

**OPENING OF THE LEGAL YEAR – GEELONG – 2011**

***Monday 17 January 2011***

***The Hon Justice Clyde Croft***

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***Address on the Opening***

Thank you for the welcome extended to the Court on behalf of the Victorian Bar, the Geelong Law Association and the Office of Public Prosecutions.

Occasions of this kind are very important because they give us time to pause from our busy professional lives and think about the purpose and importance of the practice of the profession of the law, and the manner in which it is practised. In so doing we might reflect on the fundamental importance of the rule of law - applied to all citizens, whatever their position in the community, and without fear

or favour - administered by an independent judiciary and combined with an open and accessible justice system. These values and attributes are so fundamental to our democratic society that there is the risk that they will be taken for granted as we pursue our daily work in the law, with all the time and other pressures that brings. However, history and more contemporary events in countries which also share our common law heritage should sound a salutary warning that these fundamental values and attributes are fragile and must be vigorously protected by judges, legal practitioners, governments and the wider community. And the danger is not always readily apparent. Incremental, insidious erosion of the rule of law, the independence of the courts and the independence of the legal profession is probably the greatest danger in societies like ours, so we must be ever vigilant. Additionally, as modern life becomes more complex, cost structures grow and demand for court services increases access to the justice system tends to become more difficult and costly. This trend poses further issues and challenges.

In the course of our thinking it is, I think, also helpful to reflect upon the very deep traditions of the common law; the “deep wells” of the common law. In this vein you may recall my comparing the traditional Geelong opening of the legal year with the grand assize. This is a reminder that concern for the application of a uniform rule of law and accessible justice, also available locally, can be traced very clearly to the time of Henry II in twelfth century England. Until this time parochial law dominated, in the hands of feudal and sub-feudal lords, the church and various local corporations. Glossing over eight or nine hundred years of legal history it is fair to say that Henry II established the uniform rule of law throughout the country; the law that we still refer to, descriptively, as the “common law”. “Common” to all throughout the land, and locally accessible. This was achieved by Henry’s itinerant Royal Justices, the justices in eyre, who travelled the country from the developing central courts at Westminster and presided at the assizes throughout the country. The assize was held

periodically in all major centres and opened with a great gathering which included City and County heads, officials, lawyers and others involved in the administration of the law; much as we see here today. The itinerant justices dealt with civil and criminal matters and over time the assize system became regular and formalised; and in more modern times as the regular the court “circuit” system.

The coming of the assize continued over the centuries to be a matter of great ceremony and significance, as Mr Justice O’Byrne noted in his Opening of the Legal Year in Geelong in 1979:

For centuries, lawyers and judges have enjoyed ceremony and pageantry associated with the courts and the legal system. Although we no longer witness the pomp and the fanfare of trumpets that used to welcome the judge’s private railway carriage at the station, and the delivery up to him of the white gloves, if there is no crime in the city, nevertheless we still dress up on an occasion such as this, and welcome all those citizens who have spared the time to be present today.

Although this Court is built on railway land beside the historic terminal station of the Melbourne and Geelong Railway, some aspects of the ceremony have clearly changed!

Nevertheless, the uniform application of the law and accessible justice at the highest levels is also deeply rooted in the history of the law in Geelong, from the earliest days. Vivian Hill in his book *Geelong Lawyers* (1986) provides us with an insight into the growth of the legal profession in Geelong from the early days, after Captain Foster Fyans arrived in 1837 to be the first Magistrate in Geelong. These were indeed early days when we remember that it was not until July 1851 that Victoria became a separate colony. Nevertheless Vivian Hill notes that the Supreme Court did sit in Geelong in April 1841, though it was of course our predecessor here, the Supreme Court of New South Wales sitting in the Port Phillip District. The Court returned in 1850 presided over by Mr Justice William A'Beckett, who returned in 1852 as Victoria's first Chief Justice and presided over a Criminal

Session and General Gaol Delivery. Mr Justice O'Bryan referred to these events in his Opening of the Legal Year in Geelong in 1985, and noted the comments by Mr Justice A'Beckett in relation to the reasons for being assembled:

The holding of circuit courts is an event which will not only be the means of bringing together for a time many scattered and distant residents but those who are thus collected will be thereby afforded an opportunity of forming some acquaintance with the laws by which they are governed and the course and procedure of the courts in which those laws are administered.

In this era of modern electronic communications the physical gathering may not be so important, but these comments do reflect the ongoing tradition and commitment to the uniform rule of law and an accessible justice system, centrally and locally.

Important as it is to reflect upon the deep roots and values inherent in our gathering today it should not be forgotten that the maintenance of these values also involves their practical application

in today's conditions. This does not diminish their importance but does raise a variety of issues, including issues of access to justice – an issue with which courts, governments and the legal profession have been struggling in this and many other countries. As experience here and elsewhere demonstrates the answers are not easy or simple. Modern life and society is inherently complex, law is labour intensive requiring the work of highly trained individuals; unless we are aiming to replicate, for example, the “mothers’ and the fathers’” courts of Burma post independence from Britain. Consequently a great deal of work has been undertaken here and elsewhere to make the justice system accessible, without loss of the fundamental values and attributes. We have seen, for example, the Report of Lord Woolf in England and the civil procedure reforms which followed and, more recently, the work of Lord Justice Jackson in England which made further proposals for reform, particularly in relation to pre-trial protocols and appropriate dispute resolution. These and other developments were considered by the Victorian Law Reform

Commission in recent years. The result was the very detailed, comprehensive and helpful *Civil Justice Review Report* (Report 14), which was published in 2008.

The *Civil Justice Review Report* provided the foundation for the extensive legislative changes to civil procedure in Victoria made by the *Civil Procedure Act* 2010, which commenced on 1 January 2011.

The Act introduces pre-trial protocols which are designed to encourage parties and their advisers to think carefully before embarking on the cost, expense and stress of litigation and encourages the use of appropriate dispute resolution to enable parties to resolve disputes without the need to resort to litigation.

Important and extensive obligations are imposed on parties and practitioners in relation to the conduct of litigation and the application of appropriate dispute resolution processes - by way of overriding obligations to assist the courts achieve the overarching purpose of the Act and the rules of court in relation to civil



proceedings – all of which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. The Act also provides for very extensive powers of case management by the courts and a variety of other matters – including, for example, enhanced powers designed to limit discovery and also for summary dismissal of claims or defences. The use of these powers by the courts, with the assistance and co-operation of and between members of the legal profession, should assist significantly in promoting efficient dispute resolution - with the greater use of processes other than litigation and less costly and more expeditious litigation – hence improved access to justice. The Supreme Court and the other courts, the County Court and the Magistrates Court, have been active in conducting and participating in conferences and seminars on the operation of the new Act – and I am pleased to say that I will be conducting one here tomorrow with Geelong practitioners.

Access to the Supreme Court in Geelong for civil and criminal matters which is provided through the circuit system has remained very important, and continues to be so. As many of you would know the Supreme Court is now providing, as an additional service, the services of the Commercial Court in Geelong. This development followed a meeting which Justice Pagone, the Chief Judge of the Commercial Court, and I held with Geelong practitioners in the latter part of last year. I should add that the meeting and the provision of this service would not have occurred but for the very strong support received from the Chief Justice, the Honourable Marilyn Warren AC.

Geelong is, as we all know, a major commercial centre and the second-largest regional city in the country. Consequently it is expected that the demand for Commercial Court services will grow significantly. Nevertheless, it should be stressed that this development does not detract in any way from the existing circuit system; and nor does it involve the provision of Commercial Court services “on circuit”. Rather it provides the same 365 day – and in

many types of matters, 24 hour services – Commercial Court services that are available at the Supreme Court in William Street, Melbourne. Bearing in mind that a “commercial” matter is now very broadly defined and there is no limit on trial length in the Commercial Court – in contrast to the position that formerly existed in the “Commercial List” days - it must be said that this opens up new horizons for civil litigation in Geelong. Regular Commercial Court Directions Days will now be held in Geelong (and as required) and applications and trials in Commercial Court matters issued in Geelong will normally be held in Geelong. Indeed I am sitting in a Commercial Court matter here this afternoon.

Last, but by no means least, I would emphasise the importance of not only an independent legal profession, but also one that is skilful, well informed, co-operative and dedicated to serving the community, litigants and the courts, in maintaining and protecting the fundamental values and attributes of the justice system. The Geelong

Law Association has a particularly important role to play in supporting such a profession. The Association, its officers and members are to be commended for their work in this respect for very many years now in Geelong. On a more personal note I would like to say how much I have enjoyed working with Geelong practitioners, over many years now. As a rule one should never mention names but I do wish to further acknowledge the late Vivian Hill who was, incidentally, among the first to brief me from Geelong and, significantly more importantly, whose great foresight, dedication and many hours of work resulted in the establishment of the website which is now a major repository of historical material in relation to the law in Geelong since the earliest days; including the courts and the profession (a website which is part of the Deakin University Library site).

Finally, I conclude by thanking all those involved in organising today's events – Father Dillon of St Mary of the Angels, the Geelong Law Association, particularly Ms Anne O'Loughlan, Mr Ross Nankivell of

the Victorian Bar and the Court staff, both in Geelong and Melbourne, and my Associates.

And thank you all for taking the time to attend this Ceremonial Sitting this morning.

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