

‘The dancing man’ - Frank McAlary QC

By Andrew Bell

‘In Elizabeth Street I danced a dance like a semi-despondent fury.

For I thought that I should never hit on a chance of addressing a New South Wales jury’.

With apologies to WS Gilbert, *Trial by Jury*

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Singleton Shire
Council and
Burnie Port
Authority v
General Jones
Pty Limited.*

Impromptu farewell sittings are rare enough for judges. For counsel, they are, to this writer’s knowledge, unprecedented. McAlary QC, however, has made a habit of ‘breaking the mould’. Accordingly, in December 2002, on the final day of his last appeal in the New South Wales Court of Appeal, the President’s court was packed with friends and colleagues. McAlary, who was quite unaware of the looming honour, was somewhat bemused by the fact that they had, apparently, taken a sudden interest in the second day of his argument and were in the well of the court. He also wondered what a television camera was doing there but, to a man famously not shy of the camera, thought nothing of it! The Bench, augmented by his two former floor colleagues, justices Sheller and Giles, convened and the President of the Court of Appeal offered the following tribute:

This is the last occasion when Mr McAlary QC will appear in this court. I have it on the authority of his clerk that he has sold his chambers and is leaving practice at the Bar at the end of the year. Experience with judges who retire ‘never to return’ cautions one to be sceptical about such foreswearings, but that is no reason why the formal end of a notable career should be overlooked.

It is not the practice of this court to farewell every departing barrister, but it is fitting that we should do so on this occasion.

It is appropriate that judges should acknowledge, from time to time, their indebtedness to the profession. The course of justice would simply not flow without the assistance of counsel and solicitors.

In your case Mr McAlary there are particular reasons why it is fitting that we should break with tradition.

You are the longest serving member of the Bar in this state, perhaps the country. You were called to the Bar on 7 May 1948 and have been in continuous active practice ever since. That is a very long time – I was one year old in 1948.

Yours has been a most varied practice. Common law was your staple diet, but you moved freely in equity, family law, commercial

cases, local government law and many other fields. The law reports attest to the range of leading cases in which you appeared, and the long list of your doughty clients.

On this occasion special mention should be made of your role as an appellate advocate. The court wishes to thank you for the assistance given to it (and to its predecessor, the full court of the Supreme Court) over many years. Your advocacy has been marked with clarity of definition of issues and agility of expression. You have a mine of persuasive anecdotes. Your reminiscences about points of long-forgotten procedure and evidence have generally been accurate and helpful. (For obvious reasons I exclude from these comments my views about your submissions in the present case. I shall reserve them until judgment.)

Another aspect of your advocacy style has been its forcefulness. If prodded, you do not take a backward step. Your nickname ‘Roan Bull’ probably attests to the number of opponents who have been gored. Judges have also felt your wrath. It is said that there was an occasion in the Court of Appeal, presided over by Mr Justice Moffitt, when you had a blazing row with Mr Justice Hutley. Even you thought you might have gone a little too far and this was confirmed when you received a note from Mr Justice Moffitt commanding you to attend his chambers at the conclusion of the hearing. You were relieved when, upon entering the judge’s chambers you were greeted with a glass of whisky. He said ‘Here Frank, take this and settle down, I haven’t seen such a good show in years’.

The marks of a true appellate advocate are the ability to inform, to persuade and not to bore the Bench; and to do so with charm and utter frankness. These have been your hallmarks.

The court wishes you well in your retirement.

McAlary QC, who took silk in 1969, has had a long and distinguished career at the New South Wales Bar. In the last 10 years alone, he has been involved in a number of notable cases including, *Astley v Austrust* (1999) 197 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 and *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520 (a case which he won at each level of the judicial hierarchy on a different ground at each level). But as Justice Mason alluded to, the depth and breadth of his practice has been vast. This should not have come as a surprise to those of his colleagues at the Sydney University Law School. In 1947, one of the student editors of *Blackacre*, an E G Whitlam BA LLB, had written of Frank:

The red-haired boy of the Stone Age, Frank very early came to the fore. Year Rep. in his first year, he was on the SRC in his third and fourth years. He took a courageous stand last year in the often thankless job of director of student publications. A brilliant student, he left no page of Stone unturned. The child Jesus disputing with doctors in the temple would have been no match for Frank disputing in lectures with the doctor of scientific jurisprudence. He [Frank] was articled to Messrs Freehill, Hollingdale and Co. and is now the brains trust of messrs. Minter, Simpson and Co.'

Justice Michael Kirby, who originally briefed and then appeared with Frank in his time at the Bar before seeing him regularly on the Bench, has paid the following glowing tribute:

I have known Frank McAlary since my earliest days in the law.

As an articled clerk I briefed him many times for the workers in compo cases. He was a great fighter and the Labor Council of NSW loved him. Being Irish and Catholic did not hurt him in that department. His charm and ability soon wore down my Ulster doubts.

My first case out of Sydney involved instructing him in a claim of an abattoir worker. I think it concerned an alleged 'holiday meatie' - a claimed self amputation of a finger in order to get the compo to pay for a modest holiday. Things were pretty basic back in 1958. The worker denied the dastardly charge.

We flew to Bourke in central NSW. Against all odds Frank won the case. Then he jumped on a truck to another town leaving me marooned in a heat wave, twenty-four hours to the next plane, most of them spent thinking alternatively, about Frank's brilliance and his cruel abandonment of me to my fate.

But to really understand his technique of advocacy one had to see him from the other side of the Bar table. Opponents never knew his secret weapon. It was those eyes. It was *unbearably* painful for a judge to reject the slightest argument, however trivial, of a barrister always so utterly convinced of the rectitude of his client's cause. I hope those eyes are captured on video in the High Court's filmed archives. They should be played and replayed in centuries to come to teach new judges of the need to be on the lookout for advocates of passion like Frank McAlary. A big mind. A big heart. Impossible to believe that he will retire.

The occasion in 1999 of the dinner celebrating 50 years in practice of McAlary QC, Porter QC and Hughes QC will long be remembered as one of the great nights of the New South Wales Bar. The sense of *esprit de corps* was palpable as each of those

towering figures took their respective bows. Frank McAlary now retires as the senior member of the New South Wales Bar and as the last of the original occupants of the Wentworth/Selborne building, having joined the 11 Selborne, as it then was, in 1957.

Earlier this year, Frank's current and past colleagues on the 11th floor held a memorable dinner in his honour. Frank will pursue his modest business and pastoral interests in retirement. He has been a legend of the New South Wales Bar and we wish both he and Paddy a long and healthy retirement.



Frank McAlary, 'The Dancing Man', in Elizabeth Street, Sydney, during victory celebrations on VJ Day, 15 August 1945. Photo: *News Image Archive*