SPEECH

ATTORNEY GENERAL MICHAEL DALEY

200th ANNIVERSARY SUPREME COURT OF NEW SOUTH WALES

Ceremonial Sitting to mark the Bicentenary of the Supreme Court of New South Wales.

Law Courts Building, Queens Square, 184 Phillip St, Sydney NSW 2000

9.15am, Friday 17 May 2024

May it please the Court,

May I begin by acknowledging the Gadigal of the Eora nation, and pay my respects to Elders past, present and emerging –

And acknowledge all First Nations people in attendance today.

Can I thank Andrew Smith and Mr William Barton for the historic and moving role they have played in this sitting today –

For reminding us of the deep and beautiful, and not so beautiful history of this land –

And for reminding us on this day where we celebrate the rule of law that sovereignty was never ceded.

Of course, I acknowledge the many special guests that you have already acknowledged here this morning.

It is a great privilege to speak on behalf of the Government and the people of New South Wales as Attorney General.

The historic moment which we celebrate and commemorate today is rightly regarded as one of the most important dates in the history of the State of New South Wales –

And indeed, in the history of this nation.

It is not over-statement to contend that the creation of a Supreme Court in the fledgling colony of NSW in 1824 was in many ways one of the most significant steps in the evolution of our own Australian-style western liberal democracy.

It is important to consider not only how far we have come in that time, but to reflect upon the milestones on that journey.

New South Wales began as a dumping ground for the dislocated, disenfranchised, miserable underclass of an unfair Georgian England, and a fair smattering of Irish political prisoners.

At the time Earl Bathurst summed up the attitude of the Mother Country towards her young colony when he argued that being sent to NSW was “intended as a severe punishment” and “an object of real terror to all classes of the community”.

So, how did it come to be that this geographical outpost of “real terror” acquire an institution that was to become a constant guardian of the rule of law?

Well, through the concentrated efforts of a small but influential few who brought about what we celebrate today as the Third Charter of Justice.

None of the judicial institutions created by the First and Second Charters of Justice during the early years of colonisation endured.

In 1787 the First Charter of Justice established a separate civil court and a court of criminal jurisdiction, headed by a deputy judge-advocate and six military officers, many of whom had little or no legal training.

An attempt at reform was made in 1814 under the Second Charter of Justice, which created three new civil courts: the Governor's Court, the Vice-Regal Courts (of NSW and Van Diemen's Land) and the Supreme Court of Civil Judicature, headed by Justice Jeffrey Bent.

By the start of the 1820s, New South Wales had evolved from a starving penal colony into a reasonably wealthy (for some), export-oriented, pastoral economy.

But in 1824, NSW was still a military autocracy supported by the “Exclusives” – retired officers, free settlers and wealthy pastoralists with the pretensions of a landed aristocracy.

It was clear that the colony required independent courts that were ‘less beholden to the autocratic rule of a governor’ and could resolve commercial disputes more efficiently.

Lachlan Macquarie managed a system of discipline and punishment, but he also believed in rehabilitation. He appointed emancipated convicts to all spheres of

life in the colony, including the law, medicine and agriculture.

By Letters Patent issued under the seal of King George III on 5 January 1819, the English judge and Royal Commissioner John Bigge was appointed ‘to examine into all the Laws Regulations and Usages of the Settlements in the said Territory [of New South Wales]” –

And among other things, the “State of Judicial Establishment”.

The result of Bigge’s inquiry was the *New South Wales Act 1823, a*n Act of the Imperial Parliament, which was drafted in large part by Francis Forbes, the former chief justice of Newfoundland who would go on to become the first Chief Justice of NSW –

The *NSW Act 1823* was passed in September 1823 and the Third Charter of Justice was proclaimed the following month.

Yet due to the tyranny of distance, the document did not arrive in the colony until 17 May 1824, when it was proclaimed at a site now marked on Elizabeth Street.

This led to the appointment of Sir Francis Forbes as the inaugural Chief Justice -

As well as the appointment of the first members of an independent Bar, including the colony's inaugural Attorney General, Saxe Bannister, as well as John Stephen, Robert Wardell and William Wentworth.

This development represented nothing less than the establishment of a new second powerful class to rival, and eventually outshine the military officers.

All legislation enacted by the new Legislative Council, also established by the Third Charter, was subject to a ruling by the Chief Justice that the Act was not repugnant to the laws of England.

This is a significant point because by 1825 Attorney General Bannister found himself at odds with Governor Thomas Brisbane about whether he was bound to draft a bill which seemed to Bannister to be repugnant to the laws of England.

History tells us that shortly there after it was the Attorney General who resigned his office, apparently over an issue related to remuneration.

Thankfully, those types of discussions have now become seriously unfashionable.

The creation of the Supreme Court of New South Wales on the far-flung side of the globe turned out to be ground breaking in many ways.

For instance, the establishment of a single superior court of record was 50 years ahead of England's structural reforms of 1875.

The Court's authority to administer insolvency and bankruptcy by common principles was also an improvement on the English law at the time.

Chief Justice Forbes' Court rejected an early push by barristers for exclusive right of audience.

It is somewhat startling to realise that some judges of the day even toyed with the idea of recognising Aboriginal law.

Indeed, while the High Court of Australia has occupied the pinnacle of our judicial hierarchy since

1903, it was during the early history of the Supreme Court, through judgments such as *R v Lowe* in 1827, *R v Ballard* in 1829 and *R v Murrell* in 1836 that English criminal law was applied to our Indigenous peoples.

One of the most remarkable achievements of the Court's first 50 years was Attorney General John Hubert Plunkett's feat in pushing through the prosecutions of those responsible for the 1838 Myall Creek massacre of innocent Aboriginal people, largely women and children – a stain on our nation.

Plunkett pursued these extraordinarily divisive prosecutions in the face of tectonic and furious opposition from his peers and contemporaries.

But he prevailed and remains a little-known, but Herculean human rights pioneer in not just our state, but our nation

The Myall Creek massacre prosecutions were an early example of the Supreme Court's deserved reputation as a place where all who seek justice can find it.

There have been notable reforms to the Court.

The Court of Criminal Appeal was set up in 1912, five years after its namesake in England.

The creation of the Court of Appeal – Australia's first permanent, intermediate appellate court – was another landmark reform. In post-War Australia, the increasing complexity of litigation resulted in more appeals and delays.

The Court of Appeal first sat on 8 February 1966 and heard 401 appeals that year. Its Presidents have included Sir Kenneth Jacobs and Michael Kirby, both subsequently elevated to the High Court, and James Allsop, later Chief Justice of the Federal Court.

Two centuries on from its first sitting, with Francis Forbes and two magistrates on the bench, the Supreme Court of New South Wales is now more than 50 judges strong, an increasing number of them being women –

That tradition I can guarantee your Honour will continue.

It continues to be at the heart of many of the complex issues of our times.

As recently as 2021, it was former Supreme Court Justice now High Court Justice Robert Beech-Jones who, at the height of the COVID crisis dismissed two legal challenges to health orders requiring COVID-19 vaccinations for workers in NSW, saying the approach taken by the then Health Minister was “very much consistent with the objects of the Public Health Act."

This was another demonstration of the Court's ability to act decisively and with a cool head for the greater good in the face of public debates fuelled by high emotions and human fear and uncertainty.

In Conclusion, I would like to reflect on the opening of this Law Courts Building on 1 February 1977, when then Premier Neville Wran QC – who loved the law and was a masterful exponent of it - described the Supreme Court of New South Wales as 'the visible embodiment of the essence of the law – growth, change, and progress within continuity.

Wran continued: "[It] is now established physically and symbolically where it has always been – in the historic and living heart of the history of New South Wales - and Australia."

Here we are today living in a mature democracy, with a Supreme Court that has served the people of NSW tirelessly and with integrity for two centuries. It is recognised as one of the great common law courts of the world and deserves its reputation as the “constant guardian” of the rule of law in NSW.

It is not now and nor should it ever be a place for elites –

It is a place for all, for each and every citizen.

The Supreme Court has shown itself to be a vital civic institution which has lived up to its oath:

“To do right to all manner of people, according to the law, without fear or favour, affection or ill will.”

May it please the Court.