

THE SUPREME COURT OF
WESTERN AUSTRALIA

FAREWELL TO THE HONOURABLE CHIEF JUSTICE
DAVID K. MALCOLM AC

TRANSCRIPT OF PROCEEDINGS
AT PERTH ON TUESDAY, 7 FEBRUARY 2006, AT 9.30 AM

MURRAY J: Your Honours, members of the profession, ladies and gentlemen, there are far too many special guests present today for me to acknowledge their presence individually. However, I must observe that we are pleased that we are joined on the Bench by his Honour Chief Justice Black and Justices Lee, Nicholson and Siopis of the Federal Court.

I note the presence in court of the heads of jurisdiction of the other West Australian Courts, the Solicitor-General and senior executives of the Department of the Attorney-General, which has received the acronym DOTAG, I gather in preference to other possible acronyms.

It would also be remiss of me not to mention the presence in court of the members of your Honour's family and large numbers of your Honour's friends. I also record that Queen's Counsel, Senior Counsel and members of the profession have turned out in numbers, together with a considerable number of retired members of the Court who have shared judicial office with you during your long period of magnificent service to this community as Chief Justice of Western Australia from 26 May 1988 until today, a period just short of 18 years.

Your Honour, was the 12th Chief Justice of Western Australia. Your portrait and those of your predecessors in chronological order adorn the walls of this gracious courtroom, a constant reminder to those of us who work here of long continuity of distinguished service rendered to the citizens of this State.

Your Honour has held a unique position as Chief Justice in this way: you were the first to be appointed directly to that office from the ranks of the practising profession since the third Chief Justice Sir Alexander Onslow was appointed in 1883. When he was joined on the Bench by Sir Edward Stone in 1884, his Honour became the first Puisne Judge. Prior to that, there was only one member of the Court and therefore, inevitably, the incumbent was Chief Justice.

What made your Honour's accession to the office of Chief Justice unique was that you joined a Bench of eight Puisne Judges, the most recently appointed of which, just before your accession to office was Justice Seaman, who had previously served as a Master of the Court.

I think it fair to say that there were events occurring in Western Australia at the time of your Honour's appointment as Chief Justice which were calculated to increase the difficulty for both Chief Justice and the Court. I refer of course to the events which came to be compendiously described as the collapse of WA Inc. Not only did those events have considerable impact upon the business of the Court but during 1991 and 1992, Justice Kennedy, then newly the Senior Puisne Judge of the Court, was appointed as the senior member of the consequent Royal Commission, the one with the catchy title now so familiar to us, the other members of which were the retired High Court Judge, Sir Ronald Wilson QC, and the recently retired member of the Supreme Court, the Honourable Peter Brinsden QC.

When your Honour was first appointed, it was one of those periods of turmoil which the Court has since experienced where there are a substantial number of retirements and new appointments. Senior members of the Court, Justice Smith in 1989, Justice Brinsden in 1990 and Justice Wallace in 1991 - nearly half the total strength of the Court - retired.

Following the appointment of Justice Seaman in 1988, that year saw the appointment of Justice Nicholson, now, since 1994, a long-serving member of the Federal Court, and Justice Walsh. Justice Ipp, now of the Court of Appeal of New South Wales, and Justice Wallwork were appointed in 1989. I was appointed in 1990, which seems forever ago, closely followed in the same year by the Honourable Robert Anderson QC. 1991 saw the appointment of Justice Owen. In 1992 the Honourable Graeme Scott QC was appointed, together with the Honourable Kerry White who had previously, in 1988, been pirated from the District Court to serve as a Master of this Court. So it was I think without doubt a situation of turmoil and change upon which you embarked as Chief Justice.

There is no doubt I think that looking back over those years it is noticeable that the complexity of the business of the Court has increased very substantially during the whole of your Honour's period in office. Further, there has been the steady and unrelenting increase in the volume of business. All of that has seen increases in the size of the Court but never, it seems to me, if I may be forgiven for saying so on this occasion, sufficient to restore for the Judges the mode of service of earlier and more leisurely days and always lagging well behind perceived need.

In addition, throughout the whole of your Honour's service as Chief Justice the administrative complexity of leadership of the Court and the administrative demands of the office of Chief Justice have increased - to use a word much favoured by Justice Ipp and me in a different context - exponentially.

Your Honour has constantly borne the lion's share of the demands made by successive Attorneys-General to express your views on issues of the day and comment, always in the context, if I may be forgiven for saying so, of unrealistic time frames, upon often quite complex and important pieces of proposed legislation.

When you were welcomed to the Bench, you spoke of your wish to ensure that the high standing of this Court would be maintained under your stewardship, that it would continue to offer expedition and effective processes in dealing with litigation and that it would be a Court which would continue to be respected for the quality of its decision-making and its judgments, as your Honour then put it. Perhaps I should not say so as a serving member of the Bench, but it seems to me that your Honour has always held those goals firmly in mind and that you have always embraced innovation where change could be seen to be for the better. It seems to me that you may depart from office satisfied that you have achieved what you sought for the Court.

A moment's reflection brings to mind, in no particular order, procedural innovations on the civil side to make the trial process more efficient, constant attempts by the Court to achieve the right processes of pre-trial case management, continuing now, the introduction of specialised lists, particularly the expedited list, the rolling Duty Judge system to enable urgent matters to be dealt with at any time when the Court is not sitting, working over the Rules of the Supreme Court on occasions, and that is a process which now continues.

Your Honour has constantly supported and encouraged increasing reliance on information technology for work processes for the Judges, for access to library materials, for record-keeping, for processing lodgments and file management and for taking evidence. The process continues,

increasing the use of video technology generally and remote video-links in particular. Trial materials and materials on appeal are now routinely before the Court in electronic form. The time is fast approaching, with your Honour's support to this point, when it will be routine to lodge and serve documents electronically.

On the criminal side of the Court's business, your Honour has presided over reforms of case management, paralleling those on the civil side. The rules of criminal procedure have been entirely rewritten and recently the Court participated in the wholesale reform of criminal procedure, now embodied in the Criminal Procedure Act.

It is easy to forget that it has been during your Honour's period as Chief Justice that we have seen the introduction of processes which we now take for granted, but which have been directed to improving the efficiency and fairness of the litigation process. Increasingly sophisticated Court based mediation comes to mind, as does the entirely unrelated innovations concerning evidence given by children and other vulnerable and protected witnesses.

Your Honour has encouraged and supported the ongoing process of enhancing Court security, at the same time seeking to preserve wide public access to the courts. Admittedly, some changes in the area of security have only been able to be achieved when they became crisis-driven, but such is the way of the world.

Your Honour has pioneered the process of having Aboriginal Liaison Officers attached to the courts to enhance access by indigenous citizens and you have supported endeavours to enhance the understanding and sensitivity of the Judges to indigenous cultural issues.

Again, one should not overlook your Honour's efforts to deal fairly with the media and enhance their understanding and capacity to properly report the activities of the courts. It was an early innovation in that regard when your Honour achieved the appointment of a media liaison officer for the courts.

One should not overlook your Honour's support and encouragement for the establishment of the State Administrative Tribunal, chaired by Justice Barker, and certainly of recent times a major innovation close to your Honour's heart has been the creation of an Appellate Division of the Court, a process designed to enhance the capacity to introduce procedural reforms in the appellate process and to introduce the specialisation involved in the creation of the Court of Appeal for its capacity to maintain and improve the quality of the Court's appellate judgments, long thought by your Honour to be a matter of particular importance for this Court, given the fact that, as you have remarked often, appeals to the High Court being always by special leave, this Court is often the final court of appeal for the citizens of this State.

I cannot let the moment pass without observing that much of the work to which I have briefly referred has been hampered by a long history of unsatisfactory accommodation of this Court. Again, it has been a process of seeking to achieve improvements which has shown your Honour at your best as a long-distance runner and with stamina which was both necessary and unflagging. And although, when we commenced to operate out of the WA Inc Royal Commission premises at 111 St Georges Terrace, it was on a strictly temporary basis, and although we're still there, there are,

I think, now clear signs that the saga is coming to a close and that we will now achieve a solution to avoid the continued splitting of the Court between two locations and the inefficiencies and extra cost burden which that has entailed.

Of course, your Honour has not been concerned as Chief Justice of Western Australia solely with the affairs and needs of this Court. Your Honour has, with the heads of the other state jurisdictions, been very much concerned with the welfare and efficient operation, particularly of the District Court, the Magistracy and the Children's Court.

Further, your Honour has somehow found time to maintain a high profile in activities of the community too numerous to mention here which have been related to the central importance to the life of the community, of the maintenance of the courts, access to the law and an understanding of the constitutional function of the courts. On my count, your Honour is the patron, a vice-patron, the chairperson or trustee of no less than 24 community organisations of various sorts, in the activities of many of which your Honour continues to be actively involved.

I will leave to the others to speak of your unfailing support of the activities of the Law Society and the Bar Association, but I must mention the important work that your Honour has long done in support of regional judicial associations to enhance the rule of law in this region generally. I speak, of course, of your Honour's long membership of LAWASIA and your chairmanship of the judicial section of that organisation. You consistently chaired biennial conferences of Chief Justices of Asia and the Pacific throughout your term of office and most recently in Queensland last year. You chair the Advisory Board of the Crime Research Centre at UWA, upon the Senate of which university you were for a substantial period a member.

I will not even mention your chairmanship of the Board of Trustees of the Special Airborne Resources Trust and your association with the Rugby Union of WA and the Fremantle Dockers, but brief reference to such matters is enough to show how your Honour's very high standing in the community has caused a reflected glow for the benefit of the Court and the justice system in this State generally.

What else has your Honour done during your time as Chief Justice? Open at random any volume of the Western Australian Reports during that period. You will not have to search far before you come upon an important judgment given by your Honour on aspects of the law covering the whole gamut of the unlimited jurisdiction of this Court. The Court and the administration of justice in this State has enjoyed during the period of your judicial service unparalleled academic leadership. Despite the enormous workload which you have otherwise carried, your Honour has never shirked a full load of judicial duties, often exceeding the capacity of less productive members of the Court.

That is not to say that you have never fallen into error over the 18 years that have passed. I can think of at least three matters where your Honour has been involved, either on the Full Court or the Court of Criminal Appeal, in correcting my efforts at first instance, corrections which I have to say have at the time caused me some disappointment but, as the saying goes, "To err is human."

Your Honour, it has been my privilege to work with you, observe you at work and learn from you but I am left with no understanding how you could possibly have borne for such a long period of time the workload which I have described. I can only suppose that the answer lies in the comment made by the then Senior Puisne Judge, Justice Wallace, when he spoke on behalf of the Court to welcome you to the Bench. His Honour said that since your earliest days in the law he had witnessed in you an enthusiasm and good-humoured vigour which had remained undiminished. It remains undiminished still and what you have achieved earns you the gratitude of the State and its citizens for the contribution you have made, the worth of which will certainly receive the favourable judgment of history.

It only remains, as we farewell you from the Bench, to wish you well in your new endeavour which you commence tomorrow when you take up a chair of law at Notre Dame University. We hope that that will not be such a demanding role, although challenging and interesting, and that you will be able to spend more time with Kaaren and with Manisha. We wish you a long and happy retirement.

Mr Attorney?

THE ATTORNEY-GENERAL: May it please the Court.

I rise to officially farewell the 12th Chief Justice of Western Australia and to celebrate a magnificent judicial career. In the last few weeks Western Australia has seen a change at the top of each of the three arms of Government: a new Premier, a new Governor and the retirement after almost 18 years of the head of the Judiciary. It is a time of great change and new beginnings for us all.

In speaking about David Kingsley Malcolm AC we recall a career that has been stamped by a unique personality that has helped shape the careers of many, many others and, indeed, the personality of this State.

I am acutely aware that today the Chief Justice will have the final say, so perhaps the safest way to start reflections on Chief Justice David Malcolm's years in office is to quote the man himself.

He told university students in 1997 that his motto was twofold: "take your work seriously, take any office you hold seriously, but don't make the mistake of taking yourself too seriously."

Then, "secondly, however difficult and challenging the office or the task, find a way to make it fun. If it is not fun, it is not worth it."

If I can speak a little out of school, yesterday State Cabinet hosted a luncheon for the Chief Justice. Serious discussion was interspersed with pre-judicial anecdotes of three assassination attempts; kidnapping celebrities like Spike Milligan; the ponding of others at the University of Western Australia, Rugby tales - all from a man who so obviously enjoys life and laughter.

The commitment and energy with which the Chief Justice has taken on and carried out so many roles within the legal profession, and we have heard highlights from that impressive CV today, would have been impossible had he not stayed true to his twofold motto.

There are many people who would be unable to find the element of fun in a job that has long hours and an ever-increasing workload and requires you to take a substantial pay cut as well, but fortunately the people of Western Australia found just such a man in David Malcolm. They found an instinctive and talented leader who genuinely passes the historian and Pulitzer Prize winning writer, Theodore White's, test who wrote:

“Whether a man is burdened by power or enjoys power, whether he is trapped by responsibility or made free by it, whether he is moved by other people and outer forces or moves them, this is the essence of leadership.”

It was not a difficult decision for the then Attorney-General Joe Berinson to propose that the Government of 1988 appoint the man who was Western Australia's foremost Queen's Counsel, a man who had forged a reputation nationally and internationally and proven his dedication to the profession and the community, straight from the Bar to the position of Chief Justice and just two years later to the position of Lieutenant Governor.

As Chief Justice, David Malcolm helped rewrite the job description.

In 1990 he told the State's daily paper, *The West Australian*, that, and I quote, "the work is unrelenting and the consequences of mistakes are mind-boggling" but that did not stop him heaping even more demands upon himself as an administrator and a jurist.

To the extent that the legislative reform program of the last five years has added to that unrelenting workload, I apologise but advise your successor to expect more of the same.

Chief Justice Malcolm worked hard in meeting the challenge laid down for him by his predecessor Chief Justice, Sir Francis Burt, who said upon his retirement that "the profession and, the judiciary in particular, must recognise that they have an obligation to communicate".

The media was, in a sense, a comfort zone for the Chief Justice, if that can ever be the case. David Malcolm was a recognised expert in media law and, in his early career, adviser to broadcast journalists. As Chief Justice he made himself available to a new generation of journalists from all mediums and indeed to the community through talk-back radio.

Putting into action a belief that accountability is fuelled by open communication, he also spoke to countless conference groups, business groups and shared his personal experience, insights and knowledge with law students and even newspaper cadets.

Barely two years into the job, the new Chief Justice was described in just one of the many feature reports to appear during his tenure as "highly intelligent, enthusiastic, innovative and tireless, attracting virtually universal praise for his achievements as Chief Justice," the article went on to say.

One of the roles for which he received high praise from colleagues was that as an advocate to Government.

From day one, Governments have been crystal clear on the priorities of a Chief Justice totally committed to this Court.

He used the opportunity of his welcome to the Supreme Court in May 1988 to put on record his understanding that "Judge for Judge, this Court is the hardest working Court in Australia" and his related concerns about maintaining the quality of work and the need for additional resources.

And for the past almost 18 years, I assure that Attorneys-General and Governments have been well aware that infrastructure improvements have always been a high priority.

I am sure that there are areas of "unfinished business" for the Chief Justice, but it is worth reflecting on some of what has been achieved, much of it at his urging, particularly in more recent years.

When the Chief Justice took up the role in 1988 there were a total of 10 Judges. As he leaves the role, there are 20 including four women.

Additional Judges was just one of the methods of confronting what has been described as an "avalanche of litigation".

He has written himself into the history books as an innovator. The expedited list, for example, was a very effective tool introduced to radically reduce delays.

The Chief Justice can be very proud of the role he has played in modernising the traditional rules, forms and procedures under which the Court has operated for the best part of a century, and a big part of that has been the way this State's judiciary has embraced another kind of "network". Computer technology has underpinned much of the reform in this Court.

As Chief Justice, David Malcolm has also seen, and in many instances been a party to, the implementation of around 400 recommendations of the Law Reform Commission of Western Australia, to which he was also a great contributor in the 1980s as its chair.

Almost a year ago to the day Western Australia's Court of Appeal, for which the Chief Justice had long pressed, was established under its first President, the Honourable Justice Chris Steytler, a clear demonstration of commitment to quality and efficiency.

A month earlier, the Honourable Justice Michael Barker of the Supreme Court, had become the first President of the new State Administrative Tribunal, the amalgamation of almost 50 industry and public sector Boards and Tribunals including the Town Planning Appeals Tribunal of which the Chief Justice was the inaugural Chair.

His Honour leaves his position as Australia's longest serving Chief Justice and the sheer length of his service makes it impossible to highlight every milestone and achievement during that period.

Such a litany dominated by his work as an administrator might also be at risk of taking too much of the spotlight from the Chief Justice's outstanding work as a Judge.

The Chief Justice has always assumed a formidable case load, and his dedication to the judicial task has been unparalleled.

Colleagues and Counsel alike find it difficult to choose just a couple of “highlight” cases in a career they estimate puts him without peer in producing judgments in the history of the Supreme Court.

The Chief Justice, I am told, was not a specialist in criminal law prior to his appointment but is recognised for delivering a series of landmark judgments in the Court of Criminal Appeal. These have clarified enormously complex areas of law, including sentencing, a testament to his intellect, broad knowledge of the law and its application.

Put simply, he led from the front, never shirking the difficult cases - in fact, making a point of taking them on with characteristic attention to detail.

The case of John Button comes immediately to mind, an almost 40-year-old matter that captured the hearts and imaginations of all Western Australians.

His Honour's judgment in the Court of Appeal handed down in early 2002, has been described as a masterpiece in terms of the meticulous analysis of the circumstances of the case. In a blaze of publicity and high emotion, resolving the case of a man convicted and sentenced to 10 years' gaol for the 1963 manslaughter of Rosemary Anderson, despite his protestations of innocence, came down to a lot of hard work and care - the Chief Justice gave both in spades and the rest, as they say, is history.

The Chief Justice will also be remembered for turning the spotlight on prickly and difficult issues of fundamental importance to the community.

One such case that led to significant change right across Australia was the State of Western Australia v Bropho - bringing to a legal head the issue of Aboriginal heritage and whether or not the law applied to the State. Once again, in the heated environment of debate over the future of the Old Swan Brewery and the protests and publicity that generated. As a result of that case, which went to the High Court, the law has been made very clear, so that today almost every statute includes a section stating its intention or otherwise to bind the State.

Interstate guests here today might well also remember the case involving an appeal by his Honour Dyson Heydon, now of the High Court, when he was still a Barrister in New South Wales. The case against him alleged that he was negligent in failing to advise that the High Court in a pending case might change the law and that this resulted in an economic loss to his client. The then Barrister appealed against the decision, but by the time the hearing date drew near he had been made a Judge of the Appeal Court. Chief Justice Malcolm was invited to be the presiding Judge in a Court made up of three out-of-state Judges - an enormous vote of confidence in a man who had earned an enviable reputation across Australia and, indeed, overseas.

Chief Justice Malcolm has also proven himself a leader outside the Court, giving generously to the legal profession, the law and to the community in terms of his time, wisdom and experience.

The range of jurisdictions represented here today is just one indicator of the roles that the Chief Justice has played locally, nationally and internationally.

Judicial independence has been a key theme throughout his career, nowhere more so than as a member and life member of the Law Association of Asia and the Pacific. He held a number of key positions with LAWASIA and championed the *Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, adopted unanimously in 1995.

Nationally and locally the Chief Justice has been an advocate of many causes and a willing contributor to community debate. In fact, he has sometimes been criticised for not confining his comments to legal issues ... for taking an active part in debate on various issues of fundamental interest and importance. However, I applaud him for this and for extending the role of the Chief Justice into the community - fulfilling once again, the challenge set down by Sir Francis Burt to communicate the law and the role it plays in the community.

So much of what the Chief Justice has done in his long career and in his service to the community has been about informing and educating.

It is fitting that the Chief Justice is now to make more of that passion for education and play an even more pivotal role in the development of young men and women who share his love of the law.

Today's retirement marks a milestone in a most remarkable career of service to the law and to the community. To the Chief Justice, I offer my personal best wishes and on behalf of the Government and the people of Western Australia. You are a truly great Western Australian. I thank you for your ongoing service to the State and wish you and your family a most successful and happy future. May it please the Court.

MURRAY J: Thank you, Mr Attorney. Mr Martin?

MARTIN, MR W: Your Honour, the Chief Justice, other members of the Court, distinguished guests, it is my great pleasure to appear today on behalf of the Law Society and the legal profession of Western Australia to congratulate and thank your Honour for more than 17 years of outstanding and dedicated service to the State and people of Western Australia.

I trust those reporting these proceedings will not be confused by the fact that I am to be followed by a speaker of the same name and hope that I don't add to that confusion by observing that while he and I have been brothers in law for almost 30 years, we are not related in any way. No such problem arose in this Court on 26 May 1988 on the occasion of your Honour's investiture. Some measure of the time which has elapsed and the changes which have occurred since then is provided by reference to those who spoke on that occasion.

Your Honour was welcomed to the Court by Justice Wallace. No other member of the Court then remains a member of the Court today although it was a little surprising to me, I have to say, to notice that each of Justices French and Lee had by then been appointed to, and, of course, remain as, members of the Federal Court. Judging from their youthful appearance, obviously they must have been appointed to that Court as teenagers.

The Attorney-General of the State, Mr Joe Berinson, spoke on behalf of the Government that day followed by Mr Ian Temby QC on behalf

of the Attorney-General of the Commonwealth. My role that day was performed by Mr M.J. Murray QC, as his Honour then was, and the Bar was represented by Mr R.J. Anderson QC, as he then was, then wasn't and now is again.

Much was said on that occasion of your Honour's illustrious career prior to appointment to the Bench although many speakers complained of the difficulty of doing that career justice in the time allotted. Today I propose to address only your Honour's achievements since appointment and to make the same complaint. Any adequate chronicle of your Honour's achievements on the Bench requires a thesis at least and is well beyond the scope of my short address but I will endeavour to do my best.

Your Honour had enormous shoes to fill, those of your predecessor the late and much lamented Sir Francis Burt. Sir Francis had been a mentor to your Honour and it is fitting that he is here today in image at least and perhaps, I like to think, in spirit also. Undaunted by the prospect of comparison with your predecessor your Honour set about the many and varied duties of your office with a zest and vigour that left others struggling to keep up.

High up on your Honour's priorities and achievements was the modernisation and reform of the Procedures of the Court. As your Honour has previously observed on another occasion, at the time of your appointment the Court didn't even have a fax machine. Those machines have today been rendered almost redundant by email but, as has already been observed, your Honour was not slow to embrace the opportunities provided by the advancement of technology.

Among the things for which the late L.R. Connell will be remembered is the fact that in 1994 his trial and subsequent appeal on charges relating to the fixing of a horse race in Bunbury were the first to use electronic transcript.

Of course, fully electronic trials are now a regular feature of practice in this Court although I would take this opportunity to remind the Attorney that not nearly enough courtrooms are yet equipped for such trials and to join with Justice Murray to suggest to the Attorney that obviously the best way to solve that problem will be to finally provide a proper building to house the entire Supreme Court, something for which your Honour has been pressing successive Governments since your appointment more than 17 years ago, which I suppose just goes to show that nobody, not even your Honour, can win them all.

Many of the changes and reforms introduced or overseen by your Honour have already been mentioned. Those that I would single out for particular mention include the use of victim impact statements, the videotaping of evidence of children and vulnerable witnesses, gender bias and Indigenous issue training for Judges, the publication of sentencing summaries, the introduction of alternate dispute resolution as a standard part of the processes of the Court, the creation of the Court of Appeal, the use of a variety of innovative measures, including blitzes, to address the backlog of cases, and the occasional invitation of the electronic media into the courtroom.

On the subject of the media, for my own part I would describe your Honour's relationship with the fourth estate as perhaps chequered. From the time of your appointment you have always accepted that one of

the burdens of your office was the obligation to explain and demystify the law and the judicial process to all Western Australians and not just the educated elite.

Obviously the adequate discharge of that duty has required the aid of the popular media, the use of which has generally enabled your Honour to get that message across to a wide audience and very effectively. To that end, as the Attorney has mentioned, your Honour was the first Chief Justice to go on talkback radio although perhaps after your Honour's experiences in that somewhat unpredictable medium you may be the last.

Your Honour has been an almost ubiquitous speaker at public functions and gatherings, again, to fulfil what you have, with respect, rightly seen as a duty to speak out on contentious issues. I think it was Richard Utting who suggested that your Honour would willingly turn up and give a speech at the opening of almost anything, including an envelope, which I certainly took to be a benevolent reference to your Honour's sense of duty in that regard.

Any review of your Honour's multitudinous speeches over the last 17 years suggests that almost no subject has been left untouched and I would venture to suggest that your Honour has been right up there with Justice Michael Kirby in terms of extra-curial commentary and that is no mean feat.

Given Chief Justice Spigelman's address last week on the subject of manners and Sir Lawrence Street's weekly column in a national newspaper on ethics, perhaps we are entering into a new era in which we will look to our Chief Justices as public commentators on any and every issue.

Your Honour, I realise that I have spoken for quite a while already without yet mentioning what has been at the core of your Honour's service: your time on the bench deciding cases. In that role your Honour has achieved a well-deserved national and international reputation as an outstanding jurist. As just one example in support of that proposition, it was of course no coincidence that your Honour was asked to preside over the New South Wales Court of Appeal when a panel of interstate Judges was assembled to comprise that court when one of its members was a party of an appeal before it in the circumstances already mentioned by the Attorney. Again it's a measure of the respect accorded to your Honour's judgment that that person has been appointed to the High Court following your Honour's dismissal of the claim against him.

On the occasion of your welcome in 1988, Mr Temby speculated as to whether you would apply the same economy of language to your judgments as your predecessor. I suspect he was teasing as I sense that he had an accurate premonition that that was unlikely.

The erudition of your Honour's judgments has been properly recognised by the editors of various law reports, the pages of which, as has already been mentioned, have been dominated by your Honour's judgments. I am sure that students, academics and practitioners have all been grateful for your Honour's characteristically thorough review of both precedent and principle.

Despite your Honour's commitment to these onerous duties of office, your Honour has found the time for significant extra curricula activities, some of which have already been mentioned. Those to which I

would draw particular attention include your very significant roles in Law Asia, the International Commission of Jurists and the International Society for the Reform of Criminal Law, to mention just a few.

It seems to me that this brief catalogue of your Honour's achievements enables us to be bold enough to look behind them and attempt to identify the personal qualities that have enabled them. I do so with great respect and with a certain amount of fear and trepidation. However, pressing on, if I was obliged to sum all this up in a few words, hopefully well chosen, I would suggest that your Honour has shown a combination of great intellect, enormous vigour, an extraordinary sense of and devotion to public duty, performed perhaps most importantly of all with an overriding sense of compassion and humanity. The combination of all these qualities in any one individual is rare indeed and I am sure the people of Western Australia are most grateful that you have brought them all to bear in their service.

Some measure of the humanity with which your Honour is associated is the fact that those of us down here still all refer to you, behind your back, by the nickname you were given at school, somewhat unfairly I think, at least from the perspective of one of not dissimilar build.

Your Honour's devotion to public duty has of course been at the great expense of time and energy that might otherwise have been available for leisure and family. The Law Society sincerely hopes that your transition to your new academic role will enable you to spend a lot more quality time with your wife Kaaren and your daughter Manisha.

Of course your Honour is no stranger to academic pursuits, having been captain of school at Guildford, a Rhodes Scholar, a part-time lecturer in law at UWA for many years and a member of the Senate of that university, so in a very real sense your new role - because of course your Honour is not retiring - is simply a logical extension of those previous activities.

The legal profession and the people of this state owe your Honour a great debt for more than 17 years of conspicuous public service. I can't speak for all the people of the State but I can speak for the legal profession to express our gratitude for all that you have done and to express our best wishes to you and your family in your new role which I am sure will enable you to add to the many accomplishments of a long and illustrious career in the law. May it please the Court.

MURRAY J: Mr Ken Martin.

MARTIN, MR K: May it please the court. It's a privilege and a true pleasure on behalf of the West Australian Bar Association to offer the congratulations and good wishes of our Association to your Honour the Chief Justice at the conclusion of what has been a remarkable period of service to the people of Western Australia as Chief Justice of our State.

The West Australian Bar of course is selfishly proud of your achievements, given that prior to your appointment as Chief Justice you were one of its outstanding leaders, serving as president in the period 1981 to 1984. Your service to the administration of justice not only in this State but throughout the Commonwealth of Australia was recently recognised in

January when the Australian Bar Association, the national Association of barristers, represented in Court this morning by my learned friend Mr Viner took the step of conferring upon you the unique honour of life membership of the Australian Bar Association. Only three persons had previously been accorded this honour: Sir Gerard Brennan, the Honourable Mary Gaudron and the Honourable Michael McHugh, one Chief Justice and two former Justices of the High Court.

The fact that life membership was bestowed upon you in such company reflects the high degree of national esteem in which you are held by those with insight. It was entirely appropriate, with respect, that your Honour should be nationally recognised since prior to your appointment in 1988 as Chief Justice, you were one of the few West Australian silks to attain what was a truly Australia-wide national practice, being regularly briefed to appear, for instance, out of New South Wales and, as has been mentioned, even internationally.

You were the undoubted leader of the West Australian Bar upon your appointment as Chief Justice in 1988 and, as I can attest, were particularly sought after in red hot, multimillion dollar commercial litigation matters.

In the event of a heavy commercial fight looming, there was a predictable scramble by Solicitors to secure your services at the very earliest before the other side. In the unfortunate event of being gazumped, it became necessary to try and counter the tactical advantage enjoyed by the side you were leading by a recourse of engaging a heavy counterweight Senior Counsel from out of state.

One particular instance of that phenomenon was the Dalmacija litigation, reported as *Australian Ocean Line Pty Ltd v West Australian Newspapers*, a Federal Court case heard before Justice Toohey in the Federal Court as a single Judge in 1984 over a period of about three weeks.

A local newspaper, now defunct, the *Daily News*, had described a Christmas Far East pleasure cruise on the Yugoslavian flagged vessel, the *Dalmacija*, as 25 days of hell. A subsequent headline described it as a nightmare cruise, but one of the strongest printed criticisms about the cruise was that there was no pudding provided to passengers on Christmas Day. You were for the plaintiff. The respondent newspaper was driven to import the services and skills of one A.M. Gleeson QC to be your opponent, a New South Wales Silk with a fair reputation at the time.

In the end however you prevailed in a case which saw a broadening of the reach of the Federal Trade Practices Act to subjugate an area of private law that had formerly been the exclusive province of the common law of defamation. Your success in that case was such that the Trade Practices Act was urgently amended, so as to immunise newspapers and other media organisations against the unwelcome intrusion of section 52's misleading and deceptive conduct law into their businesses of reporting newsworthy events. That is indeed the background to what is now section 65A of the Federal Trade Practices Act and section 63 of the West Australian Fair Trading Act.

It is also fitting that your contributions to the law at a national level be recognised since some of your finest achievements have been through your work in the Asia Pacific region, both before and after your appointment as Chief Justice, and I know my learned friend Mr Viner is

going to mention this, so I will just pass over it quickly. Mention should be made however of your early employment in Asia as Deputy General Counsel of the Asian Development Bank and your abiding association with the work of Law Asia thereafter.

As Chief Justice of Western Australia however you continued and extended that work as Chairman of Law Asia's judicial section. Volume 70 of the 1996 Australian Law Journal bears testament to that work. At page 299 there's to be found a record of the Beijing Statement of Minimum Principles for the Independence of the Judiciary in the Asia Pacific region. This was a statement agreed in 1995, as has been mentioned, at the 6th Conference of the Chief Justices of Asia and the Pacific, adopted at Beijing by the Chief Justices of 20 nations of the region. Subsequently at Manila in 1997 that statement became further accepted by a total of 32 countries in the Asia Pacific region.

The joint statement enshrining accepted minimum principles for judicial independence and the impartiality of the judiciary remains a global achievement of enormous significance to our region of the world. Your work over years towards bringing that joint statement to a successful culmination was not only of great personal achievement but an achievement that derivatively created for this State international recognition.

Contrasting the Supreme Court in 2006 to the Supreme Court as it was in May 1988, when you were sworn in as Chief Justice, it would surely be undeniable that the Court under your stewardship is now a generationally enhanced institution, thoroughly unrecognisable from the days when it didn't even possess a fax machine. Generational changes and technological achievements in an almost 18-year period are legion.

One thing however that never changed in this period is your Honour's fierce commitment to a solemn promise you made to do right according to the laws of this State to all persons without fear or favour. Having given so much for so long, it is only fair that your Honour should now be able to shake loose the burdens of public duty, comfortable in the knowledge that you have personally contributed more to this State than any individual should ever really be asked to contribute.

The Beijing statement and my reference to heavyweights provides, I hope, a tenuous concluding bridge to invoke some wisdom of the ancient Chinese philosopher, Confucius, born around the year 551 BC in the ancient Chinese state of Lu. Confucius himself eventually became a Chief Justice and later Governor of the state of Lu, although I think not a Lieutenant Governor. One of Confucius's recorded sayings was this:

If the superior man is not heavy, then he will not inspire awe in others. If he is not learned, then he will not be on firm ground. He takes loyalty and good faith to be of primary importance and has no friends who are not of equal moral calibre. When he makes a mistake, he does not hesitate to correct -

and, finally, the philosopher said this:

This is the kind of person of whom you can say, "He loves learning."

Your Honour's forthcoming professorial appointment to Notre Dame University's law schools surely confirms just that. Your Honour, on behalf of the West Australian Bar Association, once again, our warmest congratulations and our abiding respect. We wish you good health, happiness and fulfilment for many years to follow. May it please the court.

MURRAY J: Thank you, Mr Martin. Mr Viner?

VINER, MR: Chief Justice, Justices of the Supreme Court and other Courts, Mr Attorney: I am today the last in line to say farewell, a difficult task. The life of the Chief Justice has been laid out before us. Beneath his Honour's wig, I think I detected, strangely, blushing cheeks from all the accolades that have been given and perhaps a tear.

The Australian Bar Association welcomes the opportunity to join in the tributes. I do so on behalf of the President Glenn Martin SC of the Queensland Bar. At least standing here I am able to break the grip of the Martinets at the Bar table.

Ken Martin QC has mentioned the conferment of life membership upon the Chief Justice by the Australian Bar Association. I was fortunate on my last occasion as President to confer the life membership at the New Silks Dinner on January 30, held in the Great Hall of the High Court of Australia, a life membership so richly deserved.

Western Australia was a small, isolated community of sandgroppers, Bunbury even smaller. It was the days when the last of the great sailing ships *Passat* and *Pamir* tied up at the Bunbury Jetty and blue manna crabs flopped in abundance into your drop nets and grabbed at your toes in Leschenault Estuary that I knew the Chief Justice as a small boy. Our mothers were the very best of friends, David's mother my sister's ballet teacher, his father my older brother's first employer. For myself, I was David's babysitter - a far cry from recent years, having to bow to his Honour and obligingly say, "Yes, your Honour", "No, your Honour". But I feel today, with the Chief Justice retiring, and I still practising at the Bar, that I have the upper hand again in a position to give the Chief Justice sage, not stern, advice on his retirement.

Western Australia has been like the Chief Justice's life where a lifetime has seen great change and great personal opportunity for those who would grasp it, where what was disparagingly known as the cinderella State has grown into the economic engine of the Commonwealth, where you could in the 1960s meet the legal profession walking from Howard Street to the Supreme Court and the whole of the profession could sit down to dinner with the High Court in the banquet hall of the Palace Hotel. You could relive the day's criminal trial with Leo Wood regaling you with his successes by the lamppost on the Barrack Street corner. Those were the days.

The Chief Justice came into that legal world and changed it, the mark of someone destined for professional leadership arriving at a critical time of change. I can claim some credit at least for the timing, for in 1965 when I joined the Bar the Chief Justice took over my partnership in Muir and Williams, and after his three years with the Asian Development Bank from 1967 to 1970 proceeded to see that old pre-war firm transformed into a firm of national significance, the forerunner of the national firms moving

westwards into this State, and doing so just as Western Australia was about to throw off its Cinderella tag and make its economic presence felt in the affairs of the nation.

The Chief Justice's move to the Bar was inevitable. As Queen's Counsel in 1980 his leadership of the Bar inexorable, leading the Bar at a time of growing confidence and importance with an influx of new members of significant talent. Then answering the call of his mentor Sir Francis Burt in 1988, his Honour took on the leadership of this Court, once more at a critical time of change.

Sir Francis and his colleagues represented the pre-war and post-war professional generation of this State, Chief Justice Malcolm the new generation. Sir Francis saw the need. Chief Justice Malcolm responded with energy and vision, again with foresight and leadership to guide the court in a great expansion of its work to meet the demands of a rapidly expanding population, to equip the Court with men and women of acknowledged talent, to publicly argue the case for the Court to be properly resourced by reluctant Treasury without fear from any Government.

Judicial and professional energy and leadership were not alone on this journey of the last 18 years. The Chief Justice has made an enormous contribution to public life in Western Australia; in law reform, legal education, public and tertiary education, scouting, youth leadership, charities, the SAS Trust, sport - although a Dockers' fan - a continuing connection to Asia and the Pacific by his Chairmanship of the Biennial Conferences of Chief Justices since 1991, public support of the cause of minorities including Aboriginal reconciliation and arguing for a Bill of Rights. They have all received the Chief Justice's interest, energy and leadership. For a Bunbury boy, Chief Justice, you have done well.

You have served your profession, the judiciary and the people of Western Australia selflessly and with great distinction. The Australian Bar Association joins with the Bench, Mr Attorney, the Law Society of Western Australia and the Western Australian Bar Association in thanking you for your service and wishing you well in your retirement. May it please the Court.

MURRAY J: Thank you, Mr Viner. Chief Justice?

MALCOLM CJ: Thank you, your Honour, Justice Murray, Mr Attorney, Mr Wayne Martin QC, President of the Law Society, Mr Ken Martin QC, President of the Western Australian Bar Association and Mr Ian Viner QC, representing the President of the Australian Bar Association, I thank each of you for what you have said this morning.

I would also like to thank for their presence on the bench today, your Honours the Judges, Chief Justice Black and Justices Lee, Nicholson and Siopis from the Federal Court, Masters Sanderson and Newnes. I also wish to thank all of those who have taken the time to be present to share this occasion with me and members of my family and friends in addition to members of the profession.

It is difficult to accept that I have been in office for some 17 years and eight months. From one perspective, the time has flown. I have learned that time flies even if you are not necessarily having fun. Being

Chief Justice has been an absorbing and demanding occupation made enjoyable and fulfilling by those who have served on the Bench with me and the members of the profession who have appeared before me.

When I was appointed Chief Justice, I was the most junior member of the Court in terms of admission and practice and in terms of my appointment to the Bench. It was not until December 2004, when Justice Parker retired to take up his appointment with the International Tribunal for the Former Yugoslavia, that I became the senior member of the Court in terms of admission to practise.

In 1988, Justice Bob Wallace was the Senior Judge on the Court after the Chief Justice. It was he who welcomed me to the Bench on behalf of all of the members of the Court. Unfortunately, he has not been able to join us today. He was of enormous assistance to me during the time we were on the Court together, as were Justices Brinsden, Smith, Kennedy, Pidgeon, Rowland, Franklyn and Seaman, and Master White and Acting Master Ng.

I had sponsored the then Acting Master's immigration to Australia from Malaysia following the anti-Chinese riots in that country in 1969 and it was very gratifying to see that he was appointed a member of the judiciary in this State, as he had been in Malaysia. All of the Judges except for Justice Pidgeon had been fellow members of the Independent Bar. Justice Pidgeon, however, had been my Sunday School monitor at St Paul's Cathedral in Bunbury and was my supervisor for the Guildford Grammar School scholarship examination of 1950. I owe him a great deal and he was a very kind monitor during those Sunday School days.

At the time of my appointment, Justice Toohey, who had taught real property when I was at law school, who I also knew well from my time at the Bar, was the resident Judge of the Federal Court. I had the privilege of appearing with him as his junior and later appeared before him on a significant number of occasions.

I remember well one occasion before the former Chief Justice Woolf who had a close affinity with the working of water wells, and this was a case about one such well, but unfortunately the Judge fell asleep when Franklyn was addressing. Toohey and Franklyn said, "You're Mr Junior, you wake him up." I thought that was unjust and told Franklyn that he had sent him to sleep; he should wake him up. Anyway, like lawyers, ultimately there was a negotiated settlement. I woke up the Associate who woke up the Judge.

All of those made me feel extremely welcome following my appointment. All of them were extremely helpful and supportive and that has been my consistent impression of all of those with whom I have had the privilege of having as colleagues on the Court.

During my time on the bench, I have been very grateful to the Law Society, the Bar Association and the Women Lawyers for their support and cooperation. The high level of that cooperation was evidenced in the August blitz of 1993 when we disposed of the equivalent of one full year's work in terms of pending cases in a single month.

The August blitz was the precursor of the system of case management which was subsequently introduced and is the basis of the

system which operates today. The introduction of mediation has been a major reform with Registrars achieving a success rate of settlements of 70 per cent or more in all of the years since then. The investment which was made in sending the Principal Registrar to Harvard where they ran mediation courses and bring back all of that knowledge to the Supreme Court has paid very substantial dividends.

We have had from time to time difficulties in obtaining the necessary resources to function as efficiently as possible. The past year has seen an adverse change in the civil list, although the criminal list has been managed very effectively. The delay in the hearing of criminal cases in 2005 was affected by the work required to rectify the deficiencies in the detention facilities at the Supreme Court following the escape of prisoners in July 2004, but out of adversity sometimes spring important things. We now have the most efficient, effective and satisfactory detention facilities of any Court.

Since its establishment at the beginning of 2005 the Court of Appeal has proved to be very efficient and effective, although it became clear that the workload was very great. Justice Steytler, the President of the Court of Appeal, and all the members of the Court of Appeal, deserve congratulations on a tremendous year's work. The workload is very, very difficult but this has been relieved somewhat by the recent appointment of Justice Buss.

I am very grateful to all of the members of the Court for their friendship and support over the years. The Court has enjoyed a high reputation during the bulk of my term of office, which reflects great credit on the level of judicial work in the Court.

My one disappointment is that the accommodation problems which were apparent at the time of my appointment in 1988 have still not been solved. In 1992, the then Attorney-General, Mr Joe Berinson QC, sought and obtained the approval of Cabinet in April for the construction of significant extensions to the Supreme Court on this site.

Unfortunately, before the project could be implemented, there was a change of Government. While the new Attorney-General, Mrs Cheryl Edwardes, initially indicated her support for the project, neither she nor her successor, Mr Peter Foss QC, were able to secure Cabinet approval for the expansion of the Court on this site. The consequence is that since 1990, the Court has for some 15 years operated from two locations, one of which has involved substantial expenditure in terms of rent. On my calculation, the rent payable over the first 12 years would have paid for the extensions which we were wanting at that time.

This has meant that the Court has been denied the efficiencies of having all its courtrooms in the one secure and appropriate complex at the Supreme Court site, suitably expanded to meet the needs of the 21st century. This has been the situation for the major part of my term as Chief Justice. It is essential for the future efficient operation of the administration of justice at the level of the Supreme Court that this situation be rectified at the earliest possible date.

Notwithstanding the difficulties we have had to face, the Judges, Masters and Registrars and staff of the Court have cooperated in an endeavour to conduct the business of the Court in the most efficient manner possible within the constraints within which we have had to operate. I thank

all of those who have served on the Court, including the Acting Judges and Commissioners, who have assisted us for their valuable work.

Last Thursday I had the opportunity to spend some time with a considerable number of former employees of mine as well as my personal staff and other staff at the Court with whom I have worked over the years. There are more than 40 of them. I had the opportunity to thank them then, but there are some who worked with me for very considerable periods.

When I was with the law firm now known as Freehills, Deanna Corra was my secretary for a significant period. When I joined the Bar on 1 January 1980, Deanna came with me and remained with me when I was Chief Justice. In all, she worked for me for some 17 years. Jennifer Lazberger was her replacement in 1991 as my Secretary and as the job grew was appointed as my Chamber's Manager. She performs a key role within the Court. I am very grateful for the work that she has undertaken in many ways. I thank her most sincerely for her high level of assistance and personal support over the years.

I am grateful to my former secretary, Meredith Williams, and particularly want to thank my subsequent Secretary, Christina Curtis, who was reclassified some time ago as my Executive Assistant. She has been a great help to me and it has been a pleasure to work with her.

Among other innovations was the appointment of the Public Information Officer for the Courts. The first person to be appointed to that position was Lissa Manolas. Later this position was shared by employing two part-time officers who shared the job, namely, Lissa Manolas and Val Buchanan. Val Buchanan, I am happy to say, is still with the Court. More recently she has carried out this duty full-time with very considerable success. She has been of very great assistance with a new title reflecting her role, namely, Manager, Media and Public Liaison.

I also have been greatly assisted by successive Aboriginal Community Liaison Officers, the most recent of which have been Sharon Bedford and Vincent Pickett who have played an important liaison role between the Courts and various Aboriginal groups and individuals. This is an extremely important and sensitive function, particularly in the context of criminal trials.

I have had a number of Administrative and Research Assistants. I had the opportunity to thank them all at the function to which I have referred but I am very grateful to Mr Jerome Rivalland, my current Research and Administrative Assistant, for his hard work and patience. I would like to thank all my past Associates, and in particular my present Associate, Mr Geoff Kuehne, for all his help, support and unflappable demeanour. I also thank all my Orderlies, past and present, including my current Orderly, Greg Willis, who has continued the tradition of being an ex-RAAF officer.

I have enjoyed working with a number of persons who have been in charge of the administrative staff at the Supreme Court and, in particular, Max Campbell, Greg Nairn, Giles Nunis, Gavan Jones and Graeme Ferguson and I also especially thank Mr Alan Ashe for his assistance personally over a very long period.

I thank all of you who have come today for your attendance on this very special occasion. Finally, I thank my wife Kaaren for her great loyalty, love and support, agreeing to leave England and come to Australia

to be my wife and for the gift of our beautiful daughter, Manisha, of whom I am immensely proud. I look forward very much to being able to spend rather more time with them, following the resumption of my academic career.

A few years ago while walking down Napoleon Street, I was chiding Manisha, I thought fairly gently, but a passer-by immediately quipped, "You'll get no justice out of him, kid." As a result, Manisha has developed a strong sense of justice. There may be a scintilla of a possibility that she will follow at least some of her father's footsteps in the future. Now, we will adjourn. Thank you.

AT 10.39 AM THE MATTER WAS ADJOURNED ACCORDINGLY