CEREMONIAL SITTING FOR THE BICENTENARY OF THE SUPREME COURT OF NEW SOUTH WALES

RCA Higgins SC, President of the NSW Bar Association

17 May 2024, 9.15am, Banco Court

1. May it please the Court.

2. Chief Justice, your Honours, distinguished guests, I too acknowledge the traditional owners.

3. I especially acknowledge that, for many millennia before the New South Wales Act[i] passed on 19 July 1823, a mosaic of indigenous legal systems mapped this continent.[ii] [iii] To speak, on this occasion, of the inception and development of our current institutional forms is only to reinforce that the first participants within legal practices and systems in this country were Aboriginal and Torres Strait Islander individuals.[iv]

4. With the passage of the New South Wales Act, British systems of law intruded into this land.

5. On 17 May 1824, Sir Francis Forbes was sworn in as Chief Justice of the Supreme Court. There was, that day, a twin birth; because certain institutional forms characteristically emerge together. At the Court's first sitting, Saxe Bannister was sworn in as Attorney-General of New South

Wales, with the right of private practice as a barrister, but not as a solicitor.[v] His name was the first to be entered on the roll of the Bar of New South Wales. In August, John Stephen was admitted and sworn in as Solicitor-General.

6. The common law system transplanted into New South Wales under the 1823 Charter of Justice, bore not only a Norman legal legacy, but also traces of an English professional structure that had developed over some centuries. Saxe Bannister himself had been called to the English Bar at Lincoln's Inn.[vi] The English system rested in divisions: between the outer and the inner bar, and more generally between barristers and solicitors.[vii]

7. Given this disparate inheritance,[viii] the new colonial laws and practices sought to articulate the institutional facts, recognition of which would permit the creation and regulation of power relationships among people within the new colony.[ix]

8. Clause 10 of the Charter of Justice expressly dealt with those who could practise before the new Supreme Court. It included reference to: "such … persons, having been admitted Barrister-at-Law or Advocates in Great Britain or Ireland or having been admitted Writers, Attorneys, or Solicitors, in one of Our Courts at Westminster, Dublin or Edinburgh."

9. Within five months of Bannister's swearing in, the division of labour within the legal profession presented itself as a way of getting the institutional facts straight.

10. The language of clause 10 had resulted in the separate enrolment of barristers and solicitors. But the text left unanswered whether the profession was to be divided, as in England, with only barristers having a right of appearance in superior courts.

11. On 10 September 1824, William Charles Wentworth and Robert Wardell — effectively the founders of the private bar in New South Wales — were admitted as barristers, authorized to act "in the character of proctors, attornies and solicitors". Having been admitted in this dual capacity, they immediately sought to prevent solicitors from enjoying an equivalent right.

12. Wentworth moved a rule that the attorneys show cause why, having regard to the true construction of clause 10 of the Charter, they should not forthwith retire from the Bar. On 14 September 1824, the rule came before the Chief Justice. Each of Bannister, Stephen, Wardell and Wentworth and all six of the then enrolled solicitors made oral submissions.

13. The rule was discharged. The Chief Justice found that the Charter could not support the construction the barristers sought to place on it. Forbes

nonetheless expressed a hope that the division of the profession would be achieved in time. That occurred in 1834.[x]

14. This stalled schism at the inception of the Bar in New South Wales was simultaneously a moment of beguiling professional affirmation.

15. On 16 September 1824, the *Sydney Gazette* rhapsodized, and I quote:[xi]

> Our annals could never before boast of such a day as Tuesday last! The keen ingenuity, the laborious exposition of the Law, the flights of fancy, the satirical rubs, the bursts of oratory, the convincing and thundering arguments, the profundity of science all, all conspired to overwhelm the reflecting auditor with sublime conceptions of the future!

16. This episode is emblematic in three ways. **First**, it manifested both the inclusive and exclusionary social potential of the Bar in New South Wales. All who argued were enchanting, even as some tried to disenfranchise the others, and even as a new system of law brutally dispossessed indigenous peoples. **Second**, it foreshadowed that much of the life of the law thereafter would be neither logic, nor experience, but interpretation.[xii] **Third**, it began an intellectual engagement with what it would mean for there to be an independent bar in New South Wales.

17. The role of an independent bar, in an adversarial common law system, is to defend citizens against the abuse of public and private power, through the practice of skilled and ethical advocacy before the courts.[xiii] The role of the barrister is to achieve and maintain intellectual confidence, ethical courage, honesty of thought and clarity of expression, and a way of seeing, and being in, the world that can reconcile at all times her fiduciary duty to the client and her duty of candour to the court.

18. On his retirement as Chief Justice in 1933, Sir Philip Street acknowledged the assistance he had received from "sound argument by members of an able and upright Bar."[xiv] Those were words earnestly spoken, in the midst of the Depression and circumstances of great social uncertainty. They remind us of the importance of the Bar as a profession and not a business, with all that entails, and of the confederacy of Bench and Bar when functioning well.

19. Through the slow course of the two centuries that followed Wentworth's failed rule of 1824, the New South Wales Bar has established itself as the largest independent bar in Australia. That is an achievement about which we can feel some measure of proper pride. An independent, ethical, and competent Bar is a foundational aspect of our legal system, and a legal system operating subject to the rule of law is a substantial human achievement.

20. One readily legible measure of the success of our Bar is the sheer number of senior members of the judiciary and executive that it has furnished. Scores of Chief Justices, several Prime Ministers and Premiers, and numerous Attorneys-General started their professional life on Philip Street. A less obvious, but no less important, measure is the extent of the policy work and consultation undertaken by our Association to promote access to justice and sound law reform in our community.

21. Our appreciation of these achievements must, however, encounter limits.

22. We should remain shocked that a century passed before a female barrister, Sybil Morrison, began practise in New South Wales in 1924; that the first First Nations barrister, Lloyd Clive McDermott was admitted in 1972, and that the first First Nations Silk, Tony McAvoy SC was appointed in 2015; even as we remain grateful to each of those individuals for the weight they bore and the path they led.

23. Our institutions serve us best, and we them, when we include the interests of those whose lives they affect, in ways that are meaningful and subjectively recognizable **to them**. Not to do so is to sacrifice cohesion and to risk creating a disaffected and hostile element in the state.[xv]

24. As barristers in New South Wales, like this honourable Court, embark upon their third century, we are as aware as ever we were, that each time we

announce our appearance in a Court or Tribunal, we bear the solemn privilege and responsibility of being entrusted with presenting another person's legal claim in a manner that will assist the decision-maker to reach the legally correct answer according to law.

25. And we remain acutely aware that we must continue to work towards creating a profession that accurately reflects the composition of the society in which we practise, and a legal system which genuinely and fairly protects its subjects.

26. To secure legitimacy, law must be both an instrument of social control and an enabling means to facilitate human interaction, **for all**, within a society.[xvi]

27. That aspect of the work of justice is incomplete; but it is one to which the New South Wales Bar Association remains completely committed.

28. May it please the Court.

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[i] Act 4 Geo IV c 96
[ii] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) 28.
[iii] Martin Nakata, 'The Cultural Interface' (2007) 36 *The Australian Journal of Indigenous Education* 7, at 9; Brooke Greenwood, 'First Laws: The Challenge and Promise of Teaching Indigenous Laws in Australian Law Schools' (2016) 24 *Waikato Law Review* 43, at 52.
[iv] See, generally:
https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2019-Speeches/Chief-Justice/Bathurst_20190919.pdf
[v] Lord Bathurst ordered that, as an "advocate under the same restrictions as are observed in this country" it would be "improper … to permit him to practise as a solicitor." JM Bennett (ed) *A History of the New South Wales Bar* (The Law Book Company Limited, 1969) p. 33.
[vi] Australian Dictionary of Biography.
vii W Prest, *The Rise of The Barristers: A Social History of the English Bar 1590-1640* (Oxford, Clarendon, 1991)
viii Cf "family resemblances" in the sense used by L Wittgenstein, *Philosophical Investigations* (1953) §65-71.
ix JR Searle, *Making The Social World: The Structure of Human Civilisation* (Oxford, OUP, 2012) Ch 5, esp. at 106.
x The Supreme Court approved the division of the profession in 1829, after which the issue was referred to London, receiving final approval in 1834.
[xi] *Sydney Gazette*, 16 September 1824: at https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSupC/1824/17.html?context=1;query=Division%20of%20the%20Profession%20(Bar%20Monopoly%20Case)%20%5B1824%5D%20NSWSupC%2017%20(14%20September%201824);mask_path=au/cases/nsw/NSWSupC
[xii] Cf O. W. Holmes Jr., *The Common Law* (1891) p 1. Holmes similarly observed in New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921): "A page of history is worth a volume of logic."
[xiii] Cf Allsop, "The Independent Bar", Ch 11, in *The Humanity of Law* (forthcoming, Federation Press, 2024)
[xiv] (1933) 33 S.R. Memoranda, vii.
[xv] Aristotle *The Politics* III.xi.1281[b]21 (London: Penguin, 1992) (translated T.A. Sinclair): "there is a risk in not giving them a share, and in their non-participation, for when there are many who have no property and no honours, they inevitably constitute a huge hostile element in the state".
[xvi] See Lon L. Fuller, "Law as an instrument for social control and law as a facilitation of human behaviour" in L Legaz y Lacambra (ed), *Die Funktionen des Rechts* ARSP Beiheft 8 Neue Folge Nr. 8 (Frans Steiner Verlag, Wiesbaden, 1974) pp. 99-105 (also published in (1975) 1 *Brigham Young University Law Review* at pp. 89-96); and Lon L. Fuller, "Human Interaction and the Law" (1969) 14 *American Journal of Jurisprudence* 30.