ADDRESS BY JUSTICE FRYBERG ON THE OCCASION OF HIS SWEARING IN

23 SEPTEMBER 1994

Chief Justice, fellow judges, judges of other courts, Mr Acting Attorney, Mr Solicitor, Mr Sofronoff, Mr O'Sullivan, members of the profession, ladies and gentlemen.

First, I must thank you all for your generous expressions of commendation and support. I greatly appreciate and value them. They are of course flattering; but conceit at least forbids my scrutinising them with the care which I hope to apply hereafter. They also comfort me in the rightness of a decision which, to my own considerable surprise, I found much harder to take than I would have expected.

It is my particular good fortune to be joining a court every one of whose members I count as a personal and professional friend. I have known all of the judges for many years, and a good number since university days. Five of the bench have had chambers on the floor which I am now leaving. Three others served with me in the university regiment – two of them as somewhat insubordinate private soldiers in my first platoon. With others I have regularly played tennis, sung songs or debated the problems of the world. I look forward to reinvigorating these friendships, though in an appropriately sedate environment.

It is a particular pleasure to be welcomed by you, Mr Acting Attorney. You were a colleague for a number of years until you succumbed to the temptations of politics. You reminded me the other day of an occasion when we appeared together in the Local Government Court – somewhat to my embarrassment, for as leaders are prone to do, I had forgotten the case. Perhaps one day you may occupy the office in which you are presently acting. In that event, I may be able to boast that I was the first of many to whom you extended this welcome.

It seems appropriate to address Mr Solicitor in the same paragraph as Mr Sofronoff. Every newly appointed judge finds leaving the Bar among the greatest wrenches involved in the transition. I am certainly no exception. I wanted to become a barrister from the age of 14. Life at the Bar has fulfilled and satisfied me in ways of which I could not even have dreamed had I not experienced them. And I am optimistic regarding the future of the Bar. I have observed the changes of the last 25 years; and I can assure you that the Bar is now better educated, better skilled and more diligent than at any other time during that period. Inevitably, my relationship with members of the Bar must in future be somewhat different, although I hope, just as warm.

When a new judge is appointed, the question which quite rightly concerns most barristers is, “What will he or she be like?” Those who have gone first into the firing line are pressed for details of the latest judicial performance. In the interests of a level playing field, I now make a full disclosure. I will expect of those appearing before me standards no lower than I demanded of my juniors when they appeared with me. If you don’t know what that means, I have no doubt you will be able to find out.

I have been fortunate in my time at the Bar to have had more opportunities to work closely with the Law Society than are afforded most barristers. Your Society, Mr O’Sullivan, does a tremendous job. I have enjoyed working on a number of joint committees over the years and I know the expertise and energy which your members deploy in their work for the Society. I have formed many happy friendships on those committees and with solicitors who have briefed me, and I hope these friendships may continue. Thank you for your kind wishes.

I cannot allow the occasion to pass without thanking my family for their support and tolerance over the years. I am particularly pleased that my mother is able to attend today. To her, to my wife and my children, thank you.

Justice de Jersey was reported a couple of weeks ago as having observed the oddity of the notion that judges should remain silent lest by

speaking up they put their foot in it. With such encouragement, few of you who know me would expect me to reinforce the oddity. His Honour urged that judges be more willing to tell the community what they really think about important non-political issues, in the hope of influencing desirable social change. Thus emboldened, may I address the subject of judicial independence.

I can think of few characteristics of a democracy more important than an unbiased and completely independent judiciary. The reasons for this are well known and I need not elaborate upon them. They are as old as democracy itself.

However the methods by which judicial independence is achieved are not immutable. They must change as society itself changes. Structures and procedures which were appropriate 50 years ago are not necessarily appropriate today. In his well-known report, Mr Fitzgerald QC as he then was, drew attention to the threat to judicial independence posed by over-dependence upon administrative and financial resources from government departments, and observed that independence of the judiciary demands as much autonomy as possible in the internal management and administration of courts.

That view has found wide support in recent years in Australia, and is reflected in structural arrangements which have been made for the High Court and Federal Court for example. Put simply, these courts administer themselves and operate on a one line budget voted to them by parliament. It is high time similar provision was made for the Supreme Court of Queensland. It is true that the Court of Appeal has achieved a measure of such independence; but even there it is not I think complete. The rest of the court is beholden to the executive in many day to day aspects of its administration. This arrangement is quite wrong in today's society, and needs immediate change.

The corollary of judicial independence is judicial responsibility. The failure of the Queensland system to provide structural independence has in my view impeded the modernisation of court processes. There has been considerable criticism in recent years of delays in the legal system and of the consequent increases in cost to litigants and to the public. Part of the reason for the problems in this area is the absence of anyone able to take responsibility for change. Without structural independence and the responsibility for their own affairs which that would bring, the courts have been impeded in implementing reforms.

I suspect that governments have also increasingly felt a sense of powerlessness and frustration at the intractability of the problems. Reform of the legal profession has been seized upon by many as the answer to the problem of providing reasonable access to justice; but as the contributing editor of the Court Mail observed last Saturday, that reform is unlikely to have much impact on either the courts' or clients' costs. Economic theorists who suggest otherwise are living in a dream world.

Establishing structural independent and responsibility of the judiciary would not by itself solve all the problems of the legal system; but it would in my view be a very important step toward their solution. It would also enhance the stature of the court and underline its constitutional importance.

May I now turn to a much more traditional method of securing judicial independence in a democracy: the provision of a guaranteed judicial salary. Guaranteed remuneration means remuneration which cannot be reduced; at the will of the executive or anyone else. Put simply, the system should not permit a change in judicial remuneration adverse to the office holder. By this means judges are immunised from one avenue of improper pressure.

It has recently become apparent that the Queensland system for determining judicial remuneration conflicts with this important principle. That is a matter of profound regret. It is no answer to say that changes which are proposed (and I refer of course to changes proposed to the jurisprudential

allowance) will be beneficial to some judges. The fact is that they will be financially detrimental to some existing judges. The implementation of such changes amounts in my view to constitutional impropriety. The existence of a system which permits a tribunal to propose such changes is a blot upon our constitutional arrangements.

I am emboldened to speak on this topic because I am the only person on the beach who has taken office knowing of the proposed changes and with no personal basis to complain about their effect on him. I therefore raise the issue not from self-interest, but as one of high principle.

I do not wish to comment on the merits or otherwise of having a jurisprudential allowance, nor upon whether it is in the public interest that the State should be relieved of the need to pay fringe benefits tax in respect of it. These are matters which are properly the subject of public debate and government policy. My concern is that the system provided for determining judicial remuneration does not contain an overriding requirement that no change be to the financial detriment of an existing judicial office holder. Such an overriding provision would not prevent all change. For example, I would see no objection to permitting the conversion of jurisprudential allowance to salary if that is what the tribunal and the public wants and if the judge concerned does not perceive it as a disadvantage in his particular situation. Even government departments sometimes allow conversion of fringe benefits to cash at the option of the office holder. My complaint is of a system which permits such change to be forced upon a judge when it is to his financial detriment. Such a system is open to abuse; it tends to erode the independence of the judiciary; it is wrong in principle; and it ought to be changed.

I have detained you for long enough. Those of you who have heard my promises to try to perform my judicial duties quickly will already be scoffing. Thank you all for your attendance here today and for the honour you have done me. I trust I may prove worthy of it.