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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2000**

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Opening Address at the Annual Conference of the Aviation Law Association of Australia and New Zealand

OPENING ADDRESS BY

THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

ANNUAL CONFERENCE OF THE AVIATION LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND

SYDNEY, 13 NOVEMBER 2000

Thank you for the invitation to open your annual conference. Organisations such as yours play an important role in enhancing the quality of legal advice and representation. True areas of specialisation, such as aviation law, encompass both the consideration of matters unique to that specialisation and also, the particular application of general legal principles.

Conferences such as this enhance the ability of all who participate to serve their clients in accordance with the highest of professional standards. Your particular area of specialisation involves one of the most important industries in Australia and, indeed, in the world. It is the economic significance of the law upon which I wish to focus in these brief opening remarks.

Over recent decades, public policy in all western nations has been influenced by a philosophy which emphasises the significance of market forces and deprecates, or at least, questions the supply of services by governments. This approach has influenced policy with respect to the structure of the legal profession, as well as the operations of the courts and the resources made available to courts. In Australia this approach is often labelled "economic rationalism", an unfortunate term as no-one would wish to come forward as an advocate for "economic irrationalism".

The basic proposition I wish to advance this morning is that we must recognise that there are limits beyond which this approach to public policy cannot go, without undermining the very foundations of the system that is being advocated. To put it shortly, there is a danger of throwing out the baby with the bath water.

In the Town Hall of Siena there are two wonderful frescos by Lorenzetti: Allegories of Good Government and of Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, would convince anyone that without government and a legal system there can be no market system.

There is a tendency amongst proponents of market ideology to treat "the market" as some sort of force of nature: as if it were no more than an Oriental bazaar or a Mediterranean rialto. Markets of this face to face nature have always existed. Advanced markets are, however, a human construct. More than anything else they are a construct of the law.

A market economy is a very rare phenomenon. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy. The peoples of the nations of the former Soviet Union realise every day that the benefits of a market economy do not arise simply from the absence of governmental restraint.

An American economist, the late Mancur Olsen, expressed the point well when he said in a book published posthumously earlier this year:

“There is no private property without government - individuals may have possessions, the way a dog possesses a bone, but there is private property only if the society protects and defends a private right to that possession against other private parties and against the government as well. If the society has clear and secure individual rights, there are strong incentives to produce, invest, and engage in mutually advantageous trade and therefore at least some economic advance.”[1]

For the maintenance of a market economy Olsen, together with many other economists dating back to Adam Smith himself, have emphasised the significance of the legal system:

“To realise all the gains from trade, then, there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be. These arrangements must also be expected to last for some time.

Without such institutions, a society will not be able to reap the full benefits of a market in insurance, to produce complex goods efficiently that require the cooperation of many people over an extended period of time, or to achieve the gains from other multi-party or multi-period arrangements. Without the right institutional environment, a country will be restricted to trades that are self-enforcing.”[2]

Olsen is a practitioner of the new institutional economics which, over recent years, has emphasised the significance of the institutional structure, encompassing both the rules of the game and the organisations which administer those rules, for economic welfare and growth. It is these institutions which, it is now widely acknowledged, determine the profitability and the feasibility of engaging in market exchange. The role played by such institutions can only be understood in a historical context. It is this incremental history which determines contemporary, and future, economic performance.

In an address earlier this year, Chief Justice Gleeson expressed the opinion that the economic significance of the administration of justice is generally undervalued. His Honour added:

“Economic rationalism should be comprehensively rational. If proper attention were given to the economic importance of the institutional framework within which commerce and industry function, then courts throughout Australia might compete for government funding on better terms.”[3]

Other aspects of the administration of justice are also of great significance for the performance of the economy, even though not necessarily acknowledged by all of the institutional economists to whom I have referred. Their tendency is to focus on the contribution that the law makes through the enforcement of contracts and the protection of property to market exchange and the structures of long term economic arrangements and investments.

A perhaps less tangible, but nonetheless real, advantage to all aspects of social interaction, including economic interaction, is the contribution the law makes to the protection of individual freedoms and the maintenance of justice, understood in the sense of fair outcomes arrived at by fair procedures. Most notably in the criminal law, but also in the administration of civil justice, the protection of freedom and the promotion of justice in this sense is as essential for the economy as the administration of those aspects of the law which impinge directly upon market transactions. The creation of a societal and institutional environment protecting freedom and promoting fairness, however imperfectly in either case, does appear to be one of the requirements of economic success. The overwhelming preponderance given to commercial values in contemporary intellectual fashion could, if taken too far, destroy the institutional arrangements upon which, in the long run, a market economy depends.

This perspective is also of significance for each of you as legal practitioners. There is a tendency amongst many to question whether or not the law is necessary or makes any useful contribution. The thousands of lawyers jokes are, almost without exception, variations on a single theme, to the extent that there appears to be only one lawyer joke, expressed in an apparently infinite number of ways - lawyers are dispensable.

It is true that lawyers do not produce anything of a physical character in the way that manufacturers, miners or farmers do. The intangible nature of a service makes its contribution difficult to understand, unless it has some obvious physical consequences as do medical services. The perspective of the essential contribution the law makes as a foundation of the economy, which I have emphasised today, counteracts the simplistic approach that lawyers do not really “produce” anything. Nothing could be further from the truth.

The services each of you perform, both directly with respect to economic transactions and also indirectly with respect to the maintenance of freedoms and the maintenance of a sense of fairness in our society, make an absolutely vital contribution to the economic, and to the social, welfare of our nation. There is no job more important in terms of economic importance than a legal job.

There is no need for legal practitioners, or the profession as a whole, or the institutions for the administration of justice, to be at all reticent in emphasising, that without the services they perform, no economic progress is possible. An advanced economy is not feasible without lawyers. The alternative is some form of anarchy or authoritarianism neither of which is compatible with the economic freedom that has created the richest societies the world has ever known. The suggestion that is sometimes made and more often assumed, that lawyers are not productive in an economic sense, is fundamentally wrong, perhaps dangerously so.

Practitioners of aviation law have particular reason to be aware of the economic value of their contribution.

I am pleased to declare this Conference open.

[1] Olsen *Power and Prosperity*, Basic Books, 2000 at p196.

[2] *Ibid* at p185.

[3] The Honourable Murray Gleeson AC, “Managing Justice in the Australian Context”, Australian Law Reform Commission Conference, Sydney, 19 May 2000 at p2.

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Address to the LEADR Dinner - University and Schools' Club Sydney

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

TO THE LEADR DINNER

UNIVERSITY AND SCHOOLS' CLUB SYDNEY

9 NOVEMBER 2000

Thank you for your invitation to address you this evening. I am pleased to acknowledge the key role this organisation has played in fostering the recognition of the important place that mediation can play in the resolution of civil disputes and also the significant role of LEADR in the training of mediators. I wish to comment on two aspects of the Court's involvement in mediation: the practice of the Court with respect to court-annexed mediation and the amendment of the *Supreme Court Act* to permit the Court to compel mediation.

In May of last year the Council of Chief Justices of Australia and New Zealand issued a *Position Paper and Declaration of Principle on Court-Annexed Mediation*. Appended to that document were summaries of mediation policy and practice in each of the Courts, including the Supreme Court of New South Wales. In both the respects to which I wish to refer this evening, the policy and practice of the Supreme Court has changed from that set out in the summary in the Position Paper. The registrars of the Court now conduct mediations which are not limited to what was there described as conferences. Secondly, the Court has now acquired the power, after a change of policy within the Court, to compel mediation.

The Chief Justices Council adopted a formal *Declaration of Principles on Court-Annexed Mediation* which included the following points:

- Mediation is an integral part of the Court's adjudicative processes and the "shadow of the court" promotes resolution.
- Mediation enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.
- Consensual mediation is highly desirable but, in appropriate cases, parties can be referred where they do not consent, at the discretion of the Court.
- The parties should be free to choose, and should pay, their own mediator, provided that when an order is sought for such mediation the mediator is approved by the Court.
- Mediation ought to be available at any time in the litigation process but no referral should be made before litigation commences.
- In each case referral to mediation should depend on the nature of the case and be in the discretion of the Court.
- Mediators provided by the Court must be suitably qualified and experienced. They should possess a high level of skill which is regularly assessed and updated.
- Mediators must have appropriate statutory protection and immunity from prosecution.
- Appropriate legislative measures should be taken to protect the confidentiality of mediations. Every

obligation of confidentiality should extend to mediators themselves.

- Mediators should normally be court officers, such as Registrars or Counsellors rather than Judges, but there may be some circumstances where it is appropriate for a Judge to mediate.

- The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.

Many of these principles will no doubt receive widespread acceptance. Some, I recognise, remain controversial. No doubt some of you believe that any form of court provided mediation is basically a mechanism for taking food out of the mouths of your children.

At a higher level of principle many of you will no doubt share the view forcibly put by Sir Laurence Street, that participation by court officers, whether judges or registrars, in a mediation process should not be permitted on the basis that it threatens the integrity and the impartiality of the court system itself. Sir Laurence said in an editorial comment in the *Australian Dispute Resolution Journal* in November 1991:

“Private access to a representative of a court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the courts observe.”

The *Declaration of Principles* adopted by the Chief Justices Council, as quoted above, recommends that mediators should “normally” be court officers, like registrars. It does, however, contemplate circumstances in which it is appropriate for a Judge to mediate. The practice of the Supreme Court of New South Wales is that mediations are done only by registrars. No judicial officer descends into the arena in the way feared by Sir Laurence.

No doubt there are people who do not understand the difference between registrars, who are administrative officers, and judges and masters, who are judicial officers. Nevertheless, the difference does exist and it is *the* important line in this respect. This is a distinction which it is the policy of the Supreme Court to maintain.

The first principle in the Chief Justices Council *Declaration* is that mediation is an integral part of the Court’s adjudicative processes - it is not, of course, itself adjudicative, but is an integral part of the process of adjudication as a means of resolving disputes. That first principle also asserts that the “shadow of the court” promotes resolution. This appears to unquestionably be the case.

There may be some difficulty in maintaining the distinction between registrars and judges in the public arena, but I do not see any signs that the blurring of any such distinction, if there be blurring, is affecting or likely to affect public confidence in the administration of justice. The issue deserves to be watched, for the reasons Sir Laurence mentioned. As Justice Gummow has put it, “public confidence in the administration of justice in present times, is the meaning of the ancient phrase ‘the majesty of the law’.” (*Mann v O’Neill* (1996-1997) 191 CLR 204 at 245).

In the Supreme Court mediations have been conducted by the Registrar in the Equity Division since 1996. More recently, as a result of a deliberate policy, a number of registrars have been trained to conduct mediations by either this organisation or ACDC. Six of the Court’s ten registrars are now trained. A programme is in place to ensure that all registrars are trained in mediation, and this will extend to the increase of two in the complement of registrars, likely within the next few months.

The primary use of mediation by registrars has been in the Equity Division. Commencing last year, registrars in Common Law were trained and, this year, in Probate. There has been limited use of mediation in Common Law. The position in the Equity Division is now well established and that in Probate is growing in significance.

In 1999 a total of 131 mediations were conducted in Equity of which 91 settled at the mediation and a further 19 settled prior to hearing. In the first nine months of 2000 the Registrar in Equity reports that 89 court-annexed mediations have been conducted, 54 of those resulting in settlement. The Registrar in Probate reports that 20 court-annexed mediations have been conducted, over the period May to September, of which 13 have resulted in settlement.

In Common Law only a handful of cases have been mediated by registrars. However, a substantial practice in reference for mediation has developed in the Professional Negligence List. These mediations are not conducted by court officers.

The judges who administer the Professional Negligence List actively encourage mediation. So does the judge who conducts the Possession List, though not with the same success, in terms of numbers referred. All the reports I get from the Professional Negligence List affirm that the role of the mediators has been of critical significance in the success of the list, both in achieving settlements and in narrowing the range of issues.

During the eight months to the end of October 2000, 252 professional negligence cases were finalised of which 54 had been referred for mediation. Of those 54 cases, 36 were settled, discontinued or otherwise disposed of, without seeking further hearing from the Court and 18 sought further hearing from the Court, but settled at or before the hearing. As at the end of October 2000 there were 554 active cases in the Professional Negligence List. A referral to mediation has been made in 96 of those active cases, nine of these simultaneously obtaining hearing dates and 15 subsequently obtaining hearing dates.

The extensive use of external mediators will, I am sure, be more widely accepted as a result of the experience with the Professional Negligence List. It is perhaps a little early to evaluate the success of mediation in that list, but the early indications are very positive.

There are some signs in the Professional Negligence List, and I will put it no higher than signs, that delays are being occasioned by the unavailability of a mediator chosen by the parties. Mediation is intended to ensure the early resolution of disputes. The Court will keep a watchful eye to ensure that references to mediation do not add to delays in finalising matters.

From the perspective of the Court, one significant consideration is the effective disposal of matters in the list. Delays in the Supreme Court are reducing. Accordingly, directions will tighten thus enabling mediation to occur at a point of time attractive to the parties and in circumstances where, if the mediation proves unsuccessful, the parties will not have lost their priority in the list.

The experience in the Equity Division is that the following kinds of cases are appropriate to be referred to mediation: *Family Provision Act* matters, *Property (Relationships) Act* matters, partnership disputes, quantification of damages, accounts and applications under s66G of the *Conveyancing Act*. In Probate disputes over conflict of wills and between competing applications for grants of probate in estates have been successfully mediated.

The second matter to which I wish to refer is the adoption by the Supreme Court of a new policy that there are circumstances in which parties should be compelled to mediate. Until the *Supreme Court Amendment (Referral of Proceedings) Act 2000*, s110K of the *Supreme Court Act* permitted the Court to refer civil matter or mediation or neutral evaluation with the consent of the parties. The new s110K expressly states that the power to make a reference can be exercised with or without the consent of the parties. The mediator or evaluator is to be agreed to by the parties, however, in the absence of agreement, the Court may appoint a person to conduct the mediation or a neutral evaluation.

The *Declaration of Principles* of the Council of Chief Justices, which I have quoted above, accepts that, although consensual mediation was desirable, a referral without consent can occur in appropriate cases. In one sense, the idea of a compulsory mediation is a contradiction in terms. To be successful a mediation process requires consensus.

Notwithstanding the 'contradiction in terms', there are precedents for compulsion of mediation. Indeed any contractual arrangement which requires mediation, as is frequently the case, is in one sense a compulsion of this character, albeit one agreed consensually at a time when the possibility of dispute was far from the contracting parties' minds. Some legislative schemes have included provision for compulsion. I refer in particular to the *Farm Debt Mediation Act* and the *Retail Leases Act*. The Federal Court and the Supreme Courts of South Australia, Victoria and Western Australia have for some time had power to refer matters to mediation over the objection of one or both of the parties.

No doubt it is true to say that at least some people, perhaps many people, compelled to mediate will not approach the process in a frame of mind likely to lead to a successful mediation. There is, however, a substantial body of opinion - albeit not unanimous - that some persons who do not agree to mediate, or who express a reluctance to do so, nevertheless participate in the process often leading to a

successful resolution of the dispute.

I am advised that in Victoria no difference in success rates or user satisfaction between compulsory and non-compulsory mediation has been noted. Not all research or anecdotal evidence is to this effect.

It appears that, perhaps as a matter of tactics, neither the parties nor their legal representatives in a hard fought dispute are willing to suggest mediation or even to indicate that they are prepared to contemplate it. No doubt this could be seen as a sign of weakness. Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a Judge.

There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed. I formed the view that a power of the character now conferred on the court by Parliament was a useful addition to the armory of the court to achieve its objectives.

That overriding purpose of the Supreme Court Rules is now set forth in explicit terms in Part 1 rule 3, being the first substantive rule of the Supreme Court Rules. That rule now provides:

“3(1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.”

As Chief Justice Gleeson observed in an address earlier this year, this rule emphasises the importance of punctuation. Sir Roger Casement, his Honour recalled, was said to have died for want of a comma.

Part 1 rule 3 continues:

“(2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.

(3) A party to civil proceedings, is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

(4) A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3).

(5) The Court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs.”

Although this rule refers to the exercise of a discretion under the rules, similar considerations will be relevant, and in many cases determinative, with respect to the exercise of the statutory powers now found in Part 7B of the *Supreme Court Act*. Indeed the duty to participate referred to Part 1 rule 3, is expressly enacted in s110L of the Act, which provides:

“110L It is the duty of each party to the proceedings the subject of a referral under s110K to participate, in good faith, in the mediation or neutral evaluation.”

I am aware that there are other views with respect to the efficacy of mediation in reducing delays and costs. Some mediations are conducted as if they were mini trials and, where unsuccessful, a mediation adds to the costs ultimately borne by the parties, in some cases, to a substantial degree.

Nevertheless, the benefits are potentially substantial. We are presently engaged, particularly with respect to compulsory mediation, at the early stage of a long process of gathering experience which will assist us in determining in what circumstances an order under s110K as amended could prove fruitful.

In making these decisions the Court is anxious to draw upon the experience of mediators who are able to inform the Court about which types of cases are suitable for mediation and which are not. Either by advising those who are making submissions with respect to a particular case, or more generally

through the processes of publication, seminars and lectures, I trust that the cumulative experience of the members of LEADR will become available to Judges of the Court so that we become aware of what are the matters which, in your opinion, favour the Court exercising its powers to compulsorily refer a matter and what are the considerations which weigh against the exercise of those powers. Your researches and opinions, to be reviewed in the course of a public dialogue with others experienced in the field, will assist the Court when it comes to determine whether or not the powers should be exercised.

Section 110M of the *Supreme Court Act* now requires the parties to meet the cost of the mediation. Where a mediation is unsuccessful and has occurred over the objection of one or, perhaps, even both parties, there may be concerns because the costs of the resolution of dispute have been increased to those parties. Judicious exercise of the power will, I trust, ensure that, considered overall, the amount saved will greatly exceed the costs added by reason of this addition to the judicial armoury. These costs are, of course, not present in the case of court-annexed mediation. That fact is of particular significance where one or both of the parties do not have deep pockets. Where that is the case, the use of registrars remains an important option which should be available to the Court.

The new power will have to be exercised with care. I do not anticipate that it will be exercised frequently. In its exercise Judges will, I have no doubt, seek to ensure that no party is disadvantaged by the mediation process.

As noted above, both s110L and Part 1 rule 3(3) recognise a duty by the parties to participate in the processes of the court and of mediation when it is ordered. This statement of principle is, in some respects, a culmination of several decades of development of case management.

The pressure of litigation and the increased costs associated with litigation have come into conflict with restrictions on government expenditure which the courts, legal aid and all aspects of the administration of justice have had to meet, in the same way as all areas of public administration. Progressively, over a period of time the courts, have intervened more and more in the process of litigation to ensure that it is conducted efficiently and expeditiously. The 'duty to participate' is a reflection of the proposition that the parties share with the courts and with the profession, a mutual responsibility for the effective administration of justice.

No doubt there will be cases in the future in which the issue of "good faith" under s110L will be the subject of dispute, perhaps in the context of seeking the Court to make a particular order for the payment of costs of a mediation. These are also matters to be resolved on a case by case basis. The conduct of parties in litigation, including any attempts to settle litigation, is a matter of significance beyond the specific parties involved in the litigation. It affects, potentially, all other litigants who seek access to the limited public resources available to perform the function of dispute resolution.

May I, in conclusion, make certain observations about the limitations on alternative dispute resolution. It is a characteristic feature of such processes that they are held in private. It is the characteristic feature of the administration of justice by the courts, that it is conducted in public. There are important public values served by the resolution of disputes in public. The courts are part of a continuing dialogue by which our society affirms its fundamental values and adapts them to changing circumstances. This function is best served by a public process.

We do not live in a Confucian society in which overriding value is attributed to the restoration of social harmony. Plainly, considerations of that character are of particular significance where the parties to a dispute are in, or ought be in, a continuing relationship after the resolution of the dispute. In such circumstances settlement in and of itself has a particular value. This, however, is not true of all cases.

We live in a society where persons are acknowledged to have rights, which are enforceable by public processes. The state has always lent its authority to the enforcement of private rights, by reason of the public benefits that enure from the recognition of such rights and the performance of private obligations. There are occasions, most clearly in a criminal context, but also often in a civil context, where there is a very real public purpose in proclaiming that one party was right and another party was wrong. The performance of that function in a public manner is, and will remain, an important aspect of the administration of justice.

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College of Law Graduation Ceremony

**COLLEGE OF LAW GRADUATION CEREMONY
OCCASIONAL ADDRESS BY
THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
8 NOVEMBER 2000**

I am pleased to be present on this occasion in order to acknowledge the excellent work done by the College of Law in practical legal training and also to congratulate the graduates who have taken this important step on the road to becoming legal practitioners.

The profession which each of you is about to enter is an old and an honoured one. It has great traditions. It makes a vital contribution to the social and economic welfare of our nation.

In common with many other long established traditions, many of its practices have been subject to review and challenge over recent decades. In common with all other manifestations of institutional authority, the structures of the profession, the courts and the administration of justice have also been subject to review and challenge over those decades. Much of that review and challenge has not been well informed. Some of that review and challenge was, and is, justified.

At such a time, it is easy to lose sight of the major contribution which these traditions and institutions make and of the enduring quality of the values which they represent. Part of the job description of a chief justice is to emphasise such contributions and affirm such values.

The performance of this task is, of necessity, a conservative one. There is a limited range of arguments that can be deployed. The full panoply of Tory logic is as follows: the baby with the bath water argument; the straw that breaks the camel's back argument; and the thin edge of the wedge argument. I am happy to deploy all three forms of reasoning where appropriate. This evening, however, I wish to concentrate on a baby with the bath water argument.

Over recent decades, public policy in all western nations has been influenced by a philosophy which emphasises the significance of market forces and deprecates, or at least, questions the supply of services by governments. This approach has influenced policy with respect to the structure of the legal profession, as well as the operations of the courts and the resources made available to courts. In Australia this approach is often labelled "economic rationalism", an unfortunate term as no-one would wish to come forward as an advocate for "economic irrationalism".

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Other aspects of the administration of justice are also of great significance for the performance of the economy, even though not necessarily acknowledged by all of the institutional economists to whom I have referred. Their tendency is to focus on the contribution that the law makes through the enforcement of contracts and the protection of property to market exchange and the structures of long term economic arrangements and investments.

A perhaps less tangible, but nonetheless real, advantage to all aspects of social interaction, including economic interaction, is the contribution the law makes to the protection of individual freedoms and the maintenance of justice, understood in the sense of fair outcomes arrived at by fair procedures. Most notably in the criminal law, but also in the administration of civil justice, the protection of freedom and the promotion of justice in this sense is as essential for the economy as the administration of those aspects of the law which impinge directly upon market transactions. The creation of a societal and institutional environment protecting freedom and promoting fairness, however imperfectly in either case, does appear to be one of the requirements of economic success. The overwhelming preponderance given to commercial values in contemporary intellectual fashion could, if taken too far, destroy the institutional arrangements upon which, in the long run, a market economy depends.

This perspective is also of significance for each of you as legal practitioners. There is a tendency amongst many to question whether or not the law is necessary or makes any useful contribution. The thousands of lawyers jokes are, almost without exception, variations on this theme to the extent that there appears to be only one lawyer joke, expressed in an apparently infinite number of ways - lawyers are dispensable.

It is true that lawyers do not produce anything of a physical character in the way that manufacturers,

miners or farmers do. The intangible nature of a service makes its contribution difficult to understand, unless it has some obvious physical consequences as do medical services. The perspective of the essential contribution the law makes as a foundation of the economy, which I have emphasised today, counteracts the simplistic approach that lawyers do not really "produce" anything. Nothing could be further from the truth.

The services each of you do and will perform, both directly with respect to economic transactions and also indirectly with respect to the maintenance of freedoms and the maintenance of sense of fairness in our society, are an absolutely vital contribution to the economic, as to the social, welfare of our nation. There is no job more important in terms of economic importance than a legal job.

There is no need for legal practitioners, or the profession as a whole, or the institutions for the administration of justice, to be at all reticent in emphasising, that without the services they perform, no economic progress is possible. An advanced economy is not feasible without lawyers. The alternative is some form of anarchy or authoritarianism neither of which is compatible with the economic freedom that has created the richest societies the world has ever known. The suggestion that is sometimes made and more often assumed, that lawyers are not productive in an economic sense, is fundamentally wrong, perhaps dangerously so.

In the years of practice ahead of you, you should remember the positive contribution that you are making, not only to your individual clients, but also to society as a whole. That contribution, obviously, will go beyond the economic considerations which, in order only to redress an imbalance, I have chosen to concentrate on today.

On this occasion of your graduation I congratulate you on your achievement and wish you well in your professional careers.

[1] Olsen *Power and Prosperity*, Basic Books, 2000 at p196.

[2] *Ibid* at p185.

[3] The Honourable Murray Gleeson AC, "Managing Justice in the Australian Context", Australian Law Reform Commission Conference, Sydney, 19 May 2000 at p2.

Address to the UNSW Symposium 2000 - Mandatory Sentencing - Rights and Wrongs

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE UNSW SYMPOSIUM 2000
MANDATORY SENTENCING - RIGHTS AND WRONGS
SYDNEY, 28 OCTOBER 2000
OPENING ADDRESS**

The University has conducted this annual Symposium series on matters of substantial public importance. Few topics are capable of generating as much controversy as the subject of this year's Symposium has generated. The University, accordingly, is to be congratulated on providing a forum in which this multifaceted and complex issue can be considered in depth in a comparatively calm and reasoned atmosphere.

I venture to suggest that in all of recorded history, there has never been a time when the problems of crime and punishment have not been the subject of debate and differences of opinion. This is not a condition likely to change in the future. The problem may be said to have started in the garden of Eden when God called Adam to account for his transgression. He of course blamed his wife. She blamed a snake. All three were the subject of condign punishment, the implications of which are still being debated today.

There is a wide spectrum of legitimate opinion about appropriate levels of punishment for criminal offences. There have been periods in the history of all societies when a widespread conviction prevailed as to the necessity for the imposition of severe punishment. In the past, that has taken the form of death, mutilation, whipping and other forms of infliction of pain. In our own times the call is for significant periods of incarceration. The history of the imposition of severe punishment in the past has been that at a certain level of severity, the punishment became tolerable no longer. It came to be regarded by many to be virtually as repulsive as the crime. There appears to be a natural oscillation in the balance of outrage in such matters.

The reason why debate about sentencing will know no rest, is because the ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. It has always been thus. Requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.

Centuries of practical experience establish that the assessment of the multiplicity of factors involved in the sentencing task is best served by the exercise of a broad discretion. That same practical experience over centuries has led to the conclusion that this difficult process of weighing and balancing all of the relevant considerations is best done by an independent, impartial, experienced, professional judge. It is not best done on talk-back radio.

The existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstance of the individual case then, irrespective of how much legislative thought has gone into the determination of a particular rule or regime, there will always be the prospect of injustice in the individual case.

Nevertheless, from time to time this generally accepted principle, has been qualified in various ways. Mandatory minimum sentences are not a new phenomenon. This symposium is concerned with the particular application of mandatory sentencing in contemporary Australia. There are many perspectives from which consideration of these matters can proceed. One perspective, which comes naturally to a judge, is to inquire why it is that with respect to a particular category of offenders, defined as they must be in a specific statutory formulation, their sentencing should be conducted upon principles which differ from those that determine the sentences of all other offenders. What is special, unique or different about the particular category, which requires this treatment?

The political dynamics which have led to minimum sentence regimes are, at least in part, derived from a belief in some sections of the community, that judicial performance of the sentencing task is not as rigorous as they would wish. These are issues that arise in controversial and sometimes inflammatory circumstances.

There are occasions when public criticism of specific sentences for leniency is justified. These criticisms are not always able to be rectified on appeal. There are significant and entirely appropriate inhibitions on the Crown from initiating appeals on sentence at all. When they are instituted, appellate courts approach such appeals with the application of the principle of double jeopardy and considerable self restraint against interfering with the exercise of the discretion.

The occasional inadequate sentence receives much more significant public exposure through the media, than the continuing, day in and day out, imposition of sentences that are generally regarded as correct and, for that reason, pass without comment. In such a context, judges are entitled to feel a little irritated when, although they apply themselves diligently to a difficult task, they are frequently accused collectively of excessive leniency and of being out of touch. However, like other persons in public office, a judge has no more right to complain about misreporting in the media than about the weather.

There is an important task of educating the public about the actual level of sentences imposed. The media, with their understandable focus on high profile cases, fails to inform the public about what judges are actually doing in the normal line of case. There do not seem to be adequate alternative means of public information.

There is a considerable body of research which indicates that with respect to crime and, particularly with respect to sentencing, there is a significant disparity between what actually happens and what a significant portion of the public believes happens. Research shows, for example, that the public believes that crime is going up, when in fact it is going down. Members of the public believe that they are much more likely to be the victim of crime than the objective facts suggest.

Detailed research in many nations, including Australia, has shown that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentences actually imposed by judicial officers or, at least, to express the opinion that the sentences were lenient to a significantly lesser extent than answers to general, undirected questions about judicial leniency in sentencing, would suggest.

This is not an area in which there can ever be unanimity. The most that can be expected is that when the facts of particular cases are known the proportion of the public which believe that the judge's sentence was too high, is of the same order of magnitude as the proportion who believe that the judge's sentence was too low. That is in fact what research studies, in which the public knows or is informed of details of the case, establish to in fact occur. There is a very real discrepancy between public perception and the reality of sentencing practice. The public interest will be well served if we can minimise that discrepancy. Success in that endeavour could go a long way to alleviating the political pressures which have resulted in the legislative responses that are under consideration in this Symposium.

The issues to be discussed are important issues. I congratulate the University on its choice of topic and I declare this Symposium open.

The 14th Lionel Murphy Memorial Lecture - Economic Rationalism and the Law

**THE 14TH LIONEL MURPHY MEMORIAL LECTURE
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
STATE LIBRARY OF NEW SOUTH WALES
26 OCTOBER 2000
ECONOMIC RATIONALISM AND THE LAW**

The decade and a half since the death of Lionel Murphy has witnessed the ascendancy of market ideology as a major determinant of public policy. It is not, I believe, an ascendancy with which Lionel, even as the instigator of the *Trade Practices Act*, would have been comfortable.

This approach to public policy is generally referred to in Australia by the label "economic rationalism". This is not a fortunate choice of phrase - no one would wish to come forward as an advocate for "economic irrationalism". Donald Horne once advanced a preference for the term "economic fundamentalism". It never caught on. The terminology of "economic rationalism" is, it appears, unique to Australia [1], but we are stuck with it.

Over recent decades commercial values have been applied to every sphere of conduct - to the extent that it sometimes appears that everything is for sale. This ascendancy is perhaps most dramatically manifest in the physical structure of our cities. Since time immemorial the dominant buildings in an urban area were public buildings: a Parliament House, a Town Hall, a Cathedral, a Court. Today all these buildings are dwarfed by commercial office blocks. Many public functions are now performed in buildings which are indistinguishable from commercial office blocks, like the Supreme Court.

I do not mean to suggest that economic criteria are not relevant and, indeed, central. However, they are not the only values which we profess as a society. For the legal system, the values of truth, justice and fairness demand primary consideration. Nevertheless, market ideology has had a substantial impact on the law. It is that continuing impact which I wish to explore to some degree in this lecture.

The Law and Markets

There is a tendency amongst proponents of market ideology to treat "the market" as some sort of force of nature: as if it were no more than an Oriental bazaar or a Mediterranean rialto. Although markets in this face to face sense, exist under all systems of government and law, a market economy is in fact a rare phenomenon. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy. The peoples of the nations of the former Soviet Union realise every day that the benefits of a market economy do not arise simply from the absence of governmental restraint.

More than anything else, a successful market economy is the product of good government and of the law. In the Town Hall of Sienna there are two wonderful frescos by Lorenzetti: Allegories of Good Government and of Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, would convince anyone that without law there can be no market system.

This has long been acknowledged by proponents of a market economy, though not always in the policy descriptions which they draw from their ideology. Indeed, Adam Smith himself in the founding tract of the movement - *The Wealth of Nations* - said:

"Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures in short, can seldom flourish in any state in which there is not a certain

degree of confidence in the justice of government.” [2]

More recently, the late Mancur Olsen emphasised this point:

“There is no private property without government - individuals may have possessions, the way a dog possesses a bone, but there is private property only if the society protects and defends a private right to that possession against other private parties and against the government as well. If a society has clear and secure individual rights, there are strong incentives to produce, invest, and engage in mutually advantageous trade and therefore at least some economic advance.” [3]

Olsen emphasised the significance of the legal system:

“To realise all the gains from trade, then, there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be. These arrangements must also be expected to last for some time.

Without such institutions, a society will not be able to reap the full benefits of a market in insurance, to produce complex goods efficiently that require the cooperation of many people over an extended period of time, or to achieve the gains from other multiparty or multiperiod arrangements. Without the right institutional environment, a country will be restricted to trades that are self enforcing.” [4]

Olsen is a practitioner of what is sometimes referred to as the “new institutional economics”. Many of these economists use the word “institution” in a special sense. The “institutions” to which they refer are rules of the game, such as the law of contracts or moral standards. Other words, like “organisations”, are used to refer to aspects of the institutional structure, such as courts. The central thrust of the new institutional economics is to emphasise the significance of institutions, understood in the sense of rules of the game and, to some extent, institutions in the sense of organisations, to the operations of the market economy.

In the words of the Nobel Prize winning economist, Douglass C North: “History matters”. History is embedded in institutions which he defines as the “rules of the game”, which encompasses both formal rules and informal norms, together with the enforcement characteristics of both. He argues that such ‘institutions’ reduce uncertainty by providing a structure to every day life. It is the overall complex of institutions, both formal and informal, that shapes and determines the cost of transacting in the economy. North concludes that it is the institutional framework that is the “critical key to the relative success of economies”. He argues that economic welfare does not depend primarily on allocative efficiency, the traditional comparative static approach of neoclassical economics. Rather, economic welfare is determined by what he calls “adaptive efficiency”, the way an economy evolves through time. With respect to adaptive efficiency, the key role is played by the institutional structure, particularly so far as it encourages experiment and innovation. He concludes that institutions are in fact the “underlying determinative of the long run performance of economies”. [5]

North emphasises the significant role of historical continuity when he says:

“Institutions provide the basic structure by which human beings throughout history have created order and attempted to reduce uncertainty in exchange. Together with the technology employed they determine transaction and transformation costs and hence the profitability and feasibility of engaging in economic activity. They connect the past with the present and the future, so that history is a largely incremental story of institutional evolution in which the historical performance of economies can only be understood as part of a sequential story.” [6]

These are important insights, not always recognised in the public debate about the legal system. In an address earlier this year, Chief Justice Gleeson expressed the opinion that the economic significance of the administration of justice is generally undervalued. His Honour added:

“Economic rationalism should be comprehensively rational. If proper attention were given to the economic importance of the institutional framework within which commerce

and industry function, then courts throughout Australia might compete for government funding on better terms." [7]

Suspicion of all governmental expenditure is a characteristic of market ideology. That suspicion has been applied to the administration of justice in budgetary decision-making processes. To the extent that such suspicion is a primary input to decisions about allocation of resources, then the fundamental functions performed by the legal system may be compromised. Taken too far, it will threaten the very market system in the name of which the process is instituted.

The Courts as a 'Service'

There is a perspective, common amongst those influential in determining the allocation of governmental resources, which identifies citizens as consumers and treats governmental institutions as providers of services. A good example of this perspective is found in the creation of the Federal Magistrates Court. It is a Court created under Chapter III of the Constitution. However, by specific statutory provision, permission is given to all to refer to the Court as the "Federal Magistrates Service". This is not a concept found in Chapter III.

In the budget allocation process the major pressure on the courts, like other parts of the public sector, is to increase throughput without increased resources. No doubt that can be achieved to some extent without compromising the performance of the function by qualitative, and not merely quantitative, standards. There are, however, limits which are difficult to define.

I am reminded, in this respect, of the micro-economic reformer who noted that a Mozart string quartet takes as long to perform in 2000 as it did in 1800. In short, in 200 years there has been no productivity improvement whatsoever. Plainly this can only be the result of a collusive arrangement amongst professional musicians. The matter needs to be investigated by the ACCC.

Some things take time, justice is one of them.

There are two fundamental errors in this approach to the administration of justice.

First, litigants are not consumers. Human life cannot be characterised merely as a series of consumer choices. For many litigation is not a choice. That includes plaintiffs. They do not choose to go to court in the same way as someone chooses between brands of toothpaste. Litigants have rights. They are there to assert their rights, not to exercise some form of consumer choice. In the criminal justice process, the community, represented by the Crown, asserts rights by way of protecting itself. Litigants are, and should be, treated in the courts as citizens not consumers.

The second fundamental defect in this approach with respect to the legal system is that the courts do not deliver a "service". The courts administer justice in accordance with law. They no more deliver a "service" in the form of judgments, than the Parliament delivers a "service" in the form of statutes.

A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who was right and who was wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the resolution of private disputes. They constitute, collectively, a core function of government.

I do not doubt that there are important areas of government activity in which market forces have been introduced with substantial benefits to the community as a whole. Not all areas of government are capable of being moulded by analogy with the operation of a free market. The administration of justice is not an area in which such an analogy has much that is useful to contribute.

No-one advocates that commercial corporations should conduct their affairs in public, nor that they should publish reasons for their decisions, or observe any of the other principles of open justice. Nor should the operations of commercial corporations be seen as having any particular relevance for the administration of justice.

One characteristic of our administration of justice is its inefficiency when compared with some other systems of decision-making.

There is no doubt that a much greater volume of cases could be handled by a specific number of

judges if they could sit in camera, dispense with the presumption of innocence, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, act on the basis that no-one had any rights and not have to publish reasons for their decisions. Even greater "efficiency" would be quickly apparent if judges had made up their minds before the cases began. There are places where such a mode of decision making has been, and indeed is being, followed. We do not regard them as role models.

Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision-making in the law, in order to protect rights and freedoms. We have deliberately chosen inefficient ways of governmental decision-making in order to ensure that governments act with the consent of the governed.

The values that are served by our system of justice and by our parliamentary institutions should not be regarded as subordinate to, let alone some kind of manifestation of, the allegedly superior values of a market system.

History and Legitimacy

I have on a number of occasions referred to the great significance of historical continuity in our governmental and legal institutions. The acceptance of the legitimacy of those institutions - based to a significant extent on their longevity - is one of this nation's principal assets. It represents a deeply embedded form of social capital without which a market economy would be difficult, and perhaps impossible, to maintain. The more simplistic manifestations of market ideology - using the terminology of rationality but often displaying merely faith - may well threaten that social capital.

An approach which gives primacy to a system of exchange operates for the instant of the exchange. The tradition of neo-classic economics, unlike the new institutional economics, does not give proper value to history. As I said on the occasion of my swearing-in as Chief Justice, markets do not value tradition, a market wakes up every morning with a blank mind, like Noddy.

In some respects my emphasis on the significance of historical continuity represents a conservative position. I do believe that this continuity is at the heart of the legitimacy of our legal system. The market ideology to which I have been referring represents a radical anti-traditional force. The application of principles derived from that ideology to the legal system is capable of undermining the legitimacy of the system. That legitimacy depends, in large measure, on the perceived delivery of justice, understood as a system by which fair outcomes are arrived at by fair processes. I do not intend to suggest that considerations of efficiency based on the salience of self interest, are not important. However, their application must be tempered by an acknowledgment that there are other values to be served.

Other, also perhaps conservative, recent commentary has come to similar conclusions. In a recent article Rabbi Jonathon Sacks, the Chief Rabbi of the British Commonwealth, argued that the kind of society that gives rise to and is able to sustain a market economy tends to be a society with a strong respect for certain kinds of tradition. He was concerned with religion, but his analysis applies to our mechanisms of governance. Rabbi Sacks expressed concern that traditions were being undermined by the power of the market. He identified the recent global triumph of the market as perhaps the market economy's own worst enemy. He said:

"When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our work is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.

That, not the return of socialism is the danger that advanced economies now face. And in these times, when markets seem to hold out the promise of uninterrupted growth in our satisfaction of desires, the voice of our great religious traditions needs to be heard, warning us of the gods that devour their own children, and of the temples that stand today as relics of civilisations which once seemed invincible. ...

The market, in my view, has already gone too far: not indeed as an economic system, but as a cast of thought governing relationships and the image we have of ourselves ... The idea that human happiness can be exhaustively accounted for in terms of things we

can buy, exchange and replace is one of the great corrosive acids that eat away the foundations on which society rests; and by the time we have discovered this, it is already too late.

The market does not survive by market forces alone. It depends on respect for institutions, which are themselves expressions of our reverence for the human individual as the image and likeness of God." [8]

Neville Wran will correct me if I am wrong, but that may well be the first time that God has been invoked in a Lionel Murphy Memorial Lecture. Shorn of that reference, I do not think there is anything in Rabbi Sacks' remarks with which Lionel would have disagreed.

Law and Economics

Market ideology based on neo-classical economics makes assumptions about individual behaviour - particularly the overwhelming centrality of self-interest as a motive of such behaviour. This intellectual toolkit has progressively been applied to other areas of social science. First, to the political sciences in the form of what became known as Public Choice theory. Then it was applied to the law in what has become known as the "Law and Economics" school. Although not dominant in Australian schools of jurisprudence, in the United States it has emerged over the last few decades as the most significant new movement in the teaching of law. It is present in all courses of jurisprudence and dominant in many. There are a number of specialist journals and the literature is now huge.

I have always regarded myself as someone sensitive to economic issues, not least because I have economic qualifications from university. It is, I believe, important for judges to understand the economic implications of the decisions they take. Plainly there are significant areas in which economic analysis is of great significance, if not determinative. I have in mind, for example, the law of competition. The claims of the law and economics school go much beyond such matters. It purports to apply a market ideology to virtually any aspect of the law, to all legal institutions and any participant in the legal process.

Although I cannot claim familiarity with the full range of law and economics literature, such occasions as I have had to refer to it, have left me with an unrequited thirst for guidance. Generally I have found the literature to consist of something like 90 percent political ideology and 10 percent jurisprudence. I have also found that the conclusions appear to be an ineluctable inference from the assumptions made about human behaviour, rather than a result of analysis. These qualifications apply to both aspects of "law and economics": positive law and economics, which purports to describe how the law works and how legal actors behave, and normative law and economics, which prescribes what the law ought to be.

There are economists who question many of the fundamental assumptions of neo-classical economics on which the mainstream of law and economics is based. Of particular significance is what has been called 'experimental' or 'behavioural economics' which identifies divergences from neo-classical assumptions about human behaviour that occur in systematic ways. People often act on the basis of motives other than self interest, understood in a narrow sense. They act, in the words of Amartya Sen, the Nobel Prize winning economist, as "rational fools" [9]. In a legal process where people act on the basis that they have certain rights, narrow self-interest is not an explanation of probable behaviour. I give one example.

Behavioural economists have devised an experiment known as the "ultimatum game" [10]. In the ultimatum game one person is given a sum of money and is instructed to offer it to the second player. If the second player accepts the amount, then he or she can keep what is offered and the first player gets to keep the rest. If the second player rejects the offer neither player gets anything. No bargaining is allowed.

On the basis of traditional assumptions of rational behaviour and pursuit of self interest, a neoclassical economist would predict that the first player will offer a minimum amount and the second player will accept it. This is not what happens. Offers usually average between 30 and 40 percent. Offers less than 20 percent are usually rejected. The average minimum amount that respondents say they will accept is between 20 and 30 percent.

Behaviour of this character is based on considerations of perceived fairness. An offeree feels mistreated in a contemptuous way by a minimal offer. The offeree would rather get nothing than be treated in this unfair way. Offerors expect and understand that this will happen. They make offers

likely to be perceived to be fair.

Such considerations of fairness are central to the delivery of justice by the courts. They affect both the substantive rules of law and the procedures by which the law is administered. These are not matters on which neo-classical economics has anything that is useful or interesting to say. Indeed some law and economics analysts proclaim that considerations of fairness are incompatible with their standard of welfare, Pareto optimality [11]. If that be so, then what must be questioned is the relevance of the standard, not the relevance of fairness.

Professional Regulation

Market ideology has also been invoked with respect to the structure and functions of the legal profession. The regulation of the professions, including the legal profession, is now subject, to a substantial degree, to competition policy. This proceeds on the assumption that the primary bond between a professional and her or his client is a commercial one. Hitherto, the primary aspect of the relationship between a professional and his or her client was a personal bond, created in a context of a high degree of personal responsibility.

There can be no doubt that competition operates in the public interest and that many past aspects of professional practice could not be justified as being in the public interest. Too much of professional self regulation was exposed as merely protectionist. Much has been changed in the legal profession. However, the pressures for change continue. In New South Wales, government policy will permit multi-disciplinary practices and corporatisation. To the extent these emerge as a new organisational form for legal practice, new challenges will emerge for the maintenance of professional standards.

As Chief Justice Gleeson has said, with respect to such new forms of practice:

“The professional associations, if they are to preserve the characteristics of professionalism, will need to ensure that the standards of behaviour they seek to impose and enforce will include such matters as not encouraging fruitless or merely tactical litigation, however profitable it may be to the corporate employer, accepting an obligation to undertake a reasonable share of pro bono work, and insisting upon full observance of duties to the court, as well as to clients, in all aspects of the administration of justice. Of course, there are already lawyers whose observance of professional obligations of this kind, is, to say the least, imperfect, but that is a reason for emphasising the obligations, not for relaxing them.” [12]

The traditional approach was eloquently enunciated by Justice Sandra Day O'Connor of the Supreme Court in the United States, when her Honour said:

“One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be.” [13]

In one sense the debate is between two alternative ways of approaching professional organisation. The first is to regard professionalism as a means by which an occupation exercises a degree of control over the market for its services [14]. The other approach is to identify the profession with the maintenance of professional standards of conduct and ethical obligations, irrespective of economic advantage.

The balance between these two approaches has shifted over recent years and the final balance in Australia is not yet clear. In the United States there are many commentators who have lamented the decline of the professions. Others have welcomed what they describe as the substitution of a “Business Paradigm” of organisation of lawyers, for the former “Professional Paradigm” [15]. Whether such a shift occurs in Australia will depend in large measure on the behaviour of lawyers and their professional associations.

I do not mean to suggest that venality is unknown to legal practitioners. It has not, however, in the past, been the central organising principle of the profession. If commercial advantage, rather than a sense of service requiring honesty, fidelity and diligence, becomes clearly dominant, then the shift to a different paradigm for regulation will occur. The comparatively recent emergence of the tyranny of billable hours and the ubiquity of time based charging - a system which rewards the least efficient - has created real difficulties for the maintenance of an ethic of service.

In the Australian context, at the heart of the traditional approach to professionalism is the close relationship between the profession and the Court. Barristers and solicitors were, and are, officers of the Court, admitted by the Court to participate in the administration of justice. By this relationship, legal practitioners assume obligations to the Court which override obligations to a particular client. They also override considerations of self-interest. These include a duty not to mislead the Court, a duty not to commence or pursue baseless proceedings, a duty not to assist any form of improper conduct, a duty to refrain from making allegations of impropriety without cause, a duty to conduct proceedings efficiently and expeditiously. Even Richard Posner - perhaps the foremost advocate of law and economics - acknowledges that competition principles will undermine the performance of such duties to the Court and to third parties [16].

These duties to the court have recently been reinforced by amendments to the Supreme Court Rules and the adoption by the professional associations of new advocacy rules. These new ethical rules - which emerged in part from a dialogue between myself and the two associations - promulgate for the first time many of the duties to the Court as professional obligations. They reinforce longstanding professional rules which are also inconsistent with the pursuit of commercial self-interest by lawyers, including the full range of fiduciary obligations and, particularly, the duty to avoid conflicts of interest.

If the professional paradigm for the organisation of legal practitioners is to survive the pressures of competition policy and the introduction of multi-disciplinary practices and corporatisation, the enforcement of these traditional professional obligations - both ethical duties and duties to the Court - must be, and be seen to be, at the heart of legal practice. For the tradition of professional ethics to simply become some form of sub category of business ethics would not, in my view, constitute progress.

A particular difficulty with the application of a purely market driven approach to the legal profession arises from the specialised knowledge that lawyers acquire about substantive law and about legal procedure. Justice Sandra Day O'Connor, in the same judgment from which I quoted earlier, said:

“Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand their clients bargain for their services in the same arms length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subject to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialised knowledge that these professionals possess.” [17]

I believe that economists refer to such issues as raising a problem of “asymmetric information”: i.e. the consumers of and the providers of services know different things. Economists will instinctively approach a claim for self regulation based on superior knowledge as a form of rent seeking behaviour designed to cheat the consumer. On the other hand, there is a degree of naivety in the assumption that increasing information flow, and other forms of competition, will overcome this basic asymmetry in the real world, as distinct from the world assumed in microeconomics textbooks.

No doubt there are some consumers of legal services who are capable of acquiring the kind of information which would enable them to assess the quality and the need for the type and quantity of legal services they are receiving. These however would only be corporations or large organisations. I am very sceptical that the usual forms of information delivery in a market context can, as a practical matter, perform the function effectively in the case of legal services in general. To some degree case management by the Court can be seen as a form of regulation which compensates for this market failure [18].

More significantly, however, I am concerned that the regulation of professionals on the primary basis of competition policy, will have a self-fulfilling quality. If lawyers are treated as if their conduct is only a

business, then that is what they will become to an even greater degree. The internalised self restraint of professional values will then be lost. The alternative of restraint by a market may not prove as effective.

Competition Between Courts

The debate about the applicability of market ideology to areas of public administration is a continuing one. At least one significant area of the administration of justice has, in part, been privatised. I refer to the emergence of privately owned prisons. Advocates of market ideology assert that this approach can and should be applied in many other areas. Sometimes they do so with a conviction that they are saying something new, radical, and different, propounding something that has never been tried before. In most cases, a century and more ago, things were organised much as they now advocate.

There was a time in the 18th to early 19th century when even the criminal law of England was privatised. The police force and the prosecution service operated primarily on the basis of what was then called "rewards", which would now be called market incentives. A private prosecutor was paid if he achieved a conviction. Forty pounds - a very substantial sum in the 18th century - was the reward for convicting someone of a highway offence. This created a system - of great relief to the limited body of taxpayers - where private individuals went out, caught criminals and prosecuted them. The only thing that mattered was the conviction. Personal rights in the course of investigation, arrest and trial, were decidedly secondary considerations.

In this context emerged Jonathon Wilde. He was the basis of the character Peacham in John Gay's *The Beggar's Opera*. He gave himself the title "Chief Thief Taker of England" and so it proved to be. Jonathon Wilde was, in effect, the Chief of Police and the Director of Public Prosecutions. However, he also became the leading figure in organised crime for the whole of London. His role in the administration of criminal justice merged into his conduct of a protection racket and an organised system for the receiving of stolen goods.

One example of his conduct. He put an advertisement in the press saying "one wallet with name - lost in such and such a street". The street, as everybody in London knew, was the location of a famous brothel. The advertisement indicated that the person who had lost the wallet could claim it and pay a certain amount of money. The implication was that if he didn't do so his name would become public.

Whilst running these sorts of rackets, Jonathon Wilde as a prosecutor used the facilities of the courts to put every other gang in London out of business. For some considerable time this occurred with the acclamation of all right thinking citizens. It was a very effective form of privatisation. Such arrangements between organised crime and the police tend to ensure a quiet life for all concerned. In our own State of New South Wales, there have in the past been people who appreciated the efficiency of such a system.

The significance of competition as a model for the organisation of institutions that serve the public may also attract some attention from micro-economic reformers in the case of the courts. For many centuries the courts of England competed with each other. There were four major courts: the Chancery and the three common law courts, the Court of Common Pleas, the Kings Bench and the Exchequer.

The judges and the court officials kept the fees. This was how they were paid. Offices in the court, such as that of the Master, were of such value that they were openly bought and sold for substantial capital sums. Judges and court officers became very wealthy. In some respects, the model is not wholly without merit.

Each of the courts attracted separate bars. Interest groups developed, each of which had a commercial interest in the work flow to a particular court.

The Court of Common Pleas was supposed to do all matters between individual subjects. The Exchequer was concerned with matters of revenue. Kings Bench did everything involving the King and the King's peace, including all crime and other breaches of the peace, like trespass. It had jurisdiction over anybody in a prison.

Competition between the Courts had major effects on the substantive law. Significant sections of procedural and substantive law were created by judges in order to attract work and so maximise their status and income.

For example, the judges of the Kings Bench had a vested interest in getting litigants into one of his or her Majesty's prisons. The Court did so by creating a fiction. It pretended that a person had committed a trespass, under what was called the Bill of Middlesex. The beauty about this allegation that somebody had committed a trespass was that the Court of Kings Bench refused to allow anyone to deny it. Once in prison, the Court had jurisdiction over any aspect of that person's affairs.

The Exchequer court acted in a similar way. Although it was concerned only with protection of the revenue, it allowed civil actions to be brought before it on the basis that whenever a person was owed money by another, that person was less able to pay taxes. Again the judges who sat, and the barristers who practised, in the Exchequer increased their income.

In Adam Smith's *The Wealth of Nations* there is a section in which he refers to the historical development of causes of action like trespass, as arising from this competition amongst courts. It is clear he regarded it as a good thing [19]. The spur of competition, driven by the judges venality, meant that they created law which would best serve the interests of parties.

Adam Smith accepted the system under which the fees of court should be paid to the court and distributed to judges. He added two qualifications. First they should not be paid immediately but, as an incentive, only when they deliver their judgments. Secondly, because it was desirable to have a judiciary which was not open to corruption, distribution of court fees to judges should occur "in certain known proportions" [20]. As I have said, this system is not without its attractions. Nothing in the recent history of privatisation of government functions should leave us sanguine that the deliberate creation of competition between courts, or between rival forums for dispute resolution, is merely a historical curiosity.

I would assume, without knowing, that the virtues of competition between courts identified by Adam Smith, has been taken up somewhere in the 'law and economics' literature. In the future, it will no doubt be used to justify the overlapping jurisdictions of the State Supreme Courts and the Federal Court.

The history of the English courts in this respect affirms one basic insight. Institutional structures, including the structures of competition, have consequences. It should be recognised that it is not the parties to litigation who choose the court which will hear matters. It is only the plaintiffs who do that. Accordingly, the way for one court to attract business from other courts is to develop the procedural and substantive law in a manner favourable to plaintiffs. There are many who would regard that as a good thing. However, it should be understood that the application of market ideology to create competition between courts would not be neutral in its effects.

Conclusion

I do not mean to suggest that the application of market ideology has not made a significant positive contribution to our welfare. In many areas of public discourse this approach has been implemented with great success. Such success has also occurred in the application to some areas of the law. My intention is simply to indicate that there are areas to which the approach should not be applied.

Some of the analysis put forward has a touch of monomania about it. Legal systems have seen off other bursts of monomania. They have in the past tended to come in the form of religion. Once they came in the form of the divine right of kings. They now come in the form of the divine right of markets.

The claim for universality which is made in the name of the market is not compatible with the pursuit of truth, justice and fairness. These are fundamental values of the legal system.

A diversity of organising principles is as important for the health of our society as biodiversity is for our environment. A monoculture is inherently unstable. There is reason to resist the attempt to determine all aspects of public policy on the assumption that there is a single model of human behaviour that is universally applicable to all areas of discourse.

[1] Schneider "'Economic Rationalism', Economic Rationalists and Economists" *Quadrant*, October 1998 at 48.

[2] Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* Encyclopedia Britannica ed 1952 at p 403.

[3] Olsen *Power and Prosperity* Basics Books 2000 at p196.

[4] *Ibid* at p185.

[5] Douglass C North "*Institutions, Institutional Change and Economic Performance* Cambridge University Press 1990 ppvii, 3-4, 34, 69, 80, 107, 118.

[6] *Ibid* at p118.

[7] The Honourable Murray Gleeson AC "Managing Justice in the Australian Context" Australian Law Reform Commission Conference, Sydney, 19 May 2000 at p2.

[8] Jonathon Sacks "Markets and Morals 2000" 105 *First Things* Aug/Sept 2000 at 23-28 accessible at www.firstthings.com.

[9] Sen "Rational Fools: A Critique of the Behavioural Foundations of Economic Theory" first published in Harris (ed) *Scientific Models and Men* Oxford University Press 1978 reprinted in Jane J Mansbridge (ed) *Beyond Self Interest* University of Chicago Press 1990.

[10] Sunstein *Free Markets and Social Justice* Oxford University Press 1997 at p32; Sunstein (ed) *Behavioural Law and Economics* Cambridge University Press 2000 at pp21, 23.

[11] See, e.g., Kaplow and Shavell "The Conflict between Notions of Fairness and the Pareto Principle" Harvard Law School, Public Law and Legal Theory Working Paper Series working Paper No 2 Fall 1999; c/f Chang "A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle" Uni of Pa Law School, Institute for Law and Economics Working Paper No 272 December 1999. Both accessible at www.papers.ssrn.com.

[12] The Honourable Murray Gleeson AC "The Changing Paradigm". Address to the Women Lawyers Association of New South Wales, 26 October 1999, at pp5-6. See generally his Honour's earlier address "Are the Professions Worth Keeping" Greek-Australian International Legal and Medical Conference, 31 May 1999.

[13] *Shapero v Kentucky Bar Association* (1988) 486 US 466.

[14] See, e.g., Abel "The Decline of Professionalism" (1986) 49 *MLR* 1.

[15] Russell G Pearce "The Professionalism Paradigm Shift: Why Discarding Professional Ideology will Improve the Conduct and Reputation of the Bar" (1995) 70 *NYUL Rev.* 1229. See also Rhode "The Professionalism Problem" (1998) 39 *William & Mary LR* 283.

[16] Posner *Overcoming Law* Harvard U.P. 1995, at p93.

[17] *Shapero v Kentucky Bar Association* *supra*.

[18] See my address "The Qualitative Dimension of Judicial Administration" (1999) 4 *The Judicial Review* 179 at 186-187.

[19] *The Wealth of Nations* *supra* V (i).2 esp pp313-314.

[20] *Ibid* at p313.

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Address at the State Funeral for Charles Nelson Perkins AO

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
THE STATE FUNERAL FOR CHARLES NELSON PERKINS AO
TOWN HALL, SYDNEY, 25 OCTOBER 2000**

We gather here today to mourn the passing and celebrate the life of a great Australian. Charles Perkins was a hero for indigenous Australians. He was a moral force for all Australians. Australia is a better and a fairer place for his life.

My closest association with Charlie was when he served as President, and I as Secretary, of Student Action For Aborigines which, in 1965, conducted the freedom ride through New South Wales rural towns. It was that event which first brought him to the forefront of national attention, a prominence which by force of his character, capacity and achievements, he would never relinquish.

There were numerous occasions on the freedom ride, when Charlie displayed the intelligence, the debating skill, the determination, the passion and the anger which would mark his life.

In Walgett, he engaged in open disputation with the leaders of the RSL Club, a club which refused to permit Aboriginal ex-servicemen - men who had fought for Australia - to become members. In Moree, Charlie led a group of Aboriginal children into the swimming pool from which, by formal resolution of the Council, they had hitherto been excluded. In Kempsey, he himself sought entry to the municipal swimming pool, informing the officer that he was an Aborigine, only to be told that, again by formal Council resolution, no Aborigine could be admitted to the pool.

Nothing, however, dramatised the position, to the general public, better than the bigoted violence to which we were subjected. At Walgett we had made arrangements to stay in the local church hall. At 9.30pm at night the clergyman threw us out, on the basis of the controversy we had caused in the town during the day. We were followed out of town by a convoy of cars, not knowing who the occupants were. A truck sideswiped the bus a number of times and eventually forced us off the road luckily, through the skill of the driver, without serious mishap. Our apprehension was considerable as the other cars came off the road and surrounded the bus. As it turned out, these were the local Aborigines who had come out to protect us. Similarly violent incidents occurred in Moree, when a number of us were assaulted and all of us were subject to abuse.

These were dramatic incidents which had a permanent effect on the nature and intensity of the debate about injustices to Aborigines in this country. One of the most significant of the long term effects was, however, the emergence, for the first time in our history, of an Aborigine in a clear leadership role. There was no doubt at the time that Charlie Perkins was the leader of, and the spokesman for, the entire group of white students. In this, as in so much else, he was a pioneer for his people and a role model of considerable significance.

The contribution Charlie made during this period was to confront Australia with issues which it would have preferred to ignore. Pamphlets and articles we prepared for the freedom ride quoted a particular statement by Martin Luther King in his letter from Birmingham Gaol:

“Non violent direct action seeks to create such a crisis and establish such creative tension, that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatise the issue that it can no longer be ignored.”

This text retained its influence on Charlie. Throughout his life, Charlie sought to dramatise the injustices of his people in a way that could no longer be ignored. He remained a proponent of creative tension throughout his life.

In 1968, I was in Chattanooga Tennessee when Martin Luther King was assassinated in Memphis. I

drove from Chatanooga to Atlanta for his funeral. It was an event of national significance, not unlike today and for similar reasons. Along the way I passed a number of establishments which were flying their flags at half mast, as the President of the United States had requested. However, those flags were not the flag of the United States. They were the flag of the Confederacy.

My first reaction was a sense of irony that a flag under which men had fought for the maintenance of slavery could be lowered in acknowledgment of the greatest champion of the United States civil rights movement. Further thought, however, suggested a different view. To the owners of each such establishment, this was their flag. They lowered it in tribute to a great American. Despite their identification with the traditions of the South, they were acknowledging the extraordinary contribution that Martin Luther King had made to the whole nation. The tragedy of his death had become a unifying factor.

The death of Charlie Perkins has, to some extent, already had a similar effect. There is no shortage of people, with whom Charlie had arguments. Many are in this hall. Today, however, all stand united in recognition of his contribution to the Aboriginal people and to Australia. In doing so we take a further step, as a community, towards the achievement of the goals to which he dedicated his life.

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Admission of Legal Practitioners

SPIGELMAN CJ
SHELLER JA
SIMPSON J

ADMISSION OF LEGAL PRACTITIONERS

SPIGELMAN CJ: The formal part of these proceedings is now complete, but before the Court adjourns I should like to offer a few words of congratulations and of welcome to the newly admitted legal practitioners of this Court.

The first thing I wish to say to you is that you are each individually welcome. You have all arrived here after a long and successful course of study and, in many cases, a lengthy period of practical training. You are entitled to be proud of your achievement, and your family and friends are entitled to be proud of your achievement.

Present with me on the Bench this morning are Mr Justice Sheller to my right, and Justice Simpson to my left. Together we constitute the Court that has, in the due exercise of its jurisdiction, admitted you to practice.

The ceremony in which you have participated is an old one. The first such ceremony occurred on 17 May 1824 within a few hundred yards of where we sit now in the Georgian School located on what is now the site of the David Jones women's store. Since that time this ceremony has been going on in this immediate vicinity for over 176 years. That is a very old tradition that you have just joined.

We Australians like to think of this as a young country. Indeed, the second line of your National Anthem is that "We are young and free". But when it comes to basic mechanisms of governance - the rule of law and Parliamentary democracy - this is an old country. The number of nations that have courts as old as the Supreme Court of New South Wales can be counted on the fingers of one hand. The tradition you have joined is an old one and in all that period has been a profession. That is the first matter about which I wish to add some observations this morning.

Legal practitioners have professional obligations to their client, and also obligations to this Court. Those obligations are what distinguish a profession from a business or a job. There is no doubt that many aspects of the law constitute a business, but it is not *only* a business or a job. One of the most important aspects of the legal system, and one of the bases of its success over the centuries, is that it depends upon the performance of professional obligations by professional people.

In a period of this nation's history, when more and more things are judged merely by economic standards, it is important that some spheres of conduct affirm that there are values in life: the values of justice, truth and fairness are central to the activities of the legal system. That is why that system cannot be assessed only by economic criteria.

Amongst the obligations you have acquired to this Court are: a duty of full disclosure of the relevant law; a duty of candour not to mislead the Court as to any of the facts, or to knowingly permit your client to do so; a duty to refuse to permit the commencement or continuance of any baseless proceeding; a duty to exercise care before making any allegation of any misconduct against any person; a duty not to assist any form of improper conduct; a duty to conduct any proceedings before this Court efficiently and expeditiously.

The performance of some of these duties may, on occasions, conflict with your client's interests or, indeed, his or her enthusiasms. Nevertheless, they are obligations of a professional character that you owe to the Court.

The second matter to which I wish to refer is the criticism that is often made of the law in its practical operation throughout the society, to the effect that it operates unevenly and perhaps unfairly to some

sections of that society. As a general rule people who are popular or powerful, or who enjoy the support of the majority, either do not need or do not have any difficulty in securing the protection of the law. The people who need that protection are the weak, the friendless, the people who are accused of crime or other disgraceful conduct, people who can appeal only to the law to protect and vindicate their rights.

There is in certain sections of the community at the moment a great deal of impatience with the law's insistence upon upholding the rights of unpopular people. History shows that you cannot be selective about granting or upholding rights which people have. In many cases the assertion of a non-popular individual of a legal right will offend a majority in the community. But it is basic to our society's values that, where necessary, the law will insist upon respect for that individual's rights. That is why justice is administered by independent, unelected Judges who do not need to be constantly seeking popularity, or the approval of Governments.

Lawyers, who are part of this system, must be prepared to stand up for individuals and minorities, even at the risk of incurring the resentment and anger of the majority.

The performance of obligations to the Court, the maintenance of professional ethical obligations, and the protection of the rights of the unpopular, does not involve an easy path. As each of you face the challenges and tribulations of dealing with clients and superiors, you should remember the support you can always receive from the broader professional community which you join today.

For many of you this is an important family occasion. Those of you who have recently concluded a long course of study will be celebrating with family and friends your success. Many of you, no doubt, owe a great deal to the support that you have received over the period of your study and training from your relatives and friends. It is always a source of great pleasure to the Judges of this Court to see so many relatives and friends in the court room participating in this important ceremony.

I hope that this is a happy and memorable occasion for you all. On behalf of the Judges of this Court, I congratulate you on your admission and wish you warm welcome to the legal profession of this State.

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Becket and Henry II: The New Archbishop - The Second Address in the Becket Lecture Series

BECKET AND HENRY II: THE NEW ARCHBISHOP THE SECOND ADDRESS IN THE BECKET LECTURE SERIES

BY THE HONOURABLE J J SPIGELMAN AC CHIEF JUSTICE OF NEW SOUTH WALES

TO THE ST THOMAS MORE SOCIETY

SYDNEY 15 AUGUST 2000

Upon his appointment as chancellor, Thomas Becket acquired the institutional loyalties of the office, like a robe, a chain or a seal. He wallowed luxuriantly in the secular role, indulging in a level of conspicuous consumption typical of the acute status anxieties of a self-made man determined to proclaim his success. As one contemporary recorded:

“He never dined without the company of Earls and Barons, whom he had invited. He ordered his hall to be strewn every day with fresh straw and hay in winter and with green branches in summer. His board shone with vessels of gold and silver and abounded with rich dishes and precious liquors, so that whatever objects of consumption, either for eating or drinking, were recommended by their rarity. No price was great enough to deter his agents from purchasing them.”

Becket established a reputation as having the most sumptuous furnishings, the most lavish table and the richest wardrobe. His throngs of guests were served by crowds of servants, with obscenely exotic entertainments like monkeys acting as ornaments and wild wolves hunting their kin. None of this was for his own consumption. A delicacy of stomach prevented him from partaking. This was for show.

Henry himself - secure in his noble birth and having nothing to establish by ostentation - would frequently call unannounced on his Chancellor, proclaiming a perverse pleasure in discovering his latest extravagance.

From time to time, of course, Henry had to show who was in charge. On a number of occasions he is reported to have emphasised his position by riding his horse into Becket's banqueting hall.

Henry acquired the nickname of “Curtmantle” or “Short Cloak”, as he habitually wore only tunic hose and a short riding cape - eschewing the peacock display of sumptuous clothes in which others at court, not least Becket, indulged.

On one occasion the king and the chancellor were riding through London in a severe winter. Henry pointed to a scantily clad old man and in the words of a contemporary chronicler said:

“Do you see that old man? How poor and infirm he his and he is almost naked. Would it not be a great charity to give him a thick warm cloak?”

“It would indeed be a great charity” replied Becket “And you as King ought to keep this matter in your eye.”

“You shall have the credit of doing this great act of charity.”

Henry struggled with Becket, both still mounted, and eventually pulled off his new scarlet and grey cape and gave it to the startled pauper.

Christopher Fry in his play entitled “*Curtmantle*” added some colour:

“He said ‘We'll have no naked men. Christ's Charity, Thomas, let him have your cloak!’

'Give him your's Henry,' Becket said;
'This is *your* deed of grace. Mine's too old and too short,
Said the King. 'It would be no charity to his arse'.

The moral was clear. The parvenu chancellor owed everything to the king, even the cloak on his back. Fry has Henry refer to the incident with a smug sarcasm:

"His dignity is shaken, but thanks to me
There's much joy in heaven over his charity."

As I said in the first of these lectures, Henry had a compulsive, indeed visceral, need to be in control of every situation in which he found himself.

In his youth Becket had acquired a most unclerical passion for hunting and hawking, under the patronage of his father's friend, Richard de L'Aigle, whose honour of the town and castle of Peveseny - specifically mentioned in the 1153 Peace Treaty between King Stephen and Duke Henry as having been granted in succession to Stephen's second son - was the location of Becket's early blooding in the murder of animals. This was the favourite pastime of the Anglo-Norman aristocracy, at least when they were not murdering Frenchmen, Welshmen or each other. The invasion of Ireland, I digress, would come after Becket's martyrdom, when Henry was specifically charged by the pope to tame "the barbarous and uncouth races" of Ireland. Indeed Hadrian IV, pursuant to the right of property over all islands purportedly vested in the papacy by the forged Donation of Constantine, had earlier made a gift of Ireland to Henry II, who became the first of many British invaders. The Holocaust is not the only subject that requires an apology. End of digression.

Henry shared the noble passion for the "sport" of hunting, as had his predecessors in office. Huge swathes of the English countryside had been preserved as Royal Forests - national parks for birds, deer and other royal game. These were the greatest national parks that any nation has ever established. They were protected by some of the most ruthless penalties in the contemporary criminal law. This was not done for the purpose of nature conservation, but so that the king could use the forests for his larder and to kill animals for his pleasure and that of his courtiers. This passion was shared by Becket.

The funds for Becket's extravagant lifestyle were provided from his own income and from his management of the cash flow of the king. Becket did not surrender any of his ecclesiastical sources of wealth. As chancellor he remained an absentee archdeacon of Canterbury - objecting vociferously when Archbishop Theobald tried to reduce his income. He continued to hold the various prebends and churches that he had acquired while on Theobald's staff. To these were added the gifts of grateful nobles - like the Earl of Augy who gave him the prebend of Hastings - and the king's rewards, such as the custody of castles at Eye and Berkhamstead, which brought the services of 80 and 23 knights respectively.

Most significant was his control of the king's revenue. Whenever one of the king's direct tenants died - an earl, or a bishop or an abbot - feudal custom dictated that the king, who in theory had conveyed all the land on that person in return for stipulated services, could manage the property until a successor was appointed. In the interim the king kept the profits. This was a constant source of tension in medieval life because the king had it in his capacity to defer the succession and an interest to do so for as long as possible. By reason of the stricture against the sin of simony - the purchase of ecclesiastical office - ecclesiastic successors found it impossible to pay a capital sum for accelerating their accession to office, in the way that secular barons were able to do.

Becket's control of the king's revenue included the right to spend some of the revenue to pay legitimate expenses he incurred on the King's behalf. However, there was a freedom from regular account which proved dangerous when he fell out with the king. He did not resist the overwhelming temptation to defray his own lavish expenditure from this royal revenue.

The 12th century was not a time of agnosticism. There is no reason to doubt that both Henry and Becket shared the fervent religious belief of the time. They understood that the path to salvation was enhanced by the simplicity of a life of self denial. The life of a monk was the highest ideal of the era and universally accepted as such. The king and the chancellor would both have accepted that the spiritual dimension represented by the church - especially by the monastic life - belonged to a higher order of discourse than the one in which they were absorbed. Self-effacement was not, however, an

advantage in worldly affairs.

All the contemporary biographies - save one which reports a contrary rumour - are unanimous that Becket never succumbed to the temptations of the flesh, notwithstanding numerous invitations by the openly philandering king - the most notorious of whose mistresses was immortalised in poetry as "the Fair Rosemund".

Christopher Fry has Henry say to Becket:

"Your virginity is as crass and extravagant as the rest of your ways of living."

The French playwright, Anouilh, regarded the suggestion of sexual abstinence as so obviously incomprehensible, that he cast a mistress for Becket in his play.

There is no reason to doubt that Becket contained his sexual drive. The supporters of the king, who would be in a position to know and had no reason to be reticent, never accused Becket of lapsing in this regard - at least so far as the records which have been permitted to survive suggest. As William Fitzstephen, the contemporary biographer perhaps most critical of Becket, recorded:

"I've heard from his confessor, Robert the venerable canon of Merton, that from the time of his becoming Chancellor, he never gave way to licentious habits. This was a subject on which the King was continually tempting him night and day; but as a man of prudence, and ordained of God he was ever sober in the flesh and had his loins girded up about him. As a wise man, he was bent on administering the kingdom, and whilst busy in so many matters, both public and private, he rarely yielded to such temptation. For what says the poet ---
'For he that hath no leisure hath no time
To shoot shafts from the bow of strong desire.'"

Given the notorious example of Henry II, it seems clear that Fitzstephen had his tongue firmly planted in his cheek.

It was during the occupancy by Becket of the chancellorship that Henry made one of his most daring strategic moves: a grand coalition with the King of France, Louis VII, the first husband of Henry's own wife Eleanor of Aquitaine. Having divorced Eleanor because of her failure to produce a son and heir - notwithstanding an occasion on which the pope personally prepared their bed chamber - Louis had still only managed another daughter from his second marriage. Henry proposed a formal betrothal for one of Henry's own sons - whom Eleanor continued to produce in an abundance which Louis must have taken personally - and Louis' own new daughter. The fact that the boy was only four and the girl not yet one, would not deter such a marriage merger.

Becket was chosen to lead the embassy to Paris to finalise the deal. William Fitzstephen, who had a vivid eye for detail, has left an extraordinary record of the event:

"He had some 200 horsemen, knights, clerks, stewards, men in waiting, men at arms and squires of noble family, all in ordered ranks. All these, and all their followers, wore bright new festal garments. He himself had 24 suits and many silk cloaks to be left behind as presents and all kinds of coloured clothes, furs, hangings and carpets. Hounds and hawks of every kind and 85 horse chariots and on every horse was a sturdy groom in a new tunic and on every chariot a warden. Two carts carried nothing but beer for the French, who are not familiar with the brew, a healthy drink, clear, dark as wine and finer in flavour. The Chancellor's chapel had a special van, his private room another, his cash a third and his kitchen a fourth. Twelve pack horses with chests of gold and silverplate. His cups, platters, goblets, pitchers, basins, salt cellars, salvers and dishes, money, the sacred vessels of the chapel, the ornaments and books of the altar. Each pack horse had a groom in small turnout, every chariot had a fierce great mastiff on a leash standing in the cart or walking beneath it and every pack horse had a long tail monkey on its back. Then there were about 250 men marching six or ten abreast, singing as they went in the English fashion. At intervals came braces of stag hounds and greyhounds with their attendants, then the men at arms, with the shields and chargers of knights, then other men at arms and falconers carrying hawks on their wrists; after them the stewards, masters and servants of the Chancellor's household, next the knights and

clerks who were riding two by two and last of all came the Chancellor himself surrounded by some of his intimate friends.”

Clearly one of the functions of the embassy was the promotion of English beer exports. Some things change little over the centuries. This was only six years after a series of bad grape harvests had resulted in the then unprecedented, according to a contemporary source, export of beer to France.

The ridiculous waste of Becket's ostentation offended the King of France, who had never lost the taste for austerity from his early training in a monastery, before the death of his elder brother brought him an unwelcome and unexpected succession to the throne. Eleanor had once complained that life with Louis had been like being married to a monk, rather than a man. Eventually, he became known as "Louis the Pious". Louis proclaimed that he alone would provide the complete hospitality for Becket's grotesque retinue and forbade any Frenchmen selling anything to the English party. Becket had to send his servants in disguise into the towns around Paris to acquire provisions and thwart the king's posturing magnanimity. No doubt Louis had squirmed like one of the eels which, Fitzstephen records, the Chancellor acquired for the obscene price of 100 shillings.

Despite this tension about minor matters, the alliance was agreed. There is no doubt about the mutual interest involved. Henry was Louis' most unruly and powerful subject. The lands which the King of France in fact controlled abutted the lands of Henry in each of his capacities as Duke of Normandy, Count of Anjou and Duke of Aquitaine. Border tensions between them was frequent. The possibility of insubordination omnipresent.

There was to be nothing sentimental about the dowry. This was a matter of power - a political merger rather than a marriage.

The basic building block of political power in the era, was the castle. In the four years since Henry had acceded to the throne of England in 1154, he had devoted a considerable proportion of his energy destroying the adulterine castles of his earls, including those of some of his strongest supporters before his accession.

Throughout Europe the medieval aristocracy ran what can only be described as a protection racket. Armed forces centred on a fortified base could ensure that all occupants of the surrounding countryside complied with the wishes of the castellan. Centuries after the last vestiges of the rule of law in Roman civilisation had disappeared from Europe, and at a time when a new system for the rule of law was only then being developed by the Church, the political system was founded on force.

The major castles of the era were formidable, smooth faced, dressed stone towers, built on sites with natural barriers like rivers or cliffs, with layers of internal walls and complex fortifications of drawbridges and gatehouses situated at the sole ground floor entrance, with narrow slits of windows, corner turrets and crenulated battlements. A related group of castles constituted defence in depth and completely controlled an area, harassing any army which ventured within a day's return ride. The garrison within could do whatever it liked to the local farms and villages and expected obedience in return.

When Henry's father Geoffrey, then only the Count of Anjou, forcibly acquired the dukedom of Normandy in pursuit of his wife's claim to the inheritance of William the Conqueror, he had to give up control of the castle at Gisors, the most powerful fortification in an area known as the Vexin, a buffer zone between Normandy and the area controlled by the King of France. Henry, himself, when he succeeded his father as Duke of Normandy had to cede the whole of the Vexin region to the king as the price of his elevation. Henry never liked giving anything up. He always used his strengths to reinforce his position.

Vis a vis the king of France, Henry's strength was the fact that he had produced sons. He sought the return of the Vexin as the dowry. Louis accepted in the knowledge that there was likely to be little practical disadvantage to him for some time. The arrangement was that the three key castles in the Vexin region would be placed into independent hands in the form of the Knights Templar. They would act as custodians during the engagement which, in view of the age of the children, was likely to be a very long one.

Emboldened by his new relationship with Louis, Henry decided to settle one of the few remaining untidy border issues in his empire: his claim as the Duke of Aquitaine to rule the neighbouring province of Toulouse and thus extend his empire across southern France to the Mediterranean.

Becket raised a force of 700 knights from his own resources and commanded them in the field. This was not conduct expected of a cleric. However, what really infuriated his colleagues in the English church, was the imposition of taxes on the church to pay for the Toulouse campaign. In 1159 the tax called scutage - by which the obligation to provide military support in kind was commuted to a money payment - increased dramatically. However, even worse, the king required, for the first time, a gift or *donatum* from the church - a form of tax hitherto imposed only on boroughs, money lenders, sheriffs and Jews. Thousands of marks of silver were extracted from bishops, abbots and abbesses. On one calculation their tax burden had multiplied six fold.

According to Gilbert Foliot, Bishop of London, this was "a sword plunged in the vitals the holy mother church". Jean Anouilh in his play *Becket*, picked up this ringing phrase verbatim, brought it forward in time and had Becket as chancellor reply:

"My Lord and King has given me his seal with the three lions to guard. My mother is England now."

Years later, John of Salisbury, during their joint exile, dwelt on this "improper and unjust extortion" and, whilst refusing to blame Becket alone, was not prepared to excuse him:

"He did not follow the dictates of greed but the dictates of necessity and I judge him to have fully deserved to be punished, especially at the hands of the King, who he was putting before God."

John acknowledged that:

"Becket was on this occasion accessory to heavy, and even iniquitous transactions, and we know of no palliation for his conduct, except the fact that he seems never to have forfeited the friendship of Theobold."

But Theobold had been looked after with a personal exemption from the tax, also extended to his immediate acolytes. This fact was not, it appears from John's letter, known by either the Bishop of London or of Exeter, who both paid the full tax.

The Toulouse campaign ended in frustration. The Count of Toulouse had formed his own marriage alliance against Aquitaine by marrying the king's sister. During the siege of Toulouse, Louis raised the stakes by personally coming to the city and entering the walls. Henry was in a great dilemma. He had fought often enough against Louis' troops but he had never directly attacked the king, his overlord to whom he had sworn loyalty. Becket, impulsively, urged Henry to attack, but Henry would not. He understood better than his advisers what was at stake for Louis. The sons of the Count of Toulouse and of Louis' sister were then the only males in the Capetian line. The future of his dynasty could turn on this alliance. Henry raised the siege.

Henry had another source of strength. This was a time of a schism in the papacy. Two popes were elected by rival factions in the College of Cardinals, taking the names of Victor and Alexander III. Everyone knew that one of the rival claimants was an anti-pope and that the other represented the true line of direct legitimacy that had been conferred on St Peter. The problem was deciding who was which.

The German Emperor favoured Victor. It took some years for Henry to finally commit himself. The majority of French bishops favoured Alexander and, no doubt, it was inconceivable that Henry as duke of Normandy could deal with one pope in that capacity and another pope as King of England. Henry requested advice, first from the English Church, which met in council at London in June 1160, just after the peace treaty had been finalised between Henry and Louis, and then from the Norman Church which met soon after. Both supported Alexander.

Henry was determined to take full advantage of his temporary power over the pope. He bargained his recognition for control of his border region, the Norman Vexin. Louis had promised to cede control of the area on the eventual marriage of his daughter to Henry's heir. Practical control rested with the Knights Templar as custodians, upon the promise to hand them over to Henry when the marriage occurred.

Henry told Alexander's representatives that he would not recognise Alexander unless the Church would turn a blind eye to a marriage of the six year old groom and the three year old bride. Alexander agreed. Notwithstanding Louis' fury over this trick, the Knights Templar handed over the castles in accordance with their undertaking. Henry's practical position had been substantially strengthened. In all these twists and turns Becket had been his most trusted adviser.

When Archbishop Theobald of Canterbury died in April 1161, Henry kept the see vacant for over a year. Becket, in his capacity as chancellor, took over the administration of the secular property of the see and collected the revenues on behalf of the king. Such depredations had been anticipated by Theobald himself who, in a formal will issued just before his death said:

"On behalf of almighty God and under pain of anathema we forbid any officer of our Lord the King to presume to lay rash hands on any property that is dedicated for the sole use of the monks of the Church of Canterbury. Further under threat of the same ban we forbid the alienation of any of the lands belonging to the Archbishop, and prohibit all cutting down and damage to the woods until our successor be appointed, save only for some essential purpose of the church or if the King command it with his own lips. Under the same threat we forbid that the clerks of our bishopric be oppressed by any undue exactions or unjust vexations and we order that all liberties and just customs which they had in the days of William of Happy Memory, my predecessor, continued to be observed."

At the same time, Theobald wrote a last letter to the king:

"I earnestly entreat that you will deign to hear your faithful servant, whose loyalty towards you has never grown cold, now at the hour of his death. To you I commend the Church of Canterbury from whose hand by my ministration you received the governance of the realm. And do you, if it so please you, defend it from the assault of evil men; and make it your study to appoint in succession to myself a shepherd who may seem not unworthy of so great a see, a lover of religion and one who may be deemed acceptable to the Most High by reason of his virtue. In this matter do not seek the things that are yours but the things that are of God."

It is difficult to see this as an endorsement of Becket. Becket, after all, until that point, had been an aide all of his life. His power had been exercised through his influence at court - first Theobald's, then Henry's. This was a derived, not a personal authority. Becket had never known the loneliness, nor the conflicting tensions, of ultimate, direct responsibility. Someone of Theobald's temperament and experience may well have regarded this as an inadequate foundation for the role of archbishop.

Henry, as always, kept everyone in suspense about his intentions for the succession at Canterbury. He took full advantage of the opportunity to advance his own position. He obtained from the pope two documents. The first entitled him to have his son crowned as his successor by any bishop of his own choosing. The second was an order to Roger, Archbishop of York, requiring him to perform the coronation if Henry ever asked him to do so. The traditional role of the Archbishop of Canterbury to perform coronations was compromised to Henry's distinct advantage. A future archbishop would not be able to threaten to refuse to perform this task which was, in a practical sense, the archbishop's most important power over the monarchy. Henry never allowed any opportunity to pass until he had fully maximised the advantages for his own position, particularly his absolute freedom of action.

Nevertheless, the rumours were persistent that Henry intended to promote the appointment of Becket. During this period, whilst Becket was recuperating from an illness at the Church of St Gervais in Rouen, he was visited by an old acquaintance, the prior of the Augustinian monastery at Leicester, who must not have seen him during his entire chancellorship. The prior declaimed:

"What's this? So you go in for capes with sleeves now, just like fowlers when carrying hawks! And you a clerk - unique I know, but plural in your benefices: Archdeacon of Canterbury, dean of Hastings, provost of York, canon here and canon there, custodian of the archbishopric and, as court rumour has it, archbishop to be."

Becket denied any ambition for such an appointment, a statement he often repeated with a "whatever you do don't throw me into the briar patch" quality about it. There is, however, no reason to doubt

Becket's additional observation, which the monk has passed on for posterity:

"For if it should come about that I am promoted, I know the King so well, indeed, inside out, that I would either have to lose his favour or, God forbid! neglect my duty to the Almighty."

According to Herbert of Bosham - later the most intense zealot on Becket's personal staff - when the king finally revealed to Becket that he intended to appoint him, Becket drew the king's attention to his secular dress and said:

"How religious, how saintly, is the man whom you would appoint to that holy see and over so renowned and pious a body of monks. I know of a truth that, should God so dispose it, you would speedily turn your face away from me, and, the love which is now so great between us would be changed into the most bitter hatred. I know indeed that you would make many demands - for already you presume over much in ecclesiastical affairs - which I could never bear with equanimity."

Herbert is not a reliable chronicler. It is not conceivable that Henry would have let so obvious a threat lie. It is probable that what had passed between the king and the chancellor was a general reference to the inevitability of a divergence of institutional interests and the effect that that must have on their hitherto excellent personal relationship. It is most unlikely that Becket ever said anything like "for already you presume overmuch in ecclesiastical affairs". That observation has all the hallmarks of ex-post hagiography.

Nevertheless, it appears that Becket knew from the outset that conflict of a substantive character was inevitable. John of Salisbury confirms Becket's opinion in the following terms:

"He rightly drew the conclusion that, if he accepted the post offered to him, he would either lose the royal favour of God or of the King. For he could not cleave to God and obey the royal will, or give precedence to the laws of the saints without making an enemy of the King."

Another contemporary observer, Roger of Pontigny similarly records:

"Thomas knew full well that it was impossible to serve two masters, whose wills were so much at variance and that whoever was made Archbishop of Canterbury would be sure soon to offend either God or the King."

Neither John nor Roger suggested Becket told Henry anything like this. Herbert of Bosham - who admits he was not present for the discussion he recounts - was no doubt anxious to protect his martyred master from any charge of false pretences.

Henry must have fully appreciated the tensions which the conflict of institutional interests would inevitably bring. Nevertheless he appeared to be confident of Becket's ultimate loyalty. He had every reason to be.

The Empress Matilda, Henry's mother, who had given him much useful realpolitik advice in the past - when he listened to her - was opposed to the appointment. She recalled how her first husband, the Holy Roman Emperor, Henry V, had promoted his Chancellor Adalbert - until then his loyal supporter in promoting imperial authority over the church against the papacy - to be Archbishop of Mainz, the most significant in Germany, as Canterbury was in England. Henry V had lived to regret this appointment. Adalbert used his power base as chancellor and archbishop to promote his personal ambitions, embracing the ideology of the reform papacy, including the independence of the church from secular rulers. Eventually Henry V imprisoned him for three years.

Henry II may also have forgotten the miraculous transformation wrought by his grandfather, namesake and model, Henry I, when he appointed his personal chaplain and long-serving intimate at court to the office of Archbishop of York. Like Becket, Thurstan of York was not even a priest but a mere subdeacon at the time. Startling the canons of his new cathedral, Thurstan turned on his benefactor and refused to obey Henry's demands that he profess obedience to the Archbishop of Canterbury. Henry had been outraged at Thurstan's ingratitude. Like his father, William the Conqueror, Henry I found it administratively convenient to have a church organisation which was precisely parallel with his

own territory - just as the Archbishop of Rouen covered the same area as his duchy of Normandy.

Casting aside these precedents, Henry II determined to promote Becket's appointment as Archbishop of Canterbury.

The selection of a new archbishop was, formally, a matter for the monks of the cathedral chapter. This was of considerable political significance. The claims of the reform papacy for the independence of the church from secular influence had been the major political conflict of Christendom for almost a century.

By canon law, no ecclesiastical office could be invested by secular hand. To do so was to taint the sacred nature of the lineal line of descent of legitimate authority from Christ and his Apostles. On the other hand the king had a very real interest in determining the identity of one of his major barons who, in the case of the Archbishop of Canterbury, would hold as much land, with attendant obligations of service upon the king, not least the provision of knights, as any secular baron. According to the Domesday Book, the Archbishop of Canterbury held land of the value of £1500, which put the occupant in the top echelon of barons.

Nevertheless, the church was at pains to ensure that it, and it alone, determined by a process of canonical election who would occupy each office. Only a few years before, on 1 February 1156, Hadrian IV, the only English pope, had promulgated a formal edict which prohibited the consecration of a bishop "who had not been freely elected and without previous nomination by the secular power".

In the case of Becket's selection, Henry made it clear where his preference lay. A delegation to the monks of the cathedral chapter was led by Henry's chief administrator, the co-justiciar Richard de Luci, accompanied by his brother, Walter the Abbot of Battle and three bishops: Hilary of Chichester, Bartholomew of Exeter and Walter of Rochester, Theobold's brother. Richard addressed the packed chapter house:

"The King is most zealous in everything which concerns the things of God and displays the utmost devotion to Holy Church, especially towards this Church of Canterbury, which he recognises in all humility, loyalty and filial affection as his particular mother in the Lord. Wherefore be it known that the King accords you freedom of election, provided however, that you choose a man worthy of such great office and equal to the burden thereof."

This was the barest possible obeisance to the form of "free election" by the cathedral chapter. The reservation by the king of the right to decide who was "worthy", reflects the substance. After some controversy about the fact that Becket was not a monk - and no doubt other unrecorded reservations - the chapter bowed to the inevitable and "elected" Becket, "unanimously" as the record proclaims. In practical terms there could be no question that the king's wish would prevail.

The monks themselves, particularly the senior officeholders of the chapter, had family connections whose property and interests could be subject to depredation by a hostile king. Even more significantly, the chapter itself and its future abbot, the archbishop, had a wide range of interests that could be adversely affected by Royal disapproval. I give only one example concerning a legal dispute in 1127 during the time of Henry I.

I mentioned in the last lecture that there was considerable conflict between Christchurch and the other local monastery, St Augustine's. The town of Sandwich was a significant port and Christchurch claimed a monopoly over the tolls and customs duty on trade through the port. On the other side of the harbour there was some land owned by the abbot of St Augustine's. It was also a convenient place for ships to tie up. St Augustine's had secretly received the tolls and custom of foreign traders. This had led to frequent disputes, including physical conflicts between the agents of the Abbot of St Augustines and agents of the Archbishop of Canterbury. As the formal record of the case recorded:

"Wherefore many disputes and quarrels, without number broke out among them, while the ministers of Christchurch rightfully and consistently tried to retain the ancient custom, [the Abbot's men], with cunning and guile and daring fierceness, tried to strengthen their hold on what they had wrongfully seized."

Henry I ordered that an assembly of local residents should determine where the rights lay. The truth was to be found by "twelve lawful men of Dover and twelve lawful men of the neighbourhood of

Sandwich who are neither the men of the Archbishop nor the men of the Abbot". This early form of jury declared that the port, tolls and maritime customs of Sandwich belonged to the monks of Christchurch.

In this as in many other ways, the freedom, autonomy and prosperity of the cathedral chapter depended upon the exercise of royal justice. The chapter and many of the monks were potentially litigants in the kings' court - no doubt some were so engaged at the very time. In those courts, justice was personal and not infrequently arbitrary. In any such matter Thomas, if he remained as chancellor, could seek revenge.

The next step in the appointment was the acceptance of the nominee by all the social orders. Bishops, abbots, priors and barons from throughout the realm, gathered in the monks' refectory at Westminster Abbey, in the presence of Henry's son and heir, also called Henry, then seven years of age, acting as the king's representative.

Summoned into the refectory, Becket maintained the facade of reluctance, as if all this furious energy occurring at the direction of the king could somehow prove completely futile. He referred, no doubt by a prearrangement hammered out in detailed private negotiations between the king's representatives and those of the Church, to the fact that he was "unredeemed from his own burden", namely the chancellorship. Speaking as the senior bishop on behalf of the English Church, Henry of Winchester addressed the king's son who had been given formal delegated authority by his father with an undertaking that his "decisions" would be ratified:

"The Chancellor, our archbishop elect has now for long enjoyed the highest place in the household of the King your father and in the whole realm, which he has had entirely under his governance and nothing has been done in the kingdom during this time of office save at his command. We demand that he should be handed over to us and God's church free and absolved from all ties and service to the court and from all suits, accusations or other charges and that from this hour and henceforth he may be at liberty and leisure to pursue freely the service of God."

The fact that such a release was thought necessary may indicate the degree of suspicion with which Becket was greeted by significant elements of the church. No doubt with the king's prior knowledge, the young Henry accepted the condition in his name. Decades later five of Becket's biographers referred to the release giving, as is quite usual with recollection of such oral promises, five different versions of its terms.

Becket himself, according to his biographers, muttered some further expressions of humility and reluctance - the veracity of which can be judged by the fact that he must have sworn fealty to Henry for the archbishop's secular property before he left Normandy, such an oath being an absolute precondition to his consecration and there being no suggestion of any visit by Becket to Normandy after the assembly at Westminster, which confirmed his selection as archbishop.

Henry of Winchester, now an elder statesman and a somewhat mellowed power-broker, acknowledged Becket's expression of sorrow for past offences and urged the archbishop elect to let the future atone for the past. Drawing on a pertinent precedent he reminded Thomas of Paul who had been transformed from Saul, a great persecutor of the church into, and I quote Bishop Henry's words, "the greatest prop of her in word and example and glorified her at last in his blood at his death". Many in that conclave would have reason to recall the analogy as prophetic.

On 2 June 1162 Becket was ordained a priest by his first patron, Theobald's brother Walter. The Archbishop of York, Roger of Pont L'Éveque, his contemporary and at different times ally and rival in the Theobald household, claimed by formal seniority the right to consecrate Becket as archbishop. Roger, however - personal feelings no doubt reinforcing the longstanding institutional rivalry between York and Canterbury - refused to make a formal profession of obedience. Becket, slipping naturally into his new institutional role, refused to accept consecration from Roger unless he made such a profession. Accordingly, Henry of Winchester performed the ceremony in Canterbury Cathedral at an early hour on 3 June, the Sunday after Pentecost, which Becket would later nominate as a national festival of the Holy Trinity, already celebrated as such by the monks of his cathedral chapter dedicated to the Trinity, and which was eventually adopted as such by the whole Church.

With the barons and knights thronging in the nave and the choir packed with bishops, abbots and priors and the clergy and common folk packing and surrounding the cathedral, Becket, whom many

had seen only in the most sumptuous of clothes, emerged from the vestry, clad only in the black cassock and white surplice of a priest. He stood before the elite of England, knowing that not one of them expected any spiritual guidance from him.

In accordance with ceremonial tradition the gospels were opened at random and the adventitious text - like a cryptic message from the Delphic oracle - was Christ's curse in Matthew 21:19:

“Let no fruit grow on thee henceforth forever.’ And presently the fig tree withered away.”

None of the later hagiographers were prepared to say that this text contained an omen.

The new priest celebrated his first mass as primate of the English Church.

Becket's institutional metamorphosis was immediate. Without Henry's permission - indeed without his knowledge - Becket discarded the chrysalis of the chancellorship.

Henry had every reason to expect that the two roles could be successfully combined. His grandfather, Henry I, when similarly preoccupied with his claims in France, had made Roger Bishop of Salisbury, his viceroy in England. Throughout Henry I's reign, Roger remained the second most powerful man in England. Louis VII of France had relied on Abbot Suger of St Denis as his closest adviser and, indeed, as regent of France during his absence on crusade. Archbishop Lanfranc of Canterbury had performed a similar function of regency during William I's absences from England.

The requirements of the canon law, that a priest could not hold secular office, had been frequently breached or modified. The papal dispensation - which on one account had already been granted by Pope Alexander III for Becket - had been readily available for Louis VII of France when his chancellor Hugh of Champfleury was appointed Bishop of Soissons in 1159. The precedents in the Holy Roman Empire, on the other side of the papal schism, were just as clear. The Archbishop of Mainz had served as Frederick I's chancellor for Germany and the Archbishop of Cologne was performing similar functions in Italy and, as was notorious throughout Europe, had become the Emperor's most trusted confidante.

Becket who had never had any difficulty being both chancellor and archdeacon, found that he could not accept any such overlapping lines of loyalty as an archbishop.

As Ralph Decito - perhaps the most objective and perceptive contemporary chronicler - put it:

“As he put on those robes, reserved by God's command to the highest of his clergy, he changed not only his apparel but his caste of mind.”

William Fitzstephen - an accurate reporter but no stranger to exaggeration - was more lyrical:

“In his consecration, Thomas was anointed with the visible unction of God's mercy: putting off the secular man, he now put on Jesus Christ ... The glorious Archbishop Thomas, contrary to the expectation of the king and everyone else, so utterly abandoned the world and so suddenly experienced that conversion, which is God's handiwork, that all men marvelled thereat.”

In the intricate web of interlocking loyalties that provided the moral framework of medieval society, it was common for a person to owe loyalties to more than one superior, perhaps holding land from rival lords. Conflict was often resolved by acknowledging one relationship as dominant, so that the feudal oath of fealty to one's “liege lord” would take priority in case of dissension. Becket plainly intended to give the Church, as an institution, priority in this sense, over his loyalty to the monarchy as an institution and, therefore, over any personal loyalty to the monarch. It was quite clear that he regarded this, from the outset, as a matter of a duty.

None of the chroniclers record any reasons advanced by Becket for resigning as chancellor. No doubt there were numerous pros and cons which he considered in his own mind, before taking the final decision, on balance. He knew Henry well enough to realise that the king would make demands on him, in relation to the administration of the church, which would be adverse to the interests of the church. Resistance to Henry's will was not often possible and never welcome. Becket may well have thought that the inevitable confrontation would be even more bitter, precisely because of the loyalty

which the king would feel to be his due by reason of Becket's occupation of the office of chancellor. Henry may not be able to make demands, or at least not make demands in the same way, in the case of an arms length archbishop.

Perhaps, paradoxically, Becket understood that he could not truly perform the office of chancellor with the singleminded loyalty which he believed - as his entire conduct of that role attested - that the position demanded and deserved. As a matter of duty, he knew he would give priority to the interests of the church.

His resignation - which came as much of a surprise to his supporters as his detractors - was the clearest possible manifestation of his devotion to his new duties and his determination to meet the expectations of his new constituency. Becket had a very strong sense of duty. It was now his duty to show leadership by example, based on a recognition of the worth and validity of the beliefs and practices of the community which he now led.

Becket gathered around him a personal staff on the Theobald model. They spent hours listening to scripture readings during the household dinners and thereafter disputing religious issues in the archbishop's presence, disputes which were heavily weighted to the new canon law and to theology. His staff did not include ascetic monks who gave greater weight to personal devotion than to practical matters. One visiting monk to the archbishop's table permitted himself a smile at dinner and immediately felt the lash of the archbishop's tongue:

"If I mistake not brother there is more greediness in your eating of your beans than in my eating of this pheasant."

One is reminded of the rebuke by the ascetic Cistercian abbot during Becket's later exile, who dismissed Becket's fear of martyrdom with the observation:

"You eat and drink too much to be made a martyr."

The commentators are unanimous about the transformation in Becket's demeanour and personal conduct after his appointment. However, these biographies were all written after the martyrdom. It is not always possible to identify the hagiography. Most likely to be true is William Fitzstephen's version when he recounts a new "gravity" in Becket's speech and makes the observation that the new priest "handled the holy sacraments with utmost reverence", noting his "diligence" in prayer and in the study of scriptures. William Fitzstephen said: "He was at pains to fulfil the functions of a good archbishop."

It is much more difficult to accept the later assertions of strict personal piety including mortification of the flesh by the wearing of a hairshirt, regular flagellation and the intensity of his private prayer frequently leading to tears. All of these recollections, which post date the martyrdom, share a common characteristic. The acts were all performed in secret.

In January 1163, Henry returned to England. Becket greeted him at Southampton accompanied by the young Prince Henry, whom the king had placed in Becket's household for training. The warmth of the reunion was obvious to all, though some contemporary chroniclers claimed Henry dissembled a gathering resentment.

For the next few days, king and archbishop displayed all their former intimacy: riding together and engaging in private conversation of which there is no record. Henry had kept the position of chancellor vacant - probably hoping that Becket would change his mind. He allowed its functions to be performed in an acting capacity by Geoffrey Ridel, Becket's own protégé and former deputy. Until this moment, Becket had continued to hold the fiefs, honours and benefices which he had accumulated over the years. He even continued to hold the lucrative archdeaconry of Canterbury, to which he had originally been appointed by, Theobald. Apparently at Henry's insistence, Becket now resigned as archdeacon and appointed Ridel to the office. Significantly, this may have been a function of Henry's impish sense of humour. This transfer emphasised the fact that the archbishop, who now proclaimed the impossibility of serving two masters, had not always been punctilious in this regard. On Henry's part, the incident revealed a degree of posturing that could easily descend into a determination to humiliate.

A number of tensions accumulated during the first year of Becket's occupancy of the archbishop's office. His strength lay, of course, in his role in the European order of Christendom. I have addressed the significance of this European dimension in a lecture to the Selden Society in May of this year. The

role of the church was in significant measure governmental. The church levied taxes called tithes. Baptism was a kind of citizenship. Western Christendom had performed the ultimate act of a supernatural authority: it went to war as a single polity in the crusades. The church, under the monarchical authority of the papacy, exercised legislative, executive and judicial authority over, broadly, the same territory as the European Union now exercises similar authority.

The year after his appointment, Becket was summoned to a meeting of the European Parliament, a Council of the Church, to be held at Tours. From the time of his landing at Gravelines, where he was welcomed by the Count of Flanders, Becket proceeded by triumphal procession via Normandy and Maine to Tours, in the heart of Henry's ancestral territory.

At the meeting of the Council, which opened on 19 May 1163, Becket found himself in the presence of a magnificent assembly: 17 cardinals, 24 bishops and 414 abbots.

The pope presiding at this Council was a cautious Siennese intellectual and canon lawyer, Roland Bandinelli, who had assumed the name Alexander III. He found himself driven into exile to France, with the Holy Roman Emperor Frederick Barbarosa in control of Germany and much of Northern Italy, supporting the schismatic pope, Victor.

As a cardinal and chancellor to his predecessor Pope Hadrian IV, Alexander had publicly defied Frederick at an Imperial Diet at Besançon. He delivered a letter from Hadrian in which reference was made, ambiguously, to the emperor holding his title from the pope, in a feudal sense. Amidst the uproar provoked by this assertion in the Imperial Court, Alexander had stood his ground and proclaimed defiantly:

"From whom then does he have the empire if not from our Lord the Pope".

Frederick, like King Henry II, thought that he held his title directly from God.

Alexander had been driven into exile by the combined force of the Emperor and the always turbulent factions within the city of Rome. He convened the Council at Tours to re-assert the central role of the papacy and proclaim the unity of the church.

At the Council, the Archbishop of York, Roger of Pont L'Éveque pressed a claim for precedence over the Archbishop of Canterbury. According to one monk: "he made everything resound with a great whirl of words".

Roger, who was Becket's predecessor as Archdeacon of Canterbury, had taken the worldly ways of that office, to York. One, somewhat jaundiced contemporary, observed:

"Roger was a learned and eloquent man, and in worldly affairs, prudent almost to singularity. In his episcopal office, that is in the cure of souls, he was less conscientious ..."

Adding for good measure:

"His design was rather to shear than to feed the sheep of God."

Roger had, for some years, been challenging Canterbury's claim of primacy over York. He relied on the original appointment of St Augustine himself by Pope Gregory the Great, which had indicated that the primacy should follow seniority of appointment. Indeed in January 1161, Alexander had confirmed this position in a letter to Roger, when he said:

"We forbid by apostolic authority that the Archbishop of Canterbury should demand from York, or that York should offer to Canterbury, any sort of profession. Nor in any way should York be subject to the authority of Canterbury. But according to the Constitution of St Gregory, this honorific distinction should apply perpetually: whoever has been consecrated first, takes precedence."

The conflict between York and Canterbury had caused divisions in the English Church for almost a century.

When Alexander's emissaries had first visited England to issue invitations to the Council, they communicated the pope's regrets that the king supported Canterbury in its dispute with York. Alexander suggested that the issue should be resolved by the Council. Henry believed that this was a matter for England and, no doubt, for him. He insisted on a condition for permitting his clergy to attend the Council that "no new custom would be brought into the kingdom, nor its dignity in any way reduced by any action of the Council."

A key component of the papal reform movement was the expansion of the direct administrative and judicial oversight by the centralised papacy. Henry's demand was inconsistent with this programme in two ways. First, it asserted a non-canonical lay interference in ecclesiastical affairs. Secondly, the intervention of regional overlords circumscribed the direct administrative and judicial authority of the papacy.

At the height of the schism, Alexander was in no position to resist Henry's demand, which may well have been sought by Becket. He accepted the condition imposed by the king.

Becket had attended a meeting of the European Parliament before. A general Council of the Church had met in Rheims in March 1148. King Stephen had forbidden the then new Archbishop of Canterbury, Theobald, from attending. Stephen had taken that step in retaliation against Pope Eugenius III, who had appointed an Archbishop of York without consultation with the king. This was the subject of my address to the Selden Society.

Theobald decided to defy his king. He set sail on a tiny fishing boat to cross the channel in stormy conditions. Theobald described his voyage as "more a swim than a sail". He was accompanied by a single aide, Thomas Becket. This was no doubt a formative experience for the young cleric.

As I indicated in my address to the Selden Society, one of the issues that Theobald raised at Rheims was the question of the primacy of Canterbury over York. It was not an auspicious time to raise this issue. On the agenda of the Council were a series of identical legal appeals.

The Bishop of Paris claimed jurisdiction over the Abbot of St Germain, the Bishop of Autun claimed jurisdiction over Vezelay, the Archbishop of Rouen over Fécamp, the Archbishop of Sens over Ferriers and St Colombe, the Archbishop of Lyons asserted primacy and right of obedience from the Archbishops of Rouen and Sens, as well as Tours, the Archbishop of Vienne claimed the subjection of Bourges, the Archbishop of Bourges claimed the subjection of both the Archbishop of Norbonne and the Bishop of Le Pui. The greatest merriment was occasioned by the claims of Alberic, Archbishop of Trèves, to the subjection of Rheims itself. John of Salisbury reported that the gathering thought him mad. A few months later, at the succeeding conference of Italian bishops, Eugenius would have to deal with the mutual claims of precedence over each other between the Archbishops of Ravenna and Milan, the claims of Milan over Genoa, the claims of Ravenna over Piacenza and other such jurisdictional spats. All these claims were rejected or deferred.

Becket could not have failed to notice the contrast between his furtive departure for Rheims in 1148 as Theobald's sole aide, with his new status in 1163, as a prince of the church in his won right, at Tours.

Alexander went out of his way to court Becket - sending most of his attendant cardinals to greet him outside the city walls, rising to meet him almost as an equal, in the ante-chamber of the papal rooms. He sat him on his right hand during the Council. Roger of Pont L'Éveque, was pointedly seated on Alexander's left. Alexander, always the diplomat, indicated that the cathedral at Tours was "short and narrow" and accordingly it was not such as to permit an organised arrangement of the participants. He emphasised that no precedent would be set by the seating pattern and, in accordance with condition imposed by Henry - possibly at Becket's behest - that no "custom" of England would be upset.

Becket did, however, have a corporate project at Tours, a project that indicated the extent to which he identified with his new office. He sought the canonisation of Anselm, one of his predecessors as archbishop.

This proposal could well have been regarded by Henry as a provocation. In 1163, Anselm was probably best remembered as the archbishop who had openly defied both William Rufus and Henry I, sons of and successive successors of, William the Conqueror, the present king's great uncle and grandfather. The practices of Henry I were - as was well known to everyone, not least Becket - Henry II's universal reference point and abiding model.

St Anselm was probably the greatest theologian between St Augustine of Hippo and St Thomas Aquinas. Accepted today as the founder of scholasticism, the dominant philosophical school of the era, he is perhaps best known as the originator of the ontological argument for the existence of God: the very fact that we can conceive of so perfect a concept, proves that God must exist. This reasoning besotted great philosophers like Hegel, although Schopenhauer dismissed it as a "charming joke". The central premise of the argument - if I can think of it, it must exist - is reasoning for which Anselm should, long since, have been adopted as the patron saint of science fiction writers.

Anselm's personal preoccupation was that of a monk. This was manifest in the deepest personal conviction that his own salvation lay in the monastic life. He always exhibited disdain for personal ambition. He left his native Italy attracted by the ideological fervour that focused on the abbey at Bec under the inspired leadership of the Italian canon lawyer Lanfranc, who himself had sought spiritual fulfilment in this isolated monastery in Normandy, and whom Anselm would eventually succeed, both as prior of the abbey and as Archbishop of Canterbury. Reluctantly accepting successive administrative posts as prior, abbot and archbishop, Anselm adopted as the overriding goal of ecclesiastic leadership, the precept of Gregory the Great - founder of the English church - "the art of arts is the guidance of souls".

From the time that Gregory had sent Augustine on a special mission to England in 597, the relationship between the English church and the papacy had been direct and close. On St Peter's day each year, the English church collected what was known as "Peter's pence" or the "Rome penny". No other kingdom paid such a tax to the papacy.

It is, perhaps, the most revealing manifestation of the central significance of institutional loyalty for the temper of the times that St Anselm, of all people, accepted the preservation of the institutional interests of the archbishopric of Canterbury as an overriding obligation. This was a man who was preoccupied with a life of study and of teaching and of spiritual contemplation. His primary focus in life was the rigid observance of religious and liturgical routine. His leadership consisted of endless rounds of ordinations, consecrations, visitations, of discipline and of judgment, the inspection of churches, abbeys, priories and whenever possible, writing the great works that have stood the test of philosophical time. Nevertheless, Anselm devoted an enormous amount of personal energy to protecting the inherited rights of his see.

His determination in this respect was clear from the outset. When William Rufus, son and immediate successor of the Conqueror, offered Anselm appointment to Canterbury, Anselm demanded as a condition of acceptance that he would be invested with all of the Canterbury land exactly as it had been held by Lanfranc. William agreed, with some minor exceptions of enfeoffments which he had made during the three years he deliberately kept the office vacant and collected the profits thereof. They were minor matters as far as the property of the Archbishop of Canterbury was concerned. Anselm refused to accept appointment if there was any exception and the king had to back down.

Throughout his life Anselm, manifested a complete inability to compromise on any matter which he regarded as one of principle. He regarded the property of the see as in this category. A good example is the case of the manor Church of St Marys, which stood on the peak of Harrow Hill - overlooking the flat clay country of Middlesex, with panoramic views backed to the walled city of London. It still exists with some of the original structure, next to Harrow School.

Like most local churches at the time, St Marys remained the property of the land owner. Throughout Christendom, the Roman Catholic Church had struggled to ensure that consecration was the function of the church's own administrative representative, i.e. the bishop of the particular diocese. The manor of Harrow, together with its new church, was on the property of the Archbishop of Canterbury held by him in his capacity as a feudal lord. However, it lay within the diocese of London. The Bishop of London made a claim to be entitled to dedicate the church. Within the interstices of every such right, there lay the prospect of a fee. Anselm rejected the bishop's request. On 4 January 1094 he dedicated the church himself.

Anselm had twice chosen exile, rather than accept the assertion by the king of England of an alleged customary right to interfere with the free conduct by the church of its affairs. The first disputes with William Rufus were about land. In general, Anselm displayed a great respect for royal authority, but he would not yield on any aspect of the property of the see, and when this led to conflict with the king, Anselm chose exile.

In his absence, Henry I succeeded his brother William Rufus, after a fortuitous hunting accident which, by what is unlikely to have been a coincidence, Henry was in a position to immediately exploit at the

expense of his elder brother in Normandy. Henry had, to the consternation of all concerned with the rights of Canterbury, been crowned as king by the Archbishop of York.

Anselm returned to England, but within three years was in exile again. During his first exile, he had personally attended a Council of the Church at which Urban II reaffirmed the prohibition against lay investiture of ecclesiastical office. Anselm returned with an unshakeable opposition to any form of lay investiture by reason of his duty of obedience to the pope. He had no sense of inconsistency - Anselm had originally been invested by William Rufus with crozier and ring. Consistency, of course, is a virtue only for mediocrities.

No-one at the time knew that they were living during the period of the "investiture dispute", but it was the central political conflict of the era. The claim of the church to *libertas ecclesiae* was the ideological and symbolical centrepiece of the papal program that created a united Europe. The clergy, in its organisational structure of the church, provided both the intellectual and the administrative infrastructure of a European order.

The program of Gregory VII was based on the independence of the church from all lay interference in ecclesiastical appointments, in the exercise by the church of its religious functions and, much more controversially, in the administration by the church of its temporal rights of property. To this had been added the claim for the immunity of clerics from secular jurisdiction. This corporate independence of the ecclesiastical organisation and the clerical caste was to become of central significance in the relationship between Becket and Henry II. That, however, was only the most dramatic example of an institutional conflict that pervaded Europe for centuries.

Anselm had approached this conflict as one on which he could not compromise. Eventually, the papacy and the monarchy negotiated a settlement which was reflected in the Concordat of Bec in 1107, a compromise which proved a model for the rest of Europe. This permitted bishops to do formal feudal homage for their worldly possessions, so long as the act of homage took place prior to their consecration as bishops or abbots. In exchange, Henry I had given up any claim on the part of the monarchy to confer the insignia of ecclesiastical office.

Anselm regarded it as his duty to ensure that nothing which had once been dedicated to God or the saints should be withdrawn or diminished. To do so was a sin. This was a matter of religious observance. Like every abbot or bishop, he believed that in some ways he became the *persona* of the saints to whom his church was dedicated. In a sense he stood in their place. He was accountable to them as a trustee and custodian. This obligation was assumed by him with his consecration oath of fidelity to the church of Canterbury and its saints.

This role as trustee or custodian had behind it the driving force of the corporate identity of the monastic community of the cathedral. The intensity of an all encompassing communal life created a complete identification with the monastery and elevated corporate continuity to the standing of a dominant virtue. As Sir Richard Southern, Anselm's most recent biographer has said, in pursuit of the institutional prerogatives of his see, no compromise was possible. He "knew no moderation, moderation was sin". To surrender would be to endanger his soul.

During his period of office, Anselm asserted, for the first time an authority over the Welsh church, his realm advancing with the Norman invasion. He asserted a permanent legatine authority in an ex-officio capacity and opposed the various papal legates sent to England as inconsistent with his function. He also asserted ecclesiastical jurisdiction over the whole British Isles and, in particular, primacy over the only other archbishop in the area, the Archbishop of York.

No messenger of his went to Rome in the early years of Henry I's reign without a plea for papal recognition of Canterbury's primacy. Lanfranc had forced the then Archbishop of York to acknowledge the primacy, but that did not bind his successors. Only the pope could ensure that that occurred.

When a new Archbishop of York hesitated before making the profession of obedience, Anselm wrote to the pope that without such submission:

"... The Church of England will be torn asunder and brought to desolation ... and the vigour of apostolic discipline will in no small measure be weakened. As for myself, I could on no account remain in England, for I neither ought to, nor can, suffer the primacy of our church to be destroyed in my life time."

His last recorded act, just before his death in 1109, was a letter threatening ex-communication to the new Archbishop of York, if he assumed office without a profession of obedience to Canterbury. The fervour of his identification is manifest in this correspondence:

“Thomas, in the sight of God, I Anselm, Archbishop of Canterbury and Primate of all Britain, speak to you and speaking in the name of God himself I now forbid you to assume the priestly office which you undertook at my bidding in my diocese as my sovereign and I charge you not to presume to intermeddle in any pastoral care until you abandon the revolt which you have started against the Church of Canterbury and make the profession of submission to that church which your predecessors ... made following the old established custom ... on you yourself too, Thomas, under penalty of the ... curse in God’s name I lay this prohibition, that you are never to accept consecration to the episcopate of York without first making the profession which your predecessors ... made to the Church of Canterbury.”

Becket’s pursuit of the canonisation of Anselm was revealing in a number of respects. No-one, including Pope Alexander, would have any doubt that such an act could be regarded as provocative by Henry II. As I have said Henry I, with whom Anselm was in almost continual conflict over the prerogatives of the church, was well known to be Henry II’s universal reference point and abiding model. No doubt for that reason, notwithstanding Becket’s representations at the Council of Tours, Alexander deferred Becket’s proposal that Anselm be canonised until the English church as a whole could consider it.

Of particular note was the sense of identification that Becket appeared to display with Anselm’s extraordinary rigidity and his inability to compromise on matters relating to the interests of the church as a whole and, in particular, relating to the interests of the office of archbishop of Canterbury.

Anselm’s canonisation would have to wait. Immediately upon his return from Tours, Becket would take the first steps towards his own.

Address to the Australia-Britain Society on the Centenary of the Signing of the Australian Constitution Act

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE AUSTRALIA-BRITAIN SOCIETY ON THE CENTENARY OF THE SIGNING OF THE
AUSTRALIAN CONSTITUTION ACT
10 JULY 2000 PARLIAMENT HOUSE, SYDNEY**

We commemorate today the final step in the formal legal process which led to the creation of the Commonwealth of Australia on 1 January 1901, the first day of the 20th Century. The polity created on that day, together with the legislative, executive and judicial institutions created for the purposes of that polity, have endured for far longer than history indicates is usual.

Australians like to think of this as a young country. Indeed, the second line of our National Anthem is "For we are young and free". However when it comes to the basic mechanisms of governance - both of parliamentary democracy and of the rule of law - this is not a young country. This is an old country. It is time that our self image adjusted to the extraordinary success of our fundamental institutions of parliamentary democracy and the rule of law.

There are only a dozen or so other nations which have parliamentary and judicial institutions as old as those of the Commonwealth of Australia. The achievement involved in that circumstance is not sufficiently appreciated by Australians.

At the time of the creation of the Commonwealth, Germany was an Empire. Only a few decades before it had consisted of a bewildering range of disunited kingdoms, principalities, dukedoms and city states. Ahead of it was a republic, a totalitarian dictatorship, then two divided republics and a subsequent amalgamation. China was still an Empire. Ahead of it lay a nationalist republic, dismemberment by war lords and the puppet state of Manchukuo, a civil war between rival republics and then the People's Republic. Japan was an Empire, with a Parliament only ten years old. Ahead of it lay military dictatorship and a new post-war constitution. Nowhere in Asia, other than the Kingdom of Siam, was there to be found independent nations with established parliamentary and judicial institutions that have lasted to this day. The same was true of Africa. Most of the Middle East was subject to the suzerainty of the Sultan of the Ottoman Empire and much of Eastern Europe was subject to the Austro/Hungarian Emperor.

In all these parts of the world the basic mechanisms of governance, whether legislative, executive or judicial, were to undergo fundamental transformations over the course of the last century, in almost all cases, more than once. Throughout that period the institutions created for the Commonwealth have continued to operate in much the same way and with a direct line of institutional legitimacy.

The institutions of the Commonwealth are part of a national fabric of even longer vintage. Last year the Supreme Courts of New South Wales and Tasmania celebrated 175 years of existence, in a direct line of institutional continuity. In five years time we will mark the 150th anniversary of representative and responsible government in New South Wales.

These are old traditions by world standards. Their longevity is a manifestation of their success. That longevity enhances the legitimacy of those institutions and, accordingly, the stability of the society which they serve.

There is great wisdom deeply embedded in institutions which have grown and developed over long periods of time. We have had the advantage of a British heritage for all our institutions of governance. That is a heritage which we have successfully adapted to our own needs and wishes. Perhaps the most abiding characteristic of our experience with these institutions - the explanation for their longevity - is the concurrent existence, at all times, of both continuity and change.

Queen's Trust for Young Australians Forum for Developing Tomorrow's Leaders

QUEEN'S TRUST FOR YOUNG AUSTRALIANS FORUM FOR DEVELOPING TOMORROW'S LEADERS DINNER AND OPENING CEREMONY

THE HON J.J. SPIGELMAN, AC - LIEUTENANT GOVERNOR AND CHIEF JUSTICE OF NEW SOUTH WALES

Sunday, 2 July 2000

When I was a student at this university, more years ago than I care to remember, in Economics, in the area of public finance, I was taught that the basic rule of taxation is that an old tax is a good tax. I think they had in mind a period longer than 24 hours. However, I should on this occasion, having been introduced by John Ralph - who doesn't claim responsibility for the GST but just about everything else that happened the other day - refer to the interconnection between this and the legal system that I have a passing acquaintanceship with.

Judge Richard Posner, who is a polymath of extraordinary dimensions and is the Chief Judge of the Court of Appeals for the Federal area including Illinois, once propounded what he thought would be a major advance in the social welfare of America. He said that he thought there would be a really significant social improvement if you could lower the IQ of all tax lawyers by 10 points, and I think we all know what he means by that. I agree, except in some cases five would do! I'm pleased to say that, as a State judge, I'm not going to have to look at this legislation ever. I will never have to open it in anger.

Next week we have an anniversary with respect to a matter that's already been referred to. Wednesday, is the centenary of the passage through the British Parliament of the Australian Constitution Act. It's an anniversary of some significance.

The one thing I want to say to you - and I will illustrate it in two ways - about the subject of leadership, rather than to talk about it in any didactic way as to what it is and how you do it, is that an essential part of leadership in any situation of any organisation is to understand your strengths, whatever they may be. You as a group, selected for the potential of being leaders of this nation in the future, ought to have an understanding of the strengths of this nation, and one of them is indicated by the anniversary we will celebrate next week.

We Australians like to think of this as a young country. Indeed, the second line of our national anthem is "for we are young and free". But when it comes to the basic mechanisms of governance, this is not a young country, this is an old country. A centenary of a political system that has lasted without any serious challenge is an extraordinary event, and it is of great antiquity.

The Supreme Court, of which I am the Chief Justice, has passed its 176th anniversary. It was created on 17 May in 1824. We have just celebrated, last year, our 175th. Next year we celebrate the centenary of Federation. In 2005 we will celebrate the 150th anniversary of representative and responsible government in New South Wales. These are very, very old institutions.

In 1824, the Supreme Court of New South Wales was established and commenced its work. I can understand what they were doing then. I can read the judgments delivered in the 1820's. They use concepts with which I am familiar, they came to decisions by procedures which are in many respects similar to those that we adopt today. It is a perfectly understandable system. There is a direct line of institutional continuity of 175 years plus.

In 1824, when that started here, Germany was a bundle of principalities, of city states, of dukedoms and various kingdoms. It didn't exist except in the cultural imagination. It subsequently went through a process of amalgamation and empire, had a republic, a dictatorship, division into two separate

republics and reunification. Every one of those transitions was associated with fundamental changes in its institutional structure.

France was a recently restored monarchy. It had ahead of it four republics and an empire and the Vichy regime.

China had been an empire for as long as anyone could remember and longer than that. It was 20 years before the first Opium War. Subsequently, it had the collapse of the empire, a republic, relapse into warlord status of regional governments, a civil war, a People's Republic, et cetera.

Japan: it was 40 years before Commander Perry's black ships sailed into Tokyo Bay. It was a hermetically sealed shogunate.

Throughout all of this, the Supreme Court of New South Wales was behaving in much the same way as it behaves today. From 1854, the parliament of New South Wales was behaving in much the same way as it does today. For almost a century now, our national institutions have grown and been solidified in a way that has really not been changed. There is a handful of countries that can claim institutional traditions as old as ours.

In that longevity is a degree of legitimacy that is the foundation not only of political stability but also of much of our economic prosperity. One doesn't have to look very far around today in our immediate region to understand the benefits of this, not only from a social and economic and political point of view but from the point of view of personal freedom and the ability to develop in your own way as individuals.

This is an extraordinary achievement and yet we regard ourselves as a young country. In many respects we are not. I think there is an intellectual adjustment we ought to make to realise that we have this strength and we have this tradition that is longer than any nation, other than a handful, has been able to achieve.

The second aspect of our strength to which I wish to refer is our ability to adapt - eventually, after perhaps some friction - to social conflict, peacefully. We have done it several times in our history. As we witness the conflicts going on in Indonesia or Fiji or in the Balkans, we should recognise our ability to adapt to fundamental social and cultural divisions in a way that few nations have been able to emulate.

The best example of that - and I think this is the origin of this capacity - is, of course, the convict system. For the first 50 or 60 years of our nation's existence, of the then colonies, that was the most important division: whether you or your forebears had been convicts. It was something that decided where you went to school, whether you got jobs and, in many respects, the full range of opportunities available to you, both social and economic. Over a period of some decades, that basic barrier disappeared. It didn't go in any dramatic way. It just basically disappeared over a period of time through a process of adaptation.

We have seen that same capacity more recently. When I was a young law graduate, it was quite clear to me by looking around the legal profession that the basic division in this society was between Catholics and Protestants. There were law firms that had never had a Catholic partner; there were law firms that had never had a Protestant partner. That's just inconceivable today. It just doesn't happen.

It had been, for the best part of a century, the basic division in our society. Most Catholics voted Labor. It was obviously a religious division. It was a social division and it was an educational division. It was reflected in just about every aspect of our society. For about four or so decades the Police Commissioner of New South Wales was alternatively a Mason and a Catholic. It was too powerful a position not

to share it. That has only disappeared in the late seventies as a tradition. Many of you may not recognise this, but for those a little older than yourselves, this was the most important division in Australian society.

It disappeared without conflict and without tension within a decade or two, completely - just went. There was a process of adaptation at all levels of society, at all levels of the economy, where companies, government departments that had never had any of the others, whatever they may be, went through a process where suddenly it was done, and then it became common, and then it became

uncommented upon, so that all kinds of institutions that had been exclusive and excluding in various ways, changed within the course, I think, of no more than two decades and most within one, and did so without any kind of residual tension.

We have similar challenges to that ahead of us. Clearly there is an Asian migration that some members of this community do not accept as much as others. I am quite confident that that same process will be gone through as well. As a migrant myself, I am very conscious of those who say, "Well, these new migrants aren't like you good old migrants, the ones we used to call wogs and reffos and that sort of thing. They're not like you." But, of course, we weren't like us either, then. There's no doubt that the degree of acceptance of people from various parts of Europe - the greatest numbers were from Italy and Greece - has now reached a level that would not have been anticipated 20 or 30 years ago, because there was a sense of tension and exclusion then which doesn't exist now.

There is, as we know, a process of reconciliation with the original Aboriginal population that is under way. That will take time. It is of great significance. I have noticed two events which show the capacity of this society to adapt in a positive way and in ways that no-one will expect.

The Olympic Torch arrived at Ayers Rock. Geographically, I suppose, there is some point in that, but basically it's an identifiable Aboriginal place, Uluru. We used to call it Ayers Rock but no-one does any more. The first event, as I understand it, on 1 January 2001, of the centenary of Federation will be also at Uluru - absolutely nothing to do with Federation whatsoever.

There is a process by which we seek symbols of identity and find them, these days, in Aboriginal places, and they are accepted without comment as appropriate national symbols, as places at which foundational events, or razzamatazz events like the Olympic Torch, are appropriately to be located. It's this kind of process of adaptation which I regard as an important national strength and one that we ought to accept and understand, because it will assist us to meet the great challenges that lie ahead of us all.

Perhaps I will leave you with just the one example of the significance for us of certain events. 1 January 1901 was planned as the foundation for the new Commonwealth of Australia because it was then regarded as the first day of a new century. The slogan at the time was "A new nation for a new century". There was a journal, one of the great journals of those times, called *19th Century*. It decided it had to change its name to show how with-it it was at the time and it changed its name to *19th Century and After*. Its new edition appeared on 1 January 1901. In those days everybody knew when the century ended and when it didn't.

The reason why it was like that is because in the 5th century there was a monk who created the *anno domini* system. His name was Dionysius Exiguus. A rough translation of his name is "Dennis the Short". Dennis was doing his work in the 5th century. It was several centuries before the Arab mathematician who invented the zero had done his work. There was no zero, so 1 BC was immediately followed by 1 AD. So it has been throughout, until 31 December last year, when the whole world declared that the 20th century was the first century in human history to consist of only 99 years.

The reason for that is, I'm sure, the motor car. The odometer. We all watch it, 999 going over to 1,000, or whatever. The odometer has attributed a degree of significance to those three zeros that has never existed in all of human history. At the end of this year we Australians ought to acknowledge the true millennium because that is the centenary of our own existence as a nation. I expect that it will be celebrated by a significant number of religious fanatics and a handful of pedants like me. But there is a significance to it.

I think most of you will have finished your formal studies; probably all of you will have finished your formal education. Having done so some years ago myself, one thing is clear, looking back on that period. There are few occasions after that, when you have an opportunity to lay down any serious intellectual capital. You tend to use your intellectual capital; you tend to work off it after that. There are some occasions where you can add to it. It is quite plain that the week ahead of you is such an occasion. It is a great opportunity. I am sure that you all deserve to be given that opportunity. I trust you will make the most of it.

There are numerous challenges that John Ralph has referred to which will face us all in the future. The kind of capital you lay down, of ideas for your own involvement in various walks of life, will be of great significance not only to you and the organisations you represent, but to the nation as a whole.

For that reason, it gives me much pleasure to formally declare this Forum open.

Occasional Address at the Aeronautical Engineering Graduation Ceremony by The Honourable J J Spigelman Chief Justice of New South Wales

In a number of speeches that I have given I have made a particular point but never to a more appropriate audience than this. If we were to have a competition to build a statue to only one person who has improved the Australian way of life more than any other in this century, who would that person be? The answer I proposed and repeat today is that the person who has most improved our way of live over the course of the last century is the chief engineer on the Boeing 747 Project. Until about the mid 1960s, when I was a student at this University, it was still cheaper to take someone on a boat and feed them for six weeks than it is to fly to Europe. The transformation, primarily by the Boeing 747, has made overseas travel feasible for the overwhelming majority of Australians.

There can be no doubt that these expanded opportunities for travel now available to all Australians, and of course also available to persons to come to Australia, have overcome the intellectual and cultural provincialism with which this nation was afflicted for most of its existence.

The Boeing 747 is of course an extraordinary engineering achievement. However, one hears nothing about the achievement until a wheel undercarriage on a Qantas 747 collapses. Then there is a media feeding frenzy. Even the most benign and everyday engineering problems become newsworthy and for a period of time are presented as if there is some major technological crisis.

It may be that the most significant reward of engineering achievement is, in fact, a quiet life.

Perhaps the most distinctive feature of practice of your profession of engineering is that the mark of your success is to be taken for granted. Australians unquestionably do so. When we flick a switch, we expect electricity to be instantly available. When we turn a tap, we expect water to flow. When we use a telephone, we expect immediate connection to anywhere in the world. It is rare for any Australian to appreciate the extraordinary amount of embedded knowledge and skill that enables those phenomena to occur.

I have read with interest and admiration the degree of innovation which young engineers of this faculty have displayed over recent years: such as the dolphin propulsor, the digital canary, and, that most Australian of inventions, the solar powered esky. I have long admired this form of ingenuity and its practical significance as the foundation of our standard of living.

I acquired this conviction in the late 1970s, in the United States, while writing a book on nuclear energy. It was for such reasons that I actively sought to become, and enjoyed, my period of office as President of the Powerhouse Museum. It is also for such reasons that when invited, I asked to address an engineering graduation ceremony, rather than speak to law graduates who will, in future years, have more occasions to listen to or read my words than they would freely have chosen.

I wish by this choice to convey a simple message: what you engineers do is important and appreciated by persons outside your profession. It may be that the pressures of contemporary life do not permit such appreciation to be articulated as often as it should be, but it nevertheless exists.

The speed with which everything seems to happen today may be the most striking difference between the time of my own graduation and that of yours. I grew up in a country in which the Prime Minister, Sir Robert Menzies, felt able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching the cricket and then return by boat taking another six weeks to do so. Such conduct is completely inconceivable today.

Everything has speeded up. Sir Robert Menzies would not have approved of one day cricket and with reason. He would never have understood basketball with which, no doubt, he would have compared one day cricket.

The accessibility which we now have to the rest of the world, and which the rest of the world has to us - determined in large measure by the success of aeronautical engineering and telecommunications engineering - has overcome the tyranny of distance with which we were long afflicted. However, we have substituted for that tyranny, a new tyranny of immediacy. This, at least, is a tyranny which we share with everyone else.

The process of acceleration is unremitting. In the United States it took 46 years for 25 percent of the population to be connected to electricity. It took 35 years for that proportion to get the telephone. It took 16 years for that proportion to take up personal computers. However, it has only taken seven years for that proportion of 25 percent, to be connected to the world wide web.

There is of course so much more to absorb and that makes time more precious. On one calculation, a search on the subject "Information Overload" on the world wide web hits 20,000 different sites. That calculation is 12 months old. No doubt the number has doubled.

Anyone using contemporary telecommunications or computer technology has experienced the strange phenomenon of being absolutely infuriated by the delay associated with some processing function. We simply forget that only six months before that length of delay for that function was perfectly acceptable and, indeed, six months or a year before that, the function itself, having been introduced for the first time, was regarded as an absolute marvel. We are taking things for granted faster and faster.

Where we once spoke of words per minute, we now speak of characters per second. One can buy telephone answering machines with a quick replay button, in a digital format so that the replay is accelerated without the high pitch of a Disneyfied chipmunk. Similarly, one can buy music CD players with an option that lets the user close the one or two second gap between tracks. Anyone who needs that function has a medical condition.

Time is more important than ever. In Tokyo one restaurant charges by time at the rate of 35 Yen per minute. You clock in, you clock, out and your bill is computed on the time difference. Unfortunately, some of us do eat like that.

It is apparently necessary for us to create the illusion that we are saving time even when we cannot do so. On many elevators the "door close" button is in fact a placebo. It has no function, other than to placate those who measure their life in seconds.

In the midst of all this change it is appropriate to reflect - when we can find the time to do so - on things that endure. Whilst engineers are, no doubt, conscious of the fact that their achievements are taken for granted, the same is true in many respects of my profession, the law. Like engineering, the law works best when it is not noticed. The events of recent months in our neighbourhood, Indonesia, the Solomon Islands, Fiji, or in other parts of the world, Sierra Leone, Zimbabwe and in recent years in countries like the former Yugoslavia, should emphasise for all of us the great significance of the legal institutional structure which we have inherited.

Two weeks ago the Supreme Court of New South Wales marked the 176th anniversary of its creation. The Court of which I am Chief Justice was formally established on 17 May 1824 and has had a continuous institutional existence since that time. Next year we will celebrate the Centenary of Federation. In 2005, we will celebrate the 150th anniversary of representative and responsible government. These are old traditions by any standards. The number of nations which have judicial institutions as old as the Supreme Court of New South Wales can be counted on the fingers of one hand.

We Australians like to think of ourselves as a young country. Indeed the second line of our national anthem is "For we are young and free". However, when it comes to the basic mechanisms of governance this is not a young country. This is an old country.

The twin great institutional traditions of our system of governance - the rule of law and the need for the consent of the governed - form part of the core content of Australian national identity. Their force today, reflected in the universal acceptance of the legitimacy of the institutions which perform these functions - the Courts and the Parliaments - is derived in large measure from the longevity of the traditions by which they are performed.

It is a regrettable characteristic of much Australian public debate that it proceeds on the basis that history is of little significance. Indeed it sometimes appears that many think of history as something that happened somewhere else. However, virtually everywhere one looks in Europe, Asia, Africa and Latin America, the institutional structure of law and government bears not the slightest resemblance to that which existed 176 years ago when the Supreme Court of New South Wales was established, or 150 years ago when our system of representative and responsible government created. In Australia,

in contrast, there is a clear line of uninterrupted institutional continuity. That continuity is an essential basis of our prosperity and social stability.

As in so much of engineering sometimes the most important things are those that one takes for granted.

Address to The Selden Society - A Twelfth Century Succession at York

Maitland called the twelfth “a legal century”. The American legal historian, Harold Berman, has called it *the* legal century. It was a formative period for the common law, the civil law and canon law. The doctrines and institutions developed in that century continue to have an influence down the centuries to our own time.

Over recent decades a new legal system has emerged in Western Europe. The European Union has developed, and is in the course of expanding, a supra-national system of law. The same phenomenon occurred from the middle of the eleventh century through the twelfth century. What we today call Europe was then known as Christendom, specifically Western Christendom. The church, under the monarchical authority of the papacy, exercised legislative, executive and judicial authority over, broadly, the same territory as the European Union now exercises similar authority.

The matters that are now regarded as appropriate for supra-national jurisdiction are primarily economic. In the twelfth century, the centralised institutions were not concerned with issues of free trade or competition policy and the like, rather they focused on health, education, tourism - then called pilgrimage - and, of course religious ritual, the single most important social bond of the time - the church, was an essential part of the infrastructure, like roads, bridges and telecommunication cables today. Its role was, in large measure, governmental. The church levied taxes called tithes. Baptism was a kind of citizenship. Eventually, Western Christendom performed the ultimate act of a supra-national authority: it went to war as a single polity, in the crusades. It was only last year that the European Union, for the first time, did the same in Kosovo.

The united legal system of Christendom encompassed any conduct by the clergy, marriage, inheritance, legitimacy, property over benefices, jurisdiction over sins, which encompassed much of what we would now call tort and some of what we would now call crime. Significantly, for purposes of this lecture, was the body of rules with respect to appointment to the multiplicity of offices in every cathedral, monastery, nunnery and church. This body of law, if only because of its significance in medieval society, may be appropriately characterised as a form of constitutional law. In every respect, it is a recognisable form of corporation law.

From the middle of the eleventh century, the great creative impetus of the canon law was the flow of decisions in individual cases, hardening into precedents, made by the popes. These papal decretals were known as the ‘new law’ or *jus novum*, to distinguish them from the conciliar canons, the “old law” or *jus antiquum*. As the supreme legislator and the supreme judge, the pope asserted a right to hear appeals from anywhere in Christendom. In 1140, Gratian’s compilation of these decisions in his Decretum, provided an authorised text for the application and further development of this European system of law.

As this audience is aware, late last year I delivered an address to the St Thomas More Society on the subject of Henry II and Thomas Becket. That address concentrated on the early years of their relationship. I have undertaken to the St Thomas More Society to deliver a series of lectures ultimately, I presently intend, five. When selecting a topic, after being invited to address the Selden Society, I have chosen to focus on a conflict which, in some respects, raises similar issues to those involved in the Becket dispute, although I will endeavour not to trespass on the matters I will address in the lectures I have undertaken to give to the St Thomas More Society.

I look north to the see of York. To a battle over the succession as Archbishop of York.

In the first of my lectures to the St Thomas More Society last year, I argued that the basic fault line of political life in Western Christendom during the twelfth century was constituted by the conflicting institutional imperatives of the church, on the one hand, and secular rulers, on the other. The fault line of political life over, approximately, the last two centuries, has been the conflict of institutional imperatives between the centralised state, on the one hand, and private organisations of various kinds, particularly commercial corporations, on the other.

In the twelfth century, as in ours, the pursuit of institutional self-interest was a mainspring of social action. Institutional loyalty was a primary social bond. As I said to the St Thomas More Society, institutions, like individuals, have a craving for self esteem. The drive for prestige, recognition and freedom amongst individuals is also reflected in institutional demands for autonomy. A pre-occupation with institutional loyalties is present in all ages, but in some periods of history, it proves to be more central to the issues of the time than in others. The centrality of institutional loyalty is something which our own times share with the twelfth century.

In many respects, the origins of Western constitutionalism and its protection of freedom, is to be found in the accommodation between the two great power structures of medieval society.

The issue in what historians call the investiture contest was whether any lay ruler could invest an ecclesiastic with his office. This was the fundamental aspect for the institutional autonomy of the church. It was however merely representative of a multifaceted territorial imperative. For over a century that imperative produced quakes by the score and tremors by the hundred. At the very highest level of intensity was the bitter conflict between the pope and the Holy Roman Emperor. Other disputes, like the conflict between Becket and Henry II measured equally high on the relevant Richter scale. But the imperative was also reflected in hundreds of less prominent disputes. This was a conflict about institutional legitimacy which penetrated all layers of the formal medieval hierarchy.

What was at stake in those disputes was no less than the church's claim of sacramental legitimacy based on a direct line of succession from Jesus Christ and his Apostles to the bishops and priests who, it was believed, had inherited special sacramental powers by succession. Direct succession was a more powerful claim than adoption or submission, just as inheritance by blood was regarded as more legitimate than accession, let alone conquest. The church's claim to authority by lineal descent is the most successful claim of direct institutional legitimacy in history, with the possible exceptions of the Chinese imperial tradition and the Egyptian pharaonic tradition.

Nothing threatened this claim to succession more than the idea that any bishop, or worse the pope himself, had actually been appointed to office by a lay ruler rather than by legitimate authority under canon law. Even worse was the taint of corruption that sometimes accompanied appointment to these very valuable offices - valuable in the light of the substantial property controlled by a bishop or abbot, or indeed, by clergy throughout the hierarchy. That sin was called simony, named after Simon Magus, who according to the Acts of the Apostles was the first Christian to attempt it.

The abolition of a lay investiture and the attack on simony, together with the re-assertion of celibacy as the distinctive characteristic of the priestly caste, were at the forefront of the idealistic reforms - the "progressive" project of the age - that became the papal revolution of Leo IX, spurred by his Archdeacon Hildebrand and continued by Hildebrand himself, when he became pope as Gregory VII. The changes or sometimes called the "Gregorian reforms". The assertion of institutional autonomy, indeed of superiority, on the part of the church - *libertas ecclesiae* - gave rise to the most important conflicts of the age.

These themes permeate the Becket dispute. They are also present in the events that unfolded when Archbishop Thurstan of York, after more than a quarter of a century in office, died in 1140.

I note for tonight's purposes, that the first dramatic phase of the struggle between Pope Gregory VII and the Holy Roman Emperor, Henry IV - culminating in the snows at Canossa - began with a dispute over the appointment of an Archbishop of Milan.

In some respects the appointment and early career of Thurstan, paralleled that of Becket as Archbishop of Canterbury about half a century later. Thurstan was Henry I's personal chaplain and a long-serving intimate at court. Henry I appointed a series of loyal servants of the Crown as bishops and archbishops. In 1114 he appointed Thurstan Archbishop of York. He appeared to represent a Bayeux faction: three Archbishops of York and two bishops of Durham, York's sole suffragan, emerged from the circle of Odo, Bishop of Bayeux and, by appointment off the Conqueror, Earl of Kent.

Thurstan was not even a priest at the time of his appointment, but a mere archdeacon. Perhaps

he found solace in the fact that a few decades before when Archdeacon Hildebrand was elected Pope as Gregory VII. Hildebrand had not yet even been ordained a priest, let alone a bishop.

More significantly, there was a tinge of illegitimacy about Thurstan's appointment, because the free election by the cathedral chapter was plainly overborne by the will of Henry I.

Thurstan, like Becket, immediately became an ardent advocate of the institutional interests of his see. Any sense of apprehension that the canons of the cathedral at York may have had about the appointment of a royal servant, were quickly swept aside as Thurstan took a firm stance in the long running institutional conflict, between York and Canterbury, as to whether or not York was subservient to Canterbury in the ecclesiastical hierarchy.

To the fury of Henry I, who had adopted the policy of his own father, William the Conqueror - or Guillaume Le Bâtard as French historians still affectionately call him - that it was in the royal interest to have a church organisation that was precisely parallel with his kingdom - just as the Archbishop of Rouen covered the same area as the Duchy of Normandy - Thurstan refused to profess obedience to Canterbury. Henry I supported his Archbishop of Canterbury, who refused to perform the consecration of Thurstan without a profession of obedience. This occurred during the course of a long running dispute between the king and the pope over the latter's assertion of a right to exercise direct jurisdiction in England. Henry ordered that Thurstan must refuse any consecration by the pope, or by anyone authorised by him.

In 1119 a Council of the Church was called at Rheims. It was there that this dispute would be dramatically escalated. Rheims was a location of solemn symbolic significance for all those clerics who believed in the papal revolution and its central premise that the church was the dominant authority in all of Europe. In 1049 it had been the location of the first conspicuous assertion of this ideology, and of its first success, when the newly elected Pope Leo IX, had summoned a council of the French Church. It was at Rheims that Leo revealed the program that would dominate European political life for over two centuries. At the council, which he chaired, Leo IX declared that the pope alone was the universal primate, the "Apostolicus". Although by no means a new claim, its reassertion at this time constituted an aggressive agenda of self-conscious change. The pope was to rule the church and the church was to rule Christendom. Lay rulers received their authority from the church. King Henry I of France, perhaps knowing something of the intentions of Leo IX, did not attend the council and, as a result, the bulk of French bishops and abbots stayed away. Nevertheless, Leo pursued his plan.

His first task at the Council of 1049 was to transfer the bones of St Remigius (St Remi) who had converted Clovis I, King of France in the fifth century, and who was the patron saint of Rheims. It was at this cathedral that the kings of France were traditionally crowned. Leo's first task at the Council was to transfer the bones to the high altar of a new church at the monastery named after the saint.

On October 1, the Feast of St Remigius, his bones were carried around the town amidst throngs of excited laymen. Leo IX dramatically delayed the internment of the saint in his new resting place. Leo ordered that his remains be lain on the high altar. He proceeded to conduct the three day council in the saint's "presence".

At the outset of the council, Hildebrand, the future Gregory VII, innocently requested that all present should declare whether they had committed simony. The consternation was immediate. Even the host, the Archbishop of Rheims was implicated, as everyone knew. After inquisition, one-quarter of the bishops present confessed. One was eventually ex-communicated. Some were demoted. Others reinstated. As far as the general public was concerned, Leo had achieved a public relationship triumph by re-asserting the integrity of the Church.

At the end of the Council, Leo personally carried the relics of St Remigius to their new resting place.

The themes were not dissimilar seventy years later in 1119 when there was held in Rheims a formal Council of the whole Western Church - in effect, a meeting of the European Parliament. Archbishops, bishops, and abbots from all over Europe gathered in the town - according to one count, four hundred and twenty four staffs of office were present on Sunday, 19 October 1119.

The council, in its final resolution, reinforced the church's claim to complete autonomy from monarchs and the Holy Roman Emperor. In an affirmatory clarion call of the radical movement for reform of the church, the progressive idealism of its time, the council reaffirmed the principles that had emerged at the earlier gathering in Rheims, in the following terms:

- “1. We confirm all that has been ordained ... about the sin of simony. If anyone sells or buys any bishopric, abbey, deanery, parochial cure, provostship prebend, churches or ecclesiastical benefices of any kind or promotions, ordinations, consecrations, dedications of churches, clerical tonsure, stalls in choir or any other ecclesiastical office both the buyer and the seller shall be liable to forfeit his dignity and office and benefice.
2. We utterly forbid the investiture of bishoprics and abbey to be performed by lay hands. ...
3. We decree that the possessions granted to all churches by the generosity of Kings or the bounty of magnates or the gift of any of the faithful shall always remain secure and inviolate. ...
4. No bishop, no priest, no member whatsoever of the clergy shall bequeath ecclesiastical offices or benefices to anyone as if by hereditary right.
5. We utterly forbid priests, deacons and sub-deacons to cohabit with concubines or wives.”

It was at this Council that the Pope, in defiance of the orders of the King of England, consecrated Thurstan as Archbishop of York. The taint of illegitimacy about his appointment had been swept aside. This is not the succession at York on which I wish to concentrate this evening. However, the background is instructive for an understanding of what happened after Thurstan himself, following a long and illustrious career, died in 1140.

This was a time of civil war over the succession to Henry I, a conflict between King Stephen and Henry's only surviving child, Matilda, known as the Empress because of her marriage to the Holy Roman Emperor, having been brought back by Henry from Germany after the death of her husband, to lay claim to the throne. In large measure because of the sexism of the aristocracy, the throne had been usurped by Stephen of Blois, grandson of William the Conqueror by his daughter Adela, Henry I's sister. This conflict was only finally resolved when Stephen - in accordance with a treaty negotiated when Stephen's own son died - was succeeded by Matilda's son, Henry in whose favour Matilda had abdicated her claim.

On Thurstan's death, Stephen together with his own brother, Henry of Blois, the Bishop of Winchester, procured the post of Archbishop of York for a member of their own extended family: William Fitzherbert, illegitimate son of their half sister. He was already Treasurer of the cathedral at York. He was one of the inexhaustible supply of nephews placed in key positions by the house of Blois, a House which had its primary ancestral lands in a region adjacent to the core lands of the King of France around Paris and, as such, a natural ally for the Duke of Normandy. Hence the marriage alliance of the Conqueror's daughter to the Count of Blois and Chartres.

Complying with the formal requirements, William Fitzherbert was elected by a majority of the canons in the cathedral chapter. However, this occurred in the presence of Stephen's staunch ally and local viceroy, the Earl of York. It was said that the King ordered the election of his relative, William. He defeated a candidate of the Cistercian order, an idealistic group of monks from nearby monasteries. The minority immediately appealed the election to the Pope in Rome.

The issues raised went to the heart of the legitimacy of the election. There was a suggestion of simony. There was a conviction that there had been improper influence by the King and the Earl of York. After all members of a cathedral chapter often had property which the secular rulers could devalue or confiscate. They all had relatives with such property or who were otherwise susceptible to the pressure of secular authority.

Here, in this distant outpost of Christendom, a battle for the succession would be fought, with passion and intensity. It concerned the electoral principle as the basis of legitimacy of the occupation of office. Just as a pope was elected by the cardinals so - pursuant to a decree of April 1059 which was, in effect, a declaration of independence by the church - the key hierarchical posts were elected: an abbot by the monks of the monastery, a bishop by the chapter of the cathedral consisting of the canons and, often, other clergy of the capital. Less usually, the monks of nearby monasteries were included in the chapter. York was such a case. The rules for such elections were in substance a branch of corporations law although the significance of the office of archbishop, suggests that such an election could be seen to be a

form of constitutional law.

Although not mentioned in the contemporary chronicles to which I have had reference, it may be that part of the passion about York arose from the fact that it was at York that Constantine crowned himself Emperor of the Romans, before taking his legions in a successful invasion of Europe and then Italy. Constantine was, of course, the Emperor who converted the empire to Christianity and, even though he moved the focus of the empire east to his new imperial capital of Constantinople, his legacy was of central significance in the political issues of the day.

It was, after all, the belief of the reform papacy that Constantine had made the Western empire a gift to the pope. The so called Donation of Constantine was then universally accepted as the foundation of the church's claim to control the secular world. The great pioneer of textual criticism, the Renaissance scholar Lorenzo Valla, revealed the Donation to be a forgery by the papal chancery. No doubt the Donation was believed to be, like many such clerical forgeries - of which there was a very substantial industry in the twelfth century - to merely provide documentation for an actual event which had, or should have, occurred, but which was negligently conveyed in oral form, or even worse, left to implication.

The Donation was the centrepiece of a ninth century compilation of legal precedents - some seven hundred and fifty pages in length, of which at least a third were new fabrications and the balance significantly distorted - known to historians as the False Decretals or Pseudo-Isidore. The series of letters and charters, prepared in sham chronological sequence, faked even their author by fraudulently adopting the name of a highly respected legal scholar, Isadore Mercator. They had originally been compiled by a group of clerics in Rheims itself as part of their resistance to the attempt by the Archbishop of Rheims, to prevent his clergy from appealing disputes to Rome. These false decretals were not in fact accepted by the Pope for about two centuries. However, the reform papacy of the eleventh century accepted them without question. It may be that that curious document of Gregory VII, the *Dictatus Papae* - a series of assertions of papal authority which Gregory appeared to address only to himself - in fact constituted chapter headings for his own collection of constitutional law texts, a collection which was never completed.

Beginning with the purported decisions of the earliest popes, the compilation by the Pseudo Isidore of alleged ancient precedent gave legitimacy to the papal program in an era where law was regarded simply as the revelation of custom. It was in fact a new political program for the independence of individual bishops and abbots from the control of laymen and also of the independence of various levels of the ecclesiastical hierarchy from the level immediately above, by reason of the right of any ecclesiastic to appeal to Rome. This assertion of direct subjugation to the overriding authority of the pope proved particularly appealing to Rome and ensured that this false compilation became the key legal precedent book of the middle ages. Its centrepiece was the Donation of Constantine.

Of central significance in the conflict over the succession to Thurstan of York, was the assertion by the unsuccessful minority, that they had been defeated by the influence wielded by the secular power on the electoral body in the chapter. This tainted the legitimacy of the election.

The unsuccessful candidate was a monk of the Cistercian order. Encouraged by Thurstan during his long period as archbishop, the wilds north of York had become the English centre of this order. The order was a fundamentalist revival of the most rigid application of the original monastic rule, symbolised by the white robes of pure undyed wool - "dressed as the angels might be" as one Cistercian monk demurely noted - consciously chosen to distinguish them from the black robes of the Benedictines. The white monks, as they became known, sought to return monastic life to a rigid asceticism which involved the strict application of the life of the rule, from which the Benedictines had strayed as their wealth and comforts had grown.

An offshoot of the revival of monasticism at Cluny, the Cistercians were the most idealistic clergy of their time. The Cistercians called for simplicity in all things, including buildings, dress, liturgy, organisation, together with a literal interpretation of the rule of St Benedict. The order chose secluded distant sites as part of this return to simplicity and abandonment of the temptations of this world.

It was the very isolation and poverty of Yorkshire that had attracted the Cistercians to that region. Unlike the black monks who required a small fortune to be endowed in order to create a new monastery, the white monks needed only a small building and uncultivated land. The

greater the rigours of the toil in forest or wilderness to eke out their basic sustenance, the closer they believed themselves to God. There was no shortage of such land in Yorkshire.

The leader of the order was Bernard of Clairvaux, gaunt ascetic, mystic and puritan, with the appearance and hectoring tone of an Old Testament prophet. He was the driving force of the order in its repudiation of ornament and ostentation. He went so far as to forbid the illumination of manuscripts a speciality at Citeaux - Cistercium in Latin - the founding monastery of the order, which Bernard with his boundless energy had revived, before forming, in 1115, a daughter abbey at Clairvaux, in an isolated location on the River Aube. As one of St Bernard's contemporary biographers put it:

“For all his fleeing from it, glory chased after him as relentlessly as it always evades those who grasp at it. A proverb he often had on his lips was ‘doing what no-one else does, draws all eyes’.”

Herewith, Bernard himself on the monastic life and one of its great contributions to contemporary civilisation; the cultivation of wine:

“Naturally all of us, as monks, suffer from a weak stomach which is why we pay good heed to Paul's advice to use a little wine. It is just the word little gets overlooked, I can't think why. And if only we were content to drink it plain, albeit undiluted. ... But once the wine is flowing through the veins and the whole head is throbbing with it, what else can (monks) do when they get up from table but go and sleep it off? And if you force a monk to get up for vigils before he has digested, you will set him groaning rather than intoning. Having got to bed, its not the sin of drunkenness they regret if questioned, but not being able to face their food.”

St Bernard wrote prose of great force and clarity. In his Latin verse, however, he refused to be bound by the rules of metre so, as Gregory of Tours said of another, his poetry had no feet to stand on.

This self-appointed conscience of Christendom, stamped the whole order with his overweening self righteousness. That characteristic would be particularly manifest in one of the great confrontations of twelfth century Europe between Bernard, the advocate of faith, and Abelard, the liberal minded advocate of intellectual freedom, at the nascent university in Paris.

Bernard had a personal interest in the affairs of York. A group of Yorkshiremen, who had been his own disciples at Clairvaux - including Bernard's own former secretary - had set up the new monastery at Rievaulx, thirty miles north of York. Bernard himself wrote, portentously, to King Henry I:

“In your land there is an outpost of my Lord and your Lord, an outpost which he has preferred to die for rather than to lose. I have proposed to occupy it and I am sending men from my army who will, if it is not displeasing to you, claim it, recover it and restore it with a strong hand. Help them as messengers of your Lord and in their persons fulfil your duties as a vassal of their Lord.”

The idealism of Rievaulx, by invidious comparison, created disaffection within the Benedictine house of St Marys in York. A group of idealistic monks dissatisfied with what they saw as laxity in observance, formed a splinter group under the protection of Archbishop Thurstan, and created Fountains abbey at Ripon by the river Skell, on land granted them by the Archbishop himself. Fontaines, north of Dijon in Burgundy, was the birthplace of Bernard of Clairvaux.

These two abbeys of Rievaulx and Fountains, forged in the white heat of ideological fervour under the direct patronage of Bernard himself, were determined that their local Archbishop would live up to their expectations. William Fitzherbert, the nephew of the House of Blois, who had apparently served well as Treasurer of the see of York for over twenty years, was not a monk and had no intention of living as one. He had the support of the majority of the canons of York cathedral, no doubt due to lay influence from the Earl of York, on the urging of King Stephen. William was also personally popular in the city, the population of which remained his enthusiastic supporters throughout the dispute.

The patron and uncle of William Fitzherbert was Henry of Blois, bishop of Winchester. Henry represented everything in the church which Bernard of Clairvaux despised.

Henry, grandson of the Conqueror by his formidable daughter Adela, had systematically established one of the great private empires of the twelfth century, stepping easily from ecclesiastical to secular politics and back. Displaying resoluteness of purpose, a thorough grasp of detail and consummate administrative skill, he accumulated the basic elements of social power and wealth - manors, castles, ecclesiastical rights. As a great Lord of substantial secular property, Henry built and extended numerous castles, fortifying Wolvesey Palace in his episcopal seat of Winchester - in the defence of which, on one occasion, he caused the destruction of much of the surrounding city.

Without any sense of inconsistency with his secular and military conduct, Henry remained an energetic and dedicated advocate for the Church of Rome. He embraced the ideology of the independence and predominance of the church under the control of the Pope. He accepted the central tenet that the church should be independent of, indeed superior to, secular authority. This came naturally to him as a political program for his own autonomy, perhaps more so than as a moral ideal. He had no difficulty rejecting his brother the King - indeed for one brief period, he openly supported the rival claims of the Empress Matilda - when Stephen purported to confiscate some of the secular property of other bishops. This was a precedent that Henry would have found most distasteful.

One contemporary chronicler described Henry as "a new kind of monster, compounded of purity and corruption, a monk and a knight".

Henry was a worthy - almost Venetian - leader of a city which was then still the second city of England, as the former capital of King Alfred's Wessex Kingdom. The cosmopolitan tone of the city was affirmed a few decades later by a cleric who described the orgy of mass murder of Jews that engulfed England in 1189 on the coronation of Richard I, and who said:

"Winchester alone, a people prudent and far seeing, and a city always acting with a due regard for civil rights, spared its worms. Never has the city done anything with excessive haste; fearing nothing more than to be obliged to repent, it calculates the issue of events before it thinks of the beginnings."
Qualities worthy of Venice.

Henry of Blois commenced as a monk at Cluny, the focal abbey of the epoch - the original centre of the revival of monasticism, with its daughter houses, uniquely, headed by priors responsible to the abbot at Cluny. This was the first multinational corporation and, in many respects, a model for the reform papacy.

Whatever else Henry imbued at Cluny, however, it was not a taste for the monastic vows involving self denial and simplicity of life. Henry of Blois was an active, vivacious extrovert, a princely connoisseur and one of the great collectors of his time: from classical antiquities - called pagan statues by his critics - to lavish golden bejewelled ornaments, including crosses, alters, chalice cups, vestments, gospel books, illuminated manuscripts, including the exquisite Winchester Bible. Cistercian establishments scorned all but a single chalice cup.

Attached to one portable altar, which Henry donated to his cathedral, was a gilded enamel plaque which read:

"May the angel take the giver to heaven for his gifts, but not yet, lest England groan for it, since on him it depends for peace or war, agitation or rest."

Most of all, in an age gripped with a mania about relics, Henry donated many to Winchester cathedral to ensure the status of his bishopric and the tourist income of the city. These gifts included two of the small forest of surviving pieces from the True Cross and one from the Manger; one indelible band of the Blessed Virgin's hair and bits and pieces from Abraham, Isaac, Jacob, St Matthew, St Stephen, St George, a piece of the Holy Winding Sheet and a chip from the stone which Jacob used as a pillow. A great cornucopia of human credulity.

Appointed when in his twenties, by his uncle King Henry I, as abbot of Glastonbury - by a considerable margin the wealthiest abbey in England with an annual income of over eight hundred pounds, about half that of the Archbishop of Canterbury - Henry never relinquished the wealth and power it brought him. At thirty, he was appointed Bishop of Winchester, still the

second city of England and second after Canterbury itself as the wealthiest see in England. By special papal dispensation, Henry held both positions of abbot and bishop in "plurality", as it was called by those in the church who denounced the venality of the practice as inconsistent with the spiritual mission of the church.

First amongst those was Bernard of Clairvaux. He called Henry "the whore of Winchester".

When the dissident minority appealed the appointment of William Fitzherbert as Archbishop of York, Bernard eagerly threw his considerable influence behind them. Henry displayed his skill as a masterful ecclesiastical politician and outmanoeuvred him. The pope decided the legal issue in the appeal, but remitted the matter for a trial on the facts, under the presiding jurisdiction of the papal legate. The papal legate was, none other than the Bishop of Winchester.

Henry acquired this additional function as legate after his brother King Stephen - who had plainly decided that Henry's wealth and power was already significant enough, without further aggrandisement - orchestrated the appointment of Theobald as Archbishop of Canterbury, a position to which Henry had aspired. The King of England made the appointment in secret on 24 December 1138 at the royal court at Westminster, without any notice to Henry, who was attending to his acting episcopal duties of the then vacant London see at an ordination of deacons in St Pauls, just around the bend of the Thames in the City of London. The fact that the King felt obliged to act in this covert manner was a testimony to the power of his brother. When he heard the news of the fait accompli, Henry stormed out of St Pauls, without completing the ceremony.

Henry acted swiftly to improve his position. Pope Innocent II made him the papal legate for the whole of the Kingdom of England. As the Pope's delegate, Henry - who as the Bishop of Winchester was Theobald's subordinate or suffragan - had authority over his own archbishop. This unprecedented separation of the offices of papal legate and that of Archbishop of Canterbury, undermined the claims of the Archbishop to primacy over the English church.

In the trial that the pope had ordained to occur before his legate to resolve the factual issues in the contested election at York, there were two matters in dispute. First, would William, the Archbishop elect, himself swear that he had not bought his election. The taint of the sin of simony must be removed. Secondly, would William of Ste-Barbe - the dean of York and an upright clergyman plainly regarded as honest by the Cistercian advocates in Rome - swear that the Earl of York had not delivered an order from Stephen to the chapter, commanding the election of William. There seems little doubt that the Cistercians knew the answer to the second question.

By a strange coincidence, William of Ste-Barbe had, in the interim been consecrated by Henry as Bishop of Durham, the sole suffragan of York. To the surprise of the Cistercians, at the trial held at Winchester to resolve the facts, a document was produced - either a forgery or obtained by fraud and of which no trace could be found in the papal registers only a few years later. The document authorised Henry to act on the testimony of other witnesses in the unlikely event that William of Ste-Barbe happened to be unavailable. It was no surprise, by then, that the pressure of his duties at Durham had prevented William of Ste-Barbe from attending the Council. The formal finding that the Earl of York had not influenced the outcome was made. Henry consecrated his nephew as Archbishop of York.

Bernard of Clairvaux was outraged by the blatant rigging of the appointment. He wrote to the Pope with a pen dipped in the vitriol of sarcasm:

"I returned home to my own affairs from that excellent meeting of your Curia strengthened by the grace of God. Since then I have been waiting to see if the flower of the decision you made in Rome would bear the appropriate fruit in Winchester. O happy Winchester, second Rome, happy in your choice of so great a name! O city so powerful that you can withstand the authority of your might fathers in Curia, change their decrees, pervert their judgment, defame the truth, and with a great vice confirm what Rome has most rightly judged shall not be confirmed without the prescribed condition. What will not the "cursed lust for gold" drive a man to do! Winchester has arrogated to himself the venerable name of Rome and not only the name but the prerogatives too. Behold here, here I say is the enemy, here is the man who walks before Satan, the son of perdition, the man who disrupts all rights and laws. Would that the song that they sing that Winchester is greater than Rome could be silenced on their lips. Lest

such contumacy should become a custom and example, lest the dignity of Rome should be torn to shreds, lest the authority of St Peter succumb to these new and great humiliations, lest religion should grow cold in the diocese of York, yea, lest it be wholly uprooted and scattered to the winds, let Rome in the sole interests of justice, crush the contumacy of this stubborn man.”

Bernard was not given to understatement.

Unbeknown to Henry, just two days before he consecrated his nephew William, at Winchester on 26 September 1143, Innocent II died. Henry’s legateship had automatically terminated. William’s appointment to York was not canonical. Bernard was determined to overthrow the new Archbishop of York. The next Pope did not act but soon died.

On 15 February 1145, Bernard of Pisa, abbot of the Monastery of ss Vincenzo e Anastasio at Rome was elected pope and took the name Eugenius III. His was a monastery of the fundamentalist Cistercian order. Eugenius was a personal disciple of Bernard of Clairvaux and he brought the grievances of the order to the papacy.

In his first letter of congratulations to Eugenius, Bernard - emaciated by self-inflicted austerity and writing from his tiny cell-like nook in an angle of the staircase of Clairvaux - specifically drew attention to the inequity in the see of York.

“When you have time”, he confidently advised his disciple, “deal with them according to their works, so they may know a prophet has arisen in Israel”.

He went on to declaim “My pen is directed against the idol of York with all the more reason because my other attacks with this weapon have not gone home. It belongs to the Roman pontiff to command the deposition of bishops, for although others may be called to share his cares, the fullness of power rests with him alone.”

Eugenius acted quickly. William, in Rome to receive the pallium, was suspended. The election had been illicit. It was not a free election.

On 7 December 1147, Eugenius appointed the originally unsuccessful candidate, the abbot of Fountains - a stern Cistercian protégé of Bernard’s called Henry Murdac - as Archbishop of York. An ardent, ascetic disciplinarian, Murdac’s original arrival at Fountains, then already known for its rigour, was described with biblical sweep by a contemporary: “He cut down the groves, and destroyed the high places, searched Jerusalem with lamps, swept out the house and scoured off the rust still clung to the sides of the vessel.” The contrast with the lifestyle of Henry of Blois and his family, could not have been greater.

To appoint an Archbishop without the approval of the King of England was of course a challenge to Stephen’s institutional authority which - in a world obsessed with the force of precedent and the recognition of prestige - could not be ignored. The King’s liberty or dignity or honour had been challenged. His sovereignty was tarnished. When Eugenius summoned a General Council of the Church to meet, again, in Rheims on 21 March 1148, Stephen in retaliation against the Pope, nominated three specific bishops who would represent the English Church. All other bishops were forbidden from attending.

King Stephen sought to prevent the new Archbishop of Canterbury, Theobald, from attending. Stephen himself attended the consecration of Theobald’s brother Walter as Bishop of Rochester, a see long regarded as a subsidiary of Canterbury and within the sole gift of its archbishop. This consecration occurred on 14 March, just one week before Eugenius’s Council had been convened for Rheims. The English theologian, John of Salisbury - then serving on the staff of Eugenius and probably already in Rheims, and who later became Theobald’s personal secretary - stated that Stephen’s presence at Canterbury for the consecration of Walter, was some kind of personal mission to prevent Theobald escaping over the channel. John was never short of a personal melodramatic touch. At that time Stephen was still holding all the assets of the Archbishop of York and was refusing to acknowledge the legitimacy of Henry Murdac’s appointment. The King’s sanctions over ecclesiastic defiance were being exercised.

Nevertheless, Theobald had decided to defy his King. He set sail on a tiny fishing boat to cross the Channel in stormy conditions. Theobald described his voyage as “more a swim than a sail”. He was accompanied to Rheims by a single aid, Thomas Becket - no doubt a formative

experience for the young cleric.

Having displayed his loyalty to the reform papacy, Theobald raised at Rheims the question of the primacy of Canterbury over York. The previous year he had successfully resisted the appeal to the Pope by Bernard, Bishop of St David, to liberate the Welsh church from Canterbury. Whilst postponing a final resolution of what he described as "the truth about the dignity of the Church of St Davids and its liberty", Eugenius had accepted Theobald's witnesses who testified - contrary to Bernard's denial - that at Bernard's own consecration over thirty years before, he had professed obedience to the church of Canterbury.

In the case of York, however, Theobald was seeking to change the status quo established by Thurstan. The Council of Rheims was not an auspicious moment to raise such an issue. On the agenda of the Council were a series of identical legal appeals.

The Bishop of Paris claimed jurisdiction over the abbot of St Germain, the Bishop of Autun claimed jurisdiction over Vezelay, the Archbishop of Rouen over Fécamp, the Archbishop of Sens over Ferrières and St Colombe, the Archbishop of Lyons asserted primacy and right of obedience from the Archbishops of Rouen and Sens - as well as Tours, the Archbishop of Vienne claimed the subjection of Bourges, the Archbishop of Bourges claimed the subjection of both the Archbishop of Norbonne and the Bishop of Le Pui. The greatest merriment and clamour arose from the claims by Alberic, Archbishop of Trèves, to the subjection of Rheims itself. John of Salisbury reported that the gathering thought him mad.

A few months later at the succeeding conference of Italian Bishops - only one of whom could come to Rheims - Eugenius would have to deal with the mutual claims of precedence over each other between the Archbishops of Ravenna and Milan; the claims of Milan over Genoa; the claims of Ravenna over Piacenza and other such jurisdictional sprats.

All the claims, including that of Theobald were rejected. It may well be that Eugenius, imbued with the Cistercian's zeal to reform the Church's worldly ways, simply treated the jurisdictional disputes with contempt and confirmed the status quo in detached disdain. In any event, the regional claims of primacy had come to be resented in the curia as an interference with the powers of the centralised papacy. They too had come to love the joys of a federal structure. After a century of active reform, Rome found that it could deal with a wide range of disputes directly, without the need for a regional overlord.

Eugenius showed the extent of these powers by taking upon himself the direct discipline of the English church. Stephen had challenged the authority of the Pope both by refusing to accept his consecrated Archbishop of York, Henry Murdac and by interfering with the Pope's summons to a general Council. Eugenius suspended all the bishops who, in obedience to the King, had stayed in England. He gave Theobald the power to lift the suspensions, except in the case of Henry of Winchester. Henry had to appeal to the Pope himself.

In the concluding session at Rheims, the Pope himself prepared to conduct the ceremony of excommunication of the King of England. The candles were lit when Theobald - either overcoming an earlier reluctance to raise a matter which he was sure to lose, or choosing the moment when the very breach of decorum emphasised the strength of his opinion - stepped in and begged for a stay of the order. Eugenius was plainly astounded. "After a little thought and a few sighs" as John of Salisbury put it later, he declared:

"Behold! Brethren, a man who in our own day has fulfilled the Gospel's precepts, who is wont to love his enemy and ceaseth not to pray for his persecutors. Therefore, although this King has properly incurred our wrath and that of God's Church, we cannot but approve such charity manifested by one whose wishes we are compelled to obey."

This last phrase, reported without comment by John of Salisbury, is redolent with irony addressed, perhaps, to Bernard and the Cistercians camp, who probably sought excommunication to enforce the final acceptance of the their colleague as Archbishop of York.

King Stephen still refused to let Henry Murdac return to England. This was the first Archbishop since the Norman Conquest who had been elected and consecrated without the approval of the King. When Henry Murdac did return, the majority faction at York cathedral, backed by the Earl of York, denied the Archbishop access to the city itself. He had to conduct his archiepiscopal

duties from Ripon, near Fountains abbey.

Henry Murdac served as Archbishop of York from 1147 to 1153. His installation occurred during a brief period where the Cistercian order combined both political power and moral authority, particularly in the region of Yorkshire. Murdac himself was a Yorkshireman who had submitted to the charisma of Bernard at the abbey of Clairvaux, no doubt in a period of idealism. The combination of real authority and idealism proved, as is often the case, to give rise to contradictions. Henry Murdac proved an entrepreneurial abbot of Fountains, establishing daughter houses, even as far away as Norway. As archbishop, he maintained his authority over the abbey by hiring and firing a series of stooges as abbot of Fountains and appeared to find spiritual fulfilment, not merely in the cloister but also by maintaining the rights of his see in as aggressive a way as Thurstan had done.

The surviving records are not adequate to be able to finally judge on which side of that fine line between principle and self-righteousness he should be seen to fall. His great ally in his succession to the archdiocese was William of Rievaulx, another Englishman and the first abbot of the other great Yorkshire monastery of the Cistercians. As I have noted, he had also been a monk at Clairvaux and an intimate disciple of St Bernard. Second to no-one in zeal, the records do not suggest any lapsing from principle into self righteousness on his part. In the case of Henry Murdac, his lip service to the ban on holding ecclesiastic offices in plurality, by retaining effective though not formal control of Fountains abbey, suggests on which side of the line he fell.

After his removal from office, William Fitzherbert, entered retirement in the cathedral monastery at Winchester, it appears without complaint.

In 1153, within a few weeks of each other, Eugenius (on 8 July) Bernard (on 20 August) and Henry Murdac (on 14 October) all died. The new pope Anastasius IV was not of the Cistercian faction, which was in eclipse because of the calamitous second crusade - cut to pieces in Asia Minor without ever reaching the Holy Land - that had been proposed by Eugenius and launched with ardour in a stirring oration by St Bernard at the church at Vezelay.

With the Cistercians in political retreat, William Fitzherbert was re-appointed as archbishop. His return to York was described by contemporaries as a triumphant progress. The local mythology tells how the bridge at York broke under the crowd which had gathered to welcome him and all were miraculously restored by his prayers. One of William's first tasks was to visit and offer compensation to the Cistercian abbey at Fountains which his supporters had invaded and sacked upon his removal six years before.

Another nephew of the House of Blois was given immediate preferment. Hugh du Puiset, son of Agnes of Blois, the sister of Stephen and of Henry of Winchester, had been bishop Henry's archdeacon at Winchester from 1139 and became the Treasurer of York during William's first appointment to the see. His arrogance is manifest in the way he described himself during this period as: Hugh "By the grace of God, Treasurer and Archdeacon". For a time he, together with the Earl of York, was instrumental in denying Henry Murdac access to the city. When the archbishop had excommunicated his treasurer and the Earl, Hugh retaliated by excommunicating his own archbishop. In 1153 Hugh de Puiset was appointed as Bishop of Durham, the sole suffragan of the see of York.

It does appear that William's appointment to York and Hugh's appointment to Durham were locally popular. No doubt, the population rejected the puritanical regime of the Cistercians.

Hugh du Puiset would, in a long life, establish a reputation for avarice. He was, one historian has said, one of the most avaricious public figures in twelfth century England. A big call.

William Fitzherbert, however, had only one year to live. He died in 1154. His own archdeacon, and one of the principle opponents of his original election in 1141, Osbert of Bayeux, then archdeacon of York, was accused of administering poison to his archbishop in the chalice at mass. Osbert was the nephew of the former Archbishop Thurstan and another member of the Bayeux faction in the twelfth century English church.

Theobald, Archbishop of Canterbury, who had kept aloof from the decade long battle in the see of York, intervened decisively on William's death and secured the appointment of his own

archdeacon, Roger de Pont L'Eveque as Archbishop of York. This was a crucial event in Theobold's household, permitting the promotion of Thomas Becket and at the same time establishing a personal rival in what became in the future an extension of the traditional institutional rivalry.

Hadrian IV - the only English pope - reinforced the precedent of Eugenius' decision in the case of William Fitzherbert by promulgating, on 5 February 1156, a formal edict which prohibited the consecration of a bishop "who had not been freely elected and without previous nomination by the secular power". It was a ruling which could taint the appointment of Becket to Canterbury.

The case against Archdeacon Osbert for murder of his archbishop was brought before King Stephen's court. King Stephen was proposing to exercise that jurisdiction, notwithstanding the objection of the clergy, including Archbishop Theobold, who advanced the claim of clerical immunity from such secular jurisdiction, even for crimes of this character. Stephen apparently asserted that he should exercise jurisdiction, not only because of the atrocity of the crime, but also because he happened himself to be in York when the alleged offence was committed. Stephen died later that same year of 1154.

At a time when the new Henry II was at his most vulnerable and needed the support of the church, Theobold prevailed upon him to permit the church to conduct the trial. Theobold reported to the Pope "We just, and only just, succeeded in recalling the case to the judgment of the church".

This moment of weakness would prove to be of considerable significance for the future controversy between Henry II and Becket. The church proved unable to satisfactorily resolve the allegation of murder. Years later, Archbishop Theobold himself had to tell the pope that the case failed "owing to the subtlety of the laws and the canons". Osbert was never punished. Belief in his guilt, however, reflected in the recollections of John of Salisbury amongst others, was so widespread that he left the clergy and lived out his life as a minor baron.

The procedure of the ecclesiastical courts was not, in the event, able to cope with the accusation. The case was never resolved. There is little doubt that Henry II was very conscious of this failure in his subsequent determination to bring criminous clerks under the jurisdiction of the royal courts. When Henry II launched his campaign against the criminous clerks, he did so having been told that since his coronation, more than one hundred murders had been committed by clerks.

Perhaps it was because of the manner of his death, perhaps because of his ability to bear adversity with dignity, William Fitzherbert became St William of York, canonised by Honorius III. No historian can think of a reason which justified this elevation. Most attribute it to the anxiety of the canons of York to have saintly relics in their cathedral. By that stage, Canterbury, with the relics of Becket, was beginning to monopolise the pilgrimage trade.

St Bernard of Clairvaux is one of the few people who are specifically mentioned by Dante as having been admitted to Paradise. If the mutual belief of St Bernard of Clairvaux and St William of York has proven true, and all saints are in heaven, I have no doubt that St Bernard, has for the last eight hundred years, been berating the Almighty himself for allowing entry to William Fitzherbert.

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Address by The Chief Justice of New South Wales at the Graduation Ceremony of the University of Western Sydney, Neplan

It is approximately thirty years since my own graduation in law. The period of my life which ended at that time is one upon which I look back with great warmth. I trust you will all have the same experience.

Perhaps the most striking difference between the time of my own graduation and that of yours, is the speed with which everything happens today.

I grew up in a country in which the Prime Minister, Sir Robert Menzies was able to travel to England for six weeks by boat with the Australian cricket team stay, for a month or so watching cricket and then return by boat, taking another six weeks to do so. Such conduct is completely inconceivable today. Everything has speeded up. Sir Robert Menzies would never have approved of one day cricket. Even today, he would not be alone in that.

There have, of course, been many improvements directly associated with increased speed. If there were a competition to build a statue for the one person who has most improved the Australian standard of living over the course of the twentieth century, I would nominate the Chief Engineer on the Boeing 747 Project. Until about the time in the mid to late sixties, when I was a student, it was still cheaper to take someone on a boat and feed them for six weeks, than it was to fly to Europe. There can be no doubt that the expanded opportunities for travel available now to all Australians have overcome the intellectual and cultural provincialism with which this nation was afflicted for most of its existence.

Nevertheless, as a nation we have substituted the tyranny of distance with a tyranny of immediacy - a tyranny which, at least, we share with everyone else.

The process of acceleration is unremitting. In the United States it took forty-six years for twenty-five percent of the population to be connected to electricity. It took thirty-five years for that proportion to get the telephone. It took sixteen years for that proportion to take up personal computers, but only seven years for that proportion of twenty-five percent, to be connected to the world wide web.

Anyone using contemporary telecommunications or computer technology has experienced the phenomenon of being infuriated by the delay associated with some processing function, not remembering that only six months before, that length of delay was perfectly acceptable and that six months or a year before that, the function, having been introduced for the first time, was regarded as an absolute marvel.

Where we once spoke of words per minute we now speak of characters per second. One can buy telephone answering machines with a quick replay button in a digital format, so that the reply is accelerated without the high pitch of a Disneyfied chipmunk. Similarly, one can buy music CD players with an option that lets the user close the one or two second gap between tracks.

Time is more important than ever. In Tokyo one restaurant charges by time at the rate of thirty-five yen per minute. You clock in, you clock out and your bill is computed on the time difference. Indeed, it is necessary for us to create the illusion that we are saving time even when we cannot do so. On many elevators the "door close" button is in fact a placebo. It has no function, other than to placate those who measure their life in seconds.

Perhaps we sense that time is scarce because there is more to absorb. On one recent calculation, a search on the subject "Information Overload" on the world wide web hits twenty thousand different sites. That is information overload indeed.

In the midst of this change, it remains appropriate to reflect - when we can find the time to do so - on things that endure. Although yours is a new University and your School of Law - for which today is the first graduation - is even younger, your campus contains one of the most important heritage complexes in Australia. It is appropriate to reflect on the significance of that heritage.

Last year the Supreme Court of New South Wales celebrated the one hundred and seventy-fifth Anniversary of its creation. On 17 May 1824 the Charter of Justice creating the Court was promulgated and, thus, was here inaugurated a free community governed by the rule of law.

Next year we will celebrate the Centenary of Federation. In a few years we will celebrate the one hundred and fiftieth Anniversary of representative and responsible Government. These are old traditions by any standards. The number of nations which have judicial institutions as old as the Supreme Court of New South Wales can be counted on the fingers of one hand.

In 1824 when the Supreme Court was established, France was a monarchy. Ahead of it lay one empire and four separate republics. Germany did not exist. It consisted of a series of kingdoms, principalities, dukedoms and city states. It had before it a process of unification and an empire, a republic, a totalitarian dictatorship, further division into two separate republics and reunification. All of these various changes were accompanied by fundamental alterations in the basic institutions, both judicial and governmental.

Virtually everywhere one looks in Europe, Asia, Africa and Latin America the institutional structure bears not the slightest resemblance to that which existed one hundred and seventy-five years ago or, in most places, even one hundred years ago. In Australia there is a clear line of uninterrupted institutional continuity.

Australians like to think of this as a young country. Indeed the second line of our national anthem states: "For we are young and free". However, when it comes to the basic mechanisms of governance this is not a young country, this is an old country.

The twin great institutional traditions of our system of governance - the rule of law and the need of the consent of the governed - form part of the core content of Australian national identity. Their force today, reflected in the universal acceptance of the legitimacy of the institutions which perform these functions, is derived in large measure from the longevity of the traditions by which they are performed.

There is a tendency for some to treat the courts as if they were some form of publicly funded dispute resolution service. Such an approach would deny our long heritage. The Supreme Court does not provide a service to litigants as consumers. The Court administers justice in accordance with law. This is a core function of government.

There is a great deal of wisdom deeply embedded in institutions which have grown and adapted to changing circumstances over long periods of time. It is a regrettable characteristic of much Australian public debate that it proceeds on the basis that history is of little significance. Indeed it sometimes appears as if many think of history as something that happened somewhere else. No law graduate could think in that way. I am sure that your studies will have shown you just how significant has been the process of adaptation of our law to the changing demands of varying social conditions over time.

As I have said, those changes now come with greater speed. As you yourselves take your place in that process - some in the law, some in other spheres of endeavour - you should reflect on the strength of the tradition which you have behind you.

On this day I congratulate each of you on your achievement and wish you well in the future application of the knowledge you have acquired during these important years.

Speech to the Australian Insurance Law Association Annual Conference

OPENING ADDRESS BY THE CHIEF JUSTICE OF NEW SOUTH WALES TO THE AUSTRALIAN INSURANCE LAW ASSOCIATION ANNUAL CONFERENCE SYDNEY, 6 APRIL 2000

At the commencement of the Law Term this year, I announced a series of reforms in the practice and procedure of the Supreme Court, directed to improving the efficiency with which the Court conducts cases before it. Of particular concern was the extent to which the Court imposes costs upon litigants.

In today's address I wish to concentrate particularly on the issue of expert evidence. However, the overall context remains of significance.

The new Rules represent a further stage of the development that has been occurring over a period of some two to three decades, involving the increased intervention by the Court in the conduct of cases through case management by the Court.

Until it was abolished in the late eighteenth century, the common law had a mechanism known as *peine forte et dure*, a form of torture inflicted upon a prisoner indicted for felony who refused to plead and submit to the jurisdiction of the court. Heavy weights were applied to his body until he consented to be tried by either pleading "guilty" or "not guilty" or until he died. This was an early form of case management. It remains a model for the courts.

The Supreme Court has adopted a new overriding purpose for the Rules: to facilitate the just quick and cheap resolution of the real issues in dispute. The new Rules identify:

- An obligation on the Court to give effect to the overriding purpose when it exercises any of its powers.
- An obligation on a party to civil proceedings to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
- An obligation on legal practitioners to refrain from engaging in conduct which causes his or her client to be put in breach of this duty.
- A power in the Court, when exercising the Court's discretion to award costs, to take into account any failure to comply with these duties by a party or by a legal practitioner.

This overriding objective is reinforced by new professional rules of conduct adopted by the Bar Association, in consultation with myself as part of the same consultative process which led to the new Court Rules. I assume these rules will be adopted by the Law Society as the advocacy rules for solicitors. These new rules emphasise the importance of:

- Confining a case to issues genuinely in dispute.
- Refraining from making allegations of fact without a proper basis.
- Complying with orders, directions, rules and practices of the Court.
- Preparing a case for hearing as soon as practicable.
- Presenting issues clearly and simply.
- Being as brief as reasonably necessary.

There can be no doubt that one of the great challenges facing the administration of justice is the creation of a rational relationship between the costs of conducting proceedings and the value of the subject matter in dispute in such proceedings. This involves legal costs. But it also involves control of the expenditure on expert witnesses. These issues have acquired a greater degree of salience because of the significant changes over recent decades in many areas of institutional practice throughout our society that have been spurred by a new emphasis on economic efficiency.

These issues are not new. No reader of Dickens would have any difficulty identifying the problems involved. Indeed, the precedents go back even further.

In the days when legal fees were determined by the volume of documentation lodged with the court,

prolixity became an art form. In response, there were rules of court which required a certain minimum number of words per sheet, to minimise the degree to which clients could be exploited by their lawyers. In the Court of Kings Bench every sheet had to have at least seventy-two words on it; in the Court of Exchequer, at least seventy-eight; and in Chancery, always more concerned with questions of conscience, every sheet had to have ninety words on it. One Lord Chief Justice of England identified the problem:

“There are certain unreasonable impertinences used ... which doth not only exceedingly prejudice the people, but ... serves for no other use but to swell the attorney’s bill, and at present helps fill their prothonotarys’ pocket, and to reimburse with advantage the purchase of his place.” Melinkoff *The Language of the Law* (1963) at 190.

The latter is a reference to the fact that clerks of the court had a vested interest in this prolixity also. Like other public officers of the day, these positions were for sale. A public officer was expected to pay himself by exploiting his office, relevantly, out of the fees for preparing and filing documents. It operated on the same principles as the sale by government to tax farmers of the right to collect taxes. These were an early form of privatisation.

Before we get too smug about the comparative progress in our own time with respect to these matters, we should be aware of the financial incentives that are created for practitioners in today’s legal system by the, comparatively recent, universal adoption of the practice of charging on the basis of time and also the profit element that appears sometimes to be included in disbursements for photocopying. Some proposals for setting court fees on a user pays basis should also be carefully scrutinised, although no one has yet suggested that the judges can keep the fees.

Other than in circumstances where the courts themselves - as reflected in the jurisdictional wars over the centuries amongst the courts of Kings Bench, Common Pleas and Exchequer - had similar financial incentives, the courts have been trying to control these problems for many years. A good example comes from 1556 *Milward v Weldon* (1566) 21 ER 136.

in a case when the Plaintiff’s replication had been stretched from an adequate sixteen pages to one hundred and twenty pages. The report records:

“It is therefore ordered that the Warden of the Fleet shall take the said Richard Mylward ... into his custody, and shall bring him unto Westminster Hall on Saturday next ... and there and then shall cut a hole in the myddest of the same engrossed replication ... and put the said Richard’s head through the same hole, and so let the same reproduction hang about his shoulders with the written side outward; and then, the same side hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of the three courts within the Hall.” Quoted in 5 Holdsworth *A History of English Law* 233 note 7 (1924).

In days gone by, interrogatories, and in the present day, affidavits, could be subject to similar acts of public shaming. However, nothing that could conceivably adorn a person can be done with the contemporary Agreed Bundle of Documents. Perhaps we should order defaulters to be pushed around the Court in a trolley. The particular example I have just quoted about the poor Mr Richard Mylward, is instructive in another respect. He was the Plaintiff. He was not the legal practitioner.

Subsequently, Francis Bacon when Chancellor, between 1618 and 1622 enacted Rule 55 of his Chancery Ordinances to the following effect:

“If any bill, answers, replication, or rejoinder shall be found of an immoderate length, both the party and the counsel under whose hand it passes shall be fined.” 7 Bacon *Works* 285.

Accordingly, it can be seen that there are long standing precedents for the recently announced modification of the rules of the Supreme Court which enable costs to be awarded against legal practitioners. These are reinforced by a new Practice Note outlining the procedure for making such orders and the circumstances in which they may be appropriate.

There has long been a rule which empowered the court to make such “wasted costs” orders. Furthermore, the Court has always had an inherent jurisdiction to make orders of this character. Last year the Court of Appeal of New Zealand affirmed an award of costs against legal practitioners by the

High Court of New Zealand *Harley v McDonald* [1999] 3 NZLR 545.

. In that case his Honour, Justice Tipping, delivering the judgment of the Court, carefully distinguished the policy reasons for immunity from suit on the part of barristers and indicated that those policy reasons do not apply to an award of costs against a barrister At [22]-[28] and [32]-[50].

. His Honour emphasised that the basis on which such orders are made was a significant dereliction of the duty which solicitors and barrister owe to the Court. The Court of Appeal found that, on the facts of that case, the pursuit by the barrister of a completely hopeless case represented such a high level of incompetence that a costs order against her was appropriate. The Court also found that the firm of instructing solicitors could not hide behind the dereliction of duty on the part of the barrister. They had an obligation "to apply their own minds to the viability of their clients' contentions" At [84].

The new rules of the Supreme Court with respect to expert evidence should be assessed in the context of the overall package designed to ensure just, quick and cheap resolution of the real issues in dispute. In this regard, I do not focus solely on the question of costs. The issue of justice, itself not wholly divorced from the question of costs, must also receive emphasis.

Error on the part of experts in litigation - whether the error is a result of bias or an error of judgment - can have very serious consequences. One has only to remember the scatter of what appeared to be droplets in a car - said by an expert to be the blood of Azaria Chamberlain, yet subsequently established to the satisfaction of a Commissioner of Inquiry, Justice Trevor Morling, to have been laid down at the time of the manufacturer of the car - to recognise the serious implications of error or bias on the part of an expert.

The problem of bias has been a matter of continual commentary by judicial observers over many years. It has recently been the subject of a study conducted by the Australian Institute of Judicial Administration Dr I. Freckelton "Australian Judicial Perspectives on Expert Evidence: An Empirical Study" AIJA 1999.

. Sixty-five percent of the judges surveyed found that they encountered bias "occasionally" and twenty-six percent said that they encountered bias "often". About forty percent of the total respondents said that partisanship in expert witnesses was a significant problem for the quality of fact finding in their court.

According to Justice Sperling of the Supreme Court, whose comment is recorded in the AIJA study, and which is said by the authors to have been typical:

"In the ordinary run of personal injury work and to a lesser extent in other work, the expert witnesses are so partisan that their evidence is useless. Cases then have to be decided upon probabilities as best one can." The Hon Justice H D Sperling *Expert Evidence: The Problem of Bias and Other Things* 3-4 Sept. 1999 accessible at www.lawlink.nsw.gov.au/sc.

One of the issues that has arisen in the context of allegations of bias amongst expert witnesses is interaction between an expert and a legal practitioner with respect to the contents of the report. This has, on occasions, raised very real questions about the performance by the legal practitioner of his or her own professional responsibilities, including duties to the court. There are very real limits on the extent to which it is acceptable for a legal practitioner to seek to fashion expert evidence in a direction which happens to suit his or her client's case.

Such problems have, in part, prompted proposals that there ought be a modification to the principles of legal professional privilege with respect to expert witnesses. Most recently, a recommendation that a party that calls an expert adviser to give evidence should be taken to have waived privilege with respect to communications with the expert, except communications consisting of statements to other witnesses, has been made in Western Australia by the Review of the Criminal and Civil Justice System.

These proposals are well motivated. However, I am not minded to support an approach of that character. There is much to be gained from the free exchange of ideas and the formulation of ideas between expert and lawyer. The benefits include clarification of issues, testing the relevance of various approaches to the issues, removal of irrelevant observations, refining the focus on relevant questions, correcting errors in the expert's understanding of instructions and in the facts to be assumed, improving clarity of expression, removing ambiguities, and formatting the report in a way that would be most useful. Drafts for these legitimate processes are common place and are legitimate.

On the other hand, it may be doubted whether or not the denial of privilege would achieve the objective of impeding the presentation of dishonest opinion evidence. Communications between excessively malleable experts and legal practitioners who do not understand their professional responsibilities, would still be carried on orally, even if they lose the element of efficiency which is afforded to them by the use of written communication.

Finally, it should be pointed out that with respect to this kind of manipulation in the system, there does not appear to me to be any difference between expert witnesses and lay witnesses, other than in the respect that an expert is entitled to the degree of respect that the expertise provides. On the other hand, if they fall off their pedestal, they have further to fall.

There are many respects in which the law of legal professional privilege qualifies the ability of an adversary system to identify the truth. This is a manifestation of the principle on which that adversary system is based that there are occasions on which the truth costs too much. As Knight-Bruce, Vice-Chancellor said in 1846:

“The discovery and vindication and the establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much.” *Pearce v Pearce* (1846) 63 ER 950 at 957.

The new Part 36 Rules 13C and 13CA and Part 39, with respect to court appointed experts, together with the Expert Witness Code of Conduct contained in Schedule K of the Rules, constitutes a new regime for the presentation of expert evidence in the Supreme Court. These rules draw upon the general approach reflected in the 1998 Federal Court Rules with respect to this subject, which rules are themselves presently the subject of review in that Court. They also constitute a development of the Court's Practice Note No. 104 of December 1998 for the Professional Negligence List.

The central proposition in the Code is the assertion, to be acknowledged by the expert, that an expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise. It is emphasised that the expert is not an advocate for a party, but has a paramount duty to the court, not to the person retaining the expert. In many respects this exhortation may prove to be a counsel of perfection. It is nonetheless valuable, even if one must recognise that it will not always be observed.

As one cynic once put it on the issue of bias:

“The most important thing is authenticity. If you can fake that, you've got it made.”

The new rules will establish a number of matters of practical significance which an expert concerned with his reputation, and perhaps his future in the forensic branch of his or her profession, will feel obliged to observe. The Code of Conduct requires an expert:

- To state any qualification in his or her report without which the report may be incomplete or inaccurate.
- State, if it be the fact, that the opinion is not a concluded opinion because of insufficient research, insufficient data, or any other reason.
- Communicate any change in opinion on a material matter that occurs after the presentation of the report.

The Court may, on application or of its own motion, direct expert witnesses to confer to endeavour to reach agreement and to provide a joint report, specifying matters agreed and matters not agreed. Like many other aspects of case management, such conferences are capable of adding to the costs of litigation. The objective, however, is to minimise costs by facilitating early resolution of disputes and narrowing the range of issues in dispute. Resolving disputes at an early stage has a dramatic impact on the costs of litigation.

A formal order, pursuant to the Rules of Court, requiring experts to confer and produce a joint report,

may have ancillary effects. In one recent English case, an expert who revised a draft report as a result of a conference required by the court was sued by his former client, who had felt obliged to settle the matter in accordance with the joint report. He subsequently wished to resile from this settlement. The English Court of Appeal held that the expert was immune from suit. The fact that the conference occurred pursuant to a court order was a relevant factor *Stanton v Callaghan* [1999] 2 WLR 745.

The costs of expert witnesses are, second only to the costs of legal practitioners, the most important component of the cost of litigation. A central dilemma for any attempt to minimise costs arises from the fact that the economic incentives for legal practitioners and expert witnesses are in favour of delay and lengthening proceedings, not in favour of speed and expedition.

Lord Woolf expressed the problem in his Access to Justice Report, which has led to the new English Civil Procedure Rules of 1999:

“A large litigation support industry, generating a multimillion pound fee income, has grown up amongst professions such as accountants, architects and others ... This goes against all principles of proportionality and access to justice.” Access to Justice Final Report 1996 chap 13 para 2.

The system presently relies significantly on a sense of professional responsibility on the part of both legal practitioners and experts to overcome the economic incentives they have to delay and lengthen proceedings. The power to award costs against legal practitioners is available if professional values fail in this respect.

Another issue that has arisen in the context of the consideration of expert evidence is whether the Court should establish a formal system by which one party may interrogate the opposite party's expert. Part 35.6 of the new English Civil Procedure Rules permits such a course. The recent Review for the Western Australian Law Reform Commission also recommends such a procedure. So did the Australian Law Reform Commission Report on the Federal Civil Justice System Review of the Criminal and Civil Justice System in Western Australia: Final Report. The Law Reform Commission of Western Australia, September 1999 para 22.4; Australian Law Reform Commission Report No. 89 Managing Justice: A Review of the Federal Civil Justice System, Australian Law Reform Commission, January 2000, Recommendation 63 para 6.90.

. This proposal could add to costs. However, it is a matter worthy of further consideration.

The new Civil Procedure code for England has been implemented, but it is too early to assess its efficacy. The implementation of the new code has led to a Draft Code of Guidance for Experts which was released for discussion in 1999 and which, I understand, is likely to be promulgated in a month or so.

In the context of the Professional Negligence List, the Supreme Court has established a Working Party under the chair of Justice Abadee. It is comprised of representatives of legal practitioners, insurance companies and of the medical profession. The Working Party will draft a set of guidelines or a protocol designed in a practical way to help and assist medical experts who are instructed under Part 36 Rule 13C, or directed to attend joint conferences under Rule 13CA. It will also consider the role of Court appointed experts under Part 39. I am confident that a practical result will ensue from this Working Party. Its deliberations may well result in the formulation of a Practice Note. Some parts of any such Protocol may prove to be applicable to other spheres of expertise.

The new Part 39 of the Rules is designed to facilitate the appointment of experts by the Court. This facility has long existed but has rarely been used. There is a tension between such an appointment and the traditional operation of the adversary system. Nevertheless, such experts may be of particular significance in the resolution of technical issues in the context of litigation in which the amount in dispute is less than the likely cost of litigation See the observations of Pincus J in *Newark Pty Ltd v Civil and Civic Pty Ltd* (1987) 75 ALR 350 at 351.

In many situations a court appointed expert would add to, rather than diminish, the costs. The Supreme Court has not followed the model based on Lord Woolf's recommendation, found in Part 35 of the Civil Procedure Rules 1999 to the effect that the court may direct that evidence on an issue is to be given by one expert only. However, Part 34 Rule 6AA(i)(b) and Part 39 Rule 6 do authorise the Court to limit the number of other experts whose evidence may be adduced, on the question upon

which a court appointed expert has reported.

It may be that in appropriate cases, particularly those which do not involve any significant amount in dispute, that a greater use of court appointed experts will emerge over time. In this regard the various powers contained in the new package of rules may be employed in a synergistic way.

Under Part 34 Rule 6AA the Court's inherent powers to limit the time taken in examination of witnesses, in making submissions or in presenting a case, has been made express. The Court is obliged to take into account a range of factors under Rule 6(2) and (3) when exercising this power.

Of particular significance to the client will be the costs which it may need to pay in the event of the trial being conducted in a particular manner. The Court has an express power under Part 34 Rule 6(4) to direct a solicitor or barrister to give his client an estimate of the length of the trial and of the costs the client would incur, together with an estimate of the costs that would be payable to another party if the client proved to be unsuccessful. This latter step goes beyond the obligations of disclosure under the *Legal Profession Act*.

Furthermore, in Part 52A Rule 35 the Court has power to specify the maximum amount of costs that may be recovered by one party from another. This is designed to ensure that a party with deep pockets cannot prevail simply by reason of that fact. This is a rule that has existed for some time in the Federal Court Rules and has not been used to any great degree. Its use in New South Wales cannot presently be predicted but it, like other powers of the Court, must be exercised by judges in the light of the overriding purpose to ensure the just, quick and cheap disposition of proceedings.

Part 15A is a new provision, the future of which is also difficult to predict. It creates the possibility of limiting the extent of disputation about matters of expert evidence. It establishes an obligation not to put matters in issue unless it is reasonable to do so. The new provision enables a presiding judge to certify that allegations of fact were made or put in issue contrary to the obligation to only do so when reasonable. The effect is that the party in default will be obliged to pay the costs of the issue referred to in such a certificate on an indemnity basis and to do so irrespective of the outcome of the trial as a whole. This new part of the rule may be found to have an application in a context of assertions of fact to which expert evidence is material.

Speech to the Annual Conference of Judges of the High Court and the Court of Appeal of New Zealand

**SPEECH BY THE HONOURABLE J J SPIGELMAN
CHIEF JUSTICE OF NEW SOUTH WALES
ANNUAL CONFERENCE OF THE JUDGES OF THE HIGH COURT AND THE COURT OF APPEAL
OF NEW ZEALAND
NAPIER, NEW ZEALAND
2 APRIL 2000**

Sir Kenneth Keith was kind enough to forward to me a copy of the 1999 Annual Report of the Court of Appeal, with the suggestion that I might consider commenting on three of the matters to which that Report refers:

- * Tariff judgments for sentencing (Part 4 of the Report);
- * Appeals on fact and second appeals (Part 5 of the Report); and
- * Interpretation of statutes and contracts (Part 6 of the Report).

Sentencing Guidelines

Part 4 of the Report sets out the tariff judgments that were delivered by the Court during 1999. Since the period to which the Report relates, the Court has delivered judgment in *R v Mako* [1] on the revision of the tariff for aggravated robbery that had earlier been set down in *R v Moananui* [2].

The role of an appellate court in formulating guidance for sentencing judges is something that has come to prominence in Australia in recent years. The Court of Criminal Appeal in New South Wales adopted a system of formal guideline judgments in 1998. It has since issued four such judgments with respect to the offences of dangerous driving causing death [3], armed robbery [4], break enter and steal [5], and drug importation [6].

In the cases of dangerous driving and armed robbery the Court was able to identify a typical case and decided to adopt a quantitative guideline which would operate as a starting point for sentences with respect to such a case. The Court also identified a list of mitigating and aggravating factors that could cause the sentence to vary from the starting point. The Court emphasised that the guidance provided by the quantitative sentence was in no way binding on trial judges. It operated as an indicator in much the same way as a maximum penalty operates as an indicator. However, departure from the guideline would need to be the subject of reasons.

In the case of break, enter and steal, the Court was unable to identify a typical case or otherwise provide a quantitative indication of an appropriate sentence. The guideline judgment in that case consisted of a list of aggravating and mitigating factors.

In the case of drug importation the Court was concerned with cocaine and heroin. Unlike the previous decisions with respect to dangerous driving causing death and armed robbery, the Court was unable to identify any form of systematic leniency or inconsistency in the sentencing pattern of trial judges. In these circumstances it did not adopt a quantitative guideline designed to correct sentencing practice. Rather it adopted a quantitative guideline designed to reflect the pattern of sentencing of trial judges. It did so both to limit the possibility of aberrant sentences at first instance, rare as such sentences may have been with respect to this offence. Furthermore, the promulgation of likely actual sentences was thought to increase the efficiency of the transmission of knowledge about actual sentencing practice and accordingly assist the objective of general deterrence.

I have described guideline judgments which are intended to reflect actual sentencing practices as "bottom up judgments". Those which contain some element of prescription I have called "top down judgments". My understanding of tariff judgments in New Zealand is that most are of the "bottom up" variety. Some judgments of recent years identify starting points and appear to be of the "top down" type. When the New South Wales Court of Criminal Appeal decided to adopt a system of guideline judgments it primarily followed the model of guideline judgments developed in England which included judgments of a "top down" character.

In May of this year the Court will be hearing an application on behalf of the New South Wales Director of Public Prosecutions that the Court formulate a guideline judgment with respect to the discount for pleas of guilty. The present position in Australia is similar to that re-articulated by the Court of Appeal of New Zealand in *R v Mako* at [14]. I do not know whether the Crown will be submitting that the Court should adopt any kind of quantum or proportion, a proposition which has been resisted in Australia for the same reason as it appears to have been resisted in New Zealand, namely the extreme variation in particular factual circumstances relating to a plea. The sentencing statistics in New South Wales, to which I will refer further, enable the Court to know the precise difference in sentencing patterns for pleas of guilty and not guilty for every offence. They do not, however, reveal when the plea of guilty was entered.

I have emphasised in my judgments and writing on this matter that guideline judgments are a mechanism for structuring discretion not a mechanism for restricting discretion. Even where a guideline contains a quantitative element of a prescriptive nature, they are not binding rules, let alone precedents. I accept that the existence of a sentencing discretion is an essential component of the fairness of the criminal justice system.

In New South Wales, as in every other developed country, sentencing has been one of the most controversial areas of judicial decision-making. Indeed perceptions of leniency and inconsistency in sentencing decisions are more likely than any other matter to lead to the loss of public confidence in the administration of justice. Populist pressures have been reflected in legislative interventions in all developed nations, designed to increase the levels of sentences for particular offences. This has sometimes only taken the form of increased maximum sentences, which the traditional approach to sentencing can readily accommodate. Indeed, it was the failure of trial judges to implement a significant number of Court of Criminal Appeal decisions that said that a significant upward movement in sentences for dangerous driving causing death was required by the increases in maximum sentences in the Crimes Act 1900, that prompted the New South Wales Court of Criminal Appeal to promulgate its first guideline judgment.

A more significant intrusion into the sentencing discretion is the system of a grid sentencing, of varying degrees of strictness, that have been proposed from time to time. Such a proposal led to a significant conflict between the government and the judges in Western Australia, in late 1998.

Of course the greatest interference with discretion is the promulgation of minimum sentences. This has led to considerable controversy in Australia with respect to such statutes in Western Australian and, particularly, the Northern Territory. A similar debate was sparked in England in 1996 by proposals to create minimum sentences. Lord Taylor, then Lord Chief Justice of England, instituted a debate in the House of Lords in which he condemned the proposals [7]. It was during the course of that debate that Lord Cooke of Thorndon made his maiden speech in that legislative Chamber. During the course of that speech His Lordship said:

"Sentencing problems are much the same in all developed countries, as are trends in crime."

He also noted the particular contribution of the English Court of Appeal in this respect when he said:

"In the past quarter of a century, sentencing patterns and principles in the UK and other Commonwealth courts have become noticeably more consistent and coherent. In large measure that has been due to the role assumed by successive Lord Chief Justices of England and their colleagues in delivering avowedly guideline judgments."

There is also much wisdom in His Lordship's comments that:

"My Lords there can be no sharp constitutional boundaries between the legislature and the judiciary in evolving sentencing policy - only a delicate practical balance."

In New South Wales the development of guideline judgments of a top-down character has performed a role in the maintenance of that balance. In New South Wales such judgments have been accepted as alternative to a prescriptive legislative intervention in the sentencing process.

The public response to the Court's decision to institute a system of guideline judgments was such that the government introduced legislation to empower the Attorney General to apply to the Court for a guideline judgment. The legislation specifies that the Court is not obliged to issue any guideline upon such an application. The Court's practice is that any such reference from the Attorney General will be listed together with some actual cases involving Crown appeals and/or severity appeals for the particular offence. This will not be possible in all cases. The Attorney's power to make a reference extends to cases which do not, in the normal course, come to the Court of Criminal Appeal at all. There are some offences dealt with by magistrates from which the only right of appeal is to the District Court. No such reference has yet been received.

The ability to identify systematic leniency or inconsistency in the decisions of trial judges depends to a very significant extent on the availability to the Court of Criminal Appeal of detailed statistics on actual sentences. The Judicial Information Research System (JIRS) of the Judicial Commission of New South Wales provides comprehensive information about actual sentences in a format which is able to be used not only by sentencing judges but also by appeal courts. I know that the Chief Executive Officer of the Judicial Commission has visited New Zealand to participate in discussions about the adoption of a computer based and readily accessible system of sentencing statistics. These statistics have been essential for the Court to determine whether or not there has been an element of leniency or of inconsistency of a character which cannot be rectified by the usual course of Crown appeals against sentences.

More significantly, these statistics are readily available by computer to all sentencing magistrates and judges. That availability minimises the risk of inconsistencies at first instance.

I am satisfied that sentencing guidelines, which are not binding in any formal sense, have an important role in maintaining the appropriate balance between the broad discretion that must be retained to ensure that justice is done in each individual case on the one hand, and the need for consistency in sentencing and the promotion of public confidence in the administration of justice, on the other hand [8].

Leave to Appeal

Under the heading of "Recurring Civil Issues" the Report indicates that in a number of cases the Court had emphasised its reluctance to grant leave to second appeals and reiterated the comments in *Waller v Hider*⁹ to the effect that on the second appeal the Court "is not engaged in the general correction of error". One of those cases was *Snee v Snee* [10] where the Court said at [15]:

"The scarce time and resources of the High Court and of this Court are not to be wasted, nor additional expense for an unsuccessful client incurred without realistic hope of benefit.

Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by the Court."

The Court went on to refer to the costs of the litigants in coming to the Court of Appeal and the costs to the court system in processing, hearing and determining appeals.

The New South Wales Court of Appeal does not have a second appeal jurisdiction. Appeals from decisions of magistrates are to the District Court and do not come to the Court of Appeal by means of an appeal. Such proceedings may come to the Supreme Court by means of a stated case or by application for an order equivalent to a prerogative writ.

Leave to appeal is required in some cases. The rule in New South Wales is that leave is required for any matter with respect to which the amount in dispute does not exceed \$100,000. The exercise of that jurisdiction gives rise to similar considerations to those which have been of concern to yourselves. Our practice with respect to these matters is that a judge of appeal reviews the case in advance. If

there is a real prospect that leave will be granted then the matter is listed before three judges, rather than the usual two, with a view to immediately hearing the actual appeal if leave is granted.

This occurred in a recent case [11] which involved a dispute about \$6,000. The contention was that the trial judge made a factual mistake. The Court indicated that it was perhaps arguable this was so. However leave was refused because of the small amount in dispute. In the judgment delivered by Priestley JA for the Court, his Honour made reference to the observations of Lord Hoffmann in *Piglowska v Piglowski* [12].

His Lordship's observations are particularly pertinent to a system such as your own, where there is provision for multiple appeals in the judicial hierarchy. We are all acutely aware that the judicial system is organised in layers, like Dante's Hell.

The case involved a property settlement after divorce. The total value of the property was estimated at £127,400. The legal costs expended in deciding how they should be divided was estimated to exceed £128,000. Both sides had been funded by the Legal Aid Board which had a charge on the assets to recover its expenditure. The matter had been before a District Judge in the Family Division. An appeal from the District Judge was brought to a judge of the Family Division. Leave was required to appeal to the Court of Appeal. That leave was refused by a single judge of appeal. However, a party is entitled to renew an application at an *ex parte* oral hearing before two Lord Justices. That was done and leave granted. The appeal was heard and allowed. Leave was sought to appeal to the House of Lords and granted. In allowing the ultimate appeal Lord Hoffmann said [13]:

"... There is the principle of proportionality between the amount at stake and the legal resources of the parties and the community which is appropriate to spend on resolving the dispute. In a case such as the present, the legal system provides for the possibility of three successive appeals from the decision at first instance. The first is of right and the second and third are subject to screening processes which themselves may involve more than one stage. If one includes applications for leave, the facts of this case, by the time it reached the Court of Appeal, have been considered by five differently constituted tribunals. This cannot be right. To allow successive appeals in the hope of producing an answer which accords with perfect justice is to kill the parties with kindness."

Issues of Interpretation

Part 6 of the 1999 Annual Report notes a number of recent developments relating to the interpretation of statutes and of contracts. The Report makes particular reference to a recent decision of the House of Lords about reading words into an Act [14]. As the Report suggests, this goes to the heart of the statutory interpretation process. It raises a significant issue of a constitutional character in terms of the proper role of the judiciary. Their Lordships referred to an earlier formulation of three conditions, before a court can act in this way, by Lord Diplock [15].

I had occasion to consider this issue in the Court of Criminal Appeal last year [16]. My conclusion was that the formulation "reading words into an Act" is not an accurate description of what is involved in the process of interpretation that is sometimes so described. On my reading of the authorities, and I acknowledge that this is not the only possible reading of those authorities, the court does not supply the words omitted by the legislature *per se*. Rather, what a court does is to construe the words actually used by the legislature, with the effect that certain words appear in the statute. The words so included reflect in express, and therefore more readily observable form, the true construction of the words actually used.

Save in the case of obvious typographical errors, in my opinion, any process of statutory interpretation which goes beyond this approach raises profound constitutional issues. It is not part of the function of any judge to amend legislation. The task of the courts is to determine what Parliament meant by the words it used, not to determine what Parliament intended to say [17]. The task is to interpret the words of the legislature, not to divine the intent of the legislature [18].

Lord Diplock's observations in *Wentworth v Jones* have been applied in Australia on a number of occasions, with the conclusion that a court was justified in treating a provision as containing additional words [19]. It is, however, important to emphasise the opening words of Lord Diplock in the passage in which he formulates the three conditions:

"... The task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it."

In order to be able to characterise the process as one of construction, which in my opinion remains an important constitutional restriction on the judicial role, one should not describe the process as 'introducing words into the Act'. It remains a process of construction if the words actually used by the Parliament are given an effect as if they contained additional words. That is not, however, to introduce the words in the Act. It involves the construction of the words actually used. Interpretation must always be text based. The reformulation of a statutory provision with additional words should be understood as a means of expressing the court's conclusion with clarity, rather than as a description of the actual reasoning process which the court has conducted.

I do not see anything inconsistent in the recent House of Lords decision in *Inco Europe v First Choice Distribution* referred to in the 1999 Annual Report of your Court. It is true that Lord Nichols of Birkenhead, with whom the other members of the court agreed said:

"I firmly acknowledge that this interpretation ... involves reading words into the paragraphs. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. ... This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. This statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words."

His Lordship then went on to refer to the three conditions originally propounded by Lord Diplock.

It is of significance that this particular passage follows on a process of construction of the words used. The paragraph immediately preceding in which the words were said to be "added", was directed, in terms, to how the words actually in the statutory text should be "read". That passage, without needing to explain the particular legislative scheme, was as follows:

"The sole object of paragraph 37(2) in Schedule 3 was to amend s18(1)(g) by substituting a new paragraph (g) that would serve the same purpose regarding the Act of 1996 as the original paragraph (g) had served regarding the Act of 1979. The language used was not apt to achieve this result. Given that the intended object of paragraph 37(2) is so plain, the paragraphs should be read in a manner which gives effect to the parliamentary intention. Thus the new s18(1)(g) substituted by paragraph 37(2) should be read as confined to decisions of the High Court under sections of Part I which make provision regarding an appeal from such decision. In other words, "from any decision of the High Court under that part" is to be read as meaning from any decision of the High Court under a section in that part which provides for an appeal from such a decision." (Emphasis added)

This is a legitimate process of construction. What the court has done is to take words of general application, namely "any decision of the court under that Part" and state that that particular composite phrase does not extend to the full scope of the dictionary definition of the words used. As a matter of construction, the phrase "under that Part" was read down so that it applies only to some sections in that Part of the Act.

The cases in which a court has read down words into a statute do involve a recognised technique for interpreting the words actually used, such as reading words down or giving words an ambulatory operation.

In Australia, the basic authority on legislative inadvertence is *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* [20]. In my recent judgment in *R v Young* [21] I came to the conclusion that that case in fact involved reading down words of general application rather than supplying omitted words.

The Barons of the Exchequer said as long ago as 1560 [22]:

"... and the judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the intent was particular."

They added [23]:

"The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act to another and sometime by foreign circumstances. So that they have ever been guided by the intent of the legislature which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

I emphasise that this judgment was delivered in 1560. The contemporary concern with a purposive construction is not new. In particular the process of reading down general words is a well established means of construction [24]. Lord Simon of Glaisdale referred to the process as identifying the draftsman's 'linguistic register' [25].

A particular and quite dramatic example of reading down occurred in a controversial civil liberty case in 1934 when the Australian Government sought to prevent the radical political figure Egon Kisch from entering Australia. The relevant legislation entitled the Commonwealth official to administer a dictation test "in a European language". Kisch, a national of Czechoslovakia, was asked to submit to a test in Scottish Gaelic. The High Court read down the words "a European language" to encompass only "some form of speech which in some politically organised European community is regarded as the common means of communication" [26]. Scottish Gaelic was not such a "European language".

The words that I have quoted do not appear in the statute. In a sense they have been "added" by the court. But what has in fact happened is that words of general application have been read down so as to only apply to some part of the full extent of the dictionary definition. In the course of a particular judicial proceeding this technique of construction results in a conclusion that the word or phrase does not apply to some particular fact or circumstance in issue in those proceedings. However, it is not accurate to describe the process as introducing words into the statute.

This explanation of these authorities indicates that it is permissible to, in effect, add words when to do so confines the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a Court has "added words" with the effect of expanding the sphere of operation that could be given to the words actually used.

This was the actual issue in *R v Young* [27]. The debate in Australia as to whether the extended scope for claims of legal professional privilege found in the Evidence Acts of the Commonwealth and New South Wales had any derivative application to ancillary processes of discovery and subpoenas has now been resolved. An Act dealing with "evidence" cannot be construed or otherwise extended to ancillary processes [28]. There are many cases in which words have been read down. I know of no case in which words have been read up.

The process of reading down words is sometimes said to be a process of resolving an "ambiguity" in the statutory formulation. Not without some irony, the word "ambiguity" is not without its own

difficulties. When used in the law of statutory interpretation, the word "ambiguity" does not only refer to lexical or verbal ambiguity and syntactic or grammatical ambiguity. In this context it is used to extend to circumstances in which the intention of the legislature is, for whatever reason, doubtful [29].

The frequency with which ambiguity in the strict sense is seen to arise is one of our strengths.

As Lord Simon of Glaisdale has put it in *Stock v Frank Jones (Tipton) Ltd* [30]:

"Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law)."

As the late Poet Laureate, Ted Hughes, once said:

"A word is its own little solar system of meaning."

An example of the flexibility of the language - unlikely to be of interest to poets - is the phrase "The chicken is ready to eat". That can either mean a cooked chicken or a hungry chicken.

Recurring difficulty for the interpreter which is involved in the reading down of general words is a difficulty which I have described as one of "inexplicitness" rather than "ambiguity" [31]. Some of the case law uses "ambiguity" in a sufficiently broad manner to encompass inexplicitness.

The word ambiguity is frequently employed to identify circumstances in which an interpreter may go beyond the text of the document being construed in order to discern the purpose or intent of the drafter. Such references use ambiguity in the broader sense to which I have referred.

The contemporary approach to interpretation is, in my opinion, accurately described by one text writer as "literal in total context"[31].

I note with interest that s5(1) of your new Interpretation Act 1999 states that:

"The meaning of an enactment must be ascertained from its text and in the light of its purpose."

This formulation involved a rejection of the recommendation of the Law Commission that this subsection include the words "and in its context"[32]. No doubt your Honours will in due course have to determine what, if any, significance should be attached to the omission. Plainly however, taking into account context remains of central significance for interpretation.

A good example is the following[33]. Parents leave their children in the care of a babysitter. They suggest that to keep the children amused the babysitter should teach them a game of cards. After the parents leave the babysitter teaches the children to play strip poker. The natural and ordinary meaning of the words "game of cards" would encompass strip poker. There is no doubt however that the meaning which the parents intended for the words they chose did not encompass this particular example of such a game. The reason for that is the context.

In the Australian law of statutory interpretation, the process of construction begins with context. As a joint judgment of the High Court of Australia has put it:

"... The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its wide sense to include such things as the existing state of the law and the mischief which by legitimate means ... one may discern the statute was intended to remedy."[34]

It may be that this particular reference to "context" does not encompass all matters which forms part of the relevant context. The extent to which a court should go in terms of the scope of "context" material for the purposes of interpretation, is not something that is finally resolved in Australia. It will no doubt differ from one statutory context to another.

There is however point in emphasising that there is a relevant distinction in this regard between different kinds of texts. In a loose sense the traditional so-called "canons of construction" are applied to all forms of texts whether Constitutions, statutes or contracts. Constitutions and statutes are in a different category because of the authority which attaches to them. Statutes have an institutional and, generally, normative character which is not the case with contracts and other private texts. Statutes are entitled to a greater degree of judicial deference. It frequently arises in a commercial context that a case is pleaded in the alternative, as one of construction or as one of an implied term. Implied terms have no role in the process of determining the operation of a statute. Nor does rectification.

The 1999 Annual Report of the Court of Appeal of New Zealand raises the potential significance of the approach to construction propounded by Lord Hoffmann in *Investors Compensation Scheme Limited v West Brunswick Building Society Limited*[35]. His Lordship applied his earlier reasoning[36] to the effect that the task is to ascertain the meaning which a document would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the party. His Lordship referred to the background in broad terms as follows:

"It includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."[37]

Whatever may be the future of this approach in the context of contractual interpretation, I venture to suggest that it is not appropriate for statutory interpretation. A statute does not involve an ordinary form of communication between individuals. Its institutional character gives a statute a different status. The identification of relevant context cannot be quite as wide-ranging as it can be in a context of ordinary communication. The frequently overlapping issues of implication of terms and rectification, do not arise.

Endnotes

- 1 *R v Jamie Totuhoe Mako* (Court of Appeal of New Zealand, 23 March 2000, unreported).
- 2 *R v Moananui* [1983] NZLR 537.
- 3 *R v Jurisic* (1998) 45 NSWLR 209.
- 4 *R v Henry* (1999) 46 NSWLR 346.
- 5 *In the Matter of the Attorney General's Application (No 1) under s26 of the Criminal Appeal Act; R v Ponfield & Ors* [1999] NSWCCA 435.
- 6 *R v Wong & Leung* [1999] NSWCCA 420.
- 7 House of Lords, *Hansard*, 23 May 1996 at 1025 et seq.
- 8 See generally *The Honourable J J Spigelman "Sentencing Guideline Judgments"* (1999) 73 ALJ 876.
- 9 [1998] 1 NZLR 412.
- 10 (2000) NZFLR 120 (21 November 1999).
- 11 *Rumortex Pty Ltd v Rodgers* [2000] NSWCA 2000.
- 12 [1999] 1 WLR 1360 at 1373.
- 13 At 1373.
- 14 *Inco Europe Limited v First Choice Distribution (a Firm)* (UKHL, 9 March 2000, unreported).
- 15 *Wentworth v Jones* (sub nom *Jones v Wrotham Park Settled Estates*) [1980] AC 74 at 105.
- 16 *R v Young* (1999) 46 NSWLR 681 at paras [5]-[32].
- 17 *R v Young* supra at para 5 referring to *Stock v Frank Jones (Tipton) Limited* [1978] 1 WLR 231 at 236G; *Black-Clawson International Limited v Papierwerke Walhof-Aschaffenburg AG* [1975] AC 591 at 613G and 645C-D; *Re Bolton*; *Ex parte Bean* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 459.
- 18 See *State v Zuma* (1995) 4 BCLR 401 at 412; *Matadeen v Pointu* [1999] 1 AC 98 at 108.
- 19 See *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 422 per McHugh JA; *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283 per Mahoney JA; *Birmingham v Corrective Services Commission (NSW)* (1988) 15 NSWLR 292 at 299-300 per Hope JA and 302 per McHugh J; *Saraswati v The Queen* (1991) 172 CLR 1 at 22 per McHugh J and *Newcastle City Council v GIO General Limited (t/ as GIO Australia)* (1997) 191 CLR 85 at 113 per McHugh J.
- 20 (1981) 147 CLR 297.

21 At [17] - [22].

22 *Stradling v Morgan* (1560) 1 *Plowden* 199 at 204; 75 *ER* 305 at 312 (see also at 205; 315).

23 at 205; 315.

24 See *Bowtell v Goldsborough Mort & Co Ltd* (1905) 3 *CLR* 444 at 456-457; *Ex parte Walsh*; *Re Yates* (1925) 37 *CLR* 36 at 91-93; *R v Wilson*; *Ex parte Kisch* (1934) 52 *CLR* 234 at 244; *Church of the Holy Trinity v United States* 143 *US* 457 (1982) at 459; *Tokyo Mart supra* at 279; *Smith v East Elloe Rural District Council* [1956] *AC* 736 at 764-765; *Bropho v Western Australia* (1991) 71 *CLR* 17-18; See also my address "Statutory Interpretation: Identifying the Linguistic Register", The Sir Ninian Stephen Lecture at the University of Newcastle, 23 March 1999, to be published in the Newcastle University Law Review and accessible at www.lawlink.nsw.gov.au/sc; *R v Young supra esp* at [23]-[32].

25 *Maunsell v Olins* [1975] *AC* 373 at 391; *Farrell v Alexander* [1977] *AC* 59 at 84; *Black-Clawson International supra* at 645.

26 *R v Wilson*; *Ex part Kisch supra* at 244.

27 *Supra*.

28 *Northern Territory v GPAO* (1999) 73 *ALJR* 470; *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] *HCA* 67 at [16]-[17], [64], [149].

29 See *Bowtell v Goldsborough Mort & Co Limited supra* at 456-477; *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 *CLR* 273 at 287-288; *Cross on Statutory Interpretation* (3rd ed 1995) pp83-84.

30 [1978] 1 *WLR* 231 at 236.

31 *E Dreidger Construction of Statute* (2nd ed) at 2. The author of the third edition *Dreidger on the Construction of Statutes* (3rd ed 1994), substitutes a more convoluted phrase: "Today, in every case, the meaning that emerges from reading the words in their immediate context must be considered in light of a larger context and tested against other sources of legislative meaning." (at p 3)

32 *Law Commission Report No 17 A New Interpretation Act: To Avoid "Prolixity and Tautology"* December 1990 at p9 and [68]-[72].

33 *Zander The Law Making Process* (1980) at 57.

34 *CIC Insurance Limited v Bankstown Football Club Limited* (1995-1997) 187 *CLR* 384 at 408. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 *CLR* 335 at [69].

35 (1998) 1 *WLR* 896. This case has been followed at first instance in Australia. See *Acorn Consolidated Pty Limited v Hawkslade Investments Pty Limited* [1999] *WASC* 218; *Allstate Exploration NL v Beaconsfield Gold NL* 1999 *NSWSC* 832.

36 *Mannai Limited v Eagle Star Assurance Co Limited* [1997] *AC* 749 at 774-775.

37 At 913.

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The Sitting of the Supreme Court in Wagga Wagga

IN THE COURT OF
CRIMINAL APPEAL

SPIGELMAN
CJ
WOOD CJ AT
CL
GROVE J
O'DONOGHUE
SM
HASKETT SM
MAYOR
WALES

MONDAY 13 MARCH 2000

FORMAL OPENING CEREMONY COURT OF CRIMINAL APPEAL AT WAGGA WAGGA

Senior member of Bar, Nicholas Cowdery QC, Director of Public Prosecutions
President of Law Society of New South Wales, John North
President of South West Slopes Law Society, Anthony Paul

1 **SPIGELMAN CJ:** On behalf of the Court, I welcome you all to the ceremonial sittings of the Court. I invite Councillor Kevin Wales to address the Court.

2 **COUNCILLOR K WALES, MAYOR OF WAGGA WAGGA:** Thank you, Chief Justice Spigelman, Justice Wood, Justice Grove, John North, the President of the New South Wales Law Society, and Nicholas Cowdery, Director of Public Prosecutions.

3 This morning it is with great pleasure that I have the opportunity to address this very astute gathering in the city of Wagga Wagga. I am told that this is the first time that this particular court of appeal is outside of Sydney and Newcastle. I think it is a tremendous tribute to the city of Wagga Wagga for us to have this gathering in our city this morning.

4 Next week I will be having the honour of welcoming His Royal Highness, the Duke of Edinburgh, to the city of Wagga Wagga and today, of course, I have the honour of welcoming to the city of Wagga Wagga the hierarchy, or perhaps we could even say royalty, within our justice system within New South Wales.

5 Today, of course, I would like to say to this Court, and I have mentioned it to Chief Justice Spigelman, if there is any chance, for the Judges to take the opportunity to have a look around our city.

6 Chief Justice Spigelman has said it is the first time he has been back to Wagga Wagga since 1973. Certainly there have been big changes in our city in that time and I would like to pass on an invitation to the Justices and/or their Associates to take the opportunity to have a look at our new Civic Centre, which has a marvellous art gallery and art glass collection, as well as a museum and very spacious library. If you would take that opportunity, I would certainly give you the opportunity to have a look at those marvellous facilities within our city.

7 I pass on to you, on behalf of the people of the city of Wagga Wagga, a very warm and friendly welcome. We do hope that these court sittings have their desired effect on the community of the city of Wagga Wagga.

8 Thank you very much.

9 **SPIGELMAN CJ:** Thank you, Councillor Wales.

10 I invite the senior member of the Bar, the Director of Public Prosecutions, Mr Nicholas Cowdery QC, to address the Court.

11 **MR N R COWDERY QC, DIRECTOR OF PUBLIC PROSECUTIONS:** If it please the Court.

12 On behalf of the barristers of New South Wales and on behalf of my office, I have much pleasure in welcoming your Honours and the Court of Criminal Appeal to these sittings at Wagga Wagga.

13 This is only the second time this Court has sat outside of Sydney, the first being in Newcastle in February of last year. It is, therefore, the Court's first visit to the southwest slopes of New South Wales.

14 The tradition of the Courts bringing justice to the people of the provinces dates back a long way to the English forebears of this Court. In Saxon times the English King's Court travelled the country. By Norman times there were six circuits with three Judges on each, and they dealt with a much wider range of activities than your Honours will be burdened with in this sittings at Wagga Wagga.

15 As a security measure, they regulated the harbouring of strangers that were allowed to be put up for one night at a time, but only for good reason, and it had to be explained to the neighbours. They oversaw the demolition of castles and, therefore, the destruction of the centres of power and possible challenges to the monarchy. They settled strikes by clergymen.

16 Every seven years they examined every detail of local administration, investigated embezzlement and oppression by the Sheriff, and they imposed huge fines for any breaches detected.

17 There were scales of fines for offences. For a dog bite, there was a fine of six shillings for a first offence, twelve shillings for a second, and thirty shillings for a third; an early form of mandatory sentencing.

18 While the Judges were on circuit in those times, they sat every day for a fortnight, including Sundays, and by 1178 it was thought, at least by one commentator, that England had become overburdened by justices; all eighteen of them.

19 In more modern times, still in England, when the assizes were held, a Rolls Royce would draw up outside the law courts in a provincial town and the High Court Judges would emerge, fully robed, to be greeted by the High Sheriff, Lord Mayor and a fanfare of trumpets. We do have the Mayor this morning.

20 Of course, this Supreme Court, in its original jurisdiction, has long travelled to country areas of New South Wales, but not in its appellate jurisdiction, and these sittings have come about chiefly at the initiative of your Honour, the Chief Justice, to bring criminal justice at its highest level in the State to the people.

21 This is a welcome development, especially at a time when ignorance of the judicial process in some circles has produced much uninformed criticism of the judiciary, particularly in the criminal jurisdiction. It is hoped that the custom will be extended to other centres.

22 This Court is open to the public. Anybody may enter and observe how the Court goes about its business. Your Honours proceedings are open and plain for all to see. The reasons for the decisions you make will be available to be scrutinized.

23 The same comments apply, of course, to the District Court and to the Local Court when they sit here in Wagga Wagga, as elsewhere. Your Honours will always be welcome as you bring justice to all parties in accordance with the law. May it please the Court.

24 **SPIGELMAN CJ:** Thank you, Mr Cowdery.

25 I invite the President of the Law Society of New South Wales, Mr John North, to address the Court.

26 **MR J F S NORTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court.

27 I am delighted to speak today on behalf of the 15,000 practising solicitors of New South Wales at this important occasion.

28 As a solicitor with many years experience working in the bush, I appreciate fully the significance to the justice system and to the local community of having a Supreme Court sitting at appellate level in a major regional centre such as Wagga Wagga. The Court sitting today shows commitment to ensuring that our justice system is accessible and open.

29 For the city of Wagga Wagga and surrounding areas, this occasion creates an opportunity for local people to see how the justice system functions at its highest level.

30 From my court experience throughout central western New South Wales, I know that the occasion is also an opportunity for visiting members of the judiciary, their support staff, solicitors, barristers and other people, to experience, and I hope to understand more, the dynamics and values of country communities.

31 While I appreciate that the visit is a short one, it can achieve a lot in bringing together people from different walks of life to learn more about each other and to make sure their concerns are respected and acted on.

32 The Law Society recognises how essential it is to have direct and open lines of communication. The society is connected to its members and their clients through a flow of information and activity by regional law societies located throughout the State. We have many country representatives on our committees, reviewing laws and suggesting improvements to many areas, including criminal, family, property, personal injury, education and rural issues. Their reservoir of experience and skills plays an important role in making sure legal services continue to be relevant and

accessible to everyone, no matter where people choose to live.

33 Pleasingly the governing body of the Law Society, its Council, is also well represented by country members. I am from Dubbo and continue to have a practice there, and another President, just two years ago, grew up in Temora and still has extensive family ties in this region.

34 By allocating valuable resources to hear matters in Wagga Wagga, the Supreme Court is showing leadership and making sure that the legal system is meaningful and available to everyone.

35 May it please the Court.

36 **SPIGELMAN CJ:** Thank you, Mr North.

37 I invite the President of the South West Slopes Law Society, Mr Anthony Paul, to address the Court.

38 **MR A PAUL, PRESIDENT, SOUTH WEST SLOPES LAW SOCIETY:** May it please the Court.

39 On behalf of the local legal profession, I welcome the Court of Criminal Appeal to Wagga Wagga, being the largest inland town in New South Wales.

40 We of the profession, and the general public, are delighted that the Court has selected Wagga Wagga for its first real venture into the country.

41 The establishment of the Court in Wagga Wagga goes back a long way.

42 In 1814 the squatters on the lower Murrumbidgee petitioned the Governor to provide a court and a magistrate. The petition read, as follows:

"Your Excellency is aware that this district is the great thoroughfare to South Australia, Portland Bay and Port Phillip. Thousands of sheep and cattle are frequently travelling these roads, driven in many instances by some of the worst of characters, in the capacity of shepherds, stock keepers and bullock drivers, who have no intention of returning to the colony if they can effect their escape. These persons, afforded by the numerous public houses lately established on the road, are induced to become intoxicated and hence the highway in the vicinity of such houses presents the most appalling scenes of infamy and disorder, even on the Sabbath day."

43 On 30 April 1847, the New South Wales Government Gazette announced Wagga Wagga was to be a place for the holding of a Court.

44 460 pounds was allocated for the project. There was 100 pounds for the Clerk, 70 pounds per annum for each of the two ordinary constables and 75 pounds to erect the courthouse. The courthouse was subsequently erected within budget.

45 In 1858 the District Court commenced sitting at Wagga Wagga.

46 A sittings of the Supreme Court followed in the 1870s.

47 Now, 130 years on, the Court of Criminal Appeal has arrived.

48 Although it has taken 130 years for the Court to arrive in Wagga Wagga, we are delighted to have the Court here and we hope your stay, although short, will be enjoyable.

49 **SPIGELMAN CJ:** Thank you, Mr Paul.

50 Last year the Supreme Court of New South Wales celebrated the 175th anniversary of its foundation. On 17 May 1824 the Court was formally established in a ceremony in Sydney. That is a very large number in terms of the history of this nation but, most significantly, it is a large number in terms of the history of just about every other nation in the world.

51 It is useful for us in Australia, where we tend to think history is something that happens somewhere else, to contemplate on it. A number of speakers today have made reference to historical touchstones for their address.

52 In 1824, when this Court was established, France was a monarchy. Since then it has had one empire and four republics. Germany at that stage did not exist. It was a few dozen principalities, aristocracies of various arrangements and independent city States. It has since been amalgamated, through a process of war and treaty, into a single nation under an empire first, then under a republic, then under a totalitarian dictatorship. It was split in two and only recently reamalgamated. France and Germany are but two examples. One can multiply that many times.

53 For every new regime there were new courts and different institutions with changes in fundamental principles. Throughout that period of 175 years, the Supreme Court of New South Wales has basically stayed the same. Its functions have contracted. You speak, Mr Paul, of Wagga Wagga. At the time, of course, Melbourne and Brisbane were both circuit

towns visited by Judges of this Court.

54 Over that history, one can see the changes but one can also see a great degree of continuity. The changes that one sees are that the bullock drivers, to which Mr Paul referred, were brought under control so that you could widen the footpaths in the main street. There is no longer a need to be able to circle the bullock train in the street. You probably have not even needed it for some years.

55 Supplying those services, with continual adaptation to social change, is one of the things that is a hallmark of our legal system.

56 We like to think of ourselves in Australia as a young country. Indeed, the second line of our national anthem says that "We are young and free", but when it comes to our basic institutions of the rule of law and Parliamentary democracy, this is not a new nation; this is an old nation.

57 The number of nations which have judicial institutions as old as the Supreme Court of New South Wales can be counted on the fingers of one hand.

58 Our Parliamentary institutions are also old. Within a few years we will celebrate the 150th anniversary of responsible Government. Next year we celebrate the 100th anniversary of Federation.

59 When one looks around the world, there are very few nations with institutions as old, and as well-established, as our basic institutions of the rule of law and Parliamentary democracy. One of the reasons those institutions are successful and have stood the test of time and served the community in terms of providing the basic stability of our social framework, is the fact that they have been able to change and the fact that they have maintained a connection with the communities which they serve.

60 It is for that reason that the maintenance of the contact by visits such as this remains of great significance. It is only in this way that our legal system can maintain the ability to adapt to the demands placed upon it and to the changing circumstances in which it must operate.

61 We have, in our recent past, had a change in the jurisdiction of the Supreme Court of quite a substantial degree. Many of the cases in the civil area that used to come to this Court now go to the District Court. As a result, the District Court sits more often in rural areas in civil cases and the Supreme Court sits less often.

62 That has not proven to be the case so much in recent years in the criminal area conducted by Judges of this Court, particularly Judges of the Common Law Division, of which the Chief Judge, to my right, Justice Wood, and also the most senior Judge of the Division, Justice Grove, to my left, are with me on the Bench today.

63 In their capacity in conducting criminal trials, there are members of that Division, including the two Judges with me here today, who come to rural New South Wales often. They used to in the past come more often in civil cases than they now do. That is simply because the number of cases instituted in this Court of that character is just not as large as it once was.

64 However, in part as compensation to make sure that the Court retains its contact with the broader community that it serves, the decision has been made to sit the Court of Criminal Appeal outside of Sydney for the first time. It occurred, as has been said, for the first time ever, last year in Newcastle and this year, for the first time, in a true rural community.

65 I know that the President of the Law Society is anxious that we sit also in Dubbo in the near future. That may happen. This is a change in the practice of the Court which I believe is now permanent. It is a delight on this occasion, for the first sitting of the Court in a rural area, to have been in your town.

66 The cases that we seek to list in sittings such as this are cases of some relevance to the local communities, understood in a regional sense rather than the immediate community. That will be our intention in the future with respect to such sittings.

67 Thank you all very much for your attendance. I declare the ceremonial sitting over.

68 The Court will now adjourn.

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Opening of Law Term: Just, Quick and Cheap - A Standard for Civil Justice

**Address by the Honourable JJ Spigelman,
Chief Justice of NSW
Opening of the Law Term Dinner
Parliament House, Sydney
31 January 2000**

I grew up in a country in which the Prime Minister was able to travel to England for six weeks by boat with the Australian Cricket team, stay for a month or so watching cricket and then return by boat, taking another six weeks to do so. Things have speeded up since then. Not all of the change has been an improvement.

Sir Robert Menzies would never have approved of one day cricket: a game with special rules designed to speed things up, including penalising a team for a slow over rate.

Most other changes in sports have been in the same direction. Tie breakers in tennis. Olympic sports like luge, cycling and canoeing are now measured in milli-seconds.

Of course, there have been many improvements associated with increased speed. Indeed, if there were a competition to build a statue for the one person who has most improved the Australian standard of living in the twentieth century, I would nominate the Chief Engineer on the Boeing 747 Project.

Nevertheless, as a nation we have substituted the tyranny of distance, with a tyranny of immediacy, which, at least, we share with everyone else.

The process of acceleration is unremitting. In the United States, it took 46 years for 25% of the population to be connected to electricity. It took 35 years for that proportion to get the telephone, 16 years for that proportion to take up personal computers and 7 years for that proportion to be connected to the world-wide web.

Anyone using contemporary telecommunications or computer technology has experienced a curious phenomenon: the sense that a particular delay in some processing function was quite intolerable, even though that length of delay was perfectly acceptable only six months or one year before.

Where we once spoke of words per minute, we now speak of characters per second. One can buy telephone answering machines with a quick replay button - in a digital format, so that the replay is accelerated without the high pitch of a Disneyfied chipmunk. Similarly, one can buy music CD players with an option that lets the user close the one or two second gap between tracks. \

Time is more important than ever. In Tokyo one restaurant charges by time: at the rate of 35 Yen per minute. You clock in, you clock out and your bill is computed on the time difference. Indeed, it is necessary for us to create the illusion that we are saving time, even when we cannot do so. On many elevators, the "door close" button is in fact a placebo. It has no function, other than to placate those who measure their life in seconds.

Perhaps we need more time because there is more to absorb. On one recent calculation, a search on the subject "Information Overload" on the world wide web, hits twenty thousand different sites Gleick "*Faster: The Acceleration of Just About Everything*" 1999 p88.. Information overload indeed.

Two things, however, have not speeded up during the period since Sir Robert Menzies travelled to England with the First XI. One is city traffic. The other is litigation.

In this regard, traffic and litigation share another characteristic. There are significant limits as to the desirable speed with which either should be conducted. Some things take time. Justice is one of them.

In the course of my address to this dinner last year, I indicated my commitment to the maintenance of the quality of justice. Speed is like light: if you have too much, it will obscure not illuminate. There is a

limit to the extent to which litigation can be hastened. We are not yet close to that limit.

Delay is not only a quantitative factor. It is also of significance in terms of the quality of justice. Most significantly, delay in the litigation process does add to the costs which that process imposes on litigants. Parkinson's law operates: work expands to fill the time set aside for it.

Perhaps the greatest challenge facing all of us involved in the litigation process is the restoration of a rational relationship between the cost of litigation and the subject matter in dispute.

Psychologists tell us that a normal fast talker speaks at up to 150 words a minute. Listeners, however, can process speech reaching the ear at 500 or 600 words a minute. Any judge will tell you that one of the technical facilities he would most like to have is a fast forward button for advocates - in digital form for the reason I have already mentioned. This would enable an oral hearing to take only one-third or one-quarter of the time that it now takes.

Of course, any such process of acceleration would prevent a judge thinking about what was being said to him. This would stop a judge formulating and putting questions to the advocate about the submissions being made. Any advocate would tell you that the absence of questions from the bench would speed things up even more. Accordingly the technical innovation many advocates would want is a stop, or at least a pause, button directed at the judge.

While we wait for these inventions we will have to do the best we can.

It is incumbent upon all of us as participants in the administration of justice, to ensure that litigation is conducted as efficiently and expeditiously as possible. For centuries, indeed it was only abolished in the late eighteenth century, the common law had a mechanism known as *peine forte et dure*, a form of torture inflicted upon a prisoner indicted for felony who refused to plead and submit to the jurisdiction of the court. Heavy weights were applied to his body until he consented to be tried by either pleading "guilty" or "not guilty", or until he died. This was an early form of case management. It remains a model for some contemporary practices.

The extension and elaboration of case management has been a feature of judicial administration over a period of two decades. The courts are not immune from the change in public expectations with regard to accountability for public funds that has affected the entire gamut of governmental institutions. Nor are they immune from the restrictions on availability of resources to which all areas of government are subject. Furthermore, the courts, like all areas of the government over recent decades, have been subject to assessment in terms of the extent to which performance of their functions impose avoidable costs, relevantly on litigants and third parties.

The last two decades have witnessed very substantial changes in many areas of public administration, with a view to improving the efficiency of their operation. Almost invariably such changes have involved alteration of long existing practices. The emergence of case management in place of the traditional hands-off approach to the conduct of litigation, has been the judicial response to these new expectations.

The time has now arrived for the Supreme Court to further develop its case management by accepting responsibility for the progress of cases before the Court. In this State, the acceptance of this responsibility has been pioneered by the District Court and I acknowledge the significant role that Justice Blanch, the Chief Judge of that Court, has played in this regard.

Of course, the caseload and the functions of the Supreme Court differ in significant respects from those in the District Court. Accordingly, practices adopted in one court for the conduct of proceedings efficiently and expeditiously, yet in compliance with the dictates of justice, will not be appropriate in the other. Nevertheless, the acceptance of responsibility by the adoption of a comprehensive system of case management from the commencement of proceedings to their disposition, is the same in both courts.

The judges of the Supreme Court have decided to adopt time standards for the conduct of proceedings within the Court. This decision necessarily involves an acceptance of responsibility for the progress of such proceedings from their commencement to their disposal.

Over the course of last year, the Court has engaged in a number of reviews of practice and procedure, particularly with respect to civil justice. These have included a dialogue between myself and

representatives of the Law Society and of the Bar Association, as anticipated in my speech on being sworn in as Chief Justice, when I emphasised the central importance of the performance by practitioners of duties to the Court.

The Bar Association, with my active encouragement during this dialogue, has recently incorporated a number of these duties to the Court in its professional ethical rules. These rules now emphasise the importance of

- Confining a case to issues genuinely in dispute.
- Refraining from making allegations of fact without a proper basis.
- Complying with orders, directions, rules and practices of the Court.
- Preparing a case for hearing as soon as practicable.
- Presenting issues clearly and succinctly.
- Being as brief as reasonably necessary.

The Law Society has in the past adopted the Bar's Advocacy Rules without amendment. I assume it will do so with respect to these recent amendments. It may also be desirable to reflect some of these principles in the obligations of instructing solicitors, not merely those of solicitor advocates.

Other reforms to which I will shortly refer, have involved consultations within the Court. I also appointed a Rules Review Committee, on which both professional associations are represented, as they are on the Rule Committee of the Court, which finalised most of the reforms, to which I will presently refer. In all of this, the representatives of the Law Society played a positive and creative role, although not all the submissions that they made on behalf of the Society were accepted. Despite some differences, I believe that the reforms represent a broad consensus of judicial and of professional opinion, as expressed in these consultations and committee deliberations. Indeed, if there had been unanimity, I would be convinced that we had not tried hard enough.

The package of reforms is designed to improve the administration of justice by changing practices and adopting realistic costs sanctions. The principle changes are:

- The Court has adopted a new statement of overriding purpose, inserted at the commencement of the Supreme Court Rules: that the objective of the Rules is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings.
- The Court has adopted specific time targets for the disposal of cases, together with a plan for the progressive reduction of delays.
- The Rules will impose on all parties an obligation to refrain from making allegations, or maintaining issues, unless it is reasonable to do so. A new summary procedure is created for the payment of costs on an indemnity basis by parties who breach this obligation.
- The Rules will now identify a range of specific directions which the Court may make in the course of managing cases, including the imposition of time limits on the evidence of witnesses, or on submissions, or on the whole, or part, of a case.
- The Rules will now empower the Court to direct a legal practitioner to give a party a memorandum providing an estimate of the length of the trial of the costs and disbursements of that practitioner and of the estimated costs that would be payable by the party to another party, if the party were unsuccessful.
- The Rules will now empower the Court to specify the maximum costs that may be recovered by one party from another, to avoid the injustices that can occur when one party has "deep pockets".
- The Rules will empower the Court to order that costs be payable forthwith, in any case in which a party has been subject to unreasonable delay or default, or the proceedings are unreasonably protracted, or justice otherwise demands such an order.

- The Rules will expressly empower the Court to order a person to pay the costs occasioned by the failure of that person to comply with a direction of the Court.
- There are amendments to the existing Rules which identify circumstances in which a legal practitioner can be ordered to pay costs. By means of a Practice Note, a new procedure for the making of such orders is established. Breach of duties to the Court - duties now reflected in the Bar Rules themselves - may lead to a practitioner being ordered to pay costs occasioned by the breach.
- The Rules promulgate a Code of Conduct for expert witnesses. The Code establishes that an expert witness has an overriding duty to assist the Court impartially. It specifies that an expert witness's paramount duty is to the Court. He or she is not as an advocate for a party to the proceedings.
- The new Code establishes a system by which experts make full disclosure of relevant matters in their reports and, upon direction by the Court, confer with other expert witnesses in an endeavour to reach agreement on material matters. An expert is obliged to state any qualification without which, in his or her opinion, a report may be incomplete or inaccurate. Furthermore, where the expert has insufficient data or research to state a concluded opinion, he or she must say so.

A number of these measures replicate or adapt rules and practices that already exist in other courts, specifically the Supreme Courts of Western Australia and of Queensland and the Federal Court. Some of the reforms are novel.

These reforms will enable judges to ensure that cases in the Court are dealt with in a just, quick and cheap manner. Some new cost sanctions have been adopted. However, the reforms will not work without the active collaboration of the profession, including by enforcement of the new Bar Rules.

The new overriding purpose of the Rules is stated in plain English: to facilitate the just quick and cheap resolution of the real issues in litigation. This formulation has long been found in the directions making power in Part 26 Rule 1. It will now serve as an objective for the conduct of proceedings. While the requirements of justice and those of speed do not always point in the same direction they are often inter-related.

The new Rules identify:

- An obligation on the Court to give effect to the overriding purpose when it exercises any of its powers.
- An obligation on a party to civil proceedings to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
- An obligation on legal practitioners to refrain from engaging in conduct which causes his or her client to be put in breach of this duty.
- A power in the Court, when exercising the Court's discretion to award costs, to take into account any failure to comply with these duties by a party or a legal practitioner.

I wish to make a few additional observations on the Court's time standards.

The time standards that have been adopted for the Supreme Court are intended to be achievable, incorporating gradual but attainable improvement. Accordingly, the Court has adopted standards for both calendar year 2000 and calendar year 2001.

With respect to criminal proceedings on indictment - which in the Supreme Court are primarily trials for murder - the Court aims in 2000 to dispose of 75% of cases within nine months of the date of committal; 85% within twelve months and 100% within fifteen months. In 2001, the Court aims to dispose of 75% within six months, 85% within nine months and 100% within twelve months.

In the Court of Appeal, the Court aims to dispose of 50% of cases within six months of the filing of initiating process in both 2000 and 2001; 80% within twelve months in 2000 rising to 85% in 2001; 90% within eighteen months in 2000, rising to 100% in 2001; with 100% within twenty-four months in

2000.

In the Court of Criminal Appeal, the Court aims to dispose of 40% of appeals from the date of filing of initiating process within six months in the year 2000, rising to 50% within six months in the year 2001; 80% within twelve months in 2000, rising to 90% in 2001 and of 100% of cases within eighteen months in both years.

The Court has internal targets for civil trial work in the Common Law and Equity Divisions. However, until improvements are made to the computer based case management systems available to the Court, which enable it to monitor and measure the case management process with a degree of speed and precision not presently available, it is not appropriate to publicly commit the Court to such targets. Further work needs to be done in this respect. In due course these targets will be finalised and made public. I do, however, indicate that the Court plans to dispose of over 50% of all civil cases instituted in the Court within 6 months of the filing of process.

In order to achieve those objectives the Court's practices will need to change. Specifically, no matter will be stood over generally and no case will be permitted to lie dormant for more than 6 months without being listed in the Court.

These time standards are not, or are not only, measurements of the Court's delivery of justice. Rather, they measure the delivery of justice by all those associated with the process, including the profession.

There has in the past been a tendency on the part of different participants in the administration of justice to blame others for what is universally accepted to be excessive delay. I have not thought it appropriate to adopt for the Court a time standard based on aspects of the process for which the Court alone bears primary responsibility eg by identifying a standard for the disposal of cases from the point at which a case is ready for trial.

The entire thrust of the development of case management over recent decades has been for the Court to accept increased responsibility for ensuring that matters are made ready for trial and that trials focus on the real issues and are conducted expeditiously. The time standards I have announced tonight are for the process as a whole, a process in which the profession and the judiciary have, at times, separate but interdependent responsibilities. These standards can only be attained by cooperation between the profession and the judiciary.

An indication of that cooperation is the response of both professional associations, which I announce tonight, to a new pro bono scheme to be created by the Court. This Court has experienced an increase in the number of unrepresented litigants. This significantly slows down the Court, adversely affecting its ability to deliver "just quick and cheap" decision-making. More significantly, the unavailability of professional assistance can lead to injustices.

The new Supreme Court Legal Assistance Scheme will operate on the basis of referrals by a judge of the Court. The Bar Association has agreed to provide a list of counsel who are prepared to serve on a pro bono panel. The Law Society has agreed to extend the Law Society Pro Bono Scheme to incorporate referrals from the Court.

I look forward to the implementation of this scheme and further close collaboration to achieve the overriding purpose which the Court has now adopted. I am confident that that will occur.