

AFTER DINNER SPEECH BY THE HONOURABLE DENNIS MAHONEY AO QC

Supreme Court Judges Dinner

2 February 2011

Thank you for inviting me to dine with you. It is an invitation which is, I confess, daunting. It is a long time since I stood to address a full bench of Judges.

And thank you, Chief Justice, for your introduction. I am always apprehensive when I await an introduction. I recall one introduction of which I was warned. The Chairman said: "I would like to introduce to you this evening a great man, a man who is an icon amongst us, a man of great personal charm and a great speaker. Unfortunately he couldn't come. So I can only introduce to you the speaker for the evening". Chief Justice, your introduction has been very kind.

You have suggested that we talk about my experience in the Law. But that causes a problem. My experience goes back a long way, longer than I like to recall. To do what you suggest involves that I go back into memory. And going back into memory, reminiscing, is...it can be...a difficult thing. It has at least two dangers. What one saw then is not necessarily what happened but how it appeared to one at the time; for what one sees depends on where one stands. And now one remembers only part of it. So you will understand that when I talk with you, I have not gone back to check the accuracy or the fullness of what I recall. What I say to you is what I now recall of what seemed to be to be happening to me at the time. But then that is the fate of all of us when we reminisce. I would be interested to compare it with what your reminiscences suggest.

When I think back, what impresses me generally is how different the Law is now from what it was when I first came to it. Since that time the Law has, I think, changed more than it changed in the preceding three hundred years. That is a broad proposition. But if pressed I think I could support it.

For example, three things stand out for me. The custody of the Law, the custody of the development of it, has passed from the Judges to the politicians (to the legislators and the executive). The Law has traditionally involved the principles which provide the objectives to be achieved by it and then the detailed provisions by which those principles are to be carried into effect. In the past the new principles were in the main developed by the Judges and they and the details of it were developed by the process of decision by the Judges. That now seems to have changed. In the area of new principles, the innovations now seem to have come mainly from the politicians-.things such as (I take a few miscellaneous examples) the Family Provision laws and their modification of the freedom of testamentary disposition; the laws encroaching on the sanctity of contract which now allow the formation and the terms of contracts to be modified to accommodate perceived inequities; Trade Practices laws and the effect they have had on commerce; the so-called planning and other laws restricting the way in which an owner may use his own property (to prune the trees on my property I must have a governmental permission);and the many laws restricting the liberty of the subject. Think of the number of the Acts and the Regulations that are passed each year and which now determine not merely the text of the laws but in the main the policies which drive the thrust of it. I notice that the Chief Justice of the Federal Court of Australia referred to this a short time ago .You will be more familiar than I with the number of them. Recently I came across a submission made to the NSW Parliament^ was made by an interested party and I cannot vouch the correctness of it. But it suggested: "...In 2003 (there were) 1800 Commonwealth Acts in place...170 had been passed in the previous year...in 2005,there were 1300 NSW Acts of Parliament in place, 115 of which had been passed in the previous year. During 2000-2003 the NSW Parliament passed 300 pages of Acts, Rules, regulations and by-laws each sitting week".

Second there is the great change that has taken place in the administration of the Law, both in the Courts and in the manner in which practitioners do what they do in their operation of it. The function of the Courts has changed. Courts no longer merely wait to act when the parties ask them to act; and, when they are asked to act, they are no longer merely umpires in the day to day conduct of the litigation which the parties choose to pursue. They are expected to be managers of what is done. Courts are expected both to be both managers of the litigation that is brought to them and

also managers of themselves, in the way that other organizations are expected to be managed. And, because of advances in technology and in our thinking, that can now be done. That was not so even as recently as when, in the start of the 1980's, Richard McGarvie and I succeeded in setting up the present Australian Institute of Judicial Administration. If you are interested in what was the position then, you may care to pursue the observations in the papers given at the first conference of the Institute in 1982: see 57 ALJ 8; especially those collected in the paper that I prepared: 57 ALJ 30. It was only with trepidation that we then put forward the view which is now current, that it is the function of the Courts to ensure that cases are pressed forward and conducted with managerial efficiency.

And the way in which the Law is practiced... what lawyers do in the practice of it... has changed fundamentally. It is of course now a business and not (if you will, in addition to being) a profession and all that that implies. I have in mind the change which has taken place in the way in which I had to do what as a barrister I was to do. I had to spend hours, not in constructive thought, but in finding and assembling the materials with which I had to work. The materials with which I had to do what was to be done consisted of what was contained in the briefing papers sent to me and in the legal materials, statutory and case materials, which I had to find and apply. What could be done with the briefing materials was constricted by the practicalities of that time, by the limits imposed by the fact that papers had to be typed, that the verbiage of the papers that were typed had to be checked and that copies to be made had to be made by carbon paper. One did not have the facility of a dictation machine, much less a word processor; the first dictating machine that was available, in my late days as a junior (I had one), consisted of two large reels of tape on the top of a box about twelve by twenty four inches in size and nine inches deep.

As to the legal materials, one had to spend time, sometimes hours, searching out the legal material, statutory and judicial, which might be relevant to what one had to do in the particular case. For example, one did not know what were the terms of a new Act of Parliament and sometimes, even, what new Acts had been passed. A copy of a new Act of Parliament was not simply on issue to the profession; it had to be sought out. Often one was not even available until weeks and more after it was passed. One normally did not know whether subordinate legislation had been

passed modifying the effect of an Act or, for months, where it could be found. The text of Supreme Court judgments were often unavailable for weeks, even from the so-called Weekly Notes, unless of course one knew the Associate of the Judge in question and could obtain a copy from him. One's practice consisted of, often, hours of searching for the legislation, the decisions and the dicta which might exist. I can recall the hours, during the day but often far into the night, spent in checking the details of things which now are available at the flick of a finger. It was only then that one could indulge in constructive thought.

And there is the change in the public attitude to the Law. Law used to be seen as frightening, and rightly so. No person, no sensible person, would go into it willingly. He or she went into it only if dragged into it, kicking and screaming. Last century, lawyers.. .at least the more academic minded of them... started to hold out to people that if they came into the Law, lawyers and Judges would solve all of their problems and justice would be done to them. Law came to be promoted, not as what it was, an instrument for the management and control of society and those in it, but as an instrument for achieving individual good. I wonder whether you think that that promotion has been made good? I suspect that it has not. If there is a feeling of dissatisfaction with what we do, perhaps it is because expectations were built up which we have not been able to fulfil.

But these are things of generality. The Chief Justice suggested that I speak with you about my own personal experiences in the Law. He has given me copies of the papers of some who have spoken with you in previous years: Anthony Mason, Robert Ellicott, and Tom Hughes. Michael Kirby has published what he said. I have been interested and impressed by what they have said. I wondered what I should do. I have followed their example and have put some words into writing. Not to compete with them but to record the thrust of what I recollect. I will give them to the Chief Justice as my sentiments, in the manner of the elderly gentleman of whom I heard. He...elderly gentlemen do such things... thought he might avoid kneeling and saying, word after word, the prayers that he had to say .He put his prayers into writing, hung them on the wall and each night pointed to them and said merely: "God, them's my sentiments" I had thought that I might treat the Chief Justice as God .. .that might not

be inappropriate, do you think?... and ask him to treat the words that I have written as a proper discharge of my response to his invitation.

But that would not be what, as a speaker, I should do. What I have written is there. I shall take some parts of it, parts that time permits. So let me say something about what happened to me when I came into the Law and what I have taken with me as I go out of it. It may be of interest to you for me to describe what it seemed to me to be like in the past, at a time now approaching seventy years ago. For after all the past is the prologue for the present and for the future, and that, the present and the future, is what you as Judges have to deal with. One understands something best if one understands where it came from.

I have read what previous speakers have said of their experience in the Law and the way in which they have approached what their memory now lets them remember. I have found that, in many ways, my experience has been different from theirs. There are many differences. Let me, in the time available, example only two of them. In those days things were different, or so I seemed to me. The way in which I came into Law was different; and the Bar, when I came into the Law, was different.. .or so it seemed to me.

When I came into the Law it was possible to come into it on a part time and an indigent basis. I came into the Law not by design but by default. When I left school I wanted to be an economist. I was told that I could not, or should not, be an economist. I was told to forget that wish because as an economist no one would employ me.(For reasons with which I shall not trouble you, at the time that, as I have since found, was true).So I went into Law as a second choice, a choice by default. As it eventuated it was a good choice. Life in the Law to me...and I suspect to you... has been good.

But, having made that second choice, I was told that in fact I could not go into Law. Surprisingly I was told that I could not enter the Law Faculty; it was said that I did not have a matriculation for Law. (I say surprisingly.. .it was seen as surprising at my school... because my school claimed that, that year, we had had a great class and that my pass at the Leaving Certificate Examination was the highest in the State, that

I had the highest aggregate of any marks in the State. But, we were told, that was not enough for Law). That, it was said, was the result of earlier times, of the days when Sir John Peden and Ms Margaret Dalrymple Hay had managed the Faculty of Law and before the changes during the time of Julius Stone and others. However that be, I was advised that I did not have the then required subjects; to matriculate I would have to go to the Arts Faculty, pass seven courses there, and then apply for entry into the first year in the Faculty of Law. Full time study was for me not financially possible. I was seventeen years old. So for two years I worked in the Registrar Generals Department. That was not a bad thing; I learned something of the Torrens system of land registration which later stood by me judicially. I spent the two years, as an evening student, completing the seven courses in the Faculty of Arts, under Professor John Anderson and others. It was only then that I was able to come into the Law Faculty. That meant that my way into the Law was different, at least less than direct. And of course that had other effects on what I could do.

When I came into the Faculty of Law, that was also on a part time basis. In those days it was possible to study for a law degree as a part time student. Some of us did that. I obtained employment as an articled clerk and was paid just enough to make Law financially possible.

(I was able to obtain articles with what was then a small one man firm, Campbell, Campbell and Campbell. The joke was: "May I speak to Mr Campbell? No, he is out. Then can I speak to Mr Campbell? No, he is in Court. Well, can I speak with Mr Campbell? Speaking").

This, part time study, was the course followed by some others. Some of you may have heard of Frederick Millar .He graduated with me. He was articled with Allen Allen and Hemsley. He also completed his law part time. He then became a partner in that firm and became a force in commerce, as Chairman of TNT Ltd and other listed companies. I and, I suspect, others would not have been able to enter the Law Faculty had part time study not been possible. I mention these things because the Vice Chancellor, as he has told me, is considering a rearrangement of faculties. I hope that for the future those two things will be possible: to study for a university

degree by evening study; and, effectively, to study for a Law degree part time. If not, some who should be lawyers will not be there.

I completed my examinations in the Law Faculty at the end of 1947. In January 1948 I made the, as it now seems to me, foolhardy decision to go to the Bar. I say foolhardy because I had no connections in the profession and so had no obvious prospects. But I had accumulated a small sum, with the help of prizes that I had won over the four years of Law studies. I thought that that might support me for the first year or so and that the University Medal might attract some work, from fellow students and others. And so it eventuated.

My point is that, in those days, persons in such a position could enter the Bar because practice at the Bar was different. It was possible to commence at the Bar by simply finding a room and setting up in practice. There were no organized Chambers; I mean organized Chambers such as now exist. Barristers clerks were not what they are now and one could exist without them. Many did. One simply found a place from which to practice and set up in practice. One waited for solicitors to call and hoped that they would. I am not sure how but I managed to arrange to share a room with one or two other barristers on the third floor in the then University Chambers in Elizabeth Street. From there I practised for the first few years.

I mention these things because it shows that in those times it was possible for someone who was without money and without connections to achieve a start in the profession, first into Law and then to the Bar. I was not alone in this; there were some others who were able to enter the profession in a similar way. But I tell you of it because I wonder whether or to what extent it is still possible. I do not know the details of what now obtains. There are first the fees payable to the University which, I am told, are counted in thousands of dollars. Then there is the cost of setting up in practice! note that the Australian Financial Review of 29 October 2010 page 43 "Legal Affairs" records observations by those who claim to know, that 'set up costs' in the first year at the Bar are now, on one view, \$6-11,000 or on another view \$20,000, and these are plus robes, practicing certificate, professional indemnity insurance and bar accreditation fees. Rooms, it is said, 'can reach \$50,000 and above'. I hope that what we were able to do then is still possible and will remain so.

Perhaps it is. It would be sad if entry to the Bar did not remain open to those in a similar situation. But, however that be, that is the way in which I entered the profession. And it had effects on what I could do.

Perhaps you will have some interest in these things, because Judges still have some influence upon the profession and the way in which it is to be managed. Some have argued that the Bar is a special profession and that, if it is to retain its special quality and to perform its special function, entry into it should be regulated. Regulation will inevitably mean that entry will be more difficult and more expensive. That is something that will no doubt be in the minds of those who control the destiny of this small part of the world with which we are concerned. But that is now not a matter for me; it is a matter for you and for those who now manage the profession.

That leads me to the second thing to which I referred: the nature of the Bar as it then was or seemed to be. At least one or two aspects of it.

The Bar, compared with the present, was small some three hundred or so. Only some of them practised. In a sense it was collegiate. When I was admitted, in January 1948, the main body of the Bar regarded itself as a special group, a group apart, and, as it seemed to me, the solicitors and the Bench treated them as such. Mature solicitors treated me, a very young barrister, with a measure of deference, a deference due of course to the way in which the Bar as an institution was then regarded. There were things which helped to set barristers apart. The Bar had its own special principles, its own special practices and its own rules of etiquette. Particularly it had, or claimed, its own standards of conduct, of what a barrister should and should not do. That helped to set it apart, and, by and large, those who comprised it came from or became members of a special group who knew of and observed rules of this kind. They accepted the discipline which such rules involved; they knew what was done and what was not done. Mostly they knew one another; at least, there was in a sense a cohesion between most of them. They regarded themselves and were seen to be separate and different. And that had effects.

Let me go off on a tangent for a moment. This matter...the Bar as separate...is a matter that is interesting and important. If it is to achieve its social function, the Bar

must be separate, not merely in name but in purpose. Otherwise barristers will become merely lawyers among other lawyers. For barristers to achieve this purpose, there must be restrictions on what a barrister can and should do, restrictions beyond what can be done by lawyers in general. But how is the Bar to ensure that its members observe these restrictions and do what barristers are to do and so maintain its special identity? Rules can be laid down. But there is a difference between rules and the ethos behind them which leads to their being observed, the understanding of the things that are 'not done'. I remember, for example, the disfavour that, in those early times, was applied to members of the Bar who were seen robed outside the permitted areas near the Courts or who talked with the press about their cases. I remember how one barrister was frowned on when it was reported that he had been seen eating a meat pie in the street when robed.

I mention this this evening because it may affect ...at least offer an analogy to... the position of the Judges. Is it necessary that, to achieve public acceptance of their role and their standing, the Judges also have and maintain a degree of separateness? I do not infer that any Judge would eat a meat pie in public in Phillip Street. (The gentleman said to be concerned once shared chambers with me). But how far, for example, should Judges now be "Jolly Chums" or, on the contrary, how far is a particular ethos necessary, how far is it necessary to the maintenance of the position of the Judiciary that they maintain a degree of separateness? But this is beyond the topic of the evening.

Let me go back to the Bar as it was when I came to it. At that time there existed, for the Bar, the kind of separateness and cohesion to which I have referred. (I speak of course in the generalities that I must). However, at the time there existed and was developing... or so it seems to me looking back... a smaller group of barristers who were different. There was a division, a real division, between them and the more traditional members of the profession. Why the division existed, why they seemed to be set apart, I do not pursue in detail. A political factor operated; barristers who were Labor members were not warmly welcomed. There was a religious factor; with exceptions (as Tom Hughes QC has illustrated), Catholics were treated at arms length: cf Peter Young's note in the Australian Law Journal some little time ago. And there seemed, to an extent, to be a form of social division. (I do not of course

suggest that the newer group did not have principles appropriate to membership of the Bar but they were different). That division was later to break down and now has ceased to exist. But at the time it was, and was seen by me to be, real.

That is a large topic. I have referred only to some aspects of it and only in the broadest of terms. The division had significant effects upon the Bar and the legal profession and in a sense even upon the text of the law, particularly the law of negligence and of employer and employee relations. Some say that at that time there was taking place a change from a defendants law to a law more favourable to plaintiffs. How else can one understand the contrast between the appellate decisions given in the first thirty years or so of the last century and the present line of decisions? Perhaps some day some one will write about it in detail.(I understand that Justice Elizabeth Evatt may bring together some of the material relating to her father and his life in the Law. I hope that she is able to do so). But unless one is conscious of it, one cannot now, I think, understand the division that then existed between, for example, barristers such as Eric Miller KC, McClemens KC and Clive Evatt KC (each of whom had dominating practices) and the solicitors who briefed them, and the main body of the Bar and the profession. And of course the way in which they were treated by the Bench and by the more traditional Bar.

I refer to it because, of course, I was not a member of the traditional group and that affected what I did and what happened to me and to others who came into the Law as I did. It affected the atmosphere of the Bar. There was no welcoming committee for such a new barrister as I was; quite the contrary. As an example of the division which existed, there were only five rooms on the floor to which I came. The main rooms were occupied by established barristers: George Hungerford, Walter Gee and Norman Jenkyn. During the several years that I was on the floor, as I remember, they did not speak to me...not once. I do not say this by way of criticism of them. They were I understand men of high principle. Gee and Jenkyn were I think high in their Church. But that was the way that it was; at least as it seemed to me. If you were not a member of the group that was accepted...the term Establishment was then not current and is not what I mean... you were treated not necessarily with suspicion but at a distance that was considerably longer than normal arms length. That may have been the right thing to do, at least in their view. A different group was

coming into the Bar and no doubt those who had been traditionally members of the Bar may have seen values, values which they thought right, to be at risk. (I recall the acid and critical comments made by my master solicitor... who dated his forebears among the earliest of the (free) arrivals to Sydney Cove... about those whom he saw as the different group coming into the law). To an extent they were different. I refer to it because, however that be, the situation was less than congenial and because it affected, and to some extent explained, what happened to me and to others in my situation.

To a young man who entered it then, the profession was different from the profession as it now is. It is, I think, good that there has been the change to what now is. As I have said, perhaps one day someone will write a history of what took place and why. It will be an interesting social study. Such a history will have to examine the question of what the nature of the Bar must be if it is to maintain the special position which it claims for itself and which, I think, it should have. Perhaps barristers, if not elitist, at least must have special qualities. Otherwise, as I have said, barristers will become merely lawyers among other lawyers. That would not be in the interest of the Law. And... it is to this that of course I am leading... it would have an effect on the nature of the Judiciary .But that is a matter for another occasion.

What of, as the Chief Justice described it, my personal experience at the Bar? Is there interest in what the day to day practice at the Bar was like? I was admitted to the Bar in January 1948. I was a junior until the end of 1960-1. I went to the Bench in August 1972. The times that I spent as a junior, some twelve or more years, were interesting times. Those who were not connected did not have the opportunity to learn their craft as formal "readers" with, or as associates of, an established junior or as a junior to silk in litigation in the higher courts. They were briefed in the Police Courts, as the Magistrates Courts were then described. It was there that they learned how to conduct litigation and what were the other practicalities of the law. This had some advantages. One learned that "Ladies Day" was not a race day at Randwick, but Monday morning at the Central Police Court where those arrested during the weekend for prostitution came before the Magistrate and paid their fines. The great bulk of criminal work was dealt with in the Police Courts and was prosecuted by Police Prosecutors. One learned to deal with Police Prosecutors, which was no small thing. If one could manage Police Prosecutors and unqualified

Magistrates (as many of them were), one might hope to manage even Justices of the High Court. One could learn from Police Prosecutors how to dominate a Court and how to maintain an appropriate relationship with the presiding Magistrate. I wonder whether young barristers now see it as appropriate to learn their trade on their feet in Magistrates Courts.

(I recall an occasion at the Police Court at Campsie. The Court was next to the Police Station. On a hot summer afternoon our case was droning on. Suddenly the case was interrupted. There was a loud "Bang, Bang, Bang" from next door. The Magistrate looked up with irritation at the interruption. The Police Prosecutor dealt with it. He was on his feet at once. "I apologise to Your Worship for the noise. The Police are taking a voluntary statement". The Magistrate was not upset and the case proceeded. If I recall accurately, the Police Prosecutor was Sergeant Don Goode, a man from whom a young advocate could have learned much).

It was from those with whom one had contact there that a deal of work came. In my case at least, work came from unexpected quarters. One was briefed by small firms (some of whom later became great) who had a need for someone to represent a client in a lower court and for an appropriately small fee. That was one of the ways in which those who had limited means could have legal assistance. (As I sought to progress up the fee scale, one solicitor took to showing me from time to time a brief to J W Shand which was marked with the fee of two guineas). I recall the work of Millers Brewery and Penfolds Wines from W P McElhone and Co. Millers had much to do with the rise of the licensed Club movement in this State. From the Penfolds work from Roger Tillam there I learned the function of the "Wine Bars" and the significance of a "tawny red" in the days before Penfolds Grange became the fashion. Ken Reed (who recently gave \$7m in paintings to the Art Gallery) helped to brief me from that firm and I dealt once or twice with his father, who controlled much of the stevedoring activities at the time. I benefited from the large insurance practice of McLachlan Chilton and Co and the skills there of Dick Parker and Don McLachlan. (Perhaps one day someone will write how the anger of Dick Parker at what he thought was the failure to honour an agreement to settle the case produced the results in *Prowse v McIntyre* (111 CLR 264)). And, as I progressed, work came from Bartier Perry and Purcell, Freehill Hollingdale and Page and others. (The old

establishment firms came only later, when one was needed by them). Often the matter in issue, and the fee, did not warrant the presence of an instructing solicitor at the court; one received the brief, met the client in chambers or sometimes at the court and fought for him as appropriate.

One met colourful folk, solicitors and others. One solicitor whom I remember with some warmth was Charles Robinson. He had lost an arm at the war and had returned to build up an active practice. I remember him particularly for how hard he fought for every client; every point was to be found and to be taken. If you were briefed, he expected you to do the same. It was a good training. I remember him because he briefed Maurice Byers and later...Byers was some eight or more years older than I... he came to brief me. Byers had been an associate of a Supreme Court Judge but I suspect that it was from Charles Robinson that he learned to take the curious and exotic points for which, in his period as a junior and later, he was known.

I had the pleasure of working with James Vincent Comans of R D Meagher Kinley and Comans. As I discovered later, he had had a sporting career and then an extraordinary war record in Bomber Command the detail of which would and should provide an interesting biography. As a solicitor he briefed me in relation to horse racing identities (he acted for the jockey George Moore and others and he and Moore taught me some of the intricacies of horse racing and bookmaking); football of the Rugby League style (I was briefed in matters of the Bulldogs, the Canterbury Bankstown Club, and we, as Handley will recall, worked to ultimately free players from the controls of the League Administration and let them be the professionals that now they are); and then there were the developments of Tattersalls Club and the Australian Jockey Club. I believe that with the help of Jack Shand QC we could have kept the journalist Frank Browne from being jailed by the Australian Parliament. They were, as I have said, interesting days.

In those days the nature of the work at the junior bar was different from what it later became. It was varied and to an extent colourful. At least it was for me. Landlord and tenant work was a staple. (Robert Hope made a name by authoring the several editions of the standard work on the topic). But law and so the Bar were concerned

with matters more fundamental than the words of statutes. Sydney was different from what it is now and this affected the nature of the work that was on offer. It has been said that, until the mid 1950's, Sydney was a town whose function was essentially to service the countryside and the organizations which were concerned with doing that. It was I think that at that time litigation came to be concerned with commerce as such and so with those whom one met there, some of whom had only a confused idea of the difference between commerce and fraud. (It was the time of the H G Palmer liquidation). Sydney did not become essentially a commercial centre in its own right until later in that decade. Finance had originally come essentially from the trading banks and the AMP. It was only about that time or perhaps a little later that the first so called merchant banks were set up here. I can remember acting for the young James Wolfensohn, (successfully as he has reminded me), before he went off to London and Schrodgers and then to New York and became President of the World Bank.

Some of the main litigation was concerned not with money but with power. There was constant litigation in the Conciliation and Arbitration Court and from there to the High Court. In what was a thrust for power, communist controlled unions engineered a coal strike that brought the community to a standstill for some weeks. In 1949, the ALP government took proceedings to break the strike and to send the union leaders to gaol. I was briefed with Martin Hardie KC to appear for the Waterside Workers Federation and its Secretary Jim Healy. Some of the union leaders were sent to gaol. I can recall a conference in senior counsels chambers on a Sunday afternoon when four or five of the union secretaries from the communist unions decided what it was that they wanted to achieve by the litigation and what we should be instructed to do, or not to do, for them. (Let no one think that what was involved was merely "Reds under the bed". It was serious and those concerned knew how serious it was). The high drama of the proceedings in the Conciliation and Arbitration Court should have been recorded for posterity and for the education of the junior Bar. I remember, for example, the skill with which Government Counsel in those proceedings, William Dovey KC, handled a situation which could have exploded. But like most legal drama it has passed beyond memory.

For a time I was briefed by a woman, Christian Jollie Smith, a solicitor who acted for some of the communist controlled unions.(She was, I discovered later, said to be one of the original members of the Communist Party of Australia and, if I understand correctly , associated with the Central Committee of the Party. She was a charming person). I do not know how it was that she came to brief me, in that case and others. For a time, as a tutor, I taught Australian Constitutional Law at the University; perhaps that was the reason. In due course she asked me for an opinion upon the validity of the legislation proscribing the Communist Party and I pointed out what became the central point in the High Court litigation. At least I think that I did. Simon Isaacs KC then gave an opinion. And then others were involved. Later she ceased to brief me. I suspect that my views were not acceptable to those for whom she acted. I can, to an extent, vouch for the genuineness of the Petrov defection. You may recall it is said for government (and denied by some who see the allegation of the defection as a manufactured conspiracy) that the Security folk had to talk with Petrov to persuade him to defect. They, it was said by them, had difficulty in finding a method of doing this which was satisfactory, a place which would not attract the attention of Petrov's superiors. Petrov had an eye problem and was to consult, inter alia, one of the leading ophthalmologists, the late Dr Beckett. The doctor was approached by Security to see whether he would become involved. He did not know whether he should be involved. He consulted his solicitor and his solicitor consulted me;at least he talked it over with me. (The solicitor acted also for the John Wren family interests and briefed me in proceedings affecting fights conducted by Stadiums Ltd).We decided that he should be advised that he should agree. And in the result he was and he did.(I do not remember whether I talked with the doctor or only the solicitor) .But to this extent I can confirm that Petrov had to be persuaded to defect and that the problems associated with persuading him to defect appeared to be real and not manufactured.

One could go on; they were interesting days. One of these days...at least I hope so... someone will write an account of this time at the Bar. It is I think sad, but a fact, that those who towered over the Bar at that time are now seldom if ever remembered. In my first years there were, for example, Claude Weston KC, H H Mason KC and Clive Teece KC, names which now few would even recognize. Barwick KC came a little later and he, of course, is remembered. But there was Gordon Wallace KC...do you

remember his standing or perhaps even his name? He was the person who authored the standard books on company law, 1936 and 1961. He claimed, and complained, to me one day in passing that it was he who had the retainers from the blue ribbon companies whereas Barwick KC was, he said, then the person who was briefed by the shady people who were in trouble. (Monaco was said to be a sunny place for shady people). Perhaps this illustrates the saying that no one remembers who came second. (I would add that, in a short time, no one remembers who came first. At least at the Bar). Sadly, barristers cannot hope for post mortem fame. And I wonder whether the fate of Judges is different.

I took silk at the end of 1960-1. (I had been Chairman of a Royal Commission in 1960. The subject was the Landlord and Tenant Legislation, relating to Fair Rents and the like. This was the first of three formal Government Inquiries which I have conducted and from which I have emerged unscathed; I mean at least without public criticism. I was fortunate. I say that because public criticism, often quite unfair, now seems to be expected when one takes on such tasks. It can be a dangerous occupation, as, for example, Carter and Marks found). I practiced as silk until August 1972! say only that they were good years. There were the taxation cases, when taxation was governed by the terms of the Acts and not by the discretion of the authorities. The financial world expanded. Freehills started to advise the Committee of the Stock Exchange and Edward O'Halloran and I were involved with the Committee in some of the things that were done. (The two books by James Bain provide an interesting outline of the changes that occurred in the financial structure of the State and of the work of the Chairman Alister Urquhart and others in changing the financial system). They were remunerative years and I enjoyed them.

Then the Bench: August 1972 until Christmas night 1996. That was less remunerative but I enjoyed it. (Governments should understand that while money does not mean happiness, lack of it prevents it. Poverty is no sin but that is all that can be said for it.). Two years with Laurence Street while we dealt with his reorganisation of the Equity Division and we sought to change the atmosphere created by Myers J. Then ten years or so in the Moffatt Court of Appeal; ten years or so in the Michael Kirby Court of Appeal and then a year on my own as President. Nearly twenty five years as a Judge. A lot of things happened. But that is for another time and place.

Now, it is approaching seventy years since I entered University and the Law: 1942 to 2011. I have now come out of it. The Chief Justice's suggestion was that I look back on it and say what I see. Looking back, there are many things, many more things about the Bench, that one could talk of. Too many for this evening. Let me pick at random only three that still stand out for me.

First, attitude. Attitude is more important than rules. As Lawyers... and particularly as Judges... we surround ourselves with rules. What we do is supposed to be regulated by rules. But, in the result, attitude produces... it can produce... more, much more, than the rules which we have laid down for ourselves.

Let me suggest an example. At the time of the Moffatt Court of Appeal, Courts were places which were less than congenial. Perhaps taking their theme from the High Court of earlier times... those who can recall the High Court in the times of Starke J, Taylor J, Kitto J and later Barwick CJ, will understand what I mean... the Moffatt Court adopted the view, as it seemed to me, that one could obtain more from the barristers appearing before it by the whip than by the kind word. And litigants were apt to be treated in the manner of Ms (now Professor) Wendy Bacon.

The Michael Kirby Court of Appeal was different. Barristers were treated with courtesy, sometimes amounting to kindness. And litigants (I recall, for example, Mr Radski and Ms Wentworth) were given a consideration which I suspect they would not have been given in earlier times. (I recall one of the student jokes that I heard at the time: "I have heard of God but I have seen Michael Kirby"). I understand that even the High Court is now different from what it was in those earlier times.

I emphasise that I do not make a judgment as to which attitude was or is correct. I do not here criticize what then was done to barristers or to litigants. Discipline of those appearing before superior courts may be necessary. There are some lawyers who do not know what they think until they hear what they say; discipline may be necessary to ensure that their thinking is done in their own time rather than on their feet at the expense of court time. But, however that be, a change took place. In my time the attitude to the barristers and to litigants changed and, I think, the change

was for the better. It was substantial. The point is that that change took place, not as the result of rules, but by reason of the attitude of the Judges. It is the attitude of Judges which determines... at least it is important in determining... the quality of the justice which the Courts dispense. There is a difference between upholding the law and justice. (I recall the story of the objection taken to a brothel on the ground that it was closer to a school than the law allowed. The law was upheld. The decision was that the school should be moved). The quality of justice is a matter which is in your hands.

That leads to the second matter: the opportunity which being a Judge gives to one to have and to enjoy a wider life. A Judge does not have to live life through a straw. I do not argue whether life on the Bench now is as congenial as it should be. I am told that in my time it was more congenial than it is now. I confess that I was led to accept appointment to the Bench because, as it was then, life as a Judge was easier than the day and night grind of my life at the Bar. In 1972 one could look to the occasional afternoon off to watch the cricket... in those days one's judicial badge gave one honorary access to the Sydney Cricket Ground. That is one of the benefits which are now in the past.

More important are the things that, at least in my time, as a Judge one could do. Robert Hope did several significant inquiries for the Australian government into matters of high security and I am sure that it made his life more interesting. He and Gordon Samuels were each Chancellors of a University. My friend Michael Kirby wore many hats and I think enjoyed each of them. And Peter Young, Keith Mason, Ken Handley and Simon Sheller have been involved with high Diocesan dignatories. For myself judicial life gave me the opportunity and the time for things which would not have been possible had I remained at the Bar. There were such things as being Chairman of the Commonwealth Remuneration Tribunal (I had interesting times in the fixing of the remuneration of Prime Ministers, politicians and Judges); and the reformation (with Richard McGarvie) and the reestablishment of the Australian Institute of Judicial Administration and the changes which flowed from that. In particular matter which I remember fondly, it gave me the opportunity (I was Co-Chairman, with the Chief Justice of India and then the Chief Justice of the Philippines, of the Judges Section of Lawasia), to be concerned with the

development of judicial structures in South East Asia. As a Judge one had the opportunity to deal with lawyers and Judges in Peshawar, on the Afghan border, in Pakistan, India, Bangladesh, Burma, Thailand, Malaysia, Singapore and the Philippines. And there was for me the fascination of the time spent in China under the aegis of President Ren Xian Rin and the Supreme Peoples Court of China and the opening up of the relationships between Chinese Judges and Judges from Australia. This is now a matter on which the Chief Justice can speak with authority.

Views differ as to whether superior Judges should accept appointments of extrajudicial kinds. My own view is that, with discretion and judgment, State Judges at least should be permitted to do so. There are parts of public life where impartiality and objectivity are still important and where such judgments, able to be given without fear or favour, need to be made and expressed. Few but Judges can do such things with confidence and security. Such things form part of the tapestry of judicial life which a Judge should be able to look forward to, if such be his or her inclination. They formed part of my own judicial experience, a part which I enjoyed.

The third matter is of a more general nature. I make this observation with appropriate diffidence. I criticise no one. It is prompted by what a friend of mine described, and complained about, as the ongoing destruction of public confidence in the Law.

It is important that members of the public have confidence that, should they be brought in contact with the Law, they will have a just result. There are those... importantly, sometimes those in the profession... who say, and reiterate when an occasion presents, that the law is inadequate to do justice. ("This decision is unjust. The law needs to be changed. The law needs to be brought up to date. The law should be what my... dissenting... judgment says it should be". And so on). One may expect those things from litigants who are disappointed, from media persons who have or wish to attract public attention and from others who may be expected to complain; they may express such views without doing great damage. That is what they are expected to say. But when such things are said by one who has a high position in the Law, such as a Judge, the person in the public bus may be led to doubt that the Law is to be respected and accordingly to be obeyed. And the repetition of it increases the damage.

What really is the position? Do such things need to be said? What are the facts? Everyone is entitled to his or her own opinion and to express it. But not to his own facts. Is the law inadequate in this way? Ideally, the law should be such that the application of it always produces a result that is just and without hurt. But a person who is adult knows that law is not for the text book but for real life. In real life, as every Judge knows, there are some cases in which what he or she does will cause hurt or even, in some few cases, produce an injustice. Almost all of the cases of injustice, perhaps all, are either the result of the text of a mandatory statute the terms of which are ill considered or are produced by facts the inherent abrasions of which no legal or judicial wisdom can avoid. A result may be just and yet cause hurt, because that is the nature of life. I wonder whether a contested award of the custody of a child can be made without hurt.

My point is that, such cases apart, I cannot think of a case in which the law required me, as a Judge, to produce a result which I considered to be unjust. Certainly no case in which the result warranted the kind of criticism which undermines the public confidence in the Law. If one looked, there was always some principle to be found by the application of which that result could be avoided. It is I believe part of the skill of a Judge to know that there are available, to know what they are, and to apply, the principles which the law provides to enable him or her to produce a just... at least an acceptable... result. And, I believe, such principles are available.

There is of course more to this point than can be considered tonight. I refer to it... I hope that you will permit me to do so... because the irritation which I have felt from it remains with me even after I have left the Law. I hope that you will excuse my indulging a personal irritation by referring to it. I say only that in my experience, when, as Judge, a result was suggested to me that appeared unjust, there was always a principle available to be applied that would produce a different, and an acceptably just, result. Perhaps one day someone will produce a history of cases such as *Prowse v McIntyre* (111CLR 264) and the *Latec Investments Ltd* case (113 CLR 262), which show what I have said, that, if one looks hard enough, a remedy can be found when an injustice is felt. I wonder whether your experience has been different?

Chief Justice, your kind invitation has led me to trespass on the time of the Judges too long. And to attempt to compress into paragraphs things that can only be dealt with by pages. My apology can be only that, even after I have come out of the Law, these things still interest me.

I asked the Chief Justice for how long I should speak. I am conscious of the occasion of which I heard. A speaker asked his host, "For how long should I speak?". His host replied, "You are our honoured guest, you must speak for as long as you like. I say only one thing. At nine o'clock we will all go home. But you speak as long as you like". You will therefore understand why I make sure that I stop while you are all still here.

Again, thank you for your kind invitation.

Dennis Mahoney