

**Index to compilation of speeches delivered by
the Hon. Justice GFK Santow AO**

Date speech delivered	Description	Page number reference within pdf compilation
14 December 2007	Index to articles and papers by Justice Santow	Page 2 of 153
14 December 2007	Remarks at Farewell from the Supreme Court of NSW	Page 5 of 153
14 December 2007	Address on the retirement of the Honourable Justice GFK Santow AO	Page 10 of 153
26 November 2007	Last things	Page 26 of 153
16 April 2007	Women on Boards – the end of civilisation as we know it?	Page 37 of 153
26 March 2007	Truth-telling	Page 41 of 153
3 December 2006	Oriental Society of Australia "World without walls"	Page 45 of 153
20 October 2006	Talk to final year students' end of year dinner for 2006	Page 48 of 153
15 June 2006	Tradition and ambition: Law at Sydney	Page 54 of 153
13 June 2006	Faculty of Medicine's 150th Anniversary Celebration Ceremony	Page 56 of 153
22 May 2006	Some reflections on tolerance and conviction	Page 61 of 153
5 November 2005	Laying foundations	Page 64 of 153
28 September 2005	Music and Social Justice	Page 68 of 153
11 April 2005	Sancta Sophia College – Address for the Chancellor's Dinner	Page 71 of 153
18 March 2005	The University and Schools Club – a talk to mark its centenary of Sydney connection in an era of social change	Page 74 of 153
17 August 2004	"Tribute to an enduring partnership"	Page 82 of 153
29 July 2004	Professor Jonathan Stone – unveiling a portrait	Page 85 of 153
9 August 2001	Law Practice Today	Page 89 of 153
12 February 2000	CLERPing the Panel — Blue Ribbon Jury or quasi Court	Page 100 of 153
July 1999	Charity in its Political Voice - a tinkling cymbal or a sounding brass?	Page 123 of 153
24 October 1997	Launch of the Sydney Post-graduate Studies Programme 1998-1999, University of Sydney Law School	Page 141 of 153
29 November 1996	Some Reflections on Mémoires à Deux Voix, Elie Wiesel and François Mitterrand	Page 144 of 153
20 November 1996	Address to Professional Staff at FHP on Pro Bono Programme	Page 148 of 153
23 April 1996	The Modern Judge	Page 151 of 153

Articles* and Speeches By The Hon Justice Kim Santow AO

LAW, POLICY AND THE COURTS

“Corporations Law in a Federal System” (2000) 20 Aust Bar Rev 162

“Mandatory Sentencing: A Matter for the High Court?” (2000) 74 ALJ 298

“The Codification of Directors’ Duties: Some Observations from an Australian Standpoint on the Joint Consultation Paper of September 1998 Issued by the Law Commissions of the United Kingdom” (2000) 2(2) International and Comparative Corporate Law Journal 127

“Law Practice To-day”, unpublished address at UNSW, 9 August 2001

“Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?” (1999) 18 Aust Bar Rev 225 and (1999) 52 Current Legal Problems 255

“Codification of Directors’ Duties” (1999) 73 ALJ 336

“Sex, Lies and Sureties: Touching the Conscience of the Creditor” (1999) 10 JBFLP 7

“The Figure in the Landscape: A Comparative Sketch of Directors’ Self-Interested Transactions: A Commentary” [1999] CfiLR 214

“Transition to the Bench” (1997) 71 ALJ 294 and (1997) 41(5) Quadrant 11

“Taking the Legalism out of Takeovers” (1997) 71 ALJ 749

“Guaranteeing Supply: ‘The Ghost in the Machine’” (1996) 7 Public Law Review 8

“Aspects of Judicial Restraint” (1995) 13 Aust Bar Rev 116

Santow and Leeming: “Refining Australia’s Appellate System and Enhancing its Significance in our Region” (1995) 69 ALJ 438

“The Modern Judge”, unpublished paper 23 April 1996

“Ethics and the Rush to Regulation” (1994) 14 City Ethics 4

“A Message to Law Graduates” (1994) 68 ALJ 730

“Corporate Crime: Complex Criminal Trials: A Commentary” (1994) 5(3) Current Issues in Criminal Justice 280

“The Regulation of Business and the Achievement of Ethical Standards” (1993) 65(2) Australian Quarterly 38

“The Trial of Complex Corporate Transgressions: The United Kingdom Experience and the Australian Context” (1993) 67 ALJ 265

John M. Green, Kim Santow and Bruce K. Cutler, “Australia: A Special Report” in International M&A: A Guide to the Regulation of Mergers and Acquisitions

Worldwide (International Financial Law Review, Special Supplement, January 1991) 15

“Governmental Financing of Infrastructure – Legal, Political and Financial Restraints” [1983] AMPLA Yearbook 85

“Defensive Measures against Company Take-overs” (1979) 53 ALJ 374

Santow and Gonski: “Mergers after the Trade Practices Act 1974-1977” (1978) 52 ALJ 132

“Regulating Corporate Misfeasance and Maintaining Honest Markets” (1977) 51 ALJ 541

“Mergers and the Commonwealth Trade Practices Act 1974” (1975) 49 ALJ 52

“*Last Things*”, Talk to a dinner of the Wills and Estates Specialists, Law Society of New South Wales, 26 November 2007

GENERAL – A SELECTION

- “*Tradition and Ambition: Law at Sydney*” Plaque Unveiling for the new Law School at Camperdown, 15 June 2006.
- “*Laying Foundations*” Alumni Sesquicentenary Dinner of Sydney Law School, 5 November 2005
- Talk to Final Year Law Students, 28 October 2006.
- “*Some Reflections on Tolerance and Conviction*” Sancta Sophia College address for Academic Dinner, 22 May 2006
- “*Some Reflections on Mémoires à Deux Voix, Elie Wiesel and François Mitterrand*” 29 November 1996, published in Quadrant
- Faculty of Medicine University of Sydney – address on 150th anniversary, 13 June 2006.
- “*Clubs*” a talk to mark the centenary of the University and Schools Club and its Sydney connection in an era of social change, 18 March 2005.
- “*Music and Social Justice*”, address at Sydney Conservatorium of Music, 28 September 2005.
- “*Address on Catherine Hamlin and related topics*”, Sancta Sophia College 11 April 2005
- “*Tribute to an enduring partnership*”, Larsen and Lewers “*New Work*”, 17 August 2004
- “*Professor Jonathan Stone unveiling a portrait*”, 29 July 2004.
- Launch of the Sydney Post-graduate Studies Programme 1998-1999; University of Sydney Law School 24 October 1997
- “*CLERPing the Panel – Blue Ribbon Jury or quasi Court*” 12 February 2000
- “*World without Walls*” address to Oriental Society, 3 December 2006
- “*Women on Boards – the end of civilisation as we know it?*” 16 April 2007
- “*Truth-Telling*” address to Womens College 26 March 2007

- *“Remarks at my Farewell”* 14 December 2007

Remarks at my Farewell from the Supreme Court of NSW

I am deeply moved that so many of you have come to attend my farewell. I am especially grateful to Chief Justice Spigelman, the Attorney-General of New South Wales and to the Acting President of the Law Society for what they have said about me. May I reassure them and you that I do not intend to leave the Court by what was until recently designated TEMPORARY EXIT, that discrete door hidden amongst the Supreme Court building works. I have crossed my personal Rubicon - yet the words which I quoted from Vikram Seth's "A Suitable Boy" at my swearing-in fifteen years ago, still resonate. This is what I said:

"Mr Justice Chatterji, a distinguished Judge of the Calcutta High Court, is musing over the circumstances of his appointment to the Bench. He recalls that when the Chief Justiceship was first offered, he declined. He is asked by the Chief Justice to reconsider. But he would not. His father (recently retired from the Bench), his wife and his sons also fail to move him. But then his former law clerk, Biswas Babhu, says something to Chatterji. This has "a slow but profound effect". Biswas asks simply, "Do you not want to do justice?" Is this not the essence of the judicial calling?"

That insistent question "Do you not want to do justice?" was first posed for me by my Hungarian father, who had so happily emigrated to Australia, escaping the horrors that beset his judicial brother who would not leave. My father was a deeply reflective, humanitarian surgeon and obstetrician. His hope was that I would aspire to judicial work. Sadly he died long before this could have even been contemplated. When finally I had the privilege of joining this Court, no longer a commercial solicitor though not leaving that craft behind, my concerns were more akin to those of a caring doctor. In equity particularly, I drew upon the metaphor of a public hospital, engaged in a healing operation under a constrained budget, our patients often poor. That operation had to be conducted with as much humanity and individual concern

as the traumatic encounter allows, necessarily with an eye to efficiency and cost but not sacrificing fairness. I learnt early on from Brian Page, senior partner in my old law firm, that a legal answer which offended common sense or basic fairness was usually wrong, however cleverly contrived. That conviction sustained me throughout my time on the Court.

When later I joined the Court of Appeal from Equity, I became ever more conscious of how important it was to explain in the clearest and simplest of language, especially to the losing party, why the Court has decided as it has. This is no less important than explaining what is important about the decision itself in legal principle. Our President Keith Mason's dedicated and unselfish leadership has marked my time at the Court of Appeal, for which I will always be grateful. I have been especially fortunate to have served in such a collegiate court, so well led, its members bringing an intellectual breadth rarely to be found in any institution. I think for example of Justice Hodgson, testing ideas of guilty intent in the criminal law against his profound interest in philosophical concepts of free-will and of consciousness itself. Or of Chief Justice Spigelman - writing of Thomas à Beckett, relating those issues of conflict between church and state, to the constitutional problems of our time.

To return to family influence, I was strongly beckoned towards judicial office by the letters written by my father's brother, Uncle Imre, whose ruptured career was a tragic loss both to legal scholarship and to the Hungarian judiciary. "His retirement" from the judiciary was no thing of honourable stepping down. He was brutally dismissed - under the Hungarian anti-Jewish laws passed during that Nazi era. Stripped of office, he was sent into the countryside to work as a labourer, before finally meeting his death in Buchenwald; a stark reminder of the vulnerability of our own judicial status to the cataclysms that engulf an apparently ordered society, and exploit its fault lines. Recent events in Pakistan demonstrate yet again how the Rule of Law depends upon the community's support for an independent judiciary, itself dependent on the judiciary staying within its own proper sphere.

Uncle Imre's daughter (Ildiko), here to-day, will recall the words her father wrote as a young student in his twenties, studying comparative law at the Sorbonne. He

rejected the lucrative prospects of commercial legal practice, instead choosing that slow progression towards a professional judicial career, starting at the lowest rung as one did in Europe. This is what Imre wrote:

“If I wait until the time when I will be able to undertake the most inferior tasks of a judge, then in this way I would perhaps have in my reach the most wonderful and purest of legal work a lawyer is ever able to undertake I will not have to view affairs and cases, from a single vantage point.”

At that time in 1932 he had written an article on “civil societies” for the Hungarian Journal “Civil Law”. Twelve years later he was to perish at the hands of those who had rejected all semblance of a civil society.

These, then, were the contradictory influences on my life. On the one hand Imre’s absolutist sense of civic duty, and on the other my father’s own idealism, tempered by clear-sighted realism and his Irish wife’s practicality. Both made their mark. Unlike Imre I gained much from my experience as a commercial solicitor at the then firm of Freehill, Hollingdale & Page. I was fortunate to be appointed at the behest of an Attorney-General who, like his successors, sought to widen the ranks of the judiciary with those bringing a diversity of background and experience. This was so long as, to quote Sir Anthony Mason, they had “*An intellectual capacity to acquire in a relatively short time the requisite professional legal skills appropriate to judicial work.*” I sought to bring to bear, as have my successors, a commercial sense of what lay beneath the water-line, in what remains the busiest corporations list in the country.

Nonetheless I arrived at the Court in fearful anticipation of what lay ahead - and how much I had to learn. As I walked into court I would mutter to myself, “plaintiffs on the right, defendants on the left” (or was it, as of the bar, “guns to the right of me, guns to the left of me, volleyed and thundered”?). I faithfully observed Malcolm McClelland’s homily, “*you can’t put a foot wrong if you don’t move your feet*”. So I would think carefully and deliberately before ruling in what was still unfamiliar territory.

Indeed so unaware was I of court protocol that when, as I am doing now, I gave my response at my swearing-in to the generous words I received from the profession, I stood up. Chief Justice Gleeson, whose only human weakness is a certain hypochondria, expressed relief that, by so speaking away from him, I had not infected him with my cold.

My Associate, Dorothy Laidler, came with me from Freehills. Fortunately we had a young tipstaff whose motto was the Whitlam-esque “crash through or crash”. Each of my tipstaves following, have been of extraordinary ability and goodness; the practice of law is renewed through these exceptional young men and women. The risks of that crash-through approach were mitigated by the tact and savvy of Brian Davies, here today. Brian used to induct new judges and took particular care with one who had never been a barrister. Dorothy and I (she has put up with me for 21 years) owe a deep debt of gratitude for the way in which my transition to the Bench was eased and for the generosity with which the profession made me welcome.

Lately I have been asked, “What is it you are proposing to do?” To that I reply that Lee, my wife, when she was a Marriage Guidance Counsellor, used to advise those who were leaving a domestic relationship that they should not expect to find a neatly synchronised replacement, waiting in the wings, possibly blond. I can only hope that, like Mr Micawber, “something will come up”. In Micawber’s case it was to become a magistrate in Australia, so I had better be careful! I hope what I find will be both challenging and still allow me to contribute to the community in other ways. Our three boys are particularly anxious that I should do so, lest I live vicariously through them or run out of stories for our grandchildren! I have, however, been fortunate that the Court allowed me to peek over the monastery walls, as Chancellor of the University of Sydney, inspired and reassured by the late Gordon Samuels, who gave me such wise advice when I embarked on that course. That advice was essentially not to intermeddle, but to be properly and fully involved in the really critical decisions and appointments.

But for now I simply express my heartfelt gratitude for the kind words you have said at my farewell, so completing my judicial journey on this Lee’s birthday. Lee and I have shared everything – including this day – as she has had to do with her twin

brother all their lives. It is a passage which began with those deep and abiding familial influences which beckoned me, a judicial ingenu, to join this remarkable institution.

Kim Santow

14 December 2007

**THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND JUDGES OF THE
SUPREME COURT**

Friday 14 December 2007

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE G F K SANTOW AO
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **SPIGELMAN CJ:** We commemorate today over 14 years of service as a judge of this Court by the Honourable Kim Santow AO, more than eight years as a judge of the Equity Division and six years as a judge of the Court of Appeal. You were only the second solicitor appointed as a judge of this Court and swiftly overcame the lingering prejudices of your new former barrister colleagues by reason of the depth of your legal learning, your personal charm and your capacity for hard work.

- 2 As a trial judge, and perhaps even more so as an appeal judge, your Honour has dealt efficiently and fairly with the full range of this Court's jurisdiction. Your judgments have made significant contributions to the development of the law. Your extra curricular writings on legal matters have made significant contributions to the development of public policy and to the law. This has occurred over a broad field.

- 3 It is appropriate, nevertheless, to emphasise one contribution which your Honour has made of a character which simply could not have been made by any other person. You brought to the realm of commercial disputation a breadth and depth of knowledge of the world of commerce that few judges of this Court have ever had. Over decades as one of the most accomplished commercial solicitors in Sydney you acquired an understanding of the interface between law and commerce, especially of

its creative potential, which was rarely if ever available to barristers, whose primary source of knowledge in these respects is cleaning up after a disaster.

- 4 From the time that your Honour assumed responsibility for the management of corporations law cases, this Court established itself as a pre-eminent Court in the corporate field. Supported by other judges, your Honour brought a unique combination of talent and experience to ensuring that the Court resolves disputes in corporations law at the highest quality of decision-making and with a full recognition of the commercial realities underlying the disputes, both in terms of the need for speed and the determination of the result. It is, accordingly, appropriate to highlight the special contribution your Honour has made to the development of corporations law as a judge.
- 5 For many years, you were the author of more judgments reported in the Australian Corporations and Securities Reports than any other judge in Australia. Your judgments covered the full range of corporations law including statutory demands, preferences, the Court's remedial powers, selective capital reductions, valuation of minority interests, schemes of arrangement, including such high profile cases as Advance Bank, the NRMA and James Hardie. Your Honour's judgments are, and will remain, the leading judgments in many areas of corporate law, e.g. on the prohibition of collateral benefits in takeover bids, in which I was the unsuccessful counsel, and on the imposition of civil penalty and disqualification orders upon defaulting directors. Your judgments are, and will remain, frequently cited throughout Australia.
- 6 Many of these judgments called for the exercise of discretions and an understanding of the need to reconcile different interests in a practical and positive way, perhaps most notably in schemes of arrangement. In this regard your background as a commercial solicitor made you more likely to look for solutions to problems, rather than to act only as the umpire of a fight.

- 7 Your behaviour in Court, as both a trial and an appellate judge, was characterised by your patience with counsel and unrepresented litigants and your determination that all parties should have their opportunity to state their case fully. Your judgments manifest careful attention to detail, no matter how complex the issue, and a dedication to answering all points that were raised in the case. On no occasion did your Honour sidestep or evade a difficult point. Throughout your career as a judge you appeared to relish the intellectual challenge of the law and managed always to muster that enthusiasm for some arcane technical point that only those who love the law can manage, like a mother who alone can see beauty in an ugly baby.
- 8 Throughout your career on the bench your Honour continued to serve the community in numerous capacities, particularly in education and the arts. Perhaps your most distinguished contribution was your period of over five years as the Chancellor of the University of Sydney. All of us on the Court came to admire your extraordinary capacity to continue with the full burden of an appellate judge as well as discharging the office of Chancellor, which itself came close to being a full time job. This was only achievable by redirecting your entitlement to leave in the Court to the tasks of the University. The physical and mental determination and capacity that you displayed throughout this period was a wonder to behold.
- 9 Of particular significance to that great institution of learning was the way in which you acted as a peacemaker after some years of fractious conflict on the Senate. Your personality, together with the extraordinary breadth of your intellectual interests, as well as your interpersonal and commercial skills, were put to full use in setting the University on a more stable and successful path.
- 10 Throughout this period your Honour continued to make contributions to the law and to this Court. You served on the Appeal Panel of the Takeover Tribunal, an institution, whose role has now happily been declared to be

constitutionally valid, the very existence of which owed much to your advocacy of corporate law reform over the decades. Your work on the Tribunal laid down important practical principles for the swift resolution of disputes in a commercial context which requires pragmatism and expedition.

- 11 In this Court you served for five years on the Rules Committee and an overlapping five years on the Legal Practitioners Admission Board, both of which are of critical significance to the effective operation of the Court and of the profession.
- 12 You also served, almost throughout your period as a judge, on the Education Committee of the Court, to the activities of which you brought the breadth of your general knowledge and interests, together with the depth of your understanding of social, economic and political issues and of the arts. This contribution was invaluable, not least by introducing to the Court a wide range of international contacts, particularly in the law but not limited to the law, many of whom at your invitation came to address the Annual Conference of the Court to the delight and education of all of your colleagues. This included a number of the most senior judges from England but extended to a wide range of others, including Pierre Rykmans, Australia's pre-eminent Sinologist and Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts and her husband, the legally literate New York Times columnist, Anthony Lewis. They and others were introduced to us as your friends.
- 13 The intellectual curiosity, energy and sophistication of yourself and of your wife Lee, will be missed by us all. Together you have expanded all of our horizons. We will also miss the numerous personal kindnesses which your and Lee's generosity of spirit have provided to each of us over the years.
- 14 I cannot do justice, on an occasion such as this, to the numerous judgments, speeches and articles you have published over the years as a member of this Court, to which must be added your enormous output as

Chancellor of the University of Sydney. Their breadth and depth stand as a testament to your intellectual powers.

- 15 I draw on one speech, which you gave shortly after your appointment as a judge, on the subject of “Transition to the Bench”. This speech, one of many subsequently published in the Australian Law Journal, was delivered to the Orientation Programme for judges from throughout Australia held in Sydney each year. You concluded a witty and learned address with the following: “May it be said of us, as of Lord Atkin: ‘Compassion and freedom from narrow prejudice was a quality which animated our work’.”
- 16 I have no doubt that the legal profession of this State, and your colleagues on the bench, are unanimous in joining with me to acknowledge that your work was indeed animated by compassion and that you never once manifested anything capable of description as narrow prejudice. On behalf of all of the members of the Court I thank you for your contribution to the law and to this Court and for enriching all of our lives.
- 17 **THE HONOURABLE JOHN HATZISTERGOS MLC ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honours, today we formally farewell your Honour Mr Justice Santow from this Court and reflect on his truly remarkable career of education and community service, a career that has spanned through all spheres of the law and also of sport.
- 18 At your swearing in ceremony, the then President of the Law Society noticed that you took up the calling of sculling whilst studying law as a distraction from the boredom of law. He was of course referring to sculling in the sporting sense rather than the vernacular one. However, rather than pursuing a career in seafaring you chose to navigate the geography of the law, and I would have to say the world is a better place for it.
- 19 You were I understand the youngest partner at Freehills and had the distinction at Freehills of supervising the next batch of Queen’s Counsel, professors of law and legal eagles in their fledgling days as clerks. Your

colleagues from that time applaud the superb mentoring you provided. From 1965 to 1993 you were a partner of that firm and co-founded its London office, and you practised extensively in public and commercial law where you were also the chair of the firm's Pro Bono Committee.

- 20 Your Honour was appointed to the Supreme Court on 30 August 1993 and later to the Court of Appeal on 29 January 2002. It is a testament to your Honour's intellect and legal wisdom that the appointment to the bench was made without previous service either as a barrister or as a Master of the Court.
- 21 Your contribution to the body of law in New South Wales, especially in the area of corporations law, is greatly appreciated. Your decision in the NRMA demutualisation case, *Re NRMA Insurance*, raised many important issues on the principles of mutuality. It was a case posing almost every question of principle applicable to schemes of arrangement and dealt with the treatment of schemes on a comparative law basis. Your drawing together of the principles that apply to civil penalties and disqualifications under corporations legislation in *ASIC v Adler* is widely cited judicially and academically. It was subsequently cited with approval by Justice McHugh in the High Court as a leading case on civil penalty and disqualification.
- 22 As you know, special leave was sought from the High Court to appeal aspects of the decision of the Court of Appeal handed down by your Honour, but the High Court refused that application. In *Allianz Australia Insurance v GSF Australia*, Allianz's argument to the Court of Appeal was that injury was not an injury within the meaning of that term as defined by the Act, and that was dismissed by a majority decision. However, a subsequent appeal to the High Court was allowed, saying that the finding of the Court of Appeal was in error. Your Honour had wisely dissented in that case.
- 23 Your vast experience and impressive ability have made valuable contributions to many different government and expert committees. Of

commendable mention is your paper in 1975 that significantly influenced the development of a co-operative for companies and security law in Australia. During your time on the bench you have served on a number of court committees including the Supreme Court Education Committee. You have held numerous and distinguished academic positions including visiting scholar at Harvard, Cornell and the Society at Lincoln's Inn. In Australia you have dedicated many years of teaching, both at the University of New South Wales and at the University of Sydney.

24 Stepping down in May this year, you ably held the position of Chancellor and Fellow of the Senate of the University of Sydney since 2001. Our paths crossed on that body for nearly two years. It is fair to say your accession to that position was at a difficult time. A mark of the success of chancellors and politicians, I might add, is whether they can choose the time of their own departure. Unlike others, you were able to choose the timing of your exit.

25 Earlier this year you were made an Officer of the Order of Australia, having previously been awarded the medal of the Order of Australia in 1990. These awards recognise your service to the judiciary and to the law, to education, particularly in the area of university governance, and to the arts.

26 Your colleagues describe you as a congenial man with wide interests. I note your interests and community involvement have provided you with valuable insights in both your judicial work and academic writing. Those close to you have commented on the novel way of your thinking, your enthusiasm and dedication to every matter put before you, and above all your generosity of spirit.

27 When you were sworn in you alluded to Vikram Seth's "A Suitable Boy" and the case of a recalcitrant candidate for the bench who refuses to accept the offer of Chief Justiceship until he is moved by the simple yet profound words of his former law clerk, "Do you not want to do justice?" Your Honour has answered in word and indeed this calling. You

understood well the perennial challenge facing the law, that of continuity and change, a challenge which your Honour embraced. As John Henry Newman observed in his clever oxymoron, "Great ideas change in order to remain the same," a remark that equally applies, I would venture, to the law.

28 You have served the people of this State with distinction and for that the community is grateful. Knowing your fondness for the arts, I thought it would be fitting to conclude with a line from Shakespeare. There is a memorable scene in "The Tempest" where Prospero breaks his staff, buries it certain fathoms in the Earth and, deeper than did ever plummet sound, drowns his book. But in your case I think a line from "King Lear" is better suited: "Men must endure their going hence, even as their coming hither; ripeness is all.

29 " The passage of time has certainly not wearied your Honour. I believe yours is a lasting ripeness. May it please the Court.

30 **MR H MACKEN ACTING PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. It is an honour and a privilege to be invited to speak on behalf of the Law Society of New South Wales and members of the profession at this auspicious occasion, and to contribute to the valedictory remarks being made here today.

31 Much has already been said about your Honour's extraordinary achievements and extensive contribution to the legal profession, and the Law Society echoes these sentiments wholeheartedly. Today I wish to focus on the legacy you leave through your role in helping to uphold the values of the legal profession and the way in which your Honour has helped build the calibre and respect of the legal profession.

32 In addition to your esteemed judicial status, your Honour has proved himself to be first and foremost a great statesman, a strong believer in practising law in a moral and ethical way rather than just looking at the

business aspects of law, recognising that altruistic values can still flourish alongside a healthy commercial environment. As your Honour stated in your address to the law graduates at the University of Sydney in 1994,

“The best commercial lawyers will remember that they are lawyers first, understanding business yet still a step removed. You do not need to leave your calling behind nor your idealism in pursuing security and ultimate success. You will influence the firms you join, you are entitled to pursue a place in the sun, but fight to make sure it shines for all.”

- 33 Your Honour has been a driving force in raising the skills and abilities of the profession, fostering excellence in professional practice as evidenced by your work with Freehills, and mentoring the profession, particularly the young people coming through.
- 34 Someone who believes he owes everything to your Honour in terms of his development is Sydney University Chancellor David Gonski, and he appears well qualified to make such a statement. Your Honour was David's master solicitor, becoming his boss in the late 70s, and later his partner. Both of you served on the Sydney Grammar School board and have remained close friends. David has described your Honour as having a very astute academic mind and great generosity of spirit. When your Honour joined Freehill Hollingdale & Page in 1965 it was an excellent small firm. David said your Honour was the driving force behind the firm's rise to being an excellent large firm, widening Freehill's base and attracting the best talent.
- 35 During that period your Honour continued to lecture in law at Sydney University, later becoming Chancellor. In addition to your Honour's expertise in corporate and commercial law, your influence extended well beyond law to encompass a range of community organisations including the Art Gallery of New South Wales, St Vincent's Hospital and the Malcolm Sergeant Fund for Children With Cancer. Your Honour's contribution was duly recognised, as has been previously mentioned, when you were awarded the prestigious medal of the Order of Australia.

- 36 However, Mr Gonski has said that your work in corporate and commercial law paled in significance when compared with your Honour's mentoring ability and the tremendous contribution you have made to the profession. It has been noted that your Honour has done his utmost to promote collegiality within the profession, and the importance of building and contributing to a profession rather than a business. Your Honour has gone beyond the clinical aspects of law, wanting a creative solution when a party is given a proper hearing, which is crucial to lifting the perception of the profession with the public.
- 37 Not only has your Honour practised extensively in all aspects of commercial law, both nationally and internationally, served on numerous State and Federal committees, authored various law journal articles and lectured law students at the University of Sydney, your Honour with the support of your wife Lee has successfully raised three sons whilst still finding time to actively pursue your interests in the arts and sporting arenas, particularly sculling. And, as has been previously mentioned, we are talking about boats, not beer.
- 38 In preparing for this occasion, the Society's office wanted to gain an insider's view of your Honour's background which may have influenced your subsequent contribution to the legal fraternity. Your Honour's father, Geza, came to Australia from Hungary and married your mother, who hailed from Brisbane, although I understand she was still commended on her excellent understanding of the English language. Your Honour's sister, Gigi, suggested that rather than follow your father into the medical profession, and given that you were not very mechanically minded, the Faculty of Law would have held much more appeal. Bill Bilinsky, who was on the Senate at the University of Sydney with your Honour and now resides in private practice at Bowral, has said that like your parents your Honour was an easy-going, relaxed bloke who would always make time for others. He had this to say about those early days when your Honour was a student at law:

“Kim is one who has little trouble seeing and being seen in a crowd, and his nature is such that he will always stand out. He still vigorously attacks and becomes an authority on those subjects which interest him, rather than those on which compulsory questions are set. Thus he leaves behind him a trail of victories over such obscure topics as Shatwell’s theory of mistake in contract, while his examination record does little justice to a mind such as his. The ideal companion for a dull lecture, he can be relied upon as soon as anyone dozed to attract attention by asking the lecturer a question or laughing loudly when no one else does. His preoccupation with the law has not prevented him from becoming most proficient in the noble art of rowing. He will always maintain the highest standards of professionalism while at the same time flavouring the lawyer’s normal routine with enthusiasm and touches of brilliance.”

- 39 Back in the 60s, your Honour was landlord and housemate in a very upmarket premises in very downmarket Kings Cross. Residing with your Honour was Maggie O’Toole, who is now a District Court judge, and her sister, May. At the time you were keeping company with your future wife, Lee Frankel, who I understand was the daughter of a silk and accordingly likely to have some understanding of the dinnertime conversations. Whether it was at this time that your Honour developed his infamous habit of getting attacks of the giggles or a more palatable passion for quality wine, I was not able to ascertain. What I do know is that once you and the O’Toole girls moved on, it was exceedingly difficult to find good tenants ever after. It was a great loss for The Cross in the 60s.
- 40 The tremendous support, respect and high esteem in which your Honour is held is evidenced by the indelible mark you leave not only on the profession but also on those privileged enough to cross your path. As one of the few solicitors to have gone straight to the Supreme Court, you have paved the way for others to follow. Remarking on your transition to the Supreme Court at a dinner speech at the Judicial Orientation Programme in October 1996, you stated, “there is no transition, we simply emerge as judges like Venus fully formed from the waves.”

41 It is beyond doubt that you have transcended the depths of the ocean and gone to the heavens of legal jurisprudence and academic excellence, and shining like a second sun with the light of professional integrity and grace. As the Court pleases.

42 **SANTOW JA:** I am deeply moved that so many of you have come to attend my farewell. I am especially grateful to Chief Justice Spigelman, the Attorney-General of New South Wales and to the Acting President of the Law Society for what they have said about me. May I reassure them and you that I do not intend to leave the Court by what was until recently designated TEMPORARY EXIT, that discrete door hidden amongst the Supreme Court building works. I have crossed my personal Rubicon - yet the words which I quoted from Vikram Seth's "A Suitable Boy" at my swearing-in fifteen years ago, still resonate. This is what I said:

"Mr Justice Chatterji, a distinguished Judge of the Calcutta High Court, is musing over the circumstances of his appointment to the Bench. He recalls that when the Chief Justiceship was first offered, he declined. He is asked by the Chief Justice to reconsider. But he would not. His father (recently retired from the Bench), his wife and his sons also fail to move him. But then his former law clerk, Biswas Babhu, says something to Chatterji. This has "a slow but profound effect". Biswas asks simply, "Do you not want to do justice?" Is this not the essence of the judicial calling?"

43 That insistent question "Do you not want to do justice?" was first posed for me by my Hungarian father, who had so happily emigrated to Australia, escaping the horrors that beset his judicial brother who would not leave. My father was a deeply reflective, humanitarian surgeon and obstetrician. His hope was that I would aspire to judicial work. Sadly he died long before this could have even been contemplated. When finally I had the privilege of joining this Court, no longer a commercial solicitor though not leaving that craft behind, my concerns were more akin to those of a caring doctor. In equity particularly, I drew upon the metaphor of a public hospital, engaged in a healing operation under a constrained budget, our patients often poor. That operation had to be conducted with as much humanity and individual concern as the traumatic encounter allows,

necessarily with an eye to efficiency and cost but not sacrificing fairness. I learnt early on from Brian Page, senior partner in my old law firm, that a legal answer which offended common sense or basic fairness was usually wrong, however cleverly contrived. That conviction sustained me throughout my time on the Court.

44 When later I joined the Court of Appeal from Equity, I became ever more conscious of how important it was to explain in the clearest and simplest of language, especially to the losing party, why the Court has decided as it has. This is no less important than explaining what is important about the decision itself in legal principle. Our President Keith Mason's dedicated and unselfish leadership has marked my time at the Court of Appeal, for which I will always be grateful. I have been especially fortunate to have served in such a collegiate court, so well led, its members bringing an intellectual breadth rarely to be found in any institution. I think for example of Justice Hodgson, testing ideas of guilty intent in the criminal law against his profound interest in philosophical concepts of free-will and of consciousness itself. Or of Chief Justice Spigelman - writing of Thomas à Beckett, relating those issues of conflict between church and state, to the constitutional problems of our time.

45 To return to family influence, I was strongly beckoned towards judicial office by the letters written by my father's brother, Uncle Imre, whose ruptured career was a tragic loss both to legal scholarship and to the Hungarian judiciary. "His retirement" from the judiciary was no thing of honourable stepping down. He was brutally dismissed -under the Hungarian anti-Jewish laws passed during that Nazi era. Stripped of office, he was sent into the countryside to work as a labourer, before finally meeting his death in Buchenwald; a stark reminder of the vulnerability of our own judicial status to the cataclysms that engulf an apparently ordered society, and exploit its fault lines. Recent events in Pakistan demonstrate yet again how the Rule of Law depends upon the community's support for an independent judiciary, itself dependent on the judiciary staying within its own proper sphere.

46 Uncle Imre's daughter (Ildiko), here to-day, will recall the words her father wrote as a young student in his twenties, studying comparative law at the Sorbonne. He rejected the lucrative prospects of commercial legal practice, instead choosing that slow progression towards a professional judicial career, starting at the lowest rung as one did in Europe. This is what Imre wrote:

"If I wait until the time when I will be able to undertake the most inferior tasks of a judge, then in this way I would perhaps have in my reach the most wonderful and purest of legal work a lawyer is ever able to undertake I will not have to view affairs and cases, from a single vantage point."

47 At that time in 1932 he had written an article on "civil societies" for the Hungarian Journal "Civil Law". Twelve years later he was to perish at the hands of those who had rejected all semblance of a civil society.

48 These, then, were the contradictory influences on my life. On the one hand Imre's absolutist sense of civic duty, and on the other my father's own idealism, tempered by clear-sighted realism and his Irish wife's practicality. Both made their mark. Unlike Imre I gained much from my experience as a commercial solicitor at the then firm of Freehill, Hollingdale & Page. I was fortunate to be appointed at the behest of an Attorney-General who, like his successors, sought to widen the ranks of the judiciary with those bringing a diversity of background and experience. This was so long as, to quote Sir Anthony Mason, they had "*An intellectual capacity to acquire in a relatively short time the requisite professional legal skills appropriate to judicial work.*" I sought to bring to bear, as have my successors, a commercial sense of what lay beneath the water-line, in what remains the busiest corporations list in the country.

49 Nonetheless I arrived at the Court in fearful anticipation of what lay ahead - and how much I had to learn. As I walked into court I would mutter to myself, "plaintiffs on the right, defendants on the left" (or was it, as of the

bar, “guns to the right of me, guns to the left of me, volleyed and thundered”?). I faithfully observed Malcolm McClelland’s homily, “*you can’t put a foot wrong if you don’t move your feet*”. So I would think carefully and deliberately before ruling in what was still unfamiliar territory.

50 Indeed so unaware was I of court protocol that when, as I am doing now, I gave my response at my swearing-in to the generous words I received from the profession, I stood up. Chief Justice Gleeson, whose only human weakness is a certain hypochondria, expressed relief that, by so speaking away from him, I had not infected him with my cold.

51 My Associate, Dorothy Laidler, came with me from Freehills. Fortunately we had a young tipstaff whose motto was the Whitlam-esque “crash through or crash”. Each of my tipstaves following, have been of extraordinary ability and goodness; the practice of law is renewed through these exceptional young men and women. The risks of that crash-through approach were mitigated by the tact and savvy of Brian Davies, here today. Brian used to induct new judges and took particular care with one who had never been a barrister. Dorothy and I (she has put up with me for 21 years) owe a deep debt of gratitude for the way in which my transition to the Bench was eased and for the generosity with which the profession made me welcome.

52 Lately I have been asked, “What is it you are proposing to do?” To that I reply that Lee, my wife, when she was a Marriage Guidance Counsellor, used to advise those who were leaving a domestic relationship that they should not expect to find a neatly synchronised replacement, waiting in the wings, possibly blond. I can only hope that, like Mr Micawber, “something will come up”. In Micawber’s case it was to become a magistrate in Australia, so I had better be careful! I hope what I find will be both challenging and still allow me to contribute to the community in other ways. Our three boys are particularly anxious that I should do so, lest I live vicariously through them or run out of stories for our grandchildren! I have, however, been fortunate that the Court allowed me to peek over the

monastery walls, as Chancellor of the University of Sydney, inspired and reassured by the late Gordon Samuels, who gave me such wise advice when I embarked on that course. That advice was essentially not to intermeddle, but to be properly and fully involved in the really critical decisions and appointments.

- 53 But for now I simply express my heartfelt gratitude for the kind words you have said at my farewell, so completing my judicial journey on this Lee's birthday. Lee and I have shared everything – including this day – as she has had to do with her twin brother all their lives. It is a passage which began with those deep and abiding familial influences which beckoned me, a judicial ingenu, to join this remarkable institution.

LAST THINGS

Talk to a dinner of the Wills and Estates Specialists,
Law Society of New South Wales
26 November 2007

“Last things”; concluding title of C P Snow’s series on pre-war Cambridge, is of that time of gathering dusk, fading into night. Those characters who have taken hold of us are reaching the end of their earthly time, and soon to voyage to that “undiscovered country from whose bourne no traveller returns”.

When we draft a will or trust for another, we too are engaged in those “last things”. We help write each person’s final messages to the living, whether as an act of private beneficence or of public charity. Our paramount concern is their authenticity and meaning. The author now departed, we are left with stilted text, expressed in the formal language of the law. It may be hard to discern what truly animates that will or trust – love of family, desire for continuity, public charity; or a deep irrational antipathy, reflected in the unexpected omission of a close relative.

I am deeply appreciative that so many of you have come to hear me talk tonight on this most formal, yet intimate process. This is more especially as each of you is an accredited specialist in Wills and Estates. Indeed preparing this later written version of my talk has also allowed me to take into account some very useful comments I received from a number of you when I first delivered the paper.

It is notable that the distinguished firms you represent do not include any of what might be called the “mega” firms. Bigness I know is a relative term. I am referring to those national giants that bestride the corporate commercial world and who have long since given up most personal work. (Does that mean that what is left is only “impersonal work”?). Yet wills and trusts were still a feature of the firm from which I joined the Court, then known as Freehill, Hollingdale & Page.

For the over thirty years I was at that firm, it retained a still significant though declining component of wills and trusts. The legal learning that attended them was

an important part of the craft of the law. Moreover, it readily translated into sophisticated commercial documents such as a property trust. We had necessarily to understand the technical rules for a valid trust or accumulation within it. Likewise the tax effect of distributions from the trust. Such trusts were usually discretionary, whether incorporated in a will or in an *inter vivos* settlement. When it came to drafting wills, imbued in us was the need not only to draft clearly but to make sure that the testator truly understood his or her dispositions. Above all, it was imperative not to delay when instructed to prepare a will. This led to a lesson I learnt early on; one which illustrated how well a family can behave in what could have turned out to be deeply divisive.

I prepared a will over substantial assets. I took just a week to get the will to the testator, yet this proved not soon enough. The day before the will arrived to be signed the testator died, entirely unexpectedly. What followed was almost unique in my experience. Every member of that close-knit family who would have benefited more generously under the old will made sure that full effect was instead given to the new will. This was achieved by a series of entirely voluntary gifts within the family.

Regrettably, cases that come to Court do not always reflect that spirit of magnanimity. When I joined the Court in the Equity Division, I was very much a commercial lawyer. My knowledge of wills and succession was the product of being terrorised by the late Frank Hutley. The only predicable thing about the exam he set was that it would be hideously difficult, and probably cover material that he insisted in lecturing on, during the one day of our university holidays within term time, Commem Day, that was meant to be an unofficial holiday. It is true we also had the then Roddy Meagher QC to teach us. His learning was no less formidable but he was not quite as extreme as Frank. I recall my one isolated triumph in an otherwise uneven performance – my essay on *In re the goods of Boehm*¹ was read out to the class. (The other essay read out was by Bob Nicholls whose brilliance in succession laid the foundation for his since becoming Kazakhstan's leading commercial lawyer, though not related to Borat). My essay was about when you can add words to a will that one inferred the testator intended to include but failed to do so. The legal

¹ 1891 P247

question, as you know, is whether the testator would have “known and approved” a will so adjusted.

The question of how you construe a will is a fascinating subject. As in contract, the cases continue to struggle against the law’s stricture precluding access to evidence of the testator’s actual subjective intention save as evinced by the testator’s written words. This is especially when one has good reason to suspect that the will (or trust) as written, could not have expressed the testator’s true intention. Can one, for example, resort to extrinsic evidence to show the will was ambiguous?² This would then open the door to extrinsic evidence on the will’s meaning, under that recognised exception to the preclusion of extrinsic evidence.

My early period in the Equity Division featured many contested wills. The challenge commonly asserted lack of testamentary capacity on the part of the testator. Sometimes there was a suggestion also that undue influence had been exerted upon the testator.

The case that remains most memorable for me was a son’s challenge to his mother’s testamentary capacity *Easter v Griffiths*. It began before me as a single judge and then went on appeal. By a majority of two to one my judgment upholding the son’s challenge to the will was affirmed. Kirby P dissented, but not on the basal principles.³

That case prompted me to make this observation, in a talk to new judges⁴:

“At the end of a case, we immerse in its deconstructed particulars, evidence laid out in desiccated fashion. We may come, on occasion, to sense its incompleteness. Not so much for the literal events – like poor biography, the plethora of details reconstructs every *event*

² “Construction of wills in Australia” (Butterworths, 2007) at 5.14 to 5.27. Compare the *cri de coeur* of Lord Nicholls of Birkenhead, advocating extra-judicially that the stricture against evidence of subjective intention should be relaxed in contract; “My Kingdom for a Horse! the Meaning of Words” (2005) 121 LQR 577.

³ SC NSW 17 June 1994 No. 104467/93; in the Court of Appeal NSWSCA unreported, 7 June 1995 BC9504790. ,

⁴ “Transition to the Bench” 71 ALJ 294 at 302

minutely. Rather, what is sometimes missing is what *animates* those events. Judgment becomes a process of ordering, of understanding – intuitive as well as analytic – and of integration. In my own jurisdiction I find will cases the most satisfying example of this. Did the will-maker, a mother, eccentric and intelligent, have an insane delusion? Did she understand the natural claimants on her bounty? What *is* an insane delusion, first viewed by the 19th century mind judging *Banks v Goodfellow* and then to judge to-day? Does it require insanity as we now know it? How ultimately do we make sense of *this* testator's life, *her* ruptured relationship with her son, against a plethora of incidents, impressions and letters?"

To this I would add what Pierre Ryckmans (under the *nom de plume* Simon Leys) recently said, speaking to our judges on "Historical and Other Truths", or as he preferred "Lies that Tell the Truth".⁵ His was a plea to find truth through our imagination. Yet (you may ask) what business do judges have of applying imagination to the facts? But he was revealing a deep truth. That to judge adequately these cases of human complexity one must remain open to imaginative insight. This is not to embrace the merely fanciful or abandon judgment. Listen to what Simon Leys says of the historian and the novelist:

"The historian does not merely record; he edits, he omits, he judges, he interprets, he reorganises, he composes. His mission is nothing less than 'to render the highest kind of justice to the visible universe, by bringing to light the truth manifold and one, underlying its every aspect'. Yet this quote is not from a historian discussing history writing; it is from a novelist on the art of fiction: it is the famous beginning of Joseph Conrad's preface to *The Nigger of the Narcissus*, a true manifesto of the novelist's mission.

The fact is, these two arts – history writing and fiction writing – originating both in poetry, involve similar activities and mobilise the

⁵ Published in "The Monthly", November 2007 at 40.

same faculties: memory and imagination; and this is why it could rightly be said that the novelist is the historian of the present and the historian the novelist of the past. Both must invent the truth.”

The bare facts of *Easter v Griffiths* were that the son, the disappointed beneficiary, was for many years and into adult life exceptionally close to his mother who was the testator. Yet she was to leave him entirely out of her will. They lived together happily in the family home. Out of the blue their relations suffered irreparable breakdown. That rupture appeared to have no rational basis. One clue though was that the son at the time of their breakdown, had begun a close relationship with a young woman. The testator, a highly intelligent woman, was herself still successfully completing courses at the University. She then became increasingly aggressive to her son, her moods swinging from violent to a savage smouldering expressed in manner and attitude. It led to a florid incident where she appeared by her son's bedside with a knife in her hand. This led to the son understandably fleeing the house in shock. Despite an attempt by the son to restore relations, their rupture proved intractable. His mother then died, some thirteen months after her son had finally left home. Though she had no other children or close relations her will excluded the son entirely. The son challenged the will, contending that his mother, highly intelligent as she was, lacked testamentary capacity, as evinced by a delusion on her part concerning him.

There was psychiatric evidence that the mother suffered from a severe paranoid personality disorder. This the son sought to characterise as an insane delusion. Kirby P's observation in the later appeal on the true relevance of such psychiatric evidence bears repeating:

“In judging the will propounded, and the challenge to it, the court must consider all of the facts proved which are relevant to the testamentary capacity of the testator. It must not be deflected into a consideration of medical evidence, still less of jargon, as to whether particular conditions such as a ‘delusion’ or ‘paranoia’ have been established. Such evidence is only relevant as it throws light on the court's responsibility to decide whether the testator has appreciated the extent

of the property to be disposed of; realised the various calls for disposition to which consideration should be given; and was able to evaluate those calls to give effect to the resulting dispositions by the provisions of the will. See *Banks*, 557. There is nothing excessively technical in any of these considerations. What the court is asked to do is to determine, on all of the evidence, whether for the purpose for which the law provides and protects testamentary freedom, the testator had the capacity to give effect to the legal privilege. Determining that question, courts must steadfastly resist the temptation to rewrite the wills of testators which they regard as unfair, unwise or harsh.”

That observation reinforces the conclusion that insanity of the testator, while clearly indicating lack of testamentary capacity, would raise the bar too high, if adopted as a test for lack of testamentary capacity. That well-known reference in *Banks v Goodfellow* to “disorder of the mind” speaks more broadly than that and need not require the establishment of an actual psychiatric illness. Thus a delusion need not be insane, to invalidate a will affected by it. A delusion represents a fixed and incorrigible false belief, out of which its victim cannot be reasoned. Depending on its nature, such a delusion may well preclude the testator having the capacity to understand the nature of the testamentary act or to comprehend and appreciate the natural claims on the testator’s bounty.

Easter v Griffiths confronted the court with the critical distinction between a prejudiced or unreasonable exercise of testamentary capacity and the lack of that capacity altogether. The former does not of itself invalidate a will. Rather it invites suspicion that capacity may be lacking, and causes the evidentiary onus to shift to the party seeking to uphold the will. It is only actual lack of capacity that invalidates the will.

Here it fell upon the executor to discharge that evidentiary onus of satisfying the conscience of the Court that the testator had the necessary capacity at the relevant time. There were florid symptoms of psychotic disturbance exhibited by the testator. They were however at odds with the fact that the testator was a woman who presented to the world an appearance of intelligence and rationality but who had

formed an unreasoned aversion to her only son. To resolve that paradox called for imaginative insight. Chief Justice Gleeson summed up the issue to be decided with his usual clarity:

“However where, as in the present case, what is claimed is that a woman, who presented to the world an appearance of intelligence and rationality, had formed an aversion to her child so unfounded and unreasoning that it evidences an unsoundness of mind, the decision may be very difficult. This was the point made by Sir James Hannen in his charge to the jury in *Boughton v Knight*. Nevertheless, difficult though its application may be in individual cases, the law treats as critical the distinction between mere antipathy, albeit unreasonable, towards one who has a claim, and a judgment which is affected by a disorder of the mind.

I should here remind you, what Sir James Hannen said to that jury which did use the language of insanity:

‘You must put this question to yourself and answer it: ‘Can I understand how any man in possession of his senses could have believed such and such a thing?’ And if the answer you give is ‘I cannot understand it’, then it is of the necessity of the case you should say the man is not sane’.”

I decided a number of cases subsequently dealing with the challenges to testamentary capacity. However, these tended to be cases where the issue was the mental frailty of the testator, often coupled with severe physical illness, usually in the last months of that person’s ebbing life. One, sad and memorable, was the memory in court of two sisters, totally estranged from one another where the second sister had taken over from the first the daily care of an elderly aunt. The aunt had developed the illusion that the husband of the first sister was trying to kill her. The aunt then left everything to the second sister taking over that care, despite the first sister’s earlier years of devoted care.

There can be issues of whether undue influence has been brought to bear upon an enfeebled testator. Rumour had it that such an exploitive “friend” had opportunistically involved herself in the lives of several elderly ladies in the Eastern Suburbs whose wills were then adjusted to her advantage.

In a decision in the will of a Mrs Cole, *Pates v Diane Craig and the Public Trustee* (Supreme Court, unreported, 28 August 1995) I attempted to set out some ethical and professional considerations. These will be self-evident to you as experienced specialists in this field. Obviously a solicitor standing to receive a substantial benefit from a will is in a position of acutest conflict. Such solicitor should ensure that the will is drawn up by an independent solicitor who gives proper advice remembering that to fail to do so comes within the professional conduct rules. This is not only where there is reason to fear lack of testamentary capacity on the part of the testator for reasons such as fragility, illness or advanced age, though these reinforce that requirement.

Where there is an obviously enfeebled testator whose capacity is potentially in doubt, the solicitor concerned should take particular care to gain reasonable assurance as to testamentary capacity. I acknowledge that there are practical limits in doing so. I do not therefore suggest any perfunctory mechanical check list approach. Rather the solicitor concerned should be on the alert to see if the will had been instigated by a particular person and should in any event ask questions to probe the testator’s understanding. Mason and Handler in their “Wills, Probate and Administration Service” at [10,019] sets out some valuable procedures in that context. Notes made by the solicitor attending the will signing can be particularly helpful.

I encountered some fascinating problems in the area of charitable trusts. As is well known, a trust for political purposes cannot constitute a charitable trust. But what if the trust seeks to advance a charitable object by means which seek to influence public or political opinion, remembering these are not necessarily the same? Many charities refuse to accept a role where they are consigned to dealing only with symptoms and not their political causes. There is a long history of fighting charities, campaigning to remove perceived political obstacles in the way of public welfare.

Their combative spirit was captured by Thomas Paine in words carved on his monument at Islington in London: “*Lay then the axe to the roots and teach Governments humanity*”.

But we know charities that have as a central object change of government policy or the law can find under present law that this is fatal to their charitable status. This is so despite fine distinctions between merely influencing public opinion as distinct from direct pressure on government. As Meagher and Gummow comment critically in the 1997 edition of “*Jacobs Law of Trusts in Australia*”; “*just how are such compassionate objects ... capable of achievement otherwise than by (at least) the exertion of moral pressures?*” And there are difficult issues where moral pressure on public opinion is dressed up as education in order thereby to qualify as a charitable trust.

These issues arose in a case⁶ ten years ago involving a will trust leaving money to an entity, no longer in existence. This was the Federal Council for the Advancement of Aborigines and Torres Strait Islanders, known by the acronym FCATSI. FCATSI was long associated with campaigners for indigenous welfare like Jessie Street and Faith Bandler. The will trust would have failed and fallen into residue unless a general charitable intention could be found so that the gift could be rendered cy-près. The evidence included the history of FCATSI as recorded in a book by Faith Bandler “*Turning the Tide*”. She described FCATSI as an organisation dedicated to improving the position of aborigines and Torres Strait Islanders in an active and effective way, against a difficult social and political climate. Faith Bandler’s book made clear however that FCATSI organised public demonstrations and formed groups to educate the public and to lobby the Government “*to achieve justice for Aboriginal people*”.

The most serious obstacle in the way of recognising FCATSI as giving rise to a general charitable intention was that two of its objects were overtly political. These were first abolition of all legislation discriminating against Aborigines and Torres Strait Islanders on the basis of race. Then there was the introduction of legislation to

⁶ *Public Trustee v Attorney General of New South Wales & Ors* (1997) 42 NSWLR 600

assist those people and their communities in various ways including granting ownership on a collective or individual basis over land traditionally occupied.

However the *Charitable Trusts Act* of New South Wales permitted the severance of the non-charitable and invalid purposes from what remained. What remained did permit application of the fund for a charitable purpose, so the testator's general charitable intention was established and the trust saved by a *cy-près* scheme.

That case and the reading it prompted, led me to write during a sabbatical at Cambridge on "Charity in its Political Voice; a tinkling Cymbal or a sounding Brass?"⁷.

I was reminded of this when it was suggested a year or so ago that charities which criticised the government of the day should lose their charitable or at least tax exempt status and that legislation might be introduced to facilitate this. Yet already under the general law there are limits on how far charities can legitimately go in undertaking a sustained campaign of a political character and still call themselves charities. If political agitation becomes the predominant activity, the community may well consider that the doing of good works of a charitable character has become subordinated to the point where charitable status should be denied. But that distinction in degree is important. If mere criticism sufficed, charities may well ask why their freedom of speech should be threatened by legislation of that kind.

Might I leave you now with my favourite story of that earlier time. One day there turned up in the Court yet another dispute between two well-known charitable bodies competing for charitable donation⁸. The two competing charities were both devoted to the training of seeing-eye dogs. I remember vividly one of the witnesses being in the witness box, his seeing-eye dog apparently slumbering in the well of the Court. But then the cross-examination became more robust. Suddenly his dog woke up and emitted a threatening growl, which must have clearly disconcerted the unfortunate barrister. I never did ask the then Annabelle Bennett of counsel (now

⁷ (1999) 18 Australian Bar Review 225

⁸ *Permanent Trustee Company v State of New South Wales* (Supreme Court, unreported, 23 November 1995, No. 003445/92)

Justice Bennett of the Federal Court) whether she had arranged this. I might add that the case was settled by way of compromise with the consent of the Attorney-General who had been made a party to the proceedings in his capacity as protector of charitable trusts. Such compromises remain an especially useful way of resolving difficult questions affecting charitable trusts⁹.

Let me conclude by saying again how much I respect your craft. About two years ago my wife and I went to one of the specialists here to renew our wills. I quickly realised how much more sophisticated the drafting of a will had become from the time that I had done this kind of work over 30 years ago. One example was the flexibility of embodying discretionary trusts in a will so it can be adapted to unforeseen circumstances, fiscal or family. Then there was the integration of superannuation arrangements with the Will. It again brought home to me how important are the skills each of you bring to bear as we too finally come to terms with our “last things”.

G F K Santow
26 November 2007

⁹ see “Tudor on Charities” (Sweet & Maxwell, 1984) at 340 and the authorities cited at fn 65 and also *Meggitt & Ors v Perpetual Trustee Company Limited & Ors* (Needham J, 9 June 1978, unreported).

Sancta Sophia College – Address for Academic Dinner

16 April 2007

Chairman of Council Josephine Heesh

Principal Dr Elizabeth Hepburn

Chair and Members of Council

Monsignor Walsh

Women of the College

And may I make special mention of John Sheldon, who continues the Sheldon family's deep connection with Sancta

* **Women on Boards – the end of civilisation as we know it?**

My former den-mate, retired Justice Roderick Pitt Meagher, eminent jurist, classics scholar and formerly the untidiest inmate of St John's College, had his judicial chambers next to mine. His door had on it what the French called "affiches". Many wicked cartoons designed to provoke you to think he was, like his description of Patrick White, "*an old curmudgeon with a tea-cosy on his head*", for which read "wig"!

One of the cartoons had a picture of a head-hunter in full regalia pointing to an even more decorated woman of his tribe, a witch doctor, expostulating, "*Women doctors, the end of civilisation as we know it*".

I want to talk to you about women on boards in the same vein. There was a time when corporate Australia thought that this too was the end of civilisation as we know it, or at any rate, the end of the long male Board lunch.

One of the outstanding women of her generation, Mary Archer, eminent chemist and academic, and also known as the long-suffering wife of Jeffrey Archer, had the following school report, aged six: "*gymnastics – Mary works well. She must learn not to mind if she cannot always be a leader*". It reminded me of the stained glass window in a church in Hunters Hill, in memory of a deceased parishioner. The inscription about her read, "*she did what she could*".

These two quotations encapsulate barriers women face. They must not mind too much if they cannot be leaders and are praised for doing what (little) they could.

But what is the picture to-day when it comes to women on corporate boards? I distinguish here the higher percentage of women on "not for profit boards" no doubt reflecting the positive influence of government and universities. Take for example our Senate. There women represent close to half of the appointees whilst your outstanding Council is led by Josephine Heesh. But when you come to corporate commercial boards, statistics are depressing, though they are signs of an upward trend in the percentage of women. To-day, on Australian publicly listed top 500 companies the percentage is around 8%, with only 3% of public companies and associations having female chairs. In the United Kingdom the percentage of directorships held by women is just slightly higher at 10.5% while in the USA 14.7%.

Nonetheless there are some interesting trends identified and quantified by Claire Braund, co-founder of the organisation “Women on Boards” or “WOB”:

- (1) Companies with better financial results are more likely to have female directors;
- (2) Companies listed since the year 2000 are more likely to have female directors;
- (3) Women are least likely to be on boards in Queensland (27%), Victoria (33%), Tasmania (33%) and Western Australia (34%). Interestingly enough women are much more likely to be on boards in New Zealand (55%) ACT (58%), New South Wales (47%), while the Athens of the south, South Australia, comes in at 37%;
- (4) Larger companies with more employees have more women on their boards;
- (5) Perhaps reflecting the herd instinct and the inadequate intelligence about women who are eligible for board appointments, once appointed to a board the same women are appointed to more boards on average than men.
- (6) In banking and finance (Josephine take a bow) we are much more likely to find one or more female directors, along with insurance and petroleum process industries (85%). What I found surprising was that the least likely to have women on the board were hotels, restaurants and leisure sectors (9%); sectors where women are likely to bring a distinct set of insights from men.
- (7) In searching for the explanation for this you have to ask how people get appointed to boards in the first place. The short answer is that 60-80% are appointed by personal knowledge through the “old-boy” network. Then there is the 10-20% who get appointed through the work of search companies – ASX 100 companies are much more likely to use the search company. But WOB questions whether their databases could be expanded and refreshed.

So how do networks come about and how do you join one? Here university is specially critical. As women of exceptional ability, each of you have the opportunity to make your mark at university and be noticed, though let me quickly add that this does not mean that you have to behave like a man.

So that I do not suffer the same fate as Larry Summers, ex-President of Harvard, let me say that the next generalisation comes from Claire Braund. She says, recognising this is a very broad generalisation, that on the whole men are focussed on competitive outcomes so that going up in the career path is an end in itself. Whereas, she says women tend to be more focussed on process. Certainly I learnt from Lee early on as a commercial lawyer and later as a judge, that there was much insight to be derived from understanding the **process** of what is going on rather than mindlessly demanding “*where’s your evidence*”. I have always been conscious of

that in court. As Oliver Sacks observed, “*a good judge has to have both empathy and objectivity*”. Empathy allows you to enter into the mind of those before you, while objectivity helps you distance yourself from partisanship or visceral prejudice. There is of course a place for evidence. It is how you interpret it that brings in your sensibility and discernment.

However these gender stereotypes are not to be pressed too far. I was intrigued to learn that the Australian Rugby Union Captain, Nick Farr-Jones, in 1998 called his demoralised team together to try and find out what was going wrong. He found that his players were focussing on the scoreboard rather than on the process of play. You could say that he instilled a feminine insight by shifting that focus back to process on the field.

It is interesting to observe how clubs, another important source of networking, are breaking down the barriers for women as women are admitted. Of course there is nothing wrong with retaining the option to join an all-women’s club or all-men’s club, so long as there are also equivalent clubs of the mixed variety. The same, as I do not need to tell you, applies to your all-women’s College, compared to St John’s mixed one. It is great to have that choice.

Sporting clubs are an especially important source of networking. From time to time I go to the University Rugby Dinner and I am always amazed at the extraordinary range of business contacts that come out of it. But you can find replicated mixed clubs such as rowing, tennis and the like where the networking opportunities are equally available to men as to women. We know that our elite sports men and women actually do exceptionally well when they turn the discipline and the intelligence to their careers that they have brought to bear in managing their time successfully between sport and study.

So answering the question, why aren’t there more women on boards I agree with Claire that absence of networking opportunities is certainly one factor. Others include that men prefer women to exhibit feminine traits, which can then be at odds with stereotypic business expectations. You see it in the different vocabularies used to describe the same qualities in men (confident, take-charge, committed) and women (bossy, aggressive, emotional). Again to quote Claire, men are seen as competing harder than women, but not working harder than women.

Women are often better at work life balance issues and employers are not always discerning enough to see that someone with that perspective is likely to have good judgment in business issues as well.

In all of this let me emphasise that I am not for tokenism. Rather, I am for appointing women whose merit warrants that appointment and for merit to be fairly judged. There is no doubt that many of you who choose a business career or even a more limited board role will be eminently suitable for top positions in business. You will only value that when you have been appointed on merit and for the distinctive perspective you can bring.

I have no doubt that boards are no longer seen as a sinecure. Nor are they. So it is a legitimate question as to whether it is really so desirable to be on a board.

However from corporate Australia's viewpoint, I believe it is highly desirable for boards to have more qualified and competent women. This is in order to have the diversity in gender and background along with the insights that go with that. I frequently experience those insights as I sit on the Court of Appeal with its women members.

So let me leave you with this message. Become part of the networks that will naturally advance your career prospects, but do so not for that reason. The network you join will likely work best for you if it is intrinsically congenial and of people with whom you share things in common. Many of these will quite naturally and not for expedient reasons become your friends. In philosophy you will know about the hedonistic fallacy. It is essentially that to pursue happiness is to lose it; happiness must rather come upon you unsought. In the same way I am confident you will win success in whatever sphere you pursue, whether board appointments or quite different aspirations. The important thing is to retain your own distinctive insights and values in the process. And especially those you derive from this College with its outstanding role models among your mentors, here tonight at each table.

G F K Santow

Chancellor

University of Sydney

Sydney University Women's College – Chancellor's Dinner

Response to Toast

26 March 2007

Acknowledgments:

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and Dr Ferenc and Martha Moritz, distinguished residents of College
and to you above all, the Women of the College

Truth-telling

“What is Truth?” said jesting Pilate; and would not stay for an answer.” Francis Bacon's words¹ are my theme tonight; though time permits but a glimpse of the profundity that lies beneath that question.

On a cold and wintry Saturday evening two days ago, Women's College entertained the Master of St John's College Cambridge, Professor Richard Perham and his wife Dr Nancy Lane, herself also a distinguished scientist. At the dinner Richard spoke of the connection between St John's College and several heroes of truth-telling. He referred first to the three Fellows of the College who almost single-handedly brought about the abolition of the slave trade in England 175 years ago. The best known of the three was William Wilberforce whose early life at Cambridge was indolent, dissolute, and utterly hedonistic:

“Before his conversion to evangelical Christianity, Wilberforce was a ladies' man whose friends included the bewitching Duchess of Gordon, who recruited for the Gordon Highlanders by offering the king's shilling between her lips.”

Wilberforce started his campaign in 1788, the same year that Captain Arthur Phillip sailed into Sydney Harbour. It took him 45 years of unrelenting effort, probably cost him his life, for he was sickly, before Parliament finally passed the bill to abolish slavery. In terms of self-interest, the historian Simon Schama called it *“an absolutely spectacular act of irrationality”* – but it was morally right. For what the campaigners were purveying was in Al Gore's words (about climate change), an *“inconvenient truth”* – greatly inconvenient for the slave-owners who had enriched themselves from a hideous and vicious practice. Even the father of Gladstone, the Victorian Prime Minister, had benefited from that odious trade, though not Wilberforce whose family owed its fortune to the Baltic trade.²

The second truth-teller Richard mentioned was one more recent. Dr Hans Blix is to receive an honorary degree from Cambridge University, for his courage and tenacity in insisting that

¹ Francis Bacon “Essays or Counsels – of Truth”, quoted by Sir Owen Dixon in his collection of essays “Jesting Pilate” and who added *“I have not forgotten that when Pilate said this he was about to leave the judgment hall”*.

² See article in The Sunday Times, March 25, 2007 “Sickly shrimp of a man who sank the slave ships”.

the truth be told about the state of our knowledge concerning “weapons of mass destruction”. Father Frank Brennan observes in his book “Acting on Conscience” that not even Hans Blix knew whether or not the Iraqi’s had disposed of all their WMD’s before the invasion and certainly could not guarantee there were none. He was happy to adopt Donald Rumsfeld’s line that “*the absence of evidence is not the evidence of absence*”; Rumsfeld, as you know was something of an epistemological expert on “known unknowns” as well as “unknown unknowns”, this being perhaps in both categories! However, Dr Blix knew by the time his inspections were abruptly terminated that the evidence was all one way and **against** there being WMD hidden in Iraq, though we were not in a state of certainty. So the case for invasion was based on a version of the precautionary principle. If you are not sure of the presence of WMD’s but their consequences are horrendous if present and used, you act accordingly in pre-emptive fashion. But that form of reasoning still requires one to weigh up the consequences of invasion, comparing the risk and effect of competing options.

According to Father Brennan, the real sin against truth with which Hans Blix confronts us was different. First, in what was genuinely a matter of uncertainty, but with evidence mounting strongly against the presence of WMD, was the pretence that this uncertainty did not exist. That in turn led to the second sin against the truth, namely that, as Blix puts it, it was most probable “*that the governments [of the US and UK] were conscious that they were exaggerating the risks they saw in order to get the political support they would not otherwise have had*” to carry out the invasion of Iraq.

Blix summed up his own view in these words:

“It is understood and accepted that governments must simplify complex international matters in explaining them to the public in democratic states. However, they are not just vendors of merchandise but leaders from whom some integrity should be asked when they exercise their responsibility for war and peace in the world.”

We often have to make decisions in circumstances of uncertainty. How rare though is it to find someone who makes a decision as best able in circumstances of incomplete knowledge, and then admits error in light of later information. Father Brennan brings out how Bishop Frame uniquely did just this, when on 18 June 2004 he published an opinion piece in the “Age” acknowledging:

“As the only Anglican bishop to have publicly endorsed the Australian Government’s case for war, I now concede that Iraq did not possess weapons of mass destruction. It did not pose a threat to either its nearer neighbours or the United States and its allies. It did not host or give material support to al-Qaeda or other terrorist groups.”

That said, the case for war may still rely on the perceived risk and its horrific consequences for Iraq’s neighbours, like Israel, had Saddam Hussein in fact been concealing WMD, or was later to acquire them, though it has shifted to emphasise regime change. It is undoubtedly the fact that his hideous regime was ousted though leaving horrific civil death and destruction in its place. There is now general recognition that planning for post-invasion Iraq may well have suffered from the Pentagon’s virtual exclusion of the State Department with its Middle Eastern experts. No doubt Rumsfeld excluded the State Department lest “*the native hue of resolution be sicklied o’er with the pale cast of thought*”.

In all of this, truth, here about comparative risk, challenges dogmatic answers. There may, I am not sure, be a parallel with Vietnam and the notion that Saddam Hussein was making common cause with others intent on the west’s destruction. At the time of the Vietnam war there was a fear of monolithic communism imposing its domino effect throughout Asia. Yet

the reality in Vietnam was a form of nationalistic local communism having little to do with communism elsewhere. Post-invasion Saudi Arabia now fears a Shiite hegemony in the Middle East. Who is right?

What we now do about attempting to restore stability in Iraq generates a whole set of further issues. About these there are conflicting opinions passionately held where you must bring to bear your own cool and properly informed reason.

Though not so 200 years ago, to-day the kind of truth that lay behind the abolitionist's case against slavery appears a morally overwhelming one. This is despite the fact that we still have slavery today, women and children being so frequently its victims. That harrowing film "The Last Days of Sophie Scholl", which many of you will have seen, shows how the perspective of time and distance can lead to radically different judgments.

Sophie Scholl, her brother Hans, and Christoph Propst were part of a small group of Munich students. They were almost the only protestors in 1943 who had the suicidal courage to speak out, not only against the Nazi regime, but also against the moral indolence and numbness of the German people. Under the name "White Rose" they issued appeals and painted slogans on walls calling for an uprising against Hitler. They established ties with a few like-minded students in Berlin, Stuttgart, Hamburg and Vienna. Hans and Sophie Scholl were arrested while throwing hundreds of leaflets from the gallery of the atrium at Ludwig-Maximilian University of Munich. Their motives, as Joachim Fest brings out in his book "The German Resistance to Hitler" were among the simplest and, sadly, the rarest of all: a sense of right and wrong and a determination to take action.

In a trial lasting less than 3½ hours Hans and Sophie Scholl and Christoph Propst were sentenced to death and pitilessly guillotined the same day. Others to be executed included their mentor, the philosopher of music, Kurt Huber. Let me quote from Fest:

"Although Hans and Sophie Scholl could easily have fled after dropping their leaflets, they submitted without resistance to the university porter who came after them shouting. "You're under arrest!" Apparently they hoped to set an example of self-sacrifice that would inspire others. "What does my death matter if by our action thousands of people are awakened and stirred to action?" Sophie Scholl asked after reading the indictment. The only visible result, however, was a demonstration of loyalty to the regime staged right in front of the university just two hours after her execution. Three days later, in the university's main auditorium, hundreds of students cheered a speech by a Nazi student leader deriding their former classmates. They stamped their feet in applause for the porter, Jakob Schmied, who "received the ovation standing up with his arms outstretched."

While after the Nuremberg trials, the truth these martyrs told came to be recognised, wartime Germany was purblind to these truths when they mattered. The hardest thing is to recognise a moral issue immediately it happens upon us; yet a reflex based on strong moral intuition is a vital part of what you take from Women's College.

The other lesson to be learned is that we are all creatures of our time, in the moral and other judgments we draw. We can be proud that Sydney University was ahead of its time in admitting women students; but with hindsight we were not early on as welcoming, for example to women medical students seeking hospital residency, as we might have been. As the article in last week's London Times points out, Wilberforce himself did not share the same sense of outrage about the repression of British workers. As an MP he played a part in outlawing unions, introducing imprisonment without trial and reducing freedom of speech.

In all of this I do not pretend to be able to draw indubitable moral or historical judgments or discern any self-evident truth, though that does not mean one should become a moral neuter. What I do say is that as thinking students of this College, you must grapple with history and what it can teach us about contemporary events. This is so, whether you are studying the Vietnam War for the lessons it may carry to-day or even whether you follow Mel Gibson. Mel Gibson has recently set himself up now as an expert on Mayan civilisation with an on-campus screening of his latest film "Apocalypto". Alice Estrada, an Assistant Professor of Central American Studies at California State University, accused Gibson of misrepresenting Mayan culture in the movie, featuring as it did rulers slitting throats and ripping the still beating hearts from the chests of their enemies. Apparently Gibson directed the f-word at Professor Estrada on Friday and told her she should "*get a history book and read*".

So my reply to Sophie Gulliver's toast – another Sophie – despite its serious note – is to affirm all you have absorbed and learnt at Women's College. Willingly suspend judgment till you can make at least a provisional one. But then do not shirk from making it, even if the consequences are against your self-interest. Likewise do not be afraid to withdraw, qualify or refine that judgment if further information compels this, whatever your investment in the original opinion. The truth remains the truth however inconvenient. Above all do not be like jesting Pilate – stay always for an answer. All of you who have excelled in your studies or contributed to the College community in other ways epitomise that enquiring and thoughtful attitude based on concern for others.

G F K Santow
Chancellor

OSA Speech

World without walls – opening of conference

“World without walls” – your conference theme conveys a powerful yet subtle image. The welcome to country evokes in our minds the closest connection to a landscape without walls or monuments, with no desert ozymandias amid the spinifex. There is an extraordinary parallel between the millennia of Australia’s indigenous culture inhabiting a landscape of the mind and what Pierre Ryckman alias Simon Leys observed of contemporary China.

“ ... China which is loaded with so much history and so many memories is also oddly deprived of ancient monuments”

As he might have observed of our indigenous past, “the Chinese past is both spiritually active and physically invisible”.

This emerges in the analects of Confucius. The narrative is a series of episodic verbal encounters usually initiated by the cycle with the Master, never set in any recognizable landscape. These are not however stories of a Chinese dreamtime but Confucius laying down the requirements for a properly ordered society. He is recorded as saying that “political authority should reside with the moral elite; with those who can demonstrate that they are morally and intellectually qualified” – Junzi or gentlemen. Confucius laid the groundwork for a revolution of thinking whereby denial of real power to the aristocracy led eventually to the establishment of a bureaucratic empire of the intellectual elite lasting over 2 millennia.

When the West in the form of traders launched their assault on the Chinese barriers to trade in the 19th century, driven by the money to be derived especially from opium, that bureaucratic empire was already showing signs of sclerosis. Jim Spigelman describes the opening of Shanghai in precisely these terms in his recent paper.

Confucianism, as our Hon Associate Professor Mabel Lee describes it, had degenerated into an autocratic ideology alongside infrastructures that allowed it to permeate all levels of society. The individual from birth was conditioned to be subservient to a defined hierarchy of authorities. Bureaucratic walls constrained intellectual freedom to the extent it threatened social stability, the paramount concern of contemporary China. What is however remarkable is the growing confidence of the Chinese authorities in tolerating a greater degree of intellectual freedom than was allowed Gao Xing Jian, who Mabel Lee translated so superbly. He survived the Cultural Revolution and was even successful in staging three of his plays in Beijing but this was not without considerable anxiety in the politically ambiguous 1980s. He made a quick decision to flee Beijing in 1983 following criticism for “spiritual pollution” absconding to the remote forest regions and wandering along the Yangtse River from its source to the coast, finally settling in Paris.

His counterpart today would have less fear of constraint though there remain limits.

Your conference focuses on walls both actual and metaphoric. It was Konichi Omhae who as a Japanese management consultant and former physicist who wrote of the “Borderless World”. The paradox of contemporary Asia is that at the very time the internet is breaking

down information barriers there is a countervailing tendency to re-erect them—barriers of misunderstanding and sometimes good intentions.

There is a striking example of that in Sebastian Mallaby's account of how the World Bank under Jim Wolfensohn achieved greater success in China in alleviating poverty yet came undone with the notorious Qinghai relocation project. As he explains, by the 1990s the World Bank's biggest client was China and for good reason: not only was China the world's most populous nation, it was also the most spectacularly efficient at eliminating poverty. The World Bank proposed to relocate 58,000 farmers from the hopelessly parched hillside in the Western province of Qinghai to an irrigated area in another part. There a small dam would be built to collect melting snow for them and their re-settlement would be voluntary. Earlier such projects had been hugely successful in reducing poverty and there was no obvious reason to suppose that this one would be different.

Yet the whole scheme was to collapse over the fact that Qinghai bordered Tibet and 1 million of Qinghai's 5 million inhabitants were Tibetan. In a campaign that did no credit to the World Bank's assailants, the Tibetan issue was allowed to derail the project. The assailants were a disparate coalition of pro-Tibetans, conservatives from the far right, and some ngo's. The end result was the abandonment of the project though subsequently the Bank recovered its position in China thanks to its Chinese co-managing director Shengman Zhang.

If ever an incident demonstrated the need for thoughtful consideration of what to the occidental is still too frequently the Asian 'other', then this was such a case.

That leads me to the enhancement of Australia's capacity to understand Asia and the value of conferences such as this. I observe that Alison Broinowski is a keynote speaker. As James Mackie remarked in his preface to her pioneering book, written in 1991 on Australian impressions of Asia she set within a broad cultural context how Australian impressions of Asia have been formed, shaped and changed over the last 200 years. This was from the crude caricatures that even Sir Isaac Isaacs indulged in when he referred to the 'heathen Chinese' to the writings of a Christopher Koch of Indonesia or the music of Sculthorpe drawing on Indonesiaketchuk music. Yet just 6 years later Stephen Fitzgerald asked the question "Is Australian an Asian country?" with its subtext "Can Australia survive in an East Asian future?"

I pause to note a striking fact; apart from Alison who comes from the Athens of the south (Adelaide not Melbourne) each of Koch, Sculthorpe and Fitzgerald were originally Tasmanians. Perhaps there is something about living in close proximity to a much larger island that sharpens perceptions and enhances sensibility about Australia vis-à-vis the potentially dominating Asia that surrounds us. Jim Wolfensohn has been addressing Sydney audiences on that economic domination to come -- GDP projections from China and India surpassing not only the mature economy of Japan, but soon to overtake the United States. I stress GDP figures because the per capita income of China and India remains the greatest domestic challenge and in its accommodation perhaps the brake upon that threatened domination.

Yet is not Alison right, and Stephen too, in emphasizing that it is Australia's perceptions of Asia and their reciprocal in Asia's view of us that remains critically important. Is it not ironic that at this very moment where the leadership of the Australian labor party is at issue, there is barely a word of the fact that Kevin Rudd is almost unique in Australian politics in being

not only a fluent Mandarin speaker but a serious student of Asian history with deep connections to the Region.

Let me return now to walls.

Your conference speaks of electronic walls, defensive walls, new Berlin walls, walls of oppression, classroom walls, but especially “looking over the wall”, the latter led by Dr Soumeyan Muckerjee. Dr Muckerjee echoes Pyramus and Thisbee as they rail against the wall that separates them, so often the theme of East and West. So Pyramus

“and thou, O wall, O sweet, O lovely wall

That stand'st between her father's ground and mine

Thou wall, O wall, O sweet and lovely wall,

Show me thy chink to blink through with mine eyne” ...

Then, denied his Thisbee, cursing “thy stones for thus deceiving me”, at last the lovers meet concluding with these words, metaphor for this conference.

Wall “thus have I Wall my part discharg'ed so;

And, being done, thus Wall away doth go.

Theseus: Now is the mure rais'ed between the two neighbours

So may this conference break down the inner walls shedding light between east and West on this the 50th Anniversary of the birth of the Oriental Society of Australia. A birth we joyfully celebrate at Women's College of the University of Sydney.

GFK Santow
Chancellor
3 December 2006

Talk to Final Year Law Students End of Year Dinner for 2006 ¹

20 October 2006

Dean Ron McCallum and Mary Crock
Oliver Jones
Faculty
Graduates to be

In returning to the University at Camperdown for this the End of Year Dinner, you re-enter our intellectual heartland, soon to house the new Law School. Imagine it! That luminous building, light and open, sits Janus-faced. It looks outward to the city where you pursue your professional lives, not all in law. Inward to the old Medical School where law engages with sciences and humanities at a deeper level. In the city, that essential trilogy of law, business and government will find its extraversion. A vital hub linking music at the Conservatorium, art at the Art Gallery, government at the Lowy Centre, science at the Museum. At the very centre, Sydney's old Law School housing a city presence for the US Studies Centre. There teaching those professional courses that are your future; business, banking and post-graduate law with close connection to our Camperdown campus.

Tonight you have a sense both of prospect and retrospect. Of the characters of our year of 1963, I specially recall Frank Nugan. He wrote an essay in jurisprudence entitled "Jurisprudence is bunk". Not being Henry Ford, but a boy from Griffith, when Professor Julius Stone confronted him, like Galileo faced with the inquisition he quickly recanted. Julius Stone forgave him with a reference that took him to Harvard, describing him as a "prairie lad". Sadly Frank fell into dangerous company. His mysterious death, as principal of the notorious Nugan Hand Group, led him to be the only one in our year (so far) to be disinterred.

I myself left Law School to spend the first 30 years of professional life practising as a commercial solicitor at the firm then known as Freehill, Hollingdale & Page, now Freehills. I joined it in 1960, when sectarian and gender bias had not disappeared. If you were a Roman Catholic or a Jew there were firms that would not look

¹ This is a slightly expanded version of the after-dinner talk.

favourably at your application. And women had not yet broken into the ranks of partnership at any of the leading city firms. Freehills was an upstart Catholic firm who welcomed non-Catholics, and embraced women. I think of Rod McLeod, the Changi survivor whose idea of technology was to shout at his articulated clerk who in turn shouted into the dictaphone, Freehills made itself open to all-comers, the first big city-firm with female partners. I was particularly pleased when I applied that no one asked me my school, whether I had been a prefect or what sport I had played, let alone my religion. Just as well. The then senior partner, Brian Page, now aged 94, looked simply for character, ability and a creative edge.

The professional world you are now entering has largely swept away those barriers and prejudices. Yet each generation has its own issues. One of the most difficult today is retaining professional independence. As barriers to entry into the legal profession have broken down, it is a disturbing paradox that many legal practitioners have created their own self-imposed barriers. They do so by willingly submitting to constraints on their independence — by an excessive desire to please the predilections of whoever gives them legal instructions and those they perceive behind them. Their perceptions may do their client no service. Recent events surrounding the Australian Wheat Board highlight for me that fundamental question my late father-in-law Irving Frankel used to pose; “Just who is your client?” he would ask. By that he meant, does the person instructing you really represent and appreciate your client’s interests and not just short term, shorn of the expedience of the moment?

The Wheat Board story is not just about why the lawyers concerned did not until the death produce the documents Commissioner Cole was entitled to receive. The question was rather, who among the many lawyers ever gave objective advice? Who insisted upon being briefed with the real facts, probing them? Some lawyers of integrity undoubtedly did. Cassandras, I concede, are not always popular. Yet if we lawyers value our reputation, we may have to risk losing a client or two in the short term if the client cannot cope with a truthful opinion. Longer term they will be the gainer; particularly if as lawyers or (I add) as merchant bankers or financial advisers

you have the creative flair to circumvent properly understood risks and difficulties with sound solutions.

When our current Chief Justice of the High Court Murray Gleeson was the leading barrister in Australia, people went to him for an objective opinion in depth, valuing his advice accordingly. Nor did his advice lack resourcefulness or creativity, but above all it was sound and had integrity.

Remember, clients may not want to cut corners to achieve a legally risky outcome, especially if the desired commercial result can be achieved by a more creative approach that is legitimate. Clients will thank you for that, even if some are used to operating at the sharp end. No one gratuitously takes a risk they can avoid, not even Alan Bond. Just occasionally, you actually have to say no, that can't be done legally; or the risks are unacceptable — just so long as this is not the product of your own limitations.

After 30 years at Freehills I went to the Bench, happy that I was occasionally engaging in the social work my wife Lee had practiced. Mind you I preferred it when she was a marriage guidance counsellor. Not being a litigator, I actually had to get someone to tell me on my first day whether the plaintiff sits on the left or the right! But what I learnt is that issues of character and integrity count no less for a judge, even protected as we are from losing our jobs, save for the kind of misconduct that would move both Houses of Parliament!

A striking example of judicial integrity and a proper independence from the executive is the recent decision of the Supreme Court of the United States in *Hamdan v Rumsfeld*. By a majority of 5 to 3 (the Chief Justice did not participate) the court held that Congress had not authorised the President to create military commissions of the kind which had been set up to deal with charges of conspiracy laid against Hamdan, following his detention at Guantanamo Bay. At the conclusion of the majority opinion, written I might add by an 87 year old member of the Supreme Court, Justice Stevens, the following was said:

“We have assumed, as we must, that the allegations made in the Government’s charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge – viz, that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasising that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.” (at 72)

Recently the Victorian Court of Appeal were vilified and held to ridicule for ordering the release of the individual known as Jihad Jack. They did so for a reason which, in an age of terrorism, is no longer unquestioned; that confessions obtained by duress can be no basis for conviction; *R v Thomas* [2006] VSCA 165 (18 August 2006). More recently Chief Justice Gleeson gave a seminal paper on “A Core Value” as to the use of evidence obtained by torture, or, and more difficult, where there is doubt as to whether or not so obtained.²

It is now recognised that judges make contestable decisions on moral and policy issues. Not always are these issues easy to resolve. Nor are they capable of a black and white answer. As the Chief Justice observed “*unfortunately, the high moral ground does not provide a refuge from the necessity of making hard practical decisions*”. It is a sign of maturity, that we accept that judges can be confronted by legislation or factual situations which compel them to make decisions of a normative kind. The difference is that today, judges are expected to lay open the factors which weighed in those decisions including the judge’s perception of community values. We can thank the late Julius Stone for his pioneering insights and influence in this process of making explicit what once lay hidden.

² Paper given by Chief Justice Murray Gleeson to Judicial Conference of Australia, Canberra 6 October 2006 “A Core Value”, commenting on Lord Hope’s judgment in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 at 283.

There is one aspect of our judicial craft I have especially enjoyed, particularly as a trial judge in Equity. As law students, you get the facts cut and dried; as a trial judge you have to find them through the adversary system, recognising its limitations as a means to discover truth. The following dialogue occurred in cross-examination between a feisty elderly lady who claimed to be deaf. She was being questioned about whether she had had an affair with a cleric whose housekeeper she was. The cross-examination began inauspiciously:

“Witness: God, here’s this old bloke now.”

The barrister so described did his best to press on questioning this combative person — old enough to be his grandmother:

“Q. What was your relationship with X?

A. I’ve been waiting for that wonderful question. My relationship with Mr X was one of friendship and don’t insinuate anything else.

Q. Your Honour, might the witness be reminded of her function as a witness in this court?”

Witness: “What?”

As I finally approached the witness to try and restore some order, she said to me loudly to put me off my stroke “I can’t hear you”. When I said to her that, “They are entitled to ask you about your private life”. “I know my rights” was her tart riposte.

The final denouement was when the barrister pressed her about the discrepancy between her oral evidence and her affidavit. She exploded: “God! You are absolutely the end. I don’t remember every special word we said. This is 1992 and I’m 89. How I am I going to remember every blooming word that was said? I bet you couldn’t remember what you said in 1992.”

Why do I mention humour in the law? Because it is the capacity to see the incongruities of things; for that is the key to perspective and good judgment.

Let me conclude, drawing these disparate strands together. The professional world you are entering no longer has the barriers that stand in the way of ability. Yet women in the law are still under-represented at the Bar and in the Judiciary though that is changing, as it should. If Sydney University retains your affections it will be because of extraordinary teachers and leaders like Ron McCallum. He to me epitomises a capacity to listen intently, pick the nuances below the surface and project the excitement of what is to come for this great Law School. My message to each of you is to balance your intellectual ability with humanity and commonsense. Stay grounded. Seek your place in the sun but don't be driven by money. Dare I say it at the precipice of tonight's festivities, have fun too!

And now a toast to the graduating class of 2006!

G F K Santow
Chancellor

PLAQUE UNVEILING FOR THE NEW LAW SCHOOL AT CAMPERDOWN

Vice-Chancellor, Professor Gavin Brown
Dean Ron McCallum
Chief Justice James Spigelman
Justices
Former Prime Minister Gough Whitlam and Margaret Whitlam
Graduates of Sydney Law School
Friends

Tradition and Ambition: Law at Sydney.

The twin themes of tradition and ambition are especially apposite for our new Law School. It was the traditional notion of Law that from the beginning separated our city-based Law Faculty from the Camperdown campus of the University. That is not to say that the traditional view of law devalued the humanities. Indeed the first Professor of Law, Pitt Cobbett, required his students to undertake a combined course in Arts and Law, the former at Camperdown and the latter in the city premises alongside the Courts. Even when straight Law became possible, seven years later in 1897, students were strongly encouraged to undertake the combined Arts-Law course, as they were during Sir John Peden's long tenure. But no-one then thought of combining a Law degree with the degrees of other faculties.

That said, Law in our city premises created enduring connections with the profession that have proved indispensable. And not only for articles or part-time work in a law firm. The city's leading practitioners taught us superbly, alongside a generally outstanding full-time teaching staff (with the occasional alcoholic as I recall from earlier days). The city premises that preceded the current Law School building were quaint and decrepit. I specially remember being struck by the adjoining Infants Mistresses' Association, intrigued at the thought of those precocious infants.

Yet it is ambition not just tradition that brings us back to Camperdown: As I said at the Alumni Sesquicentenary Dinner, Sydney Law School's aspiration is to be an abiding influence on future generations of law students and scholars; for so it was for us. A contemporary law school in the twenty-first century must reach out to all the leading faculties of the University. We will do so in a way that enhances our links with the legal profession – and build new connections with other professions. Our aspiration demands a law faculty housed in the University's intellectual heartland, here on this superb central site. The new Law School, as you see, is beautifully designed, light and almost translucent, respectful of the older architecture and with a wonderful open area to meet and talk. The new Law School looks outward towards medicine, economics, the humanities and science on one side, and back to the city across parkland to the other, a potent symbol of our dual orientation. We need to be Janus-faced, to remind lawyers there are two vital dimensions to our craft, the practical and the theoretical, the pure and applied. I need hardly say that to our Vice-Chancellor in his mathematical mode!

The *New York Times* pointed out that the recently appointed leadership of the US Supreme Court will face its greatest challenge in accommodating the new sciences of bio-technology and genetics. What a lawyer needs to understand for to-day and tomorrow is vastly expanded. Already Sydney Law School is engaged at the interface between Law, Medicine and Public Health; so too with the Humanities and the Social Sciences and especially Business and Economics. Our Dean could not possibly teach labour law without delving into its economic implications, to which he recently subtly added feminist ones.

The Law's international dimension is no less important, with faculty exchange and post-graduate scholarships, most recently for Oxford's BCL. Diccon Loxton has been indefatigable in writing over 200 individual hand-written letters for funds for the scholarship in memory of the late Peter Cameron, deeply valued Chair of the Law School's advisory group. Likewise, I acknowledge with gratitude those who are putting in place a fund in memory of another sadly missed alumnus, the late Justice Peter Hely.

So tradition and ambition embrace each other in a dual existence for the future Sydney Law School. The city premises will become Sydney University's extraversion, its scholastic roots at Camperdown. The tradition of teaching Law as part of professional training must accommodate the new paradigm of the young professional engaged in the city. He or she will pursue post-graduate offerings across law, business, government, finance and banking, whether for intellectual depth or to advance a career. The "old" Law School will become a hub teaching post-graduate disciplines across a wide spectrum related to the needs of the city. It will retain a close and symbiotic connection with Camperdown. To-day's young city professional may then combine music at Sydney's Conservatorium of Music and at Camperdown, Art at the Art Gallery of New South Wales and the Power Institute, or Rozelle, geopolitical issues at the Lowy Institute and our Graduate School of Government. It is more than a happy accident that our newly appointed Professor Alan Dupont, head of the Hinze Centre in International Security, launches his seminal paper this week on climate change at the Lowy Institute from where he will be joining us.

To use an analogy that may appeal to Chris Beale here to-day from New York, imagine Sydney University with a presence in Manhattan at one end and downtown New York at the other. So you see the scope of Sydney University's ambition – a unique multidisciplinary focus and thriving presence at Camperdown with its outreach to the city and expanded presence there, cherishing its connections that bring our alumni to this gathering. Here in the heartland of this eclectic campus with its rich cultural life we will nurture the profoundest research and most fruitful interaction between law students and their teachers. It is that which will spawn thinking that transcends our traditional faculty boundaries.

G F K Santow
Chancellor
15 June 2006

Faculty of Medicine's 150th Anniversary Celebration Ceremony

13 June 2006

Your Excellency
Vice-Chancellor
Dean and Faculty of Medicine
Distinguished Guests

In welcoming each of you to this historic celebration ceremony, I join with those who alone can give a true "welcome to the country". For that has traditionally come from the Eora and Cadigal people, whose ancient connection to this land I acknowledge, with deep respect for our indigenous past. Their spiritual connection with the land is one with which we can all identify. For the spirit of enquiry that inspires each of those honoured to-day and which underlies all research is not some material thing to be owned. Rather it is part of the very being of those scholars who are "forever learning".

I have deliberately used the words "*forever learning*" as they are a translation of the Vietnamese "Hoc Mai". That is the Australian-Vietnam Medical Foundation of which our Governor, Professor Marie Bashir, is both patron and inspiration. Most importantly, it brings together the collective medical knowledge and experience of Vietnam and Australia in an educational partnership led by our acting Dean Professor Bruce Robinson and Sydney's Faculty of Medicine.

A great medical faculty is indeed "*forever learning*", its orientation humanistic and socially engaged, yet built on a rigorous scientific foundation. It is no accident that Medicine is now a graduate faculty as likely to recruit a researcher or clinician with an Arts degree in Sanskrit as in Advanced Science. Those characteristics were part of the DNA of a great medical faculty which began with predominantly Scottish doctors, who were **educated** and not merely trained at leading Scottish universities. They saw medical education as more than a mere professional guild, encompassing as it must the craft of medicine. I remember the late John Young explaining how it was at Edinburgh and the other great Scottish universities that medicine was first taught as a university subject free of domination from the professional colleges. Whereas in the rest of the United Kingdom, medicine was then dominated by the professional Colleges of Physicians and Surgeons. That tension can be seen in the Lancet's reporting of the Medical Profession Bill 150 years ago opening up medical education to the universities in competition. There was less of that element in the Australian Medical Journal of the same time on Victoria's Medical Reform legislation.¹

One only has to read the memoirs of that blunt Scot, Dr Robert Scot Skirving, whose lifetime was essentially co-terminous with the first one hundred years of the Medical Faculty's existence at Sydney University, to appreciate the depth of that Scottish connection with our Faculty, and its humanistic, European tradition.² Importantly, he reflected a vital strand in our Medical Faculty's 150 year-old history. I refer to the Faculty's relationship with the clinicians in the great teaching hospitals who provided clinical training. Sydney's early medical world undoubtedly had its tribal elements which, had they become dominant, could

¹ Lancet October 1856, p284, Australian Medical Journal July 1856, p208.

² Memoirs of Dr Robert Scot Skirving 1859-1956" edited by Ann Macintosh (his daughter)

have led to a parochial closed shop. Fortunately, as the later history reveals, they did not prevail. Rather, the University turned those traditions into a source of strength, not weakness.

Skirving himself embodied the best elements of that tradition and its close connection with clinical medicine. He enjoyed the superlative technique of a surgeon and the intuitive understanding of a great clinician. Yet, as Herbert Moran recounts in “Viewless Winds”³, Skirving was the first president of the first society in Australia for the study of medical history and literature. Alongside was a distinguished group. They included Thomas Fiaschi, a Florentine humanist who understood how medicine began in renaissance Italy at the great anatomy schools of Padua and Bologna. Then could the boundary lines between Medicine and Art disappear in a drawing by Da Vinci of the human torso.

Dr Moran recounts something of the macho surgeon-culture in the early part of the last century, in what was then still a relatively small pond:

“Surgery was only just emerging from the long phase of mass extirpations; operations were largely a matter of lopping off. Gentle anatomical dissections and careful restoration of cut surfaces were rarely practised. Tissues were for the most part handled roughly. Even the personality of the surgeon was different; he was a much more downright, forceful, bullying sort of person. It was then often alleged that too intimate a knowledge of anatomy hindered rather than aided the surgeon, making him timid and squeamish. The pottering operator was despised: ‘Get in quick and get out quicker’ was a favourite axiom. We were still a little under the influence of those old surgeons who had had to amputate without any general anaesthetic. For this it was, above all, stout hearts and strong fingers that were necessary. The ancient operators had no fine sense of tissue.”

That criticism could never have applied universally, and certainly not to that early master surgeon and fellow Scot, Sir Alexander MacCormick; he “*seemed to caress the tissues*”. With MacCormick, Skirving had a not entirely easy relationship, nor an uncritical one but he appreciated his quality.⁴

The humanities were however a world away from MacCormick the outstanding technician. To-day the Medical Faculty encompasses not only Stan Goulston’s pioneering course on Poetry now taught by Dr Jill Hunter – how better to develop empathy with patient and family – and most recently a unique combined course in Music and Medicine. Professor Ben Freedman, our Pro Dean, will tell you how violin playing develops the surgeon’s fine motor skills. This is not some recent mutation. Rather, it was the natural outcome of an enduring humanistic culture that pervaded Sydney Medicine, reinforced by a succession of outward-looking Deans.

Those presented to-day for a degree of Doctor of Medicine *honoris causa* epitomise that humanistic tradition. Sir Michael Marmot, memorably interviewed by Dr Norman Swan in November 1998 recounts how, even as a student at Sydney, he understood the impact of

³ “Viewless Winds”, by Herbert M Moran at 114.

Also, of Dr Skirving at 94-5, “*those doctors were capable of being brutal about each other*”. Moran also recounts the story of a disastrous Sydney appointment in oncology in the 1930’s in Ch 7 “Cancer ... and Chaos” There are indeed some object lessons for a Senate being both too intrusive and at the same time not involved enough where the danger signs were unmistakable about the disastrous appointment, with the problem swept under the carpet.

⁴ op cit f/n 2 at 298 and following

social causes on the pattern of disease affecting populations.⁵ Already his instinct was that of an epidemiologist, preparing him for his ground-breaking studies on the direct relationship between the degree of work autonomy and vulnerability to disease. Put crudely in the words of the Two Ronnies, the boss with the key to the executive loo did better healthwise than Little Ronnie at the bottom of the pile who “*just held it in*”.

I cannot resist quoting from his Berkeley interview in 2002 for it so aptly expresses the social engagement of our Faculty in Public Health:

“When I was a medical student, I thought public health was to do with drains. We had lectures from somebody who had been very important in public health in New Guinea, and drew diagrams of how you dig a deep pit latrine. I'm sure it's very important to know how to dig a deep pit latrine in New Guinea, but that's how public health was taught to us. When I went a bit further, I thought public health was about preventing these individual patients from coming back, and then I started to think more about society.

So even when I was in Berkeley, we were doing studies of Japanese migrants, the fact that when Japanese change from one environment to another, their health rates changed; but I still didn't quite think about societal organization. I thought this was to do with their culture and their behaviour. It was only when I looked at this gradient, by grade of employee. As a fairly ignorant person, I thought, “What on earth does this mean?” And it was this simple finding of the gradient that got me to thinking about what does it mean, and set me off on this odyssey about the social determinants of health. And that, of course -- you have your own form of the midlife crises -- [led me to] saying, “Well, maybe the purpose of doing this research is not to publish one more paper, important as that is, maybe the purpose of the research is to try and change things.”

Dr Norman Swan himself reflects a down-to-earth Scottish background, graduate as he is of the University of Aberdeen. We see those forthright qualities in his work as a medical investigative journalist without peer, most especially of scientific fraud. He brings medicine alive, in its social and scientific setting with both eloquence and rigor.

Our third “honorary”, Emeritus Professor John Chalmers, is not only a superlative researcher with outstanding achievements on the effect of high blood pressure. He has also picked up the mantle of his distinguished predecessor, our deeply missed John Young an historian manqué, as treasurer of Professor Cambitoglou's Archaeological Institute. And if, as former Sydney surgeon and graduate Dr Mark Spigelman's work demonstrates, there is such a field as the epidemiology of ancient Egypt, perhaps John too may turn to the convergence of medicine and archaeology.

Our main speaker Sir Gustav Nossal, represents yet another strand, superlative researcher now engaged in global issues in public health of transcendental importance. Who can forget his speaking to our Post-graduate Medical Foundation four years ago on the outstanding work he has done for the Gates Foundation. His pioneering research in immunology inspired him in developing Gates' mass immunisation program for the African continent, against the ravages of parasite infection afflicting whole populations.

Finally, we can be proud of the fact that the University of Sydney Medical School was the very first to admit women students, recognising that the experience of the first female

⁵ “The Health Report”, Dr Norman Swan, ABC Interview, 16 November 1998 and subsequently “Epidemiology and Social Stratification” Conversation with Sir Michael Marmot 18 March 2002, an interview at Berkeley where his interest in the impact of social issues on health took firm hold
<<http://globetrotter.Berkeley.edu/people2/marmot/marmot-con4.html>>.

graduate Dagmar Berne, shows this was not without difficulty. In contrast to that history, I was particularly struck by a publication in the Lancet 150 years ago of the doings at the University of London.⁶ There one Jessie White sought admission to its Faculty of Medicine. So shocked were its Senate when, as the Lancet put it, she had “*fairly driven the Senate into a corner*” that it sought to consult the terms of its Charter. Senate then took refuge in counsel’s opinion. The charter provided that

“the said Chancellor, Vice-Chancellor and Fellows shall have power after examination to confer the several degrees of Bachelor of Arts, Master of Arts, Bachelor of Laws, Doctor of Laws, Bachelor of Medicine, Doctor of Medicine, and to examine for medical degrees in the four branches of Medicine, Surgery, Midwifery and Pharmacy.

The Lancet adds slyly,

“The dictates of discretion would, no doubt, warn us to decline intervention in a dispute which is thus committed for decision to the gown; but we cannot help thinking that this reference looks very like an appeal from common sense to legal subtlety.”

Then follows the Lancet’s version of commonsense, tongue firmly in cheek. Although it is not **explicitly** stated that degrees shall only be conferred on persons of the male sex, “*that is precisely because the idea or possibility of females becoming Bachelors or Masters never occurred.*” As the Lancet says “*they would have as soon expected a cow to change into a bull as a maid into a ‘bachelor’.*” Since of course one could not become a doctor without first becoming a bachelor of medicine, that apparent unisex description of “*doctor*” was to derive its male character from the preceding references to bachelors and masters, under that *eiusdem generis* rule so beloved of we mere lawyers.

The Lancet chides,

“We are therefore entitled to conclude that the Senate has not the power, under this charter or otherwise, to make [bachelors, masters and doctors] out of the female sex. We are unable to understand why that venerable body should think it necessary to ask counsel if it had such a power of sexual transformation. We can only account for this reference to the gown, on the supposition that in the course of years some members of the Senate who have themselves undergone a process of anile metamorphosis, have been led to consider the converse change equally within the order of nature, and thus to contemplate the possibility of turning old women [of Senate] into old men”⁷.

⁶ Lancet, 19 July 1956 at 83.

⁷ Women were admitted by University College London for the first time as full degree students in Science, Arts and Law in 1878; one assumes medicine followed. At Sydney University too, women had broken through under its outstanding Dean, Professor Anderson-Stuart. However, hospital appointments, until the Rachel Forster Hospital for Women and Children was set up, remained a further barrier to women pursuing clinical practice, though that barrier too was overcome; for a more detailed account see “Centenary Book of the University of Sydney Faculty of Medicine” Ch 6 *Women and the Medical School* p218. Moreover, women have long since joined its Faculty; see “150 Years of the Faculty of Medicine” under the distinguished medical authorship of Emeritus Professor Ann Sefton, Dr Yvonne Cossart and Dr Louise Freckleton and the companion volume “150 Years, 150 Firsts: The People of the Faculty of Medicine” by Lise Millar at 10.

I am conscious that I have touched on only some of the strands that have produced to-day's outstanding Medical Faculty, a flagship of Sydney University. To tell you more of that history and of current developments at the very frontiers of medicine like BIO3, I will ask our distinguished Dean, Professor Andrew Coats, to address us, before the conferring of honorary degrees.

G F K Santow

Chancellor

University of Sydney

Sancta Sophia College – Address for Academic Dinner

22 May 2006

Chairman of Council Josephine Heesh

Principal Dr Elizabeth Hepburn

Chair and Members of Council

Women of the College

And may I make special mention of John Sheldon, who continues the Sheldon family's deep connection with Sancta

Some Reflections on Tolerance and Conviction.

At an earlier Sancta Dinner, I spoke of Dr Hepburn's distinguished predecessor Mother Swift who joined Sancta as its Principal in 1958. I first recall her as a mature-aged Articled Clerk at the then firm of Freehill, Hollingdale & Page. That was the law firm founded over a century ago by Francis Bede Freehill. His wife was referred to as Countess E M Freehill because Frank was a Papal Count. She donated the Italian Prizes at Sydney University and the St Johns College's tower. Frank Freehill was admitted as a solicitor in 1877. He helped found not only Toohey's Brewery but also the Citizens Life Assurance Company subsequently called MLC. Frank Freehill was known as "One Gun Freehill". As an Honorary Consul he was entitled to a one-gun salute as he entered Port Jackson Heads!

The firm founded by Frank Freehill was joined by the Hollingdales. When I joined it in 1961 as an Articled Clerk, it was led by an individual of remarkable character, Brian Page, now in his 90's, his intellect and memory still formidable. The very same Page who, before Mother Swift dedicated her life to the Church, was her early boyfriend when she was twelve and he thirteen at Xavier College. History does not relate whether that drove her to taking Holy Orders. But she was the first nun taking an active part in university life. She cast off her habit after Vatican II and wore a red wig in a no longer enclosed order. She attended, with young John Sheldon, lectures in Latin and Greek as well as Hebrew.

This intersection between Sancta and Freehills, the law firm with which I spent thirty years of my professional life before joining the Bench, prompts me to talk about tolerance, religious and racial. For that was a cardinal feature of that law firm. Yet few to-day recall the sectarian prejudice that even in the 1950's still existed in Sydney. The then partners were determined it would find no place at Freehills in any form.

Much of that sectarian prejudice was directed against Irish Catholics; indeed it was the lightning rod that partially deflected it from the Jews, though not entirely. There were still in the 50's some law firms that would not give Articles to a Roman Catholic or a Jew. Successive New South Wales Premiers tended to favour, successively, Catholics or non-Catholics for judicial appointment, depending on their own religion. No Catholic could obtain a seat on the Stock Exchange. This was until a courageous New South Wales Attorney-General, Reg Downing, hearing of the exclusion of Bernard Curran from a seat on the Stock Exchange, told the then committee of the Exchange that he would legislate them out of existence unless they opened the Stock Exchange to all, no matter what their religion.

Mercifully, Sydney University was utterly free from sectarian prejudice from its very start. So too schools like Sydney Grammar, which shared much of Sydney University's early history and ethos, sharing a common group of founders and a home in College Street. Likewise the then named University Club (now the University and Schools Club) which admitted members of all faiths and was a pioneer in admitting women.

It was of that sectarian prejudice that our Chief Justice Murray Gleeson spoke when nearly twenty years ago judges of our Court invited back to the Supreme Court our aboriginal hosts. They had earlier welcomed us judges when we visited them as part of an indigenous awareness programme for the Supreme Court. As a country boy from Wingham Chief Justice Gleeson would have seen many aboriginals and their disadvantage. To that gathering of aboriginal men and women, some who had lost children or siblings in the circumstances described in the report "Bringing Them Home", he said, as I recall, something like this. For those of you who are tempted at despair that reconciliation will never come, consider the experience I had as a young Catholic. In the 1950's not only were Articles in a law firm not always available to a Catholic but there were other professional barriers. Yet by the 1960's, but a decade later, they had essentially gone.

When I came to Freehills as a young Articled Law Clerk it was that openness to people of all religions or none that so appealed to me. I was greatly attracted to the fact that this was a dynamic, progressive firm smaller than the dominant establishment firms. It had needed to break through sectarian prejudice in the 1950's to rival them, doing so under Brian Page's inspirational and always robust leadership. As a result of that experience all that mattered to the leaders of the firm was whether those working there had integrity and ability. Women were welcomed – it was the first of the larger city firms to appoint a woman partner. Another barrier later surmounted was to provide a workplace where you could give birth to children whilst coping with the demands of partnership. No-one asked me what school I had gone to or whether I had been a prefect though they probably knew the former from my application and the latter from its absence from my CV.

Among the firm's memorable characters in the 1950's and beyond was Rod McLeod, a Changi survivor. He died only a few years ago. He was not strong on technology. He used to dictate on an early version of the dictaphone, reluctantly, by shouting at his Articled Clerk, Jim Graham. Jim Graham in turn would murmur at the dictaphone. Fortunately that was not how Freehills moved into the technological era.

But the purpose of this is not just reminiscence. It is to bring home the importance of tolerance in a conflicted world. I do not mean by that tolerance of vicious fanaticism, but of difference. All of you will at some time encounter prejudice, more likely directed at someone else. Yesterday it was those of Asian extraction, now largely abated. Before that it was of the waves of European refugees and the later Greeks and Italians. To-day, the vulnerable in our society tend to be the next wave of migration, typically though not only those of Islamic background. Tolerance is not helped by those on both sides, ideologues, who seek to portray relations between the West and the Islamic world as a "*clash of civilizations*".

In France, so strongly secular is the State, that neither the head-scarf nor yarmulke may be worn at school; Sikhs must conform too. It is no accident that race riots have disfigured Parisian streets. But recent conflict on our own Sydney beaches leaves no room for complacency.

What can each of us do as individuals and in our institutions? The first lesson is to welcome the alien; the stranger at our gates. Recently, Sydney University gave an honorary degree to Dorothy Hodinott, alumna of Sydney University and Principal of a Sydney high school that has given outstanding support for children from refugee families. Their response has in turn been to embrace the educational opportunities she helped them find. Sydney University has a refugee English language programme, instigated by our Vice-Chancellor who wanted to see us do something worthwhile and practical. He was strongly backed by our Senate, with Thalia Anthony, playing an especially prominent part. (Thalia by the way, graduated in law with first class honours last Friday, to add to her doctorate in history.)

That kind of practical welcome is very important to those who arrive on our doorstep. It is the reason why earlier generations of migrants like my father, felt such gratitude to the country that took them in giving their children opportunities denied their parents. How do we ensure that to-day's refugees who finally succeed in settling here have a similar sense of gratitude, despite the trauma they have experienced?

To be tolerant of others does not mean that you weaken your own convictions. Rather, it is because you are unthreatened by the kind of conviction which is not fanaticism, that you can respect the convictions of others. While no-one wants bland conformance a welcoming tolerance and friendship is the best assurance for successful integration. It means those who begin by cleaving to their own will want to widen their horizons, joining our community so it is their's too. And, incidentally, enriching us all in the process. The consequences of failure are all too apparent; an entrenched fanaticism that leads to assaults on our society and a violent response.

This College and each of you can do much to bring this about. I have already encountered how successfully you are achieving this, valuing the diversity of backgrounds amongst the College women.

G F K Santow

Chancellor

University of Sydney

“Laying Foundations”

— ALUMNI SESQUICENTENARY DINNER of SYDNEY LAW SCHOOL

5 November 2005

INTRODUCING THE CHIEF JUSTICE OF NEW SOUTH WALES, THE HON. JAMES SPIGELMAN

Vice-Chancellor Professor Gavin Brown
Dean Ron McCallum
Chief Justice Spigelman
Sir Laurence Street
Justices
Graduates of Sydney Law School
Distinguished Guests

In the 1970's I taught Company Law in our Master of Laws Programme. When the young Jim Spigelman turned up for my first lecture I felt rather like Salieri had Mozart turned up for a lecture on musical theory. However, I need not have worried. Amadeus' attendance record in my class was no better than at Sydney Law School doing his LLB, though there he did manage to secure the medal!

Introductions of the Chief Justice customarily refer to his brilliant academic record and that freedom ride to Moree. These were undoubtedly seminal; as also when, still in his 20's he was private secretary to Gough Whitlam and then head of the Department of Media. Extraordinary achievements, so early, yet maintained throughout middle age and beyond, give an unparalleled range of experience. Yehudi Menuhin, similarly met Elgar at 14 and thereafter knew every musician that mattered till his 80's. Like Isaiah Berlin, his life began in Riga and ended in England; for Jim it was from Poland to settled life in Sydney. But as Alice Spigelman says, Jim lives in the present and the future; his historian's eye is not clouded by retrospective sentimentality. So what I will say about him is based on the kind of contemporary connection that he would value; and especially of Sydney Law School. Its aspiration is to be an abiding influence on future generations of law students and scholars, for so it was for us.

Jim has written three important books; and much else besides. Jim is, in Isaiah Berlin's famous dichotomy of different intellectual temperaments a wide-ranging fox who "*knows many things*", not a hedgehog who just "*knows one big thing*"¹ Those books began with "Secrecy", written when he was just 26. Ironical, because when Jim worked with the secrets of the nation, he was no lively lunch companion. Then followed "The Nuclear Barons" (with Pringle) written 10 years later, with its connection to that earlier theme. And just last year came "Becket and Henry", his lectures to the St Thomas More Society.

That concern with secrecy in Government has a direct connection with the contemporary issues of anti-terrorism legislation as well as administrative law. Though his critique was of excessive secrecy, Jim offered no facile solutions. His scorn was reserved for cases from the early 70's, such as, in particular the student radical Hall Greenland. His employment file had been stolen from the Public Service Board. That led to publication in Honi Soit of the fact that he had been refused employment in the Public Service following a perfunctory enquiry of ASIO. Honi Soit recorded ASIO's reply: "*Greenland is unfavourably known to ASIO*". In those early writings, one can see the development of Jim's mastery of administrative law; his recognition of the tension between exercise of executive authority and the checks and balances upon it in a constitutional democracy.

In "Becket and Henry", our busy Chief Justice somehow found time to write a scholarly illumination of a 12th century conflict between Archbishop and King, Church and State. That was Becket and King Henry II. Jim brought profound understanding of both the historical influences at work, and the perennial themes of institutional self-interest and loyalty.

That a stellar graduate in Economics, Government and Law, with a deep understanding of history speaks to us tonight has special significance. In just over

¹ Berlin, Sir Isaiah (1953), "The Hedgehog and the Fox", New York, Simon & Schuster
"*There is a line among the fragments of the Greek poet Archilochus which says: 'The fox knows many things, but the hedgehog knows one big thing'. Scholars have differed about the correct interpretation of these dark words, which may mean no more than that the fox, for all his cunning, is defeated by the hedgehog's one defense. But, taken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general.*"

three years, the Law School will re-establish itself in the intellectual heartland of the University, the Camperdown campus. It will be housed in a superb, almost transparent building looking towards the stone of the old medical school on one side and across the green vista of Victoria Park on the other. Our Law School will once again be in daily intimacy with the humanities and sciences, physical, social and medical. The New York Times, speaking of the future challenges facing Chief Justice Roberts and the US Supreme Court, fastened on the sciences as their most important source; from uses of DNA and stem cells to genetic profiling and privacy. No longer will law students be required to rupture their connection to those fundamental underpinnings of legal scholarship. It will be so much easier for a future Jim Spigelman to retain a continuing interface with that essential trilogy of Government, Economics and Law, illuminated by historical and social perspective. Let me quote from the words of Gordon Samuels, writing in Jim Spigelman's "Blackacre" 1970 about the future of legal education; for his words identify what that return to our heartland will make possible:

"But there is no reason why law should take a backward step for any other discipline. Law is, or should be, the supreme amalgam of the Social Sciences, and if Philosophy and History are truly Arts subjects, then it involves an amalgam of the Social Sciences and the Humanities.

The aim should not be to teach lawyers something about economics, or psychology or sociology, viewed as independent and separate disciplines, but to teach law as a manifestation of economic factors and psychological or sociological pressures. So that the sociologist is not teaching sociology, but teaching law, or training lawyers, from a particular standpoint."

Yet the law calls for both education and training. To quote Gordon Samuels again:

"Proper legal instruction must include both "education" and training". By education, I mean (to use a florid phrase) some kind of stimulation of the mind – what has been called 'mind-stretching'. By training, I mean the acquisition of the ability to apply knowledge, and the acquisition of practical skills and techniques."

Nor are these binary alternatives – they are symbiotic.

For post-graduate training, at post-graduate level, Sydney University will remain in Sydney's legal precinct, in our old Law School building. It too will be a fox rather than a hedgehog, in our offering to the professionals in the city. We already offer the leading Master of Laws course, which has the potential to embrace wider cross-disciplinary offerings. City professionals reflect the job mobility of to-day's young lawyer, so many with wider intellectual and cultural interests. You only have to see the Law Revue and the Chaser! Our city presence will be founded upon that essential trilogy of Law, Economics and Government. Their ramifications extend to finance and banking, business and public affairs, not omitting public health and urban security issues, where Sydney Hospital could play a vital role assisted by Sydney University. "Sydney University in the City" is already our inter-disciplinary outreach, close not only to the legal profession but to other city professionals as well – all who contribute to Sydney's dynamism and its rich culture. Sydney University in the City will become a vital cultural hub, connecting Sydney's Conservatorium of Music under the inspirational Kim Walker, the Art Gallery of New South Wales with its eclectic Asian programmes, the Museum with Zoology and Anthropology, and the Lowy Institute with its rich programme on world affairs. As Jim Spigelman has demonstrated, culture and history remain the leavening of all scholarship, elevating us from mere technicians.

This then is our vision for the future – led by our Vice-Chancellor Professor Gavin Brown working with outstanding Deans like Ron McCallum and Kim Walker. The city is Sydney University's extraversion, its scholastic roots at Camperdown. With your help we can indeed achieve all this.

G F K Santow
Chancellor

“MUSIC AND SOCIAL JUSTICE”

Opening and welcoming remarks [♫]

Colleagues and Friends

Jeff Dunn's "Acknowledgement of Country" depicts the power of words and music to express a special aspect of social justice. There remain unrequited wounds, requiring the salve of reconciliation. The relationship between music and social justice takes us to profoundly complex issues. To what extent does an artist have a moral duty to engage with social issues? Is the duty different for a composer as for a performer? Does music even have the capacity to fulfil a moral purpose, or indeed an immoral one? Or is music at its most communicative simply a thing in itself, an aesthetic experience which, like Beethoven's "Eroica", defies all attempts to have it represent any particular hero's career, Napoleon or anyone else. [♫]

When I look at the depth and breadth of this extraordinary programme that Dr Jennifer Shaw, Professor Peter McCallum and the Planning Committee have put together, I have a sense that those speaking and performing will indeed bring insights to answering those difficult questions. We are shortly to hear Mandawuy Yunupingu on the issues of social justice in the music of Yothu Yindi. His music will speak as eloquently as his words. Then we have Professor Ian Cross from the University of Cambridge to talk about "Music and Social Being", where communal aspects of music are his theme. His topic evokes those lines quoted by Yehudi Menuhin in his conversations with Robin Daniels, taken from the martyred Pastor Bonhoeffer's "Letters and Papers from Prison":

"Music will dissolve your perplexities and purify your character and emotions, and in time of anxiety and sorrow will help you to keep a ground bass of joy."

Menuhin exclaimed that "*music can penetrate all one's defences*"; for it is that most **consoling** of the Arts.

For me, a vivid scene comes to mind from Istvan Szabo's film "Mephisto". The central character, a progenitor of his later "Taking Sides" about Furtwängler, stands lonely in a vast amphitheatre in Hitler's Germany, the betrayer of his fellow actors. He calls out in agony "*Ich bin nur ein schauspieler*" – I am just a little actor! He asks to be excused from moral responsibility, just because he is an artist.

Furtwängler himself was in a more ambivalent position. Unlike other German conductors like Klemperer albeit of partly Jewish background, who fled Nazi Germany or the cellist Pablo Casals who sacrificed his opportunity to play the cello

[♫] on the occasion of 26th Annual Conference of the Musicological Society of Australia jointly presented by the Society and the Sydney Conservatorium of Music.

[♫] J W N Sullivan "Beethoven" (Pelican, 1949) p90: "*As a consequence of his own experience the concept of heroism was related, in his mind, within a certain context, largely unconscious, and the conception could be realized only within this context. This explains why the symphony, which makes so great an impression of organic unity, nevertheless defies all attempts to interpret it as representing any particular hero's career.*"

until fascism was vanquished, Furtwängler allowed himself to be lionised by the Nazis and lived a privileged existence. Yet if you were to ask those Jewish musicians for whom he used his connections to enable them to escape to Sweden, most would be grateful he did. Moral issues are not always clear-cut.

And what of Shostakovich? His obeisance to Stalin and to realist Soviet music not only allowed him to survive. It permitted him to conceal his disillusionment with the Soviet system amid the intensifying darkness and bitterness of his work. The scherzo of his Tenth Symphony is said to be a portrait of Stalin, if indeed music can portray savage sarcasm.

I think also of how artistic creativity, as in South Africa, may actually be stimulated in reaction to a repressive regime, so long as the repression is not total. There is a parallel to Anthony Storr's theory of creativity: he argues that sensory deprivation, if not total, likewise can enhance creativity. I think of Goya and Lloyd Rees, in old age, their canvases seen through a gentle haze of failing sight, their "*inner eye that bliss of solitude*". So too Beethoven's deafness untethered his later sonatas and those last quartets, to a place sequestered in his inner being far from any earthly audience.

Perhaps the most striking way in which music has served to bring down the oppressor comes from the subversion by parody and satire that undermined apartheid. The Market Theatre in Johannesburg was the scene of much subversive theatre though it was constrained by the extent to which the white apartheid regime allowed that expression. Far more risky were the demonstrations of the 1980's depicted in the film "Amandla", when young people did a high stepping dance accompanied by chanting called "Toyi Toyi", aimed at terrifying the country's heavily armed police.

Even more powerful, though from a safer white vantage point, was and remains the artist William Kentridge. He is the son of Sydney Kentridge, QC "*the advocate of the century*". Sydney Kentridge attacked apartheid at its roots at the coroner's enquiry into the shameful death in custody of the Black activist Steve Biko. He used words where his son used art. I remember vividly my first encounter with William's searing depiction of exploitation of black mine workers deep in the depths of Witwatersrand, called "Felix in Exile". His animated drawings in black and white dematerialised across the screen, accompanied by a haunting adaptation of the Dvorak American string quartet. So art and music in combination penetrated our defences.

And what do we say of Wagner and Beethoven, co-opted as each were by a Nazi regime, usurping their music to vicious and perverted ideological ends? While Beethoven more readily escaped that co-option, Wagner is a more ambivalent figure. His oeuvre was allied to anti-Semitic writing which invited exploitation of this kind.

Fear of being enlisted to another's cause can give rise to tension between artistic and social concerns. Some artists refuse to be didactic or to have any overt

 I am indebted to an essay by Professor Jen Webb on William Kentridge "*A beacon against forgetting*" in "*Witnessing to Silence, Art and Human Rights*" edited by Caroline Turner and Nancy Sever (ANU).

message. Yet others have found stimulation in combining the two, like our Professor Anne Boyd. Neither need be wrong.

Let me close by saying how delighted I am to launch this extraordinarily rich programme and to thank Dean Kim Walker for her generous hospitality and continuing inspiration.

G F K Santow
Chancellor
University of Sydney
28 September 2005

Sancta Sophia College – Address for the Chancellor’s Dinner
11 April 2005

Chairman of Council Josephine Heesh

Principal Mrs Barbara Walsh

Sister Mary Shanahan, former Principal

John Sheldon, long-time member of the Council

Senior Student Sarah Steele

and Fellow Students of College

Parents, Teachers and Friends.

and Sharnee Townsend, who gave us reasons to reflect on the richness of our indigenous heritage in her thoughtful “welcome to the country”.

As a child, I read of the inspirational life of Albert Schweitzer. Organist and world authority on Bach, theologian who wrote “The Quest of the Historical Jesus”, and Philosopher, he took up medicine at a mature age in order that he could devote his life to a remote African hospital at Lambaréné. His beloved organ deteriorated in the tropical conditions, his scholarship taking second place to a life of unremitting care for the African sick. There he lived with his wife, far from civilisation and the comfortable, scholarly life he might have enjoyed had they stayed in Alsace-Lorraine.

There is so much in her story that reflects the values of your College, Sancta Sophia; values which your Principal, Barbara Walsh, affirmed when referring to the importance of community and the need to contribute for the good of others not just ourselves – it is indeed the fundamental issue underlying University concerns about VSU. It was Margaret Thatcher who said that there is no such thing as society. She was profoundly wrong if she was equating society to community. Community is what binds you together as a College, and gives you the empathy to understand the needs of others, as exemplified by the poor of Ethiopia.

Just a month ago, a frail but still active woman stepped onto the stage in the Great Hall. Her lifetime, with her late husband, has been spent working in the heat and poverty of Ethiopia. There, she still repairs the lives and bodies of young women hideously injured in childbirth, facing a lifetime of incontinence, outcasts even from their own husbands. That woman, Dr Catherine Hamlin, at 81 still devotes her life as an obstetrician and gynaecologist to these rejected and suffering women. I had the honour of officiating at that ceremony to award her an honorary degree of Doctor of Medicine from our University. That ceremony was the culmination of devoted effort by her old Medical Faculty at Sydney University.

As I shook Catherine’s hand to applause from the University audience, I was conscious not only of the parallel with Albert Schweitzer but of how her devotion to the needy women of North Africa was a multi-faceted spiritual journey. It was set on

foundations that began with her Christian missionary family. With her parents' backing, she completed her medical degree at Sydney University in the 1940's. The Sydney University Faculty of Medicine senior Year Book said of her "*She is sincere, understanding and lives up to her high ideals. We are sure her good influence will always be widespread.*"

My first encounter with Catherine Hamlin was when we dressed up in our academic gowns before the ceremony. We talked briefly about Crown Street Women's Hospital where Catherine had done her resident training. I was able to reminisce about my late father, also a gynaecologist and surgeon. He too had been an honorary at Crown Street. There he encountered young girls whose teenage pregnancies were very much a product of a need for love and affection in an impoverished and unstable background; he wrote an article in the Medical Journal about all that.

In the book about the Hamlins' work "The Hospital by the River" Matron Shaw who ran the hospital is described as a person "*with a mixture of iron will and compassion ... the unwed mothers, the victims of abortions gone wrong, the single girls who had to give up their babies for adoption – the sort of people who tended to be frowned upon by upright citizens – all had a friend in Matron Shaw. ... many unmarried mothers came down from the country to have their babies at Crown Street. Matron Shaw kept a drawer full of wedding rings in her office. When they were admitted she would lend them one, telling them it was their choice whether they told the other patients about their circumstances.*"

Incidentally, there was one aspect of Crown Street Hospital which was rather less attractive. The book relates how Reg (Catherine's husband, having served brilliantly as a gynaecologist at Crown Street) applied unsuccessfully in 1956 to become an honorary. Earlier, he had had a paper published in "The Lancet" on an obstetrical topic, which properly acknowledged the work of others. But the then Chairman of the Hospital Board had earlier tried to have his own article published to similar effect in Australia and been refused. According to the book the Chairman told Reg flatly, when his application was refused, that "*as long as he had influence he would make sure he would never be accepted*". Yet from that setback a lifetime of good was to come, a lesson we can all learn.

I found Catherine Hamlin utterly humble, a gentle person, yet one whose compassionate resolve to continue the work she and her late husband Reg started over 45 years ago, is unabated.

Their Ethiopian story begins in 1959. The Hamlins had answered an advertisement in the British Medical Journal "The Lancet" and went to practice gynaecology in Addis Ababa in Ethiopia, little knowing what was to come.

Catherine Hamlin described that work to an engrossed audience after she received her honorary degree. Her slides were graphic. They showed us the young women in Ethiopia, giving birth in their villages to their first babies, many still-born, at far too young an age. So many of them, unlike those slightly older girls at Crown Street, suffered the dreadful consequence of fistulas. Let me quote from the book about her very first fistula case. "*She was a young woman of 17. The poor little thing had*

been in labour somewhere out in the country for five days and eventually gave birth to a still-born child. She had suffered a complete breakdown of the bladder, and urine was just pouring out uncontrollably. Her husband of course had left her. Her father brought her in and told us she was his only child and he would spend every cent he had if we could only make her better.”

Her slides showed the astonishing advances their innovative work had brought about. They had, patiently, developed techniques to repair these fistulas. Some of those on their staff had themselves successfully undergone fistula repair. One such staff member had been herself successfully trained in the operating technique, winning high praise from a leading visiting surgeon.

The newer Addis Ababa fistula hospital opened in 1974. To-day its surgeons treat up to 1,500 women a year, train many local doctors as well as a phalanx of young nurses aids, and former patients who run the operating theatres, laundries, offices and grounds. But most importantly, as Paola Totaro’s article in the Herald of 12 March 2005 brings out, those former patients who return to their remote villages become symbols of hope and ambassadors for those who come after them.

Moreover, there is now an outreach programme aimed at taking surgeons to Ethiopia’s provinces so that help can come at an earlier stage. The hospital itself has several large donors. Oprah Winfrey has taken the latest projects under her wing including the first outpost last year.

Let me quote from Catherine Hamlin herself. She described how she *“still feels the sting of tears remembering the plight of some of the women, one who had spent 40 years ‘dripping urine’, alone and childless. She describes the women as an ‘incredibly beautiful race’, the young women radiating an innocence and naivety that is irresistible, while the fathers who bring their injured daughters to the hospital for help display a ‘biblical’ courtesy and gentleness.*

She explained how, *“this is a labour of love to me, to be able to cure young women who have been devastatingly injured in labour. When they leave, we give them a new dress, a bus ticket home, but the women also carry a small card that reminds them that as soon as they feel their next baby move, they are to set out for the nearest hospital – some 200 kilometres away in many cases.”*

She describes how one young girl delivered six dead babies. She said *“I promised we would give her a live baby. She came back at seven months, she stayed in one of our hostels, she had a caesarean section, she had a beautiful baby.”*

On 20 March, 2005 I received a letter of thanks from Catherine Hamlin for the ceremony. My reaction was to feel gratitude to her that she had brought such honour to Sydney University.

I mention her story, partly because so many of you with country backgrounds can relate to the sense country people often have, that their concerns are of no interest to the city – not that your backgrounds would have anything like the problems of Ethiopia. I do so principally because Catherine Hamlin is an inspirational figure to all of us. And finally, for a very practical reason: we can help with her work by sending

donations to that Hamlin Fistula Welfare and Research Ltd, PO Box 965, Wahroonga 2076. For those with an interest in tax I should add that donations over \$2 are allowable deductions!

So let me conclude by saying how pleased I am to be with you again. And to wish all of you every success in the vibrant community you enjoy at this College.

G F K Santow

Chancellor

University of Sydney

Postscript: Following this talk, over coffee and after a beautifully played violin and piano duo, a number of College members came over to speak to us about Catherine Hamlin. Some had already read of her work and been inspired by it. One in particular, a medical student, said how much her example meant to her. In that lively, thoughtful atmosphere was the living proof of your sense of community at Sancta.

[Revised 12 April 2005]

THE UNIVERSITY AND SCHOOLS CLUB

- a talk to mark its centenary of Sydney connection in an era of social change.

Marion Pascoe, President of the club, past presidents, committee, members and guests.

☞ This distinguished Club began a century ago, its purpose to “*provide social intercourse and good fellowship among University men, predominantly from Sydney University*”¹. Its motto “*Hic coeant litterati et humani*” [“let those of culture and learning gather here”], brought together good fellowship with lively intellectual engagement. Phillip Derriman in his superb history describes that inaugural meeting of the Club’s principal founders, in 1904:

“All were men and most, but not all, were University of Sydney graduates. Seven of the twenty-five were doctors [including, I interpolate, young Charles Bickerton Blackburn, later Chancellor of the University of Sydney, of whom more later]. “A majority of the others appear to have been lawyers. On the whole, they were young men – generally in their twenties or early thirties, to judge from their graduation years For this was a club for the young bloods of the professions.”

Though much has changed over the years, there has been a consistent thread linking 100 years of Club history. Your President, Marion Pascoe, described today’s members in terms that remained constant over the century: “*well educated, they enjoy the company of others and value different points of view*”. They have outstanding facilities, and camaraderie, in a vibrant community of professionals. It is a welcoming place, reflecting perhaps that it has successfully amalgamated with not one, but two clubs – the Schools Club and most recently, the Sydney Club.

What have been the enduring features of this Club? It was ahead of its time, not only in 1905 but ever since. From its inception, the Club resisted parochialism. It was therefore open to graduates not just of Sydney University but from any university whose degrees it recognised. That proved a formula flexible enough to accommodate not only other Australian universities, but the leading overseas ones too.

What was especially remarkable is that from its very beginning in 1905 there was a complete absence of sectarian prejudice. That was no accident. The University had already for 50 years been established as a secular institution, despite the objections of some early church leaders. Its 1850 *Founding Act* begins with a recital which refers simply to “*the better advancement of religion and morality*”. There is no mention of any particular religion, referring rather “*to all classes and denominations of Her Majesty’s subjects ... without any distinction whatsoever*”; class privilege had

¹ Phillip Derriman “A World within A World”, a Centenary History of the University and Schools Club, (2005) at 144. Much of the club history which follows derives from his account.

no place then or since. Section 20 specifically forbade any religious test for admission either as a student or to hold any office.²

Similarly the old University Club, described as “*exclusive to a fault*”, never manifested that exclusiveness in either anti-Semitic or anti-Catholic prejudice³. Today, thankfully, these barriers in Australia are melting gradually away, so a Governor General need no longer refuse honorary membership on the ground of discrimination against others, at least at most clubs. That said, each generation has its own version of the excluded other.⁴ One hopes too that the excluded allowed in do not in turn pull up the draw-bridge against others, whether from over-enthusiastic assimilation or an exclusionary identity. This week it was suggested by one MP in Parliament, that the Governor General should refuse to become a member of any club that did not admit women. Expect a rush of Governors wanting to join this club!

Subject to one exception, there was no discrimination at the University Club against those of foreign birth either. For reasons understandable at the time, during the First World War, the Club suspended the membership of those with whom “the mother country” was at war. The assumption was that if the mother country were at war with another country, then so too would be Australia. Over the ensuing years, many foreign-born “new Australians” who were university qualified, joined the Club. One was my late father. He joined in 1957 as an Hungarian-born medical practitioner who, fortunately, had the foresight to add to his post-graduate European qualifications a Scottish licentiate. Though of foreign background, from the time he joined in 1957 he felt absolutely welcome at this Club and loved it. He used to lunch here with me, but also on occasion with a variety of exotics. (My late stepmother, an Irish Australian, used to refer to them as “continentals”.) I remember particularly the late Oscar Schmaltzbach, an eccentric psychiatrist who founded the medico-legal society. Then there was Bill Marbach who attended the Harold Park trots in some totally inexplicable official veterinary capacity. He had an infallible betting system based on numerology, which he shared with Dad – neither became rich on it.

That non-sectarian influence of the University of Sydney manifested itself in the Club’s founding Board of Directors. There was at least one Catholic, a distinguished public servant, John D’Arcy, after whom was named a prize for Sydney University evening students. I wonder what he would think of voluntary student unionism, given his strong interest in sport, especially cricket? There was also a distinguished director of Jewish origin, the remarkable polymath John Cohen. He was to represent the first of four generations of his family as Club members. John Cohen obtained a BA in 1879 from the University of Sydney with first class honours in mathematics and then an MA in 1881. He was not only a brilliant student but a talented rugby player, who qualified as an architect and engineer. He moved to Queensland at the age of 23 where he helped found the Queensland Institute of Architects, finally returning to

² An early attempt to impose a certificate of “competent religious attainment” survived from 1854 to 1858 and was then repealed following protest by the professors at Senate’s actions to promote this; see “Liberal Education and Useful Knowledge” - a brief History of the University of Sydney 1850-2000 by Bruce Williams (2002) at 2-3.

³ See also Colin Tatz and Brian Stoddart “The Royal Sydney Golf Club - the First Hundred Years”, at 46 and Colin Tatz “A Course of History - Monash Country Club 1931-2001 (at 33, 48, 81, 203-4, 269) especially his comparison of US country clubs, where exclusivism was such a feature that even one Jewish Club, itself the object of exclusion, would not take Jewish members from Eastern Europe.

⁴ Today it is Asians and those from the Middle East who seek to gain our acceptance. Past history gives hope that they will.

Sydney in his late 20's to become a lawyer instead. Voted into Parliament at the age of 38, at 49 John Cohen was appointed a judge of the District Court, where he served with great distinction. His grandson, the Honourable Brian Cohen, QC, here tonight, was especially welcoming to me at the Supreme Court when, as a solicitor, I joined the Equity Division.

John D'Arcy was no less remarkable. He was not just another director but the most active and influential man on the Board. By 1908 he had become Chairman, a position he was to hold until his death ten years later. That is the more remarkable when one considers that until the early 1950's, in Sydney and Melbourne, many law firms and clubs were effectively closed to Catholics. No Catholic could have a seat on the Stock Exchange, until the late Reg Downing as NSW Attorney General, demolished that barrier so allowing Bernard Curran to acquire his seat. As a bachelor, John D'Arcy no doubt found it easier to devote time to the Club's affairs, though conceivably it might have made him slower to see the virtues of women members!

It was therefore no accident that a club, founded by university graduates of the University of Sydney, should have no impediment of class or religion. It did not need legislation on these matters as a public university, for that ethos was strongly ingrained in its founders. So also its colleges, important as they were, were never allowed to attain the dominance they enjoy at Oxford and Cambridge. Indeed were there legislation to force private clubs to admit members without discrimination as distinct from precluding discrimination once admitted, I believe that would simply force prejudice underground or instigate its uglier manifestations. Keith Mason, now President of our Court of Appeal, once wrote; "*the Flat Earth Society must be free to expel an office-holder who repudiates central doctrine*". That is why our courts are so reluctant to interfere in the affairs of clubs and other voluntary associations, which operate in the private, not public domain. This is save where property is involved or to protect members against expulsion in breach of the club's own rules.⁵

But to place the origins of this Club in perspective, in 1905 university graduates in Sydney were a fairly rare breed. In that year the University of Sydney produced only 146 of them in a city which had a population then of over half a million. So, as Derriman's history relates, by its very nature the then University Club was an exclusive organisation, which no doubt added to its appeal; though its exclusiveness was intellectual and cultural, rather than merely social.

Exclusiveness is a feature we tend to associate with clubs. As Groucho Marx famously remarked: "*any club that wants me, I don't want to join*". Yet why is this so? Are clubs our prop against "status anxiety", like the Chairman's Lounge at Qantas? It is surely no accident that so many list their clubs in Who's Who, especially in England. Or is it as simple as not having in our club, someone we would not invite home for dinner? Or is some kind of atavistic tribalism at work? There is undoubtedly a strong urge to form affinity groups – I remember our children's amazement when they sighted an affinity group of one-legged war veterans on the island of Kos: "there's another one" said our eldest, highly audible.

⁵ Keith Mason, QC (as he then was) "Choosing Heresy - Peter Cameron's Heretic" in 1996 18(2) SLR 257 at 261

The history of clubs in London may provide an answer. Their evolution reflected the changing social mores of English society. The notion of a club as being socially exclusive was certainly not congruent with their wild and scrofulous origins. A club, to quote Aubrey in 1659, was “*a sodality in a tavern.*”⁶ The most famous of these sodalities was the club begun by Sir Walter Raleigh, which met at the Mermaid Theatre. There Shakespeare, Beaumont, Fletcher and Donne were among the members. That riotous assembly of actors and playwrights may have witnessed the tragic early death of Christopher Marlowe, killed in a tavern brawl.

The next generation of clubs tended to be more political like the celebrated Green Ribbon Club in 17th Century London. Members met now in coffee-houses as well as taverns. Charles II, easy going though he was, tried to ban those potentially subversive coffee-houses where they met. But the proclamation was so unpopular that it had to be withdrawn, and the coffee-house became established as a key feature of London social life.

So while gaming and gossip were the principal amusements, politics came to obtrude. London clubs by then reflected aristocratic vices as well as virtues. Membership grew to become a matter of hereditary privilege or special favour. With the later rise of the middle class, the nineteenth century generated a whole flock of new clubs, reflecting their (usually) sober Victorian origins. Still there was the Garrick, a club of the theatre where the only unforgivable sin was to be a bore. When at the Garrick a notorious bore button-holed a well-known playwright with the question “*Aren't you Freddie Lonsdale?*” he replied, coldly, “*No, not tonight*”. It was at the Garrick that Dickens, inventor of the Pickwick Club, finally made up his 15 year quarrel with Thackeray. Two weeks later Dickens attended Thackeray's funeral.

More typical was the sedate St James Club. Michael Ignatieff in his life of Isaiah Berlin tells the following revealing story. “*Thanks to [Berlin's] connection with Churchill, he had been befriended by the Conservative politician, Oliver Lyttelton. He, charmed by Berlin's vivid talk, put him up for membership at the St James Club in the summer of 1950, only to discover that several members were 'determined to have no one of Jewish extraction in the Club'. Berlin immediately withdrew his name and was then proposed and accepted for Brooks Club, an even more distinguished establishment just down the street. But his rejection at the St James reminded him that there were still invisible doors barring entry into the gentile world.*” (Churchill, I should interpolate, had earlier invited Berlin to a dinner at number 10, only to find himself, unbeknown sitting next to Irving Berlin. When he asked Irving Berlin his greatest achievement he replied to a bemused Churchill “*composing *Singing in the Rain**”.

I vividly remember staying at the Calvary and Guards Club in Piccadilly some twenty years ago surrounded by portraits of long-forgotten cavalry charges. Arriving at breakfast, its members were hidden behind a tent of newspapers. The memorabilia on the walls were fascinating. They included a photograph of the valley where the charge of the Light Brigade took place on 25 October 1854. A smaller frame next to it contained a lock of hair from the Duke of Wellington's charger, Copenhagen. It

⁶ I am indebted for this account to Anthony Le Jeune's brief history “The Gentleman's Clubs of London” 1984 at 11-12.

was the Duke who said “*Have a club of your own*” and “*Buy the freehold*”. Wisely the University Club did – but that’s another story.

To complete this digression on London Clubs, the University Club as it was, would have had much in common with the United University Club, founded in 1822 for matriculants at Oxford or Cambridge. In a society where class still mattered, that club and the later-formed Oxford and Cambridge Club reflected both the rise of a powerful middle class and the fact that intellectuals and literary men were not much esteemed in the fashionable clubs at the turn of the century. But their time was coming.

One common feature of London clubs and of their Australian counterparts is that women were at first not admitted at all. Then reluctantly, over time and often for financial reasons, women were allowed to become guests or even associate members, sometimes with access to a women’s annex. Some women set up their own clubs, such as the Queens’ Club. And here I come to a remarkable feature of the University and Schools Club, as it became in 1977 following its amalgamation with the Schools Club. The University of Sydney influence, reflected in the absence of sectarian impediments to membership, at first did not go so far as to lead to the admission of women. That reflected the mores of the time. For was only in 1881 that Sydney University’s Senate resolved to admit women students – though this was a good deal earlier than Oxbridge. Jessie Street in her memoir describes the obstacles eventually overcome, before women had their own hockey field and tennis courts around 1910 at the University, assisted by a reluctant convert, the then Professor of Medicine, Anderson-Stuart.

However in 1977, the University and Schools Club became the first to admit women as full members. It did so by a large majority in December of that year. That was an accomplishment of which this Club can be especially proud, though the path to its achievement had not been straightforward. Two years earlier there had been a failed attempt leading to Gough Whitlam’s resignation. Peter Wilenski, a former President of the University of Sydney’s SRC, led that charge. Perhaps the issue of women’s membership became entangled with political allegiance.

We are told by Phillip Derriman that the first time women were admitted to the Club, even as guests, was November 1930. This was to attend a lecture by Admiral Evans. I am reminded of Stephen Leacock’s hilarious essay “At the Ladies Culture Club, a lecture on the fourth dimension”. Were the Harvard President, Larry Summers⁷, to have written that essay, he might well have suffered even more of an electronic lynching than from his unfortunate remarks about women being unscientific, for which he has since apologised. So if you will let me quote just the high points of that essay, remembering Leacock’s tongue was firmly in his cheek:

“Professor Droon, rising behind the water jug, requested the audience in a low voice to dismiss from their minds all preconceived notions of the spatial content of the universe. When they had done this, he asked them in a whisper

⁷ See article by Adam Cohen of 28 February 2005 in the New York Times “The Lawrence Summers Mess: Harvard enters the internet age”; now Summers’ very position as President of Harvard is under threat, demonstrating the power of the internet in focussing public opinion.

to disregard the familiar postulate in regard to parallel lines. Indeed it would be far better, he murmured, if they dismissed all thought of lines as such and substituted the idea of motion through a series of loci conceived as instantaneous in time.

After this he drank half the water and started.

In the address which followed and which lasted for one hour and forty minutes, it was clear that the audience were held in rapt attention. They never removed their eyes from the lecturer's face and remained soundless except that there was a certain amount of interested whispering each time he drank water.

....

The comments of the audience as they flowed out of the hall showed how interested they had been. I heard one lady remark that Professor Droon had what she would call a sympathetic face; another said, yes, except that his ears stuck out too far."

But what of women in men's clubs, before the barriers fell? There is Brian Cohen's account of the bibulous District Court judge, who hid daily at the old University Club from his termagant wife, vehemently opposed to the admission of women. That misogynist might have been the inspiration for Tom Hood's poem of the abandoned wife:

*Of all the modern schemes of man
That time has brought to bear,
A plague upon the wicked plan
That parts the wedded pair!
My female friends they all allow
They met with slights and snubs,
And say, 'they have no husbands now –
They're married to their Clubs!*

One of the most remarkable members of this Club, David Selby, showed in his attitude to the admission of women that a liberal view did not depend upon age. Many will recall his recent death with sadness. He was a former Deputy Chancellor of Sydney University of great distinction, Supreme Court Judge and New Guinea war hero (though he would cringe at the latter description) and devoted club member. He joined the Club in 1927 as a 21 year old. His death in 2002 meant that he had been a member for an unequalled 75 years. His only rival in longevity are two other Sydney University connections. The late W C Wentworth the fourth was a member from 1931 till his death in 2003. And Sir Charles Bickerton Blackburn, former Chancellor of the University of Sydney, remained a member from the Club's inception in 1905 to 1972, dying at 98.

I cannot resist telling a story about Bickerton Blackburn. He was a founding member not only of this Club but of Royal Sydney Golf Club, playing regularly on its golf

course into the 90's (I mean his age, not golf score). His hitting range had by then degenerated into putting distance. The crowd behind him grew restive, their frustration palpable. Finally, bravely, one ventured "*Sir, could you not play at some other club from time to time?*" To which he replied "*No **other** club would have me*".

Well you have heard enough from me – this is after all a celebration, not a lecture. I have tried to say something of the intimate connection between Sydney University and this Club. That influence, especially early on, was pervasive. However, one of the strengths of this Club, I believe, is that this influence was always a liberating one. When, to-day, professionals are so well-educated, the notion that a club should be dependent upon its members being graduates seems anachronistic. Nor could one fairly treat this club as any longer simply an outpost of the University of Sydney like the Harvard Club for Harvard. Likewise the Schools Club, before it amalgamated with the University Club, no longer represents only the non-Catholic, non-government GPS Schools, a tribute to Bob Blanshard's wise leadership.

This is a great club, a genuine community with unmatched city sporting facilities to suit the young, and squash courts for old John Cheadle still to beat all-comers! This club provides opportunity for networking and mentoring – for both sexes – so important in a professional career in the wider world. The cultural amenity of the city is at your doorstep. Sydney University's Conservatorium under Kim Walker's inspirational leadership is just across Macquarie Street, while our Phillip Street Law School, under Ron McCallum's outstanding leadership, will remain a centre for post-graduate professional education in the city. Sydney University is now a leader of post-graduate professional education in the City. Our ambition is to catalyse a hub, linking some of the City's leading intellectual and cultural institutions. This club, with its professional membership and intellectual traditions can play a vital role. What we celebrate tonight is truly an expanding world within a world, the centenary of an enduring Sydney institution.

G F K Santow
Chancellor
University of Sydney
18 March 2005

Opening of **LARSEN & LEWERS** "New Work"
at **GIG** Gallery Glebe, 17 August 2004

"Tribute to an enduring partnership"

For 43 years, Helge Larsen and Darani Lewers have included us in their creative partnership. This evening, at Maureen Cahill's "Gig" they again speak to us so articulately, in the 75 new ideas, transformed into the individual pieces around us. There is a thematic connection linking those pieces into three groups. Each is derived from a shared, deeply felt exploration of new and old territory, based as always on their deep understanding of each other. First, Rich Pickings in Barcelona, Miro-esque, Gaudi but not gaudy, playful. Second, Blown Away, evoking windblown Chicago skyscrapers, with subliminal reference to being "wasted" by Chicago gunmen. And finally, the heartland of all their work, "Findings in Australia". There, found objects are combined, forming the middens of our shared experience. Sometimes these found objects cross boundaries – like that Danish flint-stone in an abstraction of the Australian desert.

Those of us who, by wearing, "*make a piece of their jewellery complete*" – Helge and Darani's words – share in an intimate connection with the artist which Siri Hustvedt put so well:¹

"useful objects, like chairs and dishes, passed down from one generation to another may feel briefly haunted by their former owners, but that quality vanishes rather quickly into their pragmatic functions. Art, useless as it is, resists incorporation into darkness, and if it has any power at all, seems to breathe with the life of the person who made it."

Their crafted work has that enduring quality. Each piece becomes part of our daily lives, yet never mundane. Who could call a three-finger ring mundane? After all, wearability like the metre of a poem, is discipline to their art, just as a Peter Travis kite must fly. Each piece sets off an intimate dialogue between maker and wearer, shared with the viewer. Their jewellery speaks to an idea, or theme that has seized them. Impetus for this exhibition comes from Helge and Darani's recent travels in US and Europe, blending their Australian and European sensibilities. As Gillian McCracken describes² their creative process, it is by "*reading, observing, listening, recording and layering cultural experience and fusing these impressions into their jewellery*".

A creative partnership of this kind is extraordinarily rare, for it is one which "breathes with the life" not of one person but two. Collaboration in performing music is not so rare. Two pianists playing together suffuse their separate selves into the music, like the Dichters playing Schumann, sharing in that creative act. But such joint performance is ultimately homage to the composer, whose original work it is. An artistic partnership which transcends performance is precious indeed, especially one as enduring as this.

Collaborations between husband and wife or parent and child can be fraught and fragile. First it cannot be a true collaborative partnership, if influence exerted by one on the other remains unequal. Likewise if it be as part of a hierarchical studio with one dominant head; "*while [others] labour in the mine, [he] stamps his image on the gold*". Of couples, one thinks immediately of Frida Kahlo. Her tempestuous union with Diego Riviera never gave rise to any unity of vision, though each drew from the other. Though Frida was earlier influenced by Riviera, she acquired her own distinctive style, as her later portraits attest. Nor did Rodin do other than appropriate from his exploited mistress. In musical composition and performance, Clara and Robert Schumann's collaboration, though it began with such promise, finally foundered, tragically, with his insanity. Clara's own career had been interrupted, though only

partially, by bearing their 8 children. She spent her later life as Robert's musical apostle, occasionally playing works of her own. Though unequal as a partnership, each inspired the other, giving romanticism its dual dimension.

With Helge and Darani we have the miracle of an extraordinarily productive partnership, one which remains fresh and original over 43 years. Darani was originally pupil to Helge but became his co-equal in every respect, though each have complementary strengths. Something remarkable must therefore be at work for there to be still such "rich pickings". Certainly each brings a rich endowment to the joint enterprise. Helge with his European roots, from a craft design tradition of greater antiquity than that which they pioneered in Australia. Darani, daughter of artists Margot and Gerry Lewers, brings her own Australian sensibility to what has become their shared sense of place. It is not just in human biology where genetic diversity enriches its progeny. Its mystery of genetic mutation from the environment corresponds to the artist's creative adaptation to the observed world by sudden creative leap. Helge and Darani have long combined their rich inheritance, sharing their creative leaps in a reciprocal process that is part of that mysterious alchemy of artistic creation.

Interestingly, each were temporarily diverted from joint projects by their independent though mutually supportive pursuit of social and craft issues, the latter an enduring struggle for the proper recognition of craft in Australia. Their returning to work together in 1985 evoked this comment by Gillian McCracken from her earlier retrospective Survey:

"The direction established by Lewers in her work between 1982-85 became a major influence on their joint practice. Gradually in these [succeeding] decades their perceptive sensibility to the shape, form, materials and colour of a culture has provided thematic direction for their work. While this produces a rich source of decorative elements, their interest in the cross-cultural connections present in many societies provides the innovative impetus. Making connections between cultures, with the wearer of their jewellery, and in their community is a fundamental essence in their practice."

That they have common values is not to suggest their individual expression of them is the same. In the pre-1985 period (1981-84) Darani and her sister Tanya Crothers would collaborate on projects whose expression was more overtly didactic, though never polemical. These were political and social issues about which they felt strongly. Helge would have felt no less strongly. But when later Helge and Darani came to express particular ideas they would do so within an aesthetic whose essence resonates in metaphor and evocative abstraction, yet connected to the landscape and grounded in the daily use of their creations. Their partnership works because they have not suppressed individual differences but blended them in their craft.

Each of this evening's thematic series engages with ideas and social issues. Each series is itself linked to the others through common concerns, especially the interaction of built and natural environment. Had Helge and Darani's values not been shared ones, such collaboration would not have been possible. But it goes further. There is a temperamental complementarity between the two. We think of Darani as spontaneous, intuitive and fiercely combative in pursuit of their joint convictions, though never from self-interest. By contrast Helge is empathic and contemplative, his way to mediate outcomes in calm and deliberate fashion. That may partly reflect a cooler Scandinavian temperament, but also his experience as a teacher and leader at the Sydney College of Arts, one of Sydney University's brightest jewels.

I wonder though, whether there is not a deep connection between Helge and Darani's sense of the **social** value of their craft, and their own intimate expression of that in the collaborative process of its creation. They do so through the constant partnership of their daily lives, in which we are fortunate to participate as friends and wearers.

That such a partnership has had such artistic fecundity bespeaks qualities of character and intimacy of a rare kind. Like the Webbs, they have achieved more together than either could apart. They told us in their 1986 retrospective that it is through their common values that they have the potential to create stronger and more diverse work as a team.³

So to-day's exhibition is cause for friends and followers to pay homage to an enduring partnership; one which continues to bringing pleasure while provoking us out of complacency. Let us now enjoy it together with Helge and Darani, and have them tell you more as you look at each piece.

G F K Santow

Chancellor

University of Sydney

17 August 2004

¹ Siri Hustvedt "*What I Loved*" p257. She is married to another renowned contemporary novelist, Paul Auster. They on occasion dedicate, as in this case, their books to each other. Their writing is, according to Andrea Stretton, subtly referential to each other and their shared experience, yet it remains independent, save for one early jointly written work.

² Gillian McCracken "*Larsen and Lewers: a Survey 1986-2002*" p5.

³ *Helge Larsen & Darani Lewers, a retrospective* National Gallery of Victoria, 1986.

Professor Jonathan Stone – unveiling a portrait

Twenty years almost to the day, Naomi Bern's portrait of Professor Julius Stone, Jonathan's father, was hung in the showing for the Portia Geach Memorial Award for women painters. Like Rodin's wife and women lawyers, female painters have not always been fairly treated. At a small reception when the portrait was unveiled, Julius kept quietly going back into a side room for yet one more look, while trying to excuse his actions by saying "*I'm not really vain*". I believe that portrait hangs still in Jonathan's office, who is mostly definitely **not** vain as Robert Hannaford's careful likeness so truthfully depicts. Though he shows a dark side, there is nothing saturnine or soigné about Jonathan, no clothes' horse as his daughters attest.

It is fitting that this portrait is unveiled in the Anderson-Stuart Building. It is a worthy addition to our collection of portraits of great anatomists and physiologists hanging outside this room. Indeed reminiscent of the 15th century portraiture of Fallopius and others in the School of Anatomy at the ancient university of Padua, where anatomy began under the critical shadow of the Church.

We have too a wonderful photographic portrait of Jonathan wearing a hard-hat on the roof alongside the statue of Asclepius. He has a gap-toothed grin reminiscent of Murillo's portrait of the cheeky boy eating watermelons.



Jonathan, the very antithesis of a self-promoter, put so much of himself in the restoration of this building. He raised the funds for its restoration, ripping down the ugly neon lights in the corridors and the exposed electrical cabling, starting with the refurbishment of our great Museum of Anatomy, the Shellscheer Museum.

The funds for that restoration came very much because Ann McIntosh, the widow of Professor McIntosh, Jonathan's distinguished predecessor by two as our Challis Professor of Anatomy, found in Jonathan a kindred spirit. She gave generously in response to his pleadings.

Jonathan raised a massive \$1 million, ringing every medical graduate by unrelenting hard work, leavened by the flair of his "adopt a gargoye" campaign.

But that is Jonathan; extraordinarily assiduous and patient in achieving incremental advances, whose cumulative effect, when revealed, achieves a critical difference. That approach demands the necessary time to pursue anatomy and its correlates with the depth and rigor they require.

There is another side to Jonathan, more mischievous than his father allowed himself to be. (Though even Julius was not above finding a mordant correlation between diminution of his powers and the perceptive falling away in his production of footnotes as well as children.) In Jonathan's case, three brilliant daughters survived the embarrassment of their father being banned from Ascham parent-staff meetings because he so teased their teachers. That said, Rowena Danziger, here to-day, knew his worth!

Great portraiture depicts the eyes as window to the soul; *“les yeux sont la fenêtre de l'âme”*. They do here. And it is therefore fitting that Jonathan's neuro-anatomical research has centred on the eye and in particular upon the neural correlates of vision. For a lay person like myself, Jonathan's interview in 1996 for the Australian Academy of Science's video histories of Australian scientists gives a vivid, accessible picture of his work. There is much too of a personal nature, as when he met Margaret, his wife, now Justice Margaret Stone, in Professor Peter Bishop's physiology lab. There, over an anaesthetised feline, she taught him there were more ways than one to skin a cat. In his words *“I've drawn very deeply on her intellect as well as her warmth as a person”*.

That interview casts light on the way in which his wider interests have ramified from his initial concentration on vision. These encompass Alzheimer's disease, animal welfare, and population biology, the latter the scene of many forensic debates with his equally articulate daughters.

The truth is that Jonathan is multi-faceted; an intellectual engaged by big ideas. He brings to bear strong but not dogmatic convictions. In that way, he was the product of, in his words *“tough people who had come through tough times, a very strongly Jewish family”*; an individual *“cradled with warmth, intellect and no nonsense”*. His first love was English. He writes with lively elegance and rigor. I can remember still a talk he gave more than 20 years ago in Occam's Razor, on artificial intelligence. It inspired my polymathic judicial colleague, David Hodgson, then writing on the mind, to make contact. Jonathan remains deeply involved with the philosophical bases of science.

For him the history of anatomy is to be found in physical anthropology. When early on he travelled to Europe, he belonged to what he called a victim group. Yet when he came back to Australia he felt himself a member of an oppressor group so far as our indigenous population was concerned. Let me quote what he says about the sensitive, firm and balanced way he resolved the issue of aboriginal remains in our anatomy museum:

“I have done everything I can to fit in with the Aboriginal claims and always will. But I must say that the Aboriginals and all indigenous peoples claim – absolutely rightly – to be part of the human family and to deserve recognition. But if that is true, then

their history is also my history, because I am part of the same family. So the claim of the most extreme to exclude people like me or white anthropologists from the study of these bones seems to me to be flawed. And I am sure that will come to be accepted. I hope that we can with care and responsiveness work through to that position, but it will take a few years.”

Another of those multi-facets is Jonathan’s extraordinary capacity as humane administrator, inspiring research creativity in others, while retaining his own research output undiminished. After a highly distinguished career at Sydney University as Challis Professor of Anatomy, Jonathan is currently director of the Research School of Biological Sciences at the Australian National University with responsibility for some three hundred researchers. We are glad he is a friend at ANU, for our relations with that university, as the Vice-Chancellor observed, are especially close. For a taste of Jonathan’s management style and gentle humour, let me quote a recent email, where confidential University numbers were posted accidentally on the website. I quote:

“Dear Colleagues

The posting of u numbers on the website was an error.

Which of us doesn’t make errors?

I have yet to be advised that anyone’s privacy has actually suffered. OK there was potential – but how interesting are we anyway?

But some of you are writing letters to colleagues, demanding one thing and another; and copying the demands and complaints to the central parts of the University.

Please calm down about it. No harm was meant; no harm has been done.

It has been fixed.

There is a lack of generosity in these complaints.

We are a community. We have to live and work together. Inflate one colleague’s error into a firestorm and you invite retaliation, when you slip up.

So be kind to each other.

Or I’ll ...

And I only went away for a day!

J”

If only the same tolerance were to be found at universities in so many other areas, where conviction is often pretext for mindless vituperation under the guise of vigorous debate!

Let me now close with these words from Jonathan’s medical daughter, Emily, where she speaks of him as researcher, teacher and source of inspiration:

“He has always been a dedicated researcher. That’s an easy thing to say about many people, but about my father it means the following: dedication to the field, not for reasons of career progression or personal fulfilment, but because it is important to get it right. His dedication was obvious - he goes to his desk every night, because he likes it. Not because he has to – not because of deadlines - but because he can’t stop thinking about the project or experiment or idea. He is a quiet man and has a

quiet passion for his work. This applies to all aspects of his work. I know that he does not let an idea go until he has worked through it thoroughly. He is scrupulous about his manuscripts and delighted with interesting results, (when we lived at home he used to drag us down to his desk to look at photographs of retinal cells). He is also dedicated to his research team. I know that he is a great boss, supporting and encouraging his students and researchers much, much more than many others do. His research is his lifework. It does not exclude other things, but he is inseparable from it.

.....

What can a daughter say. Lots of things about my father inspire me. In his university career, perhaps one thing stands out. The year that none of his grant applications were funded. None. This almost never happens and is a huge blow to a research scientist. I know it hurt badly, and I remember him being miserable (it was a long time ago now). But he just kept working and writing and teaching and he climbed out of that bad patch and reached heights that didn't seem possible.”

Those heights of his lifetime's work in vision research were recognised in Jonathan Stone's award this year of the prestigious The Ludwig von Sallmann Prize.

G F K Santow
Chancellor
29 July 2004

Law Practice To-day*

I shall start with two stories. The first takes us back forty years. To set the scene, picture the Australian Embassy holding a grand diplomatic party in a former African colony. The African Minister for Justice engages our Ambassador in earnest conversation. “Do you know” he says, “that one of your countrymen was appointed a Magistrate eighteen months ago? He has absolutely transformed the whole judicial scene here. He is dispensing justice with a wisdom and despatch we have never experienced before!”

The Ambassador, intrigued, asked, “Who is this person?” The answer comes back, “Peter Clyne — quite the most marvellous lawyer we have ever come across here.”

The Ambassador turns white. He remembers Peter Clyne only too well as the barrister who had been struck off for unethical conduct, had gone into and out of bankruptcy and had written a number of entrepreneurial articles on escaping what he called “the fiscal fiend”. A lawyer of consummate brilliance and ingenuity. But, as the late Professor Parsons from our shared University of Sydney LLM tax classes could attest, appearing to lack a moral governor on his engine. Clyne spent his declining years exploiting tax loopholes and the *Landlord and Tenant Act*, adding much to the law reports.

The Ambassador enlightened the Minister for Justice. He in turn sadly sacked that defrocked paragon, thereby losing quite the best performing judge that poor African principality ever had.

My next story is right up to the minute. I leap from Africa forty years ago into cyberspace. Did you know that one of the most frequently visited “knowledge exchanges” on the internet is a site called “AskMe.com”? Set up in February 2000, in its first year the site had more than ten million visitors. It is a place for free advice, where accountants, lawyers and

* UNSW Law Society Speakers' Forum 2001 talk given 9 August 2001

financial consultants mingle their licensed knowledge with experts in sports trivia, fortune telling and body piercing. The most popular field of advice is law. Here though the experts are self-appointed, ranked by the people who sought the advice.

I want to tell you about its leading star, who described himself as “Justin Anthony Wyrick, Jr”. He gave as his cyber-name — “LawGuy 1975”. Even in his first year he was rated No. 3. He would give instant responses to questions like this,

“Can you be found guilty of theft if you keep something that you find in your yard, even if the owner asks you to return it? For example — a neighbour’s dog enters your property — can you keep the dog?”

The answer: “No.” You cannot keep the dog. It constitutes theft as you have stated. You must make some sort of attempt to return the property missing.

Depending on the value of the dog will determine your sentence, should you chose not to return the dog.

But it isn’t worth a couple of months in jail for a dog, is it? You should make a reasonable attempt to return the dog

If you have any questions, please write back!”

That answer was rated with five stars.

And who, you might ask, was LawGuy 1975 or Justin Anthony Wyrick, Jr? The answer, Marcus Arnold, fifteen years of age, a great big bear of boy, six feet tall and weighing around 200 pounds. It was normal to Marcus that he spent most of the time he was not at school on the internet, giving legal advice to grown-ups.

The writer, Michael Lewis, described this phenomenon in a fascinating article in the New York Times Magazine of 15 July 2001 from his new book "Next". He tells us that, "in a few weeks, Marcus had created a new identity for himself: "legal wizard". ... He had no legal training, formal or informal. His doting mother, asked how he got his expertise, replied, "he was borne with it", "Marcus has got a gift". This was true only up to a point though. Basically he got his information — for that was the kind of law he was purveying — from watching a TV show called "Court TV" and websites that he browsed. There were no law books around.

When it finally came out that he was unqualified, an extraordinary series of events occurred. First, he faced a barrage of extreme email hostility particularly from lawyers who also worked on the site. But then remarkably, soon after changing his description to "fifteen year old intern attorney expert" his huge following of readers came to his defence with a flood of supportive emails and calls. Within two weeks of his new description, he went from No. 3 expert to No. 1, answering around 110 questions per day.

What do these stories tell us? One thing they have in common, is what sociologists call "role theory". The role theorists argue that we have no "self" as such. Self is merely the mask we wear in response to each social situation in which we find ourselves. Anonymity in Africa offered Peter Clyne a chance to practice law in his magistrate's mask, free of his past, perhaps even rehabilitating himself. The internet allowed unqualified Marcus to give legal help, masked by the persona he projected onto the screen.

You may think Peter Clyne's law without values merely the accoutrements of the sharp clever lawyer. But a recent iconoclastic book on Justice Oliver Wendell Holmes by Albert Alschuler sought to portray, unfairly, his profound contribution to the law in just those terms. Mind you, Holmes in his writings did make himself vulnerable. I think, particularly of "The Path of the Law" where he sought to abolish "duty" from the legal lexicon.

"Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called

primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.”¹

Then there were his views on eugenics hardly to be excused as merely anachronistic, epitomised in that paragraph from his judgment in *Buck v Bell*,² where he said: “the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes ... three generations of imbeciles are enough.”

In truth, despite such aberrations Holmes was a great judge of profound moral concerns. He it was who described the law as “the witness and external deposit of our moral life”. No, what Marcus Arnold, *LawGuy* 1975, was about was *not* profundity. But nor was he amoral. No, what Michael Lewis drew from this phenomenon — one which he contrasted with the old family law firm dinosaur that his father managed — can be epitomised in these propositions.

First, the practice of law was succumbing to a general force, the twin American instincts to democratise and commercialise. These are the two forces that power the internet and in turn are powered by it.

Second, the knowledge gap between lawyers and non-lawyers has been shrinking for some time, and the internet is closing it further. “A large component is just information.

¹ Albert Alschuler “Law without Values: The life, work, and legacy of Justice Holmes” (the University of Chicago Press, Ltd, 2000) at 172.

² 274 US200 (1927) at 207.

Information by itself can go a long way to help solve legal problems.” says Richard Granat, co-chairman of the American Bar Association taskforce on “e-lawyering”, attempting to explain the boom in do-it-yourself internet legal services. Information moreover, purveyed in common sense answers, free of legal jargon. So legal advice is democratised, free over the internet. And supplied not just by qualified lawyers. Students, cops, even ex-convicts went on to message boards to help people with their questions. Many of them brought much needed common sense, so often absent in more learned advice.

The final proposition is the one that takes me now to the commercialising which threatens all law firms, big and small. I can do no better than quote Michael Lewis: “Once the law became a business, it is on its way to becoming a commodity. Reduce the law to the sum of its information, and, by implication, anyone can supply it.” Add to that the tyranny of billable hours and you have the greatest incentive to maximise the gathering of undiluted information, rather than crafted advice.

And that leads me to what you have advertised as my topic — the truth about big firms, though my remarks are not limited to them. But first a little retrospection. When I joined the firm then called Freehill, Hollingdale & Page 40 years ago, I was an eighteen year old articled clerk. The firm was small, growing and dynamic, inspiringly led by a man with far-sighted and humane understanding of where the law needed to go — Brian Page. Women were welcomed as partners. Talent and character were all that counted. The quill pen was replaced by electric typewriters in turn replaced by word processors and then computers. We understood much of how business people operated and thought, leavened by the boards on which the senior partners sat and sharpened by the brilliant commerce/law graduates soon to come out of the Law Schools. I think too of Sir Norman Cowper at Allens, whose influence can be traced through a series of great lawyers to Justice Gummow on to-day’s High Court and Justice Barrett on my own. Does the business of law still leave room for those lawyer/statesmen, or are they now an anachronism?

So I ask what has happened in that transformation? Akin to all great art movements, commercial law firms, big and small, are at risk of taking that commerciality too far —

into what might be called its extreme or manneristic phase. At some point, the line between being businesslike and becoming a mere business devoid of professional values will be crossed.

Nowhere is this seen more clearly than in the current rush to enable law firms to incorporate. That rush is not actuated simply by a desire to limit liability. That can only be achieved by legislation, which works as well on a traditional partnership. Rather it is to facilitate that last step — to become that oxymoron a “professional incorporated business”. But what will happen once clothed in corporate garb? Will business clients not ask themselves why it is they are going for advice to another business rather than real lawyers? Why not advise themselves, through in-house lawyers? Or better still, go to a one stop shop in the form of an accounting firm that can provide advice on everything from business management to legal risk. In saying that, I do not for one minute criticise the quality of law furnished by the large accounting firms. I merely ask why law firms would not wish to differentiate themselves, if they wish to compete?

As to incorporation with external shareholders, he who pays the piper may call the tune, whatever ethical and professional strictures are laid down by law. For detecting their breach will not be easy. There is an inherent conflict between serving one’s client in a professional manner and meeting the demands of external shareholders. They may find pro bono work or observance of legal ethics at best a necessary evil, at worst an unacceptable drain on profits.

Let me say straight away that I do not consider that law firms have yet reached that point of being a pure business. Enlightened self-interest should dictate otherwise. Nonetheless, the signs are there. It is vital that you lawyers-to-be, press hard the law firms that seek to engage you, with your insistence that you remain part of a great legal profession, businesslike but not an ersatz business. Then when they do employ you, do not let them forget that commitment. Like the pursuit of happiness, profit is more likely to come if it is not in the forefront of your thoughts.

One of the remarkable distinguishing features of the University of New South Wales and its great law school, founded by an enlightened group of professors led by Hal Wootten, is that it has never lost that sense of altruism. It is epitomised by the Kingsford Legal Centre and its concern for social issues.

One of the best accounts of how our society is changing, with often imperceptible shifts in ethics, comes from Paul Kelly's St James Centre annual lecture of four years ago. He quotes Bob Ellis:

“In 1922 an old man could die unvisited in a single room in a mouldy boarding house yet feel content. Content because he knew that in his life he had done his duty ... to his country, his party, his school, his family, his neighbourhood or his religion ... And then he could pass on into the great dark justified, in a way complete.

It is not like that now. For over the intervening years and generations the idea of Duty has somehow faded and somehow been replaced with the idea of Success. You now die justified only if you have been a Success. And the measure of success has so altered as to exclude from its embrace almost everybody.”

That leads me to another aspect about legal practice, namely the role of women in it. Kathleen Sherry, senior lecturer at this law school, wrote a challenging paper entitled, “When Mum's a Lawyer: Maternity Leave in the Legal Profession”. Her thesis is that child-rearing is one of the exclusions from that “measure of success”. Let me quote what she says about reconciling child-rearing with more flexible work hours. I would add that modern technology in the form of the computer and video-conferencing, should make it easier to work at home. But without restraint, it may render the home not a refuge but simply an extension of the workplace.

“The feminisation of the legal profession is a much discussed topic, particularly in relation to the success and status that women have, or have not achieved in the profession. A vital factor affecting our success is our ability to bear children. It is not self-evident that this should affect our success, but it does. This is because the profession, like many work environments, has not yet adjusted to the fact that its workforce is no longer exclusively made up of men with no childcare responsibilities. Our work environment has altered very little to accommodate a whole raft of workers whose lives are fundamentally different to that of the traditional (male) legal employee. Work hours are very long, part-time work is still very much the exception rather than the norm and parental leave entitlements are minimal.”

Her thesis is that

“If significant numbers of parents insist that they could only work part-time while their children were young, employers may just have to meet those demands. Excessive work hours have become the norm in the profession, not simply because employers demand them, but because employees are prepared to do them. We are not totally powerless pawns in the employment game, we are partly, although certainly not wholly, responsible for the conditions in which we work. To the extent that we are responsible for those conditions, we have the power to change them.”

I hope I do not **come across** as an impractical idealist when I criticise the tyranny of billable hours. It carries **the insidious** danger of working impossible hours, thereby to justify higher salaries at an ever earlier stage in a young legal career. Is it any wonder that too many young lawyers, disillusioned, though well paid, are increasingly leaving the profession? Kathleen Sherry reminds us that there are choices to be made. The firms you enter can be encouraged to allow greater flexibility in work hours for those who want that and are prepared to forego maximising their earnings for that privilege. I venture to suggest that the

firm which provides that flexibility will attract many of the best and brightest of you; those who are not unidimensional, who are prepared to work very hard when necessary but also seek a balance in life.

I have said so far nothing about the Bar. One of the revelations to me when I became a judge was the quality of the junior Bar. As a partner in a large law firm, we briefed the top silks and had much less to do with the up and comers. Moreover, especially in my last few years as a solicitor, I found it increasing difficult, though not impossible, to pursue transaction work whilst remaining close to my legal craft. Not so the young lawyers who chose the Bar. For they are constantly researching points of law that those who brief them are too busy to look up. Of course that is an over-simplification. The best young and older commercial partners in the law firms that I encounter have not lost their craft. But the danger is certainly there, particularly with excessive specialisation and a willingness to surrender too much of the legal and financial design work to the merchant bankers and financial engineers and sub-contract the law. If you are not careful, there will be nothing left but the legal equivalent of drafting detailed plans and specifications, however necessary they are.

Let me turn now to the longer term view. Many of you are destined to be leading merchant bankers, management consultants, business people. One of Sydney University's law graduates, James Wolfensohn, now runs the World Bank. Others will stay as legal practitioners. Some indeed may want one day to enjoy the satisfaction I have enjoyed from a transition to the Bench.

A question I am often asked, is whether solicitors or academics should have any expectancy of appointment, I can do no better than quote Sir Anthony Mason in an essay published in 1997. He expressed the view that,

“The professionally skilled barrister is more likely to be a successful judge than lawyers from a different background of experience.”

But he went on to note that, “we already have some examples of solicitors, academic lawyers and government lawyers who have proved to be successful judges.”

He pinpoints as the essential ingredient of that success,

“An intellectual capacity to acquire in a relatively short time the requisite professional legal skills appropriate to judicial work.”

Some women may choose the solicitor’s or academic’s side, concerned that time out to have children may thereby be easier to manage, though this is a problem to which the Bar has also wisely directed its practical concern. Sir Anthony Mason’s fair-minded comments will give some comfort. As you would all know, a former professor from the University of New South Wales, latterly a partner in my old firm, Margaret Stone, is now a distinguished member of the Federal Court. Two of her children, borne during her busy career, are already distinguished young lawyers. So there are some role models!

But diversity in judicial appointment goes deeper than that. The Bench must always be appointed on merit and that cannot be compromised. But one very relevant strength or merit for any court as a collective whole is that it not be monochrome. There must be those essential qualities of legal distinction and those qualities of character and temperament called for in judicial office. But they will best flourish in a court that brings together a diversity of experience, both in gender and interests, background and training. It is no accident that Justice Gaudron brought her insight to the valuing of womens’ work in recovering damages referable to unpaid home care. ³

Let me conclude with what I said at an address for the Australian Judicial Orientation programme five years ago:

“Transition to the Bench is surely least painful, most satisfying, if we welcome it as a period of reflection. Reflection both about the case in the

hand and the process in which we are engaged. If I may draw upon the metaphor of a public hospital, we should see ourselves as a potentially healing operation operating under a constrained budget, our patients often poor. It is to be conducted with as much humanity and individual care as that traumatic encounter will allow, but necessarily with an eye to efficiency and cost, without sacrificing fairness."⁴

To that I would add for balance what Pierre Ryckmans (writing as Simon Leys) said in one of his many illuminating footnotes to his translation of the Analects of Confucius (at 176) invoking Montesquieu: "for society, compulsive law-making and constant judicial interventions are a symptom of moral illness." All of that takes me back to my starting point. It is that law without values, law that is merely information, is a stale and profitless endeavour. You as its future leaders can influence the practice of law in a more altruistic direction.

G F K Santow
9 August 2001.

³ Van Gervan v Fenton (1992) 175 CLR 327 at 350.

⁴ "Transition to the Bench" (1997) 71 ALJ 294.

CLERPing the Panel — Blue Ribbon Jury or quasi Court?

Paper given to Australian Corporate Law Teachers
at Wollongong University 12 February 2000

A. SETTING THE SCENE

1 Three years ago, one could fairly say:

“The Corporations and Securities Panel, used three times in seven years, remains ineffectual in curbing tactical litigation. With powers inadequate and design fundamentally flawed, the Panel has failed its promise, despite the standing of its appointees. It should be reconstituted ... That demands rule-making power and a broad principled approach based on the culture of the London City Panel ...”;

“Taking the Legalism out of Takeovers” by Santow and Williams (1997) 71 ALJ 749.

2 The vision of those promoting the Panel was that it would shed the legalism besetting the courts. The reality was very different. The Panel has faced more legalism than the courts have generally allowed, but they have the advantage of established authority. And it may be hoped that Australian courts across the nation, applying national Corporations *Law*, are now increasingly operating with knowledge of what each court is doing,¹ no longer willing to lend themselves to the parties’ tactical manoeuvres in takeover litigation.² The Panel has inevitably been mired in legal challenges. These if anything will increase — witness earlier *Precision Data*, *John Fairfax/Merrill Lynch* and last year six actions in *Wesfi*³. Indeed the new powers of the Panel, to come into effect in March this year, will provoke even more litigation around the Panel. We will seem a long way from the non-legalistic culture of the London City Panel. Its authority is to-day is essentially

¹ Witness the initiative for a national data base of corporations law judgments through Melbourne University’s website, regular liaison between judges in each state and the Federal Court handling the corporations lists and uniform harmonised corporations rules.

² For example in denying injunctive relief where misstatements or omissions in takeover documents are alleged which are either footling, or better addressed by corrective material and the right to rescind.

³ Application by ASIC in relation to *Wesfi Limited* 12 October 1999 and note also 1999 WASC 175, 1999 WASC 183, [1999] AATA 662 (6 September 1999), [1999] FCA 1436, W 83 of 1999 (13 September 1999) and W 94 of 1999 with W 96 of 1999 (14 September 1999).

unquestioned. Even if the EU brings it under a statutory framework, I venture to suggest this will make little difference to the UK courts' hands-off stance.

3 The theme of my paper to-day is about the auspices which attend the birth of Australia's "new" Panel, what they portend in the short and longer term for the culture of corporate regulation in this country.

4 In October last year, the CLERP legislation finally passed the Senate. Amongst other renovations, it seeks to transform the Panel with new powers, operative in less than four weeks. While it cannot yet emulate the London Panel in *modus operandi* and authority, the new Panel represents a major advance on the hobbled Panel of the past. That the old Panel last year performed as well as it has, most notably with the *Wesfi* decision, is a tribute to those that have had to grapple with its high hurdles for access and legalistic statutory procedures. But of course that decision did not fully test the Panel's authority, because in the end it decided *against* intervention. It held that no "substantial interest" had been acquired to trigger its powers of intervention. Those who litigated its every move — even on the ground of the interestedness of one Panel member — could rest easy. What I want to do to-day is sketch some of the problems with which the new Panel will have to grapple, where its powers will be tested. In doing so I point to some critical points if success is to be achieved. In this paper, I distinguish the post March 2000 Panel as "the new Panel" and term the present Panel "the old Panel".

5 My starting point is this. If all the new Panel achieves is to mimic the court process, it will fail. Of course it must still provide adequate procedural fairness, but conducting its procedures "with as little formality" and "in as timely a manner" as "proper consideration of the matters before the Panel permit" (Regulation 13 of ASIC Regulations). The commercial community wants a first-rate Panel, not a second-rate court. The Panel is essentially a blue ribbon jury — drawn from a fluctuating group of 30 members — representing informed commercial opinion. It is required to adjudicate swiftly, fairly, accurately and consistently on takeover disputes. And for this it needs continuity in its panels especially for appeals and a first rate executive, working co-operatively with ASIC though necessarily independent when it comes to referrals. Finally, it needs good leadership. Simon McKeon, its President, who is a leading merchant banker has set

about providing that, recognising that as a director of Macquarie Bank, he will be limited in the hearings in which he can participate.

6 The Panel's executive comprises two ex ASIC experts. There is Nigel Morris, its acting executive director, and George Durbridge its acting general counsel, plus a younger lawyer co-opted from a leading Melbourne law firm. An early test for the Panel will be its capacity to devise internal procedures backing the perceived competence of its executive so as to enable it to emulate the London Panel's practical problem solving capacity. The London Panel solves 90 per cent of its potential or actual disputes at executive level, leaving only a handful each year for the actual Panel members at a Panel hearing; see attached statistics in Appendix B.

7 What will happen in the early days of Australia's Panel, if the Panel executive say "no" in a contested takeover to someone seeking either an attacking or defensive advantage? It must not be forgotten that in the early days of the London Panel in the 1960's, Morgan Grenfell successfully defied the then Panel led by a weak chairman. It only later showed its steel, winning the respect of the market place after some tense encounters. In Australia's litigious atmosphere, with no city club rules or disciplines, it would be expected that where the stakes are high enough, a "no" from the Panel will be challenged. Then the Panel may on occasion not wish to be bound by what the executive has said it will or won't do. Expect early on Panel procedures that try to give the executive the Panel backing to give authoritative market guidance whilst leaving the Panel some leeway in a contested situation that may emerge. Whether that will be possible remains to be seen. We should expect the Panel will evolve its views in light of the prevailing climate and experience. The position may be very different after the dust has cleared from the first cluster of challenges. The Panel's legislative underpinning may need revisiting in light of what is learned.

B. THE EMPEROR'S NEW CLOTHES - ASPIRATION AND REALITY

8 On 22 March 1999, just a year from the time the new Panel is to commence, Peter Lee, Deputy Director General, UK Panel on Takeovers and Mergers, gave evidence before the Joint Committee on Corporations and Securities. The most important thing he said was

this: “If you are going to have a Panel system, it is incredibly important that it is given as much power as possible to be the ultimate referee in dealing with takeover bids as they move along. ... I think it should have all conceivable powers to do this job properly and be able to make decisions upon which people can act.”

9 In the earlier quoted ALJ paper, we pointed to the convergence between Australia’s statutory Panel and the inevitable statutory underpinning required by EU directives for the London City Panel, replacing its present consensual base. The new Panel has still to be fully clothed — the devil will lie in the detailed regulations still to be promulgated. It will be critical for the Panel’s success that it shape them appropriately.

10 When one turns to the expanded powers of the new Panel, what do we find?

(a) An expanded remit — new s657A

11 In the last tranche of amendments made in October last year, the Government at last faced up to a fundamental anomaly in its earlier CLERP Bill. If the courts are to be ousted by a privative clause during the time a bid is extant, the Panel has to have the remit and powers to fill the vacuum. To leave the Panel simply with the power to deal with breach of the Eggleston Principles would have created a gaping hole. Attached is a point by point comparison between the new Panel’s powers and the old. The power is to declare circumstances unacceptable “in relation to the affairs of a company” (widely defined in s53 of the *Corporations Law*, if it applies, as it can by regulation). The Panel needs to decide that the circumstances are unacceptable having regard to their effect on:

- control of that company, or “another company” (a limiting term which does not include a company incorporated outside the jurisdiction),⁴ or alternatively
- an acquisition of a substantial interest in that company, or another company,

or because they constitute or give rise to a breach of Chapter 6, 6A, 6B or 6C.

⁴ See unpublished paper by George Durbridge given on 10 November 1999 and subsequently revised, under the title “Overview of the New Provisions of the Corporations Law and the ASIC Law affecting the Corporations and Securities Panel”; he suggests that the term be replaced by “body corporate” so as to catch all companies wherever incorporated.

- 12 Subject to satisfying a liberated public interest test, the new Panel can not only deal with unacceptable circumstances by reference to “the purposes” inhering in the four Eggleston Principles (no longer need they be actually breached). It also can also deal with contraventions of the black letter takeover law of Chapter 6, 6A, 6B and 6C such as misleading information. But unlike the black letter law, the Panel only has jurisdiction in the Eggleston context, where the circumstances have an effect on control or (now) potential control. Exclusive reliance is no longer placed on the alternative trigger of an acquisition or proposed acquisition of a “substantial interest” in the company — though that remains the main trigger for Panel intervention.
- 13 The new Panel may only make a declaration where it considers that doing so “is not against the public interest”. It cannot do so of its own motion, unlike the London Panel, but can do so at the behest of bidder, target, ASIC or any other person whose interests are affected. The Panel may do so, only after taking into account any policy considerations the Panel considers relevant. That is now the only threshold policy requirement. The old Panel had to determine that such declaration was positively in the public interest, a much higher hurdle. That proved fatal to making any declaration in *Re ASC and John Fairfax Holdings Ltd* (1997) 25 ACSR 441 (though there were other reasons precluding Panel intervention). This was the case on synthetics used by *BIL* in *Fairfax*. It represents one of the best examples of the failure of black letter law to keep up with a fast-moving legislative environment, despite government promises that use of synthetics would be reviewed. In London, synthetics are subject to a stringent disclosure requirements. Australia has still to catch up.
- 14 To illustrate how up to date and sophisticated takeover regulation is in the UK, the London Panel has recently promulgated new rules on
- the payment of inducement or “break up” fees,
 - the payment of success fees to the independent financial advisers of offeree companies, and
 - announcements of pre-conditional offers (statements 1999/10 to 1999/13, coming into effect 16 July 1999).

Australia has still to catch up, save for the general law. Yet these techniques are replicated in Australia. An early test of the Australian Panel will be its capacity to pass rules or issue guidelines which keep up with ever-changing financial technology. As I explain later (25 below), the Panel's rule-making power is not unconstrained.

The Panel's Discretion

- 15 Once jurisdiction is found, to what must the new Panel have regard, in exercising its discretion?
- 16 The new Panel in making a declaration of unacceptable circumstances must have regard firstly to the four (modified) Eggleston Principles, expressed as being the “purposes of this chapter set out in s602”. But the Panel must also now have regard to:
- (a) the other provisions of chapter 6,
 - (b) Panel rules made under the new rule-making power, and
 - (c) any matters specified in regulations made pursuant to s195(2)(c) of the *ASIC Act* — essentially any matters which the legislature chooses to add as matters to be taken into account by the Panel when making a decision in the course of an inquiry.

The government could, if it wished, hog-tie the new Panel by unduly prescriptive regulations. It remains to be seen whether the new Panel can persuade governments not to.

- 17 That expanded scope of what the Panel must have regard to will indubitably circumscribe the exercise of its discretion. This is because a Panel decision will be capable of being attacked if it fails to take into account what the legislature has laid down. The new Panel post March 2000 will be forced to tick off, unavoidably, each of the matters it obligatorily had to take into account.

(b) The Privative Clause — new s659B read with s659AA.

- 18 These clauses insofar as they purport to keep courts out of dealing with takeover disputes albeit for a limited period and not totally (ASIC is an exception) are probably privative clauses, though there is an argument to the contrary. The Government has disregarded criticisms made of the privative clause in terms of its effectiveness. But it has done two things designed to encourage the courts to give the Panel latitude. The first is in stating as an object, that the Panel is to be “the main forum for resolving takeover disputes about a takeover bid until the bid period has ended” (s659AA) — but note the word “main”. Will that in turn encourage the new Panel to buy into court-approved schemes of arrangement, where there might be unacceptable circumstances suggested, or will the public interest test filter these out?
- 19 The second is by inserting a power under s657EB to refer a decision to the Panel for review under the new provisions for internal Panel reviews contained in s657EA. But for such provision, “the court” (post-*Wakim* likely to be the Supreme Court⁵) asked to enforce a Panel order might be tempted to revisit the whole basis of the new Panel’s decision itself. With this power to remit, if the court feels the Panel may have got it wrong, it will be able to remit back to the new Panel for the Panel to deal with the matter by way of internal Panel review — in effect an internal appeal. The court asked to enforce a Panel order will need to be satisfied that the Panel had jurisdiction and did not fail to follow its procedures, including any requirement of minimal procedural fairness and committed no error of law. But the court does also have the power to remit for review if necessary. The internal appeal mechanism operating in the London Panel is one of the reasons why UK courts have respected the Panel’s jurisdiction and not intervened in the United Kingdom.
- 20 An early issue concerning the privative clause is whether Victoria will in seeking to oust the jurisdiction of its Supreme Court, will do what it has to do by way of manner and form under the *Constitution Act 1975*, s18(2A) and s85. That requires specific

⁵ Post *Wakim*, the Federal Court may still intervene, where either the company is incorporated in a Territory, or accrued jurisdiction is exercised. But in the latter case, it appears only if the order making power is not derived from the *Corporations Law* but from indubitably Commonwealth power such as the *Trade Practices Act*, insofar as still capable of application; see the decision of the Full Federal Court in *Edensor Nominees Pty Ltd v ASIC* (1999) 33 ACSR 237, further constraining the effective exercise of accrued jurisdiction.

legislation to overcome the constitutional entrenchment of the Supreme Court's jurisdiction in Victoria. Criticisms were levelled against the previous government's ready use of privative clauses. But if Victoria did not do so, but rather alone allowed takeover litigation in its Supreme Court during a bid, that would undermine the whole Panel scheme and national uniformity. Significantly, the UK Courts, even without any privative clause, have been respectful of the Panel's hard-earned competence, as illustrated in *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815; [1987] 2 WLR 699; [1987] 1 All ER 564. There Lord Donaldson MR said:

"I wish to make it clear beyond peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade on an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve the individuals of the disciplinary consequences of any erroneous findings of breach of the rules.'

21 Other issues concerning the privative clause include the following:

ASIC's Role

- (a) It will be observed that ASIC is not precluded from bringing an action in the courts during the period a bid is open. It will be a test of ASIC's willingness to let the Panel be the main forum for resolving disputes about a takeover bid as to whether ASIC commences court proceedings, possibly at a time when there are parallel proceedings before the Panel. That possibility would in turn lead to potential conflict between the Panel determination, if the Panel presses ahead with an enquiry also, when that too can be instigated not only by ASIC but other interested parties. The Panel might elect not to intervene, if it were of the view that it would be against the public interest for two bodies to be dealing with essentially the same dispute at the same time. The court on the other hand cannot as a matter of discretion decline jurisdiction; it either has jurisdiction or it has not.

- (b) In many cases there will neither be a takeover bid nor, initially, a proposed takeover bid. Yet a transaction may occur which would contravene Chapter 6 of the *Corporations Law*. In those cases, again the court and the Panel will have overlapping jurisdiction. Clearly if a bid later eventuates or for that matter a proposed takeover bid, the court “may” (it has a discretion) stay any pre-existing court proceedings until the end of the bid period. There is no impediment to private litigants commencing court proceedings, with no bid proposed. In exercising its discretion, the court will no doubt be reminded of the legislative object in s659AA — that the Panel be the main forum for resolving takeover disputes.

Amenability to Prerogative Writs in High Court and Federal Court

- (c) If the Panel be formed as a Commonwealth body so that each member is “an officer of the Commonwealth” (Cram 163 CLR 117 at 131), this makes the Panel unavoidably amenable to the High Court’s jurisdiction. That jurisdiction arises under s75(v) of the Constitution under which a writ of mandamus or prohibition or an injunction may lie against the Panel’s officers. Likewise that jurisdiction extends to the Federal Court by remittal under s44 of the *Judiciary Act* 1903. The Federal Court’s original jurisdiction is conferred by s39B of the *Judiciary Act* 1903 though the validity of its jurisdiction may be tested by reference to the decision on cross-vesting (*Re Wakim; ex parte McNally* (1999) 73 ALJR 839). Thus if the Federal Court has no jurisdiction in relation to Chapter 6, absent accrued jurisdiction or a Territory company, can it have this supervisory jurisdiction (based on the Panel members being officers of the Commonwealth) over the Panel’s determination in relation to Chapter 6? Interestingly, the High Court accepted, post-*Wakim*, that the Federal Court had jurisdiction in relation to the DPP under s39B in *Attorney General v Oates* [1999] HCA 35; see transcript of proceedings on 17 June 1999. But this was not in relation to a Panel owing its hybrid origin to Commonwealth and State legislation. There may indeed be future constitutional argument as to whether, by expanding the Panel’s jurisdiction to each State by the relevant State application laws, the Panel with its hybrid origin is thereby precluded from being a validly formed Commonwealth

body. Clearly enough its extended jurisdiction to the States depends on State legislation and could not be founded upon the Territories power.

ADJR Review and at State or Federal level?

(d) The Attorney-General, the Hon Daryl Williams, MP, has announced that the Government will introduce Commonwealth legislation in response to the High Court's decision which (he hopes) will ensure that the Federal Court can continue to review under ADJR legislation the lawfulness of decisions made by Commonwealth bodies and officers exercising powers under State laws: Media Releases 17 June 1999 and 24 August 1999. That legislation has, I understand, since been circulated in Bill form to various interested parties for review and may similarly extend scope for review powers to State Supreme Courts. Without that legislation, there would appear to be no Commonwealth "enactment" as is necessary for ADJR review, save in relation to an ACT incorporated company. As to policy, is any reinstated ADJR type review compatible with the earlier stated object of the Panel being the main forum for resolving takeover disputes? What about ADJR review of a Panel appeal from ASIC on a modification — will that add yet a third tier to an already convoluted process? Or is ADJR review one which the government still desires as a check on at least the other Panel powers? This is particularly now they have been expanded and the courts partially excluded. After all the courts are subject to the safeguard of appeal, so it could be said that the Panel should also. In Appendix C I have endeavoured to set out how ADJR review would operate in relation to the Panel, if applicable, in order to bring out the tensions between those two policy stances. Inevitably that review if available will be instigated by the disappointed party if the stakes are high enough. Challenges will include that the Panel has acted unreasonably in the *Wednesbury* sense, thus inviting a fresh merits appraisal though of limited ambit. Also, decisions based on guidelines rather than an individual discretionary determination may be attacked on that score, creating tension between predictability and individual fairness. The London Panel operates free of these strictures.

Privative clause and scope for review — drafting

- (e) The legislature in the privative clause (s659B) has chosen not to use the drafting technique encouraged by *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 to overcome the court’s traditional strict construction of privative clauses; that is to say, widening the jurisdiction of the Panel so as by a more benevolent judicial construction preventing the resultant act of the Panel from being held a nullity. However, there may be wisdom in not adopting this approach. This is because the very possibility of such judicial review by the High Court and Federal Court was one of the indicia relied upon by the High Court in *Attorney General v Breckler & Ors* (1999) 163 ALR 576. as pointing to the absence of an impermissible exercise of judicial power. This was in the case of *Superannuation Complaints Tribunal*, though it must be conceded that the Tribunal was amenable to a wider scope of review by way of direct appeal to the Federal Court.

No AAT Review anymore

- (f) It would appear that at any rate AAT review has been now excluded as for instance occurred in *Wesfi*; note the comments by Bruce Dyer “A Revitalised Panel” in (1998) 16 C & SLJ 261 at 277 footnote 160 (to whom I express my indebtedness for sight of a subsequent draft paper on the new Panel). Compare now the later form of the legislation amending s1317C of the *Corporations Law* via Schedule 3 item 370 inserting new paras (ga), (gb) and (gc), coupled with the addition of the words “under s655A” in the final version of s656A(5)(a).

Summing up

- 22 It may be that the object stated in s659AA and the Panel’s own competence, once established, will encourage the courts to leave matters largely to the Panel, as much as a matter of discretion than necessarily for lack of jurisdiction, though the courts cannot be wholly excluded. But the Panel will have to earn its reputation as the London Panel has, if courts are to take that course — more especially when it comes to enforcement of Panel orders, where the court is unavoidably involved. The scope of s659B will itself be a matter of argument for future cases. Further elucidation is best left for them.

C. CONSTITUTIONALITY OF PANEL

23 Clearly enough, the Panel cannot enforce its own orders. And it continues to have, as a pre-condition for its intervention, recourse to the general criterion of the public interest — that is to say policy considerations. Both of these features were relied upon in *Precision Data Holdings Ltd v Wills* (1992) 173 CLR 167 as support for the conclusion that the Panel was not exercising judicial power impermissibly. There are however other features of the new Panel which may be seized upon in any future constitutional challenge. These are features whose absence were indicia pointing to there being no exercise of judicial power. First, no longer is it that ASIC alone can institute proceedings before the Panel, though that was not considered a major factor. Second, the Panel, understandably from a policy point of view, but perhaps weakening its position from a constitutional viewpoint, now has jurisdiction to deal with contraventions of Chapter 6. Nonetheless the Panel's jurisdiction is still premised on the Panel being satisfied, on policy grounds that its intervention is not contrary to the public interest. That feature as *Precision Data* decided, points strongly to absence of any exercise of judicial power. Furthermore, while the privative clause partially ousts judicial review, if effective, it does not oust the jurisdiction of the High Court (and the Federal Court by remittal) as earlier described, provided Panel members are officers of the Commonwealth.

24 Since the recent decision in *Re Governor; ex parte Eastman* (1999) 73 ALJR 1324, it has been established a court formed under the Territories Power is not subject to Chapter 3 of the Constitution since it is not exercising judicial power of the Commonwealth. It may thus follow that in the converse case of an administrative body (the Panel) arguably exercising judicial power, it is only exercising State and Territory judicial power, and thus would not come within the strict separation of powers doctrine applicable to federal courts. Whether indeed the Panel can be said to be formed under the Territories Power (relying on the indication in s174(2) of the *ASIC Act* but with powers extended by State Application legislation to each State) is a question not beyond doubt. This was dealt with only in argument in *Precision Data* (at 169-179) and is discussed by Santow and Williams *op cit* at 756-7.

RULE-MAKING POWER — new Section 658C

- 25 It is clear that the Panel does not have unconstrained rule-making power. First, the president of the Panel in exercising that power after consultation with members of the Panel must not make rules inconsistent with the Law or the Regulations. Second, the powers are limited to rules, not inconsistent with Chapter 6, which “clarify or supplement” the operation of the provisions of Chapter 6. It would have been better to allow augmentation, even if inconsistent; at the least, adding scope for rules where, in the time honoured language, this is “necessary or convenient” for the purposes of the relevant Chapter. Finally, a president in exercising the rule-making power must consider those purposes, based on the Eggleston Principles as now set out in s602.
- 26 Inconsistency carries with it the notion of repugnancy and contrariety, though here in the context of a constraint upon the executive arm of Government exercising legislative power rather than in the context of Commonwealth/State relations. Thus it may be possible for example to clarify by rule that synthetics such as were used in the Merrill Lynch/BIL/John Fairfax case are to be treated as if they involved the acquisition of a relevant interest in securities. The argument to the contrary would be open that such an extension was not merely clarificatory or supplementary but was inconsistent with Chapter 6; it may go against the fundamental notion of the definition of “security”, despite synthetics being a means of achieving the same economic effect. It is for a future court to grapple with these questions for no doubt there will be an early test of the scope of the rule-making power once exercised. Nonetheless it is a valuable addition to the Panel’s powers, crucial as it has been for the success of the London Panel and that in South Africa and Ireland. It may be that if the Panel establishes its credentials over the next few years, a less constrained rule-making power will be conferred.
- 27 There is also potential for the rule-making power effectively to pre-empt any exemption or modification that ASIC might otherwise make; see s658B which provides that if there is an inconsistency between the rule and an exemption or modification, the rule prevails to the extent of the inconsistency. That might be said to short-circuit any appeal from an ASIC exemption or modification to the Panel. But we now know that the Panel’s wider power of rule-making will not be needed to get over the difficulties if the decision in *ASIC v DB Management Pty Ltd* (1999) 162 ALR 91 were not overruled — for the

current appeal to the High Court did succeed ([2000] HCA 7, 10 February 2000, unreported) We now know that the power to give exemptions or modifications under s730 of the *Corporations Law* does extend to the compulsory acquisition of property. That suggests that to avoid conflict between the now affirmed amplitude of ASIC's modification and exemption power and the Panel's more defined and perhaps confined rule-making power, some co-operation in their respective spheres will be desirable. It will no doubt in practice be influenced by the prospect of appeal from an ASIC modification to the Panel.

- 28 There may, as George Durbridge says in his "overview" paper, be practical difficulty if ASIC lacks an exempting or modificatory power in relation to Panel rules. Nonetheless, the Panel can always revoke or amend its rule, though with some delay compared to ASIC exemption or modification. Perhaps the Panel rule might build in its own scope for Panel consent so as to have the same effect as an exemption. Co-operating with ASIC in giving that consent may overcome any practical difficulty.

LEGALISM OF PANEL'S PROCEDURES

- 29 Under the new regime, legal representation will require the consent of the Panel. Furthermore, there is much to be said for repealing the existing formalistic regulations under the *ASIC Act* and allowing the Panel to make its own rules for the conduct of its proceedings, as it currently can do subject to any regulation and the *ASIC Act*. That would avoid the kind of frustration that was experienced in the Merrill Lynch/BIL/John Fairfax Panel referral expressed by that Panel. Certainly the ASIC Regulations on Panel proceedings mandated the formality of issuing a brief, to be circulated to the parties and then the further requirement of formal submission. All this is quite antithetical to the non-legalistic way the London Panel works with its speedy resolution of takeover disputes and in its internal appeal procedures. Oral submissions over a day or two at most is what is usually required for the necessary speed, though that must be in accordance with minimum procedural fairness. It should not need a lengthy process mimicking a court. One observes the forced written formality imposed on the Panel once again in the recent *Wesfi* referral. Yet the existing legalistic regulations leave no alternative. That *Precision Data* generated ten separate actions and most recently the

Wesfi Panel referral six (plus a foreshadowed appeal), shows the propensity of parties to want to test the Panel as strenuously as possible, particularly when they fear an adverse decision. However, while the new Panel can expect similar testing, that may ultimately prove a source of greater assurance and certainty if the challenges are resolved in the Panel's favour and in favour of the legislative intent of the new provisions. If not the Panel legislation can be amended to deal with difficulties revealed.

30 Finally, internal Panel appeals themselves will need to be dealt with by new regulations. It will be crucial to make sure that those regulations in turn ensure that the appeal procedure achieves the level of informality as well as rigour and fairness which will be crucial to the Panel establishing its reputation. The courts will be far readier to respect a Panel which shows that it can exercise its now much wider powers in a way which wins the respect of the commercial community. The Eggleston Principles, retained as they are at the commencement of Chapter 6, are important guidelines but must evolve in their practical application with the times.

SUMMING UP

31 The Panel's greatest problem will be to establish a consistent approach. This is just as State courts have had to do, guided by courts of appeal in *Corporations Law* matters. The importance of that has been re-emphasised post-*Wakim*. Inevitably conflicts of interest will result in lack of continuity in Panel membership. With more than 30 members, Panel composition for referrals will therefore vary enormously. Even the Panel "chair" for a particular referral will frequently have had no continuity of experience. Regular interchange between busy part-time members will be important. So too a highly competent executive and strong leadership from its President. Critical will be the internal Panel appeal or review process. Continuity in Panel review composition will be crucial for success, giving executive and front-line panels necessary guidance for the future.

32 Our litigious environment, with its culture of complaint, must inevitably subject the Panel early on with challenges at every turn. Too much money and reputation are at stake to expect otherwise. But eventually that phase will be over, the Panel's powers properly clarified, though there will still be the occasional challenge. The Panel must

ensure it meantime keeps its nerve and maintains its integrity. It will win the market's respect by giving on the spot practical, prompt and accurate guidance at executive level. When nonetheless matters reach the Panel by referral, the Panel needs the backing of a disinterested highly competent executive. Its decisions over time must build a consistent body of rules and guidelines that grapple intelligently with the latest tactics and financial techniques. If successful, Australia will have laid an important building block in establishing its credentials as a financial centre. It must not be forgotten that Australia does so in the Asia Pacific region. There legalism is *not* the prevailing ethos — and Hong Kong already competes with a Panel system.

G F K Santow
12 February 2000

Appendix A

A declaration of unacceptable circumstances: comparison of old test and new test

Old Panel test: s 732	New Panel test: s 657A
<ul style="list-style-type: none"> • exhaustive test prescribing particular circumstances: <ul style="list-style-type: none"> i. 732(1)(a): did not know identity of acquirer of interest in company ii. 732(1)(b): did not have reasonable time to consider proposal iii. 732(1)(c): did not have enough information to assess merits of proposal iv. 732(1)(d): did not have, so far as practicable, reasonable and equal opportunity to participate in benefits under (proposed) acquisition v. 732(1)(e):unreasonable buy-back having regard to its effect on control of the company or another company and fact that s 632A prevented disclosure and other procedural safeguards applying vi. 732(1)(f):unreasonable share capital reduction having regard to effect on control of company or another company vii.732(1)(g): company’s unreasonable acquisition or proposed acquisition of relevant interest in at least 5% of its shares having regard to effect on control of that company or another company 	<ul style="list-style-type: none"> • broad discretion to consider effect of circumstances on control, potential control or acquisition, proposed acquisition of substantial interest in the company or another company 657A(2)(a) • unacceptable where contravention of provision of Chapters 6,6A,6B, 6C: 657A(2)(b) • unacceptable circumstances need not constitute a contravention of a provision of the CL: 657A(1) • Panel must take into account target directors’ actions including actions causing not to proceed to acquisition or proposed acquisition of a substantial interest in the target (or another company): 657A(3) • Panel must have regard to: <ul style="list-style-type: none"> (a) the purposes of Ch 6 namely: <ul style="list-style-type: none"> (aa) that acquisition of control takes place in an efficient, competitive and informed market (bb) purposes derived from the equivalent of (i) to (iv) opposite (Eggleston Principles) and from the absence of appropriate procedures being followed as a preliminary to compulsory acquisition (b) other provisions of Ch 6 (c) Panel rules made by it under s 658C, and (d) matters stated in ASIC regulations that Panel is required to take into account. <p>657A(3)(a)</p>

<ul style="list-style-type: none"> • “substantial interest” : 732(1)(a)(b)(c)(d) 	<ul style="list-style-type: none"> • “substantial interest”: 657A(2)(b)
<ul style="list-style-type: none"> • “proposal” : 732(1)(b),(c) 	
	<ul style="list-style-type: none"> • “control or potential control” : 657A(2)(a)(i)
<ul style="list-style-type: none"> • “acquisition or proposed acquisition ... of a substantial interest” 732(1)(d) 	<ul style="list-style-type: none"> • “acquisition or proposed acquisition ... of a substantial interest” 657A (2)(a)(ii)
<ul style="list-style-type: none"> • declaration must be “in the public interest” after taking account of policy considerations in s 731 and any others which are relevant. 733(3) 	<ul style="list-style-type: none"> • declaration (or declining to declare) must be “not against the public interest” after taking account of any policy considerations the Panel considers relevant 657A(2)

Old test

732. Occurrence of unacceptable circumstances

(1) For the purposes of this Part, unacceptable circumstances shall be taken to have occurred if, and only if:

- (a) the shareholders and directors of a company did not know the identity of a person who proposed to acquire a substantial interest in the company; or
- (b) the shareholders and directors of a company did not have a reasonable time in which to consider a proposal under which a person would acquire a substantial interest in the company; or
- (c) the shareholders and directors of a company were not supplied with enough information for them to assess the merits of a proposal under which a person would acquire a substantial interest in the company; or
- (d) the shareholders of a company did not all have reasonable and equal opportunities to participate in any benefits, or to become entitled to participate in any benefits, accruing, whether directly or indirectly and whether immediately or in the future, to any shareholder or to any associate of a shareholder, in connection with the acquisition, or proposed acquisition, by any person of a substantial interest in the company; or
- (e) a company carries out, or proposes to carry out, a buy-back that is unreasonable having regard to:
 - (i) the effect of the buy-back on the control of that company or of another company; and
 - (ii) the fact that the disclosure and other procedural safeguards of this Chapter do not apply to the buy-back because of section 632A; or
- (f) a company reduces its share capital, or proposes to reduce its share capital, in a way that is unreasonable having regard to its effect on the control of that company or another company; or
- (g) a company acquires, or proposes to acquire, a relevant interest in at least 5% of its voting shares and the acquisition is unreasonable having regard to its effect on the control of that company or another company.

(2) Paragraph (1)(d) may be satisfied because of:

- (a) actions of the person acquiring, or proposing to acquire, the substantial interest; or
- (b) actions of the directors of the company, including actions that caused the acquisition not to proceed, or that contributed to it not proceeding.

New test

657A Declaration of unacceptable circumstances

(1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Law.

(2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

(a) are unacceptable having regard to the effect of the circumstances on:

(i) the control, or potential control, of the company or another company; or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or

(b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

The panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

(3) In exercising its powers under this section, the Panel:

(a) must have regard to:

(i) the purposes of the Chapter set out in section 602; and

(ii) the other provisions of this Chapter; and

(iii) the rules made under section 658C; and

(iv) the matters specified in regulations made for the purposes of paragraph (195(3)(c) of the *Australian Securities and Investments Commission Act 1989*

(b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(1)(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).

Appendix B

STATISTICS

The Panel held three meetings to hear appeals against rulings by the Executive. None of the appeals was successful. No cases were heard by the Appeal Committee.

There were 235 (year ended 31 March 1998-177) published takeover or merger proposals of which 231 (175) reached the stage where formal documents were sent to shareholders. These proposals were in respect of 221 (171) target companies.

38 (24) offers were not recommended at the time the offer document was posted. 24 (20) of these remained unrecommended at the end of the offer period, of which 12 (6) lapsed.

14 (13) offers were, at the time of their announcement, mandatory bids under rule 9.

A further 38 (30) cases, which were still open at 31 March 1999, are not included in these figures.

The executive was engaged in detailed consultations in another 219 (288) cases which either did not lead to published proposals, were waivers of the Code's requirements in cases involving very few shareholders or were transactions, subject to approval by shareholders, involving controlling blocks of shares.

	1998-1999	1997-1998
OUTCOME OF PROPOSALS		
Successful proposals involving control (including schemes of arrangement)	181	145
Unsuccessful proposals involving control (including schemes of arrangement)	19	11
Proposals withdrawn before issue of documents (including offers overtaken by higher offers)	4	2
Proposals involving minorities, etc.	31	19
	<u>235</u>	<u>177</u>
	—	—

Appendix C

ADJR Act review as it would apply to the Panel if applicable

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (“ADJR Act”) vests the Federal Court with the power to review decisions of an administrative nature made under an enactment by a Commonwealth officer or Minister. The statutory grounds of review under the ADJR Act are largely a restatement of the common law grounds of review of administrative decisions.

Review under the ADJR Act goes only to the legality of the decisions. The merits of the decision cannot generally be the subject of judicial review.

There are three situations contemplated by the ADJR Act:

- (i) where a decision has already been reached: section 5
- (ii) where a decision is in the process of being made: section 6
- (iii) where there is a failure to make a decision: section 7

The grounds of review available under the Act are as follows.

- A breach of the rules of natural justice: This is determined according to the requirements of procedural fairness: see generally s 195(4) of the ASIC Act 1989 as amended and the relevant ASIC Regulations including Regulation 13 in their current form.
- failure to observe procedures required by law to be observed: This encompasses the traditional ground of procedural ultra vires or ultra vires in the narrow sense. The question is whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.
- lack of jurisdiction: The tasks performed by the panel must only be those entrusted to it by the legislation.
- a decision not being authorized by the enactment
- an improper exercise of power: For example, the Panel, being a public body in which discretion is entrusted, could not fail to exercise that discretion though it may decide on the public interest ground not to intervene. A discretion must further not be exceeded in its scope. The panel, furthermore, cannot act under dictation. A person in whom a discretion is vested must be the person who exercises that discretion.
- an error of law: Errors of law include, for example, the misconstruction of a statute and a breach of the rules of natural justice. Note that wrong findings of fact or flawed inferences of fact do not constitute errors of law.

- fraud
- no evidence: In determining whether there was no evidence upon which the decision could have been made, the court does not weigh for itself conflicting evidence. The task of the court is to determine whether there is any evidence which supports the findings of fact. This ground is only made out where there is no evidence upon which a decision-maker could reasonably be satisfied that the matter required by law to be established or where the decision-maker based the decision upon the existence of a particular fact and that fact does not exist.
- “otherwise contrary to law”: this is a catch-all to allow for the judicial development of further grounds of review.
- the panel took into account irrelevant considerations or failed to take into account relevant considerations: The Panel’s discretion must be exercised on the basis of relevant considerations and without taking into account irrelevant considerations.
- the Panel acted with an improper purpose or in bad faith: the panel must exercise the powers conferred on it for no purposes but those laid down by the legislature. An improper exercise of power includes an exercise of power in bad faith. Policies of the Panel that may arise must not be implemented at the expense of the individual merits of a particular case according to the empowering legislation. A decision based on a rule of policy may be challenged as not the exercise of the discretion which the legislature has conferred on the Panel.
- The Panel must act reasonably: For the court to interfere with the Panel’s decision on this ground, the decision must be so unreasonable that no reasonable panel would have reached that decision (the *Wednesbury* test). The test is an objective one and requires an exercise in judgment.

Charity in its Political Voice - a tinkling cymbal or a sounding brass?

G F K Santow *

Introduction

I seek to compare English and Australian case law on the distinction between charitable purposes and political objects. I do so in a climate changed dramatically for human rights in the United Kingdom compared to 1982, when *McGovern v Attorney General* [1] was decided. The advent of the Human Rights Act 1998, though still to come into full force, protects, with qualifications, the right of freedom of expression thus rendering it part of the established policy of the law. That freedom was already protected in defamation law on matters pertaining to the public life of the community, with qualifications not presently relevant. Yet such a fundamental right is, in the fullest practical sense, denied charitable bodies. For unless they exercise it with muted voice, they risk losing all of their charitable status and privileges. No-one else in the community is similarly constrained. It may also be asked whether the network of treaties and conventions protective of other human rights such as the rights to liberty, security and a fair trial, reflect a fundamental shift in foreign policy. Would Amnesty today be acting in conformity with a now established policy of the law, in pursuing its international advocacy for prisoners of conscience? This is especially when those self-same rights are enshrined in the Human Rights Act 1998, in the domestic sphere. It is therefore time for a fresh look at this difficult area - one which poses a number of questions.

First, can and should charity law accommodate a greater engagement in political persuasion than its present strict requirements? At what point would such engagement - local or foreign - undermine that essential charitable attribute of public benefit? Would the courts thereby enter into no-go areas of political controversy, that should remain the exclusive domain of government - if indeed they ever were? If courts can enter into such questions of political controversy, albeit with a "margin of appreciation" deferring to government policy, will the courts thereby open charitable status to controversial projects of acknowledged debatability within the community? What is a political object or activity to change the law, where in turn the law has yet to speak, has spoken only ambiguously, or there evolves an established policy of the law, such as forbidding racial discrimination, though there be room for further legislative development? Is it permitted to have a purpose of effecting changes in law or policy, where this is in conformity with the established policy of the law rather than a reversal of it? Does an "ancillary" political activity depend for its presently recognised legitimacy on not being also a purpose, or is such a distinction unduly formalistic? What is the dividing line between education and political activity, and why has it become blurred when it comes to advocacy for projects with a political dimension?

This opportunity for a fresh look is signalled not only by the passing of the Human Rights Act 1998,[2] but by landmark cases in Australia and the UK in the sphere of defamation recognising the public benefit in "political" free speech[3]. It was earlier encouraged by the Charity Commissioners' more permissive contemporary approach to trusts to remove racial discrimination. The Commissioners thereby recognise that society's circumstances do not stay static; for the law of charity "is a moving subject".[4] Both the courts and the Commissioners have indeed long recognised that limited campaigning for political change may be permitted - though still only if it be but an ancillary activity, an incidental means to achieve genuinely charitable ends. Nor must it be politically partisan campaign. Yet charities today know they must compete in public debate for the allegiance of public opinion. Still they must constantly look over their shoulders at the Charity Commissioners for fear such advocacy may lose them charitable status.

There is nonetheless a strong historical tradition of fighting charities, campaigning to remove conceived political obstacles in the way of public welfare. Such charities refuse to accept a role where they deal only with symptoms, not attack their political causes. Their history dates back to charities such as the English charity COS in the nineteenth century acting as a pressure group to influence administrative policy on social welfare. More recently we have the Howard League for prison reform, Amnesty and Oxfam.[5] Their combative spirit was captured by Thomas Paine, in words carved on his monument at Islington: "Lay then the axe to the roots and teach governments humanity."

But charities which proselytise risk their charitable status. If an actual purpose, central or not, is change of government policy or law, that under present law will be fatal.[6] If it be to change foreign law or policy, the assumption of *McGovern* is that this is against the public interest - an assumption

that should not automatically be made. If the purpose be achieved merely by influencing domestic public opinion as distinct from direct pressure on government, the position is less clear. For just how are "such compassionate objects capable of achievement otherwise than by (at least) the exertion of moral pressures"?[7] But when moral pressure on public opinion is dressed up as education, this blurs that essential dividing line between educational activities and political persuasion. The rigidity of the political objects doctrine then tends to work an unjustified stretching of what is properly educational. This is in order to escape its strictures, which should rather be addressed more candidly and directly. These are the themes of my paper.

The Law in an unsatisfactory state?

The recent decision in *Southwood and another v Attorney General*[8] illustrates precisely that blurring between illegitimate promotion and legitimate education. Its careful delineation of past authority governing educational trusts with political objects demonstrates once again how, in the words of Sir Owen Dixon 60 years ago:

"The case law dealing with the distinction between charitable purposes and political objects is in an unsatisfactory condition"[9]

When Sir Owen Dixon wrote this of Anglo-Australian charity law, he too was confronted with a trust in the educational sphere - one to promote the extension of teaching of technical education in schools. The Australian High Court upheld it as a valid charitable trust for educational purposes. This was not a case fitting within the familiar mould; a charitable trust for the support of a particular educational body or project. Rather it was a trust to promote education itself, albeit technical, by means directed at influencing public opinion to that end. It was nonetheless upheld as charitable, there being nothing in that purpose "contrary to the established policy of the law" (at 426); for such a purpose said Sir Owen Dixon "cannot be the subject of a good charitable trust". Nor was there any explicit purpose to advocate - or, to use more loaded language, "agitate" - for legislative or political changes to bring that objective about. That too would have been fatal to its validity as a charitable trust, unless but an ancillary purpose[10].

"Thus when, the main purpose of trust is agitation for legislative or political changes, it is difficult for the law to find the necessary tendency to the public welfare, notwithstanding that the subject of the change may be religion, poor relief, or education."[11]

So when charity adopts a political voice, it must be discreetly - as a tinkling cymbal, not a sounding brass. But in the United Kingdom, a charity can never be sure that the Charity Commissioners will treat that even muted voice as merely ancillary activity, not prejudicing its status as a charity.

And in the United Kingdom, as in Australia, charitable status does matter. It confers valuable fiscal benefits on some 187,000 registered charities whose exempted income, mainly concentrated in the top 25 per cent, exceeds £18 billion.[12] These fiscal benefits are bought at the price of regulatory oversight; with it, more benevolent treatment under trust law. For example a *cy-près* scheme can be called in aid to save a charitable trust that would otherwise fail for uncertainty and construction of its terms may be more benevolent in practice. Such a trust is not subject to the Rule against Perpetuities where the rule still exists. In Australia, fiscal benefits depend on being a "public benevolent institution", allowing some room to uncouple these from charitable status generally. Nonetheless it remains largely true to say of Australia as for the UK that validity as a charitable trust and significant fiscal immunity "continue to march hand in hand"[13], making wholesale liberation of charitable status a fiscal impossibility. So the two concepts of charity and public benevolent institution remain intertwined. Any uncoupling of fiscal benefits in the United Kingdom or Australia is for future legislation. In the meantime, issues of classification still remain for the courts who are unlikely to open the floodgates.

Observe in Australia that Sir Owen Dixon's language ("it is difficult for the law to find that necessary tendency to public welfare") is not categorical. Contrast Slade LJ's all-embracing categorical imperative in *McGovern v Attorney-General*[14]. He sweeps up under incompatible political activities "those directed at [changing] domestic or foreign law, policy or decision - though it must be a 'direct and principal activity'". That was said to be justified by Lord Parker's pronouncement in *Bowman v Secular Society*: [15]

"A trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a

change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a valid gift."

Can and should the courts judge public benefit in the domestic sphere?

But does the court have no means of judging? Should the courts attempt to do so? As Slade LJ in *McGovern*[16] rightly said, the difficulty of judging is not absolute, certainly not in the domestic sphere. After all, the court in *National Anti-Vivisection Society v Inland Revenue Commissioners*[17] had no difficulty making such a judgment negatively - it held that the law change sought was not in the public interest. Indeed that was especially significant, because the court was striking down a charity recognised as such since 1895. That required the court to be satisfied in relation to a much higher hurdle than for a new charity - that a radical change in circumstances had occurred, clearly established by sufficient evidence, which justified taking charitable status away after over 50 years. So it must rather be a matter of the supposed difficulty of judging, not impossibility, in the domestic sphere.

There is then the objection that if courts enter into such an enquiry and allow charitable status to trusts of which a main object is political - they are "usurping the functions of the legislature" or at least thereby "encroach upon the functions of the legislature".[18] For the law to contemplate its improvement is said to "stultify" the law.[19] But courts in so many areas have for some time been increasingly grappling with political issues[20] - a trend to be accentuated by the Human Rights Act 1998. Is that any longer an overriding concern, provided the matter be approached objectively and with proper evidence?

In any event, the question in charitable trusts is whether seeking a change to the law by way of exercise of a trust power to do so is for the public benefit. This must be considered in the context of the trust as a whole, not in isolation. (I interpolate that I have used the term "power" here, eliding the rather formalistic distinction between purposes and permitted a charity for the latter still needs to find a source of power if it is to be permitted by the charity's constitution.) Where there are main objects which are clearly charitable, the trust then does not rely on such a power to establish its charitable character, but relies primarily on its other clearly charitable objects. The question is rather whether the presence of such a power in the context of the other trust powers and objects prevents that trust - considered as a whole - from being in the public benefit, notwithstanding its indubitably charitable objects. The test hitherto applied, is whether the pursuit of political change is an end or object in itself, as distinct from a means to achieve indubitably charitable objects. Such a means, to survive challenge, has hitherto had to be "incidental" and not expressed as an object of the trust.

Recent Canadian Supreme Court authority suggests that this is too formalistic, for a purpose or a power described as such may still be incidental and ancillary to indubitably charitable objects. [21] These questions should not turn on subtleties of drafting but on substance.

So framing the question, it could hardly be said that the court is trespassing illegitimately into legislative territory. The court is simply looking at the trust as a whole, primarily its constitution but also, at least where ambiguous, its activities.[22] The court seeks to identify the role played by political pressure and activity in the overall context of its indubitably charitable objects and activities. While the trust must still be "wholly and exclusively charitable"[23] that, as *McGovern* recognises, has never prevented incidental private benefits or incidental political aspects. Nor has it precluded exercise of non-charitable powers in furtherance of charitable objects provided their role remains incidental.

The court indeed has some latitude in construing the "incidental and ancillary" requirement, so that it is not so much a crude requirement directed merely at the level of activity. Rather it is concerned primarily with whether the political activity is genuinely directed to promoting indubitably charitable ends. Matters of degree are also relevant, but only in causing the test to be failed where the political activity is so disproportionate that it is no longer merely instrumental in achieving the indubitably charitable objects, but has become an end in itself. A similar approach has been taken to permit ancillary private benefit. [24] where the activity is politically partisan it must fail.[25]

Finally, there is the supposedly insuperable problem of judging public interest in the international sphere; that is in relation to a main object to change the law or government policy in other countries. This was said by Slade LJ to be the clearest case for courts being unable to judge. That is most conveniently considered later, in discussing *McGovern* after the Human Rights Act 1998. But the short answer is that public benefit is to be judged not from the foreign community viewpoint but from the viewpoint of the United Kingdom. Judgment should be informed by proper evidence of relevant UK

Government policy, not mere speculation as to the likely impact of advocating change to foreign law or policy on that foreign community, or on UK relations with it.

Severance

There is also the compromise approach in New South Wales of permitting severance of the non-charitable, thus saving validity at the price of abandoning the non-charitable purposes altogether. Thus s23 Charitable Trusts Act 1993 (NSW) provides as follows:

"23. (1) A trust is not invalid merely because some non-charitable and invalid purpose as well as some charitable purpose is or could be taken to be included in any of the purposes to or for which an application of the trust property or of any part of it is directed or allowed by the trust.

(2) Any such trust is to be construed and given effect to in the same manner in all respects as if no application of the trust property or of any part of it to or for any such non-charitable and invalid purpose had been or could be taken to have been so directed or allowed."

The problem is that the trust then cannot be given effect, to the extent that it encompasses the non-charitable and invalid political purpose directed to be severed. Some may say validity would then be bought at too high a price. But at least the trust is saved as charitable if severance be possible without subverting the settlor's intention.

".....there should as a matter of law be no difference of approach to trusts for the objects of an organisation from that to trusts expressed in the instrument of creation, nevertheless in fact it may often be difficult to excise a fundamental object from the objects of an organisation without doing violence to the testator's intention. To separate the objects of a trust the terms of which appear for the first time in a testator's will is not the same as to separate the objects of an organisation which has been on foot for some time and which has an established character the charitable objects of a named organisation may be so insignificant, in comparison with its non-charitable objects, that the devotion of the trust fund to the charitable objects only might defeat the testator's intention by distorting the character of the organisation he or she wished to benefit."[26]

Free speech as a public good - a "human right" of the charitable trust?

Finally, it has been suggested that courts should adopt a more permissive approach to the advocacy of political change, reflecting recent judicial recognition of a qualified privilege in defamation for "political" speech. In the United Kingdom, underpinned by the freedom of expression mandated by Article 10 of the European Convention on Human Rights, qualified privilege now attaches to statements contributing to the "flow of information to the public concerning matters relating to the public life of the community and those who take part in it", excluding only matters which are personal and private; *Reynolds v Times Newspapers Ltd.*[27] In Australia, *Lange v Australian Broadcasting Corporation*,[28] recognises a similar basis for qualified privilege, provided there has been reasonableness of conduct attending publication. Public discussion and debate on political matters in a democracy satisfying standards of honesty and reasonableness are thus accepted in the defamation sphere as itself a public good; why not also when engaged in by charities advocating changes to the law directed at the amelioration of social conditions? Many charities would say that without such legislative and policy changes, they are forever placing band-aids rather than dealing with fundamental causes of social ills. This view is propounded by Chesterman:[29]

"..... as the Commission concedes, 'the dividing line between proper debate in the public arena and improper political activity is a difficult one to judge'. The argument which I am putting here would go a long way towards reducing those difficulties. It is that participation in public debate about changes in law or policy relating to an area of charitable activity should be recognised as beneficial within a democratic society and, within limits, charitable in its own right. Judicial acceptance of this argument would significantly loosen the constraints on campaigning charities.

..... If under a differential tax regime, charities which engaged genuinely in activities assisting the poor and disadvantaged obtained more favourable treatment than other charities, they should not lose this fiscal advantage merely because one of their purposes was to campaign for changes in law or government policy within their field of operation."

But Chesterman's argument has now an additional underpinning in Article 10(1) of the European Convention on Human Rights to be rendered enforceable under domestic law when the Human Rights Act 1998 comes into force, but already part of the established policy of the law. It provides:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

It is qualified by Article 10(2), in these terms:

"(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

With freedom of speech incorporated into the UK domestic jurisprudence both by a decision of its superior court and by legislation passed but yet to come into force, can it be doubted that a charity is denied freedom of political expression? A charity which campaigns for political change, though directed at advancing its very *raison d'être* as a charity, stands to lose not just taxation privileges, but its very legal personality as a charity; this is if campaigning becomes a purpose or ceases to be merely an ancillary activity. Can it be said that "the authority and impartiality of the judiciary" depend, for their maintenance in a democratic society (Article 10(2)) upon maintenance of the political objects doctrine in its full rigour? May not now courts simply ask; has the political activity reached the point where it interferes with or overshadows the charity's indubitably charitable objects? If it has the charity should fail. If it has not, then the charity should retain its status and privileges.

But should the line be drawn when bipartisanship ceases - suppose for example a campaign directed at supporting the party or candidate which has adopted policies best directed (say) to the relief of poverty. That is no less political partisanship, though contingent on that party's support for the charity's projects. What of other charities, competing for government attention? While preserving freedom of expression is itself a public benefit, it does not follow that the manifestation of that expression in a political campaign is itself a public benefit. Thus as Morris puts it "in relation to election campaigns, a State may legitimately take the view that it needs to protect voters from being subjected to overwhelming propaganda by a charitable organisation which has superior financial advantage due to its tax efficient status".[30]

The Traditional and Accepted View - McGovern

The more liberal approach based on a right to freedom of expression is still to be accepted. *R v Radio Authority ex parte Bull*,[31] a case preceding *Reynolds* is clearly to the contrary. Slade LJ in *McGovern*,[32] expresses the traditional and accepted view upon which subsequent cases have relied. That view would leave no room for political objects, but a permitted role for political means though only if ancillary or incidental - a distinction which may suggest that lack of candour in the trust's objects would be an advantage, hardly desirable especially if this leads to unauthorised activity. Slade LJ puts the traditional position very clearly and there is of course virtue in clear, bright lines.

"(1) Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes falling within the spirit of Lord Parker's pronouncement in *Bowman's case* can never be regarded as being for the public benefit in the manner which the law regards as charitable. (2) Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.

This categorisation is not intended to be an exhaustive one, but I think it will suffice for the purposes of this judgment; I would further emphasise that it is directed to trusts of which the purposes are political. As will appear later, the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable"

But consider a charity for the homeless and destitute which campaigns for a change amounting to a reversal in Government policy - say to expand local shelters throughout the country. If it does so pursuant to an object in that behalf, that is likely, under the test in *McGovern*, to be fatal. But if the trust's objects are silent on the matter and it just does campaign, it may be able to show that the campaign is incidental and ancillary to its central object to relieve the homeless. But why make such a distinction between permissible activity and impermissible purpose? May it not be enough if the campaign, purpose or not, is in fact genuinely directed towards the relief of the homeless - itself indubitably charitable - and proportionate in its scale, so that it does not become an end in itself. Such an "incidental" test would be an incremental development of the law.

It is highly significant that Slade LJ looks for a reversal, not merely a change, in government policy or decision. That may become a crucial distinction. For one may change the law, but leave intact its established policy, when such a policy has evolved. Take as an example the now established policy of the law against racial discrimination. To seek to reverse it would clearly be political. But what about to seek to augment its legislative expression? How far can augmentation go before it amounts in substance to a reversal? Would the recommendations in relation to racial vilification, in private, following the Lawrence Report on the Metropolitan Police force be in conformity still with the established policy of the law? But leaving that difficult question of degree aside, incremental change consistent with the already established direction of the law may not be political.

Later in the same judgment Slade LJ considered two other stated purposes. These were "the undertaking promotion and commission of 'research' into the maintenance and observance of human rights", and the dissemination of the results of such research. He considered that only had these stood alone would they have been of a charitable nature:

"The subject matter of the proposed research seems to me manifestly a subject of study which is capable of adding usefully to the store of human knowledge ... if these two sub-clauses had stood in isolation I would have felt little difficulty in holding that the trusts thereby declared were for the benefit of the public. The mere theoretical possibility that the trustees might have implemented them in a political manner would not have rendered them non-charitable; the two sub-clauses would have been entitled to a benignant construction and to the presumption, referred to by Gray J in *Jackson v Phillips* (1867) 96 Mass (14 Allen) 539, that the trustees would only act in a lawful and proper manner appropriate to the trustees of a charity and not, for example, by the propagation of tendentious political opinions."

I deal later with the pejorative notion of "propagation of tendentious political opinions", in the context of educational trusts. The cases illustrate the difficult distinctions sought to be drawn in that sphere in coping with the rigidity of the traditional approach. First, I test the traditional view, by the consequences it throws up in specific cases.

Implications of the Traditional Position for Charities - some examples

Have governments handed charities a poisoned chalice by giving them tax benefits and then co-opting many of them to government welfare programmes on a contractual basis^[33] at the price of their freedom of action? This is argued by Chesterman with some force in criticising the *McGovern* decision. He sees it seriously threatening the independence of charities, at a time when charities are increasingly constrained by their co-opted role. He seeks to answer those who say that fiscal benefits should not be accorded to those seeking a change in law, policy or decision of government, when public opinion will necessarily be divided on the need for such change. He contends that the process of seeking political change, by exercise of political free speech, is itself a public benefit, and that that is the critical matter, not eventual success or, perhaps more likely at least in the short run, failure. Nonetheless, by impliedly acknowledging that, such a political object is not of itself relied upon for charitable status; that depends on there being genuine charitable objects and activities alongside such a political object and not subordinated to it.

But a consideration of some examples shows there may be scope, even under the political objects rule, to take a less radical approach which nonetheless takes account of contemporary realities in a common sense way in applying the traditional approach more sensitively.

Take first a trust which has as its object the removal, by legislation, of racial discrimination. In Australia, most of the states, but not all, had legislated to remove racial discrimination. The

Commonwealth had also so legislated. It had become part of the established policy of the law. That was the situation before the court in *Public Trustee v Attorney General of NSW*.^[34] Would a trust fail as charitable which had as one of its objects the extension of anti-discrimination legislation? This might be to extend it to the "hold-out" States. It also might be to refine and improve that legislation, for example, as regards remedy. May such a trust survive as charitable, where the object is to introduce new law consistent with the way the law is going and reinforced by adopted treaty obligations - certainly not an object contrary "to the established policy of the law"? The court gave an affirmative answer to that question, though this was expressed obiter; it was severance of the non-charitable objects that saved the validity of the trust. Thus a distinction was drawn between trusts for purposes which are "contrary to the established policy of the law", so as to fail automatically, and trusts whose object is to "introduce new law consistent with the way the law is tending"; the former may aptly be called a reversal rather than change in the law.

In the United Kingdom, the Charity Commissioners have since 1983 indicated that in their view the promotion of good race relations has ceased to be political and can be considered for the public benefit, noting that Parliament has legislated to that end^[35]. Would that benevolent view allow an object to supplement domestic anti-discrimination law (as for example proposed in March 1999 by the Lawrence Report in relation to the police in the United Kingdom), on the basis that this is in conformity with the way the law is clearly going? What - pace McGovern - if the trust in those circumstances included an object to promote further legislation in those countries outside the United Kingdom which have yet to pass any legislation forbidding racial discrimination? It may be that validity of such a trust would depend both on the trust's proselytising methods and on whether the United Kingdom in the future adopts a treaty obligation to promote such legislation internationally, a situation a long way from McGovern. But McGovern itself recognised that merely to influence the public climate of opinion, thereby indirectly bringing to bear moral pressure on government is different from directly influencing government. It was only government which held the key to release prisoners of conscience in the gaol, in contrast to pressuring the private slave owners in the United States in *Jackson v Phillips* - though the pressure was also to be exerted more generally to create a favourable public sentiment. Again, the distinction made by Slade LJ is a fine one. For a trust to create public sentiment in favour of change of that sort, when it depends for effectiveness ultimately on that in turn producing pressure on government for remedial legislation, is hardly to be distinguished from direct lobbying of government to the same end.

Consider variations of the facts of McGovern itself; there the trust was characterised by Slade LJ as being "to promote a reversal of government policy or of particular decisions of governmental authorities in a foreign country". Those changes were for the purpose of seeking a release of prisoners of conscience and the abolition of torture or inhuman or degrading treatment or punishment including capital punishment. Assume a contemporary trust of that character, but omitting the release of prisoners of conscience and the reference to "degrading" punishment. Assume, for example, it encompassed the object of promoting political action directed against genocide. The trust could point to the UK's adoption of the Convention on the Prevention and Suppression of the Crime of Genocide, as approved by the United Nations' General Assembly in December 1948. It could now show how the Convention has been incorporated in the United Kingdom domestically by the Genocide Act 1969. Furthermore, the domestic law of the United Kingdom precludes torture,^[36] and by extension inhuman treatment or inhuman punishment.

Assume further that the United Kingdom now has entered into a number of extradition treaties with certain countries on a reciprocal basis to bring to justice perpetrators of torture, genocide and inhuman treatment against nationals of those countries or of the United Kingdom. In those circumstances, it may seem artificial and indeed inconsistent with both the UK's foreign policy and domestic law, to deny charitable status to such a trust if its objects were in general conformity, not only with domestic UK government policy and law, but with the clear trend of UK government policy in the international sphere. Difficulties however would arise were the trust's objects to go significantly further than the UK has yet travelled; for example in not taking account of sovereign immunity, as has become crucial in the Pinochet case,^[37] such as pressing for law change to deny sovereign immunity protection for heads of state still in office for crimes of torture. Likewise if the trust were to extend its reach to countries outside the extradition network. McGovern after the Human Rights Act 1998 - Is the law or government policy being reversed or merely changed?

It is therefore timely to revisit McGovern on the basis that the Human Rights Act 1998 comes into force (as is progressively to occur, with s19 already in force requiring ministerial statements of compatibility when new legislation is introduced). That Act does give the force of law to fundamental human rights in the United Kingdom, which include those to be furthered by Amnesty under its objects.^[38] Enforcement is however subject to the qualification that parliamentary sovereignty is preserved.

It has been long established that international treaties may not be enforced as law by domestic courts unless, and until, they are given legislative effect incorporating them into domestic law; *The Parlement Belge*.^[39] As stated by Lord Templeman in *Maclaine Watson & Co Ltd v Department of Trade and Industry*,^[40] the rule is that:

"except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual."

But does the Human Rights Act 1998 now "incorporate" the treaty rights contained in the European Convention into UK domestic law? Clearly enough at the time of *McGovern*, they were not so incorporated as Slade LJ recognised. Now there is an incorporation, but qualified to preserve Parliament's sovereignty. First, the Act very definitely does not render invalid past acts of parliament which are clearly incompatible with the treaty rights scheduled to the Act. And future acts of parliament, while they are to be the subject of a certificate of compatibility from the relevant Minister (s19), can proceed and remain valid even where the Minister states that he or she is unable to make such a statement but "wishes the House to proceed with the Bill". That is not affected by the court's power to determine whether a provision of legislation is compatible with a Convention right and a negative determination does not invalidate that legislation (s4(6)). Under s3, legislation "so far as it is possible to do so", "must be read and given effect in a way which is compatible with the Convention rights". But that again could not work an implied statutory alteration to conform a law to Convention rights, when no "possible" interpretation would allow a reading of that legislation compatibly with those rights.

Does enforcement via the judicial remedy afforded by s8 bridge this gap? This is "to grant such relief or remedy, or make such order, within its powers as it considers just and appropriate". But again, this is only "in relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful": s6(1) defines "unlawful" subject to s6(2). Importantly, s6(2) then provides that it is not unlawful for a public authority "to act in a way which is incompatible with a Convention right" if "..... as the result ofprovisions of primary legislation, the authority could not have acted differently". Likewise there is no unlawfulness, where "in the case of provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions".

Thus, the combined effect of these provisions is that Parliament is free to enact legislation denying a Convention right, provided it gives a statement in terms of s19(1)(b) and uses words which are so clear, they leave no room for compatibility as a "possible" interpretation. In those circumstances any person claiming to have suffered a denial of that Convention right by a public authority has no remedy save to go to the European Court in Strasbourg for a declaration.

Two specific examples illustrate the effect of this, the first more stringently rationed legal aid, the second, putting in prison those not guilty of any offence but a danger to the public. Suppose in the first case there be an Act of Parliament which denies to someone charged with a criminal offence "adequate facilities" for the preparation of his defence (Article 6:3(b) Schedule 2) or "to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (Article 6:3(a) Schedule 2). That might for example, be by legislation or executive act denying access to legal aid for someone unable to afford their own defence against a legally armed prosecution. If that denial were as a result of legislation precluding the legal aid authority from making the money available, s6 would preclude that public authority from having acted unlawfully. The consequence of that would be the denial of any remedy under s8, there being no basis for the court to find the relevant act (denial of legal aid) unlawful. Leaving aside whether the courts in the United Kingdom would without aid of the Human Rights Act follow the Australian High Court in *Dietrich v The Queen*^[41] in mandating that a fair criminal trial requires the availability of legal aid to someone unable to afford representation, the end result is that this aspect of the Convention right to a fair trial is only partially incorporated into UK domestic law by the Act.^[42]

An even more striking example would be legislation, presently under consideration in the United Kingdom, putting in prison, with judicial sanction, those deemed a danger to society by reason of untreatable mental health condition, though they have committed no offence. In Australia, this has been treated as an incompatible function for a judge, even in a state court which does not have a

constitutional division of powers.[43]

But these points must be kept in perspective. Convention rights are in a substantive sense, "brought home" by the Act, though domestic legislation may still in exceptional cases fall short. Legislation can always be brought into compatibility with the codified human rights. Parliament has fast-track procedures for doing so. This is by Ministerial Order approved by both Houses of Parliament. Such an order can apply to past as well as future legislation and is able to be retrospective if so framed; see schedule 2, para 1(1)(b). Enforcement and remedy can then follow.

The few cases where Parliament in the future chooses to assert its sovereignty and declines to remedy residual incompatibility may therefore prove to be marginal. It would hardly be congruent with the adoption of these Convention rights for Parliament to do otherwise. The established policy of the law may therefore to-day be regarded as in favour of the primacy of treaty rights, though leaving Parliament free in the exceptional case to override them - or leave them overridden.

Would Amnesty, depending as it does for public benefit upon the object and activity of political pressure to free political prisoners, fail to-day as a charity because of such "political" objects? Certainly not if its activities were wholly domestic; there is (and was) no incompatibility between domestic British law and Amnesty's objects. So far however as its foreign objects and activities are concerned, if Amnesty were to limit those objects and activities to seeking the release of prisoners of conscience in those 39 or so countries which have adopted the European Treaty in the relevant respects, it might not fail as a charity to-day. That is first a matter of examining the domestic laws in each country. For in a number of such countries there may in fact be no substantive incompatibility with the relevant Convention rights in those respects affecting prisoners of conscience. But if there were a substantial incompatibility, the analysis would be the same as that below for non-conforming countries.

Looking to "non conforming" countries which have yet to adopt such rights, insofar as legislation or executive action are concerned, would it be able to be argued that the United Kingdom has to-day by its foreign policy, extradition arrangements and the high level of its incorporation of those obligations domestically, and taking into account any other relevant evidence evinced an intention to influence those countries to do likewise? That of course is a matter of evidence and its interpretation. If the evidence went so far, Amnesty to-day may be acting to the public benefit of the United Kingdom in so seeking to influence such non-conforming countries. This would distinguish the circumstances from those which moved Slade LJ in *McGovern* to conclude in 1982:[44]

"There is no obligation on the court to decide on the principle that any foreign law is ex hypothesi right as it stands; it is not obliged for all purposes to blind itself to what it may regard as the injustice of a particular foreign law.

In my judgment, however, there remain overwhelming reasons why such a trust still cannot be regarded as charitable. All the reasoning of Lord Parker of Waddington in *Bowman v Secular Society Ltd* [1917] A.C. 406 seems to me to apply a fortiori in such a case. A fortiori the court will have no adequate means of judging whether a proposed change in the law of a foreign country will or will not be for the public benefit. Sir Raymond Evershed M.R. in *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1954] Ch. 672, 684 expressed the prima facie view that the community which has to be considered in this context, even in the case of a trust to be executed abroad, is the community of the United Kingdom. Assuming that this is the right test, the court in applying it would still be bound to take account of the probable effects of attempts to procure the proposed legislation, or of its actual enactment, on the inhabitants of the country concerned, which would doubtless have a history and social structure quite different from that of the United Kingdom. Whatever might be its view as to the content of the relevant law from the standpoint of an English lawyer, it would, I think, have no satisfactory means of judging such probable effects upon the local community.

Furthermore, before ascribing charitable status to an English trust of which a main object was to secure the alteration of a foreign law, the court would also, I conceive, be bound to consider the consequences for this country as a matter of public policy. In a number of such cases there would arise a substantial prima facie risk that such a trust, if enforced, could prejudice the relations of this country with the foreign country concerned: compare *Habershon v Vardon* (1851) 4 De G & Sm 467."

It will be observed that Slade LJ accepts that it is public benefit from the viewpoint of "the community

of the United Kingdom" that matters, not that of the foreign country. It therefore is not self-evident that the court would itself need to take account of "the probable effects of attempts to procure the proposed legislation on the inhabitants of the country concerned". Rather, it would hear evidence as to whether the United Kingdom government, when it took into account such matters, held any position concerning Amnesty's bringing pressure on foreign governments to bring about change in their legislation and policy from the viewpoint of the UK community's public benefit. Indeed prejudice to the UK's relations with the countries concerned may be given by the executive as a reason why it would consider that the UK public benefit was not so served.

If the position were neutral - that is if neither for or against the UK community's public benefit for Amnesty to pursue these objects in those countries - then under present interpretation of the law the trust would fail unless the activities were ancillary or incidental to indubitably charitable ones.

Religious Trusts and Political Objects

Consider another example, this time from the religious sphere. Take a trust to promote religion, combat religious intolerance, and, more controversially, promote debate about matters where there is presently religious conflict. Inevitably, such a trust will come into collision with foreign government policy in some countries, or with particular government decisions. The UK government may strongly wish to be neutral in regard to that policy as practised abroad. In particular by extending charitable status to such a trust, the UK Government may fear that it will be less effective in operating informally at a government level to influence such an overseas government.

Methods of bringing about change

Pressure for political change can range from direct lobbying of the government for legislative change, to attempts to change public opinion on a particular issue. Whether such pressure for change is termed agitation with its pejorative overtone, propaganda (Re Shaw: Public Trustee v Day),^[45] a campaign (Webb v O'Doherty)^[46] or merely and legitimately education (Re Koepler's Will Trusts: Barclays Bank Trust Co Plc v Slack)^[47] may be to some extent in the eye of the beholder, influenced by tone and style. Rich J, in Royal North Shore Hospital, placed some sensible limit on what constitutes political means, when commenting on an essay competition designed to influence public opinion to promote technical education and thus indirectly influence government policy:^[48]

"This contention, I think, drives to an absurd conclusion a somewhat vague and indefinite but well-known objection to gifts for public purposes. When it is said that a gift for political purposes is not charitable it cannot be meant that the advancement of every public object even if religious, eleemosynary or educational ceases to be charitable if the State is concerned in or affected by the result."

Educational Trusts with a "political" agenda

That leads me to the Southwood decision itself for it is in the educational sphere that the problem of political objects becomes most acute. The question typically is whether a "political" trust has been disguised as an educational one^[49], as a trust so characterised will not be treated as charitable. The question is always whether such characterisation is the proper one. Southwood dealt with a trust called "Prodem". Its stated purpose was the "advancement of the education of the public in the subject of militarism and disarmament and related fields" by "all charitable means". That was further elucidated by a background paper, submitted in support, in which the focus was said to be "the new militarism", described as "an undue prevalence of warlike values and ideas which manifests itself in proposals for excessive military forces, judged by any conceivable threat, and a level of military expenditure beyond the requirements for defence". The method of achieving "the aims" would be by briefings supplemented by public seminars. Carnwath J concluded that the trust, despite its educational elements, did not escape characterisation as a trust for political purposes. He acknowledged "the difficulty which the courts have found in drawing a clear distinction between 'educational' purposes, which are acceptable as charitable, and 'political' purposes which are not". As he rightly says "[T]he line is not clearcut". He adopted the statement from Tudor on Charities,^[50] to the effect that "a trust described as 'educational' may be disqualified, if the subject matter is not of sufficiently educational value, or the purpose is predominantly political or propagandist in character".

After considering the background material, admitted because of ambiguity in the deed itself, he concluded that the trust's purpose was not limited to educating the public in the peaceful means of dispute resolution. He concluded that the term "militarism" was intended to define the current policies of the Western governments, and the purpose of Prodem was specifically to challenge those policies. He thus concluded against the charitable status of the trust. Clearly the difficulty for Prodem was that it relied for its public benefit on being educational, when it was in truth relying rather on the proposition that challenging "militarism" of Western Governments was itself in the public interest, under the final

general head of public benefit. My purpose is not however to debate the decision itself, but rather to look more closely at the authorities in the educational sphere. In particular, to see how those authorities have at times blurred the line between "educational" and "political" purposes.

I suggest that the line between educational and political has become blurred. Matters of tone and style are playing a larger part than acknowledged. The assumption is made that a clear and objective distinction is capable of being drawn between the legitimate non-political and the illegitimate political; thus between information and opinion, reasoned argument and advocacy, objective discussion and "the propagation of tendentious political opinions". Yet advocacy is still advocacy when carried out in polite discussion under the auspices of a university or college (though *Re Koeppler's Will Trust*,^[51] discussed below, might suggest otherwise). Choice of speaker and subject matter can subtly but effectively influence outcome or the climate of opinion, despite professed objectivity. Indeed education inevitably has a didactic quality, though still to be distinguished from mere propaganda.

Then there are the conflicting cases about whether gifts to peace societies can be charitable. According to *Re Harwood*^[52] yes, but Gibson LJ answered to the contrary in *Re Koeppler's Will Trust*.^[53] The Court of Appeal left that issue for another day but may have to face it with *Southwood*. This is particularly if reliance is placed not only on education but also on the miscellaneous fourth Pemsel head; "trusts for other purposes beneficial to the community ...". The court can best maintain its neutrality by refraining from judgment about the desirability or otherwise of peace advocacy, concentrating rather on whether it is a subject of acknowledged debatability within the community. Thus if an object or activity, be it pacifism or whatever is a project of acknowledged debatability within the community as to its public benefit, that may preclude it from being charitable, at least until a broad, though not necessarily universal, consensus emerges that it has become at least generally recognised as for the public benefit. The relief of unemployment amongst immigrant women of colour by, in part, non-educational means proved too debatable for the majority in the Canadian Supreme Court recently, but opinion on that too may evolve.^[54]

One might legitimately ask whether there is anything wrong with allowing educational trusts to have some didactic quality, as do religious schools, so long as the educative purpose is not submerged. What may well be occurring is that the strict McGovern doctrine finds alleviation but at the price of distorting the notion of an educational charity. This is both by stretching it on some occasions to save what might otherwise be political, yet on others - where political objects or activities are thought too prominent - the trust is rejected as educational because of its supposed didactic quality.

An example of an "educational" trust which crossed the line into mere advocacy, failing as charitable, was a Canadian trust to "promote true Christian family values, encourage chastity, teach natural family planning" by way of lectures and literature. The Federal Court of Canada on appeal contrasted education as directed towards the formal training of the mind or the improvement of a useful branch of human knowledge, with activities primarily designed to sway public opinion on social issues.^[55]

The Canadian Supreme Court in *Vancouver Society of Immigrant & Visible Minority Women* went further, in allowing an organisation as capable of being educational (though it failed as a charity by majority because of non-educational elements) whose educative programme was to get a group of vulnerable people out of unemployment. It would have allowed as educational, forums directed at assisting immigrant women find employment, where the information and training was provided in a structured manner to advance the knowledge or abilities of the recipients and not solely to promote a particular point of view or political orientation.

Carnwath J cites a number of cases of trusts which failed, because they were merely for "the promotion" of international co-operation and understanding; for example, a trust to promote understanding between English and Swedish peoples; *Anglo-Swedish Society v IRC*.^[56] It failed because "it was a trust to promote an attitude of mind, a view of one nation by another". Similarly in *Re Strakosch*,^[57] Lord Greene says: "the problem of appeasing racial feelings within the community is a ... political problem, perhaps primarily political ...". The assumption seems to be that, being "a problem" and thus impliedly controversial, it must be political, by no means a reliable guide. Lord Greene suggested that it might have been possible to achieve the testator's purpose by a similar trust in which the emphasis was more clearly placed on education.

In *Re Koeppler's Will Trust* in the Court of Appeal,^[58] a trust was upheld as educational and thus charitable, though it was to promote "the Wilton Park project", involving conferences with political themes designed to promote greater co-operation between Europe and the West, creating "an informed public opinion" for that purpose. What saved the trust was first, that there was no intention to further the interests of any political party, second, the past record of Wilton Park allowed the trial judge

to conclude "it is clear that Wilton Park has taken pains to avoid inculcating a particular political viewpoint" and third, it used what the court was satisfied were educational means for its aim. The Court of Appeal were in this way able to characterise the promotional purpose by reference to its educational means and thus save it as an educational trust though the steps in the reasoning may not be wholly convincing.

So Carnwath J concludes by distinguishing promotion of a cause from education to the same end - a distinction not wholly clear:

"..... it seems that the promotion of good international relations as such is not a charitable purpose; but education as to the benefits of good international relations, and the means of achieving them, will qualify. By the same token, whether or not the promotion of peace in itself is charitable, there is no reason to exclude, from the scope of charity, education as to the benefits of peace, and as to the peaceful methods of resolving international disputes."

What is the law and government policy for purposes of the political objects doctrine?

This leads back to the question what is "government policy" (Slade LJ's words) or as I prefer, what is "the established policy of the law"?[59] Indeed the qualifying word "established" reminds us that law and policy are always capable of change. They may at any one time be intrinsically ambivalent in their leaning or have left interstitial gaps.

Consider what happens when the executive desires to change the law, but there is legislative unwillingness to bring that change about, such as where an upper house will not co-operate. Is a trust directed towards such legislative change against the policy of the law? The answer is probably yes - Parliament has spoken until it changes its mind. However, that point arose in a different guise in the events in the United Kingdom leading to the Scott Report.[60] That report dealt with a situation where it was alleged that the executive had failed to act in accordance with the policies of Her Majesty's Government, by issuing export licences and giving other encouragement, contrary to the legislation prohibiting arms sales in Iraq.[61] And what of a treaty adopted with no domestic legislation enacting its consequences. Is there then any policy of the Government in such a case, and, if so, what is it? Does an unincorporated treaty at least provide the foundation for a legitimate expectation that executive discretion will reflect it? This was answered affirmatively in Australia in *Minister for Immigration v Teoh*[62] and, in the negative in the UK in *Chundawadra v Immigration Review Tribunal*. [63]

This poses in especially acute form, the difficulty of qualified incorporation, as exemplified by the Human Rights Act to which I have earlier referred. Would a trust qualify as charitable, that included amongst its objects, the promotion of those human rights codified in that Act insofar as it was directed, as a "charity of compassion" to the relief of human suffering and distress? Most probably yes. But what if its objects also include removal by legislation of all instances of incompatibility between the codified rights and UK domestic legislation?

On the one hand, such incorporation bespeaks an "established policy of the law"; to recognise each of the codified human rights on account of their fundamentality and in furtherance of treaty obligation. On the other hand, domestic legislature in mainly marginal respects still falls short. Nonetheless those shortfalls may become significant. On the one hand, it cannot be assumed that the legislature will not come to bridge those gaps in time in order to achieve compatibility. Indeed the fast-track procedure is designed for that end. Accepting that such a trust to promote those codified human rights is charitable, it may not seem congruent to conclude that the trust is fatally compromised if it includes as an object to encourage government to remove any areas of incompatibility. This is especially when government has signalled its general willingness to do so, though stopping short of absolute obligation. Insofar as an established policy of the law can be discerned, it may not yet be in conflict with such an object, though potentially it might be, depending on whether Parliament expressly declines to remedy an incompatibility or the Minister presses ahead with clearly incompatible legislation. But on the other hand, the careful preservation of Parliament's sovereign right to override treaty rights may itself be enough even now to render such a trust as impermissibly political. That leads me to the difficult issue of what happens when the law itself changes.

One looks, generally speaking,[64] to the validity of a charitable trust primarily at the date of its inception. Nonetheless, a trust may later lose its charitable status by reason of a change in the trust's character, viewed against the law and government policy as each evolves. Suppose there be an

object to change the law at that inception, so that the trust is not able to qualify as charitable. Then suppose that a year or so later the law is changed, so that the disqualifying object ceased to be political. Or conversely, suppose the law were already in the form to which change were directed, at the date the trust took effect, but the law were changed later in the opposite direction, making the object from that later date political. If the change to the law were of the common law, and one maintains the declaratory fiction, despite its affront to common sense, that "the law was always thus", [65] then in the first situation the trust - but retrospectively - is to be taken to be valid after all. Thus for example, in the House of Lords following Pinochet but before that judgment was set aside, a trust might after all be valid, though premised on the basis of a now unnecessary change in the law to remove sovereign immunity for retired heads of state for acts of torture or hostage-taking. But setting aside that judgment restores the contrary judgment of the Court of Appeal so that the law after all needs to be changed. However, the new panel has again concluded there is after all no such sovereign immunity in relation to acts of torture, after the Torture Convention was adopted in 1984. Or statute could later intervene and again create contrariety between the trust's objects and the law. Given these complex issues, it behoves a court to be cautious rather than dogmatic.

A fresh look?

When the authorities lead to the making of distinctions so fine, it is time to have a fresh look at how the doctrine may sensibly apply to-day. Government is frequently involved in carrying out welfare activity, in areas common to the charitable trust's own activities; indeed the charity may be co-opted to work together with government on a contractual basis. Given that contemporary feature of the welfare state, is the assumption still right that an agenda to promote extension of government assistance to the poor, without dressing it up as an educational charity, must necessarily be political, given the professed aims of government? Is so narrow an approach a denial of the Convention right to freedom of (political) expression, directed against charities in a discriminatory fashion? Finally, what of a trust to promote law reform? It is true that this assumes the law may be changed for the better. But government makes precisely that assumption in setting up law reform commissions.

In the United States, even a trust to change the law may be upheld, if directed to promoting improvements to the law where the subject matter comes within one of the four heads of charity. As was said by the Supreme Court of Pennsylvania in *Taylor v Hoag*: [66]

"We are led to conclude that a trust for a public charity is not invalid merely because it contemplates the procuring of such changes in existing laws as the donor deems beneficial to the people in general or to a class for whose benefit the trust is created. To hold that a change in a law is in effect an attempt to violate that law would discourage improvement in legislation and tend to compel us to continue indefinitely to live under laws designed for an entirely different state of society. Such view is opposed to every principle of our government based on the theory that it is a government 'of the people, by the people and for the people', and fails to recognise the right of those who make the laws to change them at their pleasure when circumstances seem to require. With the wisdom of the proposed change the courts are not concerned."

The authorities in the United States thus neatly avoid the objection that it is not for the court to decide what is in the public interest when that involves political questions, by holding that the cause of law reform and public participation in the legislative and government process are themselves for the public benefit. It is that basal assumption that underlies the now recognised qualified privilege in defamation attendant on political discussion.

Conclusion

Even as the law stands, courts may not preclude as charitable, an object or campaign to introduce new law consistent with the way the law is clearly tending, such as promotion of good race relations. It may not matter that there be a main object to that effect, provided the activity remains proportionate to an overall indubitably charitable purpose and genuinely directed to that end. In that sense only, such an activity is ancillary. There is a crucial distinction, implicitly recognised in *McGovern*, between permissibly changing the law within the framework of its established policy and impermissibly reversing the law along with its established policy. Incremental change to the law consistent with its established direction may indeed be permitted. But there remain limits on what is incremental change and what is more radical, as illustrated by racial vilification legislation which some may say is not merely incremental.

Likewise if there be even a main object for the domestic promotion of those human rights now codified in the Human Rights Act 1998 this may have ceased to be political. For these rights have become part

of the established policy of the law, though incorporated in a way which recognises Parliament's sovereignty.

Similarly in relation to trusts otherwise charitable with objects which include procuring changes in foreign law, or foreign policies and decisions, there need be no loss of charitable status. This is always provided that the foreign policy of the United Kingdom treats that objective as furthering the public benefit, viewed from a UK community standpoint. That is a matter of evidence rather than an automatic no-go area for charity. That evidence could include treaty obligations undertaken in that behalf, their domestic adoption and other relevant evidence concerning the public interest from the viewpoint of the United Kingdom and not the foreign community.

A trust does not depend for its charitable status on an object or purpose to change law or reverse policy where it has other indubitably charitable objects. The question is always whether that "political" object precludes the trust satisfying the public benefit requirement. When the trust does depend for any charitable status solely on an object to change law or policy, it is difficult to resist the conclusion that such a trust is not charitable, though a trust to benefit law reform generally may be in a different category.

However, it is important to define accurately the public benefit question to be answered, as I have just sought to do. The courts in embarking on such an enquiry are no more usurping the function of the legislature, than in other contexts where courts customarily grapple with political issues.

These difficult questions arise whenever there is a legitimate charitable purpose, but associated with an agenda to promote legislative change or policy change, directed to that charitable end; that agenda may or may not be associated with an educational programme. Will such a trust, to be charitable, still have to rely on the agenda being only an ancillary or incidental means (whether or not expressed as an object) or being carried out only as part of an educational programme? And if that "ancillary" requirement is retained, I have suggested that it might be treated as satisfied if, though not subordinated, it is nonetheless proportionate, bipartisan, and genuinely directed to an indubitably charitable end, whether or not expressed as an object.

Finally, how is an educative purpose to be appraised where there is a didactic element in the programme? Accepting that education must involve an objective pursuit of knowledge, can education ever be entirely value free? When does education merge into propaganda? Is education the same as mere training as for helping the unemployed? It is here judges have to be careful to keep out their own prejudices, but without avoiding those critical questions for educational trusts.

So far as validity of such trusts is concerned, but not to preserve any non-charitable political agenda, future legislative reform could consider a statutory severance provision, as in New South Wales, excising political objects from those which are indubitably charitable. Such severance will still have to meet the test of the result not defeating the testator's intention and leaves no scope for what is severed as political.

Then there is the freedom of expression, mandated by Article 10 of the European Convention and incorporated by the Human Rights Act 1998, though not yet in force. It, with its necessary qualifications, now represents the established policy of the law. Political campaigning may as a result no longer need to be subordinated to charitable ends, so long as those ends in turn are not themselves subordinated to a political agenda. That mandated freedom of expression may well allow political campaigning, within rather less stringent limits than now apply, though still requiring that the political activity be both proportionate, and genuinely directed to indubitably charitable ends.

Beyond freedom of expression so mandated, defamation law already recognises the public benefit in the protection of political speech, though not to an unlimited extent. But it would be a mistake to treat a trust object to secure political change as itself automatically for the public benefit. That must depend on whether the particular political change is directed at an indubitably charitable purpose, such as winter shelters for the relief of poverty. And the political means must not overwhelm the charitable end; there must be proportionality between means and ends. There is good sense in the Charity Commission's guidelines, when they warn against political partisanship, though in other respects they may need updating.

These developments in the law of charitable trusts should not open the floodgates to projects of acknowledged debatability in the community. Rather they properly recognise that charities may not need to remain politically mute, nor so constrained that they cannot safely exercise their rights to

freedom of expression in political debate, when all other members of society may do so.

The questions I have posed are for a future appellate court. But the fact that they can be asked shows that the law does not stultify itself in such a process. For the law of charities, so long in an unsatisfactory state, must now move with the times.

* Justice of the Supreme Court of New South Wales. This paper to appear in Current Legal Problems 1999 is based on a lecture delivered when Judicial Visitor, University College London. I express my gratitude to that institution, Lincolns Inn and the Institute for Advanced Legal Studies and earlier to Cambridge University and St. John's College for facilities extended to me.

1 [1982] Ch 321

2 The potent implications of that Act is explained by Debra Morris in "Charities, Politics and Freedom of Speech" in the Charity Law & Practice Review 1999, Vol. 5, Issue 3 at 219 (cited "Morris")

3 Note that in Australia there is no enactment of a bill of rights. Its constitution has thus far only allowed quite limited implication of such rights, namely that of political free speech derived from a system of representative government, and that less easily categorised, derived from the separation of judicial power. Thus is precluded anything which would weaken public confidence in the independence of the judiciary, as for example in requiring a judge to undertake the incompatible function of imprisoning someone representing a public danger who was not guilty of a criminal offence, a development now contemplated also in the United Kingdom - for those whose propensity for violence from untreatable mental illness poses a public risk - in order to give the odour of judicial sanctity to executive action; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577. See generally George Williams, *Human Rights under the Australian Constitution* (Oxford, 1998).

4 *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138 at 154 per Lord Wilberforce.

5 M R Chesterman *Charities Trusts and Social Welfare* (London, 1979) Ch 7

6 Compare *Jackson v Phillips* (1867) 96 Mass. (14 Allen) 539 upholding a trust to influence public opinion and slave owners to release coloured slaves distinguished from direct pressure on governments to release prisoners of conscience and change the law to remove torture, capital punishment and corporal punishment in *McGovern v Attorney General* [1982] 1 Ch 321 at 345-7.

7 R P Meagher and W M C Gummow, *Jacobs Law of Trusts* 6th ed (Sydney, 1997) at 232, describing *McGovern* as "a curious result [which] may well indicate defective reasoning".

8 A decision of Carnwath J, so far reported in the Times Law Reports of 25 October 1998 and on appeal to the Court of Appeal.

9 *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396 at 426

10 The Charity Commissioners' Guidelines on the matter seek to indicate how campaigning charities may make the most of the principle that political activity that is merely ancillary to one or more charitable purposes does not endanger charitable status; Leaflet CC9, *Political Activities and Campaigning by Chartres* (London, 1997). But it appears likely that many charities dealing with poverty and disadvantage remain convinced that, though unable to operate effectively without a significant degree of campaigning, they are nonetheless inhibited in doing so because it is difficult to tell in advance whether a campaign has gone beyond merely ancillary conduct; see M R Chesterman, *Foundations of Charity Law in the New Welfare State* paper given at King's College London 14-15 September 1998 (cited "Chesterman"), now published in (1999) 62 ModLR 333 (at 344).

11 Dixon J at 426.

12 *Charity Should Begin at the Lawyer's Office*, The Times 16 February 1999. Thus in the UK the key elements include, in defined circumstances, exemptions for charities from: income tax (*Income and Corporation Taxes Act 1988* ss.505 and 506); corporation tax (*Income and Corporation Taxes Act 1988* s9(4)); capital gains tax (*Chargeable Gains Act 1992* ss.256(1) and 257); and stamp duty (*Finance Act 1982* s129). Tax incentives are also offered to charitable donors.

13 per Lord Cross in *Dingle v Turner* [1972] AC 601 at 625

14 [1982] Ch 321 at 442

15 [1917] AC 406

16 (at 336)

17 [1948] AC 31

18 Slade LJ in *McGovern* at 337

19 Tyssen on Charitable Bequests, 1st edition, cited with approval by Lord Simonds in *National Anti-Vivisection Society* (supra) at 50.

20 See for example, the lawfulness of subsidised fares on London Transport, the decision of withdrawal of life support from an incurable or unconscious patient, the executive decision on the Pergan Dam subsidy as well as issues of gender and race discrimination; see Sydney Kentridge, QC, *Parliamentary Supremacy and the Judiciary under a Bill of Rights: Some Lessons from the Commonwealth* [1997] PL 96 at 106.

21 *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* (1999) 99 DTC 5034 (SCC) especially Gonthier J at para 108 where the political activity in the view of all judges was not outside the ancillary and incidental, though so empowered as a stated "purpose" incidental to achieving educational ends. It failed in the view of the majority, against a strong dissent, only because under a concluding further incidental power, it carried on activities like a job skills directory and the establishment of support groups for professionals, neither of which were said to be educational and on the basis that the incidental power itself contemplated purposes too vague and indeterminate to come under the fourth head of charity. The minority considered that settlement of immigrants and refugees and their integration into national life, was a valid charitable purpose under the fourth head.

22 In *Vancouver Society of Immigrant & Visible Minority Women*, it was noted that the beneficiaries were not exclusively women or members of minority groups, thus allowing the actual activities to be called in aid of validity (Gonthier J, para 105).

23 *McGovern* at 340-1

24 See in relation to incidental private benefit, for example *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73; *IRC v Glasgow Police Athletic Association* [1955] 1 All ER 525.

25 This approach conforms with the Charity Commission's revised guidelines following the Oxfam inquiry of 1991 (see footnote 8); they require activities to serve and be subordinate to the charity's purposes, not be undertaken as an end in themselves nor so as to dominate the charity's activities by what the charity undertakes to carry out its charitable activities directly. The trustees must be able to show that there is a reasonable expectation that the activities will further the purposes of the charity effectively and so benefit the intended beneficiaries.

26 H A J Ford and W A Lee, *Principles of the Law of Trusts* 3rd ed (Sydney, 1996) at 58

27 1998 3 WLR 862 at 909, on appeal to the House of Lords

28 (1997) 189 CLR 520 at 571 and 574

29 At 349.

30 See *Morris* at 228 citing *Bowman v UK* (1998) 26 EHRR 1 at 23

31 [1996] QB 169. Discussed by Stevens and Feldman, *Political Objects Judicial Review and the Influence of Charities Law* [1997] PL 615, who contend that charity law should encompass the observance of human rights and thus free speech and the honouring of international obligations -now recognised statutorily in the Human Rights Act 1998.

32 at 442

33 The Times, 16 February 1999, describes how charities are facing a surge in work with the dismantling of parts of the welfare state. Furthermore, with the Local Government Bill now going through the House of Commons, this will give charities a much greater role in the provision of social services because of the requirement on local government authorities under the new "best value regime", for "economy efficiency and effectiveness" in performing their statutory functions. The charities problem is that they are themselves often getting into trouble under the contracts they make with the authorities, with lack of legal advice being a factor.

34 (1997) 42 NSWLR 600

35 see Picarda, *The Law and Practice Relating to Charities* (London, 1995) at 167

36 See s134 of the Criminal Justice Act 1988 in England.

37 *R v Nicholas Evans and Ors* (Court of Appeal, 28 October 1998, unreported - the "Pinochet" case).

This was subsequently reversed in the House of Lords, 25 November 1998 (*Regina v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* [1998] 3 WLR 1456), which held that in its codified form, sovereign immunity did not in the United Kingdom apply to a former head of state for crimes of torture and hostage-taking, these being no part of the functions of a head of state when committed or directed by him while occupying that office. That decision was in turn set aside on 17 December 1998 by another panel of the House of Lords ([1999] 2 WLR 272) on the ground that one of the Law Lords, Lord Hoffman, had failed to disclose his links with Amnesty, which appeared as an intervenor. The matter went again before the Lords in 1999 2 WLR 827 where sovereign immunity was denied for acts of torture after UK adoption of the 1984 Convention against Torture.

38 See Human Rights Act 1998 Articles 2, 3, 5, 6, 9 in Pt I Schedule 2 and Articles 1 and 2 of Pt III, mandating the right to life, prohibition of torture, right to liberty and security, right to a fair trial, freedom of thought, conscience and religion and the abolition of the death penalty subject to time of war in instances laid down in the law.

39 (1879) 4 PD 129 at 154

40 [1989] 3 All ER 523 at 526

41 (1992) 177 CLR 292

42 See for a fuller discussion Andrew Henderson, *Parliamentary Sovereignty and the Human Rights Act 1998* [1998] PL 563 at 573-5. He does not mention the difficulty posed by the interaction of s8 with s6(1) and (2) to which I refer above, nor is it fully elaborated in K D Ewing, *The Human Rights Act and Parliamentary Democracy* (1999) 62 MLR 79.

43 See footnote 2.

44 (at 338)

45 (1957) 1 WLR 729

46 (1991) 3 Admin LR 731

47 [1986] Ch 423

48 at 419

49 See Parker and Mellows *The Modern Law of Trusts* (7th edition by A J Oakley) (London, 1998) at 413

50 8th edition at 50-1

51 [1984] Ch 243

52 [1936] Ch 285

53 (supra) at 257

54 Vancouver Society of Immigrant & Visible Minority Women (supra)

55 Human Life International in Canada Inc v Minister of National Revenue (1998) 98 DCT 6196.
[1998] 3 FC 202 [1998] 3 CTC 126. 232 NR 174 (Fed. CA)

56 (1931) 16 TC 34

57 [1949] Ch 529

58 [1986] Ch 423

59 Dixon J at 426 in Royal North Shore Hospital of Sydney

60 Report of the Inquiry into the Export of Defence Equipment and Dual-use Goods to Iraq and Related Prosecutions HC115 (1995-96) dated 15 February 1996

61 see Ian Leigh and Lawrence Lustgarten, Five Volumes in Search of Accountability: the Scott Report" (1996) 59 MLR 695

62 (1995) 183 CLR 273 (till reversed by legislation now pending in bill form)

63 [1988] Imm AR 161

64 See Jacobs' Law of Trusts in Australia sixth edition (Sydney, 1997) at 1013 and National Anti-Vivisection Society v Inland Revenue Commission [1948] AC 31 at 74.

65 Reaffirmed by the House of Lords in Kleinwort Benson Ltd v Lincoln City Council [1998] 3 WLR 1095 at 1121 per Lord Goff but per contra Lord Browne-Wilkinson at 1100.

66 116 A 826 (1922)

Launch of the Sydney Post-graduate Studies Programme 1998-1999
University of Sydney Law School
24 October 1997

On Justice Meagher's door appear two witch doctors in earnest conversation, in full regalia. One leans forward to the other and says: *Women priests — the end of civilisation as we know it?*"

Thirty-five years ago Ross Parsons threatened the end of post-graduate scholarship as we knew it. He dared to introduce a Master of Laws by course work — with a shorter scholarly paper at the end rather than a thesis; I should add that Ross personally cajoled many of us to finish it, when our energies flagged. In those days your Dean Ros Atherton would have been burnt at the stake for suggesting: "*for those who are wary of the often solitary pursuit of the PhD, but are interested in advanced legal studies with a collegial approach, the SJD is worthy of serious consideration.*"

However, Ross Parsons was not deterred. He came at a time of tentative rapprochement between practitioners and the Sydney Law School. His continuing legal education programme was decisive in converting that to a real intellectual symbiosis between Law School and the profession. *He* did not consider it the end of academic civilisation as we knew it to introduce his then radical LLM programme. This was because he maintained a proper gradation between the austere pinnacle of SJD and his new course work Master of Laws, and insisted upon a rigorous academic standard for it.

Thirty-five years later, we are now offered, to quote Ros again, "*a rich smorgasbord of opportunities for graduate studies in law and related disciplines*". Again there is a careful gradation of Diploma, Masters Degree and the two Doctorates. And the bridge it offers between the practising profession and a great law school is reaffirmed by the breadth and depth of that programme, unsurpassed in this country.

That Master's programme achieved much. Yet but for Professor Parsons followed by Justice Hill, Tom Magney and now Richard Vann, and an able teaching staff, taxation would still be the exclusive preserve of the accountants. The taxation programmes were the single most significant factor in educating a new generation of solicitors, barristers and, dare I say it, judges, in the arcane mysteries of taxation. That the sponsors of the

course include the first hybrid law and accounting firm, Greenwoods & Freehills, is symptomatic of the breaking down of barriers.

When I think of the thirty odd years since Ross Parsons first taught me tax, with that gently probing dialectic, I am irresistibly taken back to our class. It included the then disbarred barrister, Peter Clyne. I can still recall that look of pain, at odds with Ross's lively intellectual curiosity, when Peter Clyne would suggest some outrageous, ingenious tax manoeuvre. But how must Ross have felt when he later read these lines from Peter Clyne's *Adventures in Tax Avoidance (with 120 Practical Tax Hints)*?

"I would like to take this opportunity of acknowledging my indebtedness to Professor Parsons and Mr G Keneally of the Sydney University Law School, who led me by the hand into this field and let me loose there. To save them the embarrassment of being visited with tar and feathers and horse-whips, I will leave things on the basis that if this book contains any good ideas, many of them were inspired by Professor Parsons and by Mr Keneally. But the dismal failures are entirely my own."

Alongside Ross Parsons was Graham Hill's course in stamp and death duties; Justice Hill, as he now is and in our audience to-day, completed over thirty years of teaching last year in the Master of Laws programme. Surely a cause for celebration! Nor should we forget the enormous contribution of Professor Robert Austin, who straddles his academic and professional interests to the mutual advantage of both.

From those solo instruments, there is now the symphonic richness of an enormous range of courses, catering for most personal and vocational interests.

Let me transport you now to this morning. Sitting across my table, over morning tea, was Professor Hugh Corder from Cape Town University, a leading administrative lawyer. He describes how he has been crucially influenced by the Australian experience in administrative law, the best in the British Commonwealth. This as a model for the new South Africa, with its bitter memories of executive repression. He expressed his immense debt to that expertise and in particular from his contact with Professor Margaret Allars of our Law School. Yet he too received a modest contribution as a Parson's visitor in 1991 bringing him from Adelaide to Sydney for the first time and then again this year. What better illustration of how Sydney Law School has become a crucible of ideas, its radiating network influencing both scholarship and policy. And all this, battling a cruelly shrunken budget and grossly inadequate academic salaries.

To Professor Alice Tay we owe a most important linkage to our Region. She, ably assisted by Conita Leung, single-handedly set up the Centre for Asian and Pacific Law ("CAPLUS"). Its influence encompasses last year's winter school in Shanghai at which over thirty students from Sydney Law School participated, learning about Chinese Laws and its legal system. Sydney's Winter School in the planning next year will see 80 students from the Region. CAPLUS contacts and network radiate throughout Asia, reaching Vietnam, Indonesia and Korea.

Those Asian visitors whom Professor Tay have invited here join the visiting Parsons' Scholars whose funding stems from Ross's unselfish frugality. He, with Jenny Litman's help, not only provided materials for the various courses but also ran a highly successful series of Thursday evening lectures. These are continued still with leading jurists and scholars, local and overseas. The proceeds from these lectures were ploughed back meticulously into the Parsons' fund. Most recently we have welcomed Professor Roy Goode from Oxford, one of the very first of the Parsons' visitors.

I return to a theme that takes us back to the beginnings of this programme. There is no longer that gulf between practising profession and academia. Nonetheless the linkages cannot be taken for granted. There is a natural symbiosis between the manufacture of legal constructs and argument, an enterprise shared between academia, barristers and solicitors, for its wholesale application in the courts and ultimately its retailing in daily commerce. But that symbiosis requires continued painstaking nourishment, if its flow is to continue unimpeded. Complacency, triumphalism or an inward looking Law School, will quickly destroy it. We should cherish our craft and our professionalism whose cultivation is the essence of a continuing legal education. These are, after all, the qualities which differentiate us and make us useful to the community.

G F K Santow

24 October 1997

Some Reflections on *Mémoires à Deux Voix*, Elie Wiesel and François Mitterrand

I read Wiesel's self-effacing dialogue with Mitterrand with a sense first of mounting irritation. So little of Wiesel, so much of Mitterrand and he so intrusive and apparently controlling. As my reading progressed through "Childhood", that changed. Because Wiesel's questions were so gentle, so disarming, they coaxed the most revealing of responses.

It starts thus:

“Wiesel: We cherish our childhood, we keep coming back to it again and again. We judge it, just as it judges us. What do you say to the child you were?”

Mitterrand: I have nothing to say to it inwardly.

Wiesel: There's no dialogue between you?

*Mitterrand: Not really. Nothing meaningful in any event.”*¹

Just a few questions later, Mitterrand refers to his childhood as occupying an immutable place within; though relatively slight in his total being, it remained important in value — “the purest portion of my personality”. *But the little diamond has remained intact.* [“*Enfin, ce petit diamant qui est là s'est perpetué.*”] He refers to his childhood as an anchor — a reference — but never controlling his actions, only his judgments! He leaves totally unexplained, how his actions could operate independantly of his judgments, like sight after a detached retina.

Later, after evoking with real sympathy Mitterrand's abhorrence for injustice — rather like a teacher so anxious for his favourite pupil to present himself at his best — Wiesel, reluctantly, without shedding affection for the friend he wanted to continue to admire, asks

¹ Taken from the English translation by Richard Seaver and Timothy Bart, Arcade Publishing, New York 1996 of the original French edition of Editions Odile Jacob 1995)

["Wiesel: Nous aimons notre enfance, nous y revenons, nous la jugeons, elle nous juge. Que dites-vous aujourd'hui à l'enfant que vous étiez?

Mitterrand: Je n'ai rien à lui dire intérieurement.

Wiesel: Il n'y a pas de dialogue entre vous?

Mitterrand about René Bousquet. Of Bousquet's Vichy past surely known to Mitterrand; the man who helped fill the human quotas for the Nazi death camps whom Mitterrand once admired and with whom he was once associated. At first Mitterrand tries to glide around the difficulties, reconciling the irreconcilable, hiding behind Bousquet's early judicial whitewash. But faced with that unrelenting, gentle confrontation, Mitterrand then resorts to bombast and half truth; finally rejecting "the little diamond" of his purest self.

*“Mitterrand: First of all, I shall say that over the course of the years I have shed [better translated ‘I have liberated myself from’] the restrictions and restraints of my background, my education, and my early prejudices. I much prefer having followed the path I did, moving increasingly away from the conservative environment out of which I came toward the ideals of the left ... but I **did** make it, and I must confess to feeling a certain pride when I look back and see how far I have come.”*²

Observe how he replaces his conservative childhood, not with different values, but different ideas — of the left, as it happens, but it might as easily have been “cohabitation” with Chirac.

What *is* clear is that, as the psychologists would say, this is a man, highly intelligent, with a seducer's desire for approval and more, yet *who never integrated his childhood* — and who compartmentalised so much else of his life. Who could place a conservative Catholic childhood hermetically sealed (as he hoped) from his actions as a person of the Left. Judgment in one box, action in another. Whose Vichy period, with little perceptible transition, was displaced by the man of the Resistance. Who could, after Pompidou's slow decline and death, promise the French people to disclose his health, yet swore his doctor in 1981 to suppress any news of his prostate cancer. And, finally, who managed to live the schizoid existence of an apparently close and companionable marriage with Danielle and his children on the one hand, while maintaining a clandestine liaison with a mistress and their daughter on the other, all brought to the stage at the end, along with the family dog.

Mitterrand: Non, enfin, pas trop.”]

² “Je dirai d’abord que je me suis affranchi au fil des années des contraintes de mon milieu, de mon éducation, de certains de ses préjugés. Je préfère avoir suivi ce-chemin-là, m’exonérant progressivement de l’environnement conservateur qui était le mien, pour aller à la rencontre des idéaux de la gauche ... je l’ai fait et j’en ressens quelque fierté.”

One might intellectualise and justify these apparent irreconcilables. But why then choose so searching an interlocutor as Wiesel, amid all this stage management? One who could say to his friend: *My own feeling is that how you look back at your past is as important as your past itself* [“*Je pense, moi, que le regard que vous portez aujourd’hui sur votre passé est au moins aussi important que votre passé lui-même.*”] ... It is when Wiesel then pleads for some regret, some remorse, that Mitterrand responds in anger with that litany of achievements.

It is as though Mitterrand’s life was like a series of untidy rooms left behind, each door carefully shut. He moves from room to room repeating the process till finally he reaches the last room. There he now sits, with his friend, knowing he is dying, as they engage in that gentle, searching retrospection. Certainly Mitterrand wants admiration, not absolution. His friend, who so admires both his intellect and his sensibilities, tells him the price. But Mitterrand knows the price is too high. He must open all those rooms and let the light in. He will not. He says, in effect, what is the point of travelling so far, if now I must retrace my steps, looking into the dark closed places of those re-entered rooms? Surely the aedifice of a life’s achievements over that long journey is all that counts!

So why then did he choose Wiesel, who did not accept that premise? Was it out of an expectation that Mitterrand’s formidable powers of seduction, exerted on a Jewish friend, would provide the strongest refutation of any lingering ambivalence? A friend who had suffered in the Holocaust, whose testimony would be of such unimpeachable integrity in the eyes of posterity. If so, was Mitterrand’s discernment about his friend so limited that he thought Wiesel would betray his own convictions out of friendship?

Or was there truly a desire to risk all, letting the accounts reconcile as they may? Was there the conviction that, in the end, one must submit for judgment, even if the completed work be shaped and presented to best advantage? Just as earlier he co-operated (to a degree) with the biographer who attempted to reconstruct his tacking between Vichy and Resistance, so he turns himself now to a more searching light.

So indeed we should be grateful. For it takes the empathy of an Elie Wiesel to draw out such insights from so well guarded a man. Had Wiesel been merely repelled, we would know much less. May we not therefore allow ourselves at least a scintilla of admiration for Mitterrand, in choosing such a judge and laying himself open?

Or perhaps the final judgment should be Wiesel's, quoted in the *Sydney Morning Herald* of 10 October 1996:

“There has to be coherence and logic in the political journey of François Mitterrand,” he writes. ‘His refusal to inquire into the Nazi past of certain French people and to put them on trial; his custom of secretly laying a wreath on Pétain’s tomb; his links with former [fascist] Cagoullards; his determination to hide part of his life; and his habit of surrounding himself with Jews — all this must have an explanation.’”

There was one final sour note in the whole encounter. Mr Wiesel claims that Mr Attali, François Mitterrand's friend and former adviser, used the unpublished manuscript of the Wiesel/Mitterrand conversations for his memoirs, *Verbatim*, pretending the remarks were made to him. He says of this apparent breach of faith; *“this still hurts me”*.

G F K Santow

29 November 1996

**Address to Professional Staff at FHP
on Pro Bono Programme
20 November 1996**

Pierre Ryckmans, a profound and subtle man, was asked: “*Have any books changed your life?*” The answer he gave in last night’s Boyer Lecture was “*only George Orwell’s essay on tea drinking — it taught me to give up milk and sugar.*” He was referring to the uselessness of books, wherein of course lies their real value.

But Pierre was not aware of a sign on a shopfront in Darlington “*Old Books*”. This is the shopfront where Freehills, led now by Jane Sanders, **does** change lives. I refer to the Shopfront Law Office where young people from the Kings Cross streets come in crisis. The surface crisis is a brush with the Law. But the turmoil in their lives is only brought into focus by that crisis. And it is sometimes the occasion for more fundamental help from other agencies.

The story of “Helen” in Freehill’s pro bono booklet must be an outstanding example of that.

In a more profound sense, “*Old Books*” is really about values. The values of your firm and you personally; values worked out in practice rather than mere preaching.

I start with the original pioneers of your pro bono scheme — Keith Steele, Don Robertson and Kevin Broadley. I extend this appreciation to all those who have taken on pro bono tasks across a wide spectrum. I do not limit myself to lawyers. I remember vividly at least one para-legal whose own life had been changed by difficult family circumstances. She was absolutely crucial in the early success of the shopfront law office.

“Pro bono” means of course “*for the public good*”. But I believe it is also for the good of Freehills. Business organisations, and the best in them, have a yearning for values and ideals. You see it expressed often crudely in cliché-ridden mission statements, parasitic as they may be on a kind of vicarious missionary piety. Nonetheless they are a beginning. I was brought up as a Quaker to believe that what matters is not what you say but what you do — “*by your works you shall know them*”. That is why there is something quite special about your pro bono programme. It is the outward visible sign of having real values, not mere talk about them.

It was Don Robertson who first put me in touch with Kronman's insightful book, *The Lost Lawyer*. Kronman writes:

"This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul. The crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up. Disguised by the material well-being of lawyers, is a spiritual crisis that strikes at the heart of their professional pride."

More recently Justice Kirby has picked up these themes in a paper *Legal Professional Ethics in Times of Change*. The truth is, as lawyers we want to be measured by more than our billable hours. Our idealism is vulnerable to a sense of disillusionment, if there is nothing in our lives but the pursuit of material success. But let me say quite emphatically that there is nothing wrong in itself with material success. After all it is because Freehills has been so successful that it has the resources, financial and legal, to spare for others. And as we marvel at the two jumbo jets that bring an entourage of the American President and associated paraphernalia, it is surely no coincidence that the world's trouble spots still turn to generous North America for help, while Europe dithers.

Let me again quote Pierre Ryckmans, substituting "law firm" for "university":

"A true law firm is and has always been anchored in values. If deprived of this holding ground, it can only drift at the caprice of all the winds and currents of fashion, and in the end is doomed to founder in the shallows of farce and incoherence."

The holding ground for successful firms like Freehills is, I believe, the related virtues of objectivity and disinterested altruism. The best and the brightest will only come to you if you touch that idealism. You retain these brilliant young people — and older ones too — **because** they are nourished intellectually and spiritually. The paradox of self-fulfilment is that we sublimate our self in something more important than we are.

The Court system, like the public hospitals, has to survive with less and less money as governments engage in fiscal stringency. We have already seen what has happened to the doctors — demoralised, over-worked and facing various direct or indirect earning limitations. While the situation of the law is not precisely equivalent, the same trends are there. When the Director of Public Prosecutions draws out the consequences of withdrawing Legal Aid funds as leading ultimately to the impairment of the quality of

justice, he points to a problem that will not be quarantined there. So the pro bono programme which you have launched is ultimately even a matter of enlightened self-interest — though you do not participate in it for that reason.

So may I add this final plea. If, with the rigour and discipline which you bring to bear on the pro bono activities that you do, you could add a little light-footed use of occasional excess capacity? Let me explain. From time to time in the Duty List we get cases where there is an unrepresented litigant. Sometimes the Bar can help out but often there is just no advocate available. You all have rights of audience. If there were a contact point to see if someone could help, at short notice, that would greatly aid the Court system as well as the deserving litigant. And if others joined you, even better.

Thank you for inviting me to return to this firm, where I spent so much of my working life. I wish you and the pro bono programme well

G F K Santow

20 November 1996

THE MODERN JUDGE

Courts to-day do not operate in the spacious era of uncrowded lists. The modern Judge is much more a manager of litigation than the Judge of earlier times. That is the result of case management techniques and the need on occasion to limit argument as well as maintaining timetables for the fair and efficient conduct of the case in hand. But the Judge is much more than a manager. Efficiency cannot prevail over the fundamental goal of justice between the parties. This the courts have recognised, in calling from practitioners in its courts for a greater sense of personal responsibility in their conduct of the case so as to share over-stretched facilities fairly with other litigants. Thus timetables are enforced with greater vigilance. Practitioners are expected to prepare their cases thoroughly and in timely fashion. A by-product of early identification of the real issues is not only more efficient litigation compatible with justice. It also promotes early settlements, sometimes aided by mediation.

In addition, courts have embraced computer technology where it can assist, particularly for cases of voluminous factual complexity.

To-day, what judicial officers do and say is the subject of close media scrutiny. Judgments (and Judges) are subject at times to critical and sometimes selective comment and quotation, out of context. Yet the interest of the community in the working of the courts is greatly welcomed. The courts have always been open to the public. Judgments have not only to be published but to give adequate reasons. This is so the litigant who has lost can know why and appellate courts correct error. Media interest has led to courts appointing information or media officers who can inform or correct where necessary. This has led, on occasion, to individual Judges explaining, never the case they have decided, but how the judiciary works. Sometimes matters of public importance of a law reform nature have prompted remarks from the judiciary. This may be in considered papers and at times even in media interview. Sir Anthony Mason stated that "ultimately our goal must be to secure a better understanding of what the courts are doing, an appreciation that the people can confidently look to the judiciary for competent, fair and honest decision making and for protection of the rights and legitimate interests of the individual".

The judicial institution must constantly pursue ways of achieving its fundamental role in ways which take account of changing society. What has remained constant and unchanging starts with the judicial oath comprised of two promises. The first in the Oath of

Allegiance to the Queen as head of state. The second is: "To do right to all manner of people according to law without fear or favour, affection or ill-will". Sir Gerald Brennan, Chief Justice of Australia, at his swearing in emphasised that the ultimate sovereignty of the nation resides in the Australian people who alone can abrogate or amend the Constitution. Accordingly, that Oath of Allegiance is ultimately a promise of fidelity and service to the Australian people. It thus survives in its essence whether we are a Monarchy or ultimately evolve to a Republic.

The judicial oath precludes partisanship for any cause and forbids any Judge to regard himself or herself as a representative of a section of society. While each Judge must bring to bear his or her sensitivity and empathy to the individuals who appear before the court, the process of judging requires a balancing detachment and independence. It requires that judgment be according to law and not personal idiosyncratic predilection. There is choice between conflicting interpretations of the law though constrained by the degree to which the law is expressed unambiguously and in binding precedent. The precedent of other judicial decisions is applicable to each court in the hierarchy of Australian courts. Its rigour is alleviated by the constant source for the principle underlying each rule and decision.

For a Judge to fulfil the judicial oath requires that his or her selection be made by the Executive from those who fulfil the paramount requirements of outstanding competence in the law and independence of mind. The appointee must be able to meet the insistent demand for enhanced judicial performance and in a way that maintains confidence of the public in the integrity and fairness of the judicial system. Subject always to those paramount requirements, selection of the judiciary has in recent years seen a greater diversity of choice. Naturally enough, most appointments come from those who are deeply familiar as advocates with the daily conduct of litigation in the courts, namely the Bar. But appointments have also been drawn on occasion from suitable solicitors and academics. There are an increasing number of women appointed to the Bench, reflecting the prominence that women are now achieving across the spectrum of legal practice.

It is vital that the process of appointment retains that essential independence required to fulfil the judicial oath. Appointment is never sought. To do otherwise, as once proposed, would introduce the threat of lobbying, incompatible with independence from the government of the day. Nor are prospective Judges required, as in the United States, to attend confirmation hearings, there either to refuse to pre-judge future cases, or to

succumb to the temptation to parade politically acceptable views. Judges are appointed till the statutory retirement date and otherwise free from threat of removal. This is save upon address to the Governor passed by both Houses of Parliament on the grounds of proved misconduct or incapacity. Regrettably, there have been instances of inroads upon that independence, by the abolition of a court and then failure to re-appoint some of those so removed. Whatever the position of a court in the judicial hierarchy, that process must undermine the independence of judicial decision making, particularly where government interests may be affected by the litigation.

In other respects, the judiciary maintains a clear separation from executive and legislature, under the essential division of powers under our Constitution. Thus Judges do not perform executive functions. Appointments to Royal Commissions or other enquiries are by way of exception, since otherwise the very qualities of judicial independence which are called for by such enquiries may be squandered. It is by negotiation between the Attorney-General of the day and the Chief Justice, who determines whether a judge will be made available.

The press of work in the courts has not only required case management and other techniques to ensure the efficient use of judicial resources. It has also imposed increasing burdens upon individual Judges in preparing for cases, in their hearing and in the judgment writing required to give adequate reasons. A Judge will typically have a small staff responsible for essential administration and able to supplement the research required for a particular case.

Public interest in the workings and integrity of the judicial system is a daily reminder that the rule of law depends upon it.

G F K Santow

23 April 1996