Appointments & Retirements

Retirement of the Honourable Justice Dennis Mahoney AO, President of the Court of Appeal
- *18 December 1996*

Swearing in of the Honourable Justice Keith Mason, President of the Court of Appeal
- *4 February 1997*

Swearing in of the Honourable J.J. Spigelman, Chief Justice of NSW
- *25 May 1998*

Swearing in of His Honour Justice LDS Waddy RFD, Family Court of Australia
- *1 July 1998*

Swearing in of His Honour Judge K O'Connor, District Court of NSW, President of the NSW Administrative Decisions Tribunal
- *10 August 1998*

Retirement of the Honourable Justice ML Foster, Federal Court of Australia
- *26 November 1998*

Retirement of the Honourable Mr Justice JJ Cahill, Vice President of the Industrial Relations Commission of NSW
- *10 December 1998*

Retirement of the Honourable Justice BJK Cohen, Equity Division of the Supreme Court of NSW
- *1 March 1999*

Swearing in of the Honourable Justice Paddy Bergin, Supreme Court of NSW
- *1 March 1999*

Swearing in of the Honourable Justice Virginia Bell, Supreme Court of NSW
- *25 March 1999*

Retirement of the Honourable Justice Dennis Mahoney AO

Gleeson CJ:
In 1941, at the New South Wales School-boys Athletics Championships, the under 17 100 yards sprint was won by Dennis Mahoney of St Patrick's College, Strathfield. The history which I have just recounted suggests that he has never slowed down. Now at the formal end of his judicial career, retiring at the age of 72 by statutory compulsion, he is entitled to say, in the words of St Paul: 'I have fought the good fight. I have run my race to the finish. I have kept the faith'.

Burbidge QC: Your Honour prior to judicial appointment had a distinguished career at the Bar practising extensively in commercial law and revenue matters. Your Honour's capability in these areas was rewarded with an enviable press of work, which work you began to measure in 15 minute intervals, a first for the Bar, and an example which even today few have the stature or courage to emulate. Your Honour was a formidable worker at the Bar and when engrossed by a task would on occasion lock your door against the intrusions of those fellow-floor members whose obligations were less onerous, emerging from your chrysalis only when the problem was resolved. At a personal level your Honour was always willing to assist, and had the marvellous attribute of advising without preaching. Your Honour perfected the art of conveying, with no more than a cocked eyebrow, that some proposed line of action might easily result in well-deserved disaster.

Mahoney J: Chief Justice, you have been more than kind in what you have said: you have been indulgent. You and I have been friends too long not to be a little cynical about what is said on occasions such as this. But I must confess: when such things have been said of others, I have smiled: now, I can see that they may have been true, after all.

Compliments are allowed when one is on the point of retirement. When I was young, I thought that compliments should be dispensed in tea spoons; as I grew older, I thought table spoons more appropriate; but now I am inclined to think that ladles are the proper measure.

It has been in the Court of Appeal that I have served most of my judicial life: from 1974 to 1996, over 22

years. I have served with two Presidents of the Court of Appeal: with Mr Justice Moffitt and with Mr Justice Kirby. Mr Justice Moffitt conducted a firm and professional Court of Appeal, direct and to the point. Mr. Justice Kirby has been the greatest publicist for the law that we have known and he has, by what he has said, given the law a more human face than it might otherwise have had.

I take this occasion to apologise for my error on the few occasions when I have over-ruled what you have decided. As you know, an appellate judge cannot be right all of the time and I hope that you will understand.

The Bar has been a great part of my life: before and after I became a judge. One of the great achievements of the common law system is to have the legal profession – especially the Bar – accept that the great power they have is subject to equally great duties, to the client and to the court. If that should ever change, the public and the courts will be much the worse for it.

It is now fashionable to talk of what lawyers do in terms of efficiency and of 'level playing fields'. It is right that we talk of these things. But the wind can blow cold across a level playing field, cold and hard, and there is nowhere to hide when the powerful do what they do to the less powerful of us. If, because of efficiency and competition, a client cannot trust what her lawyer says or this Court cannot trust what lawyers say to it, we will have lost values which, after all, are the real point of the justice system.

The Australian judiciary is a great institution: one of which all Australians should be proud.

It has had its critics, usually they have been less than fully informed. I know the Australian judiciary perhaps better than almost anyone. I was Chairman and Deputy Chairman of the Australian Institute of Judicial Administration for four years and more. For some ten years I dealt with the federal judges as Chairman of the Australian Remuneration Tribunal. I have been a member of the General Council of the Judicial Conference of Australia. I know the judges and the judiciary from the inside: their standards, their aspirations and the (true) level of their performance.

I have worked with the judiciaries of other countries: with the judges in England, the United States, New Zealand and the Philippines. I have been Chairman of the Judicial Section of Lawasia for some ten years with the Chief Justices of India and then of the Philippines; and I have had acquaintance with judges and the judiciary in China, Russia and most of the countries of South-East Asia.

It is because I know these things that I may say that the Australian judiciary is an institution of which we should be very proud. Its impartiality, its honesty and its standard of professional capacity is exceeded by no other judiciary with which I have had contact.

Judges have some faults. Only God and critics - and perhaps you and I, Chief Justice – are without fault. Occasionally a judge will fall below what is expected of him or her. That will happen: of course it will. That is life. It will be remarked on, as it should be. I think it will be remarked on the more because the standards are so high and the exceptions are so few.

'I would like to explore with my judicial colleagues and the profession the greater use of time limits for the giving of evidence and hearing of argument, and the confining of debate to real issues clearly raised in written submissions delivered well in advance.'

Swearing in of the Honourable Justice Keith Mason

As Solicitor General I was privileged to argue a range of fascinating cases extending well beyond constitutional and public law issues. I have even argued two child custody cases; one was fought at trial on its merits (whilst incidentally involving a challenge to the State's monopoly on adoptions). Occasionally my brief might be best described as damage control, but more often it involved significant points of legal principle. I regard the case of the *Environment Protection Authority v Caltex* as the most interesting and important case I argued. The outcome carrying a reminder that the justification for conferring legal rights and immunities upon corporations, both aggregate and politic, depends on the extent to which they serve the needs and aspirations of human beings.

Of particular fascination was the work done as Solicitor General in and out of court around the edges of elections, some of which could or did result in a change of government. Like a legal Vicar of Bray I have vigorously served dying administrations, but only until the moment of their despatch. I have had my riding instructions reversed by a change of government occurring during a pending case: in one instance I found myself having to put to the High Court the very opposite of what was previously planned.

Things have always been more interesting (for a Solicitor General at least) with politically opposed governments in Canberra and Sydney, and I was fortunate to have those sorts of opportunities. Six years ago New South Wales stood alone against the Commonwealth and the other states as the only Conservative government. For some time now it has stood alone as the only ALP government. Such are the fortunes of political war.

Apart from my political masters, many things have changed in my ten years as Solicitor General. For example, the majority of constitutional cases now involve human rights issues as distinct from federal issues. In several senses *Kable's* case in 1996 stands in counterpoise to the *BLF* case in 1986. And

government has become increasingly sensitive to environmental issues in recent years. Almost a third of my practice in the 1990s has become environmental and planning law. Sometimes I have acted as prosecutor for the Environment Protection Authority (once against another agency of the Crown); but more often I have striven to keep government agencies from being entrenched in the toils of environmental and planning laws probably intended to catch others.

The frequently asked question: 'Keith, when are you coming back to the Bar?' betrayed a fundamental misunderstanding of the office of Solicitor General. Until midnight last night I never left it. True I did have but one client, 'the Crown' or 'the State', although it sometimes turned out to be a many headed animal in legal controversy within itself. Like all lawyers, there were times when I knew the advice which my client hoped it would receive, but I can truly say that I was never placed under any pressure (except time pressure) to tailor my advice. When he was Attorney General, Justice Dowd used frequently to say to the Crown Solicitor and myself, 'I would rather learn privately from you that I cannot do X rather than have a tame adviser tell me I can, only to fall flat on my face when challenged in parliament or the court'. Each of the Attorneys General under whom I was privileged to serve applied a similar principle. Outsiders might be surprised to know how often the Crown law officers (the Crown Solicitor and myself) deliver unpalatable legal advice to government, and how the rule of law is served in this state by the certainty that unambiguous advice as to the legality of proposed governmental action is scrupulously followed. Of course there is often a follow-up brief asking: 'Can it be done some other way?'

As I look ahead, I see increasing difficulties with the equitable and efficient delivery of justice. There are no easy solutions. Obviously all who are responsible for law and its administration will have to redouble their efforts if the slippage is not to become a slide. Parliament and the Executive cannot continue seeking to cure all ills by regulating society through complex and open-ended legal rules and withholding the resources to police and enforce them effectively. Otherwise the rule of law becomes a sham. And equality of men, women and children before the law is equally a sham unless litigation costs are kept down and there is an adequate system of legal aid, efficiently and equitably administered, to act as a safety net.

Between them, the legal profession and the judiciary have the primary responsibility of ensuring the fair and effective delivery of justice. I believe that we must acknowledge that justice is a limited resource and that perfect justice is unattainable. After all, we cannot agree on its identity, we its agents are human, and its administration costs money which is also required for health, education and other human aspirations.

Subject to the enacted law, and to procedural fairness, judges have (I believe) broad leeway's of choice as to the procedures they may impose on individual litigants and their legal representatives at both trial and appellate level. The difficulty lies in balancing concern for the interests of the litigants at hand and those of others also seeking to gain or avoid their just deserts. But unless we (especially the judges) keep the wider concerns as a primary focus, our legal system will slip back to that depicted by Dickens in *Bleak House* when the Court of Chancery gave 'to monied might the means abundantly of wearying out the tight'. And this can happen, indirectly, even if all litigants in a particular case are so rich or so poor that they are happy to fight till the cows come home, because their pre-emption of scarce judicial resources leaves less for others who claim their share of the total resources. I would like to explore with my judicial colleagues and the profession the greater use of time limits for the giving of evidence and hearing of argument, and the confining of debate to real issues clearly raised in written submissions delivered well in advance.

It was Pascal who once wrote, 'I have made this letter longer than usual only because I have not had the time to make it shorter'. This sentiment applies to what I have said today, and will doubtless apply to judgments I shall come to deliver. Of course, what I have said represents my own roughly-formed thoughts, and I will have the pleasure and corrective of working in a team situation where any opinion counts as nought unless it can gain at least one judicial adherent. The move to a team role, away from the relative isolation of a single player, is for me a particularly pleasing aspect of today's transition. I mean to work co-operatively with colleagues who already have my respect and affection. Since however I, like Learned Hand, have an open mind not an empty one, I have thought it proper to expose some views for debate and criticism, or at least studied neglect.

Swearing in of the Honourable JJ Spigelman

Shaw QC MLC: Your Honour's advocacy skills are illustrated by the remarkable results you had in two very recent cases before the High Court. In *Newcrest Mining (WA) Limited* v *BHP Minerals Limited & Commonwealth* (1997) 71 ALJR 1346 your Honour represented the mining company. You successfully argued that the extinguishment of mining leases as a result of the proclamation of Stage 3 of Kakadu National Park was an acquisition of property by the Commonwealth and therefore subject to section 51(xxxi) of the Constitution, that is the Commonwealth was obliged to acquire the property on just terms. Just months later, in *Commonwealth* v *Western Mining Corporation Resources Limited* (1998) 72 ALJR 280, your honour appeared before the High Court on behalf of the Commonwealth and successfully argued that the extinguishment of oil exploration permits in the Timor Gap, as a result of *Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990*, did not constitute an acquisition of property. Such a juxtaposition of advocacy is, of course, part of the attraction of life as a barrister.

You are our second Jewish Chief Justice and the welcome you have received is eloquent testimony to how far we have become an open, tolerant society since the time of our first, more than a century ago. When Julian Salomons was appointed the fifth Chief Justice of

New South Wales, his appointment was gazetted on 13 November 1886, but hostility from his colleagues led to him to resign six days later, before he had been sworn in. In his professional life, it was not the only time that he came under attack for his race. But that is long past history.

On a happier note you have followed your predecessor in other ways. Like yourself, Julian Salomons acted for a time as Solicitor-General, then in the ministry, and as a trustee of the Art Gallery. You do not have Salomons' cross eyes or squeaky voice but other likenesses may be found, in the contemporary description of Salomons as having a mordant wit and being quite the fastest, long distant talker of his time. However, the option of following him into a knighthood has passed.

Minorities who have known persecution tend to bring up children who are keen to seek justice for all people. It is perhaps literature's loss that you did not follow a vocation as a writer of fiction. But it prefigures the adult that the boy in his last year at Sydney Boys' High wrote in its magazine *The Record* a short story that condemned the White Australia policy and criticised the treatment of the Chinese in our history. The story did not flinch from saying harsh things about trade union phobias against the Chinese. When you were at school the few Chinese students in our schools tended to be side-lined. Young Jim Spigelman, provoked by some gush of enthusiasm from the authorities over an American student, formed the Asia Society, as a forum for communication with the Chinese students.

Your part in the Freedom Rides of 1965 has been much reported in recent days. They were days of hope when it was possible for the young to believe that the walls of prejudice must fall. We have made gains, but the struggle against intolerance and injustice continues. While the Freedom Riders are well-remembered, the student activist took up many other issues. You advocated a 'poverty law' option at the Law School and, as President of the Students Representative Council, championed student representation on Faculty committees.

The Hon. Justice D Kirby and The Hon. J J Spigelman, Chief Justice of NSW

Swearing in of the Honourable Justice LDS Waddy RFD

Walker S.C.: Whatever may be royal about your Honour's political attachments, whatever may be splendid about your entourage, domestically, the fact is you have always been the very furthest from regal in your dealings with your colleagues, with those whom you appear for, those whom you appear against to cross-examine and those before whom you appear. The greatest augur of your Honour's career on the bench is precisely that mixture of courtesy, humility and fairness which we at the Law Council are quite confident will provide the most solid foundation for you to go forward.

The importance of this court as one of the nation's great federal courts, is one which the Law Council wishes to make quite plain in its welcome to you. Your job ahead is one which will require all of what is known of your Honour's application both to the learning of the law and to the human side of the law. Mr Cameron has already made mention of the fact that in your long, varied and hard-working career at the Bar, you became attached or known from time to time for some of the longer, more intensive, complex inquiries or cases, including, as is well known, in the Trade Practices area.

Of some counsel, of some lawyers, it can be said if a case was not big they would make it big. Of you, that could never be said and another good augur for your performance on the bench in which we have great confidence. If the complex will not deter you, that which appears long will not deter you and what is even better, you will not lengthen it at all. Except in that most pleasant of ways which rarely increases counsel's remuneration at all, namely, by the levity and humour with which you have been known to ease many an awkward moment and which we are sure will continue to be displayed with taste and tact on the bench.

McColl S.C.: The life of a judge is not an easy one. A judge, particularly in this jurisdiction, bears the burden of having to make hard decisions which profoundly affect the lives of the litigants and their families who appear before the court. There will never be a perfect solution to the sort of disputes which are brought before this - or indeed any - court. Judges must strive in a necessarily imperfect way to reach their decisions as fairly and equitably as possible and it must be apparent to all that that is the manner in which that decision has been made.

On occasions, administering justice so that the litigants and the public appreciate the even-handedness which is involved, will itself be

difficult in the face of the tensions and emotions which will frequently attend on matters such as residence, contact and property in this jurisdiction. In order to satisfy all those competing demands, we expect our judges to display independence of mind, the wisdom of Solomon and the patience of Job. Your Honour is eminently qualified to live up to all those expectations.

You are clearly capable of great achievement. The personal history Mr Carneron has recited bears eloquent testimony to that. Less well known, perhaps, is the fact that you wrote the history of The King's School in less than three weeks. Not satisfied with that achievement, you then managed to present the history both to the Queen, and notwithstanding being an orthodox Anglican, to the Pope. Photographs indicate that the Pope was somewhat bemused but nevertheless suitably appreciative. The Queen was a more predictable recipient. As one of your former colleagues on the Eight Floor of Wentworth Chambers said recently, your Honour is a King's boy who has remained a Queen's man.

You have carried that commitment to the Queen forward in being a founding member and since 1992, chairman of Australians for Constitutional Monarchy. That position required fortitude and courage of conviction in the face of intense media scrutiny and public controversy. Your Honour demonstrated great ability to deal with the public debate which surrounded that organisation with reasoned argument, patience, wit and good humour.

Waddy J: I always practiced law on the basis that we are paid a great deal as lawyers to fight our client's cases but not a cent to fight each other. Playing the ball and not the man has always been my unwavering intention, the lasting legacy of my education.

The varied beliefs of attorneys in barristers' abilities are the one reason I've never thought floor parties were a good idea. Why put all your suppliers together in one room and let them discover the truth when with a little effort you can fool most of them most of the time if you keep them apart?

I mention these early matters to disclose that a great judge of the Matrimonial Causes Division, Mr Justice David Selby, is my ideal for gentlemanly courtesy on the bench. If I had an aspiration it would be to conduct a court room as relaxed but effective as he did, although I believe I could never fully attain his erudition and compassion. But the judge who towers above all in my life in the law was Sir Owen Dixon, followed closely in the United Kingdom by Lord Denning, whose friendship Edwina and I have enjoyed for over a quarter of a century. Lord Gardiner and Sir Garfield Barwick must rank as the greatest advocates and Lord Hailsham, also a close family friend, as this century's greatest Lord Chancellor. But for impact on the law, the duo of the double Ds, it's Dixon and Denning.

The pressures of litigation, the proper expectations of the public and the far from inexhaustible pockets of the Australian taxpayer have replaced such a rarefied court atmosphere with the economic rationalist nostrum of "productive judicial time". I expect it's the concern of

Justice LDS Waddy RFD

every judge to balance the time necessarily taken to ensure that justice is done to the parties appearing in the court with the ancient reminder, even from Magna Carta, that justice delayed is itself justice denied, which applies most pointedly nowadays to the those in the lists who cannot get their cases heard or determined expeditiously .

Although it's very often overlooked, I am persuaded that being Australian has as one of its essential elements and has had since 1788, when convict Kable successfully sued the Master of the convict transport that brought him here, a fundamental adherence to the rule of law equally applicable to all 'without fear or favour, affection or ill will'. It is referred to in the Oath of Allegiance I happily took again earlier today on the volume of the Sacred Law, in the form of the schedule to the Constitution which referred to the Queen of Australia's 'heirs and successors according to law'. That law is now, of course the law of a sovereign. independent Australia.

Well, Acting Chief Justice, you have been very patient, as have all here. I thank those at the bar table for their extremely generous comments and the extreme generosity they have shown in spending their time coming to this lovely city for this occasion. But it is time for me to take my godson's advice and 'Get on with it'.

I conclude with reference to the one power you all have over me, for judges are - as Bracton wrote in the 15th Century concerning the constitutional position of the Monarch – judges also are under 'God and the Law'. My former rector - of St Augustine's, Mr Cameron - was kind enough to write to me and compliment me on my preferment. In a generous note he concluded: 'At St Augustine's we pray for judges and magistrates, probably not as often as we pray for politicians. Your appointment will spur us on to do so more frequently'.

May I invite all so inclined to include me and all who work with or come before this court in their prayers, that justice and mercy, love and kindness may temper the lives and work of all judges, officers and employees of the Family Court of Australia, and that all litigants may here obtain justice with compassion, 'without fear or favour, affection or ill will".

Swearing in of His Honour Judge K O'Connor

On 10 August Kevin P O'Connor was sworn in as a judge of the NSW District Court by the Chief Judge, Justice Blanch. He was welcomed to the bench by the NSW Attorney General the Hon Jeff Shaw QC MLC and Mr Mark Richardson, Chief Executive Officer of the NSW Law Society. At the bar table was Justice Alwynne Rowlands formerly of the County Court of Victoria and now of the Family Court. Mr Shaw separately announced that Judge O'Connor had been appointed to a three year term as the inaugural President of the just established NSW Administrative Decisions Tribunal.

'His journey to the Bench in Australia's oldest jurisdiction has not been conventional - but what is conventional? In an era of national law firms, reciprocity of admission and uniform professional conduct rules, state borders are now of less significance in legal practice.'

In his remarks the Attorney said that Judge O'Connor comes to the Bench 'following a distinguished career, first in academia, then in the area of law reform, at the Victorian Bar, and more latterly in senior offices within the Commonwealth and New South Wales public sectors'.

Born in 1946 in London of Irish stock, Kevin Patrick O'Connor arrived in Australia at the age of five. His family settled in the western suburbs where he was educated in the catholic school system. He attended Melbourne University Law School and subsequently, on a Fulbright Scholarship, the University of Illinois at Urbana-Champaign. In the mid 1970s he returned to lecture in contract at the Melbourne Law School. Among his colleagues there at the time were the now Sackville and Weinberg J Js, R R S Tracey, Marcia Neave, and Cheryl Saunders.

In 1976 he was coaxed to Sydney to join the newly established Australian Law Reform Commission. Under the energetic chairmanship of Kirby J he joined an illustrious band of law reformers that included John Cain, F G Brennan QC, G J Evans, Murray Wilcox QC, J J Spigelman, J H Karkar, Bryan Keon-Cohen, and Jocelynne Scutt. As principal law reform officer he led the team that was responsible for the research and discussion papers for a number of important early reports of the ALRC including *Complaints Against Police,* and *Privacy.*

In 1980 he returned to Melbourne, joined the Bar and developed a general practice with a focus on administrative law. He left the Bar in 1983 to take up the position of Director of Policy and Research in the Victorian Law Department. In this role he was the intellectual force behind the team that drove the extensive law reform agenda of the early years of the Cain government under successive Attorneys General John Cain, Jim Kennan QC, and Andrew McCutcheon. Significant legislation that Judge O'Connor was involved with included freedom of information, regulation of in vitro fertilisation, establishment of the Victorian AAT, and early initiatives to reform police powers and the criminal law. In addition to directing the legislative programme he was Secretary of the Standing Committee of Attorneys General for five years. Over that period this institution too made a deal of progress on a number of uniform law projects. In his spare time his Honour was active in civil liberties. For a time he was secretary of the Victorian Council for Civil Liberties as it was then known, and also produced its weekly radio program.

In 1988, after being promoted to the position of Deputy Secretary of the Law Department, Judge O'Connor was appointed to the position of Australia's first Privacy Commissioner. With that appointment came an ex-officio position on the Commonwealth Human Rights and Equal Opportunity Commission and relocation to Sydney with his wife, Bernardette, and three school age children.

As Privacy Commissioner his first task was to guide the implementation in the federal bureaucracy of the information privacy principles that emanated from his old stamping ground, the ALRC. He also worked behind the scenes with departments and agencies to ensure that the Australian Card substitute, the tax file number system, met the high privacy standards that he brought from his civil liberties background. He was also responsible for the controversial but ultimately smooth extension of the *Privacy Act* to private sector credit reference providers. At the time that his appointment expired in 1996 there was bipartisan agreement to extend the *Privacy Act* to the entire private sector. While this was later abandoned, the fact that the Commissioner had been able to facilitate a climate of acceptance of such an extension is testament to his expertise and respect in the area. Under Judge O'Connor the office of Privacy Commissioner also produced a number of leading edge discussion papers on community attitudes to privacy issues, medical records, genetic testing, and data matching. The Privacy Commissioner also acquired an international reputation, with Australia regarded as having one of the most advanced privacy protection regimes in the western world. He addressed and convened a number of conferences on privacy issues. After his term as Privacy Commissioner he was retained as a consultant on privacy by the Hong Kong government. As a member of HREOC Judge O'Connor presided over a number of hearings of discrimination cases, represented Australia at the UN Commission on Human Rights, and acted as executive Commissioner on a number of occasions.

In 1997 Judge O'Connor was appointed as Chairman of the NSW Commercial Tribunal, the State's peak credit and home building tribunal. He is also honorary Chairperson of the Public Interest Advocacy Centre.

Judge O'Connor's first challenge is to preside over the bringing together of a number of merits review tribunals and formerly court based appeal rights. His journey to the Bench in Australia's oldest jurisdiction has not been conventional - but what is conventional? In an era of national law firms, reciprocity of admission and uniform professional conduct rules, state borders are now of less significance in legal practice. Similarly, professional careers often now include stints in academia, the bureaucracy, and law reform or other agencies of government. There is now no typical career in the law just as there is now no conventional route to judicial appointment. As he remarked at his welcome, 'perhaps this appointment represents a small milestone in the journey in seeing ourselves as lawyers belonging to a national legal profession rather than a series of State Bars.'

'Since I have been on this Court its workload has increased immensely, cases have become larger and more complex; no two cases are even remotely the same. Innovative procedures are constantly being tried.'

In any appointment to public office it is the professional and personal qualities and values that are important. In his career to date Judge O'Connor has displayed intellectual rigour, integrity, impartiality and a sense of fairness. He is admirably equipped for the challenges ahead. New South Wales' gain is Victoria's loss.

The New South Wales Bar congratulates him on his appointment and wishes him well in his judicial career.

Retirement of the Honourable Justice ML Foster

Barker QC: Fearlessness in a judge can be a bit of a worry, but your Honour had the reputation of being in fact exceedingly careful in your judgments, and to quote others, you sweated over every judgment, you agonised about getting it right.

Foster J: I should say that when I was sworn in as a Justice of the Supreme Court in 1981 by Sir Lawrence Street, my first Chief Justice, two speeches sufficed to mark my arrival in the judiciary. Today I find that no less than four speeches are required to signal my departure. If there is some hidden message in that, I don't think I'll dig for it.

I thank you, Mr Burmester, Dr Hughes, Mr Barker and Mr Heinrich for so collectively, comprehensively, conclusively and compassionately dispatching me into the outside world.

I am of course grateful for your more than flattering remarks. I'm happy to accord to them the willing suspension of disbelief for the moment. That moment will stretch out until midnight when the Constitution will strike me down. Indeed the last decision I shall make as a judge is whether to stay up until that hour in order to experience at first hand the abrupt withdrawal from my being of the judicial power of the Commonwealth or whether I shall retire to bed at a more appropriate hour and simply wake up tomorrow with a nagging sense of loss.

I have not been disappointed by the challenges of this Court. It has not been all easy. I can remember my concern when I first confronted the arcane intricacy of the Commonwealth Anti- Dumping legislation and the bewildering maze of the Taxation Acts. However, no challenges are insurmountable. I have enjoyed the work at first instance and on appeal and hope that I have made at least a meagre contribution to the success of this Court.

Since I have been on this Court its workload has increased immensely, cases have become larger and more complex; no two cases are even remotely the same. Innovative procedures are constantly being tried. The challenges of judicial life in the Federal Court, in my view, will continue to attract to this bench top legal talent from the profession and from academia and perhaps, Chief Justice, from other courts.

I confess that I have no real wish to leave this happy, growing and progressive Court. I should have liked a little more time, but it cannot be. But I have no cause to complain, I have had a rich and varied judicial life, full of interest. My wife and I have attended many judicial conferences, made social contacts with the judges from other states and have made many new friends. Moreover, I voted yes in that referendum in the '70s. I then accepted the proposition that when a judge achieves three score years and ten he is necessarily in a state of severe intellectual decline and should take his pension and, as was said, go off into his dotage. It is just that when you reach constitutional senility, and it happens with such alarming speed, that things do look rather different.

Retirement of the Honourable Mr Justice JJ Cahill

Shaw QC MLC: Justice John Cahill has lived a life of public service, in the best sense of these words. The functioning of a just and fair society depends on the work of thousands of public servants, who make it happen. John Cahill has served the people and the State of New South Wales with distinction and has well and truly earned the deep respect of the industrial and wider community in this State.

Retirement of the Honourable Justice BJK Cohen

Tobias QC: At your swearing in ceremony on 21 November 1983 as a judge of this court the then Attorney General, the Honourable Paul Landa, referred to your period as Master in which he said that you had displayed judicial qualities of fairness, impartiality, courtesy and kindness, qualities that would well equip you

for the additional appointment you were then undertaking. He also referred to the fine personal qualities of good humour, integrity and kindliness that you would bring to that office.

That was repeated by your very good friend and then Senior Vice President of the Law Society of New South Wales, Fred Herron, who when referring to your Honour's grandfather, John Jacob Cohen, who served with distinction as a judge of the District Court of this state for some ten years, referred to the tribute paid to him upon his retirement with respect of his fair mindedness, ability, integrity, common sense and loyalty. Mr Herron also referred to your period as Master in that context in which he said you displayed, 'a measure of kindness, courtesy and never ending patience which I doubt will ever be equalled and I am certain will never be surpassed'. How prophetic those words were because your Honour has lived up to them throughout the fifteen years that you have been a judge of this Court.

'You have never adopted any form of aggression nor have you bullied those who have appeared before you. On the contrary, you have been even tempered, interminably patient and over-kind.'

Your Honour has carried those qualities on to the Bench in your present role. You have never adopted any form of aggression nor have you bullied those who have appeared before you. On the contrary, you have been even tempered, interminably patient and over-kind to some of the efforts that you have no doubt experienced from some members of the Bar. Notwithstanding that, you have indeed applied delicately the scalpel to the arguments presented before you with the skill, experience and principled approach that your Honour would have learned from your Honour's mentor, the late Mr Justice Roper, to whom your Honour was Associate and whose skills as an equity lawyer you have brought to your time as a judge of the Equity Division of this Court.

Cohen J: You have pointed out the things that were said about me and said to me fifteen years ago. Your mention of the swans I seem to remember came from something Lord Pearce had said but I think repeated by McGarry J, who said that when going on the Bench one sees the judge sitting in a manner that seems to be like a swan gliding across the mirrored surface of the lake but he said the judge, like the swan, is paddling madly underneath and I have certainly had to do a lot of paddling.

One of the other things Justice McGarry said, which has had an effect on me, if you could bear a moment of seriousness, was that the most important person in court in any case is the one who is going to lose. As a result and as you don't know at the beginning who this is, it means everybody has to get a fair go. I tried to do that, I hope I have succeeded.

Swearing in of the Honourable Justice Paddy Bergin

Bergin J: Chief Justice, your Honours, Mr Barker, Ms Hole, members of the legal profession, ladies and gentlemen. Thank you Mr Barker and thank you Ms Hole. I am deeply grateful for the generous remarks that have been made.

It is most gratifying to be reminded of the interesting and important aspects of my life and career. One aspect to which reference has not been made directly is my abiding interest in the exercise of power and how it affects others.

This was first awakened in my formative years in my family environment, although at that time it wasn't so much identified as an interest but rather as a frustration, being the youngest of three children.

However, that interest flourished in my time in high school at the Sacre Coeur convent in Kincoppal. The Sacre Coeur nuns wore habits, or robes, which were quite unique and it seemed to me that their presence enhanced the nuns' authority. It was not just the individual with whom one was dealing with but an institution which commanded, and might I say received, respect.

But luckily for me it was also an institution which accommodated the ever so gentle questioning of authority when fairness seemed wanting. On the rare occasions when this occurred I always felt the nuns had this extra edge caused in no little part by the presence of their robes. Although the significance of their robes was understood they did at times cause some little curiosity. I suppose if the Sacre Coeur nuns were to see me today their curiosity may also be excited by my robes. But I have no doubt that they would understand their significance.

Mention has been made of my years as a teacher. It is interesting to reflect that those years included events that would touch upon my later life at the Bar. To this day I can vividly recall a young student on a hot summer afternoon take off his shirt to expose welts deep in his young back. When the government department was contacted to assist in the matter the school was informed that really little could be done because one had to catch the perpetrator in the act and that was a matter for another department. But for the innovative initiative of the head of that school in finding a way through the quagmire of red tape that abuse might have continued.

It is enormously satisfying to know that nearly 30 years later I was part of a process which I have no doubt was pivotal to the establishment of a more accountable and specialised system for the detection and

more importantly the prevention of abuse of children in this state. It seems to me that the community will remain indebted to Justice Wood for his remarkable achievements in this area.

Reference has also been made to my years as an Associate. I felt I was extremely privileged to be appointed as Associate to Judge Peter Ayton Leslie and later with Judge Desmond Ward QC during the period I completed my degree. That opportunity to observe the administration of justice from such a privileged position in such a diverse jurisdiction was a wonderful introduction to the law. The consolidation of that at Stephen Jaques & Stephen in working with Ross Griffith Wagland and Gerald Ingrim Raftesath prepared me well for the Bar. To all of those people I extend my gratitude.

It was to my delight that in practice as a solicitor and at the Bar I found once again that the ever so gentle questioning of the exercise of power was accommodated when fairness seemed wanting.

That interest was further enhanced in the mid-1980s by a visit to this country by Sir Robert Megarry who addressed the legal profession in Sydney. The profession had posed a question for His Lordship, 'Whither Equity?'. His Lordship disclosed to the audience that he felt a little shy addressing them because Mr R P Meagher QC, as he then was, with his immense learning on the subject, would be speaking when His Lordship concluded. Luckily for me I don't have to face that prospect - at least today.

His Lordship observed that equity seemed to go through periods of quiescence and periods of vigour. He concluded that at that time it was travelling through a period of vigour. His Lordship then fascinated the audience telling them about the *Anton Piller* order and the then very much in vogue *Mareva* injunction and delivered his answer to the question posed that there was still much life left in equity.

However, R P Meagher QC then unleashed a concerted and cerebral attack on the life left in equity to which his Lordship referred. He analysed the then recent decisions on constructive trusts and concluded that equity in England was in a state of chaos and headed for doom. He expressed further anxiety about the intolerable state of the confusion that had developed in the area of equitable damages.

And so in contrast to His Lordship's optimism his Honour's prognosis was that equity was in urgent need of resuscitation by the injection of a very large dose of precedent and principle.

My perception about the gentleness with which one could question the exercise of power was reassessed slightly when I observed his Honour call for the removal of Lord Denning's influence and a very much more drastic measure for dealing with Lord Diplock.

There was, however, one aspect of his Honour's analysis which was not lost on his audience. It was a statement about feminine logic. That statement was perceived by some as somewhat derogatory. This was not to be the only time that his Honour's statements on this topic were to be so perceived. But on analysis and with the application of a little feminine logic, that perception can not be justified. One need only observe the gender of the judges in England, and the Law Lords of whose logic his Honour was so critical in reaching his conclusion of doom, to understand that on balance his Honour's public musings about feminine logic have been but well disguised pleas for the appointment of a woman to Equity.

I am indeed honoured and delighted to be that woman and to be appointed to Equity when it is so clearly in a period of vigour.

This is a wonderful ceremony made more so by the presence of my family, my friends and colleagues. It is, of course, not possible to thank you individually but I would like to say that the trust of my instructing solicitors in placing their briefs in my hands over the years has been enormously gratifying. It is that trust upon which a career at the Bar depends. For that I thank you.

Also in this regard I am most grateful to T F Bathurst QC whose delicate tolerance of feminine logic was quite masterful.

The friendship and support of a number of people in this room has assisted me in the development in the attributes necessary for a successful career at the Bar and the assumption of this high office. To each of you I extend my gratitude.

I would like to make some personal comments and perhaps have a vision into my privacy. It is about my family. I am very happy to say publicly that I am so proud of the Bergin family. Mary, my sister, Denis my brother, and I had the extreme good fortune to be brought up in an environment of intellectual honesty which nurtured each of us in our lives and career paths. My mother, Olga, who died in 1976, was quite a spectacular individual with the capacity to combine directness and gentleness with perfect feminine poise. My father Denis, who died in 1994, was unique. His

Justice Bergin

Irish ways are very much missed today. However, I am comfortable in the knowledge that Olga and Denis would be happy with what is happening here today. My sister Mary's concerted and dedicated medical work with the leukaemic children of this state is an example to us all. There are no adequate words to express my gratitude for the great friendship and wisdom of my brother Denis. I look forward to the continuation of that friendship and my involvement very much in the lives of the next generation of Bergins, each of whom is a credit to their parents.

Before I depart I would like to say something about the profession I have grown to love. My life as a solicitor and as a member of the Bar has been fascinating and exciting. The denouement of my career at the Bar has of course been exhilarating with my recent appointment as a Senior Counsel for this State.

During my time at the Bar I examined and lectured the new barristers in ethics and during that period it was very reassuring to observe the enthusiasm with which they assumed their ethical obligations as new members of the Bar.

The history of the Bar demonstrates its resilience to attacks upon its integrity. I have no doubt that the Bar is an institution strong enough to repel any further attempts to diminish it as a profession. The continued success of the Bar in this regard is not only in the best interest of the Bar but of the judiciary and the community.

The wrench of leaving such a great institution is tempered by the knowledge of the greatness of the institution of which I am now part. However, I am acutely aware that the function of the Bar and the legal profession generally is essential to the efficient performance of my judicial function.

Cognisant of the sentiments of Oliver Wendell Holmes, of which the Chief Justice reminded us at his swearing in, that the law is not a place for poets or artists but for thinkers, your indulgence is sought today for my reference to the words which William Blake penned almost 200 years ago but which seem apt:

> Joy and woe are woven fine, a clothing for the soul divine, and under every grief and pine runs a thread of silken twine.
> It is right, it should be so, that we are meant for joy and woe, and when this we rightly know safely through the world we go.

Swearing in of the Honourable Justice Virginia Bell

Bell J: Chief Justice, your Honours, Mr Barker, Ms Hole, members of the profession, ladies and gentleman. Thank you Chief Justice for your words of welcome.

I am conscious that it is only a little over three weeks ago that at the swearing in of Justice Bergin you expressed your pleasure that her appointment, among other things, helped to redress the gender imbalance of the Court. Redressing that concern might now be thought to have acquired something of the velocity of the very fast train. I am pleased to be a part of that process. When I was first in practice as a solicitor doing a great deal of my own appearance work, there were no women judges on the District or the Supreme Court. That had the capacity to make women advocates feel somewhat exotic, even if they weren't rumoured to be go-go dancers.

'The effect of a woman presiding over a court in those days would for those steeped in the language of modern literary criticism probably be described as subversive.'

I still recall walking into number 6 court at Darlinghurst on a morning in the early 1980s to find the short matters list being called over by her Honour Judge Mathews, as she then was. The effect of a woman presiding over a court in those days would for those steeped in the language of modern literary criticism probably be described as subversive. Happily, that is no longer so and we now have a number of women on the District Court and on this Court.

I would like to take the opportunity to say how important figures such as Justice Mathews, Justice Gaudron, Justice O'Connor, to name some of the long-standing women judges in this state, have been, not just because they have served as role models, although that is important, but particularly for their personal qualities of unfailing warmth and support to women members of the profession. I have been a beneficiary of it and I am grateful and I thank them for it and I would like to say in more recent times for very much the same reasons I thank Justice Simpson.

I am mindful that the women judges of whom I speak are all very distinguished lawyers and I can't help but notice that the thing most consistently said of me is that I am likely to recognise a joke if someone tells it. I have started to think it is a pity that that is a quality rather peripheral to the business of judging. I bear in mind that the Chief Justice of Australia when Chief Justice of this state said words to the effect that if a judge is burdened by a sense of humour, it would be rather a good thing if he or she did not demonstrate that fact from the bench.

As to my other attributes, they were rather strikingly drawn together in a letter I received from a friend who is a Crown Prosecutor who recalled our days together at Sydney University in 1971 in Professor Pieden's commercial law class. Professor Pieden was then

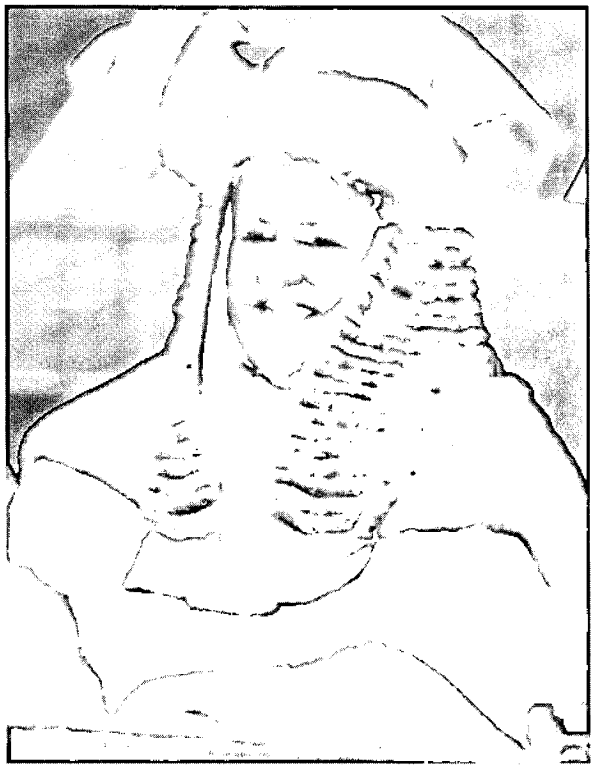
trialing a form of enforced class participation which in the heady atmosphere of university campuses in the early 1970s was quite a high risk teaching approach. A number of the fellow members of our class dealt with that challenge by sitting in their assigned seats but using pseudonyms. The Crown Prosecutor recalled that I did not resort to an assumed name. In a tone that he still remembers as loud and resonant, I replied to every question asked of me, 'I don't know'. The Crown Prosecutor cited that as an instance of my forthright honesty, an important quality in a judge, but I realise that there might be a view that it is a rather singular way for one's confrères to sum up a university career, so when I bear that in mind, together with the Chief Justice's caution as to the matter of humour on the bench, it commends to me a view that I might make a quiet style of judge and I could take comfort in the fact that that is a judicial attribute I have always found most endearing in the judges before whom I have appeared.

I would like to thank you, Ms Hole, for your very kind words and you, Mr Barker, for your very - I was going to say kindish - but indeed I would characterise them as kind words. My career as both a barrister and a solicitor has been a very satisfying one. I have had the great pleasure of working with and forming friendships with lawyers who are people of great goodwill and who have seen the practice of law as a useful means of seeking to make a contribution to a just society.

I did start work at Redfern Legal Centre almost at the time of its inception. It was then the only community legal centre in New South Wales. In the more than 20 years since that time the community legal centre movement has proliferated. There are generalised centres like Redfern throughout the state and also a number of specialist community legal centres catering for diverse needs, from those with intellectual disability to welfare recipients, those living in aged care accommodation and so forth. Historically the community legal centre movement owes a great deal to the remarkable talent and idealism of a group of academics who were then attached to the Faculty of Law at the University of New South Wales in the mid and late 1970s. Notable amongst them is John Basten of Queen's Counsel, who has been an inspiration to a generation of public interest lawyers and who has been a marvellous friend and source of counsel to me and I thank him.

When I look back to the beginning of my career, one of the most important events that I recollect is the publication of Mr Justice Nagel's report into the state of prisons in New South Wales. I was an adherent of prison reform. I attended many sessions of that Commission and I saw the report as a very powerful document that brought about far-reaching social change in the administration of prisons.

Years later it was an immense delight to have the opportunity to work as one of the counsel assisting Justice Wood in his Royal Commission into Police in New South Wales. It would have been possible for that Commission to investigate what I might describe as corruption simpliciter.



Justice Bell

Mr Justice Wood explored additionally what he described as process corruption, the systematic placing of evidence that is false in some particular before courts. In the course of that Commission's work and by his report, Justice Wood has succeeded in achieving far-reaching change and in preserving the integrity of the criminal law. It was a very great privilege to work with him.

The practice of criminal law, which has been very much my background, is one in which one can't help but be confronted by a great deal of sadness and awareness of one sort of deprivation that some people are subject to in their lives. I, like I think many people who are here today, have had the great benefit of growing up in a happy family, in my case, a conspicuously happy family. It gives me enormous pleasure to see both my parents and my brother Chris here today and to be able to say publicly what they well know, which is that I could not imagine having more loving or better parents. Criminal practice has made me very, very conscious that is a real form of privilege.

Perhaps finally I should just make this observation. Mr Justice Sully has on occasions found it necessary to take me to task for a certain want of depth in my classical allusions in advocacy. I felt I couldn't continue to let him down in my new role, so I took the time to determine what, if any, classical associations there may be about today and I discovered that 25 March marks the ancient Roman Festival of Hilaria. I am mindful that there is a latent ambiguity in that, but I propose viewing it as a favourable portent.

I would like to thank you all for taking time from your I know busy schedules to be present on this occasion. Thank you.