, short shrift from the High Court which, unanimously stated that it was a grave error for the Court of Appeal (meaning myself) to have taken this heretical step, as not only was it very unjust but also had caused great confusion. One recent text described the High Court's decision as a brutal rebuff of the doctrine of unjust enrichment. Professor Peter Butt described it as a "pungent reversal of this Court's decision." You cannot sink lower than that!

50 A reading of the High Court's judgment bears out my comment to its author at a social function shortly after it was published, that it was death by a thousand cuts, a description that did not meet with any disagreement. However, as my confidence and dignity had been trashed, and as some may think that I am still harbouring dark thoughts, I hope that you will permit me the indulgence of referring to two responses to that decision: one to my judgment and the other to that of the High Court. With respect to the former, in a case note in the *Law Quarterly Review* drawn to my attention by Justice Handley (who religiously reads these things), Professor James Edelman, Professor of the Law of Obligations at Oxford University and a Fellow of Keble College, oddly enough the College of which the author of the High Court's judgment was also a Fellow at one point of his illustrious career, in a detailed case note entitled "*A Principled Approach to the Unauthorised Receipt of Trust Property*" - a promising title I thought - described my judgment in the following terms.

"This excellent decision" - let me repeat those words - "This excellent decision achieves the symmetry between common law and equity first contemplated by Lord Hardwicke."

I have to admit that that connection eluded me, at least at the time. The article continued:

"It avoids conundrums such as why a different test for liability in equity should apply to an unauthorised recipient of assets belonging to a company at common law."

I never thought of that either.

51 No one, let alone an Oxford law professor, has ever described anything I have written, before or since, in such glowing terms. I was suitably chuffed until I was brought down to earth with a thud by an article published a short time later in the *Australian Law Journal* that was highly critical of my so-called safari into the exotic world of unjust enrichment.

- 52 The second response that has helped heal my damaged pride came from my former research assistant, now reading for the BCL at Oxford University, restitution being one of her subjects. She emailed me a couple of months ago indicating that one of the difficulties with the subject was that none of the eminent professors teaching it agreed with each other on anything except with respect to one matter, namely, that the High Court decision in *Say-Dee* was wrong. In that they were unanimous. But what would those Oxford law professors know? They were clearly biased for, after all, it was the late Professor Peter Birks of that university who started the unjust enrichment hare running, but it seems that it will never run as far as Australia. That is the prerogative of the High Court which, of course, I unhesitatingly accept, believe it or not, without rancour. They do their difficult job as I have attempted to do mine. Having got that off my chest I return now to the matter at hand.
- 53 Thank you Mr Bathurst and Mr Westgarth for your very kind, generous and thoughtful remarks about my rather short career on the bench. Mr Bathurst, you and I have known each other for nigh on 27 years when you joined Sixth Floor Selborne, of which I had been a member since shortly after being admitted to the Bar in 1964. We have had a long and close professional relationship and I have the greatest admiration for your skills as a lawyer and an advocate.
- 54 Mind you, I can only remember two occasions in which you appeared before me. One was an appeal towards the end of 2003. I had the star and I wrote my judgment before I started my Christmas vacation. I think I circulated it to the other two members of the bench but they had not come back to me by the time the Christmas break had started and I therefore expected to hand the judgment down at the commencement of the new law term in early February. However, on my return from vacation I was informed that the matter had been settled. My judgment was therefore consigned to the shredder so that you will never know whether you were going to win or lose. Mind you, I did keep a copy just in case, but we can talk about that later if you are still interested.

- 55 Mr Westgarth, we have also known each other for a very long time and I remember you briefing me when you were a very junior solicitor and I was a relatively junior barrister. I take it as a great privilege that as President of the Law Society you have taken the time to represent the solicitors of this State at this ceremony and I thank you sincerely for the honour you do me and your kind remarks. Your researches are quite awesome.
- 56 I indicated earlier that I was very reluctant to partake in this ceremony for a number of reasons. The first was that I did not consider that I had been here long enough to justify it. I have been on the Court a month short of eight years which pales into insignificance against the many years of public service of such distinguished judges as Justices Handley, Sheller, Mason, Beazley, Hodgson, Young, Giles, James, Hulme (the elder), Simpson and Hidden, all of whom have been or were members of this Court for in excess of 15 years, some of them over 20 years.
- 57 I would also include in that list my dear friend and former colleague the Honourable David Ipp AO, QC who gave long and distinguished service both to the Supreme Court of Western Australia and to this Court also totalling in excess of 20 years. It is they and others who serve or will serve the Court for fourteen or fifteen years or more who deserve the plaudits of the community for their selfless and distinguished public service rather than myself.
- 58 The second reason is that I am not really going. As many of you now know, I propose to return in May as an Acting Judge of Appeal and, with the Chief Justice's approval, to continue in that role at least for the time being. Whether I will do a Handley or not remains to be seen. Frankly, I do not believe that I could maintain the acuity of mind and the energy that he has exhibited over the last four years since he formally retired as a permanent judge of the Court.

59 Only recently the President proposed to agree with Justice Handley's judgment in a matter to which I also was a party in the following terms:

"I have had the joy of reading yet another of my brother Handley's succinct, pellucid judgments which comprehensively, yet sparely, analyses all issues with clarity and insight in a manner which makes me greatly envious."

I also am extremely envious of those talents of his Honour for the President's description of the judgment in question sums up the incredible contribution that Ken Handley has made to the law in this State for many years. No one, I repeat no one, has ever accused me of producing a succinct, pellucid judgment. Long and rambling is more my style. More than once did Ken Handley, at least when he was a permanent member of the Court, literally blue pencil my efforts in order to shorten them and delete repetition and irrelevancies. It was like being back at school.

60 Occasions such as this enable the retiring judge, in my case a temporarily retiring judge, to publicly express his or her thanks and appreciation for all those who have assisted the judge over the period of his or her tenure on the bench. In this respect I have been incredibly fortunate both with respect to my colleagues and my staff, including the Court and registry staff.

61 Although I would not deny that the Judges of Appeal work at a reasonably frenetic pace and that the work is both constant and at times difficult, I believe the same observation can and should be made with respect to the Division judges who, in my respectful view, have the much more difficult task of having to deal in many cases with lengthy and complex evidence, including the not necessarily savoury task of making credit findings with respect to the parties and their witnesses.

62 One of the advantages that the appeal judges have is that they receive the material in a packaged form. Much of the hard work sorting out the facts has been predetermined, particularly when the appeal is from the judges

of this Court. Furthermore, by the time the case has reached the Court of Appeal, the issues are often significantly narrowed. This enables us to work much more efficiently but it is the trial judges who are initially required to sort out the multitude of issues in the litigation before them. They work under considerable pressure. I admire them greatly and wish to publicly acknowledge the considerable effort and skill they bring to bear in their work.

63 I would particularly like to mention those members of the Common Law Division who have sat with me on criminal appeals over the last eight years. As they and the criminal bar are only too well aware, I am no expert in that field. I was no such expert when I came to the Court and I am not sure that I have advanced very far since then. This is particularly so with respect to sentencing appeals as I have never sentenced anyone in my life.

64 In determining those appeals I have depended greatly on the experience and skills of the two Division judges who have sat with me. I enjoyed the experience even though I was not a member of the "criminal law club". I sat in awe of the repartee between my colleagues and counsel who kept referring to cases of which they, being members of the club, were fully aware and of which I was totally ignorant. It was like watching a tennis match, following the ball, going from one player to the other. They have all been very kind to me and I have greatly appreciated both their patience and assistance in resolving those often difficult appeals.

65 I have had the pleasure and privilege of working under Chief Justice Spigelman for the whole of my time on the Court. As many have said before me, he has been and is a great leader. He has significant and extensive legal skills and an encyclopaedic knowledge of fields outside the law. Given his forthcoming retirement from the office of Chief Justice, there is no doubt that he will be in great demand and I personally wish he and his wife, Alice, well for the future.

- 66 I have also been privileged to work under two Presidents of the Court of Appeal, Justices Mason and Allsop. Each of them is a top class lawyer with whom it has been a pleasure and a privilege to sit and, in particular, learn. From my perspective they have administered the Court of Appeal with great efficiency. Significantly, each has been alive and sensitive to the pressures upon their judges. I have never been rebuffed on those occasions when it has been necessary to ask for time out of Court in order to finish a pressing judgment. Both have been thoughtful, kind and one day if I practice hard enough I may even succeed in beating Keith Mason at golf. It is both amazing and annoying how he puts so little effort into achieving so much in his incredibly efficient golf swing.
- 67 I have been blessed with eight tipstaves or research assistants of whom five are here today and whose presence I greatly appreciate. All of them are amazingly bright and personable young people whose future in the law or whatever discipline they decide to pursue as a career is assured. Their legal research and writing skills are awesome and their CVs have only served to emphasise what a complete dullard I was and how little I had achieved by the time that I left law school at the end of 1960. I thank them all for the service and friendship they have provided to me without which I simply could not have done my job. I wish them all well in their future careers.
- 68 It would be remiss of me not to mention the assistance I have received from Registrar Peter Schell and, on his retirement, Jerry Ryznychok. I am delighted that Peter is here today. I cannot thank them enough for all they have done to keep me out of trouble over the years.
- 69 It would be remiss of me not to publicly acknowledge the assistance I received from Robin Szabo when I was the presiding member of the Legal Profession Admission Board. As Executive Officer of the Board she has administered its functions with great skill and efficiency particularly at a time when, as the Chief Justice mentioned, there were a number of difficult issues to resolve. What little I achieved could not have occurred without

her patience, wise counsel, intimate knowledge of the system and good humour. I am indebted to her.

70 Then there is Eva Adams, my associate, who has been a loyal, trustworthy, skilful and efficient assistant to me for eleven years. I knew she would be an excellent associate and I thank Lucy McCallum for letting her come with me to the Court when we shared her services as barristers. Eva has relieved me of many of those annoying personal administrative duties one is required to undertake and has ensured that I have been at the right place at the right time. One of her greatest skills is that she can read my handwriting and her greatest frustration is that, despite Herculean efforts, she has not succeeded in persuading me to master the computer which has remained in my chambers untouched by human hands for the whole time I have been a judge. That, of course, placed greater pressure upon her and my tippies but computers scare the hell out of me. My eyes glaze over when I hear computer speak. Nevertheless Eva and I have worked closely together as a team for many years and I am honoured to call her my friend.

71 I wish to say something about my conduct in Court. I have tried my best, not always successfully I admit, to be courteous and civil to counsel and self-represented litigants. Having been at the receiving end of some not so courteous Judges of Appeal when at the Bar, and I am now speaking of over twenty years ago, I have attempted to ensure that I was not characterised as one of them.

72 In my speech when appointed I referred to the necessity of trust between Bench and Bar. That trust cannot be achieved if judges are rude to counsel. I have therefore sought to emulate my colleagues who, in my experience, have always exhibited polite, albeit firm, questioning of counsel in accordance with the Socratic method of interrogation.

73 I am, however, fully aware of one egregious fault and that is my habit of interrupting counsel when he or she is in mid-sentence. When Michael

Kirby was President and I a senior silk, we constantly interrupted and spoke over each other with each of us trying to achieve the upper hand. Of course, he was entitled to interrupt me but not I him. But as you would expect with Justice Kirby, he took it all in the spirit of robust advocacy. He and Justice Harold Glass were probably the most polite judges I ever had the privilege of appearing before. Michael is a wonderfully kind, thoughtful and sensitive man. He wrote me a delightful note as to why he could not be here today and I remember that back in 1996 when I was having some personal difficulties which attracted a deal of unwanted media attention, he wrote to remind me that today's news was tomorrow's fish and chip wrapper. Even more than Mr Rudd, he has firmly planted Australia's position on the international stage. I thank him in absentia most sincerely for his counsel and friendship over many years.

- 74 Before I say something about my family I am aware that it is generally expected for a retiring judge to make some earth shattering observation about the administration of justice. I would not wish to disappoint on that score, particularly Mr Bathurst. As is well known there are now moves afoot to provide a national law to govern the legal profession. In December last a new draft bill was approved in principle by the Council of Australian Governments. There is much with respect to the bill that requires further consultation and hopefully amendment but there is one issue that I would wish to mention which bears upon the independence of the judiciary from the executive which in our society is, generally regarded as a fundamental article of faith. However, that independence is inextricably linked to the independence of the profession from the executive. You cannot have one without the other. An independent judiciary is a hollow notion unless there is a robust and independent profession of advocates who appear before it. That this is so is underpinned by the fact that every member of the profession is an officer of the Court, a concept the practical significance of which many politicians and members of the media do not seem to grasp, let alone appreciate.

- 75 The new draft National Legal Profession Law sets up a Legal Services Board to oversee the regulation of the profession. The membership of that board becomes critical if the profession is to maintain the independence to which I have referred. The constitution of the board as proposed in the bill does not necessarily achieve that objective. It is so drafted as to have the potential to generate conflict between the national professional bodies and the Council of Chief Justices on the one hand and the Standing Committee of Attorneys General on the other. In one particular respect it demeans the role of the Council of Chief Justices in a manner which I find unacceptable.
- 76 The motto of the Returned Services League is that the price of liberty is eternal vigilance. That motto may be adapted to apply to the legal profession. It must be eternally vigilant if it is to maintain its independence. It cannot be a little bit independent any more than you can be a little bit pregnant. It is my fervent hope that tensions to which the Bill in its current form gives rise can be effectively resolved in a principled fashion.
- 77 Finally and most importantly, I wish to publicly acknowledge the love and support of my wife Colleen, my brother Robert, and my children Belinda, Bradley, Luke and Gabrielle and my grandchildren Thomas, Harry, Olivia, Elsa, Toby and Arlo, the last-mentioned being only ten days old. Having discussed the matter with him, and accepting that the conversation was somewhat one-sided, Arlo has not yet decided whether he is going to follow in his grandfather's footsteps but that is just a matter of time.
- 78 I am grateful to them and to my sons-in-law, Christopher and James, for the love and support they have given me during my time on the bench. Colleen is my rock. When I took this job I said "Oh well, I'll simply take it for three years and see what happens". I am still here nearly eight years later. I have not, therefore, given her the attention that she deserves but hopefully will now be able to do so. Her commonsense, wisdom, patience, sense of fun and gentleness have been the tempering influence upon my

life and, I hesitate to say, upon my ego as a judge. As she and my younger daughter have properly, firmly and constantly reminded me, being a judge is nothing special: you are just doing a particular job. I believe that is so. I am indebted to them all and I love them all dearly. They have brought me much joy and I am sure they will continue to do so.

79 This speech is obviously long enough. Ken Handley would, I am sure, have liked to have taken his blue pencil to it, but I only get one chance. Thank you again Chief Justice, Mr Bathurst and Mr Westgarth for your kind and generous remarks. Thank you all for taking the time to honour me with your presence. It is indeed a humbling experience and one which I shall remember for the rest of my life.

80 For those of you who thought that this was in fact a farewell ceremony and that you would be seeing the back of me for good, may I be permitted to adopt the immortal words of General Douglas Macarthur who told reporters in 1942 shortly arriving in Australia from Corregidor: "I came through and I shall return".
