The Hon Justice Peter Jacobson

Justice Peter Jacobson, the last QC ever appointed in New South Wales, was both a distinguished and immensely well-liked member of the inner Bar who gave generously of his time and energy to the corporate life of the Bar in a host of different capacities. His appointment to the Federal Court was marked by a heavily attended ceremonial sitting at which Walker SC observed that:

> Your Honour brings to the Bench qualities you showed at the Bar in a way which will require less transformation than most member of the Bar who are translated to the Bench. The Bar is notoriously adversarial. In trade off the Bar seeks to inculcate etiquette and civilisation between its members in order to mollify what would otherwise be the conflict between professionals as well as between parties. Your Honour was famous for never allowing those matters of conflict between parties to intrude between professionals. It was a dangerous matter ever to regard Peter Jacobson at the junior Bar if you were a junior opponent of his as somebody whose position in a case would be as easy to handle as you were personally in our dealings at interlocutory levels or at trial. The fact was the velvet covering covered a particularly obdurate material inside what was never really shaped as a fist.

Jacobson J and Conti J

In replying, Justice Jacobson, with typical modesty and self-effacement, said:

> I doubt that anyone could replace Justice John Lehane whom I am replacing, such was his learning and contribution to the Court. Nevertheless I will do my best to attain the high standards which he and the other judges of the court have met. I'm sure that I made a number of errors during the three weeks in which I've sat as a judge. I'm not sure whether Mr Walker referred to some of them or not. However, I do hope that before too long my judicial handicap will be better than my golf handicap of 27 and I won't score too many eights on easy par threes. … I did learn at least three things during the three weeks that I have sat. First, judicial life is very challenging and I'll have to work extremely hard if I'm to produce consistently high quality judgments in a speedy fashion. Second, and I suppose I knew this before I came to the court, my colleagues are a congenial group even though some of them didn't come from the seventh or the tenth floors of Selborne Chambers and I'm fortunate to have been able to join them on the bench. Third, the work load of the court is heavy. It can't be measured solely by sitting time and must take account also of administrative duties, committee work and of course time necessary to write judgments.

Reflecting on his time at Bar, his Honour made the observation that 'if a case is difficult enough to warrant silk then provided the party can afford it there's no reason why a junior counsel ought not to be retained as well; in my experience each had something to contribute to the preparation and conduct of the case.'

The Hon Justice Garry Downes AM

Few members of the New South Wales Bar can have pursued such a range of professional and charitable interests for the good of the greater community, both domestically and internationally, as Justice Garry Downes AM whose appointment to the Federal Court and as President of the Administrative Appeals Tribunal earlier this year was marked by a heavily attended ceremonial sitting earlier this year. Hughes QC, speaking for the Commonwealth Attorney, engaged in the following reminiscence:

> I remember that your Honour and I once worked on an arbitration in Paris about a seaborne oil rig anchored off the north-west shelf. It didn't work. The client was an insurance company that dabbled in oil exploration. It was then well-known for reasons other than those for which it is now well-known. This was no hardship brief. We were housed in reasonable comfort at the Hôtel Plaza Athénée in the Avenue Montaigne. It was the summer of 1983. In those days your Honour and I were each convinced of the therapeutic value of jogging. We spent early mornings tracking through the avenues and streets of the city. There was another counsel in the team, but his views on that form of exercise coincided with those attributed to Mr Justice Meagher of the Court of Appeal, to whom all forms of athletic exercise are repugnant.

Walker SC referred to Justice Downes's:

> service, quite unparalleled in depth, longevity and importance to the expert groups of the Law Council of Australia. Then one adds being Procurator of the Presbyterian Church of Australia, first in New South Wales and then nationally, with all of the importance for federal difficulties that that will lend to your present position. When one adds the National Trust Historic Buildings Committee, the Law Extension Committee, membership of the Faculty of Law at the University of Sydney, it is not surprising that your membership in the Order of Australia came, as Mr Hughes said, for such a distinguished combination of qualities. … Your Honour, your appointment brings to an array of skill, talent and experience already on this Bench something very special in relation to the internationalism that your Honour has practised so assiduously and with such success.

Replying, Justice Downes remarked on the importance of three years spent as associate to Sir Garfield Barwick, stating that 'he had, and continues to have, the greatest influence on me professionally and in many ways personally as well. It would be difficult to exaggerate the influence he has had on me. He taught me the law, he taught me how to practice it. Although he was 40 years my senior, and at the height of his intellect, he had time to share with me. We travelled together a lot because the High Court still sat regularly in every State at that time. Indeed, it was he who gave me the travel bug.'

His Honour concluded his remarks by observing that he has 'joined what I consider to be one of the great courts of the common law world. The Federal Court has served the people of Australia with distinction for more than 25 years and one can refer now to its eminence with confidence. I hope I can live up to the court's reputation.'

The Hon Justice Phillip Powell AM

On 8 November 2002 the Supreme Court held a ceremonial sitting to mark the retirement from the Court, after more than

twenty-five years of public service to the administration of justice, of the Hon Justice Phillip Powell AM. His Honour was appointed as a judge in the Equity Division of the Court in April 1977 and as a judge of appeal in October 1993.

In his speech the Chief Justice noted that his Honour decided many cases of considerable public interest and significance. None more so than the *Spycatcher* trial in which his Honour's judgment (*Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Limited* (1987) 8 NSWLR 341) was affirmed twice on appeal and made a significant contribution to the law on confidential information, although, in the subsequent television series, his Honour's survey of the law in this regard remained on the cutting room floor.

In *Perpetual Trustee Co Limited v Groth* (1985) 2 NSWLR 278, his Honour affirmed the validity of the Archibald Prize as a charitable trust, his judgment containing a comprehensive survey of the case law relating to trusts of general public utility in relation to the arts and education.

His Honour also charted a course through the quagmire of artistic temperament, when he admitted to probate the will of the artist Bret Whitely in the form of a document which could not be found after his death, had been witnessed by only one person and had last been seen fixed with sticky tape to the underside of a kitchen drawer. Day after day the people of New South Wales were entertained by the intricacies of sec 18A of the Wills Act and the endless possibilities of informality in will making.

Of course as with all judges, his Honour's views on the law have not always prevailed. For example his Honour's campaign to extirpate the heresy of the Mareva injunction did not succeed. (See *Ex Parte BP Exploration Co (Libya) Limited; Re Hunt* [1979] 2 NSWLR 406).

His Honour served for a long period as the judge in the protective jurisdiction of the court and then as the probate judge of the court. In both spheres His Honour's judgments, many unreported, decisively developed the law. Further, his administration of the lists ensured that the court's procedures operated with as much expedition as justice would allow.

The requirements of the protective jurisdiction include expertise with psychiatry and a personal touch for the disabled. Under the category of mental health, the *Australian Digest* sets out sixty judgments of this court from its inception in 1824. Twenty of those judgments – ie one third - are his Honour's.

His Honour's command of the English language is legend. Whilst the length of his Honour's sentences, often with numerous subordinate clauses, would sometimes leave a reader breathless, the journey was always assisted by the deployment of punctuation with precision and in abundance. These sentences were and are a pleasure to read, but not always so by the litigants and practitioners referred to in them. The Chief Justice selected the following samples of his Honour's art for special mention:

- In H v G (unreported) 24 August 1990, in an extempore judgment, his Honour commenced the judgment with the following:

  > At long last, after a delay of the better part of five months, which has been brought about by what I can only describe as blundering incompetence on the part of the plaintiff's advisers, this application is in a condition in which it can finally be disposed of.
  >
  > Notwithstanding the delay, and the incompetence, which have marked the application's stumbling and erratic progress to this stage, the plaintiff's counsel submits that the plaintiff should have an order that the whole of his costs of the application should be paid out of the defendant's estate.

- Words, words, mere words …' said Troilus (*Troilus and Cressida* V. iii. 109), a sentiment which I am disposed to echo after having spent many hours considering the numerous, and, at times, conflicting, and thoroughly confusing, authorities on the question of whether or not the duties of a director of a limited liability company are, or are not, the same as, or similar to, or analogous to, those of a trustee … Although – and, once more, I plagiarise the Bard of Avon – I regard the debate as '… weary, stale, flat and unprofitable …' (*Hamlet* I. Ii. 129), I believe that the true position is that, while directors are not, properly speaking, trustees, but fiduciary agents, the range of duties and obligations to which they are subject, or which are imposed upon them, include duties or obligations which place them, in relation to moneys or property which are in their possession, or over which they have control, in a position analogous to, although not identical with, that of trustees.' (*Mulkana Corporation NL (In Liq) v Bank of New South Wales* (unreported) 9 September 1983.)

- The litigants in a partnership dispute over a pharmacy were greeted with the following opening sentence in Taylor v Johnston (unreported), 14 February 1984:

  > After listening, for the whole of the morning, to the evidence, and arguments of counsel, in this matter, I am reminded of nothing so much as the learned gentleman whom Gulliver met on his voyage to Laputa, and who had spent eight years upon a project for extracting sunbeams out of cucumbers which were to be put into phials hermetically sealed, and let out to warm the air in raw inclement summers: I am amazed that, in this proceeding, so much time, money, and intellectual effort has been expended upon a question which has so little relationship to reality.'

The sentence contained eleven commas and one colon.

- Similarly, the litigants in a landlord and tenant case (*Todbern Pty Ltd v Taormina International Pty Ltd* (unreported) 13 June 1990, were greeted with the following opening:

  > Despite the fact that the amount which the plaintiff, even if it be successful in these proceedings, might recover is not much more than could have been recovered in proceedings regularly commenced in the Local Court at Kogarah, and is not such as would have entitled the plaintiff, if the proceedings had been commenced in the District Court, or, in the Common Law Division of this court, to recover full party and party costs, what one can only categorise as a total failure, on the part of the plaintiff's legal advisers, to understand some basic principles of the law and of practice and procedure has led to these proceedings being commenced by an inappropriate procedure, and in an inappropriate division of an inappropriate court.'

Once again eleven commas but no colon.

The clarity of his Honour's expression will mean that the judgments he delivered in his long period of service on this court will stand the test of time.