



Society of University Lawyers
Annual Conference

The Hon Wayne Martin
Chief Justice of Western Australia

31 October 2008
University Club

It's an honour and a privilege to have been invited to address this annual conference of the Society of University Lawyers. Like the Vice Chancellor, I would like to commence by acknowledging the traditional owners of these lands upon which we meet. They are the Nyungar people of the Perth district which is known in Nyungar language as Derbarl Yerrigan for those of you who are from other parts, and I would like to pay my respects to the traditional owners past and present.

The area in which we meet is particularly significant to the Nyungar people because it's adjacent to the Swan River. You might question the description of it as a river. Some of you might think it looks a bit more like an estuary. Well, you would be wrong because the High Court has in fact told us that it is the sea (*Gibbs v Mercantile Mutual Insurance* [2003] 214 CLR 604). I was very pleased when they declared it to be the sea because it means that when I sell my house which is just up the road, I will be able to advertise it as having ocean views.

Within Nyungar people's tradition, the main spiritual creature is a serpentine creature known as the Wagyl. The Wagyl inhabits the Swan

River. So if you feel an additional presence during your deliberations today, it's probably the Wagyl.

I was musing earlier in the week about the challenges that face university lawyers. You are much better equipped than I to identify those challenges, but there are a number that occurred to me. The first was the maintenance of your professional independence in a university context. The law has recognised for a long time that legal advice is enhanced by being given from a position of independence, and some of our professional structures have been deliberately adopted to accommodate that independence. The Bar is a classic illustration of a structure that has been modeled deliberately for the purpose of ensuring that legal advice is given from an independent source. The Bar is, of course, comprised entirely of people who practise as individuals and who are precluded by professional rules from having any association with any other legal practitioner, or indeed any other organisation, and that has been done to ensure the independence of their advice. There are also a vast number of private law firms who proceed largely upon the assumption that advice is best given from an independent source. One of the difficulties that I am sure you confront in a university setting is maintaining that degree of independence and detachment which you need to maintain if you are to give advice of value - advice that is truly independent and impartial.

Universities are places which traditionally recognise academic freedom, but academic freedom is a different thing to the independence of advice which in-house lawyers might be required to give in the setting of an administrative hierarchy. One of the things that is essential, not only in universities but, of course, for any in-house lawyer in any corporate setting, or indeed any government setting, is the maintenance of that professional independence which is such a viable part of the value of the advice given.

The second area that occurs to me is the area of ethical values and support for those ethical values. The ethics of the legal profession are not well known outside the profession and to some, our ethical standards appear strange. So I suspect that you may work in an environment where your adherence to those ethical standards may not be readily appreciated and there may be occasions upon which those to whom you report do not fully appreciate the ethical basis from which you are working.

That leads me to the third area, which concerns your reporting lines. I suspect that in most university structures, the in-house legal team would report up the line to people who are not themselves lawyers, and that can, I am sure, create some difficulties from time to time because those to

whom you report higher up the line may not appreciate the needs for independence and the need for the ethical base to which I have referred.

Another area that I am sure arises from time to time is the maintenance of professional relationships. This university has, I think, a team of seven or so lawyers, and no doubt within that team they can maintain their professional associations. But there is a challenge for lawyers in a setting such as a university to maintain their relationship with the outside profession, and to undertake the continuing legal education and the professional contact that is so necessary to keep up to date.

Another area of possible concern is performance indicators for university lawyers. How do you identify a set of standards to evaluate performance of a lawyer in a university setting? Universities are very large commercial enterprises with substantial assets and investments but they are not businesses. They are not conducted for the dominant purpose of generating a profit. In that context it is very hard to identify key performance indicators because you cannot really measure them in terms of profit. I don't know if you are required to keep timesheets and have a kind of mythical billable hour regime. I would think that is a little unreal in a university setting and so it is very hard to see how realistic

performance indicators can be established for university in-house lawyers.

The final area that I would like to refer to is career paths in a university setting. Again, because you are in a discrete area of the university administration, further up the path would normally be a non-legal setting. So there may be an inbuilt ceiling upon your capacity to rise through the university hierarchy. I am sure there are many more areas of challenge and if there are others, I would like to allow some time for questions a bit later this morning. I would be happy to hear from you.

What I would like to do is try to demonstrate the importance of these issues, like independence and the maintenance of ethical standards within a corporate setting, by reference to my experience in the HIH Royal Commission which was held in Sydney between 2001 and 2003. The collapse of the HIH Group, which was one of the largest groups of general insurance companies in Australia, was generally thought to have been the largest collapse in dollar terms in Australia to date, and that, I believe, is still the case. The collapse occurred at about the same time as a number of other collapses which were significant to Australian consumers, including Harris Scarfe, Ansett and OneTel. A rash of major unexpected collapses at a time of apparent economic prosperity took

many by surprise and properly focused the community on mechanisms and structures of corporate governance. HIH was in fact Australia's second largest general insurer. The ramifications of its collapse were profound and extensive. Almost nobody in the community was immune to the consequences of its collapse. It dominated the market for the provision of builders' warranty insurance with the result that a lot of building projects around the country simply stopped overnight and it took some months before alternative insurance could be put in place. Many people were put out of work in the building industry and in the industries that supplied the building industry.

People who had been seriously injured and who depended on insurance payments for their very survival were thrown back onto the meagre benefits provided by social welfare. Even people who had no direct dealings with HIH were profoundly affected. To give one example, there was a group of farmers for whom I was acting at the time, whose farms were burnt out by a fire which had escaped from the local tip. The tip was under the control of a local authority which was insured by HIH. The likelihood of their actually being paid in the event of their success in the claim diminished significantly with the collapse of HIH.

So given those consequences, the question that arose very loudly in the community was: How could this have happened? How did all this happen? How do we suffer these disastrous consequences? HIH had all the apparent trappings of success. It had large and opulent corporate offices in every State. It had a fabulous programme of entertainment, gifts, donations and corporate sponsorship. Its CEO, Ray Williams, was feted as one of Australia's most successful self-made men. Now, perhaps even more significant than those superficial indicators, it had a board of directors comprised of highly-regarded senior and experienced representatives of the business, legal and accounting communities. It was audited by a highly-respected accounting firm - one of the then big five - although the collapse of that firm later reduced the number to the big four. The provisions it made for future claims liabilities, which were a very significant aspect of its collapse, were the subject of advice from a number of actuaries. It operated in the most highly regulated area of Australian business which is the financial sector; it was subject to the most intensive form of regulation of any sector in the Australian business world; and it was regulated by a newly-created and highly prudential regulator, namely, the Australian Prudential Regulation Authority.

So with all that going for it, how did it happen? Why did it all go wrong? Why did all the mechanisms that were supposed to be in place to prevent

that sort of thing from happening fail? Justice Neville Owen produced three volumes of a report to explain why HIH went wrong, so it is difficult to summarise those three volumes in a few pithy sentences, but doing the best I can, I would like to draw on a fairly well-known analogy and that is: A fish rots from the head. Although HIH had firmly in place all the traditional governance mechanisms, including a well-credentialed board, an audit committee, independent auditors and actuaries, the best legal advisors that a lot of money could buy, all of those checks and balances failed because HIH at its senior levels was unduly focused upon the letter of the law (although in some cases they also breached the letter of the law), but their focus was upon the letter of the law, not upon the purpose or objective of the law. So they focused upon form and not upon substance, and they did not give any attention to the moral component of the laws that governed their business activity.

What perhaps struck me most profoundly was that although the fish had undoubtedly started to rot at the head, by the time the liquidators were appointed, that rot had spread through almost all levels of the corporate group, or indeed the two groups that merged to form HIH. It infected officers at relatively junior levels, and when they were asked questions in the Royal Commission, it was clear that their key focus was whether or

not they could get away with what they were doing, and not upon whether or not what they were doing was right.

I will try to give you some indication of the dimensions of this problem with some examples that are admittedly fairly superficial. The profligate expenditure of the managing director who was, of course, responsible for defining the culture of the institution, unchecked by the board, was an appalling example of irresponsible leadership. He spent \$380,000 of the company's money buying gold watches to give to his favourite staff members. He provided an unsecured and interest free loan from the company to a personal friend in an amount of \$500,000, and he spent \$1,600 of the company's money buying cigars for this personal friend at a time when the friend was not repaying the loan or paying any interest on it. He organised a company Christmas party in Sydney in the last year of the company's existence that cost \$800,000. He was regularly giving away about \$5,000,000 a year of the company's money to charities of his choice, most of whom reflected his generosity with other people's money by bestowing honours and accolades upon him personally. And I have to tell you that one of those institutions was a university. I won't mention it because there might be representatives of it here, but as a result of him giving that university a large amount of the company's money, they bestowed an honorary doctorate upon him.

In the context of that sort of largesse, there is one story that I have to debunk because it gained a certain degree of currency as a result of an article in The Australian newspaper. Dr Williams, as he liked to call himself, was fond of travelling quite a lot, and there was only one part of the aeroplane that he would ever travel in, and large amounts of money were spent on his travel. Michael West, who some of you may know, is a journalist with The Australian, published an article to the effect that I cross-examined Mr Williams along the line that when he travelled, he would reserve a seat next to him for Mr Casey Williams in order that he could put his briefcase on it. That was when his wife was not travelling with him. That article was published in The Australian newspaper. It then travelled the world by email very, very quickly. Within a day or so of its publication, I got emails from friends in Europe and North America that I had not heard from for years, who had seen the article, congratulating me on this extraordinary line of cross-examination. If only it had been true. So I am probably best remembered for my role in the HIH Royal Commission for a line of cross-examination that never took place.

Going back to those extravagances, you might think I am being a bit petty by drawing attention to those amounts of expenditure because in the

context of a group the size of HIH, not even expenditure at that level could have any significant impact upon the financial solvency of the group. The point I make is that that kind of largesse, and the extravagances that were seemingly endorsed by the board, and certainly encouraged by the managing director, gave rise to a corporate culture that led to much more significant and enduring problems. At all levels, I think there was a lack of awareness of the responsibilities of the employees and the officers of the company as stewards of the shareholders' funds - they just did not understand that fundamental level of responsibility. So at senior levels a number of utterly disastrous decisions were taken - I think largely because of a lack of that awareness of their fundamental position and responsibilities. They undertook a major re-insurance business in the United Kingdom which lost them about \$1.5 billion. They went into the American market, including the re-insurance market and managed to lose about \$700,000,000 there. They ventured into China and lost a significant amount of money there. There was, of course, also the acquisition of FAI which managed to lose them about another \$700,000,000. So that was about \$3 billion odd in just a few disastrous decisions and again I think it largely came about as a consequence of their failure to appreciate their responsibilities. There were other more amusing, less financially disastrous decisions like the decision to provide personal injury insurance for the Taiwanese armed

forces at a time when tension with China was extremely high. They also provided reinsurance to the main motor vehicle insurer in Israel at a time when cars were being extensively damaged by terrorist activities, and they provided so-called insurance on the outcome of the European Football Cup which was really just a gamble. Through all these ventures they managed to lose significant amounts of money.

The other problem I mentioned was the merger with FAI. It was extraordinary to me, and I hope a coincidence, that two organisations that were each corrupt managed to find each other. Perhaps it is a coincidence, but basically two mangy dogs managed to mate and you can imagine what the offspring of that union was.

The point of all of this is that there is a very real and insidious tendency for people in organisations, whether they are government or large corporate organisations, to get swept up in the need to produce results and outcomes and to lose sight of the wood for the trees and, at the risk of completely torturing and mangling this metaphor and losing my way altogether, losing their moral compass. So again, as I have mentioned, the fundamental problem in each of HIH and FAI was that the main question that was always asked when a proposition was being considered was: Can I get away with this? Not: Is this right? Certainly within the

HIH Group, from time to time the latter question was also asked, not just within the organisation, but also of external legal, commercial and other advisers. But more generally I think the question that was asked was: Can we get away with this? Unfortunately, I think from the perspective of the legal profession, the question was answered in precisely those terms, and none of the external advisers pointed out that that was really the wrong question. The HIH accounts were all smoke and mirrors, and there were quite a lot of deliberate artifices adopted to conceal the true financial position of the company. Those artifices were endorsed by external accountants and lawyers who relied upon extremely technical arguments in order to justify what was ultimately a patently false set of accounts. I think it is disappointing for those professions that neither the external lawyers, nor the accountants ever said: Well, you might be technically correct but what you are doing is wrong. There is no evidence that they ever suggested that.

The practice of law, which is what we are all engaged in, is a profession. The distinction between a profession and a business lies in the primary obligation of a professional person to serve the community, and not simply derive profit. In-house counsel have a special role and responsibility in relation to the performance of their profession because you are situated in a business or government setting, or in a university

setting, in which you are answerable to your employers. So that provides, as I said earlier, a special context in which you have to be rigorous and zealous indeed to maintain your professional standards and your professional obligations. As long ago as 1596, the great lawyer Francis Bacon in his preface to his seminal work for Common Law wrote, "I hold every man a debtor to his profession". (Gender awareness had not reached Bacon I'm afraid.) You are all debtors to your profession, but, of course, the debts that you owe are not measured in dollars and cents. They are owed in professional obligations and duties. They include, I think most significantly of all, the duty to speak out when a proposition is being advanced which might be technically correct, but is professionally irresponsible, inappropriate, unethical or immoral.

Of course, that obligation does not extend only to in-house legal advisers. It extends to external legal advisers as well. Those external advisers under the structures of contemporary business and professional practices are not themselves immune to distractions from their professional obligations by business and profit motives. Increasing focus, indeed, the almost indecent obsession within the private legal practice on billings and the achievement of fee targets is just as insidious a threat to professional independence as is an employee's obligation to the enterprise of which he or she is a member. I do not think in-house counsel are alone in this sort

of threat to institutional and professional independence. In each case though, wherever you are situated, whether you are in-house or in a private firm, the subversion must be resisted and the professional obligation must remain paramount, it must remain your guiding light, even at the risk of personal disadvantage.

Of course, wise and prudent men and women of government and commerce - and I'm sure the Vice Chancellor who is still here - realise that the benefit they have derived from legal advice will be directly related to the robustness and the independence of the position from which that advice is given. So you are not doing your clients any favours by subverting yourselves to what you think their wishes might be. If your clients pause to think about it long enough, they will soon appreciate that they gain absolutely no advantage from sycophantic minions telling them what they want to hear because, of course, when that advice comes unstuck, as it surely will, the consequences can be disastrous.

I am sure none of you have succumbed to that temptation but it is I think a real temptation and a threat can sometimes be insidious and not readily perceived. I am sure you are very well alert to these problems and I think it is also fantastic that you have a national organisation through which you can meet regularly to discuss these issues of common interest.