

# COURAGE AS A LEGAL VIRTUE<sup>1</sup>

## I: INTRODUCTION

Prof Adam Shoemaker (Vice-Chancellor & President, Southern Cross University), Prof William MacNeil (Dean and Head of the School of Law and Justice, Southern Cross University), the Hon Andrew Rogers AO QC, the Hon Helen Coonan, Ms Sophie Anderson, distinguished guests, ladies and gentlemen, especially the law students among you:

I begin by expressing my solidarity with, and hope for the implementation of, the Uluru Statement from the Heart.

I was surprised and honoured when I received Prof Bee Chen Goh's invitation to spend some time at Southern Cross University as judge in residence. I very much wish I could live up to the idea of being "in residence", but the pressure of Court business does not permit more than this afternoon and a very full day tomorrow. So perhaps rather than "in residence" you should think of me as the University's FIFO judge – flying in and flying out.

Prof Goh told me that a public lecture on a topic of my own choosing was to be an important part of the residency. I was pleased that the topic was up to me, because my lecture this afternoon gives me the chance to bring together some ideas that I have been mulling over for some time. However, my feelings of surprise and honour were more recently overtaken by a sense of alarm and inadequacy when I was told this lecture would inaugurate a series of lectures in

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<sup>1</sup> The Inaugural Andrew Rogers Lecture in Private Law and Legal Practice delivered by the Hon Justice François Kunc, a judge of the Supreme Court of NSW, on 2 May 2019 at Lismore City Hall under the aegis of the School of Law and Justice of Southern Cross University. I acknowledge the invaluable assistance of my tipstaff, Mr Charles Light BA LLB (Hons) (ANU) in the research and early drafting of this lecture. The opinions and errors are entirely my own.

private law and legal practice established by this University in honour of its foundation Chancellor, the Hon Andrew Rogers AO QC.

What I am reasonably certain the organisers did not know was that they were asking me to offer up something worthy of an occasion intended to honour a man who has been an inspiration and later a friend for my entire professional life. However, by some extraordinary serendipity, Andrew's life and career fit perfectly with the topic that I had already decided to talk about.

I should also say how much I learned from Helen, with whom I was in chambers before she was elected to the Senate. I appeared as second junior to her on a number of occasions and politics' gain was very much the Bar's loss. Quite apart from her loving partnership with Andrew, Helen has made an extraordinary contribution to civil society as a solicitor, barrister, politician, company director and supporter of the arts.

I mentioned alarm and inadequacy a moment ago. Those were familiar feelings that I often felt as a young solicitor and then barrister on most Friday mornings as I prepared to appear in Justice Rogers' Commercial List. The Court would be full to bursting with Sydney's leading commercial solicitors and counsel. I used to appreciate very much the reassuring smile I would get from a lovely lady called Margaret, who was Andrew's longtime court officer. I think I can say I eventually earned my stripes in front of his Honour, possibly dating from the day he asked me to sing my submissions. I respectfully declined, but that is a story for another day.

So I am proud to say that as a commercial litigator I was forged in the crucible of the Rogers court. However, in that court I also learnt a lot about what it was to be a good judge – first by observation of Andrew in action, and later through conversation with him on many happy social occasions. While my attempts at emulation are undoubtedly somewhat inept, there is much about how I now go about the task of being a judge – trying to run a court so as to achieve the just,

quick and cheap resolution of the real issues in dispute – which can be directly traced to the insights I gleaned from him.

I therefore count it a great privilege to have been invited to inaugurate this lecture series in honour of Andrew. I am also deeply grateful that it provides me with the opportunity to acknowledge publicly my personal and professional debt to him. These observations are offered as a small repayment of that debt. I hope they will meet his approval but, if not, then at least they might generate some pointed interrogation from him over dinner tonight, as was always the custom in his court.

## II: THE TOPIC OF THIS LECTURE

As is appropriate for a lecture such as this, I will shortly say a little more about Andrew's career. However, let me first offer a roadmap so you will at least know when you can relax because the end of the lecture will be coming into view.

This lecture is in four parts.

First, I will give three examples drawn from different periods of history, countries and legal systems of what I mean when I talk about courage as a legal virtue. The examples concern three different types of lawyers: an attorney-general, a private lawyer and a group of judges.

Second, by reference to those examples, I will try to analyse the lessons to be derived from them in a systematic way.

Third, I will give three examples of issues in contemporary Australia where all of us – but perhaps especially those recent and soon to be recent graduates of the School of Law and Justice of this University – might be called upon to apply those lessons in the greater public interest.

Finally, I will return to the example which Andrew Rogers' career offers all of us.

Before I turn to history, please allow me to say something about the title of this lecture that would need at least a whole and different paper to explain fully. I

have deliberately used the word virtue in the title because I want to make a plea to restore discussion of virtue into our public and professional discourse, a discussion that I believe has been swamped by a focus on values. But values are protean things. A simple example will suffice. You pass a sign that says “Our values are service, strength and efficiency”. That could describe a bank or an invading army.

Courage is one of what Christianity calls the cardinal virtues. There were four of them. But like so much else, Christianity sought to explain itself in terms of Greek philosophy. It is in Plato’s *Republic* that we find that the good city and the good person must have what became the four cardinal virtues: prudence, courage and self-control, none of which was complete without the other and whose proper relationship was brought about by justice.<sup>2</sup> I think we have seriously impoverished ourselves and our society by attending to values (which often are nothing more than marketing slogans) rather than asking what is it to behave virtuously in personal and professional life, behaviour that is measured by the extent to which it is good, beautiful and objectively true.

### III: THE HON ANDREW ROGERS AO QC

Andrew John Rogers was born in Hungary in 1933. His education began in Hungary and continued at the Schweizerische Alpine Mittelschule in Davos, Switzerland. His family came to Australia in 1947 and he completed his secondary education at the Cranbrook School. Andrew arrived at Cranbrook with his two brothers, but each of them had a different father and hence different Hungarian surnames. The headmaster, B W (later Sir Brian) Hone, recommended that they adopt one English surname. So, in Andrew’s case, Fekete was supplanted by Rogers, which was an Anglicisation of his stepfather’s surname of Rosza. I do not know whether Hone further helped Andrew

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<sup>2</sup> *Republic*, 427e and 435b.

acclimatise by lending him a book Hone had written in 1937 entitled “Cricket Practice and Tactics”.

Andrew graduated with an honours degree in law from what was then the only University in Sydney or, indeed, in New South Wales. He was called to the Bar in 1956 and, as it were, went straight to the top. His first brief was to appear in the Privy Council. This was notwithstanding that he relied on the goodwill of another barrister for chambers for his first six months, because there was an acute shortage of space until the completion of Wentworth Chambers.

He quickly developed a leading practice at the Bar and took silk in 1973. Andrew was sworn in as a judge of the Supreme Court on 14 December 1979 and assigned to act as the judge in charge of what was then the Commercial Causes List in the Common Law division of the Court. In 1987 he was appointed the first Chief Judge of the newly established Commercial Division. I will say more about that aspect of his career later. While on the bench he somehow found time - and this is far from an exhaustive list - to be admitted to the Bar of the State of New York, was a member of the Australian delegation to UNCITRAL, a part time member of the NSW Law Reform Commission and a member of the Education Committee of the NSW Judicial Commission.

Andrew retired from the Court on 3 May 1993. But he did not retire. Again, among many other activities, having chaired this University’s predecessor’s law advisory committee, from 1995 to 1997 he was the inaugural Chancellor of the newly formed Southern Cross University. He remained active for many years as one of the pre-eminent practitioners of alternative dispute resolution – a passion for which he shared with his close friend Sir Laurence Street – both as a mediator and arbitrator.

#### IV: JOHN HUBERT PLUNKETT<sup>3</sup>

I can now come to the first of my three historical examples.

If you drive about four and a half hours west southwest from here down the Bruxner highway, you will come to Myall Creek. It was there in 1838 that a terrible massacre took place and a courageous lawyer saw to it that the perpetrators were brought to justice.

John Hubert Plunkett was the Attorney-General of New South Wales from 1832 to 1856 and oversaw the Government's legal agenda, including the criminal courts. Plunkett's approach to the law truly encapsulated equality before the law in Australia and what it meant to give everyone "a fair go".

Plunkett had a history of fighting for emancipation and legal rights long before he arrived in New South Wales. He had spent his early career in Ireland, fighting for Catholics to be granted the same civil rights as Protestants as a matter of justice. He followed a principled approach of pursuing the rule of law as a means to advance society. He strongly believed in equality before the law, despite class, creed or colour. Plunkett believed the best way to ensure a just society was to have laws and policies applied equally to everybody as far as reasonably possible. His adherence to those beliefs was tested to the limit by the Myall Creek Massacre of 1838.

The Government of the time had limited the expansion of the colony of New South Wales to an area it could more easily administer, known as the nineteen counties. This area stretched from Taree in the north, Yass in the west, and Moruya in the south. However, this did not stop opportunistic graziers from venturing beyond Crown lands, to become "squatters". Squatting often led to violent confrontations between the Aboriginal communities who inhabited the land, and the white settlers venturing beyond government borders.

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<sup>3</sup>This section is based on T Earls, *Plunkett's Legacy*, Australian Scholarly Publishing, 2009.

In late May 1838, a small group of roughly thirty Aborigines set up camp at Myall Creek. Myall Creek was outside the boundaries of the colony, and as such was not under the control of the colonial government. The Aborigines were quiet and inoffensive, and were not planning on staying at the Creek for an extended period of time. However, Myall Creek was also being used by a squatter, Henry Dangar. To understand what happened next, I will quote the opening description provided by Plunkett at the trial of those charged with the massacre:

“On the 8<sup>th</sup> or 9<sup>th</sup> of June [the group of offenders] met at Russell’s, they were all armed and mounted and proceeded to scour the country in pursuit of the blacks. They went from station to station, until they arrived at Mr Dangar’s ... the blacks on seeing them escaped into the house; this was the object of their persecutors ... the [offenders] on being asked what they were about to do with their captives said ... that they were going to take them into the mountains and frighten them; however, they had not proceeded far when several shots were heard.”

The massacre saw the death of approximately 28 indigenous people, predominately children, women and older men. The reason it was so difficult to determine exactly how many people had been killed is because the bodies had been dismembered and so badly burnt that it was impossible to identify the victims.

The fact that this massacre was recorded, let alone investigated is remarkable in itself. The man who reported the incident, a Mr Hobbs, lost his job as an overseer as a result of speaking to the police and was “blackballed.” He was unable to find employment ever again as an overseer. The feeling among most settlers was summarised by the *Sydney Herald* which claimed “we want neither the classic nor romantic savage here. We have far too many of the murderous wretches about us already. The whole gang of black animals are not worth the money the colonists will have to pay for printing the silly court documents on which we have already wasted too much time.” To put it simply, indigenous people were

seen as worthless and the prospect that white men could be hanged for the murder of first Australians was unthinkable.

Plunkett charged eleven men with the crime. Because he could not prove to what extent each offender had participated, he charged all eleven with aiding and abetting the murder. In addition to having the support of the press, those responsible for the massacre were financially supported by a wealthy clandestine group known as the “Black Association” whose members personally benefited from squatting. The Black Association funded the defence of the offenders, and even organised a magistrate to visit them in gaol to advise them on how to avoid being convicted.

The matter was heard in the Supreme Court in Sydney on 15 November 1838. Defence barristers for the group were able to cast doubt on the murder because no one could positively identify the remains of any of the bodies. The remains of one body were believed to belong to an individual known as “Daddy”, a well-known aboriginal man who was supposedly physically a very large man. However, the condition of the bodies meant it was almost impossible to prove that Daddy, or any other victim, could be identified as having been murdered. The defence argued that because it was impossible to prove Daddy had been murdered, he could potentially walk into the court that afternoon and as such it was impossible to prove the murder.

The only evidence tendered by the defence was character references for each of the accused. It took the jury only fifteen minutes to find the men not guilty of any murder. Upon the jury announcing their verdict, there was an outburst of cheering from the gallery.

Plunkett then rose to his feet and requested the accused be remanded in custody until the following Saturday, at which time, he advised the Court he would be ready to charge them with another indictment. Plunkett planned to charge them again with murder, however with the murder of someone other than Daddy, in

fact “an unknown male Aboriginal child”. Plunkett’s application was granted and the wrath of an outraged public was aimed directly at him.

Plunkett had little reason to believe his second attempt at a trial would be more successful. However he was determined to do all within his power to hold those responsible for the massacre accountable. The second trial had no new evidence and the defence used the same argument that no victim could be identified, and as such, it was impossible to prove if anyone had died. However, Plunkett made the strategic decision to only charge seven of the offenders, with the hope that if the defence did not call the other four as witnesses an inference could be drawn that they could say nothing in support of the innocence of the accused. The case was reheard before a different judge and was virtually identical to the first trial, continuing until the early hours of the morning.

The jury returned at 2am to deliver their verdict. The chairman announced verdicts of not guilty against each of the names read out to him. However, another juror stood and corrected the record to reflect that while the jury had acquitted on some of the counts in the indictment, the jury had found the men guilty on five counts of aiding and abetting the murder of a black Aboriginal child whose name was unknown. The punishment for murder at this time was death and the guilty men were hanged. Plunkett was vehemently attacked by the press and members of the public for having white men hanged for the killing of Aboriginals. The general public perceived this as a great act of injustice, not least because the men had previously been found not guilty.

Plunkett’s prosecution in relation to the Myall Creek Massacre is unique in Australian legal history. There are no other successful prosecutions of white graziers murdering first Australians in colonial history, despite records showing these violent altercations were not uncommon. Justice was only done because Plunkett persevered.

## V: CZECHOSLOVAKIA 1946<sup>4</sup>

My scene now shifts to a century later and half a world away, to not far from the young Andrew Rogers and to exactly where my own father was. It is Czechoslovakia in 1946. Memories of the Nazi atrocities were fresh, not least Hitler's reprisal for the assassination of Reichsprotektor Reinhard Heydrich in May 1942 in Operation Anthropoid. The Secretary of State for the Nazi Protectorate of Bohemia and Moravia, Karl Hermann Frank, announced from Berlin Hitler's commands that resulted in the execution of 173 men in the village of Lidice, the later extermination of nearly all of the village's 203 women and 105 children, the killing of all pets and beasts of burden and the razing of the village to the ground, with all signs of the village obliterated by crops being planted over it.

Four years later Frank's trial as a war criminal was conducted in Prague from 15 March to 22 May 1946. He was a man who was hated by the entire nation. The crimes Frank was alleged of committing affected thousands of people. No lawyer wanted to volunteer to defend a Nazi war criminal. Various newspapers, political leaders and even some lawyers on the Bar Association's board had tried to implement a policy which would stop Czech lawyers from voluntarily defending war criminals. In some cities, this policy was adopted. Consequently, the state was compelled to appoint a lawyer to defend Frank.

Many lawyers were aware of the appointment process and refused to take the case voluntarily, with some claiming they were unwell, whilst another claimed that if he were appointed as the defence lawyer, he would strip naked, throw a sheet over his shoulders, walk out onto the riverside and shout "I am Jesus Christ!"

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<sup>4</sup>This section is based on J Drápal, *Defending Nazis in Postwar Czechoslovakia*, Karolinum Press, 2017.

The state ultimately appointed Kamill Resler as the defence lawyer to represent Frank. Resler was a Czech citizen whose family and friends had died during the war. Frank was the man responsible for their deaths.

Resler was initially consulted as to whether he would defend Frank, to which he vigorously objected. However, when directly asked whether he would defend Frank if he was forced to, he stated “every defence lawyer is bound by professional duties and must carry out every defence properly and conscientiously; that applies to me too.” On 16 March, Resler received an order with a letter from the Ministry of Justice appointing him to defend Frank.

Resler complained to the Extraordinary People’s Court that his appointment as Frank’s defence barrister had not been validly executed. Resler made at least five formal complaints about being appointed to represent Frank, with the dispute ultimately being heard in the Supreme Court. The Supreme Court held the appointment process had been valid. Some might say that Resler’s resistance makes him a less than admirable role model. I disagree. The point is rather that he applied himself completely to a task we know he personally did not want to do.

Resler described his first meeting with Frank with the words “and so I stood face to face with the man whom we all justifiably hated.” Resler had no doubt that from the moment he received Frank’s case, Frank was destined for execution. However, armed with this knowledge, and the understanding that he would have to defend Frank, a Nazi responsible for the death of his friends and family, Resler was determined to ensure Frank received not just procedural fairness, but a proper trial with a strong defence.

Frank had been charged with ten different offences, including commanding forced labour, giving orders resulting in the restriction of freedom, and committing many criminal acts, such as murder and treating a person as a slave. It was Resler’s responsibility to defend each of these charges, and ensure Frank was provided with natural justice.

One historian has described how Frank “was responsible or co-responsible for almost all the German occupational government’s victims ... It would be wrong to reduce Frank simply to a state criminal and mass murderer working from a desk (though he was that too), given that he did his best, both for ideological and opportunistic reasons, to develop Protectorate policies wherever possible along moderate lines. The policies were undoubtedly murderous and their final aim just as contemptible as those in the rest of occupied Europe, but under different leadership they might have turned out far more brutally”.<sup>5</sup>

Throughout the trial, Resler provided a thorough defence. He meticulously addressed each of the ten charges which Frank faced, and provided a technical defence to each charge. Resler provided a detailed counter narrative to that of the prosecution, suggesting how Frank could not have committed certain crimes as he could not have been physically present, or they had to have been committed by another person.

Resler raised multiple defences, including parliamentary immunity, the amnesty notice issued by the government which had been extended to criminal acts, and Frank’s psychological condition. He objected to numerous pieces of evidence being introduced, including films of the Auschwitz concentration camp, on the grounds that Frank had no influence over the conditions inside the camps. He argued the prosecution should have brought forward more witnesses to corroborate stories of Frank beating certain individuals, and he cross-examined witnesses in a detailed fashion and in one case went as far as to accuse a witness of lying to the Court.

Additionally, Resler made a proposal to have Frank’s psychological condition examined based on his answers to questioning. Resler made the application because “[Frank] lacks the ability to judge the correctness, legality and humanity

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<sup>5</sup> Rene Kupper *Karl Herman Frank (1898-1946): Politická biografie sudetonemeckeho nacionalního socialisty*. [A political biography of the Sudeten German National Socialist] Prague: Argo, 2012, 243, 247.

of his own dealings and those of his superiors or other representatives of his nation ... He is unable to understand that someone could put him on trial and punish him for his actions, and claims he was following his leader's orders ... In short, he lacks any sense of proportion in the events of his life, whether they affect himself or others." This argument was ultimately rejected.

Furthermore, Resler argued the question of intent was a complex one. He argued that it was difficult to show whether Frank could have been aware of the criminality of his actions "while being convinced that he was carrying out his professional duty ... and particularly when failing to carry out those duties ... meant certain death for him."

Resler concluded his address by arguing "in obedience to the laws of my country and of my profession, I bring this motion ... I call upon you to clear the accused of the criminal charges brought against him ... there are insufficient grounds for prosecution according to the law and for the acts to be attributed to the accused, and so I ask you to implement measures such that the appropriate court authorities place the accused permanently in a secure institution for the mentally ill."

Resler protected the rights of Frank both in and out of the courtroom. Frank suffered depression and anxiety while in prison as a result of being separated from his family. It was Resler's responsibility to ensure Frank was of a suitable frame of mind to cope with the stress of the trial. Resler did what he could to afford Frank his human dignity, the same dignity that Frank denied his victims. Resler successfully petitioned to have Frank's watch and wedding band returned to him. In one of the final letters Frank sent to his wife, he said "we must thank [Resler] for the great kindness he has shown me."

On 21 May 1946, Frank was found guilty and sentenced to death. Upon Frank thanking Resler for his assistance and service throughout the trial, Resler shook his client's hand and said "it was my duty." Frank was hanged the next day.

## VI: CIVIL RIGHTS IN THE DEEP SOUTH<sup>6</sup>

My final example takes us barely a decade forward in time and across the Atlantic to the United States.

In June 1892, Homer Plessy, was arrested for violating a Louisiana law that called for “equal but separate accommodations for the white and coloured races” on all passenger railways within the state. Plessy had been born a free man and was an “octoroon”, only one-eighth of African descent. In what was a deliberate act to set up a test case, Plessy had bought a first class ticket and sat in the “whites only” carriage. The constitutionality of the law under which he was convicted was upheld by the Supreme Court of the United States on 18 May 1896 in *Plessy v Ferguson*.<sup>7</sup> The decision established the principle of separate but equal: racial segregation in public facilities was lawful provided the facilities were equal in quality.

It was this doctrine that underpinned the issue of race in the United States for the next 60 years. A series of laws, which came to be known as the Jim Crow laws, mandated the separation of black and white Americans in the South. These laws saw the implementation of different toilets, different drinking bubblers, different waiting rooms, different schools, and in some circumstances, even different cemeteries based on the colour of one’s skin. This idea of separate but equal had infused its way into every aspect of society in the southern United States.

On 17 May 1954, the principle of separate but equal was overturned by the Supreme Court in *Brown v Board of Education of Topeka*.<sup>8</sup> *Brown* was a school

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<sup>6</sup> This section is based on J Bass, *Unlikely Heroes*, Simon and Schuster, New York, 1981.

<sup>7</sup> 163 US 537 (1896).

<sup>8</sup> 347 US 483 (1954).

desegregation decision, which held that it was unconstitutional to legislate for separate public schools for black and white American students.

It is difficult for us today to appreciate how much the decision in *Brown* was seen as an existential threat in the South. For example, the 1992 decision of our High Court in *Mabo v Queensland (No 2)*<sup>9</sup> overturning the doctrine of *terra nullius* generated public and political controversy, but that was as nothing compared to the reaction to *Brown*. By way of contrast, in what was known as “The Southern Manifesto” signed by virtually all the senators and congressmen from the Deep South, the decision was decried as “a clear abuse of judicial power” in which the Supreme Court “with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established laws of the land”.

Senator James O. Eastland of Mississippi publicly addressed a cheering crowd in Mississippi and set the tone for the white public response to *Brown* by saying “On May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided that integration was right. You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it.”

Whilst the Supreme Court made the decision, the enforcement of school desegregation fell to the federal court judges. However, the question remained as to what form compliance with *Brown* would take in a region where white supremacy had become the dominant historical force in shaping social and political institutions. It was this hostile context in which the judges of the Fifth Circuit Court not only defended the ruling in *Brown*, but extended the principle of the case to other areas of society. The United States Court of Appeals for the Fifth Judicial Circuit encompassed six states of the old Confederacy: Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. Being part of the old

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<sup>9</sup> [1992] HCA 23; (1992) 175 CLR 1.

Confederacy, these states were naturally conservative on the issue of race and would not relinquish their traditional way of life easily.

The key judges who were responsible for enforcing the *Brown* ruling and subsequent social change were Elbert Tuttle, John Brown, John Minor Wisdom and Richard Rives. They came to be known as “The Four.” In addition to “The Four”, Judges Skelly Wright and Frank Johnson also played an important role on the Court in extending the principle of equality to all Americans by removing entrenched obstacles to parity in the South. These judges all came from differing backgrounds, and the bond that linked them was their reaction to blatant injustice.

The Fifth Circuit began to expand the mandate for equality beyond just education. In *Browder v Gayle*,<sup>10</sup> a case challenging segregation on public buses, both Rives and Johnson not only followed the Supreme Court decision of *Brown* but further advanced the cause of civil rights for African Americans. Rives in his judgment stated “the separate but equal doctrine was repudiated in the area where it first developed, i.e., in the field of public education. We cannot in good conscience perform our duty as judges, by blindly following the precedent of *Plessy v Ferguson* when ... we think that *Plessy v Ferguson* has been impliedly, though not explicitly, overruled.” These findings were later affirmed by the Supreme Court.

In hindsight it can be said that these members of the federal judiciary of the deep South made the United States Court of Appeals for the Fifth Judicial Circuit an agent for change. However, they did so by a process of orthodox legal reasoning applying the principle they understood to have been established in *Brown*. The response from the Court restricted an unjust social order, helped shape the nation’s Second Reconstruction, and left a permanent imprint on American history.

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<sup>10</sup> 142 F Supp 707 (1956).

Following the decision which saw an end to segregation of black and white Americans on public buses, Senator Sam Engelhardt of Macon County issued a statement urging “the real white people of Alabama never to forget the names of Rives and Johnson. Nothing they can ever do would rectify this great wrong they have done to the good people of this state. Already more hate has been generated on this day than any since the days of the Carpetbag legislature.”

In the weeks and months following their decision in the *Browder* case, both Judges Rives and Johnson received an abundance of hate mail, abusive phone calls, and violent threats to their lives. This abuse was not only directed at the judges themselves, but also at their wives and their families. In one case, a bomb was detonated and destroyed part of the home of Johnson’s mother. It was suspected that the target was Johnson himself.

The low point for Rives came when he and his wife attended the grave of their son one morning and found it had been vandalised. Friends were lost, and both Rives and Johnson became socially ostracised for their stance on civil rights. It was not uncommon for Rives or Johnson to be walking down the street, and have familiar faces cross over to the other side of the road to avoid any interaction with them. Their stance on enforcing desegregation was not supported by the public, and this disapproval was well known.

Similarly, in New Orleans resistance was organised on both a local and state level following cases which sought to enforce desegregation. One particular judge, Skelly Wright, was known by more than 90% of the public as the “integration judge.” This was at a time when only 70% of the public could name the governor of the state. Wright was the most hated man in New Orleans, and numerous threats were made against his life. Consequently, federal marshals were ordered to protect him each day. Despite the ruling in *Brown*, 1956 in the southern states of America saw voters endorsing segregation of public school at a rate of four to one.

New Orleans was not alone with its objection to the ruling in *Brown*. The Mississippi legislature made it a crime to create a disturbance by advocating non-conformance with the “established traditions, customs, and usages of the state of Mississippi.” Louisiana suspended compulsory school attendance and established “moral standards” certification for entry into institutions of higher learning. Georgia called on its Congressmen to introduce a resolution of impeachment against multiple judges because of their “pro-communist, anti-states’ rights decision.” In Florida, an official seven-member committee that included three state judges submitted a report recommending to the legislature laws to evade the Supreme Court decisions on desegregation.

Despite this reaction from various state legislatures and wide disapproval rates from the public, the Fifth Circuit judges issued decision after decision which struck down barriers of discrimination in every aspect of public life, including schools, parks, higher education, voting, jury selection, employment and legislative reappointment. Unswayed by the clear public pressure in the South, the judges translated the basic desegregation decision of the Supreme Court in *Brown*, and developed the law to grant certain rights to all people in America, regardless of colour. The actions of the judges of the Fifth Circuit Court came at great personal expense, losing friends, being personally threatened and attacked and having the lives of their loved ones put at risk. Regardless of the risks, those judges maintained the rule of law and affirmed the human dignity of all Americans by applying the decision in *Brown*.

## VII: DEFINING COURAGE AS A LEGAL VIRTUE

So what can we learn about courage as a legal virtue from the examples I just given?

I suggest that it has at least these four features.

First, an unwavering commitment to the rule of law, the principle that everyone is equal before the law and is under the law, including - perhaps most importantly - the executive government.

Second, that the public good must always be put ahead of self-interest, whatever the cost. While none of us wants to be put to the test, that cost may be the disapproval of friends, family and the wider community and, *in extremis*, the loss of life itself.

Third, a knowledge not only of the law, but the moral and policy principles underlying it and the history of how it came to be where it is today. This involves respecting but not being bound by tradition. We need not fear change, especially principled change. As John Henry Newman wrote, “Here below to live is to change, and to be perfect is to have changed often”.

Fourth, a readiness to call out injustice and engage in civic debate. This requires being prepared to meet prejudice and intolerance with reason and respect, no matter how strong the temptation to respond in angry kind.

Having tried to identify the qualities of courage as a legal virtue, I will now describe three major issues about which it seems to me, after more than thirty years of watching developments, this country is stuck. They are social and political as much as legal questions, but I want to suggest that in the next few years many of the students and young lawyers in this room may have to bring their skills to bear on these issues in public debate, and demonstrate the kind of courage I have been talking about – without, I hope, having to put their lives on the line. In that I include those of you (probably more than half on current statistics) who have no intention to practise law but will put those skills and habits of mind to use in other occupations. You will have no less an obligation as informed citizens to speak up on either side of the debate, depending on what you think is in the public interest.

I hasten to add that I am not suggesting that lawyers have all the answers: far from it. The insights and experiences of many different disciplines need to be taken into account and a good lawyer is a good listener. But lawyers are in a privileged position because, at the end of the day, most major questions of public policy have to be given effect through the making of laws.

Let me give one example. We were all horrified when on 15 March 2019 fifty people lost their lives in an appalling attack on two mosques in Christchurch, New Zealand. How we as a society respond to such an event inevitably and ultimately involves legal questions such as understanding the inherent limitations of the law to protect against extremist acts, how the ownership of guns should be regulated, what is an appropriate level of surveillance and monitoring, should there be pre-emptive law enforcement action against those who might be planning a crime, issues of legally imposed and self-imposed censorship, trans-national intelligence gathering and sharing, the rights of the accused to a fair trial, appropriate regulation of social media and issues of freedom of speech, religion and conscience. While everyone can and should participate in debate about these questions, people with legal training are in a special position and, in my view, have a social duty to make an informed contribution to the discussion.

The issues that I would like to single out are what I call the three Rs - recognition, republic, and rights. There are of course other important issues facing us – climate change comes immediately to mind – but these are the ones I have been watching for many years. In drawing them to attention I am not advocating any particular position or outcome. However, I do think that the continued flourishing of Australia as a nation is being impeded while they remain unresolved.

## VIII: RECOGNITION OF INDIGENOUS PEOPLE WITHIN THE CONSTITUTION?

Australia became a federated nation on 1 January 1901 following the Australian Constitution coming into effect. Federation was an act of unity, bringing together the colonies of New South Wales, Victoria, South Australia, Tasmania, Western Australia and Queensland. Written during the late 1800's, the Australian Constitution was shaped by the beliefs and values of the time, and as such, there was no consultation with Aboriginal or Torres Strait Islander people when the Constitution was drafted. The only reference to Aboriginal or Torres Strait Islander people were in section 127 of the Constitution which explicitly excluded indigenous people from being counted in the national census, and section 51(xxvi), which in its original form restricted the capacity of the federal government to make laws in relation to Aboriginal people. In the words of future Prime Minister Edmund Barton, the power was there to regulate "people of coloured or inferior races who are in the Commonwealth".

Following federation, there was a growing movement amongst Aboriginal communities to change the reality faced by indigenous people. The largest and most notable open early expression of dissatisfaction with the status quo was on 26 January 1938, the Day of Mourning Protest, which marked 150 years since the colonisation of Australia. Whilst the protest did not directly call for recognition within the Constitution, it ended with a call for the Australian Government to create laws which would elevate indigenous Australians to "full citizen status and equality within the community."

In 1967, Australia held a referendum in relation to those sections of the Constitution which referred to indigenous Australians. The question put to the Australian people was "do you approve the proposed law for the alteration of the Constitution entitled – 'An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population?'" The practical effect of this referendum was to provide the Commonwealth parliament with the power

to legislate with respect to Aborigines living in a State, as well as those living in a federal territory.

The referendum passed with an astounding 90.77% of Australians and all six states having a majority supporting the change. It is worth noting that throughout Australia's history, there have been 44 attempts to change the Constitution via referendum, with only eight of those attempts being successful. That is a success rate of just 18%.

Since 1967, the debate about recognising indigenous people in the Australian Constitution has involved numerous suggestions on how to progress. Some have suggested an acknowledgment in the Constitution that the Aboriginal people were the first people of Australia, while others have pressed for a more hands-on approach which would see the incorporation of an indigenous advisory panel into the Constitution.

1999 saw another referendum being held which suggested the insertion of a preamble to the Australian Constitution. The proposed preamble would have addressed numerous issues, not just the issue of indigenous recognition in the Constitution. However, this preamble would have recognised and honoured "Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country." Unlike the earlier referendum in 1967, the results reflected 60.66% of the population being opposed to the insertion of a preamble, without a single state in Australia having a majority supporting it.

In 2012, an expert group on Constitutional Recognition of Indigenous Australians was empanelled and made a suite of recommendations. The panel recommended a series of reforms including: a statement of acknowledgment of the fact Aboriginal and Torres Strait Islander people were the first people of Australia, a modification to the wording of the Commonwealth's lawmaking power in relation to Indigenous affairs, a constitutional prohibition on racial

discrimination and the removal of a provision that contemplates states disqualifying people from voting based on their race.

Similarly, in 2015 a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islanders People made similar recommendations to that of the expert panel in 2012, however they went even further to suggest an entrenched body to advise parliament on proposed laws that would affect indigenous people.

To date, the clearest message to come from the Aboriginal community in relation to constitutional reform has been the Uluru Statement from the Heart. The Statement was delivered on 26 May 2017, almost fifty years to the day of the 1967 referendum. It was the product of a First Nation's Convention, which was attended by over 250 Aboriginal and Torres Strait Islander people. This meeting was the culmination of a series of First Nation's Regional Dialogues held across the country with the Referendum Council appointed by then Prime Minister Malcolm Turnbull.

The Statement calls for the empowerment of indigenous people through constitutional reform, namely through the establishment of a First Nation's Voice to be enshrined in the Constitution. This would provide indigenous people with a platform to voice their concerns and raise any problems with legislation which would directly impact them as a people. The Statement also calls for a Makarrata Commission, to supervise the process of agreement making and to facilitate the process of truth telling.

To date, the federal government has failed to accept the recommendations put forward in the Uluru Statement of the Heart, and has failed to act on any other recommendations from other government inquiries. In November 2018, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People again handed down another report, this time proposing more work to be done on creating the Voice in consultation with Aboriginal and Torres Strait Islander people.

We seem to be stuck in this circle of conducting inquiries, having recommendations being made and failing to act upon those recommendations. But the issue will not go away. Controversy is already beginning to stir as we approach the 250<sup>th</sup> anniversary of Captain Cook's arrival next year.

## IX: AN AUSTRALIAN REPUBLIC?

Despite the act of federation on 1 January 1901, Australia still remained legally connected to the United Kingdom. Subsequent events which saw Australia gain more independence included the establishment of the High Court in 1903, the adoption of the Statute of Westminster 1931 in 1942, which allowed the federal parliament to create legislation inconsistent with the British parliament, and the passing of the Australia Act in 1986 which saw an end to the United Kingdom's ability to legislate for Australia. However, despite these steps Australia is still today linked to the monarch in Britain via Her Majesty's representative, the Governor-General.

Like the issue of constitutional recognition of indigenous people, the topic of an Australian republic has proved to be as divisive as it has been inconclusive. Whilst the republic debate is well and truly alive today, the first record of republicanism in Australia goes back to the 1800's, with the diary of pastoralist and politician Horatio Wills espousing Australian republicanism. Similarly, numerous historians have claimed links between the 1854 Eureka Stockade and the republican movement, showing an independence movement existed within Australia well before Federation in 1901. However, at the time of Federation this republican perspective was truly in the minority and on 1 January 1901, the six colonies federated to become the Commonwealth of Australia.

World War One saw a resurgence of ties to Britain, with patriotic support for the war effort going hand in hand with a renewal of loyalty to the British crown. Whilst the larrikin Australian identity and the ANZAC legend emerged from the Great War, it was still inherently tied to aspects of British identity. This attitude

continued during the 20<sup>th</sup> century and was reinforced by Australia's "White Australia" immigration policy at the time, which saw Australia openly adopt a racist immigration policy designed to maintain cultural ties to Europe. Australia remained fond of the monarch, and during the 1954 royal tour of Queen Elizabeth II, an estimated 7 million Australians came out to see the Queen. This was at a time when Australia's population was only 9 million. This popularity for the monarch remained strong throughout Menzies' Prime Ministership, and continues today, with a revived affection towards the monarch, and particularly her grandchildren, Princes William and Harry, and their spouses the Duchess of Cambridge and the Duchess of Sussex.

In 1991, the Australian Labor Party made the establishment of an Australian republic its official policy, with then Prime Minister Bob Hawke declaring the transition towards a republic as being "inevitable." This stance saw the birth of the Australian Republican Movement as the leading republican group in Australia. Paul Keating, the successor of Hawke as Prime Minister, established the Republic Advisory Committee to produce a report on issues relating to a possible republic which could come into effect on 1 January 2001. This report was published in 1993, and maintained that "a republic is achievable without threatening Australia's cherished democratic institutions." Following this report, a referendum was promised on the creation of a republic, replacing the governor-general with a president. Under this model, the president was to be nominated by the prime minister, and appointed by a two-thirds majority in a joint sitting of the Senate and House of Representatives.

1996 saw a change of government, and with it, another new Prime Minister: John Howard, who was a staunch monarchist. Despite having strong views regarding the Crown, Howard was aware of the growing movement within Australia to sever all remaining ties with Britain and becoming a republic. Consequently, Howard held a constitutional convention in 1998 over two weeks, in which 152 delegates were asked whether Australia should become a republic, and if so, which model for a republic should be implemented. Howard stated at

the convention that if a decision could not be reached in relation to the type of model of the republic for the referendum, then plebiscites would be held to resolve that question.

Four republican models were debated, two involving direct election of the head of state, one involving appointment on the advice of the prime minister and one involving appointment by a two-thirds majority of the parliament. It was this final model which received the most support from the convention. It is worth noting that numerous people abstained from the final vote at the convention and believed this republican model would fail at a referendum, allowing a second referendum with a direct election model being proposed.

The republic referendum was held on 6 November 1999. The lead up to the referendum saw a national advertising campaign and 12.9 million pamphlets being distributed between both the yes and the no camps. Interestingly, both the yes and no campaigns were run and organised by two individuals who both became leader of the Liberal Party and the Prime Minister of Australia. Tony Abbott led a vocal campaign for the no campaign, whilst Malcolm Turnbull led the charge for the republic cause. The question put to the Australian people was whether Australia should become a republic in which the governor-general and monarch would be replaced by one office, the President of the Commonwealth of Australia, the occupant elected by a two-thirds vote of the Australian parliament for a fixed term. This question was ultimately defeated with 54.87% of people voting no to the proposed amendment. Not a single state had a majority of people supporting the referendum as the question was put.

There has been a great deal of analysis conducted to determine why there was such a small amount of support for the republic, as reflected by the vote. Some political historians believe it was due to the republican model that was proposed, which forced some republicans to vote against the referendum. Of course, this is all just speculation. What the result does show is that in 1999, the idea of

becoming a republic as presented at the time did not have the support of the Australian people.

Despite the telling result from the 1999 referendum, the question of an Australian republic still remains disputed. In 2003, the Senate referred an inquiry into an Australian republic to the Senate Legal and Constitutional References Committee. The Committee tabled their report entitled *Road to Republic* in 2004. The report examined different models of republics, from appointment through to direct-election models, and also the possibility of a hybrid model of a republic.

In 2010, then Prime Minister Julia Gillard announced her support for Australia to become a republic, however only upon the end of the reign of Queen Elizabeth II. Interestingly, following Malcolm Turnbull becoming Prime Minister of Australia in 2015, the leaders of both Australia's major political parties supported Australia becoming a republic, with Bill Shorten also supporting Australia's move away from the monarchy. Despite this bi-partisan support from both leaders to move towards a republic, no move was made by Malcolm Turnbull to propose another referendum.

Like constitutional recognition of our First Australians, the question of an Australian republic will not go away. In 2017, Bill Shorten announced that should the Australian Labor Party win the election that is now only days away, they would hold a series of plebiscites on the republican issue. This means that the issue may well be back at the centre of public debate in the year ahead and the national interest requires a debate that moves beyond slogans. Real and complex questions will have to be addressed.

## X: AN AUSTRALIAN BILL OF RIGHTS?

The third topic I wish to address is the perennial debate about whether Australia should have a bill of rights. As I'm sure most of you are aware, unlike our American counterparts, Australia does not have a bill of rights. In fact, the

Australian constitution expressly protects only five individual rights. An interesting study was conducted in Australia, asking ordinary citizens which rights they believed were expressly protected by the Australian Constitution. Some of the most popular answers were the right to plead the fifth – namely the right against self-incrimination, the right to silence, and the right to freedom of speech. Despite popular opinion and what we see on our televisions with American legal dramas, none of these rights are protected under Australia's constitution.

Proponents argue that Australia is the only liberal democracy in the world without an entrenched bill of rights. Opponents say that the common law and specific anti-discrimination legislation are sufficient protection.

The rights expressly protected by our constitution are: protection against the acquisition of property on unjust terms, the right to a trial by jury for an indictable offence, the right to reasonable water use, the right to freedom of religion, and the prohibition of discrimination on the basis of State of residency. In addition to this, the High Court has also implied some rights into the constitution. They include the right to freedom of political communication, and the right to vote. Australia also protects other rights through statutes, such as anti-discrimination legislation.

There have been numerous attempts to incorporate a bill of rights into Australia's legal framework. In 1942, a Constitutional Convention in Canberra proposed the Commonwealth be given a series of new powers. These powers were to allow the federal government to make laws with respect to freedom of speech and expression, religious freedom, freedom from want, and freedom from fear. Whilst this would not have amounted to new guarantees of rights, it would have allowed the Commonwealth Parliament to legislate to guarantee such rights. Ultimately this was not what was put to the people of Australia in a referendum held in 1944. Instead, the question put was to grant the Commonwealth Parliament fourteen new heads of power over post-war reconstruction. The vote

was rejected, with only 45.39% of Australians supporting the proposed new powers, with a majority in only two States.

The next attempt to further protect rights in Australia came in the form of a statutory bill of rights. In 1973, Senator Lionel Murphy, as Attorney-General in the Whitlam Labor Government, introduced the Human Rights Bill. The Bill sought to ratify the International Covenant on Civil and Political Rights in Australia. It would have protected a range of rights, including freedom of expression and the freedom of movement. Attorney-General Murphy recognised the limited protection the constitution provided for rights, and argued that despite the belief that certain rights were basic to our democratic society, they received little protection in Australia. He argued “what protection is given by the Australian Constitution is minimal and does not touch the most significant of these rights ... Ideally, in my view, a Bill of Rights should be written into the Australian Constitution ... [T]he enactment of this legislation will be a significant milestone in the political maturity of Australia. It will help to make Australian society more free and more just.”

Under the proposed legislation, the Bill would have overridden any inconsistent State legislation, and made any Commonwealth legislation ineffective if it breached any rights in the Bill. This proposed model would have enabled rights to be enforced against governmental breaches, and also by private cause of action. The Bill was strongly opposed and was never enacted. Although the Human Rights Bill failed to be enacted, other legislation was passed by the parliament, including the Racial Discrimination Act and the Sex Discrimination Act.

In 1983, an attempt was made to introduce a statutory bill of rights, this time by Attorney-General Senator Gareth Evans. Unlike the 1973 model, this bill of rights was weaker and did not allow rights to be enforced in private actions. The Bill was introduced in 1985, and after passing the House of Representatives, was defeated in the Senate.

Following the failure of the Bill passing in 1985, a different means was sought to protect rights in Australia, other than by statute. A mandate was sought from the Australian people in the form of a referendum. A Constitutional Commission was established in December 1985 and sought to “ensure that democratic rights [were] guaranteed.” The Commission handed down a report in 1987, recommending that express rights be expanded in the Constitution. It recommended that a new Chapter be inserted, containing a broad scope of rights drawn primarily from the Canadian Charter of Rights and Freedoms. Legislation was introduced in 1988 which sought to bring about the recommendations of the Commission. 1988 also coincided with the bicentenary of white settlement.

The legislation proposed four changes for the Australian people: four-year maximum terms for Federal Parliament, recognition of local government in the Constitution, implementation of the notion of one vote one value, and finally a guarantee of basic freedoms. All four reforms were defeated nationally and in every state. This fourth reform in relation to guaranteeing rights received the lowest amount of support of all four proposed changes, being supported by only 30.33%. This was the lowest “yes” vote ever recorded in Australia.

At a federal level, the prospect of a bill of rights appears to have stalled. Despite this, the call for the formalisation of rights within Australia has not been silenced. Recent debates such as those surrounding the rights of asylum seekers and changes to the Marriage Act impacting religious freedoms have again brought the spotlight back to the protection of rights within Australia. As the call for the protection of rights grows, the ACT, Victoria and Queensland have independently enacted charters of rights, however none of these charters gives rise enforceable by a private cause of action.

Like the previous two issues, the question of a bill of rights has not been resolved and is periodically in the headlines. Most recently - December last year - this was in the context of religious freedom and the rights of LGBTI students in schools.

Many would say such questions cannot be sensibly discussed without resolving the question of a bill of rights.

## XI: CONCLUSION

I would like to draw all of this together by coming back to a couple of aspects of the life and career of Andrew Rogers.

First, in telling you a bit about his life earlier in this lecture, I deliberately omitted one part of his story. You may have wondered about it when considering that Andrew was a Jewish boy born in Hungary in 1933 and arriving in Australia in 1947. What I omitted was, of course, that the young Andrew saw firsthand what happens when lawyers and others lose their courage, become complicit rather than speak out, and allow the rule of law to become rule by law. National Socialism – Nazism – was a political system that adopted the form of law, but was in fact rule by force and terror completely without moral compass and nothing more than an instrument of tyranny.

Although Hitler did not invade Hungary until March 1944, Hungary had allied itself with the Third Reich and its policies. Between 1941 and 1945 more than half a million Hungarian Jews – two thirds of the country’s Jewish population – were killed.

One person who did not lose her courage was Andrew’s mother Kati. She would not allow her children to wear the *Judenstern* – the yellow Star of David marked *Jude* (Jew). She and her children went into hiding in different places. Andrew was hidden with his Catholic stepmother. Here was courage of a kind that few of us can today imagine.

Second, years later, Andrew concluded his swearing in speech as a judge of the Court by saying “I want to take the opportunity of acknowledging the needs of the community for a sound and speedy commercial court”. Subsequent events suggest that he spoke better than even he knew.

The wild economic ride of the 1980s and early 1990s saw an exponential increase in the amount of commercial litigation in the Supreme Court of NSW. The Court was put under unprecedented stress and Andrew understood that the old ways of doing things were no longer fit for purpose. What Andrew did was described some years later to the *Sydney Morning Herald* by another fine commercial lawyer and judge, George Palmer:

For decades, Palmer recalls, the "basic culture of the courts was that the judge sat there as an impassive umpire; the parties played the game; it was only if the ball was kicked over the line that the judge would blow a whistle". Cases would run for as long as the resources and willpower of the litigants held out.

But in the late 1980s, in what Palmer calls the most dramatic change to court procedure in 150 years, a Supreme Court judge started to dictate to barristers how commercial cases would be run. Justice Andrew Rogers took control by insisting - on pain of costs orders - that timetables were met and that hearings focused on the real issues in dispute. Lawyers thought Rogers's directness was "shocking" and "utterly brutal."<sup>11</sup>

It may surprise you to learn that lawyers, especially senior ones, can sometimes be resistant to change. I was there at the time and I well recall the stinging criticism that was directed at Andrew from some quarters, including the Bar, for what he was doing. But in fact what he was demonstrating was courage as a legal virtue.

Based on his deep legal knowledge and years of practical experience, he understood what was essential and needed to be preserved to ensure procedural fairness and the rule of law, he was prepared to cut away the accretion of years of unthinking practice and faced down serious criticism while doing so, and at all

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<sup>11</sup> Elisabeth Sexton, Deborah Snow, Joel Gibson and Geesche Jacobsen, "Judges feel need for speed", *Sydney Morning Herald*, 10 October 2010.

times he had the greater public interest as his guide. He recognised that if the Court could not deliver commercial justice efficiently and cost-effectively that would have serious, real world, adverse economic and social consequences not just for the commercial community, but for the wider society that depended on commercial activity. What Andrew Rogers singlehandedly pioneered as Chief Judge of the Commercial Division has become orthodoxy and the young lawyers of today would not believe that litigation was ever done any other way.

Let me conclude by paraphrasing Robin Goodfellow at the end of *A Midsummer Night's Dream*, without suggesting, as Robin does, that some of you may “have but slumbered here”, although I would understand if you had. If this lecturer has offended, think but this and all is mended: we are gathered to inaugurate a lecture series in honour of a remarkable Australian who we are fortunate to have with us this evening. Therefore, please do not applaud me, but may I invite you to be upstanding and acknowledge the man for whom this series is named and which I am truly privileged to inaugurate today.