THE SUPREME COURT OF

WESTERN AUSTRALIA

SUPREME COURT OF WESTERN AUSTRALIA
150TH ANNIVERSARY IN 2011

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 17 JUNE 2011, AT 4.17 PM

MARTIN CJ: The Court sits today to commemorate the 150th anniversary of the creation of the Court. We do so one day prematurely, as the ordinance creating the Court was promulgated on 18 June 1861 but today is the closest day to the anniversary which will be marked by a dinner to be held at Government House tomorrow evening. I would like to particularly welcome our many distinguished guests: Right Honourable Dame Sian Elias, Chief Justice of New Zealand; the Honourable Terry Higgins, Chief Justice of the ACT; Justice Geoffrey Nettle, representing the Supreme Court of Victoria; Justice Roslyn Atkinson, representing the Supreme Court of Queensland; Mr Malcolm McCusker QC, Governor Designate; Justice Stephen Thackray, Chief Judge of the Family Court of Western Australia; Judge Peter Martino, Chief Judge of the District Court of Western Australia; President Denis Reynolds of the Children's Court; Justice Neil McKerracher of the Federal Court of Australia and many other distinguished guests, too numerous to mention.

The Chief Justice of Australia, the Honourable Robert French AC, had planned to join us but those plans have been thwarted by a cloud of volcanic ash which could have threatened his return to Canberra. We are, however, very pleased that her Honour Val French is able to join us. I should also mention the Chief Justice of New South Wales, the Honourable Tom Bathurst, is unable to be present this afternoon but will be attending the commemorative dinner to be held tomorrow evening.

I would also like to particularly welcome those who will address the Court this afternoon, being the Honourable Christian Porter MLA, Treasurer and Attorney-General, appearing on behalf of the Government, Mr Hylton Quail, President of the Law Society of Western Australia and Mr Grant Donaldson SC, President of the WA Bar Association.

It is important that I commence by acknowledging and paying my most sincere respects to the traditional owners of not just the lands upon which we meet but of all the lands of the State that fall within the jurisdiction of this Court and their Elders past and present. Although it is not the usual practice to commence sittings of this Court with such an acknowledgment, it is I think important that we do so today because the event which we commemorate came about as a direct consequence of the colonisation of the lands now known as Western Australia and the consequential dispossession of the original occupants of those lands, who had been the traditional custodians for around 50,000 years.

That time scale provides some perspective for the much shorter period of 150 years which we commemorate today and appropriately places the period in which these lands have been occupied by settlers, originally from Europe and later from other continents, into the broader historical

context. The settlement founded by Governor Stirling in 1829 created an inevitable clash between the culture, laws and traditions of the settlers and the culture, laws and traditions of the original inhabitants.

The first settlers, perhaps understandably, had little or no understanding of Aboriginal culture, law or tradition. Perhaps because of their ignorance of those things, the colonists made no attempt to recognise or accommodate them within the legal system which they brought with them from England. Instead of compromise and accommodation, there was a head-on collision between two radically different cultures and legal systems. That clash led to confrontations and skirmishes, which were sometimes bloody.

Of course, the colonists prevailed by force of arms and the laws and culture which they imported have been dominant since the early days of the Colony. The system of Courts founded by Governor Stirling in 1829 has been a vital component of the systems for the enforcement of those laws and this Court has been at the apex of those systems since its creation in 1861. It is important to recognise and acknowledge that the creation of this Court was a significant step in the process by which the original inhabitants of these lands were forcibly dispossessed and largely prevented from living in accordance with the laws, cultures and traditions which had governed their lives and the lives of their ancestors for tens of thousands of years prior to colonisation.

The devastating consequences of that process for Aboriginal people and their descendants presents this Court and the other Courts of this State with one of their greatest contemporary challenges, and that is a matter to which I will return, but that is why I think it is important that we commence today's sitting with the paying of our respect to all the Aboriginal peoples and language groups who live within the jurisdiction of this Court. It is also why the unveiling of a piece of art which symbolises Aboriginal law and culture by a prominent Nyoongah artist, Mr Toogarr Morrison, is the centrepiece of the function which will follow today's sitting.

This court exists to serve the community. In order to engage the broader community in the events marking our celebrations, in addition to this public sitting we are opening the court to the public this Sunday between the hours of 11 am and 4 pm. Historical artefacts will be on display, judges will be on hand to deliver short addresses on the history of the court, and areas of the court from which the public are usually excluded, including my chambers and some of the other judge's chambers, will be open for inspection, as will be the holding cells.

We are also deploying funds generously provided by the state government through the good offices of the Attorney General, and for which we are most grateful, to subsidise visits to the education centre, which operates in the old courthouse, by schools which would not otherwise be in a position to meet the costs of travel and attendance, over a program which will run from now until September and which will include art and essay competitions for visiting students. Selected entries will be published on our web site.

I have prepared a paper in which I refer in some detail to the circumstances which gave rise to the creation of this court in 1861 and in which I set out some of the more salient aspects of the history of this court since its creation, and of the courts of Western Australia which preceded the creation of this court. That paper will be available to all and it is being published on our web site as we speak, but it is too lengthy and too detailed to be presented in its entirety at this sitting, so I will speak only to some of its more significant features.

On 14 May 1829, after Captain Stirling had set out for the Swan River Colony, but before he had arrived here, the UK Parliament passed an act entitled "For the Government of His Majesty's Settlements in Western Australia on the Western Coast of New Holland". Aside from naming the colony Western Australia, that being the first colony to include "Australia" as part of its name, that act authorised the Crown to issue orders empowering any three or more persons to make laws and to constitute such courts, and I quote, "As may be necessary for the peace, order and good government of the colony".

Curiously, the powers conferred by the Western Australia Act were not exercised until almost two years later when a commission was issued to Stirling appointing him governor of the colony, and authorising him to create a group, which he would chair, which would be both an executive council and a legislative council. Interestingly, Stirling's commission contains the first reference to the Supreme Court of Western Australia in the context of a reference to those parts of the Western Australia Act which authorised the constitution of courts

within the colony, but it was to be another 30 years before a court bearing that name was created.

The commission was dispatched to Stirling with a detailed set of instructions as to how the powers were to be exercised, together with a letter from the Colonial Secretary, Lord Goderich, providing him with some advice. The letter suggested that the first priority of the Legislative Council should be the creation of a system of courts, "Of a more simple though less popular character than the courts at Westminster", but I think it is clear that Goderich was not enamoured with the procedures adopted by the courts of Westminster because, in his letter to Stirling he wrote, and I quote:

> It is almost needless to say that the administration of the law, both civil and criminal, in England is encumbered with a multitude of forms and attended by a degree of expense which have recently attracted the anxious deliberations of Parliament and of His Majesty's Government. If the same system were transferred to an infant colony, it would of course be subversive of the very end it was designed to promote. Whatever may be the advantages, real or imaginary, of the complex judicial processes which prevail in the courts in Westminster Hall, it will be at once admitted that in Western Australia justice should be administered with the utmost possible degree of simplicity and economy.

Goderich's plea to administer the law with the utmost possible degree of simplicity and economy is one that we should strive constantly to achieve.

Stirling followed his instructions and the first act of the new Colonial Legislature was the creation of a court termed the Civil Court, which was invested with all the jurisdiction within Western Australia that was enjoyed by the Common Law Courts in England. The failure to specify that the court was also invested with equitable and prerogative jurisdiction was later to become a source of controversy, and indeed became the cause of the creation of the Supreme Court in 1861.

The Civil Court was busy from its inception, as was the criminal court, the Court of Quarter Sessions. The early courts sat in both Fremantle and Perth. In Perth for the first seven years of the colony they sat in the Anglican church, situated on the corner of Hay and Irwin Streets known as the "rush church" because its walls were made of rush. The building was not weatherproof and on days of heavy rain, the court had to sit in the Registrar's office. Interestingly enough, the Central Law Courts and the District Court are each located today on that same

intersection.

The building used by the court in Fremantle was no better and was robustly criticised by the press of the day. As a result of the inadequacies of those buildings, Governor Stirling commissioned a new courthouse to be built on the banks of the Swan River, adjacent to the Commissariat Store. That building was designed by Henry Reveley, a civil engineer, who also designed the Roundhouse in Fremantle.

The building was completed in December 1836 at a cost of 736 pounds. Significantly more than that has been spent on recent renovations to the building, including the replacement of its shingle roof. Happily, however, the building still stands and it is the oldest building still extant within the City of Perth. It and the Roundhouse are the only surviving examples of Reveley's work. Several months after the courthouse was opened, Stirling was chastened by the Colonial Office for not having sought approval prior to proceeding with its construction.

During the 1850s, the court shifted to premises in the new gaol building, which had been erected in Beaufort Street, but the press was again critical of the facilities in that building and court sittings returned to the Reveley building during the 1860s, although this building continued to have its difficulties. Like the rush church, it wasn't weatherproof, and it is reported that in 1867 the first Chief Justice, Sir Archibald Burt, had to hold an umbrella above his head while sitting, until the rain became so heavy that the court had to adjourn until the weather improved.

In 1858 a Commissioner of the Civil Court, Alfred McFarland, ruled that the Court lacked equitable jurisdiction to the consternation of the Governor and the legal profession. He also made himself unpopular by refusing to work beyond normal business hours and by ruling that English Legislation didn't apply in Western Australia unless adopted by the Legislative Council of Western Australia, a ruling which was described as perverse and criticised in the most extreme terms.

The Colonial Office decided to remove McFarland from office, which created a vacancy to be filled by Sir Archibald Burt who moved with his family to Western Australia from the Leeward Islands in the Caribbean in 1861. However, shortly after his arrival Burt also ruled that the Civil Court lacked equitable jurisdiction and prerogative jurisdiction in criminal cases. It was this ruling which led to an urgent need to create a new court with plenary powers. That court was styled the Supreme Court of Western Australia and Burt became its first Chief Justice.

The Supreme Court Ordinance received royal assent on 18 June 1861. Section 4 of the Ordinance established the Supreme Court and invested it with all the jurisdiction in respect of the Colony of Western Australia as the Courts of common law and equity enjoyed in respect of England. This provision has an unfortunate historical legacy in that the jurisdiction of the Supreme Court continues to be defined by reference to the jurisdiction of the English Courts as at 18 June 1861. This occasionally gives rise to unnecessary and complicated historical inquiries into the precise extent of that jurisdiction, the last occurring as recently as two weeks ago in the course of argument before the Court of Appeal.

The Ordinance provided that the Court was to be constituted by one Judge who was to be called the Chief Justice of Western Australia. Calling oneself the Chief Justice when there are no other Justices seems a little grandiose but at least it would have been quite easy to obtain a consensus at a meeting of the Judges.

It's interesting to place the events of 1861 which we commemorate today in some historical context. In Europe the States and Principalities which combined to form Italy were unified on 17 March 1861 although it was to be another 10 years before the same sequence of events occurred in Germany. Across the Atlantic in North America the theme was not unity but disunity as the American Civil War commenced on 12 April 1861.

In Australia, 1861 marked the commencement of two sporting events of National significance.

In November of that year the first Melbourne Cup was run and of course won by Archer. 1861 is also considered to mark the beginning of the series of cricket matches between Australia and England that would in time come to be known as The Ashes series of matches. Less happily, 28 June 1861 is considered to be the approximate date upon which Burke and Wills met their demise in the outback.

Also in 1861 the convict transport Palmerston arrived in Fremantle. Amongst the convicts were Richard Martin and Thomas Martin who had been transported for the offences of larceny and rape respectively. Now, I hasten to add that Martin is a very common surname and to the best of my knowledge I have no family relationship with either of those convict settlers.

With these other distractions the creation of the Supreme Court may not have been at the forefront of the minds of the colonists. The creation of the Court was announced in the edition of the Perth Gazette of 21 June 1861 along with the appointment of the Chief Justice and the other office holders. Preceding the announcement and taking pride of place in notification of matters of importance of the day in the general intelligence section of the Gazette was the announcement:

> The usual monthly mail for Albany will be made up at the General Post Office on Tuesday next, the 25th.

That seemed to be more important to the early colonists than the creation of the Court.

Chief Justice Burt conducted the first sitting of the Court on 3 July 1861. At that time the colony had a population which is estimated at 15,593, although I assume that that would have excluded Aboriginal people. Today the population of the State is estimated at approximately 2.32 million.

Coincidentally, over the last 150 years the population of Western Australia has increased by a factor of almost exactly 150, whereas the number of Supreme Court Judges has increased by a factor of only 22. I look forward, Mr Attorney, to budgetary provision being made for the appointment of the additional 128 Judges we are owed according to the Judge-to-population ration that applied when the State was created. Of course, if one counted all the Judges and all the Magistrates of all the Courts in Western Australia their number would fall significantly short of 150.

The first case tried by the Court was the hearing of a charge brought against Robert Palin of having burglariously entered the dwelling house of Samuel Harding and committed an assault under force of arms. The Jury retired for only half an hour and returned with a verdict of guilty.

According to the Perth Gazette the prisoner was sentenced to death in a very impressive address from the Judge and the death sentence was carried out six days later. Many of the criminal cases tried in the new Supreme Court involved charges brought against Aboriginal people. Regrettably, there is still a disproportionate number of charges brought against Aboriginal people in our Court.

Amongst the many early cases involving Aboriginal people were the cases of four who were accused of murder arising from a payback killing, which was of course justified under Aboriginal law and custom. Each was sentenced to death and publicly executed in front of a large crowd. The victims declined to cooperate with the hangman and as a consequence it took an hour and a half and the assistance of several policemen to hold the prisoners in a place where their lives could be ended amidst what the Perth Gazette described as "a dreadful scene of yelling, groaning and supplications for mercy." Not a happy picture.

In November 1879, Burt shifted the Supreme Court from the Reveley Building to the much larger Commissariat Store which was adjacent. He died in office two weeks later. That is not the exit strategy which I propose to adopt.

Each of the two Chief Justices who succeeded Burt had a major falling out with the Governor of the day. Chief Justice Wrenfordsley fell out with Governor Robinson so badly that the Colonial Office decided to split them up by sending Robinson to South Australia and Wrenfordsley to Fiji, although it wasn't their idea that Wrenfordsley take with him large quantities of crystal cutlery and china purloined from Government House. Governor Broome fell out so badly with Chief Justice Onslow that he forbade him from performing his judicial duties, after which an angry mob burnt the Governor's effigy in Roe Street. Happily, relations between the Court and the Government are much more cordial today.

By mid 1898 the Judges were openly complaining about the quality of their accommodation in the old Commissariat Store. One was reported as describing the Government's inactivity as scandalous. There is a sense of déjà vu in all of this. The Government of those days, however, showed a readier willingness to provide a permanent and enduring solution to the Court's accommodation problems than more recent Governments and by 1899 a committee was appointed to oversee plans for the new courthouse. Those plans were prepared by John Grainger, who was the Chief Architect within the Department of Public Works, and the father of the acclaimed composer Percy Grainger.

The architectural style was Italian Renaissance and, because the building was to stand on an unobstructed site, particular care was taken with the elevations on all four sides. It is regrettable that the rather unsightly addition created by the construction of an annexe in 1987 has obscured public view of the eastern side of the building and diminished the prominence of the Reveley building.

The specifications called for Donnybrook stone but it became apparent the required volume of stone could not easily be found in a uniform colour. Accordingly, Grainger and his colleagues recommended that instead of Donnybrook stone the project should utilise the latest building materials available at the time, namely, stucco and cement. The Premier of the day established a Royal Commission to report on the suitability of the substitution of stucco and cement for Donnybrook stone. The Royal Commission was chaired by the Labor member for the Goldfields and the panel also comprised a rising young architect called Talbot Hobbs. By a majority of two to one, the Royal Commission recommended in favour of stucco and cement. The building was completed and the foundation stone was laid on 2 June 1902. Somewhat remarkably, the building was opened a little over a year later, on 8 June 1903, by the Governor. Given the scale of this building, completion within one year was a quite remarkable achievement. Electricity was installed in the building a year later, in 1904.

Like most new public buildings, the building had its share of critics, including members of the legal profession and at least one Judge. The building has served the Court very well indeed in the period of more than 100 years over which it has been used. Successive Governments are to be commended for having maintained the building in an appropriate state of repair and for the preservation of its very substantial heritage values. It is one of the best preserved heritage courts in Australia. This building and its façade have become for many Western Australians an iconic symbol of the rule of law. It is obviously vital that this building remain a seat of justice in perpetuity and I am pleased to report that I have never heard any serious suggestion to the contrary.

Of course, over the course of 150 years any institution comprised of human beings will make mistakes and this Court is no exception. It would be impolite to dwell excessively upon our mistakes on a celebratory occasion such as this but prominent amongst them, I think, is the decision of the Full Court in Re Haynes, when the Full Court refused to allow women to be admitted as legal practitioners on the perverse basis that the expression "every person" in the Act did not include women, even though the Interpretation Act expressly provided that it did. It took almost 20 years for legislation promoted by Edith Cowan, who coincidentally was born in 1861, 150 years ago, to overcome this appalling feat of statutory misconstruction.

More recently criticism has been directed at the Court as a result of a number of convictions that have later been found to be unsound and set aside. A detailed analysis of each of those cases is well beyond the scope of this paper but it is plain that in a number of those cases the cause of the problem was beyond the control of the Court. It is also important to remember that although a number of those cases have come to light in recent years over a relatively short period, the convictions in question span a much lengthier period of almost 50 years and, when viewed in that temporal context, are relatively few in number. But, of course, injustice in any case is a travesty which cannot be condoned and the members of this Court have worked and continue to work assiduously to minimise the risk of any such injustice. Notwithstanding those efforts, however, it would be fatuous to suggest that mistakes have not been made and I do not do so.

It is appropriate when celebrating an anniversary to spend a little time looking backwards and in my paper I have done so. However, it is also appropriate to use the lessons learnt from an historical view to look forward with a view to identifying the challenges of the future. There are a number of specific challenges for the future which I would now like to address.

As I have noted, Aboriginal people have been consistently over-represented in the criminal justice

system of Western Australia since the foundation of the Colony in 1829. I have set out the contemporary statistics dealing with that over-representation in other papers. Those depressing figures show that the head-on collision between the law, culture and customs of the European boat people and the Aboriginal inhabitants has had enduring ramifications that persist today.

I do not mean to diminish the significance of this Court and of the other criminal Courts of Western Australia by the observation that the causes, and therefore the solutions to the problem of Aboriginal crime, lie outside the Court system. I think the causes lie in all those aspects of Aboriginal disadvantage which are so well known and so well documented. They include poor standards of health, including infant health and mental health, high levels of substance abuse, family dysfunction, poor school attendance rates, poor rates of participation in employment, low levels of income, inadequate housing, cultural alienation and dispossession from traditional lands. Unless and until these multifaceted aspects of disadvantage are cohesively and holistically addressed, it is inevitable that Aboriginal people will continue to be over-represented in our Courts.

The apparent intractability of these problems suggests that we have not yet found the answers, and it is not for want of trying. Perhaps we need to spend more time listening to Aboriginal people and empowering them to take control of their own destiny to arrive at their own solutions. One thing is, however, clear and that is that the apparent intractability of these problems cannot be allowed to cause any loss of hope or enthusiasm. On the contrary, we must reaffirm our resolve to do anything and everything which we can to improve the living conditions and prospects of the descendants of those who were so affected by European settlement.

As I have noted, the evils of technicality and complexity and consequent cost appear to have been a feature of litigation since the creation of the colony in 1839. The exhortation of Lord Goderich to administer the law of Western Australia with the utmost possible degree of simplicity and economy remains an unachieved ambition. This is not the occasion for the delivery of a detailed manifesto on the steps that might be taken to address these issues, and, again, these have been covered in other papers.

One significant step, however, would be the re-enactment of the legislation creating the superior courts of this state with a view to the elimination of unnecessary technicality and complexity and the provision of legislative support for the various steps which we have taken and which we would like to take in the future to simplify procedures and expedite the resolution of proceedings. An obvious example is the quaint and impractical definition of the jurisdiction of this Court by reference to the jurisdiction of certain English courts on the day which we here commemorate, namely, 18 June 1861 and to which I have already referred.

Another important aspect of access to justice lies in the provision of information to the community concerning cases that are tried by the court. Of course our trials and hearings have generally been open to the public since the creation of the Court. Contemporary Western Australians rely more and more upon all forms of media, printed and electronic, to garner the information which they use to assess the performance of the institutions by which they are governed including the courts.

In recent years this court has actively encouraged and facilitated greater access by all forms of media to our proceedings and we will continue that quest. One recent example of the steps we have taken is the television broadcast last night of a documentary drawn from the videorecording of a homicide trial which we believe to have been the first homicide trial in Australia to have been filmed for public dissemination. We are also proposing

that as our aging audiovisual equipment is replaced. Provision will be made to enable webstreaming of court proceedings in the new equipment which is installed. This adds little extra cost but will enable us to utilise web-based media for virtual appearances by counsel and witnesses and, perhaps in years to come, streaming of court proceedings to the public. This is not to say that we are presently committed to webstreaming as there are a number of difficulties with that, merely that we think it wise to obtain the capacity to move in that direction if we wish.

As I have noted, the problem of obtaining suitable premises for the conduct of the business of the court plagued the Court during the first 40 years of operation and has resurfaced over the last 20 years of the Court's operations. The magnificent building in which we now sit was designed to house three judges, whereas the Court now has 22 judges, a master and nine registrars. At the sitting of Justice Edelman to welcome Justice Edelman next month it seems likely that one of their Honours may have to sit in the lap of another.

At the turn of the last century executive Government was induced by exigency of circumstance to realise the provision of appropriate premises for the Court and which provided an appropriate symbol of the importance of law and order in our community was a key priority of Government. They were prepared to allocate a significant proportion of the financial resources of the state which had been recently expanded by a boom derived from the exploitation of natural resources, at that time gold, in order to meet that need. It is regrettable that over the last 20 years a succession of Governments have not felt the same order of priorities despite them having the benefit of a natural resources boom of much greater proportion.

At the risk of being branded a naive optimist, I am hopeful that our accommodation needs will soon be addressed. With the active support of the Premier and the Treasurer and Attorney-General for which we are most grateful, active consideration is being given to the provision of accommodation for the Court in part of a building of approximately 35 storeys in height which is to be developed as part of the arrangements for the refurbishment of the Old Treasury Building and adjacent precincts. The site is between the Old Treasury Building and the Town Hall, immediately adjacent to the spot upon which the felling of a tree is taken to have denoted the establishment of the city of Perth. Although it is not our most ideally preferred site, it is nevertheless an entirely appropriate site and subject to some considerations which I will shortly mention could provide the Court with the accommodation it needs to continue to serve the community effectively over the next period of its existence.

If that objective is to be met there are some minimum requirements that must also be met. First, the building must be designed and constructed as a court building and not just as another office tower. That portion of the building which is to be occupied by the Court must be specifically designed with our needs and requirements in mind and in detailed consultation with the judiciary. Second, the Court must have security of tenure over the premises which it occupies. This court is very different to the many other public institutions for which Government provides accommodation. It's continued existence and operation is protected by the constitution of the Commonwealth and is part of our constitutional framework. The accommodation provided to the Court must be provided on a long-term basis which takes that timescale into account.

Third, the expansion of the Court over its first 150 years can be expected to continue into the future. The rate of development of our state, fuelled by a resources boom of unparalleled proportions, will inevitably lead to equivalent growth in Court business. It is therefore essential that plans be made for the future expansion of the premises available to the Court within the building to which I have referred.

Plans for the provision of premises for the Court in the building to which I refer are still at an early stage of development and as I have noted, no commitment has been made by Government for the provision of premises to the Court in this new building. The cynic in me would note that Government has given similarly active consideration to other proposals to meet the future accommodation requirements of the Court many times over the last 20 years but to not avail, but it would be churlish to do other than to express our considerable gratitude to the Attorney-General and Treasurer and to the Premier for their support for this possible project which has the capacity satisfactorily to meet our accommodation needs for the indefinite future.

In conclusion, can I observe that for 150 years this Court has stood at the apex of the systems that have existed within the colony and later the State of Western Australia for the maintenance of law and order and the administration of justice. The Judges of this Court have done their best and will continue to do their best to be faithful to their oath to administer the law for the benefit of all, without fear or favour, affection or ill-will.

This Court has been and will continue to be a vital component of the rule of law which is an essential aspect of our liberal democracy and which distinguishes our system of Government from the despotic and autocratic regimes which exist in too many countries of the world. The residents of this State can come to this Court confident in the knowledge that they will be given a fair hearing and that the Court will do its best to provide an outcome which best meets the justice of the case.

The history of this Court has not been without its blemishes and it's certain that mistakes will be made in the future; such is the nature of our business. However, notwithstanding those occasional blemishes the citizens of this State are entitled to take great pride in the consistent administration of justice by this Court over the first 150 years of its existence and can look forward with confidence that this Court will continue to protect their rights and interests and enforce the law of this State for the indefinite future. Mr Attorney?

THE ATTORNEY-GENERAL: Thank you, your Honour. Your Honour, it is a truly great pleasure to contribute to this sitting in commemoration of the 150th anniversary of the Supreme Court of Western Australia on behalf of the Executive Government.

During that first sitting, after the remarks from the West Australian first Chief Justice to mark the special significance of the occasion, the Chief Justice then admitted the State's first Attorney-General, George Frederick Stone, as a member of the Bar, along with two other practitioners. In admitting the first Attorney-General, the Chief Justice is reported as saying:

> I feel, gentlemen, that in my efforts to discharge the important duties of my office I can with confidence rely that at all times I shall receive courteous and strenuous support.

Over the years, Attorneys-General have had to balance the role of supporting the Courts with executive and representative Governments growing and sometimes less than compatible responsibilities to the public and to the community. However, the Office of Attorney-General has been with this Court from the beginning and the statement of the first Chief Justice that he was confident he could rely on the first Attorney-General for support is an important one.

I have taken what was said to mean not that the Chief Justice was expectant of perpetual agreement with the Attorney-General, but that being both an officer of the Court and also a member of Executive Council that the Attorney-General would be expected to support, protect and advocate on behalf of the Court and the legal profession within the Government.

The support of modern Attorneys-General to advance the interests of the Court inside Government should still be expected by the Court and I was very pleased to be able to express that support in a limited and prosaic way by funding the program of community focused events commemorating the 150th anniversary of the Court, of which today's sitting is one such occasion.

Another form of support that is available from a modern Attorney-General is with respect to the advocating inside Cabinet for the provision of funding and facilities for the Court and this is a matter to which I will return shortly.

Your Honour, it has been noted that on the first day of sitting in 1861 there were three matters prosecuted, the first with respect to Mr Robert Thomas Palin whom you have noted was found guilty beyond reasonable doubt of burglariously entering a dwelling house in Fremantle and

therein committing an assault under force of arms.

Mr Palin was found guilty by a jury that same day and after what the Perth Gazette said was a very impressive address by the Chief Justice - your Honour, if only The West Australian was as good in its reporting today - Palin was sentenced to be taken away and hanged. What is also interesting, your Honour, is that on the first day the prosecutor in that matter was the Attorney-General himself.

I can say now that as a modern Attorney-General addressing the Court on the very same occasion 150 years later, my aim for the listeners of this short address is for an outcome somewhere slightly above "mildly informative" and somewhere significantly beneath "fatal".

As is the case in many professions, while the legal profession and Courts in Western Australia have undergone many changes in 150 years, there is also some sense of the more things are changing the more that they stay the same in our profession. Dare I say it that the path of advancement through the profession today from a practitioner's developing seniority and beyond that to appointment to judicial office bears many of the hallmarks of the process of early colonial society in which it developed.

In the historian John Hirst's tremendous series of essays, he describes how gentlemanly status was greatly sought after in the early Australian colonies and how it was most often achieved by a Parliamentary appointment of a citizen to then what was the proto-judiciary, notably one's appointment as a Magistrate.

Indeed, this occurred to such a great extent in the colonies that the old English idea of a gentleman became almost synonymous with that of the office of magistrate. Hirst describes that:

> The widening of the ranks of gentlemen in the colonies was a fairly rapid but traumatic process. Gentlemen who had or thought they had good traditional claims to the gentlemanly status, regarded themselves as superior to the would-be gentlemen, but the would-be gentlemen with the summit of their ambition in sight were not disposed to accept a subordinate place. They subjected any claims to superior status to remorseless analysis. How had so-and-so made his money? What was the real reason for his coming to the colony? Who were his wife's people?
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> Such was the staple of the day-to-day gossip and often of public feuding. Challengers could not meet the traditional criteria but they used them to denigrate occupiers. Just because the new men could not be excluded, the contentions for place and precedence were fearsome. In small societies where so many were par venus and the traditional standards were being set aside, there could be no agreed basis for the ranking of gentlemen other than magistrate. The result was the bitter personal feuding and the litigiousness.

Your Honour, that is either a very good historical description of a really tough day for someone aspiring to magisterial appointment in the early colony or a perfect description of Francis Burt Chambers on a Tuesday.

While the profession still bears many resemblances to its colonial origins, there has of course been and will continue to be much change, and on occasions such as this it is customary to make some comment about the future. No doubt in another 150 years' time those repeating this ceremony will read transcript and news articles and find some of our behaviours in 2011 quaint, as we seem to do with respect to the 1860s legal profession, and I am sure that in 150 years many of our future predictions will be irrelevant if not wrong.

Nevertheless, two matters on which I would like to touch are two looming challenges of the very near. The very near physical future of the courts and the very near digital future for the court. As your Honour has noted, the court's physical past has been an interesting one. Your Honour has noted here and elsewhere that although the Old Courthouse adjacent to this building was in existence since 1836, it was in poor repair even 20 years later, and thus from 1857 the Court of Civil Judicature and then the

Supreme Court, sat above the gaol on Beaufort Street and continued to sit there until 1863 where, according to the historian Enid Russell, an expanding prison population forced the Supreme Court out of the gaol and back into the Old Courthouse building.

In your Honour's continuing discussions with the Director of the Department of Attorney-General and the Under Treasurer about a future court building, your Honour would be very wise to ensure that neither of them ever knows this history. It will give them ideas. Ideas of the type that it is dangerous for senior bureaucrats to possess. A system whereby the court was unable to continue to sit when the expanding prison population actually began to intrude into the courtroom would be described by Treasury officers as a financially homeostatic mechanism.

It was then the case that in 1863 the government had to look for an alternative location for the Supreme Court. In 1863 the return to the Old Courthouse was not an ideal solution. Indeed, your Honour, as you have noted, if all Western Australian Chief Justices were able to sit in one room and have the, "When I were a lad," discussion of the difficult attitudes of successive government to court infrastructure and the privations they had to consequently endure, his Honour Chief Justice Burt might win that argument and as you have noted on 7 June 1867, the Perth Gazette claimed:

> An unusual sight to be seen on Wednesday in the Supreme Court, a judge presiding on the bench under an umbrella. The roof was leaky and his Honour did not like to suspend the case under hearing.

Your Honour, the postscript to that story, according to Enid Russell, was that:

> The machinery of executive government sprang ever quickly into action and the roof was repaired two years later.

By 1879 the Old Courthouse building had run down to the point where the Supreme Court moved into a two storey building, originally a storehouse, not far from where the Bell Tower is presently located. It was then finally in 1903 that the current Supreme Court was finished.
Your Honour, whilst the judiciary is often, and most often justifiably hard on the executive regarding the provision of court infrastructure, it is interesting to note that it was not until after the Supreme Court had been fully completed in that year that the Parliament House was opened and that Parliament House was opened whilst only half finished.

Your Honour might take some comfort that if stadiums rank at one end of the excited public imagination for the

good and the great of public infrastructure, then it is also the case that parliamentary buildings would always trump courts for unpopularity at the other end where public enthusiasm somewhat wanes. Nevertheless, proper accommodation is of course critical and the legal profession and parliament came to appreciate an important principle regarding court infrastructure when it was first voiced by an advocate general of Western Australia in the 1850s. He argued that:

> Court renovations should be a clear priority because the misery of the judge is the misery of the bar. The amount of unmerited annoyance he can cause is scarcely conceivable and the public must suffer if his nerves give way.

It is an unfortunate reality of timing, your Honour, that some annoying legal details such as contracts not yet having been signed, preclude a completely conclusive announcement on this otherwise very suitable date regarding the issue of a new building for the Supreme Court.

However, while there has already been so much said on this issue, I would like to add just a little. Your Honour is neither naïve nor unduly optimistic in your expectation that the Old Treasury Building will become a home for the new Court. You have on your side and supporting your position the Premier, the Treasurer and the Attorney-General. Your Honour, in State politics that is a powerful trinity, particularly when there are only two of us.

All that your Honour has said about the need for the Old Treasury Building to be more than another office block is completely correct. A new home for the Supreme Court is a twice in 200-year event and it must be done right. Again, I have every confidence that the Old Treasury Building will be the new home for the Supreme Court and that it will be a fabulous building which will create a new epicentre to the first true legal district for the Perth CBD.

Your Honour, if I am proved right and the Old Treasury Building eventuates as the Court's new home, the serious truth is that it will have been your Honour's advocacy that made it happen. On this point I might, as is customary in such occasions, engage in some gratuitous but contextual flattery towards your Honour on the specific issue of your advocacy for the new Court building. I know that your Honour has been working tirelessly and diligently and negotiating with Treasury and the Department of Attorney-General to ensure that the traditional approaches of State bureaucracy to court buildings in this state are not repeated at this critical time, but your Honour had the reputation as a fearsome advocate before appointment to the Bench and all I can say is that must have been so.

I have battled the bureaucracy and for you to have Treasury back so far away from their supposedly non-negotiable position of open plan cubicles for the Court of Appeal judges is a feat of supreme and skilled advocacy.

Your Honour, at this point I should probably also mention that while Judges await the fulfilment of the promise of a new Court, the Corruption and Crime Commissioner's office has a beautifully appointed office with en suite which is presently vacant for any Judge who may be tired of their present surrounds.

Your Honour, with respect to the Court's digital future, it has been noted that technology poses great potential and a few serious risks for the future of the Court. Very briefly I would like to touch on one serious and immediate manifestation of technological risk which I think is worth noting. There are two things which are fundamental to the Court's continued authority in Western

Australian society. The first is the maintenance of the Court's inherent power to control its own processes and second is the ability of the Court with the Executive Government's assistance to ensure that the orders of the Court are strictly observed and enforced.

In 2009 the Editor of the Guardian was credited of coining the term "super-injunction" in an article about the Trafigura affair. I personally fail to see anything super or extraordinary about the injunctive orders of courts to which this term has now been readily and often applied. Injunctions which relate to the transmission of information which in effect state that certain facts and details may not be reported or otherwise disclosed are not made lightly by courts and not without the Court having very, very good reason.

What is now out of the historical ordinary is the massive volume of people who can breach a legitimate court order and the incredible ease with which they are able to breach a legitimate court order using modern communications technology with what appears at present to be almost complete immunity.

Courts do not make injunctive or other orders that affect the flow of public information without very careful consideration and very good reason. When such orders are made, courts must be tigers with nothing less than very sharp teeth otherwise their position of authority and eventually their standing will be seriously diminished. This, your Honour, will be a serious challenge for the judiciary and the profession and our Parliament and one we must start to cooperatively address.

Your Honour, in finishing today, I note here a challenge of the present which you have also noted. I have paid serious attention today to your statements about the rates of indigenous incarceration in this state. It is perhaps inevitable that after 150 years the focus on the Court's relationship with indigenous people is on sentencing because, self-evidently, the result of sentencing for an indigenous person and for any other person is the real prospect of imprisonment.

Further, I accept absolutely that the rates of indigenous imprisonment are unquestionably and undesirably high. There are various public policy theories about the way to improve Aboriginal people's welfare and with that, achieve the expected flow-on effect of decreased rates of Aboriginal offending and imprisonment. To date none of these theories has been translated into immediate significant impact on welfare and it will be likely that progress will be incremental and practical rather than astounding and theoretical, but of course, as you note, we should never give up hope and never leave any effort or stone unturned.

In the meantime it must nevertheless be frustrating for the courts of this jurisdiction to continually face the task of sentencing Aboriginal people. That frustration is very fairly held but one point that is perhaps sometimes overlooked is that the focusing on imprisonment statistics has also the tendency to skew the issue surrounding sentencing near exclusively towards consideration of the perpetrators and away from consideration of victims.

As well as rates of indigenous imprisonment there are other very unflattering figures in Western Australian criminal justice. Very sadly half of Western Australia's domestic violence involves a victim who is an Aboriginal woman and a Western Australian Aboriginal woman is a staggering 40 times more likely than the general population to be hospitalised due to a serious assault.

Whilst feeling fair frustration, perhaps it is also a mixed lament worth acknowledging that this Court in 150 years of dutiful and precise sentencing according to law has been very often the consistent guardian and protector of the weak and the vulnerable. Geoffrey Bolton in his excellent recently published History of Western Australia provides an early example. It was of his Honour Chief Justice Burt sentencing a young pastoralist from a prominent Perth family in 1872 for manslaughter.

The court's finding of fact was that the accused had shot and killed an Aboriginal male whom he was pursuing because he believed the man had stolen his horse saddle. In that sentencing, the Chief Justice said:

> I have no doubt that he did turn upon you, but that did not justify the course you pursued when you could have got away. It is quite clear, Mr Burges, that the unfortunate man died at your hand, recklessly, and the jury in my opinion have taken a mild view of your case. The judgment of the case is that you be kept in penal servitude for five years.

It is barely imaginable to us here today how unpopular that result would likely have been amongst the local community and, indeed, how courageous a thing it must have been in 1872 to sentence to imprisonment a white man from a prominent Perth family to five years' imprisonment for the manslaughter of an Aboriginal victim.

With so many indigenous people, particularly women, being the victims of offending, it is to the serious credit of the court that, notwithstanding the fair frustration with the wider statistical implications, the court has shown a consistent willingness from its very earliest days to sentence according to law and in so doing provide some serious protection to Western Australians from violence, irrespective of the indigeneity or the ethnicity or religious views of the perpetrator or any other party.

Your Honour, it has been a great pleasure to address this court. I do very much and passionately believe that this is an occasion for great celebration. There are of course, as with any institution of public service better and worse parts of the history of our Supreme Court, but in absolutely overwhelming and consistent measure, this court has been an institution which had operated for the enormous and enduring benefit of all Western Australians. May it please the court.

MARTIN CJ: Thank you very much, Mr Attorney, for those remarks and for your continued support. Mr Quail?

QUAIL, MR: May it please the court. On behalf of the Law Society of Western Australia, I am pleased and honoured to join in marking this important occasion on the 150th anniversary of the Supreme Court. It is important because of what it says about our state, our legal system and our profession.

150 years of the uninterrupted administration of justice through peace and war, growth, depression and prosperity, is a great achievement for any community. It shows stability, universal acceptance of the legitimacy of

out institutions and the ingrained confidence which the community has in our system of government. The Supreme Court is the symbol of justice in the state and what we celebrate today is the liberty of our community governed by the rule of law.

Since its inception, the Law Society has had a close connection with the Supreme Court. The first annual general meeting of the society was held in the Supreme Court library on 3 October 1927, and our meetings were held in this building until 1960. The society has benefited greatly from the continuing support of the judiciary, and it is a matter of no small pride to the society that most members of the court are honorary members of the society.

The close relationship between the society and the Supreme Court is apparent from the large number of former presidents of the society who have been appointed to this court, including their Honours, Justice John Hale, Sir John Virtue, Justice Oscar Negus, Sir Francis Burt, Sir John Latham, Justice Robert Wallace, Justice George Wright, Justice Peter Brinsden, Justice Barry Rowland, Justice Terrence Walsh, Justice Michael Murray, Justice Geoffrey Miller, Justice Rene Le Miere, Justice John Chaney and Justice Ken Martin.

Your Honour, the Chief Justice, was president of the society at the time of your appointment and your predecessor, the Honourable David Malcolm vice president at the time of his. Indeed, the society was largely responsible for the celebration of the centenary of the Supreme Court in June 1961. As best I can gather, there was no ceremonial sitting. Rather, a dinner was organised by the then secretary of the society, Sheila McClemans and president, later Chief Justice Sir Francis Burt.

Five judges of the High Court were present, including the Chief Justice, Sir Owen Dixon, as well as the Chief Justice of Western Australia, Sir Albert Wolff, and Justices Jackson and Hale. Most of the local profession were present; some are here again today.

Few records of the centenary commemoration exist, but one thing that impressed me about the occasion was that the Government of the day agreed to pick up half of the costs of the dinner, including the wine, being some 309 pounds. My persuasive skills are not in the same league as those of Sir Francis, and I am sure I will not be able to persuade the Attorney to pick up half of the tab for the cost of my dinner tomorrow.

The generosity of the State may also explain the paucity of records. Those I have spoken to who were there, unsurprisingly do not recall much detail after 50 years, other than that it was a convivial evening. Also, the passage of time might be the only explanation for their

lack of memory. Hopefully, tomorrow the court will see fit to follow precedent. The West Australian was there though, and sober enough to record that Sir Owen Dixon spoke and said:

> It was no use saying that lawyers did not build, that they did not inspire people. Their task was to keep the foundations steady, to keep the structure erect, to see there was no departure from ancient principles. Under any doctrine, extreme capitalism or extreme socialism, courts could protect the weak and administer the law and keep the strong in their place.

That is, has always been and must continue to be the role of the Supreme Court. Although we respect those ancient principles, the Supreme Court is not an unchanging relic. More recently, Chief Justice Gleeson, speaking at the 175th anniversary of the Supreme Court of New South Wales said:

> The Supreme Court is one of Australia's great and enduring institutions of state. Such institutions frequently need development, modernisation and revitalisation. They need to be able to change in order to remain the same, but the institutions which support our communal life are not like free-standing trees in an avenue, they are more like tangled vines. Sometimes they need to be pruned or even cut back hard, but that is job for a gardener, not an axeman.

What then of the future? Continuing reform is necessary if we are to ensure access to civil justice for ordinary citizens and not just commercial entities and those few who are wealthy enough to engage in an interlocutory battle in this Court. The society supports your Honour the Chief Justice's stated aim on your appointment in May 2006 to produce a simple set of new Rules of Court which are directed to achieving a just resolution as soon as reasonably possible after a matter commences.

Now that the Federal Court is about to implement new Rules, it is to be hoped that this Court in consultation with the District Court and profession can move speedily to finalise a new set of plain English State Rules which will simplify Court processes and improve access to justice for the community, and if at the same time someone could make administrative remedies intelligible to me I would be eternally grateful.

One of the success stories of the last decade has been the very significant increase in mediated outcomes in this Court. The Court should continue to focus on active case management and engagement with parties directed at resolving matters without trial. The Court should also be encouraged to continue the process of divisionalisation within its jurisdiction that has started under your Honour the Chief Justice.

The profession sees significant benefit in Judges being able to specialise and develop processes and procedures appropriate to particular classes of matter which not only deliver just outcomes but improve efficiency. Speaking as a criminal Lawyer, there is no doubt amongst practitioners that the reductions in delay that the Court has achieved over the last few years are largely because experienced criminal Judges have been responsible for sitting on serious criminal trials and case management has increased to the point where we are on the verge of almost having a docket system for murders which are managed by this Court from the time of charge.

Timely pre-trial disclosure continues to be a significant issue facing the justice system in this State and it cannot be addressed by the profession alone. The unfortunate reality is that without the involvement of the trial Court from an early point in the process, disclosure takes longer than it should and failures in disclosure result in delayed pleas and adjourned trials.

More seriously, even with the involvement of the Court in case management, under the existing legislative framework failures in disclosure by Police are still common enough that we cannot have confidence that miscarriages of justice no longer occur. There is however a balance to be

struck. Future reform of case management and disclosure obligations cannot take an axe to the fundamentals of our liberal democracy, including the right to silence.

As judicial independence is the bedrock of the Court, it in turn relies on an independent profession. Our profession is not like others. To quote the Honourable Murray Tobias, "It cannot be a little bit independent, any more than you can be a little bit pregnant."

The profession in Western Australia has been heartened by the support of the Supreme Court and the West Australian Government during the National Legal Profession Reform as we attempt to maintain that independence at least in this State. Chief Justice Spigelman has said:

> The independence of the profession is a product of the adversary system. Throughout the history of the Court, in any proceedings including those in which the State is a party, the litigants determine in large measure what issues are raised and how they are fought. This system reflects the significance our society attaches to the autonomy of individuals and to the maintenance of personal freedoms. Individuals are entitled to exercise control over their own lives. They are entitled to participate in decisions which affect their lives to the maximum degree possible. No arm of the State controls how they conduct their legal affairs. It is true that the adversary system is not the cheapest form of legal decision-making; however, nor is Parliamentary democracy the cheapest form of Government.

Finally, I have said publicly on a number of occasions that the society supports the establishment of a New South Wales style judicial Commission in this State. The main reason for our support is not because of the well-publicised function of such a body in investigating and determining complaints about judicial behaviour in a fair and transparent way.

The occasion for the exercise of such a function is vary rare indeed. Rather, it is because of the important public education function that a Commission should perform. As we head deeper into the 21st century, the public's interest in cases that come before this Court, although it has always been high, seems to be intensifying.

Local crime is a larger part of our daily news diet than I can recall previously being the case. Our criminal justice system in particular can only flourish if it is understood and respected by the public at large. Maintenance of the rule of law depends ultimately on the consent of the Government.

While the Law Society and Court have an important role to play in demystifying the law and making Courts more accessible to the public through modern technology, an independent Commission charged with the development of benchmarks for judicial performance and efficiency, improving the transparency of judicial appointment processes, the collection and publication of data on judicial performance, the development and publication of bench books and the collection and dissemination of sentencing data in particular will better reinforce the role and accountability of the Court as the third arm of Government.

For 150 years the Supreme Court has maintained the rule of law in Western Australia. This Court is our inheritance and the safeguard of our liberty and dignity. Every legal practitioner in Western Australia is an officer of this Court. Our members are proud to be associated with its long tradition and history and will continue to serve the Court as they are sworn to do and thereby the wider community. May it please the court.

MARTIN CJ: Thank you, Mr Quail. Mr Donaldson.

DONALDSON, MR: If it please the court. 1861 was an important year in many respects. Certain of them have been described by the Chief Justice and whether the creation of this Court by the Supreme Court ordinance of 1861 was as momentous an event as these others need not detain us. But that this Court has sat constantly since on or about the commencement of the American Civil War gives a sure indication of the strength of this Court as an institution and highlights that which is often overlooked. Although we are oftentimes thought of as a young country, certain of our civic institutions are long standing and so it is that this Court has been in existence for longer than any of the currently constituted common law courts of the United Kingdom.

It is also well to record on this occasion that in 1861 the creation of a colonial court of general jurisdiction was something of a novelty. The Supreme Court Ordinance of 1861 conferred on this court the powers, jurisdiction, pre-eminence and authority of the courts of Queens Bench, Common Pleas and Exchequer at Westminster along with the equitable jurisdiction exercised by the Lord Chancellor or any equity judge in Westminster. This was not a model of colonial jurisdiction that was followed elsewhere. Even after the Judicature Act reforms in England many colonial and other common law courts continued to separately administer common law and equity and famously this continued until the 1970s in New South Wales, Massachusetts and Prince Edward Island and interestingly continues still in Delaware.

Although this Court was, from its inception, a court of the most extensive jurisdiction, it was until relatively recent times a small court that largely concerned itself with criminal matters, wills and estates and personal injury claims. Large scale commercial work only found its way to this court from the 1970s and, of course, the creation of the District Court in 1970 radically affected this Court's jurisdiction as did the commencement of the Federal Court in 1977.

The historic intimacy of this court was recently illustrated in his characteristically whimsical way by Justice Murray who reminded us that of the 76 judges who have served on this court his Honour has sat with or appeared before all but 15.

Much has, in recent times, been written in the United States about the reputation of courts and individual judges over time. Judge Posner has been customarily prolific in this respect. Whatever analysis might be undertaken or hypothesis advanced, there is little doubt that the

reputation of a court is founded and rests upon the quality of its judges and quality in this sense over time refers principally to the quality of the judgments delivered in hard cases and in complex cases. The Second Circuit Court of Appeals of the United States Federal Court is a famous court, not because it is the Federal Appeals Court of New York, but because it is the Court of Judges Learned and Augustus Hand Judge Swan and Judge Friendly and their Honours' judgments have endured and continued to be keenly read, studied and applied.

Perhaps unlike New Yorkers, in this country we are too reticent to acknowledge that many of our public institutions are the envy of the world and certain of the courts of Australia no doubt fit this category. This Court has, throughout its history, counted amongst its number judges whose judgments are and have been eagerly and approvingly read throughout the common law world, and that this Court has, during its 150 years, had amongst its number judges who would sit comfortably on any common law court at any time is doubtless so. In a common law judge's world team of the sesquicentenary many of us could readily imagine Justice Geoffrey Kennedy on a half-forward flank, Chief Justice David Malcolm in the mix as a tireless hard charging back pocket with perhaps Sir Robert McMillan's name pencilled in for the interchange bench.

More, though, than reflecting on the past, milestones such as that which we acknowledge today provide an opportunity to think about the future, though certain speculations require the context of the past. At the centenary of this Court in 1961, its judges numbered fewer than the number of Judges of the High Court of Australia, and there was no District Court. Now, there are three times as many judges of this Court as there are of the High Court and, of course, nearly 30 District Court Judges.

Whether efficiency and enhancement of the rule of law requires a constant increase in the size of Courts or whether these goals can be advanced, as they have been by the High Court, without expansion of judicial numbers is a matter that the community will no doubt continue to address into the future. In this respect, the most recent annual report of this Court offers some salutary indicators. In the year 2010, there were 48 civil trials conducted in this Court, with an average length of 3.4 days.

For 2010, then, there was a total of 163 judicial sitting days taken up with these 48 trials. Of this total of 163 days, a single matter took up 94 days, and the largest three matters took up a total of 137 days. It follows that the remaining 45 trials occupied a mere 26 hearing days. In total, less than one three-day civil trial a week is to some a surprising statistic. No doubt this statistic is explained by the efficient mediation of civil disputes by this Court, but these statistics give rise to a number of issues for the future.

For instance, why should the community pay for a 94-day commercial trial involving a dispute over several hundred millions of dollars? What of compulsory, privately-funded arbitration of lengthy matters with a right of review to this Court? What of compulsory, privately-provided pre-action mediation of certain others? If such processes are introduced, will it be necessary to continue to increase the size of this and other Courts?

If civil matters will continue to be resolved by this Court overwhelmingly through mediation and management rather than judicial determination, will it be more sensible in the future to appoint as judicial officers those specifically skilled in mediation rather than adjudication? Will the invariable resolution of civil matters by mediation give rise in this State to the concern being now expressed by some in New Zealand; that too few civil matters are there proceeding to trial, resulting in a dearth of judicial decisions to guide the business community and to provide certainty? Well, the future will tell us.

Whatever may occur in the future in the civil jurisdiction of this Court, there is no doubt that criminal trials will continue to be heard in this State, and likely, some of them in this Court, though inevitably, criminal trials will, in the future, be different from the present. Lord Phillips, the President of the Supreme Court of the United Kingdom, has written and spoken recently of his concerns about criminal trials as we understand them being conducted in the future before juries comprising members of the generation whose invariable form of communication is electronic; whose cognitive functioning will be formed and nurtured by computerised interaction - computer games, texting and email - rather than traditional reading and speaking and listening; and whose attention span will be best measured in seconds, not hours or days.

These concerns are compounded by other emerging trends. The exotic and exhaustive investigation of many crimes and the fulfilment of obligations of prosecutorial disclosure prior to trial will compel the lengthening and the increased complexity of criminal trials. How will long and complex trials be heard years from now before jurors who have never read a book or listened to a lecture, or had a conversation with another human that has lasted beyond 20 seconds? Will we as a community demand that people take months out of their lives to sit uncomprehendingly as jurors in increasingly lengthy and complex criminal trials presented by means best suited to the 19th century?

No doubt, in the future, this Court will have to grapple with these dilemmas and in the future, will answer these questions too. Whatever may occur with trials, no doubt in the near future, the nature of appeals in this Court will change. Appeals will not require courtrooms. Advocates and judges may dispose of appeals via video technology as the High Court does today in most special leave applications.

That greatest of contemporary judicial innovators Justice David Stratas of the Canadian Federal Court of Appeals regularly conducts judicial business via Skype from wherever he happens to be in Canada or, as it happens, Western Australia. Perhaps with future generations more conversant with computerised or virtual communication oral appellate advocacy will disappear altogether and appeals will be conducted by written submissions and follow-up real-time interactive email-type communication with Judges and counsel engaging remotely; no doubt in all senses of the term. The televising of that will no doubt be a ratings bonanza.

As to court buildings and courtrooms, the Chief Justice recently illustrated in Toodyay that many trials, let alone appeals, do not require traditional courtrooms at all. In the longest Native Title trial heard by the Federal Court of Australia over 90 per cent of the trial days were held outside of courtrooms. Most of the trial was conducted in a lecture theatre in Kalgoorlie, many other days in a community centre in Laverton, many days in a basketball centre in Leonora, several days in a community hall at Cosmo Newberry and many, many days of evidence not in buildings at all.

The judge, court officers, counsel, solicitors and witnesses dressed casually and that trial was a model illustration of one in which all participants dignified the solemnity and importance of the process and of the matter being determined.

If these sorts of accommodations can be made for the residents of Toodyay and for Native Title claimants, why not others? If others, what will court buildings of the future resemble? But be all or any of these matters as they may and whatever it is that the future holds, the Court and the community can be assured that the Bar will adapt and be ever present to assist and to perform its principal duty to fearlessly advance the interests of those who appear before this and other courts according to law and in accordance with the enduring traditions of the profession. If it please the court.

MARTIN CJ: Thank you, Mr Donaldson. Before the Court adjourns it only remains for me to again thank all of those who have taken the trouble to be present with us this afternoon, especially those who have travelled such long distances at such an uncertain time. I would also like to again thank all who have spoken. Although the Court will shortly adjourn, that will not conclude the activities for the afternoon. As I have mentioned, there will be the unveiling of a painting in the foyer accompanied by refreshments. I would encourage everybody present to join us in the foyer for those events. The court will now adjourn.

AT 5.30 PM THE MATTER WAS ADJOURNED ACCORDINGLY