Victorian Bar Association Annual Dinner

Singers of songs and dreamers of plays

Chief Justice Robert French

3 September 2010, Melbourne

In the long-standing literary tradition of denigration of the legal profession, the American poet Carl Sandburg wrote:

> The work of a bricklayer goes to the blue
> The knack of a mason outlasts a moon
> The hands of a plasterer hold a room together,
> The land of a farmer wishes him back again.
> Singers of songs and dreamers of plays
> Build a house no wind blows over.
> The lawyers – tell me why a hearse horse snickers
> Hauling a lawyer's bones.

Sandburg's dismissal of lawyers from the ranks of singers of songs and dreamers of plays stands against the centuries long record of lawyers who have written poems, novels, plays, songs and music and who have been and are players, singers and actors. Lawyers occupy places of prominence in the Australian cultural landscape in literature, poetry, the dramatic arts and music. To name names locally would imply odious comparisons by possible omission – but my good friend, your member Peter Heerey, Master of the Rhyming Arts, cannot escape mention.

Literary allusion has found its place in many judgments with various purposes: to lift the tedium of the prose; to illustrate some point of meaning or to demonstrate normative truths.[1] Alexander Pope once wrote of 'so vast a throng the stage can ne'er contain'. Justice Neasey of the Supreme Court of Tasmania used

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[1] M Meehan, 'The Good, The Bad and the Ugly: Judicial Literary and Australian Cultural Cringe', (1989-1990) 12 *Adelaide Law Review* 431 from which the examples cited in footnotes 2 to 6 inclusive are taken.

Pope's phrase to support his conclusion that a dead blowfly resting on an indentation on the surface of an iced cake could be said to be 'contained' in the cake within the meaning of s 63(1)(ba) of the *Public Health Act 1962* (Tas).[2] That section provided that an article of food is adulterated when it contains a foreign substance. A universal truth underlying a legal principle was invoked by Justice Burbury of the same Court when he quoted Shakespeare's *King John* to explain why dying declarations are admissible:

> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I, then, be false, since it is true
> That I must die here, and live hence by truth?[3]

The Chief Justices of the High Court have from time to time indulged in poetic and literary allusion. Sir Samuel Griffith in the *Sawmillers'*[4] case in 1909 misquoted in Latin the Roman poet Juvenal and was picked up seventy-five years later by Justice Zelling in the Supreme Court of South Australia who not only referred to Griffith's error but also pointed out its lack of application. Chief Justice Owen Dixon cited Othello on provocation by adultery.[5] And in the unpromising setting of a moneylending case, Chief Justice Barwick let his literary hair down and spoke of arrangements which sprang out of friendship and which 'at least as to friendship had a Shakespearian denouement'.[6]

All the Chief Justices, however, could take lessons in judicial literary adventurism from Chief Justice John Roberts of the United States Supreme Court, who recently visited this city. In a judgment he wrote in 2008 concerning whether a

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[2] *Doyle v Maypole Bakery Pty Ltd* [1981] Tas R 376 at 378.

[3] *R v Savage* [1970] Tas SR 137 at 145.

[4] *Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465 at 494.

[5] *Parker v R* (1962-63) 111 CLR 610 at 628-629.

[6] *Hungier v Grace* (1972) 127 CLR 210 at 216.

police officer lacked probable cause to arrest a cocaine dealer, he adopted the style of Raymond Chandler:

> North Philly, May 4 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighbourhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighbourhood.
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> Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.[7]

It is not necessary for a lawyer to be a writer, composer or poet, or a judge with literary pretensions to be a singer of songs and dreamer of plays. Karl Llewellyn, in his famous Bramble Bush Lectures of the late 1920s and early 1930s, eloquently and elegantly took issue with Sandburg's relegation of the legal profession from the ranks of productive humanity. He pointed to the way in which creative advocacy informs good judging and said:

> The job of choosing wisely between the inventions of counsel is a difficult one. The job of consistent wise choice is tremendous. Yet it is not of itself the major work. That has been done, consistently, continuously, by the bar ... And when I say invention, I mean invention. To produce out of raw facts a theory of a case is prophecy. To produce it persuasively, and to get it over, is prophecy fulfilled. *Singers of songs and dreamers of plays* – though they be lawyers – *build a house no wind blows over*.[8]

The songs and plays of counsel are shaped by the exigencies of the particular cases in which they appear. They resonate in the public sphere. Every legal

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[7] *Pennsylvania v Nathan Dunlap* 129 S Ct 448.

[8] KN Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (New York, 1930) at 153.

proceeding, however small, however apparently routine, is a public acting out of the proposition that ours is a society governed by the rule of law and aspiring to justice according to law. Every contending argument in every case is a statement about where the justice of the case, according to law, is to be found. Every judicial decision made independently, impartially and with care declares the answer, as best the judge can give it, to the question: what does the doing of justice according to law require of me in this case?

In the company of this Association, embedded in the history of the law in Australia, in the formation of the Australian Federation itself and in the public affairs of both the State and the Commonwealth, I affirm the role of counsel as 'singer of songs and dreamer of plays', a role which, as the membership of your Association has amply demonstrated over the last century or so, spills out of the courts and into the wider arena of public life.

This lofty theme is not designed to mythologise the life of the advocate. The untidy realities of legal practice and our own limitations have led us all to sing songs that prove discordant and to dream plays that turn into nightmares. And sometimes it is the sad truth that opposing counsel's song is clearer, purer and better pitched to its audience than ours.

So it was in the Fremantle Court of Petty Sessions in 1973 when I appeared for the first time, representing the son of a friend of my mother's. My client base was rather limited. My client had hit a tree while driving home late on a foggy evening in Peppermint Grove. He was charged, rather leniently I think, with careless driving. Hoping to create some sense of legal nuance around what were rather intractable facts, I found a lot of interesting law on the topic of careless driving. The magistrate was treated to much of that law, including English and Canadian cases. To paraphrase Sandburg, however, my song was a house that blew over before the prosecuting inspector's pungent observation:

> What with the fog and the grog, your Worship, I don't think he knew where he was going.

The prosecutor's submission was a practical statement of the dangers of infringing the precautionary principle, expressed concisely in a judgment in the House of Lords or Court of Appeal or perhaps the Queens Bench Division, which I have been unable to recover, but which was in the following terms:

> When you do not know where you are going, you must not go.

Sometimes, creative attention getting is the best that an advocate can hope for. Returning in memory to that gladiatorial arena of my professional novitiate, the Court of Petty Sessions in the 1970s, I was representing a man charged with driving with a blood alcohol concentration in excess of 0.08 per cent. He was embarking on his evidence-in-chief. It was 3 o'clock in the afternoon. The magistrate's eyes were closed and his relaxed posture strongly suggestive of a state of altered awareness. A court clerk faithfully recorded my client's evidence with a noisy manual typewriter. I endeavoured to rouse his Worship from his slumbers. I coughed. I dropped books. All to no avail. I spoke to the prosecuting sergeant, a man of long and bitter experience in that jurisdiction. I said to him: 'I think the magistrate is asleep'. 'What else is new', he replied. At this point necessity became the mother of invention. I shouted at the magistrate: 'Your Worship' – he sat up suddenly attentively alert. 'It is possible', I said, 'that you have not heard all of my client's testimony above the sound of the typewriter.' Without hesitation he responded, 'I have great faith in the transcript, Mr French.' I suppose I could count it as a victory in a small interlocutory battle, on the way to losing the war, that I woke him up.

Sometimes one is tempted to take the bench down a peg or two especially when it resorts to literary, classical or biblical allusions in the course of argument. This is a temptation to be resisted. Generally, it is not good advocacy. In a committal hearing which I prosecuted in Perth in the wake of the Costigan Royal Commission in the 1980s, the magistrate made a sweeping ruling which appeared to exclude much, if not all, of the rather slender evidence which I was seeking to put before him. When I asked him to reconsider the breadth of his ruling, he replied: '*Quod scripsi scripsi*' – what I have written, I have written. For one of Catholic upbringing who had studied Latin, this statement had a familiar ring to it. However, only after the court rose did I remember that it was Pontius Pilate who said it. How

sweet it would have been to point out to his Worship the infamous author of his dismissive words, and how ultimately fruitless, as a piece of advocacy.

We all have little war stories, good and bad, to tell. If not told to excess, or at excessive length, they are part of the collegial delights of life at the Bar. But the cleverness or elegance or literary merit of the things we say, or do not say, in court is ephemeral. It is the substance of what we say and its contribution to the great public role of our courts as the third branch of government that matters. That contribution is enhanced when the profession is prepared to provide its skills in advancing the public interest without any corresponding private benefit.

About nine years ago, the Full Court of the Federal Court decided a case called *Ruddock v Vadarlis*[9], which concerned the executive interdiction of a Norwegian vessel, the Tampa, which had, at the request of the Australia Government, picked up some 400 asylum seekers from their sinking ship. The losing parties in the appeal, Mr Eric Vadarlis and the Victorian Council for Civil Liberties, had sought habeas corpus and ancillary orders requiring the Commonwealth to bring ashore those on the ship. They were assisted by Amnesty International and the Human Rights and Equal Opportunity Commission intervening. The applicants for relief were, for the most part, represented by members of the Victorian Bar acting without fee. In delivering the majority judgment adverse to the asylum seekers, I reflected upon the role of the barristers and solicitors who represented their interests. I do not mind repeating now, what I wrote then:

> The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing, even if

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[9] (2001) 110 FCR 491.

> ultimately unsuccessful in the litigation they have served the rule of law and so the whole community.[10]

The majority judgment was variously denounced by legal and other commentators, with such epithets as 'all at sea' applied by my late colleague Justice Brad Selway, and the ultimate condemnation of it as 'a piece of judicial activism' by David Marr. They did not denounce the tribute to counsel. That was reserved for the late PP McGuinness, the editor of Quadrant, who called it 'pure guff'.[11]

The voluntary role of counsel in that case and cases like it, reflect the interpenetration of law and public life and the opportunities which it provides for the advocate to take up in various ways and at various levels the mantle of the 'lawyer statesman'. Those possibilities are apparent to anyone familiar with the history of the Victorian Bar and of your Association and the contribution which its members have made to the law and to public life over the last 170 years or so.

Travelling back to the mid-nineteenth century in Victoria, names like Barry and Stawell and Higginbotham are part of the history of the development of self-government and responsible government in the colony. Later, came the nation builders such as Deakin, Isaacs and Higgins, and then leaders in the great task of developing and consolidating the institutional infrastructure of our representative democracy, Owen Dixon and Robert Menzies.

Because of their distance from us in history, it is difficult sometimes to visualise the humanity of such figures which can, in some measure, put their contribution to the greater good within the grasp of our contemplation.

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[10] (2001) 110 FCR 491 at 548-549 [216].

[11] PP McGuinness, 'Pesky litigators in a muddle of rights and wrongs', *The Sydney Morning Herald*, 27 September 2001, News and Features Section at 14.

It is hard to visualise Robert Menzies as a precocious 28 year old counsel arguing the *Engineers'* case[12] in the High Court, being told from the bench, as legend would have it, that he was talking nonsense and responding that he was compelled to speak nonsense by the prior decisions of the Court. Being given leave to attack those prior decisions he seized the moment and the rest is history.

We do not have a transcript of argument in the *Engineers'* case at the High Court, but we have Menzies' counsel's notebook. An examination of it shows a neat, precise record interspersed with the occasional doodle and apparently irreverent observation. Chief Justice Adrian Knox attracted the comment 'X + Y = 1'. It is not clear what Menzies meant by it, but it seems unlikely to have been complimentary.

At the young age of 33, he stood for the Legislative Council for Victoria. His campaign brochure would probably not pass muster today. It was silent on policy, but adequately recorded his achievements. I had a conversation with him in Perth in 1969 about the beginnings of his parliamentary career. He said with that humour which had not dimmed with the passing years:

> I stood for the Victorian Upper House and I lost two to one. The incumbent died and I stood again and won two to one.
> After thirteen months in the Victorian Upper House I decided that one might as well be dead, so I resigned.

Menzies' notebook is one among many documentary traces, at the High Court, of the great personalities of the past. There is one artefact however, which is an item of mystery tantalising in its possible provenance. On any view it has a Victorian connection. It is a bottle of pure Norwegian Cod Liver Oil, found by former Federal Court Chief Justice Michael Black in 1992 in a cupboard in the chambers of the Chief Justice of the High Court in the old High Court building in Little Bourke Street. He was kind enough to present it to me not long after my

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[12] *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.

appointment as Chief Justice. An examination of the bottle and some inquiries have shown that it was sold by a chemist, AE Sharpe, who carried on business in the 1920s and thereafter in Darlinghurst, opposite the old High Court building in Sydney. The label on the bottle, which promises many benefits, has handwritten on it the weight of the contents – 8 fluid ounces. The handwriting and the cork in the bottle indicate that it may have been made up by the chemist. A mark on the base of the bottle indicates that it was manufactured by a company called Australian Glass Manufacturers which produced glass products with that mark in the 1920s and 1930s and again in 1960. The features of the bottle generally are suggestive of the earlier period. There are, however, at least two hypotheses open. One is that the bottle belonged to Sir John Latham. The other is that it belonged to Sir Owen Dixon. Whoever it belonged to, they didn't have very much of it. Any member of the Victorian Bar who can solve the puzzle of the ownership of the bottle will be provided with a complimentary autographed copy of the Constitution.

Having reached our Cod Liver Oil moment, it is now time for you to enjoy your main course. So I will not detain you beyond the mandatory peroration.

The Victorian Bar and its members, famous and not so famous, have given much to the law and to Australia since its formation. They continue to do so. The Bar has what seems to me to be a healthy culture of contribution to the public good. Long may that culture continue and grow. So long as it does you can be, in the most important way, what Sandburg thought lawyers could not be – singers of song and dreamers of plays and builders of a house no wind blows over.

XXXV must be made effective !

This mode of interpretation would render 35 absolutely ineffective ; and this inconsistent with D'Emden v Pedder.

(what Knox case !) X

This the real reason for failure of Victorian Act as in page 288.

Whybrow's Case ! Cannot make an award inconsistent with State law !

Woodworkers Case 8 CLR at 493

Whybrow's Case 10 CLR 266 at 282

Cannot infringe State Statute or Common Law. [Strike]. If parties agree to do A, Court can interfere ? If State law tells them to do A, Court cannot interfere ?]

If so, could not State put every contract the force of law, and cut out Federal field altogether ?]

Whybrow's p 287 – CJ.
p 295 – Barton J.
p 302 – O'Connor J.

If Whybrow's case correct in reasoning, 35 cannot be construed as applying to the terms of employment as between Crown servants.

Crown can dismiss at pleasure ; so that Arbitrator is given power to do something otherwise impossible.

Knox - [illegible] not to [illegible].

How differ but American Const. cases, in latter's express reference to State's powers. (XI, XIV)
If draftsmen of Com. Const. had American in mind why insert new items s. 13 & 14?
Doesn't follow that American doctrine not imported?

All powers national!

Knox C.J. American cases (South Carolina v.) based on expediency, political. Courts here must reverse decisions, as far as same results as American courts.

Diff. "D'Emden v Pedder" not founded on Mcy. Common policy refers [illegible].

Knox x+y = 1

If Commonwealth forbid, [illegible] members of State Parl. attending Parliament, what would be position?
Knox C.J. there is express recognition in Constitution of State Parliaments. See Section 106.
Starke J. Abuse of the power is not argument against it.

Articles in American Constitution known to draftsmen, ∴ American cases to be followed.

Suppose [illegible] Bill. Mitchell ("Tax is a national power, intended to bind the States")
as in [illegible]
[illegible] } 5 CLR.