

The Honourable T F Bathurst

Chief Justice of New South Wales

Federalism and the National Legal Profession Reforms

Henry Davis York Annual Bench and Bar Evening

24 October 2012, Sydney

- 1 Good Evening. As Rebecca said, it is a pleasure to speak at functions such as this. We belong to a collegial profession, and it is always satisfying to see solicitors, barristers, and members of the judiciary enjoying each other's company. It is a reflection, I think, of a well-structured legal profession which serves this state well. Judges, generally speaking, are able to rely on lawyers to present cases fairly and efficiently, and lawyers, I hope, are able to rely on judges to decide cases having regard to the evidence and submissions put to them and not to go on frolics of their own.

- 2 I must admit that I am particularly fond of addressing Bench and Bar functions such as this, in part because you are generally a well lubricated audience, and there is, correspondingly, rarely an expectation that I will say anything of serious import.

- 3 That said, Rebecca has made the effort to highlight the importance of functions such as this, and so I should probably summon the will to also say something relevant and topical.

- 4 Conveniently, the Queensland Government has recently announced that it will not sign up to the National Legal Profession Reforms. I should say that this does not spell the end of the reforms, as seventy per cent of the legal population will still be covered by them. Nevertheless, the decision does provide ample material for a few choice observations this evening. I hope you don't consider them too inflammatory.
- 5 In fairness, I was involved in negotiating these reforms for a number of years before coming to the bench. I feel, therefore, that I have a bit of skin in the game. From its earliest inceptions, I have always been staggered by the vehemence of the opposition to concept of a national legal profession.
- 6 The reasons given for opting out in this particular case are: an aversion to additional costs, a belief in "competitive federalism", an assertion of state independence, and the hassle of an extra layer of bureaucracy.¹ This is despite the Queensland Law Council's express support for the reforms, and expressions of dismay from major Queensland firms, such as McCullough Robertson, that the withdrawal "is definitely a setback for ... Queensland [businesses] expanding into other states."²

¹ The Hon Jarrod Bleijie, Attorney General and Minister for Justice, Media Statement, 3 October 2012.

² Chris Merritt, "Federal Start-up Funds in Realm of Uncertainty" *The Australian*, 5 October 2012, quoting McCullough Robertson Managing Partner Guy Humble.

- 7 Now, I certainly understand an aversion based on the threat of greater costs. So let's put that to the side for one moment.
- 8 "Competitive federalism" was the next cited reason. With respect, a decision to operate under different laws from 70 per cent of your peers and those that will govern the two busiest jurisdictions in the country, seems to me, if anything, an anti-competitive step. And competition between lawyers and interaction amongst them can only improve the quality of legal services.
- 9 Competition between courts is also a good thing. Provided, of course, it is based only on the quality of judicial services provided. Gone are the days when the Kings Bench competed with the Court of Common Pleas for the choicest suitors and widest jurisdiction. Those Courts made innovative use of legal fictions to extend their respective jurisdictions. The King's Bench in particular "wooed litigants with competitive costs, and sometimes even lowered its fees in order to increase the overall takings."³
- 10 In those days, judicial remuneration was topped up by a cut of court officer fees for the issuing of writs and other procedural tasks, as well as the right to sell clerk and court officer positions.⁴ The Chief Justice

³ J H Baker, *An Interoduction to English Legal History* (4th Ed, 2002) p 43.

⁴ The Right Hon Lord Justice Brooke, "Judicial Independence – Its History in England and Wales" in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, Education Monograph 1 (1991) Judicial Commission of New South Wales, 89.

usually held rights to sell the choicest offices. In one instance, so greatly did the Chief Justice increase the fees for the office of Chancery Master, that the newly appointed Masters felt obliged to recoup the premium directly from litigants who appeared before them. To be fair, this resulted in the last great judicial scandal in England, and the Chief Justice in question, Lord Chancellor Macclesfield, was impeached.⁵

- 11 Nevertheless, it's a shame that we've abandoned that system. Given the Supreme Court's current workload, New South Wales' adoption of the UNCITRAL Model Arbitration Law and the soon to be enacted National Legal Profession Reforms, I would be placed to do quite well.
- 12 That said, Australian courts do compete today. Not to increase the judicial pay packet of course – although that would be fun to watch. Rather, courts compete for reasons of pride, ego, intellectual curiosity and jurisdictional loyalty (and, it must be said, the pathologically competitive nature of the sorts of people who tend to become judges). Let me give you one example.
- 13 State and Federal Courts both have jurisdiction in arbitration matters. Each effectively competes, in the nicest possible way, for arbitration work. This causes each Court to think about how best to serve this particular branch of the law.

⁵ Ibid.

- 14 For our part, let me just say this... we have two specialist arbitration judges available, and the President is able to assign persons experienced in that area to any appeal that arises from those judges. Expertise is available in both the domestic and international arbitration arenas. Particularly now, having regard to New South Wales' first-off-the-blocks efforts to adapt the UNCITRAL Model Law to domestic arbitration.
- 15 Further, the risk of differing decisions on appeal arising out of different state courts is also minimized by the practice that intermediate appellate courts now follow each others' judgments, unless they are plainly wrong. In summary, the New South Wales Supreme Court plainly has a lot going for it.
- 16 Not that I am saying we are necessarily the best place to bring your arbitration dispute. I don't indulge in comparative advertising. I am just setting out the facts.
- 17 In any event, giving parties a choice of forum seems to me to be no bad thing.
- 18 So, returning to my particular gripe this evening, the choice to opt a state's legal practitioners and courts out of a national regulatory

system – in the name of competitive federalism no less – seems to me to be somewhat short sighted.

19 State's independence and an aversion to an additional layer of bureaucracy were also cited reasons for Queensland's withdrawal. Here are a few quotes that reflect this sentiment:

20 An additional federal layer of bureaucracy is, I quote, "an unnecessary expense ... which is altogether out of proportion to the necessities of the case".⁶

21 It is a "lavish expenditure on what people do not well tolerate. The people do not care about a large expenditure on law and lawyers."⁷

22 If the language appears a bit stilted, it is because these statements were made in the summer of 1897-1898, during the federation debate in opposition, not to a nationalised legal profession, but to the establishment of the High Court. And that has hardly been a disaster.

23 Nevertheless, as I have said, I *do* understand an aversion to a nationalised system that will create additional costs, especially for independent legal practitioners.

⁶ Australian Federation Conference, Third Session, 28 January 1898, Adelaide, Mr Kingston.

⁷ Australian Federation Conference, First Session, 19 April 1897, Adelaide, Mr Carruthers.

- 24 This same fear of a costs blow-out was also expressed a few decades ago in opposition to the national corporations law reforms. I am sure that the eventual savings which resulted from a more cost-effective centralised system in that case was a mere aberration.
- 25 And anyway, such saving probably won't affect many sole practitioners. Save, perhaps, for those practicing near the State's borders... or those practicing in such inconsequential areas as mining and land law, corporations law, migration, competition law and intellectual property, or those who intend to expand their practice interstate, or who have clients defending actions brought in out-of-state courts, or who practice regularly in the Federal Court, or who have clients with inter-state family, business or property interests. Really, only a minority of practitioners would see any benefit.
- 26 But I am being facetious. Forgive me. I do hope that you take my sincere point that nationalisation of the legal profession will ultimately save costs, increase competition, improve services, simplify regulation and enhance Australia's, and individual states', international reputation as a jurisdiction of choice. It will create for the legal profession, what Sir Owen Dixon sought for the Judiciary: "a system which is neither state nor federal but simply Australian."⁸

⁸ Sir Owen Dixon, "Sources of Legal Authority" in Severin Woinarski (ed) *Jesting Pilate: and other papers and addresses by Sir Owen Dixon* (1965) Law Book Company, Melbourne at p 201.

27 And speaking as the custodian of a State Court, the national legal profession reforms do not threaten states' independence. No more so than did the corporations law, trade practices, personal property securities register, or the myriad other reforms that have benefited our legal practices and state and national economies, without threatening our constitutionally enshrined federalism.

28 I will leave you this evening with a final excerpt from the Federation Debates which I think reveals just how insightful our founding fathers were. Mr Carruthers of New South Wales, who went on to become Premier, said in the debates that it had been suggested that were a Federal High Court to be established it would be forced to sit in a new Australian Capital Territory that would be located not in an existing state capital, but somewhere in the Australian wilderness. To this outrageous and uncivilised suggestion, one Sir John Forrest of Western Australia dismissively retorted: “[Mr Carruthers, this has been suggested] only by lunatics.”⁹

⁹ Australian Federation Conference, Third Session, 3 March 1898.