

SPEECH BY CHIEF JUSTICE ANDREW BELL

ON THE OCCASION OF

THE BICENTENARY OF THE SUPREME COURT OF

NEW SOUTH WALES

Banco Court, Sydney

17 May 2024

- 1 Your Excellency, the Honourable Margaret Beazley AC KC, 39th Governor of New South Wales and, currently, Administrator of the Commonwealth of Australia, and Mr Dennis Wilson.

- 2 The Honourable Justice Michelle Gordon AC, Acting Chief Justice of the High Court of Australia in the absence of Chief Justice Gageler, who is representing Australia at the inaugural meeting of the “J20” in Brazil.

- 3 Dame Helen Winkelmann GNZM, Chief Justice of Aotearoa New Zealand.

- 4 The Honourable Sundaresh Menon, Chief Justice of Singapore.

- 5 Chief Justices of the Supreme Courts of all the Australian States and Territories and of the Federal Court and the Federal Circuit and Family Court of Australia, each of whom is acknowledged in the printed program.

- 6 Chief Judges of the Land and Environment Court and District Court of New South Wales, Chief Magistrate, President of the Children’s Court, President of the Personal Injuries Commission and Chief Commissioner of the Industrial Relations Commission.

- 7 Justices of the High Court of Australia and other courts, including my colleagues on the Bench.
- 8 Former Chief Justices Sir Anthony Mason, Murray Gleeson, Tom Bathurst, James Allsop and Helen Murrell.
- 9 Former justices of this Court and of other courts.
- 10 The Attorney General and Solicitor-General of the Commonwealth.
- 11 The Commonwealth Director of Public Prosecutions.
- 12 The President of the Legislative Council and the Speaker of the Legislative Assembly.
- 13 The Attorney General and Solicitor General of New South Wales.
- 14 Former Attorney General of New South Wales and current Leader of the Opposition, the Honourable Mark Speakman SC MP, and other parliamentarians.
- 15 The Director of Public Prosecutions and the Senior Public Defender of New South Wales.
- 16 Sheriff Tracy Hall, whose office also marks 200 years today.
- 17 Former Prime Minister Howard OM AC SSI (who spoke, together with EG Whitlam AC QC on the occasion of the Court's 175th anniversary).
- 18 Ms Yvonne Weldon, Councillor for the City of Sydney and Deputy Chair of the Metropolitan Local Aboriginal Land Council.
- 19 Chief Executives of the Judicial Commission of New South Wales, Legal Aid NSW and the Aboriginal Legal Service.

- 20 Presidents of the New South Wales Bar Association and the Law Society of New South Wales (and many of your predecessors and councillors).
- 21 Various faith leaders.
- 22 Members of the Consular Corps and of the Academy
- 23 Members of the legal profession.
- 24 Distinguished guests.
- 25 All.
- 26 Welcome to this historic bicentennial sitting of the Supreme Court of New South Wales whose anniversary we mark 200 years *to the day* since the Third Charter of Justice was thrice proclaimed in Sydney Town on 17 May 1824, and Sir Francis Forbes began his distinguished and critical tenure as the first Chief Justice of New South Wales.
- 27 The Court's original territorial jurisdiction extended up and down the East Coast of what was described in the Third Charter as the "Island of New Holland". It also extended eastward to cover actions of and on British ships and by British subjects in Aotearoa New Zealand, Otaheite or, and I quote, "any other island country or place situate in the Indian or Pacific Oceans and not subject to his Majesty or to any European state or power".¹
- 28 For reasons of deep respect, recognition of past injustices and in an institutional spirit of support and unity, this ceremony has begun with an acknowledgement of country which extended beyond the Gadigal, the original custodians of the lands and waterways immediately surrounding this Court, to all indigenous peoples both in and beyond the border of what is now the State of New South Wales. I echo that acknowledgment and that of our other speakers.

¹ Third Charter of Justice.

- 29 It is a melancholy fact from which we cannot and should not hide that on the 14th of August of the same year as this Court's foundation, 1824, Governor Brisbane literally suspended the Rule of Law² and mandated the "Use of Arms against the Natives", declaring "martial law to be in force in all the country westward of Mount York".³ That was the land of the Wiradjuri people. Many died in that conflict with perpetrators on one side protected by the declaration of martial law which lasted for almost four months.
- 30 To acknowledge this temporal coincidence is both historically accurate and intellectually honest. In that context, it was not only symbolically significant but a deeply generous gesture for a proud Wiradjuri man and member of the New South Wales Bar, Mr Andrew Smith, to have accepted my invitation to deliver the acknowledgement of country at this ceremony.
- 31 We have also heard from Mr William Barton, one of Australia's foremost musicians and composers, a director of the Sydney Symphony Orchestra and a former Queensland Australian of the Year. He is a proud Kalkadunga man from northern Queensland, land which originally fell within this Court's territorial jurisdiction.
- 32 His wonderful and generous performance of a piece he composed when only 15 in the Kalkatungu language celebrates the passing of culture from generation to generation. It was doubly fitting for this ceremony: sung in a language which is estimated to be between 4,500-7,000 years old, it both reminds us of what we celebrate today in terms of the handing down of traditions but also, more profoundly, it reminds us of the longevity and beauty of far, far older traditions, culture and customs of indigenous people on this Island continent.
- 33 The Third Charter of Justice was described by Dr JM Bennett as "the instrument that redeemed the colony of New South Wales from its earlier destiny as a mere

² "Bloodshed may be stopped by the Use of Arms against the Natives beyond the ordinary Rule of Law in Time of Peace; and, for this End, Resort to summary Justice has become necessary".

³ The proclamation declaring martial law was published by the Sydney Gazette on 19 August 1824.

oubliette for British felons”.⁴ The sesquicentenary of its proclamation, and the foundation of this Court, was celebrated 50 years ago today in the old Banco Court in King Street in a ceremony presided over by Sir John Kerr, 13th Chief Justice of New South Wales.

34 50 years ago, the building in which *this* ceremonial sitting is taking place did not exist.⁵

35 50 years ago, no woman had been appointed to the Supreme Court, notwithstanding the passage of the *Women’s Legal Status Act* in 1918.

36 50 years ago, the guest of honour at the Court’s sesquicentenary celebrations was the recently retired Lord Chancellor of England and Wales, Lord Hailsham.⁶

37 Although we value those historic ties and continue to share our common law heritage, the legal landscape in New South Wales as at the Court’s bicentenary is vastly different to what it was 50 years ago, as is the body of our jurisprudence.

38 In that intervening period, appeals to the Privy Council have ceased, States are no longer regarded as separate law areas,⁷ the doctrine of *terra nullius* has been exploded,⁸ the High Court has recognised that there is one common law of Australia⁹ and ever more complex statute law dominates most of the work of the Court.

39 The Court has gained both strength and an augmented respect through the increased diversity in its composition, and we now have a significant cohort of

⁴ R. Else-Mitchell and J.M. Bennett, “The Charter of Justice of New South Wales - Its Significance in 1974” (1974) 48 *Australian Law Journal* 262, 262

⁵ The Joint Law Courts Building in Queens Square was opened in 1977.

⁶ “Commemoration of Sesquicentenary of the Proclamation of Charter of Justice of New South Wales” (1974) 48 ALJ 351.

⁷ cf. *Pedersen v Young* (1964) 110 CLR 162 at 170.

⁸ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Lipohar v The Queen* (1999) 200 CLR 485; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 514–17 [2]–[15].

female judges, led by my valued colleague, the President of the Court of Appeal.¹⁰

40 Our international focus and engagement is in Asia and the Pacific, as reflected by the presence of two of the most dynamic judicial leaders of those regions, the Chief Justices of Singapore and New Zealand who do this Court a great honour by their attendance this morning.

41 Although the Court has adapted with the times and in the work it undertakes, as well as in the *mode* of that work (most notably but not only in commercial dispute resolution), it has retained a feisty independence of spirit. So much is exemplified in its singular association with the doctrines and remedies of equity but may also be seen in terms of the Court's ceremonial presentation. In this respect and unlike all other States and territories, our federal and trans-Tasman colleagues, we continue to wear the same robes and wigs – in some cases, literally – as worn by our predecessors, at once symbolising the *continuity of the rule of law* in New South Wales and emphasising the *separate and distinct authority of the judiciary* from other arms of government. These are both valuable matters of which to be routinely and publicly reminded.

42 The importance of this ceremony, at least in my view, lies in the fact that institutions matter. They are the bedrock on which any civilized society rests and it is vital that their history, work and purpose is understood and appreciated.

43 Within institutions, there is embedded the wisdom and human experience of past generations, as Chief Justice Spigelman pointed out on this day, 25 years ago. That embedded wisdom is a source of stability and reassurance.

44 Within *legal* institutions, such as this Court, that embedded wisdom is reinforced by the doctrine of precedent which ensures certainty and predictability of outcome to disputes which are the inevitable byproduct of human nature and physical and commercial interaction, in all of its changing manifestations.

¹⁰ Justice Julie Ward.

- 45 The judges are the faithful custodians of that embedded wisdom, and bear great responsibility for its maintenance and enhancement, even as society rapidly evolves.
- 46 A strong, independent and respected judiciary is also a bulwark of liberty and the public's constant guardian against excesses of executive power. That dimension of this Court's role was early to the fore, with the strong and independent Sir Francis Forbes, our first Chief Justice, twice striking down laws of Governor Darling designed to restrict the freedom of the press.¹¹
- 47 A century on, under the leadership of Chief Justice Sir Philip Street, the Court held the Legislative Assembly to account as an attempt was made to abolish the Legislative Council.¹² This Court's decision was upheld by majority in the High Court¹³ and unanimously by the Privy Council.¹⁴
- 48 The legality of executive action has been a regular subject of the Court's attention over the years, including during the Second World War and most recently in the context of the COVID-19 pandemic.¹⁵ The Court has also been ever vigilant and engaged in relation to abuses of public power.¹⁶
- 49 It is a reassuring fact that the Court's decisions in these respects have been largely accepted and respected, even if, from time to time, inconvenient or even embarrassing to incumbent governments.
- 50 The Court has itself been a witness to, and in part an agent for, great societal change over the decades such as in respect of women's rights to property, custody and status, and the huge changes wrought by the arrival of electrically powered machinery and motor vehicles, with the concomitant rise in personal injuries and industrial accidents. Most recently, its docket has seen it dealing

¹¹ Mason and Reid (eds) *Constant Guardian: Changing Times – the Supreme Court of New South Wales 1824-2024* pp.20-22.

¹² *Trethowan v Peden* (1930) 31 SR (NSW) 183.

¹³ *AttorneyGeneral for New South Wales v Trethowan* (1931) 44 CLR 394

¹⁴ *Attorney-General (NSW) v Trethowan* [1932] AC 526.

¹⁵ *Kassam v Hazzard; Henry v Hazzard* [2021] NSWCA 299

¹⁶ *State of New South Wales v Spedding* [2023] NSWCA 180; *Macdonald, Ian v R; Edward Obeid v R; Moses Obeid v R* [2023] NSWCCA 250.

with thousands of cases of historic institutional sexual abuse as well as class actions designed to facilitate access to justice.

- 51 The Court has also been the venue for a host of *causes célèbres* which have captured the attention of the colony and then the nation. Nowadays, the advance of technology has again allowed certain cases, including in this Court, to be broadcast at large to an apparently interested public.
- 52 What animates and has animated the living institution that is the Supreme Court of New South Wales over the past 200 years are the *people* who participate in its daily life, a matter to be kept uppermost in our consideration as we confront the challenges and potency of artificial intelligence.
- 53 Those people include but go well beyond the Court's judges and registrars. They include the staff of, and associated with, the Court such as the Prothonotary and Sheriff, so important to the administration of justice that they, too, were expressly referred to in the Third Charter of Justice.
- 54 The people of the Court extend, of course, to the lawyers - barristers and solicitors - who themselves belong, by symbiosis, to the institution as officers of the Court, forever bound by the oaths or affirmations solemnly rendered on admission, more often than not in this very courtroom.
- 55 They include the jurors who, on a daily basis, bring to the Court their humanity, commonsense and life experience, and conscientiously strive to reach a verdict in the most serious (and invariably distressing) of criminal cases.
- 56 And, perhaps most importantly, the people of the Court include the witnesses and litigants whose cases are, *for them*, of the greatest personal significance affecting their liberty, livelihood, status, family, property and or financial wellbeing.
- 57 The quotidian resolution of such disputes, whether they attract publicity or not, are the core work of the Court and of its judges, who strive to ensure that justice

is both done and is seen to be done, that due process is accorded to those charged with criminal offences, that property rights are respected and contracts enforced (but not when it would be unconscionable so to do), that the Court's *parens patriae* and adoption jurisdictions are administered with compassion and sensitivity and that its sundry other work is performed with care, skill and due expedition.

- 58 All the people who have populated this institution over its first two centuries, from judges to practitioners to litigants, have brought and continue to bring their essential humanity to the work of the Court. And their talents and interests have often extended well beyond the immediate practise of the law.
- 59 One future Chief Justice presided over the General Assembly of the United Nations between 1948-1949 when the Universal Declaration of Human Rights was proclaimed.¹⁷ Another was the inaugural President of LAWASIA.¹⁸ A President of the Court of Appeal was a special envoy for the Secretary General of the United Nations and was a globally admired campaigner for human rights and champion of law reform.¹⁹ A Chief Judge at Common Law sat with distinction on the International Criminal Court.²⁰ Others sat on or were involved in the work of War Crimes Tribunals in the aftermath of the Second World War, and other commissions of inquiry.²¹ A solicitor of this Court was President of the World Bank for over a decade, and was also appointed a special envoy to the Middle East.²²
- 60 One judge became a famous and acclaimed composer,²³ even as he lost his hearing - not unlike Beethoven, a name we associate with an age long past but whose 9th symphony was in fact first performed in Vienna within 10 days of this Court's first sitting. Another judge became a world renowned philosopher²⁴ and

¹⁷ Dr HV Evatt KC.

¹⁸ Sir John Kerr AK, GCMG, GCVO, QC.

¹⁹ Justice Michael Kirby AC CMG

²⁰ Justice David Hunt AO

²¹ Mason and Reid (eds) *Constant Guardian: Changing Times – the Supreme Court of New South Wales 1824-2024* Chapter 11.

²² Sir James Wolfensohn AO KBE

²³ Justice George Palmer AM

²⁴ Justice David Hodgson AO

there have been countless scholar judges, including Sir Frederick Jordan, our 9th Chief Justice, whose works educated the entire profession. The reach of later scholar judges has extended throughout Australia and the common law world.

- 61 One solicitor of the Court, waiting for work, wrote of a jolly swagman, camped by a billabong.²⁵ Another, 100 years or so later, became an internationally acclaimed playwright with her plays about the criminal justice system and a famous female judge.²⁶
- 62 Others including perhaps our finest first law officer and the first Queen's Counsel in New South Wales, John Hubert Plunkett, as well as Justices Hal Wootten, Peter Hidden, Jim Wood, John Basten, Michael Slattery and Dina Yehia, have been particularly astute to the injustices sustained by indigenous people and have sought to do something practical and meaningful about them, as have those involved with the Aboriginal Legal Service, Legal Aid and the Public Defenders' Office whose important work I acknowledge.
- 63 Judges of the Court have become Governor General²⁷ and Governors of this State,²⁸ and our Governor General designate²⁹ is an officer of this Court (and a former tipstaff, no less!).³⁰
- 64 Some six barristers and solicitors of this Court have become Prime Minister;³¹ eight have become Premiers of New South Wales.³²
- 65 A three time Premier, Sir James Martin, became our 4th Chief Justice and it was he who, perhaps because of the insight derived from his premierships, identified the Court more than 150 years ago as (and I quote) "the appointed and

²⁵ Andrew Barton "Banjo" Paterson

²⁶ Suzie Miller

²⁷ Sir William Deane AC KBE KC.

²⁸ Gordon Samuels AC QC; Margaret Beazley AC KC.

²⁹ Ms Samantha Mostyn AO.

³⁰ To Kirby P AC CMG.

³¹ Sir Edmund Barton, Sir George Reid, William (Billy) McMahon, Gough Whitlam AC QC, John Howard OM AC SSI, Malcolm Turnbull AC.

³² Sir James Martin, Sir George Reid, Sir Joseph Carruthers, Sir Charles Wade, William Holman KC, Sir George Fuller, Sir Thomas Bavin KC and Neville Wran AC QC.

recognised tribunal for the maintenance of the collective authority of the entire community” with “[e]very new law made by the Legislature com[ing] under its care, and rel[ying] upon it for its application”.³³

- 66 It is to respected civic institutions that citizens and society look for re-assurance in times of great unrest, uncertainty and anxiety. And there is no doubt that we presently find ourselves within such times, both globally and domestically, with diverse concerns relating to social harmony and cohesion within our community; despair at the scourge, tragedy and extent of domestic violence; alarm at the rate of, and limited action with respect to, climate change; the unresolved psychological sequelae of the pandemic; as well as a simmering apprehension about the potentially existential challenge of artificial intelligence and the increasing agglomeration of power of a small number of multinational social media behemoths. More generally, the phenomenon of “truth decay”, about which I have recently written, is democratically disconcerting.
- 67 Much has been said in recent years about the slide in public respect for certain institutions, both here and abroad. Our system of independent justice cannot be exposed to such corrosion and loss of respect.
- 68 It is vital that the work and the role of the independent courts and judges is and continues to be understood and valued in our community and by our governments. Fostering that understanding and respect through institutional education and public outreach has been an essential focus of the Supreme Court’s celebration of its bicentenary.
- 69 Over its long history, and sitting throughout the State, the Supreme Court has, I believe, earned the great respect of the community it serves, and has won a reputation that extends well beyond its borders. That is a tribute to the unstinting dedication, skill and public service of the current and previous judges of the Court, many of whom are present with us today.

³³ *In re “The Evening News” Newspaper* (1880) 1 LR (NSW) 211 at 237.

- 70 My role and responsibility, and that of my colleagues, is to continue to earn and maintain that respect of and from the community. In that context, no Chief Justice could hope to have, and no court or community which it serves could have, a finer cohort of judges as we have here in New South Wales in 2024. Their work is typically solitary, unrelenting and carries huge personal responsibility which they daily discharge with equanimity and great skill.
- 71 As encapsulated in the title of our recently published bicentenary history, this Court has been a constant guardian in changing times. Long may it continue to be.
