THE SUPREME COURT OF

WESTERN AUSTRALIA

CEREMONIAL SITTING

TRIBUTE TO THE LATE THE HONOURABLE

DAVID KINGSLEY MALCOLM AC QC

MARTIN CJ

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON WEDNESDAY, 19 NOVEMBER 2014, AT 4.31 PM

MARTIN CJ: This court sits this afternoon to honour the life and work of the Honourable David Kingsley Malcolm AC QC, former Chief Justice of Western Australia, who passed away on Monday, 20 October 2014. I would like to especially welcome Kaaren and Manisha Malcolm and their special guests. I'm very pleased also to welcome to the bench, the Honourable Robert French AC who is able to join us today.

And I'm pleased also to welcome Justice Neil McKerracher and Justice Michael Barker at the Federal Court of Australia; Justice Thackray, Chief Judge of the Family Court of Western of Australia; Chief Judge Peter Martino of the District Court of Western Australia; Chief Magistrate Steven Heath; President Denis Reynolds of the Children's Court; Mr Grant Donaldson SC, Solicitor General; the Honourable Malcolm McCusker AC CVO QC, former Governor of Western Australia; Ms Cheryl Gwilliam, Director General of the Department of the Attorney General; many former members of this and other courts; and other distinguished guests too numerous to mention.

I would also like to especially welcome those who will address the court this afternoon, being the Honourable Michael Mischin MLC, Attorney General of Western Australia; Mr Matthew Keogh, Senior Vice-President of the Law Society of Western Australia; and Mr Peter Quinlan SC, President of the WA Bar association. The particular focus of today's proceedings will be David Malcolm's contribution to the legal profession, the law and the administration of justice, including, in particular, of course, his contribution as Chief Justice of Western Australia for almost 18 years between 1988 and 2006.

The adoption of this focus should not be though to suggest that David Malcolm's life was one dimensional. Nothing could be further from the truth. His life was rich with endeavour in many fields and very fully lived; so fully lived, in fact, that any attempt to survey the breadth of his contribution would keep us here until the early hours of the morning. Some mention of his broader community involvement was made during the course of the memorial service held at St George's cathedral a few weeks ago but as we said, as a court this afternoon, of course, it's appropriate to focus our attention upon his contribution to the law.

David Kingsley Malcolm was born in Bunbury, Western Australia on 6 May 1938. His father was Colin Kingsley Malcolm and his mother's maiden name was Elizabeth Cowan.

His father was a livestock salesman for Elder Smith & Co and managed the south-west district for that company for a number of years before becoming manager of the Land Department in Perth. His mother ran a ballet school and then established a kindergarten and it was through her lineage that the young David Malcolm inherited a legal genealogy.

His great grandfather, Walkinshaw Cowan, was a Scottish lawyer. He came to Western Australia in 1839 in order to take up the position of official secretary to Governor Hutt, who had succeeded Governor Stirling as governor of the colony. He was clerk of the Executive Council and the Legislative Council until becoming the resident magistrate at York in 1848. Two of his three sons, William and James, were lawyers and James became a master of the Supreme Court in the latter part of the 19th century and, during the first decade of the next century, served as Chief Stipendiary Magistrate.

James was married to Edith Cowan who became the first woman elected to a Parliament anywhere in the British Commonwealth when she won the seat of West Perth in 1921. Of course, her many achievements are well recognised and commemorated, not least by the naming of a major university in her honour. David was justifiably proud of his familial connection with his great aunt Edith. The third and youngest son of Walkinshaw Cowan, Lewis, was David Malcolm's grandfather and served as a Collector of Customs in Western Australia at the time of Federation.

A series of serendipitous childhood encounters with a number of people who were to become very prominent members of the legal profession in this State combined with David's legal DNA to seal his future fate. His Sunday School monitor at St Paul's Cathedral in Bunbury was a young William Pidgeon, who also supervised a Guildford Grammar school scholarship examination which David sat in 1950. While at Guildford in July 1954, the young Malcolm participated in a debate which was adjudicated by John Wickham who was then, a member of the school council.

Wickham took a particular interest in the young Malcolm who went on to become captain of school. They developed an association in the course of which Wickham planted the seed of interest in the law as a vocation in life. A few days ago, I received a letter from the Honourable John Wickham QC in response to my invitation to attend this afternoon's sitting. He expresses his sincere apologies for his inability to attend this afternoon but, in his own words, he's now 95 years young.

In that letter he speaks very fondly of his long association with David, not only through Guildford, but also for a time at the firm of Muir Williams Nicholson. It was through John Wickham that the 17 year old David Malcolm obtained vocation employment at the firm then known as Joseph Muir & Williams. It was in that capacity that David met another great influence and mentor, Sir Francis Burt. During the special sitting of the court to welcome David Malcolm as Chief Justice, he recalled his conversations with Burt in the robing room when, as a summer clerk, he was sent down to court to provide assistance.

He was struck by the way in which Burt treated him as an equal and discussed with him the strategy to be adopted in the case. Burt lectured Malcolm in contract law and later, Malcolm served as junior counsel to Burt in a number of leading cases and of course, appeared before him many times following Burt's appointment as a judge and then Chief Justice of this court. David Malcolm was an outstanding law student, graduating with first-class honours in 1959, having achieved distinctions in 20 of the 21 subjects which he sat.

One of the many anecdotes in circulation relating to David suggests that he missed out on straight distinctions because of a peculiar requirement that a mark of 80 be achieved in order to obtain a distinction in jurisprudence, instead of the usual mark of 75 and despite a number of remarks, he only achieved a mark of 79 in that subject. David was characteristically busy at university. He was senior student and President of St George's College, secretary of the Guild of Undergraduates and Vice-President of the Blackstone Society. He represented the University of Western Australia in both Australian Rules football and Rugby.

In 1960 David Malcolm was awarded the Rhodes Scholarship for Western Australia. At that time he had commenced his articles with Robert Blackensee at Stone James & Co, although, because of his interest in litigation, he spent much of his articles working with Robert Ainslie QC, of that firm. He interrupted his articles to take up his scholarship at Wadham College Oxford, graduating as Bachelor of Common Laws with first-class honours in 1962. Surprisingly, he achieved only the second highest mark in the BCL that year. My researchers haven't revealed who obtained the highest mark but it must have been a scholar of exceptional ability.

After finishing his studies in Oxford, David returned to Perth by way of a grand tour of Europe which included

Greece, Yugoslavia, Austria, Czechoslovakia, West and East Germany, Poland and then to the Soviet Union, where he caught the Trans Siberian Railway all the way to the Pacific Ocean, then travelling to Japan, Hong Kong, Manila, Sydney and finally to Fremantle just in time for the Commonwealth Games in 1962.

That journey kindled an interest in Asia and the Pacific, which was to become a life-long passion. Upon returning to Perth, he completed his articles at Stone James & Co before being admitted to practice on 21 April 1964. The following day, he joined Wickham as a partner of Muir Williams & Co, although Wickham left relatively shortly thereafter to join Burt at the fledgling Western Australian Bar Association, leaving big shoes for young Malcolm to fill in the litigation department.

In 1967 David Malcolm took a leave of absence from the firm in order to take up a position he had been offered in the Office of the General Council at the Asia Development Bank which had its headquarters in Manila. He spent four years at the bank working on projects from Afghanistan and Sri Lanka in the west, Korea in the east, south to Indonesia and including the Pacific Islands and the countries of Central and East Asia. Within the bank he had specific responsibility for the legal work in Laos, Cambodia, Thailand, Vietnam, Malaysia and Singapore.

He also undertook specific assignments in other countries, including Sri Lanka, Korea and Nepal. These activities reinforced his commitment to the development of the law and systems for the administration of justice in the Asia-Pacific region – a commitment which he pursued throughout his year, including, most significantly, during his term as Chief Justice. In that capacity, on a number of occasions, he took responsibility for convening the bi-annual conferences of Chief Justices of Asia and the Pacific.

He was largely instrumental in the preparation and adoption by that conference of the Beijing statement of principles of the independence of the judiciary in 1995, which, to this day, remains a very important statement of the minimum standards to be observed in order to maintain the independence and effective functioning of the judiciary in the Asia-Pacific region. It was his enthusiasm and dedication to the cause of judicial independence in our region which resulted in the Asia-Pacific being the first region of the world in which such a set of principles was adopted and in 2003 the inaugural conference of Chief

Justices of Africa adopted a similar set of principles modelled on the Beijing statement.

After his term in Manila, David Malcolm returned to Perth in order to pursue his career as an advocate while resuming his place in the partnership in the firm which had become Muir Williams Nicholson. During the 1970s he headed up the litigation department of that first which was a power house of the time, as he was ably support by Robert Anderson and Robert Meadows.

After taking a leading role in the negotiation of a merger with the firm of Freehill Hollingdale & Page, Malcolm left the firm shortly after the merger had been implemented in order to join the bar. At around this time David Malcolm also served as a member and then chair of the Law Reform Commission of Western Australia, as a member of the Commonwealth Copyright Tribunal and as chairman of the Town Planning Appeal Tribunal of Western Australia. His eminence within the profession was such that he was appointed silk by the then Chief Justice Sir Francis Burt within a very short time of joining the bar.

He very quickly became the recognised leader of the Bar and was in demand both within Western Australia and nationally for all the major complex commercial cases of the day. David Malcolm served as President of the WA Bar Association between 1982 and 1984. I will leave it to the current president of that association, Mr Quinlan SC, to chronicle his many achievements at the bar. I hope, however, that I might be forgiven a slight discretion to note that it was during this period that I was fortunate enough to work closely with David as my leader on a number of major cases of the time.

In the steamy cauldron of complex commercial litigation I quickly learnt that David's prodigious energy and stamina were not limited to the preparation, development and presentation of legal argument but also extended to the social activities of the legal team engaged on the case. I also quickly learnt the hard way, and at some cost to my health, that it was a serious error to try and keep up with him on either the legal or the social front. One of the cases in which we were engaged at the time involved one of the last appeals to the Privy Council from Western Australia.

We were representing the late Len Buckeridge, whose propensities made him a very good client. I'm afraid that some of the stories associated with our journey to London are not fit for repetition on a solemn occasion such as

this but there is, I think, one which I can tell. David was an experienced Privy Council advocate and knew all the tricks. One of the tricks related to the fact that there was only one room available for use by the parties for preparation in the chambers occupied by their Lordships.

Although that was a very generous and elegant room on the first floor of the building which was on the very corner of Whitehill and Downing Street and offered commanding views of each street, the trick was to be sure that you got to London and to see Fred, the orderly to the Privy Council, before the other side got there so as to sling Fred an honorarium for the use of the room which was, I think, 25 quid. Armed with that advice, I got to Fred first and John Chaney and Malcolm Lee, who were on the other side, had nowhere to sit outside hearing hours, other than a small desk in a cramped library.

However, I must report the preparation room didn't help. Unfortunately, justice triumphed and we were roundly trounced. David Malcolm was the undoubted leader of the Bar in Western Australia at the time he was appointed to replace Sir Francis Burt as the 12th Chief Justice of Western Australia, taking up office on 26 May 1988, shortly after his 50th birthday. His appointment was universally applauded by the legal profession and the community. He brought his characteristic energy, vitality, enthusiasm and exceptional intellect to the performance of the duties of that office until his retirement on 7 February 2006, a little under 18 years later. He was an exceptional Chief Justice.

It was clear from his approach to the many tasks and responsibilities which he embraced, that he revelled in the opportunity to serve the State and people of Western Australia in that capacity. Although he never said so in so many words, I'm sure that the only reason he left office prior to compulsory retirement is because he felt that he was no longer able to achieve the exacting standards of performance which he had set for himself over such a long period and which were bound to take their toll.

I was honoured to represent the Law Society at the ceremonial sitting held to mark his Honour's departure from the court. I attempted to fulfil the impossible task of summarising his service as Chief Justice in a few short words by suggesting that he had displayed a combination of great intellect, enormous vigour, an extraordinary sense of and devotion to public duty, performed, perhaps most

importantly of all, with an overriding sense of compassion and humanity.

Further reflection upon his service from my current perspective has served to reinforce those views. So many changes to the administration of justice in this State were made during David Malcolm's term as Chief Justice, with his support and encouragement, and any attempt to catalogue those changes in an address such as this is doomed to failure.

But given the invidious task of singling out the most significant change which he implemented, I would choose court-based mediation, which he introduced with foresight and vision more than 20 years ago. The success of the mediation services offered by this court through its registrars and judges led to the adoption, many years ago, of the practice of, in effect, requiring all parties to civil litigation to attempt to resolve their differences before permitting them to go to trial.

The success of that approach has not only saved parties to proceedings in this court enormous sums of money in terms of legal costs, but has also obviated the stress and uncertainty of trials which can be avoided. The success of our mediation services contributes to the fact that less than three per cent of cases commenced on the civil side of the court are resolved by a trial, more than 97 per cent being resolved some other way. Without court-cased mediation we would have developed a massive backlog of civil cases awaiting trial accompanied by unconscionable delays in the provision of justice.

Another profoundly significant development during David Malcolm's time as Chief Justice was the introduction of case management systems under which cases are proactively managed by judicial officers, including registrars and judges. Perhaps the most significant of those systems was the expedited list which was the forerunner of what we now call the CMC list. Those systems of case management have also made enormous contributions to our capacity to reduce delay and focus quickly upon the real issues in any case.

The introduction of case management was accompanied by a process of modernisation of the Rules of Court during his Honour's term as Chief Justice, although it must be said that there is more that could be cone in this area. Prior to the effects of court-based mediation and case management being felt, by 1993 a huge backlog of civil cases awaiting trial had developed. A troika made up of Chief Justice

Malcolm and Justices Ipp and Seaman resolved upon a revolutionary way of clearing that backlog by a series of blitzes, the first of which was held in May 1993 as a trial run for a massive blitz held in August 1993 and which had the desired effect.

Chief Justice Malcolm was quick to seize upon the opportunities which the newly developing field of information technology offered to improve the efficiency of the courts and the judicial process. As he later observed, at the time of his appointment to the court, the court didn't even have a fax machine. That observation of itself provides an interesting indicator of the rate of change in information technology. While in 1988 facsimile technology was seen as cutting edge, other technological developments since then have now rendered that technology largely redundant.

With the encouragement of the Chief Justice, the court embraced information technology and the use of audio-visual facilities and was one of the first courts in Australia to regularly conduct electronic trials and electronic appeals. Regrettably, however, our leadership in this area seems to have stalled and we now lag significantly behind other jurisdictions in relation to electronic filing and service of documents. But I continue to live in hope that resources may be found for us to catch up in that area.

During his Honour's term there was also great change in the criminal side of the court's work. The video recording of police suspects – of interviews with police suspects - became standard practice. Techniques for taking evidence of children and other vulnerable witnesses were developed which remain Australian best practice. Victim impact statements were introduced and criminal procedure codified in a new Act and regulations.

The resources were found for the appointment of Aboriginal liaison officers to assist the courts in their interactions with Aboriginal people – all too often, of course, in the criminal side of the court's work. There was also significant change within the structures for the administration of justice. The State Administrative Tribunal and the Court of Appeal were each created and commenced operation during Chief Justice Malcolm's term and each has had a significant impact upon the administration of justice in this state.

The Supreme Court itself underwent significant change, not least in terms of the judicial resources of the court, including significant judicial turnover and a significant

expansion in available resources. There were 10 judges of the court at the time he was appointed in 1988. By the time of his retirement in 2006 that number had doubled to 20. His success in attracting support from government for the provision of additional judicial resources stands in stark contrast to my own abject failure, given that we are currently struggling to maintain the same level of judicial resources as was provided at the time of his retirement in February 2006.

At the time of his retirement Sir Francis Burt suggested that the biggest challenge confronting the judiciary was the need to communicate with the community. Chief Justice Malcolm responded to that challenge with characteristic enthusiasm. He was perhaps the first Chief Justice of this State to consider that his responsibilities included engagement with the community through the media of communication used by the community for the purpose of explaining the justice system to the people which it serves.

He successfully secured the resources to enable the appointment of a media liaison officer without whom I would be lost. He went on talkback radio occasionally and he seemed to accept every invitation from any community group, no matter how small, to provide an address on any justice related topic of their choosing. I think it was Richard Utting who observed that Chief Justice Malcolm would attend the opening of an envelope if invited.

I suspect that I may be vulnerable to the same criticism, if it be a criticism, but I'm trying to do my best to follow the path of community engagement which he chartered. Chief Justice Malcolm was also responsible for the initiation of substantive policy developments on a wide range of fronts, some of which I've already mentioned.

Given the attention which he focused upon gender bias, it would be remiss of me not to mention the significant review of gender bias within the legal profession and the administration of justice undertaken by the Women Lawyers Association of WA at the suggestion of the Chief Justice in 1994, particularly given that we've just seen the publication of a very important review of those issues 20 years later. That review has shown that while some progress has been made, no doubt attributable in part to the attention which Chief Justice Malcolm drew to those important issues, more remains to be done.

Of course, acknowledgement of these many and varied achievements as Chief Justice should not distract attention

from his eminence as a jurist. Even the most superficial glance at the Western Australian Reports published during his term in office reveals his outstanding contribution to the development of the law and jurisprudence of Western Australia during his term. A scholarly review of that extraordinary contribution remains to be written. For present purposes, it's sufficient to note that his eminence as a jurist is amply demonstrated by the fact that he was chosen to preside over a specially constituted bench of the Court of Appeal of New South Wales in order to determine a case involving a member of that court in his personal capacity.

The reasons given in that case were characteristic of the lucidity, clarity and comprehensibility of his reasons for judgment generally. Because the focus of this sitting is upon David Malcolm's contribution to the legal profession, the law and the administration of justice in Western Australia there has been little opportunity to comment on his personal and family like.

Because of the risk of creating a distorted view of his life by omitting reference to what was a most important part of his life, I would like to conclude by using his own words in the conclusion of the ceremonial sitting held to mark the centenary of sittings in this building in 2003 when he said:

> I would like to conclude by thanking my wife, Kaaren, who has been tremendously supportive during the last seven years – nearly half my term of office. Her background in the justice system has given her a high degree of understanding and knowledge of what I do and why I do it. Her love and support together with those of the beautiful daughter has given me are my most priceless assets.

Mr Attorney.

M. MISCHIN, MR: Thank you, your Honour, and may it please the court. On behalf of the State Government and the people of Western Australia, it gives me great pleasure both professionally and personally to acknowledge the profound contribution to the law in this State and indeed, throughout Australia and the Asia-Pacific region made by our 12th Chief Justice of Western Australia the Honourable David Malcolm AC.

Today's proceedings are not focusing on the Honourable David Malcolm's wide-ranging contributions outside the administration of justice over many decades. They are

being recognised in other places and some allusion has been made to them. Those other places include the Premier's ministerial statement at Parliament of Western Australia. I was privileged, as Attorney General, to deliver a similar tribute in the Legislative Council. Before embarking on a short exposition of what the Honourable Chief Justice has categorised as Chief Justice Malcolm's outstanding contribution to the development of law and jurisprudence of Western Australia, I would seek the court's indulgence to add a personal note to these proceedings.

Like many of my generation, I had the opportunity to appear before Chief Justice Malcolm primarily in appeals over which he presided. I always found him pleasant and engaging but that did not conceal a profound knowledge of the law and a penetrating intellect, and I can distinctly remember his frequent and welcoming smile at counsel to put them at their ease just as they blundered to their doom into a logical oubliette which they could not escape. And I was the subject of that on more than one occasion.

Again, his Honour the Chief Justice has correctly identified a deficiency which ought to be remedied and that is the fact that a scholarly review of Chief Justice Malcolm's extraordinary contribution to the law remains to be written and that will be a formidable task. For example, I understand a perusal of this court's electronic database, which doesn't take into account the bound volumes of the Law Reports, reveals that between 1991 and 2006, the Chief Justice authorised approximately 1063 judgments, give or take.

Of course, Attorney to General Ministers of the Crown and Parliamentarians are not legal academics. Even so, I would like to touch upon and in some small way contribute to the beginnings of such a review. Although his Honour was principally known for his commercial law practice and judicial opinions on that subject, there are three other areas of the law to which I would like to refer. The first area, the criminal law, is a topic in which I was mostly engaged as a practitioner with the Crown Solicitor's Office of the Crown Law Department and subsequently the Director of Public Prosecutions office.

Recently, I came across a lengthy paper delivered by Chief Justice Malcolm in November 2003, titled The High Court on Crime in Western Australia. It's clear evidence of his profound knowledge of the criminal law and his contributions to the interpretation of the Western Australian Criminal Code. One example provides such an

indication. In the difficult areas of joinder of charges and similar fact evidence, the real possibility of concoction and inconsistent evidence, the Chief Justice, although ostensible adumbrating High Court opinions, at a deeper level reveals how a wise, learned and skilful judge develops and applies the law.

The cases which his Honour used to illustrate the High Court's contribution were two Western Australian Supreme Court decisions: Strickland v The Queen and Tweedie v The Queen, in which the Chief Justice delivered significant judgments. Other criminal law decisions which his Honour delivered are also important and, in my view, will be enduring. For example, that in Button v The Queen in 2002, Mickelberg v The Queen in 2004, Wayman in 2001 and Stanton v The Queen in 2001.

In the first case his Honour's decision to quash Button's conviction for manslaughter was handed down 39 years after Mr Button was convicted. Importantly, the Chief Justice considered fresh evidence relating to the vehicle crash in which the victim was killed. He found that the fresh evidence was consistent with the account of events provided by one David Edgar Cooke.

Cooke had confessed to killing the victim prior to his execution. However, Cooke's confessions were not admissible on the grounds of hearsay. Significantly, his Honour considered evidence given by Cooke's other hit and run victims on the basis that the rules for admitting similar fact evidence had to be applied differently in the scenario. By taking into account the strength of the fresh evidence together with the similar fact evidence, he was then able to conclude that the verdict was unsafe and unsatisfactory.

One major consequence of this decision was that the rules for admitting similar fact evidence would not be as onerous in circumstances where the evidence was being led to exculpate rather than to convict an accused. Therefore an accused person may be able to create reasonable doubt by using similar fact evidence that relates to another person so long as it is relevant.

As to the second case that had to do with the Mickelberg Perth Mint fraud case, because I was involved representing the State I will leave for others to comment upon. In the third case Mr Wayman pleaded guilty to a number of offences for which he received a total effective finite sentence of five years imprisonment. However, the sentencing judge also made an order for indefinite

detention under section 98 of the Sentencing Act of 1995. The evidence was that Wayman would become dangerous if he continued to abuse drugs and alcohol and note take his medication.

On appeal, his Honour held this was an insufficient basis for imposing a term of indefinite imprisonment. In addition he found there was a denial of procedural fairness as the sentencing judge had not given counsel an opportunity to make submissions on the issue of indefinite imprisonment. From a deeper perspective, the decision upheld the principle that a term of immediate imprisonment should only be imposed where there are exceptional circumstances. In particular, his Honour noted that the offender had not yet had the benefit of engaging in substance abuse counselling programs in prison or while on parole.

The imposition of the order was therefore inappropriate given that there was still scope for rehabilitation and there were risk management options available to the parole board. A major consequence is that sentencing judges are required to assess the factors in favour of parole before concluding a person poses a constant danger to the community.

The second area of law involves interesting and challenging conundra, and associated with the law of negligence in this context, and I will briefly touch on two cases - Western Australia v Watson [1990] and Heydon v NRMA Limited in 2000 - in which his Honour delivered comprehensive judgments.

The latter is the New South Wales case that I believe his Honour the Chief Justice referred to, and perhaps the only occasion in which a Chief Justice of Western Australia has presided in the New South Wales court. As Chief Justice Martin has mentioned, his Honour was chosen to preside over a specially constituted bench, and this in itself evidences both his Honour’s well-deserved nation-wide reputation, but his contribution to the law outside of the State.

In the former case, that of Watson, a lumper and tally clerk employed in the 1950s at Point Sampson by the Department of Harbour and Lights contracted asbestosis as a result of exposure to asbestos dust. He sued the State in negligence. The action was defended on the grounds that while the dangers of asbestos inhalation were known to officers within various departments of the State, including

the Public Health Department and the Department of Mines, officers within the Department of Harbour and Lights were at the relevant time unaware of those dangers.

Mr Watson's actions succeeded, essentially, on the basis that the knowledge of State Ministers and Directors General could be aggregated and imputed to the State. Watson was a joint judgment of the Full Court of the Supreme Court of Western Australia, but even so, it is the Chief Justice who is credited with writing that part of the judgment which deals with State liability. His Honour's analysis in Watson of the nature of the State as a corporate entity, and of the interrelationship between Cabinet, Ministers of the Crown, Departments, and Directors General, has had a significant influence well beyond asbestos negligence litigation.

The Heydon case concerned allegations of negligence against, amongst others, Dyson Heydon QC, as he then was, who had in interim been appointed to the New South Wales Court of Appeal. The legal question was whether counsel had been negligent in advising the NRMA that it could be demutualised by way of member resolutions amending the company's articles.

Counsel's advice accorded with the then current law. However, it was given at a time when the High Court had given leave to appeal in a case known as Gambotto v WCP Limited in 1995 to argue that critical point. As a result, the law permitting such member resolutions resulted in the Gambotto case by the High Court some 18 months later. The trial judge found that counsel ought to have read the transcript of the leave hearing and included in his advice a warning of the risk of the current legal position being changed by the High Court. The Court of Appeal allowed the appeal.

His Honour's comprehensive judgment concerning professional liability and company law remains the leading exposition of the law relating to the content of the obligation of professionals to take reasonable care, especially in circumstances where particular skill has been professed. For those who are interested in pursuing his Honour's thoughts on the case, they might read his paper presented to the 2001 Anglo-Australian Lawyers Conference in London.

The third area, that of constitutional law, is one from which no attorney general, especially a State Attorney General, can stand aloof. It's an area of law which, in a federation, is topical not only in the courts, but also in

parliaments and cabinets. And I'm sure that, given the fact that prior to his elevation to the bench, he taught constitutional law at the University of Western Australia, his Honour was well aware of that.

In this area of the law, his Honour was, in a number of unpublished papers, particularly concerned about the independence of the judiciary and the rule of law. He pursued this theme in The Judiciary Under the Constitution: The Future of Reform, which was published in the December 2003 issue of the University of Western Australia Law Review.

Examples of his judicial opinions involving constitutional law include Holland v R in 2005, a freedom of political communication case, and Dunne v P in 2004, a section 109 Commonwealth state legislation inconsistency issue. Perhaps more well known, especially to Western Australian parliamentarians, is the Marquet litigation which involved attempts by a previous State Government to reshape the State's electoral system according to a more theoretical model of one vote, one value.

Again, Chief Justice Malcolm wrote an erudite public law opinion, including often unfamiliar issues relating to justiciability, which involved answering two questions: first, whether it was lawful for the plaintiff to present to the Governor for Her Majesty's assent the Electoral Distribution Repeal Bill 2001, and secondly, whether it was lawful for the plaintiff to the Governor for Her Majesty's assent the Electoral Amendment Bill 2001. His Honour answered both questions in the negative, and his view was upheld by the High Court on appeal.

Interestingly, his Honour, as an Electoral Distribution Commissioner, chaired the Western Australian Electoral Distributions in 1994 and 2003, and in those and other areas of the law, his Honour left an indelible impression.

Others within the practising profession and the law schools will, I hope, continue to examine his Honour's contribution to the law by analysis of his learning and the exposition of his learning in his judgments and opinions, and in the learned articles that he has prepared over the years.

Certainly, his service as Chief Justice was marked with distinction. It's an example that we could well all emulate, and he is a great loss to the State of Western Australia. His service will live on and he will be rightly

regarded, as he is now, but in the future, as one of the great sons of the legal profession in Western Australia, and an ornament to the bench and to the administration of justice in the State. And I am honoured and privileged to be here today to be able to express on behalf of the people of Western Australia and the Government its gratitude for the years of service that he has provided.

MARTIN CJ: Thank you, Mr Attorney. Mr Keogh.

M. KEOGH, MR: May it please the Court. It is my very great honour today to appear on behalf of the Law Society of Western Australia and the legal profession at large to pay tribute to the life and work of the late former Chief Justice of Western Australia, The Honourable David Kingsley Malcolm AC QC.

The thanks and tribute of the profession for a life in contribution of our late Chief Justice reflects on the State as a the whole, and, as already elaborated by yourself, your Honour, and Mr Attorney, I will try not to repeat them now. I must first start, though, by passing on the apologies of the society's President, Mr Konrad de Kerloy, for not being able to appear himself today.

While a great deal of what has been and will be said today are personal anecdotes, for my part, I was never afforded the honour and opportunity of appearing before David Malcolm, or to work with him, having been admitted to the profession just two months after the former Chief Justice retired from the bench. However, I can honestly say that, as a then law student, I was keenly aware of the towering figure that he was, both literally and figuratively, on the bench, in the profession and in the West Australian community.

While David Malcolm's passing is a sad time, today should be seen as a celebration of a life well-lived in service of his clients, the profession, the law, and the State. Much has been and will continue to be said of Justice Malcolm's judicial career and career at the Bar, but a few things should be said of his career in the amalgam.

At one stage, David Malcolm was interested in pursuing a career as a nuclear physicist, but was persuaded by others – in particular, the former Chief Justice, Sir Francis Burt – to abandon physics for the law. Later, due to the reluctance of John Wickham to guarantee employment

at Muir & Williams at the end of his articles, he undertook articles instead with Stone James.

Francis Burt and other partners were very disappointed about this, however, he did end up joining Muir & Williams as a partner upon admission in April 1964. Interestingly, David Malcolm's move from Stone James to Muir & Williams was the result of Robert Ainslie requiring that one of the State's future foremost barristers would undertake to not go to the Bar for at least 15 years. As it turned out, he did not join the Bar until January 1980, a little over 15 years later.

David Malcolm was also a part-time lecturer at the UWA law school, where I'm told he struck students with his self-assurance and poise. This was a role that he would later reprise, following his career on the bench, at the University of Notre Dame Australia law school at the end of his career.

As a partner at Muir & Williams, he was not just a litigator, but also known as an extremely capable corporate lawyer. Such dual skill is rarely seen today in the profession, and was exemplified by his role as counsel at the Asian Development Bank. He was also involved in the merger of his firm with Nicholson & Co in 1969, and the creation in Perth of the offices of Freehill Hollingdale & Page in 1979.

Indeed, it was David Malcolm's great enthusiasm and vision for the developing national law firm, capable of servicing national and international clients, that led to his Perth firm taking that first brave step. Now, after many further steps, that firm is Herbert Smith Freehills.

His former partners have remarked that David Malcolm exemplified what a firm requires to meet the needs of clients: intelligence, learning, energy and enthusiasm to deliver practical and timely legal advice, as well as to provide encouragement and support required by young lawyers to find their way in the profession.

He was known during his practice in the amalgam for a remarkable capacity for work, an infectious enthusiasm for the law, and his firm, encouraging others to excel and helping them when things were not good. A generosity of spirit, never being too busy to help, putting the best interests of his firm before his personal interests, quickly grasping the issues, and finding practical solutions, being a fountain of knowledge, and never

disappointing clients with the quality and timeliness of his service.

David Malcolm was also a significant contributor to the profession at large and the Law Society in particular. He was a longstanding member of the society and served with distinction on a number of its committees, its council, and as its Vice-President from 1986 to 1988, before his appointment as Chief Justice. He's also a life member of the Society.

He also contributed through various other community organisations, such as Chairman of the Federal Practice and Litigation section of the Law Council of Australia, Chairman of the Special Airborne Services Trust, President of the Scouts Association Board, Trustee of Youth at Fairbridge, Trustee of the Francis Burt Law Education Centre and Museum. President of Guildford Grammar School Foundation, Chairman of the Guildford Grammar School Board, Deputy Chairman of the Wollaston Theological College, and a member of the UWA Senate, and Deputy Chairman of the Board of Governors of the Anglican Schools Commission.

In 2001, David Malcolm agreed to the establishment of the Chief Justice Law Week Youth Appeal Trust by the Law Society, and became its patron. The Trust's objective is to create an ongoing charitable fundraising effort by legal practitioners to support youth charities, including but not limited to those for youth with disabilities and, in particular, youth support services that assist in diverting youth from the criminal justice system.

Beneficiaries of Trust moneys over the years have included the Kimberley-Broome Headspace, Nyoongar Patrol Outreach Service, beyondblue, Perth Inner City Youth Service, and Local Drug Action Group in Turkey Creek and Warmun branches. With the benefit to the community stretching far and wide across the State, the objectives of the Trust will live on strong as ever, as witnessed by this year's Lawyers for a Cause event, raising over $14,000 for that Trust and its objects.

David Malcolm was also the co-patron of the Armadale Domestic Violence Intervention Project, ADVIP. This was established in 1993 and targeted an interagency approach to tackling the impact of domestic violence, and went on to become the model for the WA Domestic Violence Intervention Strategy in 2008.

My father was involved in ADVIP as the Manager of the Armadale office of the Department of Family and Children's

Services, and I was subsequently involved in the organisation as the Chairman of the refuge that founded ADVIP, Starick Services.

During my involvement it was notable that people always found David Malcolm to be down to earth and approachable with all those involved in the services, and especially the victims of domestic violence that he met when attending these functions. For those people, to meet the Chief Justice and for him to take a genuine interest in their plight meant the world to them.

When ADVIP was formally launched, the Crime Sub-Committee of the Task Force on Gender Bias had just made some preliminary findings on domestic violence. These were subsequently endorsed in full by the taskforce report, which was delivered in July 1994. This brought to the fore the discussion of domestic violence, not just as a social problem, but as a crime.

As it was recently remarked by her Honour Justice Pritchard, it is easy to lose sight of the significance of Chief Justice Malcolm's decision to establish that taskforce. It was, in many respects, a radical step for its time, because it involved the acknowledgment that gender bias may exist in the law and the administration of justice in this State.

Western Australia, and in particular the legal profession, was a different place in 1993. In 1985, WAs first female magistrate and District Court judge were appointed, but by 1993, there were no female judges on the Supreme Court, the Family Court of Western Australia, or on the Federal Court bench in Perth, nor were there any female silks. In addition, there was no restraining order legislation.

The former Chief Justice came to appreciate that there was a need for all judges, including himself, to be made aware of the possibility of unconscious bias in decision-making, and of a bias in the substantive law in its application to women. Following on from the example set by a number of states in the United States and some Canadian provinces, as Chief Justice, he appointed the taskforce to investigate the extent to which gender bias existed in the law and the administration of justice and make recommendations for that bias' elimination.

While many recommendations of that 1994 report were implemented, many others have not yet been. As such, the

20th anniversary review recently undertaken by the Women Lawyers of Western Australia continues David Malcolm's legacy in his establishment of the Gender Bias Taskforce.

Indeed, right until the time of his death he was also involved in the Law Association for Asia-Pacific. David was chair of the Conference of Chief Justices of Asia and the Pacific and distinguished himself in that role. He worked hard in the Judicial Conference of LAWASIA to establish the principles and tenants of judicial independence. These were agreed to in 1995 and adopted by the Chief Justices of 20 nations in the 6th Conference of Chief Justices of Asia and the Pacific Region held in Beijing.

Subsequently, in Manila in 1997 the Statement on Judicial Independence was further accepted by a total of 32 countries in the Asia-Pacific region. Through this work, he not only achieve pre-eminence in the legal profession in Western Australia and Australia but was a significant figure in the legal profession and beyond throughout Asia. As already mentioned, David Malcolm was appointed Chief Justice of the Supreme Court on the retirement of the widely respected Sir Francis Burt who had also been his mentor.

In 1990 he also became the Lieutenant Governor of this State. Upon retirement, David Malcolm was Australia's longest serving Chief Justice. As Chief Justice, he oversaw significant changes in the court's practice and procedures as well as its embrace of technology. He also presided over some of the biggest cases in Western Australia, most notably the case of John Button. As the then Attorney General, the Honourable Jim McGinty, noted upon the former Chief Justice's retirement:

> The John Button case was extraordinary but the Chief Justice meticulously analysed the circumstances in the Court of Appeal and effectively resolved the case of a man who had been wrongly convicted and jailed for a murder 40 years ago.

In a letter to the editor only a few weeks ago John Button wrote of his surprise to hear once David Malcolm remark during a speech that he regarded Mr Button as his hero. Mr Button viewed matters in completely the opposite way. Following his retirement from the bench, David Malcolm became a professor at my alma mater, the Notre Dame Law School in Fremantle.

He commenced by teaching constitutional law and also provided specialist lectures as part of the legal history, advocacy, equity, trusts, property law, contract and evidence units. As the then Dean has noted, David's was a considerable contribution. During his time at Notre Dame he was also noted for always being willing to sit as a judge for advocacy exams, his mere presence at which was enough to terrify the students, though he did enjoy it when they cited authorities that he had argued when at the bar.

David was also a mentor to the faculty, happily engaging with them on their courses, providing presentations and sharing anecdotes of his times at Oxford, which were always thoroughly entertaining. Many in the profession have said that they will miss David and his passing leaves a hole in the profession's psyche. However, he will, of course, be particularly missed by his wife and daughter. Our condolences go out to them both and to David's extended family.

I too believe it is fitting to conclude with a quote from David Malcolm and this came from his advice to some university students in 1997:

> Take your work seriously. Take any office you hold seriously but don't make the mistake of taking yourself too seriously. Secondly, however difficult and challenging the office or the task, find a way to make it fun. If it's not fun, it's not worth it.

May it please the court.

MARTIN CJ: Thank you, Mr Keogh. Mr Quinlan.

P. QUINLAN SC, MR: May it please the court. It is a great honour to appear before the court this evening, on behalf of the WA Bar Association, to pay tribute to the life and work of the Honourable David Malcolm AC QC. Those who have already addressed the court have spoken eloquently of David Malcolm's enormous contribution to the law and the administration of justice in Western Australia and beyond, particularly during his service as Chief Justice of Western Australia between 1988 and 2006.

In addressing the court on behalf of the Bar Association, it is appropriate that I add to that canvas by focusing, particularly, upon his Honour's time as a member of the Association from 1980 to 1988. In that regard, I initially found myself at something of a disadvantage in that David Malcolm was appointed Chief Justice of Western Australia in the year that I commenced studying law. I

therefore form part of a generation of Western Australian lawyers who only knew David Malcolm first hand, as Chief Justice.

More importantly, for that generation, was the fact that we came first, to appreciate and understand the role of Chief Justice only through the example set by David Malcolm. That example of great intellect, industry and above all, humanity and decency, is one which serves the community in Western Australia both today and will continue to do so well into the future. Your Honour, the Chief Justice has remarked that, when he first met Sir Francis Burt, the young David Malcolm was struck by the way in which Sir Francis treated him as an equal.

The same was true of David Malcolm as Chief Justice. He treated all who appeared before him, no matter how senior or junior, with equal respect and as co-participants in the administration of justice while, at the same time, commanding the obvious dignity and respect that came with his high judicial office. Having served for some time as an associate in his court, I can also say that Chief Justice Malcolm showed the same interest, consideration and respect to the most junior members of the court staff.

So it is that, in reflecting upon David Malcolm's contributions to and achievements as a member of the independent bar, it is necessary that I draw upon second hand accounts from those who worked with him and those who appeared against him, many of whom we are fortunate to have present in court today. Fortunately, however, some of those second hand accounts as an advocate, came directly from David Malcolm himself.

I, with hundreds of other law students over many years, was privileged to be taught by David Malcolm. In the years immediately prior to and following his appointment as Chief Justice, a regular feature in the UWA Law School calendar was a guest lecture he presented entitled The Influence of Equity on Commercial Relationships. The lecture could appropriately have been subtitled Significant High Court Cases I have Won, for indeed, that is what it was.

It is a reminder that David Malcolm's influence on jurisprudence in Australia did not simply commence with his work as a jurist writing leading judgments as a member of this court, rather that influence began much earlier during his extensive practice as a leading advocate in the High Court of Australia. In that regard, David Malcolm QC, as his Honour then was, was one of those very few advocates

who could claim to have had, over the course of two decades, an extensive High Court practice.

It is appropriate, of course, that that High Court practice should have begun in 1966 with his Honour appearing as junior counsel to the then Francis Burt QC. Burt QC and Malcolm appeared in two appeals in the High Court in 1966: Marsh v Shire of Serpentine-Jarrahdale and NSL Proprietary Limited v Hughes, a year in which David Malcolm appeared in no less than four substantive High Court appeals. Indeed, there are very few advocates who can claim to have appeared in a substantive appeal in the High Court in every year that they practiced as a member of the independent bar.

David Malcolm was one of them, having appeared in that court in every year from 1981 until his appointment as Chief Justice in 1988, including in the celebrated cases of O'Dea v Allstates Leasing System and Hewitt v Court. David Malcolm was also that very rare breed of advocate experienced before the Privy Council, a task which he embraced with relish and at which he characteristically excelled. While, of course, still having time, as your Honour the Chief Justice has alluded, to enjoy the hospitality and culinary delights London has to offer.

The independent bar in Western Australia has never been a place in which members are inclined to hide their lights under bushels and 1980, the year in which David Malcolm joined, was no exception. At the time that he joined the Association, there were, as it were, a number of big names – people of outstanding ability and exceptional reputation: Barry Rowland QC, Paul Seaman QC, Terry Walsh QC, Geoffrey Miller QC and Ian Temby QC, but to name a few.

Notwithstanding the presence of numerous fellows of similar experience and outstanding ability, upon his election to the association, David Malcolm was immediately the acknowledged leader of the bar. As has been said, in the very year that he had joined the association, David Malcolm was appointed as Queen's Counsel for the State of Western Australia. In that same year, also appointed as Queen's Counsel for Western Australia were Temby QC, Miller QC and interstate members Murray Gleeson QC and Tom Hughes QC.

As the appointment of Gleeson and Hughes QC in 1980 demonstrated, 1980 was a time when our senior colleagues in Melbourne and Sydney were beginning to invade foreign territory. David Malcolm stood out as virtually the only West Australian barrister who could properly claim to have

a national practice and who provided a reciprocal threat to the eastern seaboard. The significant effect that David Malcolm QC had on the reputation of the WA Bar across the nation cannot be underestimated.

Another clear indicator of his pre-eminence at the Bar was that, in the year immediately following his joining, David Malcolm was elected president of the association and held the office for three years, as had his predecessor as Chief Justice. A less well known but important marker of his modesty and integrity, however, was the fact that upon joining the association, Malcolm QC turned down the offer of a number of senior members to prevail upon a junior member to vacate a large river room in his favour.

Indeed, David Malcolm occupied an internal room of modest proportions for some time until the chambers moved to new accommodation. As President of the Bar and later, as chairman of the set of chambers then known as Bar Chambers, Malcolm QC modernised the legal structure of those chambers and was instrumental in moving them into new occasion. Even with this service to the profession and his prodigious work habits, David Malcolm always had time to support and mentor junior colleagues at the bar.

Those who had the pleasure of working with him paint the picture of a man of prodigious work capacity and output with a genuine interest in the work and ideas of his juniors as well as substantial interest in what was then and is still now known as the long lunch. David Malcolm was a formidable but scrupulously fair opponent in a court albeit, I'm advised, not noted for brevity.

The Chief Justice has singled out court-based mediation as the most significant and far-sighted change introduced during David Malcolm's time as Chief Justice. His Honour's focus on the need for and the advantage to parties resolving their own disputes was also evidenced in his time in practice at the bar, demonstrated, perhaps, in an episode one of his juniors recalls with particular fondness.

While walking back to chambers with his junior during a luncheon adjournment in a trial once, Malcolm QC was approached by his client who was still under cross-examination. The client asked how his evidence was going. Malcolm responded with appropriate formality, "As you know, I am unable to discuss with you that while you are still under cross-examination but for your own safety I suggest that you bandage your left foot." When the client asked why that was necessary, Malcolm responded, "Because

it is bleeding profusely from the large hole you have just blown in it." The client avoided any further self-inflicted harm by immediately seeking out his opponent and settling the case. Thus, alternative dispute resolution was born.

On behalf of all of the members of the WA Bar Association, both past and present, may I express our gratitude for and pay tribute to the contribution of the Honourably David Kingsley Malcolm AC QC to the legal profession, the law and the community of Western Australia, and to offer our sincere condolences to Kaaren and Manisha for the passing of a great man and a great West Australian. May it please the court.

MARTIN CJ: Thank you, Mr Quinlan. It only reminds me to express, on behalf of the court, our appreciation to all who have taken the trouble to show their respect for the former Chief Justice by attending this afternoon's sitting. The court will now adjourn.

AT 5.30 PM THE MATTER WAS ADJOURNED ACCORDINGLY

Auscript are contracted by the Department of the Attorney General to record and/or transcribe court and tribunal proceedings in Western Australia as specified under a government Contract. This Contract prescribes the recording and transcription production standards that must be adhered to.

The transcript of Ceremonial Sitting - Tribute To The Late The Honourable D.K. Malcolm Ac Qc heard on 19/11/14:

- Is a written reproduction of the audio record of the proceeding;
- Is a complete transcript except where otherwise stated. Any "indistinct" notations within the transcript refer to those parts of the recording that could not be accurately transcribed due to speech clarity, recording quality or other factors impacting word intelligibility.

Certified on 21/11/2014.