

**SPEECH ON THE OCCASION OF THE RETIREMENT OF
JUSTICE JANE MATTHEWS
FROM THE FEDERAL COURT OF AUSTRALIA**

It is a great privilege and honour to speak today on behalf of the Australian Bar Association and the New South Wales Bar Association to farewell your Honour on the occasion of your retirement from this Bench.

Those who have preceded me have already spoken of the obvious and notable achievements in your Honour's career: a string of firsts in NSW, first woman Crown Prosecutor, first woman District Court Judge, first woman Supreme Court Judge, first woman President of the Administrative Appeals Tribunal. There is only one second in that string of honours that I can find and that is that you were the second woman to be elected to the New South Wales Bar Council in 1974, a council on which you remained until 1976.

In the conventional legal world, it is heterodox to place so much emphasis on the gender of the subject of the speech. It is not normally a matter upon which I would place emphasis but it is appropriate in your Honour's case because much of your career has been devoted not just to the pursuit of law, but to the pursuit of law as a Woman with a capital "W".

This was not of your own choosing. Indeed, like so many of us you embarked upon your legal career without any sense of it being an unusual choice for a woman. Your career in law started in the early 60's at the University of Sydney. You were immediately exposed to the distinct position women held in the profession at that time when your lecturer addressed the class as "lady and gentlemen".

It is with profound regret that I must acknowledge, however, that the frailty of the position of a woman in the law was brought home to you, in particular, when you joined the Bar in 1969. While your Honour has acknowledged that much of your time at the Bar was "stimulating and enjoyable", you have also spoken of the fact that you

“suffered severely at the Bar from prejudice and discrimination, particularly in the early stages”.

This was in an era, the early 70’s, when it appears that there were barristers, solicitors and no doubt clients who “could not accept that women had any place at the Bar”. To your chagrin, you would observe that your services were declined for no apparent reason other than your gender while solicitors “ended up briefing counsel with considerable less experience” than yourself.

It is hardly surprising that such painful experiences would focus your mind acutely on the role, place and acceptance of women in the law.

In May 1982 your Honour presented a paper on “The Changing Profile of Women in the Law”. In that paper you spoke of the significance of the changing attitudes to women and, in particular, the disappearance of the attitude that women’s role in society was of nurturers while men’s role was that of breadwinner. You attributed the disappearance of that attitude to “the emergence of the women’s movement as a powerful, tenacious and effective force dedicated to challenging those previously established precepts”. You mapped the increasing percentages of, in particular, women at the Bar. You concluded on a note of optimism that “if the present trend continues, the image of the law as a male-dominated profession cannot last much beyond the 1980’s”.

Sadly your Honour’s optimism proved misfounded. Just as one swallow does not a summer make, so, too, there was an increasing realisation in the late 1990’s that raw statistics of the large number of women in the law, whether in the ranks of solicitors or at the Bar and, indeed, on the Bench have not changed the male dominated nature of the profession.

In 1997, Justice Gaudron spoke of how, after reading Helen Garner’s book “The First Stone”, she wrote a note to a High Court judicial colleague saying:

“The trouble with the women of my generation is that we thought if we knocked the doors down, success would be inevitable: the trouble with the

men of your generation is that so many still think that if they hold the doors open, we will be forever grateful”.

This recognition of the fact that the removal of formal barriers does not necessarily lead to acceptance was reflected in speeches given at about the same time by your Honour and your fellow Judge, Justice Branson.

In July 1998 after a trip to Beijing your Honour expressed dismay about the “shameful paucity of women Judges in Australia, particularly on the superior Courts”. You compared those figures with the high percentage of women judges in China. You questioned why it was that nearly 20 years after women had started graduating from law schools in more or less equal numbers to men, the numbers of women judges were still so low. One possibility you examined was that the traditional pool for appointments to high judicial office being the practising Bar, you observed that the percentage of women at the Bar was still hovering around 12%. More distressingly, perhaps, your Honour observed that “the Bar...remains a heavily male dominated group, with a culture to match”.

It is a sorry indictment on the acceptance of women into the law that some 19 or so years after you were admitted to the Bar, and notwithstanding the substantial increase in numbers of women at the Bar, that as recently as 1998 you still perceived its culture as “heavily male dominated”.

Regrettably, your Honour did not have a ready solution to changing the culture of the Bar rather, you proposed that the pool from which judicial appointments should be made should be enlarged. This is something, of course, which has indeed happened as has been apparent in recent appointments both to this Court and the Supreme Court of New South Wales.

Only a few months earlier, in 1997, Justice Branson in a speech entitled “Running on the Edge” spoke eloquently of the fact that the demolition of the formal barriers (to which I have referred) to women’s equal participation with men in social and economic life had not had any real effect on changing that underlying male culture of the legal profession. She spoke of changing the culture by recognising “the need to

reduce the investment which so many of our senior professional colleagues have in myths concerning the legal past; to reduce the extent to which their professional sense of themselves is tied to the notions of male virility and mateship between men; notions which are antagonistic to a genuine recognition of women as colleagues of equal standing”.

I cannot make these remarks concerning the need to change the culture of the legal profession without acknowledging the considerable work which has been done and which is being done by the Chief Justice of this Court in particular and other senior members of the legal profession. No one could gainsay the proposition that change must take place at the top. It is clear that that is a principle this Court, in particular, takes very seriously.

Your Honour, I have dealt with these matters at perhaps somewhat unusual lengths because it seems to me to be important on the occasion of your retirement from the Bench to acknowledge the journey which you have undertaken in seeking to change those attitudes. One of the problems in changing the culture of the legal profession is that so few of its male members acknowledge the freedom with which they are able to approach their pursuit of the law, a freedom from ever having to take any matters of gender into consideration or having them taken into consideration in their pursuit of their profession.

Could I turn then to some aspects of your Honour’s judicial career.

You have been the forefront of developing the principles which have now become universally accepted as identifying what constitutes sexual harassment. Your Honour’s judgment in O’Callaghan v. Loder and the Commissioner for Main Roads delivered when you sat as the Judicial Member of the Equal Opportunity Tribunal in 1983 is the seminal judgment on what constitutes sexual harassment and, further, that sexual harassment by an employer can amount to discrimination on the ground of sex.

During your period as a Federal Court Judge, you were the Presidential Member of the National Native Title Tribunal. While holding that position, you were the lead mediator with Sean Flood in the claim by the Dunghutti people at Crescent Head.

This was the first successful native title claim successfully mediated under the 1993 *Native Title Act*. It was apparent during the course of that mediation that your Honour's approach led to all participants developing a great sense of respect for your work.

It is a hallmark to your Honour's strength of character that notwithstanding the harsh and unfair treatment to which you perceived your exposed whilst at the Bar, you have never, since your appointment to judicial office, been anything other than an absolute delight to appear before. Your work in Court has been distinguished by the way you were able to make everybody in the Courtroom feel comfortable. Your approach to judicial office was distinguished by a profound sense of humanity and your absolute commitment to being a straight down the middle fair minded Judge. You were the epitome of courtesy and fairness to counsel. Indeed, you went out of your way to assist counsel in articulating their point. If I can give but a brief quote from a recent judgment of your Honours in an immigration case, deleting, of course, the name of the counsel involved, as an illustration of this approach:

"Mr. X, in his oral and written submissions eschewed the use of the phrase 'Wednesbury unreasonableness'. However, the substance of his submission directly raised this issue this ground of review is expressly excluded by the Act I have searched for alternative and more acceptable ways of expressing the applicant's submission under this head".

Consistent with your Honour's determination to the acceptance of women in the legal profession, you have played a major role in encouraging women to go to the Bar – you have fought strongly for their rights and interests. You have supported them as they have made their way through the legal system. You have given your time generously, indeed, to working to increasing the number of women, particularly at the Bar, to that figure of 30% which you have described as the "critical mass necessary to change the culture of an organization".

You have shown a profound understanding of witnesses. You have always spoken so clearly in Court and sensibly that parties have always left your Court knowing that they had had a fair hearing.

In your long career you have presided over criminal, civil and administrative hearings. You have approached your work in an efficient, sensible and down to earth manner. You have communicated well with juries and, indeed, are described as having run “good criminal trials”. In the civil area I, too, can speak from experience of your Honour’s courteous and sensible approach and extraordinary patience, particularly when debates about some of the more arcane areas of defamation law were taking place before you.

Your Honour in your 38 years in the law, you have trampled down many thorny bushes to clear the path for we who have followed in your footsteps. You have hurdled barriers which should never have been placed in your path. While we could not in any way hope to fill your shoes, we would all be much improved if we sought to emulate but a few of your qualities as a lawyer, leader and human being.

The Bar acknowledges the contribution you have made to the administration of justice both in your work on this Court, on the Administrative Appeals Tribunal and on the Supreme and District Courts of New South Wales.

In a special message I am asked to let you know that the Australian Capital Territory Bar will miss your warmth and friendship and hopes to see you from time to time in their Common Room where you will be always welcome. Needless to say the same invitation and warm wishes are proffered on behalf of the New South Wales Bar too.

Your Honour’s love for travel indicates that the paths you will follow in the future may be diverse. Wherever those paths take you, you carry with you the profound admiration of the Australian Bar in all that you have achieved.

We wish you a happy and joyful retirement.