

DINNER TO MARK THE FIRST ANNIVERSARY OF THE APPOINTMENT OF  
THE HONOURABLE JUSTICE M D KIRBY, CMG  
AS PRESIDENT OF THE COURT OF APPEAL

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RAMBLES AND RECOLLECTIONS OF THE 12TH FLOOR WENTWORTH

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The Hon. Justice M.D. Kirby, CMG

THE TOUCH OF MIKASA

It is a delight to be with friends at this dinner. Collected here is the greatest concentration of legal talent, with the possible exception of the hotel room in Beijing, where Mahoney, JA is presently eating his fifteenth consecutive Chinese meal, in solitude.

His Honour's life has been woven into mine. And it is he who was responsible for my move from another Floor to the 12th Floor of Wentworth Chambers in February, 1972. Why he and three other members of the Floor suddenly should have gone overseas to avoid this dinner, I cannot tell. Their absence does not discourage me in the slightest, from offering my recollections of the them, 13 years ago.

Dennis Mahoney was a total contrast to the present Head of Chambers, David Rofe, QC. Whereas Rofe could not bear to hear a single pin drop - and woe betide the articulated clerk who made a noise - Dennis Mahoney conducted his conferences to the cacophonous obligato of a typewriter. In his magnificent room - still the best in the building - the cream of the business community of Australia came to hear his confident, simple advice on how they could make a lot of money, provocatively declare it, yet somehow pay no tax.

In the apprenticeship system of the law, I had become his junior in a number of cases. Because of the typewriter, I could never hear a single word of the advice he dispensed. But I always nodded wisely and said "yes, I agree". This was the Sydney Bar's equivalent to front door polishing. It was to take me far. It is a technique that stands me in good stead to this very day.

Dennis Mahoney led me in the Mikasa case in the High Court (127 CLR 617). No one involved in the case - the first test case on resale price maintenance - was untouched by it. Glass, JA, Mahoney JA, Rogers, J and I got our just deserts. The Commonwealth Industrial Court, even then avid for jurisdiction, flourished into the Federal Court of Australia. Gibbs, J who sat on the case became Chief Justice. I am not saying that all of these miracles occurred because of Mikasa. But it is coincidental, do you not think?

#### THE MISTRESS OF THE LAW

Even before I joined the 12th Floor, I knew David Rofe. I had a certain masochistic streak in me (not unknown in the legal profession). I had briefed him when I was a young solicitor. I hold him (and Trevor Morling, now Morling, J of the Federal Court) personally responsible for the destruction of my life. So high were the standards of quality and promptness in their Chamber work, that I resolved to go and do likewise. The result was (and is) the seductive capture of my life by workaholism - and the dedication of weekends to the Mistress of the Law.

When I came on the floor, Rofe, though a retiring fellow, dripping with sentiment, seemed to spend most of his time seeking injunctions against the developers building the Law School and the Law Courts in the vicinity. No rain forest environmentalism motivated his endeavours. He simply could not abide the noise. Being relatively impervious to external stimuli myself, I could never in all conscience sign his affidavits. It is remarkable, looking back, on the mass production of legal process which the saintly Mary, his secretary, produced in the single minded (but fruitless) endeavour to hold back the tide of progress.

I came to the Floor when Ken Handley, QC decided to move to another Floor for larger chambers. One of the leaders of the Floor, Denys Needham (now Needham, J) viewed the departure of Handley with anxiety. For Handley was, in his book, something of a radical. But who would be his replacement? News slowly filtered up from the lower quarters of the building of my application for his room. Rumours spread of my association with those of the "Alternative Life Style" on the 4th Floor. There were to be found the fabled Darling Point socialists - Lionel Murphy, Neville Wran, Jack Sweeney, Bill Fisher. True it was, I had fallen into that camp. I have always believed that my acceptance was less by reason of political congeniality than because I was known to be reliable at 5.30 a.m. when the business of the industrial Bar was in full swing. A few friends on the 12th Floor must have kept these dark secrets from Denys Needham. However, that may be, I was accepted on the Floor.

My immediate neighbour was the silent and retiring David Rofe. But across the corridor was Mervyn Finlay (now Finlay, J). A more gentlemanly and congenial colleague one could not choose. He was a man, I always thought, born for the judicial life: civilised, temperate, experienced and honourable. On Friday afternoons we would all gather in his chambers. And the former members would come to share a drink and gossip with the goodly number of judges whom the 12th Floor had previously spawned. This was a good convention. It saddens me that it has died away. I hope it will be revived. In the stress and tension of litigation, it is a healthy and reassuring thing to keep alive the collegiate atmosphere of the Bar. In Sydney this means, in part at least, the communities of chambers. They are parodied by John Mortimer as only an insider could do. They are collections of sovereign individuals. But they are individuals who, daily, face the battle line. As in War, this shared mortal peril forges bonds of affection, understanding, respect.

David Rofe would rarely attend these Friday gatherings. It was rumoured that he was ever waiting in his room for the imminent restoration of the Russian monarchy. These were, of course, days before he was briefed by the Commonwealth in certain major litigation. His fees in that case, the subject of countless questions in the Parliament and wide-eyed rumours in the Street. It was not without significance that the massive assault on tax avoidance followed by successive Federal Governments occurred after the payment of Rofe's fees.

Such was the depletion of the Treasury that a major assault on funds had to be ventured to salvage the National Debt.

#### THE MARKET IN BIBS AND BAGS

Further down the corridor on the western wing was Moreton Rolfe, QC. He was never, at the peril of one's life, to be confused with David Rofe. Precise, urbane he submitted to the strict discipline of Mrs. Roddenby. He was said to spend his idle moments - which were few - on the vast landed estates over which graze cattle with an exotic name similar to that of a Sydney girl's school. Mrs. Roddenby had a side interest in those days - perhaps she still has. She had cornered the market in bibs and bags. She and Lady Aitkin were said to be contemplating a joint venture to supply the world with lace fronted jabots - Australia's answer to high tech industry.

Squeezed comfortably amidst the talent of the western wall was "Dusty" Ireland. The other day I had the pleasure of experiencing his advocacy in the Court of Appeal. At the end of it, I felt obliged to compliment him on its "subtlety". Unkindly his opponent suggested that he too had not understood it. One of my brethren claimed that it was the first time any judge would have ascribed that quality to "Dusty". Congenial he was, and loyal to his colleagues.

We welcomed to those Friday gatherings the two radical reforming renegades of the Law Reform Commission. Colin Allen (now Master Allen) and R.D. Conacher had taken posts in the New South Wales Law Reform Commission. They came back regularly to join their former colleagues. Their talk of reform of the Statute of Mortmain caused Denys Needham deep anxiety. Little did I suspect that law reform (a matter upon which I was as indifferent as any other barrister) would shortly become a major preoccupation of my professional life.

#### DEFENDING THE CAPITALIST REDOUBT

I can pass by the eastern wing more rapidly for they kept to themselves, on the other side. They were a less eccentric and slightly more "up market" group. In the corner, when I came to the Floor, was Vernon Watson (now Watson, J). He shared with John Dey (later Dey, J) the dominance of the employer's interests in the industrial courts and tribunals. Dapper, efficient, economical, he was a formidable adversary for the powerful team of intellectuals, brooding eight Floors below: working out whether this was the year for shift work allowances or some other major assault upon the fortresses in the high ground of capitalism. In the best traditions of the 12th, Vernon Watson defended the redoubt. He was, after all, the inheritor of the room of Sir Kenneth Jacobs. Is it not remarkable that three of the five Presidents of the Court of Appeal (Jacobs, P, Moffitt, P and myself) came from the 12th?

Andrew Rogers, (now Rogers, J) before he inherited Mahoney's room - in a financial transaction that caused Wall Street to tremble and the Dow Jones index to leap - was on the far side. Forbes Officer, QC was scarcely ever there because he had cornered the market on the largest Privy Council practice of the Bar, disdaining colonial jurisprudence in a preference for the real thing.

Neil Campbell and later Terry Naughton were seen occasionally, struggling under a mountain of files. It was said that the Eastern Suburbs Railway tickets have a special "Naughton levy" and every journey must devote a fraction to the sinking fund established for his fees.

John Cummins, QC was our Floor's attempt at a civilised bon vivant. It was known that he had connections in Queensland, but they were not sufficient to let him through the dingo proof fence that bars barristers from Sydney appearing in that State. His interests in the Sport of Kings added a touch of glamour and colour to the floor, only slightly out of keeping with the parade of the maimed and injured who knocked on his door.

#### THE MODERN DOMESDAY BOOK

Philip Powell, QC (now Powell, J) had a large room. There was always coffee brewing. He was always ready to devote an hour to explain the mysteries of Equity, with generosity and patience. I remember vividly that he had a book - a sort of modern Domesday Book. In it was recorded the precise date upon which every judge would turn 70 and would, for statutory senility, be forced to retire. That was



a book of opportunities. In due course, one of them was seized by Powell, J. It is a sobering thought to reflect upon the fact that somebody now, almost certainly, has him (and me) in just such a book.

Malcolm McLelland (now McLelland, J) took chambers on the Floor soon after me. I had known his father, a paragon among judges. He seemed to have a constant stream of Federal public servants waiting upon his every word. It was a kind of preview for "Yes Minister".

When I first came on the Floor, the Clerk was Norman Marks. He was the last of the Clerks who took a percentage of each barrister's fees. The fabulous wealth of some of the barristers of those days made Norman Marks rich indeed. Within days of my arrival, he left. Mind you, I never took this personally. How fortunate we all were that he was replaced by Greg Isaac. What a loyal, energetic and imaginative Clerk he has been. When I was first offered appointment to the Arbitration Commission, I truly expected that there I would see out my days. It was a big choice at the age of 35. Barrister colleagues warned me that I would "sink like a stone". But Greg Isaac, looking on the importance of the Arbitration Commission (and seeing it, released from the blinkers of the legal profession) said "Boss, you could not turn that one down". I liked being called "Boss". It gave me a delusion of power. I took his advice. And I have not regretted it. But nobody calls me "Boss" any more.

SALUTE TO THE CHIEF

I have left until last, our honorary member, Sir Harry Gibbs. We adopted him soon after his Federal appointment. And what a stalwart member of the Floor he has been. What a source of pride for us he has been. I well remember his coming along to functions with Sir Kenneth Jacobs in the early 1970s. And since those days it has been my good fortune to get to know him better. His period as Chief Justice has not been without its difficulties and trials. These have tested him. But it can be said, without equivocation, that he enjoys the respect, admiration and loyal support of every member of the judiciary in Australia. And I believe the members of the Bar as well.

I suppose that the move to Canberra, and the establishment of the new building on Lake Burley Griffin will be seen as Sir Garfield Barwick's major legacy. But institutions are more important than the buildings that house them. During Sir Harry Gibbs' time, great changes have occurred in the High Court, institutionally. With the amendment to the Judiciary Act the Court can now control, as befits our final constitutional court, the appeals of importance to be heard by it. With the impending termination of the last vestiges of appeals to the Judicial Committee of the Privy Council, that remarkable imperial anachronism will cease to be part of the Australian judicial hierarchy. Alone, unchallenged, the High Court of Australia will be the sole apex of our jurisprudence.

The restoration of the special leave hearings in Sydney and Melbourne have again permitted the profession in those cities more readily to see the High Court at work. This has been a good thing, although it adds to the burden on the Justices, already "burdened and over burdened", as Deane, J has said.

Sir Harry Gibbs has recently come back from obligations discharged on behalf of Australia in Cyprus. Last week he opened the first National Criminal Law Conference in Adelaide. Many additional duties of this kind - little known by the profession - add greatly to the burdens on him. Yet all of them, he discharges with grace and integrity, drawing daily on a lifetime in the Law.

He has been steadfast in his support for the Bar. This was evidenced most recently in his comments in the foreword to the new journal of the Australian Bar Association. It is a great compliment to us all that he has joined us tonight - but especially to me. In times of rapid social and technological change, we are reminded by Sir Harry Gibbs of the contribution which a life in the law can make to decency, continuity and integrity in Australian society, living under the Rule of Law. Together with all of my colleagues, I salute the Chief!