HIGH COURT OF AUSTRALIA

TUESDAY 6 FEBRUARY 1996

SPEECH ON THE OCCASION OF HIS SWEARING IN AND WELCOME AS A JUSTICE OF THE HIGH COURT OF AUSTRALIA

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I thank you all for the flattering remarks which have been uttered on this occasion. They would probably be sufficient to persuade a judicial novice that a saintly life in the law had been rewarded, justly, with an ascent into the judicial heaven. Alas I am no novice. In fact, as you have heard, I have served in judicial positions of various kinds for more than twenty-one years. In this courtroom today, only Sir Robin Cooke and Justice Dennis Mahoney have a longer continuous service.

Today is the tenth time that I have taken the *Judicial Oath*. I have attended many, many ceremonies such as this. These are the jubilees of the legal profession, marking its continuity and change. I have heard many speeches of praise, welcome and farewell of varying degrees of enthusiasm. By that I mean, in the case of farewells, enthusiasm for the Judge, not for his going. Out of delicacy, the latter would, at least normally, be subtly disguised as it was for me on Friday last in Sydney.

It is a sobering thought that virtually none of these utterances can be remembered once the ceremony is over. Portentous words of a newly sworn judge, or a departing judicial tyro, hang in the air and then evaporate and are gone. So it will be with my words today.

Very occasionally, wise counsel is given. Chief Justice Gleeson at his welcome took his theme from the last words of the great philosopher Voltaire. A priest, approaching Voltaire with a candle heard him exclaim "Not the flames already". And when the priest enjoined the dying man to repent his sins and renounce the devil, Voltaire declared: "This is no time to be making enemies". That is a good injunction for a newly appointed judge. But I fear it comes too late for me. It would be of interest to know if it has always been observed by the sweet-natured Justices of this Court. Certainly, once appointed, they have always disguised any flaws of impatience in their character.

I am the fortieth Justice in the history of the High Court of Australia. Forty in almost a century of the Court's existence is not very many. Fortunate is the Court, and lucky is Australia, that those who have served earned for this Court a global reputation for integrity, independence and erudition. I know from my journeys to the corners of the world how high this Court stands in reputation and honour. To the qualities for which it has long been famous have lately been added an accolade of great wisdom and a willingness, in the words of Oojeroo of the Nunuccal (Kath Walker), a great Aboriginal poet, to fashion "a juster justice grown wise and stronger".[1] I will not be able to say these things after today. I only say them now because you will understand the trepidation and anxiety which any Australian lawyer would feel on being inducted to walk in the footsteps of Griffith, Isaacs, Evatt, Latham, Dixon and the great and recent company who provide the intellectual and reputational capital of this Court.

I am specially grateful that their Excellencies the Governor General and Mrs Hayden, as one of their last acts of faithful service to our country, have attended this ceremony today. And that Sir Harry Gibbs, Sir Anthony

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1 Oogeroo of the Nunuccal (Kath Walker). *Song of Hope*.

Mason and Sir William Deane (shortly to take up his new responsibilities) have come to the Court to be with us. What a privilege it is for me to sit, even momentarily, on the same Bench with them. I have also received the warmest of messages from other past Justices and from all my present colleagues and from the court officers. I thank them all from the bottom of my heart. They have stilled some of my apprehensions.

I am particularly grateful for the presence of so many Chief Justices and Judges of the Federal Courts and of courts of the Australian States and Territories. Sir Robin Cooke, soon to receive from the Queen the rare honour of a Barony, does me, and this Court, a great compliment by joining us on the Bench to represent the Chief Justice and judiciary of New Zealand. Sir John Muria, Chief Justice of Solomon Islands, also honours us by his presence. These most distinguished jurists signal vividly, by their presence today, the belated but growing recognition of the need to fashion the common law of Australia in a way that is attentive to the legal systems of our common law neighbours in the Pacific and Indian Oceans and in near Asia. No longer an historical anachronism or settler or purely European society, Australia and its legal system are now coming to terms with the challenges and opportunities of our geography and our regional destiny.

Two weeks ago, in Honiara, I sat with Sir John Muria and Sir Mari Kapi, Deputy Chief Justice of Papua New Guinea in the Court of Appeal of Solomon Islands. Attending a service in the Cathedral of Saint Barnabas, I saw the way in which the people of Solomon Islands have fervently embraced the religion of the missionaries and made it their own. So they, and we, must do with the common law. By chance, the Cathedral service included the anointing of two new deacons. It followed a form not dissimilar to a judicial welcome such as this. The only difference was that the deacons, before their confirmation, were presented to the people for

their acceptance. It is, perhaps, as well that we do not trouble you with such a question in ceremonies of this kind. The results could occasionally be awkward.

As we assemble today, Australia is in the midst of a Federal election to choose the next National Parliament. Peacefully and resolutely, as our *Constitution* envisages, millions of our fellow citizens will go in a month's time, to schools and church halls across this continent to cast their ballots and thereby to render the Federal Parliament and Government accountable to the people of this nation. We should cherish this feature of our national life. It is far from universal, as my work for the United Nations has often shown me. It is natural that in an election, political candidates should make policy speeches as they vie for popular support. Judges too need the support and understanding of the people. But a quest for personal popularity or a set of specific promises by a new judge would be completely inconsistent to our notion of an independent judiciary deciding cases on their legal merits as argued in open court. The only promise our Judges give is in that of the Judicial Oath.

Perhaps the sole speech of this kind which is known to every Australian lawyer is that of Sir Owen Dixon on his swearing-in as Chief Justice.[2] It was then, in that little courtroom at Darlinghurst, in Sydney, where, 20 years ago, I saw Lionel Murphy sworn in 1975 that Dixon uttered his well known words:

> *"There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."*[3]

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2 (1952) 85 CLR xi.
3 *Ibid.* at xiv.

Since that April day in 1952 much has changed. The world, our country and its law have changed. Technology has put our species into Space. Scientists have unravelled the double helix of DNA. Information technology has revolutionised our planet and now reaches towards simple artificial intelligence. But the abiding judicial duties of neutrality, integrity and the provision of persuasive reasoning remain as strong today as they were in Sir Owen Dixon's time. The termination of Privy Council appeals has finally released Australian law from accountability to the judicial values of England that lasted so long. The slow realisation of this fact, and its implications, in a profession often so resistant to change, presents to this, as to other Australian courts and courts of the region, challenges which are exciting and sometimes very difficult.

There will be no returning to the social values of 1952 when Sir Owen Dixon spoke, still less those of 1903 when this Court was established. It falls to each generation of Australian lawyers, led by this Court, to fashion new principles of the *Constitution*, common law, and of equity, which will contribute wisely to the good governance of the Australian people. There is now a greater public understanding of the limited, but still very real, scope for judicial creativity and legal development. Judges are now more candid about this aspect of their function. Without a measure of creativity how else would the common law have survived seven centuries, from feudalism to the space-age? How else would it have endured in so many different lands after the sun had set on the British Empire?

In any case, the "good old days" were not always so good in the law of Australia, including the common law. They were not so good if you happened to be an Australian Aboriginal.[4] Or indeed, a woman.[5] Or an

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[4] As explained in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. See also eg *Namatjira v Raabe* (1959) 100 CLR 664; *Stuart v The Queen* (1959) 101 CLR 1; *Ngataya v The Queen* (1980) 147 CLR 1.

Asian confronted by the White Australia policy.[6] Or a homosexual Australian.[7] A conscientious objector.[8] A person with heterodox political views.[9] A homeless person.[10] A publisher of the mildly erotic.[11] A complainant against official oppression.[12] A person struggling in litigation with an imperfect understanding of the English language.[13] For these Australians, judicial words on occasions such as this seemed boastful or empty. But we in Australia have now taken a confident turn in our legal journey towards enlightenment and justice for all under the law. Yet the lesson of our present enlightenment must be that there are other injustices to which we are still impervious, or indifferent or which we do not yet see clearly. We need to defend our legal institutions and to adhere to time-honoured legal principles. Not blindly. And not mechanically. But with ears, minds and hearts always open to the call of justice. Only the quest for justice gives the profession of law its claim to nobility.

I pay my tribute publicly to my parents, now in their 80th year. By God's grace, they are with me to witness this occasion. To my family and loved ones who sustain me and criticise me every day. Everyone, without exception, needs such human support and loving correction. To the political leaders, of different parties, some of them present, who have given me opportunities to serve the people who are the ultimate source of

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5 See eg *Skinner v The King* (1913) 16 CLR 336; *Yerkey v Jones* (1939) 63 CLR 649, 685. Cf *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 (CA), 36.

6 See eg *Ling Pack (Otherwise Ah Sing) v Gleeson* (1913) 15 CLR 725; *Donohoe v Wong Sau* (1925) 36 CLR 404.

7 See eg *R v McDonald* (1878) 1 SCR (NSW) 173; *R v Kemp* (1949) 50 SR (NSW) 1 (CCA).

8 See eg *R v The District Court; Ex parte White* (1966) 116 CLR 644; *Collett v Loane* (1966) 117 CLR 94.

9 See eg *The King v Sharkey* (1949) 79 CLR 121; *Burns v Ransley* (1949) 79 CLR 101.

10 See eg *Lee Fan v Dempsey* (1907) 5 CLR 310; *Zanetti v Hill* (1962) 108 CLR 433..

11 See eg *Crowe v Graham* (1968) 121 CLR 375; *Guthrie v Herbert* (1970) 122 CLR 527; *Associated Newspapers Ltd v Wavish* (1956) 96 CLR 526; and *William Heinemann Ltd v Kyle Powell* (1959) 103 CLR 351.

12 See eg *Hough v Ah Sam* (1912) 15 CLR 452; Cf *McDermott v The King* (1948) 76 CLR 501; *McKinney v The Queen* (1991) 171 CLR 468.

13 See eg *Gaio v The Queen* (1960) 104 CLR 419; *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464.

authority in our Commonwealth. To my teachers, including those in the Law Reform Commission and universities and long ago as I started as an articled clerk, who instructed me how to conceptualise the law - seeing the unity of its great mosaic. To my judicial colleagues of the past, particularly in the New South Wales Court of Appeal. There, for more than a decade, I have enjoyed intellectual stimulus, professional comradeship and personal friendship. It has been a rare preparation for the office I now enter upon. To my staff and associates in the courts and bodies I have served. To the members of the legal profession who sustain and support the judges. To the new Silks who, like me, begun a great adventure today. To the many community and legal groups with which I have been associated. And to so many personal friends, to all I say my thanks.

It has been a long journey to this moment. Sometimes, in late years, as I visited Canberra, I would steal a look across the lake at this building. I would see it close, but far away. I confess that I would then sometimes think of what might have been. Now, what might have been, is. May I prove to be worthy of the great spirits of the law who have gone before. Of you present who offer me support, love and friendship. And of the people of Australia and our country's challenging future which beckons us to the new millennium - a millennium of justice for all Australians, without discrimination, under the rule of law.