OPENING OF LAW TERM DINNER

LAW SOCIETY OF NEW SOUTH WALES

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Last week I delivered the annual Australia Day Address. My topic was the Bicentenary of the Coup of 1808 popularly, but inaccurately, known as the "Rum Rebellion". My central theme was the significance of this event, the only military coup in Australian history, for the establishment of a robust tradition of the rule of law in Australia.

Plainly rebellion against legitimate authority, for whatever reason, was a direct challenge to the rule of law. More significantly the subsequent experience of two years under military government was such that the significance of the rule of law was established on the basis of direct experience in Australia, not simply on the basis of the intellectual heritage of 18th century England.

After the Coup substantial sections of the community lost any sense of security in their person and property, particularly in the first six months. The distortions in the legal system during this period were such

that it could be said that the rule of law was suspended. Magistrates loyal to Bligh were dismissed. Other loyalists were subject to a parody of justice that was no more than malevolent revenge. They were convicted on bogus charges and sent to work in the coalmines at Newcastle. The civil court processes were abused.

For the entire period of two years of illegal government, every appointment, including to judicial office, was clearly invalid. So was every governmental decision, including every exercise of judicial power. Uncertainty was ubiquitous. Personal and property rights were institutionally insecure.

Governor Lachlan Macquarie took over on 1 January 1810 with his own 73rd Regiment to enforce the removal of the New South Wales Corps. He invalidated the appointments and the decisions of the rebel administration, including the appointments to, and the decisions of, the courts. On the basis of necessity, perfected orders were not reopened, as applied most poignantly to a number of invalid death sentences that had been carried into effect. Some redress was, however, available for the past illegal exercise of governmental power. For example, one of those banished to the coalmines sued successfully for false imprisonment.

The rule of law was emphatically restored. It has only been significantly challenged in Australia on one occasion since.

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That occurred, perhaps understandably, over an issue that incited the passions of the populace more than any other, the issue of race. The intensity of the hostility to Chinese migration in the mid to late 19th century, particularly virulent on the gold fields, led to a direct confrontation between the Government of New South Wales and the Supreme Court in 1888.

The government ordered its police force to prevent the disembarkation of Chinese passengers on a number of ships that arrived in Sydney Harbour in mid 1888. Two Chinese, one an alien and the other a returning resident with a statutory certificate of exemption from the poll tax, sought habeas corpus from the Supreme Court to prevent police restraining their disembarkation.[i] A submission on behalf of the government, to the effect that the police were simply acting upon orders, was summarily rejected. That after all was the purpose of a writ of habeas corpus. "No man's liberty", said Chief Justice Darley, who

referred to an identical claim made by Charles I, “would be safe for one moment were it held that this was sufficient …”.[ii]

The then Premier, Sir Henry Parkes, no stranger to stirring up popular prejudice for political advantage, dismissed the Supreme Court decision as “technical” and asserted that “the law of preserving the peace and welfare of civil society” must prevail.[iii] He directed the police to continue implementing the government policy and to ignore the court orders.

Notwithstanding considerable debate in the Parliament and the media, the government maintained its defiance of the law for a considerable period. The Court reiterated the basic principles of the rule of law, and the necessity for the government to comply, in a subsequent unanimous judgment upon the application of another Chinese immigrant.[iv]

As Chief Justice Darley said with respect to the events that had occurred:

> “We are not aware that such a course of conduct as has been pursued in the matter of these Chinese has ever before been adopted at any period of our history. No

> sovereign, no matter how tyrannically inclined, no government, however unconstitutional in its acts, has ever ventured to act in open opposition to, and in disregard of the law, when that law was once pronounced by the duly constituted authority. Unfortunately there have been times when by the appointment of venal judges those in authority have sought to twist the law of the land to suit their own purposes, but never has the law, once pronounced, been set at defiance. The danger of the course here pursued is obvious. We say nothing of the evil example set to the weak and thoughtless in the community, pernicious as this is in itself."[v]

The government backed off and the detainees were released although Parkes, as was his want, did so with politically motivated words of defiance.

I should note that some months later, without the same kind of confrontation with its executive government, the Supreme Court of Victoria reached the same conclusion on the interpretation of the relevant legislation, which was virtually uniform amongst the States on the eastern seaboard. It did so, however, without reference to the prior

New South Wales decisions.[vi] Conferences such as this have played an important role in establishing a sense of national collegiality amongst Australian judges so that this kind of snotty indifference is unlikely to occur today. In any event the High Court has indicated that it should not.

The fact that matters of racial and ethnic identity were regarded with such passion that they could lead to the only serious challenge to the rule of law in Australian history since the Coup of 1808, is a matter that should give us all pause. There is no reason to believe that the people of this, or of any other, nation are now so enlightened that these kinds of passions cannot be stirred again. There are too many examples in history of such xenophobia leading to catastrophe for us not to remain vigilant in this regard.

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As is so often the case, perhaps the best short description of the evils of racial and ethnic intolerance was written by William Shakespeare. He wrote it in a form that was not definitively attributed to him for centuries. Furthermore it is not found in one of his plays or poems and, accordingly, is not contained in anthologies nor taught in literature courses. It is a passage that is very little known.

There is in existence a single manuscript of a play entitled *Sir Thomas More* which was written in at least six different hands in the period 1591-1593. A passage of a few pages, referred to by Shakespearean scholars as Hand D, is attributed to Shakespeare. The play was rejected by the censor of the day, not because any positive depiction of More was impermissible under a Tudor monarch, but because of its reference to the London mob rioting in hatred of foreigners. In the years 1592-1593 there had been a number of riots against foreigners, which the authors of the play were obviously intending to exploit, but the censor feared the play would aggravate the existing tensions. It was banned, never finished and its first recorded performance was in 1994. [vii]

The occasion depicted in the play, to which the censor objected, was what became known as the “Evil May Day” of 1 May 1517, when the London mob violently attacked foreigners throughout the city in an outburst of what we would today call ethnic cleansing. Thomas More was then the Under Sheriff for the city and played a role in suppressing the riot. It was in this role that he was depicted in that part of the draft play attributed to Shakespeare.

More asks what it is the rioters want and is told that they want the strangers to be removed. More replies in words which ring down the ages:

"Grant them removed, and grant that this your noise
Hath chid down all the majesty of England;
Imagine that you see the wretched strangers
Their babies at their backs, with their poor luggage,
Plodding to th' ports and coasts for transportation,
And that you sit as kings in your desires,
Authority quite silenced by your brawl,
And you in ruff of your opinions clothed;
What had you got? I'll tell you. You had taught
How insolence and strong hand should prevail,
How order should be quelled – and by this pattern
Not one of you should live an aged man;
For other ruffians, as their fancies wrought,
With selfsame hand, self reasons, and self right
Would shark on you; and men like ravenous fishes
Would feed on one another."

I know of no passage that more effectively depicts the dangers of ethnic cleansing and the role of the rule of law in controlling the kinds of

passions that give rise to ethnic, religious or racial hatred. The "ravenous fishes" metaphor would resurface in the mouth of Cardinal Wolsey in Shakespeare's *Henry the Eighth* (I.ii.79). It was to Wolsey that More had appealed for assistance to stop the 1517 riots.[viii]

The rage associated with ethnic cleansing is well captured in the image of self-devouring humanity. It is an image repeated in *Lear*, *Othello*, *Troilus and Cressida* and the very phrase "Would feed on one another" appears in *Coriolanus* (I.i.184-8). That is the result when mob rule replaces the rule of law.

The passage deserves to be better known.

Sir Thomas More is, of course, one of history's exemplars of commitment to the rule of law. This is best reflected in the well-known passage from Robert Bolt's *A Man For All Seasons* in which Sir Thomas More rejects the religious fervour of his future son in law. More asserts that he knew what was legal, but not necessarily what was right, and would not interfere with the Devil himself, until he broke the law. The following exchange then occurred:

"ROPER: So now you give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you – where would you hide Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down … d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake."

This imagery of the law as a protection from the forces of evil is an entirely appropriate one. Each society has its own devils, some real, some imagined. The forest of laws that are planted under the rule of law protects us from those devils.

One of the principal reasons why the judicial task is often thankless and prone to controversy is precisely because we are obliged to protect the legal rights of unpopular people. The judicial oath requires no less.

When, as I have shown, it was popular passion, indeed outrage, that gave rise to the only serious challenge to the rule of law in Australia for two centuries, the words of Shakespeare that I have quoted are of particular resonance on the bicentennial of the Coup of 1808. Often it is the law alone that can prevent a situation in which, to repeat:

"… men like ravenous fishes would feed on one another."

This a task in which judges are all engaged, perhaps less dramatically than on the occasions to which I have referred. Nevertheless, like any safety system it must be well maintained in order to operate when it is needed. I have no doubt that the Australian judiciary satisfies this requirement.

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Like so many things of fundamental importance Australians take for granted the strength of our institutions for the administration of justice. The virility of our legal profession and the quality and integrity of the judiciary is of the highest order. This has come to be increasingly recognised throughout the Asia Pacific region.

The judges of the Supreme Court, over the last seven or eight years, have engaged with the judiciary of Asia in a manner which will prove to be of long term advantage to the profession and also to the nation. Bilateral exchanges have expanded significantly, perhaps most notably with China, but also with most other nations in the Asia/Pacific Region.

Every year two or more judges of the Supreme Court have lectured at the National Judges' College in Beijing. I have initiated national judicial delegation to the Supreme Courts of Japan and India. It is rare for a month to go by without a judicial delegation from China. In a few weeks we will receive delegations from Bangladesh and Nepal.

In discussions I have had with judges from Singapore, Malaysia and Hong Kong, it has been made clear to me that those jurisdictions increasingly refer to Australian authority in preference to English authority, which they believe is now influenced by European law to an extent which makes it inapplicable to their common law traditions.

Most of you will have heard me assert, more than once, the significance of the longevity of our institutions for the administration of

justice. One example of this is in commercial litigation. In 2003 we celebrated the centenary of our commercial list.

In an era when commercial litigation increasingly has an international dimension, judicial exchanges in the region have become essential. A further initiative of the Supreme Court will come to fruition in a few months time, when the first of what I expect will be a regular conference of commercial and corporations judges from throughout the region will be held in Sydney. In a joint venture with the High Court of Hong Kong, the Supreme Court of New South Wales will host the first judicial Seminar on Commercial Litigation. The second seminar will be held in Hong Kong.

In addition to a five judge delegation from Hong Kong, there will be a seven judge delegation from China led by a Vice President of the Supreme Peoples Court including, at my express suggestion, commercial judges from Guangzhou and Shanghai. Representatives will also be coming from India, Japan, Papua New Guinea, Malaysia and Singapore and I expect further acceptances in the near future.

This will be hands-on conference designed to exchange information about best practice, with a view to acquiring ideas for

improving our own practices. It is also, however, an important source of information for Australian judges who have to make decisions in commercial contexts which increasingly involve transnational elements and cross-jurisdictional disputes. We are now often called upon to either assume or decline jurisdiction, or to issue anti-suit injunctions. These decisions turn on the practices in, and quality of the judiciary of, other jurisdictions with respect to disputes that, in accordance with the universal long arm jurisdiction rules, could be heard in a number of different nations. The more we know about other practices and procedures and about the judges in these other nations, the better informed our judgments will be.

This kind of engagement is only possible so long as we maintain the vigour of our profession and of our judiciary. It is also necessary to maintain the quality of our human and physical infrastructure so that we can continue to play a critical role in the administration of justice throughout Australia, not only in the Asian region.

It has become common for the judges and professional bodies from Australian jurisdictions outside New South Wales to complain about the amount of work, particularly commercial work, which could have gone to their firms and been litigated in their courts but which is in fact

attracted to Sydney firms, counsel and courts. That issue was recently described by one of those senior judges from another State at a judges conference as the problem of the "Sydney vortex". However, as the philosopher put it: "That is not my problem".

What we have to do in this State is simply to continue to perform our functions with a high level of quality, learning, efficiency and energy which is increasingly recognised, not only throughout Australia but throughout the Asian Pacific region. How that performance affects parties who are in a position to choose where to go, should not concern us as judges or lawyers. However, as citizens we naturally wish to live in a vibrant, progressive and prosperous city.

In a service economy, Sydney has become a global city and a regional financial centre. Commercial legal practice and commercial dispute resolution – whether in courts or by arbitration and mediation – is an essential feature of a commercial city. In this regard Sydney is the only Australian city that can compete with Hong Kong, Singapore and Shanghai. If we try to spread the work around Australia, no one will get anything.

Sydney has always been the most globally minded of Australian cities. For three quarters of a century after federation, Australia lapsed into protectionism. That policy was specifically directed to overcoming the free trade tradition which was then strongest in this city. It is a tradition that has re-emerged with vigour and the legal profession of this State is an important part of it.

The pressures and requirements of commercial litigation continually change. All of us involved, whether as lawyers or judges, must remain able to adapt our practices and procedures to these changes. The experience, energy, expertise and professionalism of all those engaged in commercial dispute resolution in this city – and I include not just lawyers and judges, but arbitrators, expert witnesses and the highly sophisticated clients with whom we deal such as underwriters and investment bankers – represents a centre of excellence which is already economically significant. I am quite confident that we can build on this base.

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[i] See *Ex parte Lo Pak* (1888) 9 NSWLR (L) 221; *Ex parte Leong Kum* (1888) 9 NSWLR (L) 250; J M Bennett *Colonial Law Lords: The Judiciary in the Beginning of Responsible Government in New South Wales,* Federation Press (2006) pp 28-41.

[ii] Lo Pak supra at p 235.

[iii] Eric Rolls *Sojourned: The Epic Story of China's Centuries Old Relationship with Australia* University of Queensland Brisbane (1992) at p 481 and see 487.

[iv] See *Ex parte Woo Tin* (1888) 9 NSWLR (L) 493.

[v] Ibid at 495- 496

[vi] See *Toy v Musgrove* (1888) 14 VLR 349.

[vii] See Stephen Greenblat *Will in the World: How Shakespeare Became Shakespeare,* W W Norton & Co, New York (2004) at 262-264. See also the Wikipedia entry "Sir Thomas More (play)" www.wikipedia.org/wiki-Sir_Thomas_More_(play); Ron Rosenbaum "A Hand for Applause Books: A Hand for 'Hand D'" 10 May (1999) *The New York Observer* accessible at www.observer.com\node\41447.

[viii] Jasper Ridley *The Statesman and the Fanatic: Thomas Wolsey and Thomas More,* Constable, London (1982) pp 78-79.