

**Speech to be delivered by Anna Katzmann SC**

**At the retirement ceremony of**

**The Hon Justice Mason AC**

**Friday, 30 May 2008**

When rumours of your Honour's impending retirement reached the Bar (and before gossiping about your replacement started), disbelief was quickly followed by dismay. When your Honour told your colleagues on the bench what you were proposing to do, a pervasive sense of gloom enveloped them.

So it is with mixed feelings that I speak this morning on behalf of the barristers of New South Wales to pay tribute to a long and distinguished career in the service of the law and the people of New South Wales, to wish your Honour well on your retirement from the Bench and to send you off in the customary way.

At your swearing in, with characteristic modesty, your Honour cautioned that the air at ceremonial sittings of this court can

become “thick and sweet with flattery so that it may be best not to inhale”.

Someone may therefore need to alert me when your Honour starts to turn the same colour as Justice Young.

Despite a relatively humble background your Honour was always destined for great things. From your first year at university your friends marked you out for appointment to the bench at the highest level. Why (as the Prime Minister might put it)? First, you were a brilliant student. But what was particularly noticeable was that you were judicial in your manner. You truly had a judicial temperament. And in that regard at least you never changed. You would argue without losing your temper and you would listen to the arguments of others before reaching a balanced opinion which was quite elusive to others of the same age. You invariably managed to tread the wise middle course. Indeed, it is your Honour’s wisdom and your measured approach to things that perhaps best characterises your life and work – with one exception – golf, about which I will say something a little later.

Your Honour flirted with the solicitors' branch of the profession, working for a short time at Minter Simpson but the bar was your calling. You spent 9 years at the junior bar practising largely in equity, commercial and public law, before taking silk. You read with Theo Simos (later Justice Simos) on the Tenth Floor of Wentworth Chambers and there you remained until 1985 when you became the full time chairman of the NSW Law Reform Commission. In February 1987 your Honour to accepted your appointment as the State's Solicitor General but continued to serve the Commission on a part time basis.

Your Honour was a great mentor to junior barristers. Once you provided some useful advice to a young woman whom you had generously allowed to use your chambers for six weeks while you were off overseas. As your Honour departed, alluding to the barrister's need to continuously robe and disrobe, your Honour uttered the reassuring words: "Well, if you don't make it at the Bar you will have had a lot of practice as a stripper". Fortunately, she went on to enjoy a stellar career but, as we all know, nothing is assured at the junior bar.

After nearly ten years as Solicitor General (including a brief legislated absence to argue against an attempt to restrain the Bishop of Goulburn from ordaining female priests) your Honour took up your present appointment. Someone should have warned the present Attorney that your Honour suffers from the ten-year itch.

You noted at your swearing in ceremony that you were looking forward to working as part of a team to tackle the onerous workload of the Court of Appeal.

In this respect your Honour has been an unqualified success. The Court's annual reviews show that the court has performed well against time standards for pending caseloads. Importantly, (for these attributes encourage productivity) everyone from registry staff, to associates, to fellow judges praises your Honour's leadership, accessibility and willingness to assist, even at the most inconvenient of times. Your judgments reflect your formidable intellect, your compassion and your application. Moreover, under your Honour's leadership, the collegiate life of the Court has blossomed.

I did say that your Honour has been an unqualified success. There is one sceptic. He shall remain nameless but what he said is worth repeating. It was this. "Some say that the judge is a good administrator but I doubt it. He is too polite."

Whilst beavering away at your day job, remarkably your Honour always managed to find the time for other things – for reading, for writing, for speaking, for the Church, for the family and many other things beside.

Your Honour's academic writings include your co-authorship of the authoritative text, *The Australian Law of Restitution*, and for many years the probate and succession practice, and many papers and lectures on such topics as succession, the rule of law, legal reasoning, equity, the somewhat esoteric subject of judicial humour, and what one commentator has described as the interface between the law, religion and morality.

Your Honour also has an interest in legal history. You were a foundation member of the council of the Francis Forbes Society for Australian Legal History and currently serve as the organisation's senior vice president.

In 2003 you accepted appointment as a non-resident member of the Fiji Supreme Court. And in 2005 you were appointed a member of the Appellate Tribunal of the Anglican Church.

It is a mark of the esteem in which your Honour is held by the Bar that you were invited to speak at the Bench and Bar dinner in 2000 and to give the prestigious Maurice Byers lecture in 2004.

In 2003 your Honour received Australia's top civil award, the Companion of the Order of Australia, for your contribution to the law and legal scholarship, to the judicial system in NSW, to the Anglican Church and to the community.

The University of Sydney recognised your multiple achievements by awarding you an honorary doctorate of laws in 2005.

Notwithstanding all of this, as I mentioned earlier, your Honour finds the time to play golf, a sport which your Honour took up relatively late, but, with all the zeal of a convert. In 2002 you captained the Bench & Bar v Solicitors Golf Tournament to its usual inglorious defeat (just like the Bar hockey team) although I am reliably informed that there is no causal connection between

your Honour's stewardship and the outcome. Perhaps this was merely a case where the risk did not come home.

However, on one memorable occasion when playing against other barristers and judges in the Ken Hall classic (named after your Honour's esteemed former clerk), your Honour did make a material contribution to a win entitling you and your partner, Dennis Wheelahan (the odd couple) each to six months' custody of the trophy that bears both your names. Your Honour is very proud of your golfing achievements. Six months to the day you had someone call on Wheelahan, who had had the trophy first, to assert your rights. When a record of another of your Honour's victories appeared in the sports section of the newspaper you made sure the article was posted in a place where it was easily seen by anyone who came into your chambers.

Last year a portrait of your Honour's predecessor Justice Michael Kirby, painted in the style of Goya, was unveiled in the President's Court. There is a blank wall immediately across from it crying out to be filled. Your Honour is the obvious subject. However, a more modern artistic style is appropriate. Given your Honour's many

and varied activities perhaps something in the style of the cubists would be suitable.

Your Honour is a prodigious worker and you were not averse to mucking down with the puisne judges when the need arose. One of those instances was mentioned by the Chief Justice. It was the one where your Honour's reasons were not followed in the Court of Appeal, which upheld a notice of contention, but preferred in the High Court.

Usually your Honour's view was shared by the other members of the Court in any particular case. Not so on one memorable occasion when your Honour stood up for flexibility – dare I say modernity – in the remedies that equity could offer. On that occasion – your Honour's powerful dissent in *Harris v Digital Pulse Pty Ltd* - your Honour sanctioned an award of exemplary damages in an equity suit, unprecedented in this country, describing it as "legitimate progeny sired by judicial method from the stock of the common law of Australia" which, your Honour pointed out, included "the equitable line". Yet, to some, steeped in the old traditions, drawing on a remedy developed in tort law to redress



an equitable wrong was a heresy, perhaps just as shocking as the ordination of women priests.

My favourite judgment of your Honour's, however, is not any of those that have been mentioned. It is a judgment in a common law suit.

The case concerned a claim in contract and tort brought by a quantity surveyor against four joint venturers who were engaged in the development of land situated in the western suburbs of Sydney.

Justice Meagher delivered the leading judgment. His Honour described the parties in the following way:

"The appellant in this case", he said, "is a quantity surveyor against whom his Honour Judge Rolfe awarded a verdict of some \$665,025.00 in favour of the four respondents, who together constituted a joint venture engaged in the development of certain land said to be situated at Bossley Park (wherever that is)".

Your Honour's judgment, as usual, was eloquent. However, it lacked your Honour's customary restraint. It began:

“[1] I have had the benefit of reading in draft the reasons of Meagher JA.

[2] I also have the benefit of having access to a street directory. Accordingly, I do not share his Honour's customary doubts about the location of well-known Sydney suburbs lying to the west of Darling Point which sit cheek by jowl with his Honour's customary lack of doubts about most other matters. A useful resource for those who need to locate Bossley Park is <http://www.travelmate.com.au>. By clicking on "map maker" one can find easy ways of getting from, say, Darling Point to that suburb. [The judgment also contains the details of the link to the map.]

Otherwise [your Honour continued] I agree with Meagher JA in the dismissal of this appeal, substantially for the reasons he gives.”

Your Honour has been in preparation for this day for some time.

At the 2000 Bench and Bar Dinner your Honour adverted to the Court’s “internal pre-retirement classes”.

You told us that the topics on offer included subjects as diverse as:

- The impact of Latin on the interpretive theories of Derrida concerning good faith,
- Car-spotting;
- Insurance of art collections;

- Thomas a'Beckett's influence on causation theory in mesothelioma cases;
  - Why God waited until the start of the 3<sup>rd</sup> millennium before revealing his truth exclusively to Sydney Anglicans;
  - Whether the death of all men would increase the prospects of female ordination in the diocese of Sydney;
- and
- How to get more cars on the Balmain peninsula (wherever that is).

Your Honour has made an enormous contribution to the law and to the State – as an advocate, an academic, a writer, a law reformer and a judge.

Your Honour's special contribution, however, I venture to suggest, lies in your personal qualities, notably your unfailing courtesy and your even temper. Your Honour is universally regarded as a good man – a man of compassion and understanding, a man with regard for each individual. Only the other day I happened to look at some remarks of Sir Robert Megarry which seem apposite, especially as I understand that your Honour is keen to follow in Sir Robert's footsteps by producing your own, antipodean, version of his *Miscellany at Law*.

Sir Robert used to tell his students that the most important person in the courtroom is the litigant who is going to lose. Later on he explained:

“Naturally he will usually not know this until the case is at an end. But when the end comes, will he go away feeling that he has had a fair run and a full hearing? . . . One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process . . . Justice in full takes time, but often it is time well spent.”

By this and many other measures, your Honour has been a good judge.

You have given so much of your life to others. It is about time you started to look out for yourself. On behalf of the Bar of NSW I wish you every happiness in this next journey and, for my own part, as a graduate of the University of NSW, I am pleased that you have chosen to spend some time there.

If the Court pleases.