The Law Society of New South Wales
Annual Members' Dinner

One Small Town

Chief Justice Robert French
28 October 2010, Sydney

Many years ago my brother-in-law, a graduate of Sydney University who claimed to have been a fringe member of the Sydney Push, returned to New South Wales with a freshly minted doctorate in psychology from Princeton University. He was offered two jobs: one at Sydney University and the other at the University of Western Australia ("UWA"). Because he was interested in the field of research being undertaken in Perth he accepted the UWA offer. His Sydney friends were horrified. How can you go to Perth they said when you have been offered a job in Sydney. He replied tersely, 'one small town is much like another'.

This was a rather pungent comment on parochialism, which we tend to think of as geographical in its focus. Parochialism can also be a term which describes a narrow view of the world by members of a particular occupation or profession or specialist subdivision within a profession. It is a kind of perceptual disorder. It can affect the legal profession including its practitioners and judges. The disorder at its worst is geographical and occupational. It is best cured by standing back and looking at the place**s** where we live and the things we do from an external perspective. We can begin by looking at Australia from the outside – a vast country with what is, in global terms, a tiny population roughly equivalent to that in New York State and, for the most part, concentrated in coastal cities. We can look at our legal profession from that perspective and reflect upon how quaint it is to think of ourselves only as members of the legal professions of New South Wales or Western Australia or the Northern Territory and so on. That is not to say that we should not maintain and value an awareness and understanding of the history of the legal profession and all its branches which necessarily involves its particular histories in the States and Territories of Australia. That of the legal profession in New South

Wales belongs to Australia's larger history, the growth of the rule of law, of an independent legal profession and judiciary, and the formation of the Commonwealth.

Your Society can trace its ancestry back to the formation, in 1842, of the Sydney Law Library Society. That Society was created in response to the denunciation of the legal profession by the Governor of New South Wales, Sir George Gipps, who said that the colony's solicitors were 'causing delays in the administration of justice, increasing expense in legal proceedings and claiming excessive remuneration for services'.[1] Unhappily, those complaints were not novel. Their history long antedated Governor Gipps and they are still with us. Their longevity does not mean that there is nothing that can be done about them and the endeavour to do something about them is part of the ongoing responsibilities of professional bodies, including the Society. Of course not all complaints about legal process are complaints to which the legal profession is required to plead guilty. Particularly in the area of litigation there are certain intractable aspects such as the gathering, the hearing and the analysis of evidence which are inescapably labour intensive. In the 38 years since I was admitted as a practitioner there have been very substantial attempts by the courts, the profession and by legislatures to mitigate the worst burdens in terms of cost and delay associated with litigation.

I should say, however, that I remember a time when lawyers did not fill out timesheets. Indeed I remember when we introduced them into my own firm in the 1970s. The beguiling voice of our accountant said – 'this is just a management tool'. It is generally recognised that time costing has gone far beyond the status of a management tool. It is seen in some quarters as an encumbrance upon professionalism which places a premium on inefficiency. I am glad to see that there is ongoing contemporary debate about this practice and that the Law Council of Australia is moving to review it.

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1 'A history of service to the law, the profession and the community 1884-2009', 47 *Law Society Journal* 50 at 50.

Complaints about practitioners in colonial Australia were not peculiar to New South Wales. When the *Legal Practitioners Act 1893* (WA) was enacted, Septimus Burt, the Attorney-General of the day, said of the practitioners of his time that the 'Good ones are bad enough, and, if you get a really bad one, you won't want to see his like again'.[2]

Keeping our focus on New South Wales for the moment, the State today has the largest number of legal practitioners of any State or Territory in Australia. Your Society, I understand, counts over 20,000 solicitors as its members. This is not surprising. Quite apart from the population of the State, which requires a wide range of legal services large and small, Sydney has long been a commercial centre of great importance in the Australian economy. It is properly regarded as a global capital. The vitality and competitiveness of both branches of the profession in this State reflect that importance. The metaphor 'judicial vortex' was applied a few years ago by Chief Justice Spigelman to describe that vitality. That was a metaphor which not everybody was happy to hear. There is no doubt, however, that the courts of New South Wales deal with a high volume of important and complex litigation. It is no disrespect to those courts and the Federal Court in this State to say that they provide the lion's share of the input to the exercise of the appellate jurisdiction of the High Court. There is no disrespect in saying that because the statistics reflect the volume, difficulty and importance of the work which both the Court of Appeal of New South Wales and the Federal Court, in the exercise of its appellate jurisdiction, have to deal in this State.

The High Court's Annual Report for 2009-2010 shows that 56 per cent of all cases filed in the Court were filed in the Sydney Registry. The great bulk of them were special leave applications.

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[2] Western Australia Parliamentary Debates, Vol IV, 5 July to 5 September 1892 at 356.

The significance and variety of the work generated by the profession and the courts in New South Wales can be illustrated by a brief review of some of the cases which the High Court has decided this year coming out of this State. A number of them reflect, as cases from around the country do, the political and social issues of the day manifesting in litigation and sometimes constitutional litigation but not limited to that category.

The New South Wales year in the High Court in 2010 began with the Court's decision in *Kirk*.[3] In the contentious context of occupational health and safety laws the Court considered the entrenched supervisory role of the State Supreme Court with respect to jurisdictional error by tribunals within the State. I do not have to labour the significance of that decision. However, outside the boundaries of its ramifications there is a much larger debate about occupational health and safety laws, the resolution of which is, of course, a matter for the elected representatives of the people to resolve.

Another sensitive and contentious issue with political dimensions underpinned the question of compensation for the reduction of water entitlements in the Murray-Darling Basin. That question arose in the case of *Arnold v The Minister Administering the Water Management Act 2000*[4], a sequel to the decision of the Court delivered in December 2009 in *ICM Agriculture Pty Ltd v The Commonwealth*.[5] A similar question given a high public profile was canvassed in the context of a pleading case concerning the effect on property rights of native vegetation clearing restrictions in *Spencer v The Commonwealth*.[6] Those cases involved debate about the interaction between the constitutional guarantee of just terms in relation to the acquisition of property by laws of the Commonwealth and

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3 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

4 (2010) 240 CLR 409.

5 (2009) 240 CLR 140.

6 (2010) 268 ALR 233.

the operation of agreements between the Commonwealth and States pursuant to which the States, which are not bound by such guarantees, might acquire property. Again, the wider social and political context in which those cases were embedded has been, and no doubt will continue to be, the subject of considerable public debate and contention.

Not everything from New South Wales is about politics. In a somewhat less politically charged area the Court, in its decision in *Cadia Holdings*[7], considered the interesting history, dating back to the 17th century, behind the Crown's rights to gold and to other minerals found in mines of gold. The idea that the liability to make significant royalty payments in New South Wales today might depend in part upon statutes passed in England in 1688 and 1693 would no doubt strike some people as odd. But the particular case demonstrates perhaps in a more extreme way than others, that our law cannot be understood independently of its history.

In the personal injuries field, the availability of damages for loss of a chance was considered in *Tabet v Gett*.[8] Also in that field the Court in *Wicks v State Rail Authority of New South Wales*[9] considered the recoverability of damages for psychological and psychiatric injury suffered by police officers attending upon a major train derailment. Contests over tax liability arose in the *Bamford* case[10], relating to the treatment of trust income and in *Travelex*[11] which concerned the application of GST to the sale of foreign currency on the departure side of customs barrier. Defamation, always a popular topic in New South Wales, was at the heart of a case about whether a bank, mistakenly dishonouring certain cheques, had defamed

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7 *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 269 ALR 204.

8 (2010) 240 CLR 537.

9 (2010) 267 ALR 23.

10 *Commissioner of Taxation v Bamford* (2010) 240 CLR 481.

11 *Travelex Ltd v Commissioner of Taxation* (2010) 270 ALR 256.

its customer by notifying the payees of the cheques that they should refer to the drawer.[12] Other cases concerned the offence of conspiracy to defraud in the context of money laundering[13], the appellate jurisdiction of the New South Wales Supreme Court,[14] trade marks for beer[15] and pharmaceutical products[16], and non-publication orders under s 50 of the *Federal Court of Australia Act 1976* (Cth).[17] These New South Wales cases in which the Court has given judgment this year may be few in absolute numbers, but they are the tip of the iceberg of the immense amount of legal professional activity taking place within the State and within both the solicitors' and barristers' branches of the profession.

Some of the matters, as I have mentioned, arose in a context of political contention. There have been a number of such proceedings in the last two years, the most recent of which, *Rowe v Electoral Commissioner*, concerned the validity of the provisions of the *Commonwealth Electoral Act 1918*. However politically charged the disputes which give rise to the proceedings before it may be, the Court decides legal questions, not political questions. Importantly, the Court does not choose the matters which come before it, save to the extent that it applies a filter in determining whether or not to grant special leave to appeal from a decision of another court. It is not however unusual for cases of constitutional significance which may have political consequences to come to the Court in the exercise of its original jurisdiction. Two examples of that class of case were *Wurridjal*[18] and *Pape*.[19] The

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12 *Aktas v Westpac Banking Corporation Ltd* (2010) 268 ALR 409.

13 *R v LK* (2010) 266 ALR 399; *Ansari v The Queen* (2010) 266 ALR 446.

14 *Kostas v HIA Insurance Services Pty Ltd* (2010) 270 ALR 256.

15 *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 265 ALR 645.

16 *Health World Ltd v Shin-Sun Australia Pty Ltd* (2010) 240 CLR 590.

17 *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

18 *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

19 *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

first concerned the validity of legislation underpinning the Northern Territory intervention. The second concerned the validity of stimulus payments made by the Commonwealth Government in response to the global financial crisis.

While the Court's decisions are sometimes criticised by the media, by members of the profession, by academic lawyers and by politicians there is generally speaking a far higher degree of civility in that criticism than occurs in some other countries.

In the particular context of New South Wales, I think this point was illustrated by the parliamentary response to the Court's decision in *International Finance Trust Co Limited v New South Wales Crime Commission*[20] where the Court, by majority, held invalid a provision of the *Criminal Assets Recovery Act 1990* (NSW) which related to a species of interim freezing order. What was encouraging, and I suppose no more than one should be entitled to expect in a democratic society governed by the rule of law, was to observe in the Hansard record of the New South Wales Parliament following the Court's decision, the civil and professional discussion on both sides of the House about the decision and the steps necessary to rectify the legislation.

It has not always been thus, nor will it always be thus. In the 1920s, Billy Hughes expressed in the Commonwealth Parliament his exasperation with decisions of the High Court saying '[w]e throw the High Court an amending Act, and they hurl back its shattered remains. Then, spurred on by the demon of eternal hope, we pass another; again it is thrown back…'.[21] Eruptions will arise every now and again. That is to be expected in a robust democracy. Many here will remember, at the time of the Court's decision about the interaction between pastoral leases and native title

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20 (2009) 240 CLR 319.

21 75 Parl Deb 653 quoted in MI Aronson, 'Statutory restrictions of remedies in English and Australian administrative law' (PhD Thesis, Oxford, 1973) ch 3 at 23.

in the *Wik case*,[22] there was a cascade of criticism, one Member of Parliament describing members of the Court on television as 'pissants'. This does not appear to have been a mispronunciation of the word 'puissant'. On the other hand the Court's decision in the *Communist Party case*[23], holding invalid the *Communist Party Dissolution Act 1950* (Cth), occurred in as highly charged a political environment as one could imagine. Yet the decision was accepted and the ultimate question was put to the people by way of a referendum seeking a constitutional amendment which they eventually rejected.

I have been speaking so far by reference to what, if we were in the United States, we might be calling the 'Great State of New South Wales'. It is time to return to the larger national perspective. In Australia today we speak of a national legal profession, an integrated judicial system and a single body of common law. It is easy to point to the existence of a national legal profession. Many of us can point to particular manifestations of it. These include the growth of national law firms, many of which now have international connections. Common admission arrangements mean that a person admitted in one State can practice in another. One of my sons, a law graduate from a university in Western Australia, joined a national law firm in Perth which put him and his fellow graduates through the College of Law in New South Wales, had him admitted in New South Wales and then subsequently in Western Australia. I observed the evolution of a national profession at work simply by seeing what happened to the law firm which, with three friends, I established in 1975. We called it 'Warren McDonald French & Harrison'. We had imperial ambitions and an overdraft limit of $2,000. The realisation of our ambitions began rather modestly with the establishment of a visiting practice in the small but relatively affluent rural town of Kojonup in South West Western Australia. As solicitors and barristers we did a little of everything. We did wills, estates, land sales, general conveyancing, drunks, drugs, prostitutes, rape and murder. These

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22 *Wik Peoples v Queensland* (1996) 187 CLR 1.

23 *Australian Communist Party v The Commonwealth* (1950) 83 CLR 1.

were all part of our diet. For a while we prepared prospectuses for motion pictures in a time of much enthusiasm for such projects when massive tax concessions applied in an endeavour to stimulate the industry. This led to my acquisition of the only shares which I have ever owned. They were paid in lieu of our fees. They were shares in a company which undertook a remake of the Australian film classic, *Bush Christmas*. I think the shares remained resolutely at a value close to zero and I suspect that they actually reached that value with the passage of time.

I left the firm in 1983 to practice as a barrister. Subsequently, the firm became part of a federation of partnerships under the national name Sly & Weigall. That later became another federation under the name Deacons. That federation fused into a national partnership and has now become Norton Rose, which has a large international legal practice and claims some 600 lawyers in Brisbane, Canberra, Melbourne, Perth and Sydney. So our imperial ambitions were realised, but by others. Of course, not every legal practitioner in Australia is a member of a large national or international law firm. There are very many medium and small practices, both city-based and suburban, which are represented and no doubt form the preponderance of the membership of the Law Society of New South Wales and its equivalents in other States and Territories. Even those firms, although they may operate within particular geographical areas, will find themselves dealing with national laws or uniform laws and having to advise on matters across State and Territory borders.

In considering the notion of a national profession more deeply, a most challenging task is to work out what this can and should mean in practical terms and what principles should inform its structure and regulation. As we are all aware, a Taskforce established by the Standing Committee of Attorneys-General is considering the establishment of a national legislative scheme concerned with the admission and regulation, including discipline, of legal practitioners across Australia. This project must necessarily be a cooperative one between the States and Territories and it is proceeding upon that assumption. The model proposed by the Taskforce involves a host State enacting a national law, creating a National Legal Profession Board with responsibilities in relation to admission of legal practitioners and rules of conduct governing such practitioners. Participating States and

Territories would presumably confer concurrent powers on the National Board under each of their own laws. There is also a proposal for a National Legal Services Commissioner who would have responsibility in the area of professional discipline.

Questions of principle and practical workability have, understandably, been at the centre of debate and discussion about the Taskforce proposals. Debates about principle have raised concerns about what is meant by, and necessary to maintain, the independence of the legal profession from the Executive Governments of the States and Territories and the extent and nature of the accountability of members of the profession to their clients. That accountability is of the highest importance but it has to be viewed against the background of the special responsibility of legal practitioners as officers of the courts which admit them. In the context of litigation, those responsibilities, enhanced by new approaches to case management and the proper use of the public resources of the courts, have a public interest dimension.

The question of the independence of the profession from the Executive Governments has been seen as connected with the composition of the proposed National Board, the mode of appointment of its members and its functional relationship with the Standing Committee of Attorneys-General. The Council of Chief Justices has expressed a view supportive of one of the models for the composition of the Board, which was set out in a Discussion Paper circulated by the National Legal Profession Reform Taskforce in July 2010. Under that model it was proposed that two members of the Board be nominated by the Law Council of Australia, one by the Australian Bar Association, one by the Council of Chief Justices who would be the chair, and three nominated by the Standing Committee of Attorneys-General. That is the model which the Council of Chief Justices continues to support.

There are undoubtedly a number of issues to be worked through before a satisfactory system is able to be agreed. And even then, I suspect it will be a work in progress. It may be that not all States and Territories will join in the scheme initially. There are also some practical matters concerning the admission of legal practitioners which have been raised by the Legal Admissions Consultative Committee in a submission to the Taskforce and which will require care and

attention in the detail of any national scheme. The question of admission to practice in federal courts also has to be provided for, although I do not anticipate great technical difficulty in that respect.

It is important that the profession continue to be engaged, as it has been, in the debate about these reform proposals. It is also important that the profession recognise that there is a public interest which must be recognised and to which the politicians who have the primary responsibility for ultimately deciding the shape of the regulatory scheme, will give great weight. This, of course, is entirely compatible with the objectives of professional associations such as your Society. One of your Society's objects is:

> To consider, originate and promote reform and improvements in the law; to consider proposed alterations, and oppose or support the same; to remedy defects in the administration of justice; to effect improvements in administration or practice. And for the said purposes to petition Parliament or take such other proceedings as may be deemed expedient.[24]

That is an overarching objective which sits alongside the Society's other objectives which include representing generally the views of the profession, preserving and maintaining its integrity and status and considering and dealing with all matters affecting the professional interests of members of the Society.

In the end the independence and durability of the profession will depend upon the extent to which it is able to demonstrate that what it does and proposes are things necessary in the service of a public interest that is wider than the interests of the individuals who make up the profession. That wider public interest includes the protection and promotion of the rule of law, the pursuit of justice according to law and the improvement of the laws to better deliver justice.

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[24] *Memorandum of Association of the Law Society of New South Wales* cl 3(1).

These are the proper objectives of a member of the legal profession in any part of Australia. They are reflective of a largeness of view which is the antithesis of parochialism.