

## Good Stories Make Good Law

From an edited and annotated  
transcript of remarks by

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Thank you very much, Simon.

When you mentioned the location of the “loos” prior to my introduction, it made me realize that hardly a week passes when I don’t learn something new about Aussie culture. Two weeks ago I didn’t know about loos. That was before I saw the new Aussie movie called *Kenny*. Now I know what a loo is – so I understand your directions.

I’m curious: How many here have seen *Kenny*?.....let me see the hands...

Well, as a sandlot movie critic, I would give it four stars. Go see it! First chance you get.

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*Kenny* is one laugh after another – from the first scene to the last. But when you get up the next morning, you realize that *Kenny* is more than a comedy. ***Kenny is the story of a bloke in the porta-loo business***, a hands-on supervisor who deploys and cleans what we call “porta-potties” for a company called Splash Down.

***Kenny provides rich insights into Australian cultural values***, and the lessons are inspiring. Example: *Kenny* is proud of the work he does, and gives it 150 percent...everyday...day in and day out. He coaches other employees. He is confident, positive, self-assured, usually happy, always dignified, and firm in his belief that everything will turn out well.

*Kenny* is always looking for ways to innovate...and takes pride in making sure his porta-loos are always clean and always work. As one reviewer put it, *Kenny* is an unsung hero who “juggles family emergencies, fatherhood and sewage with grace, humor and unflinching dignity. Part philosopher, part comedian, all heart - *Kenny* is living proof that in sewage, as in life, the best will always rise to the top.”

It should be no surprise that *Kenny*’s 12-year-old son deeply admires his dad, wants to follow in his footsteps and begins to learn the porta-loo business by working side-by-side with his dad – including a job at the Melbourne Cup, where some snooty ladies in fancy hats fail to understand that all work is the Lord’s work so all work is important work (including taking care of porta-loos, no matter where they may be). The uppity upper crust also fails to appreciate the special bond between a father and his son. There are many such insights into some of the dominant values across this culture. You’ll enjoy it. Go see it.

**I have to admit I am a movie fan.** Always have been. My wife and I go to the movies nearly every week. Have for years. When I came here a year ago July, the big new Aussie flick was *The Oyster Farmer*. It is the Aussie version of Robert Redford and *The Horse Whisperer* – instead of horses, it is oysters and instead of the Big Sky county of Montana in the American West, it is the Hawkesbury River in New South Wales. *The Oyster Farmer* is a wonderful but also heartbreaking story of watermen...and their women...and their lives on a river community where 21<sup>st</sup> century aquaculture technologies and 19<sup>th</sup> century simplicity come together – and not without tension and tragedy.

After watching the *The Oyster Farmer*, I was told the oyster pens shown in the movie were in Brooklyn, NSW, so my wife and I traveled down to Brooklyn one weekend and spent a wonderful couple of days in a waterman's town that is slowly but surely beginning to gentrify.

**The first time I met Graeme Samuel, he said, "I understand you like Aussie movies?" "Yes," I said. "What is your favorite?" I replied, "The Castle, Mr. Chairman." He responded, "Why *The Castle*?" I replied, "Because Darryl Kerrigan beats the government in a takings case." After the laughter around the room died down, the Chairman, who, I've found, has a keen sense of humor, said with a steely-eyed gaze, "Just remember, Phil, in Australia that only happens in the movies."**

Enough of that. Let me thank you for the invitation to speak here this evening.

**It is a great privilege indeed to be here tonight – to honor excellence and to recognize those who are high-performers in the legal profession.**

My wife was surprised – and, I think, a little suspicious – when I told her where I was going tonight. "Isn't that an honor to be asked to speak to the 'best of the best' in Australia's legal profession?" she said.

"Mary Sue (my wife's name)," I said, **"I am a primary revenue generator for these guys. This invitation is not an honor; it's a thank-you...a thank-you for contributing to the Christmas bonuses and beach houses of all those in attendance."**

Believe me, I do understand that reality. I know we have contributed mightily to all of those in:

- Litigation
- Taxation law
- Litigation
- M&A
- Litigation
- Patents & Copyrights
- Litigation

And, if the ACCC has its way, those practicing Insolvency Law may get a boost if the **regulator keeps transferring our earnings and shareholder wealth to Singapore, Hong Kong and the other “free riders”** who are cashing in on the investments of our shareholders.

Actually, I did a calculation earlier today and figured that between Sol and me on the one side and Graeme Samuel (ACCC), Chris Chapman (ACMA), and Geoff Lucy (ACIF), we generated enough fees to cover the GDP of Bangladesh.

By the way, when Sol and I first came here 15 months ago, we did the in-depth due diligence that people like you kept us from doing before we came.

One of our findings was the following: **Mallesons, from all indications, has a monopolistic stranglehold on the legal business of Telstra.**

In fact, Telstra seems to be a virtual **Mallesons alumni association**—beginning with general counsel Will Irving and including Deena Shiff, Bruce Akhurst, Simon Brooks, Bill Gallagher, and God only knows how many others.

The Mallesons monopoly was so bad that Sol and John Stanhope issued a Competition Notice on Will Irving. Where is Freehills? Where is Blakes? So we got them in the door. After tonight, I think we should also say, “Where is Gilbert & Tobin?”

Seriously, **I have great respect for the law...and for lawyers.**

We all come from a **common heritage that we call western civilization.** Western civilization is not a place....and it is not a relic of history whose time has passed.

It’s an idea that speaks over the centuries to the **deepest meaning of the values that we hold dear** and that dominate our everyday life, values such as:

- truth
- freedom
- justice
- community

- property rights

And for many, still, faith in a personal and historic God who calls us to use our gifts to leave the world a better place than we found it.

It is a **noble and distinctive civilization** that spread far beyond its birthplace in Europe and the Middle East. It spread to:

- The US, Canada, and Mexico in North America
- Every country in Central and South America
- Australia and New Zealand in the Pacific

And beyond – and everywhere it spread, **it created a robust foundation that we now know as the *rule of law*.**

And later, of course, with the revolutions in America and then France, we added modern **democracy and republicanism** to the list of social processes that we value. But, as the American jurist, Learned Hand, once said,

“If we are to keep democracy, there must be an 11<sup>th</sup> Commandment: Thou shalt not ration justice.”<sup>2</sup>

It is through the practice of the law, that we celebrate here tonight, **that we seek justice – and do our best, imperfect as we are, to provide equal justice for all.**

That’s how I think about the law.

Let me tell you **how I came to have high regard for lawyers.**

My father was an inventor.

- He invented a new kind of home-heating furnace in the late 1950s.
- He invented a new kind of safe to protect valuables from fire in the early 1960s.

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<sup>2</sup> Speech by Judge Hand at the 75<sup>th</sup> anniversary dinner of the Legal Aid Society of New York on February 16, 1951, cited in Irving Dilliard (ed.). *The Spirit of Liberty: Papers and Addresses of Learned Hand*. New York: Knopf/Legal Classics Library, 1989.

- He invented a new kind of “spiral lock” in the 1970s.

As I was growing up, we always had patent lawyers around the house. My dad listened to them...especially to a guy named Ted Smith. From an early age, I always wanted to be a lawyer—in part because I was sure my dad would listen to me just like he listened to Ted Smith.

**I read everything I could about the law and lawyers**—even before I went to uni. When I was 17 years old, I read *The Mind and Faith of Justice Holmes*.<sup>3</sup> Oliver Wendell Holmes, as many of you will know, was a prominent U.S. jurist and Supreme Court Justice.

**Holmes, known as the “great dissenter”, greatly influenced the American concept of law** – including the idea of “judicial self-restraint” permitting elected legislatures to work their will, the notion of “clear and present danger” as a test to examine limits on the suppression of free speech, and the idea that even the most stringent protection of free speech would not “protect a man falsely shouting ‘fire’ in a crowded theater.”

As I was reading this book many years ago in my youth, **35 words jumped off the page** – and those 35 words changed my life forever. Those words:

“As life is action and passion, it is required of a man that he should be involved in the action and passion of his times, at the peril of being judged not to have lived.”<sup>4</sup>

From that moment on, **my interest in a career was always conditioned by thinking about where the action is.** I initially chose a career as a university professor specializing in politics and national security policy – after all, I came to maturity during the height of the Cold War and most of the action and passion of my time were in the international arena.

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<sup>3</sup> Max Lerner (ed.). *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions*. New York: Modern Library, 1954.

<sup>4</sup> Oliver Wendell Holmes, *The Mind And Faith Of Justice Holmes; His Speeches, Essays, Letters, And Judicial Opinions*. New York: Little, Brown, 1943.

In the wake of the civil rights movement in the US in the late 1960s, however, I came to the view that **there is *nothing* like a life in the law to allow men or women to be involved in the action and passion of their times** – including issues of:

- War and peace
- Human rights
- Civil liberties
- Freedom of conscience
- Commerce and the free movement of people, goods, capital and ideas
- Wealth creation – from entrepreneurship and corporations to globalization
- Economic justice
- Social equity
- Institutional design and governance

As an undergraduate (in the US, unlike Australia, the law degree is only a post-graduate degree), I took all the law-related courses I could—most importantly Constitutional law. It was **during six semesters of Constitutional law that I learned how to brief a case**. . . that is, real situations with real people in conflict.

**What the lawyer calls a “case”, the rest of us call a “story”**. It was then that I learned the value of story-telling. For many years, I have worked hard to communicate complex ideas with stories or cases. Let me give you a recent example – from a weekend trip I took to Katoomba, in the Blue Mountains, west of Sydney.

You will recall, **several months ago, we decided to remove 5,000 or so pay phones from around the country**. Pay phone usage has dropped dramatically with the rapid spread of mobile phones. As the automobile made the buggy whip obsolete, **technology often leads to what the economists call the “substitution effect”** – in this case the substitution of mobile telephony for fixed line telephony, including fixed line payphones.

Most of the payphones we removed were one of a pair, so at least one remained. Not one of the targeted payphones was a phone supported by Universal Service.

Still, a lot of **controversy surrounded our decision to remove the payphones**. So, anticipating the controversy, we prepared by demonstrating how shareholders were left holding the bag when uneconomic payphones were kept in place. As part of our public messaging strategy, **we identified five (5) specific payphones (“cases”) that illustrated the problem – and one of those was in Katoomba.**

A week later, I traveled to Katoomba. When I got off the train, I hailed a taxi. After a few minutes conversation, the cabbie asked, “Where are you from?” Then he asked, “Where do you work?” When I said, “Telstra”, he asked, “You wouldn’t happen to be one of them Three Amigos, would you?”

When I confirmed I was one of the Three Amigos, he surprised me. Usually the next question is, “What is Sol like in real life?” Instead, he asserted, rather boldly, “I’ve got a bone to pick with you. I’m a Telstra shareholder...and so is my wife. We have 1,600 shares. And you guys are removing payphones here in Katoomba, and a lot of people here in town don’t like it – including my wife and I.”

After asking me if he could show me the payphones we were removing, he showed me one that I knew about – because it was one of our case studies to illustrate the problem.

I said to my new friend, “I know about this phone. Do you know that every phone call on that payphone costs \$36.15 – and that is why we are removing it?”

He replied, “That doesn’t make any difference...the government pays for it.”

“Oh no it doesn’t,” I told him. “You pay for it...and your wife pays for it...and all the other Telstra shareholders pay for it.”

My cabbie/shareholder friend was quite surprised. After talking about it for several minutes, he said, “**You know, we have some other payphones here in town that you might want to consider removing.**”

I tell that story a lot. Why? Because **it captures so many of the issues that we need our shareholders, opinion leaders, and the general public to understand** – issues related to

- technological change,
- the “substitution effect,”
- shareholder rights,
- the impact of intrusive and value-destroying regulation, and
- government’s propensity to treat Telstra as a “community property” and, in the process, pick the pockets of Telstra shareholders.

We can roll out our White Papers...and the analytical pieces from our economic consultants...and the legal briefs from Mallesons and our staff attorneys...and our PowerPoint slides, but none communicates the essence of the forces driving a complex business decision around payphones the way what we now call “the Katoomba story.”

We have a lot of other stories from our experiences over the past 15 months – and our media and public relations staff are now tuned into looking for stories and how to tell stories to make a point. Why? Because, as Einstein once said, “The world is made up of stories, not atoms.”<sup>5</sup>

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<sup>5</sup> I have written several op-ed commentaries on the importance of story-telling in communications. For example, see Philip M. Burgess, “Stories Refuel Culture,” (November 25, 1997) and “Family Tales Tell Us Who We Are,” (November 21, 1995) in the *Rocky Mountain News* (Denver, Colorado) and Scripps Howard News Service.

Though my first encounter with stories came from my mother and my grandfather, my **full appreciation of the power of stories** came from my undergraduate study of law where I also learned the importance of **thinking analogically**, as you do in the law, and not just logically, as we do in the social and natural sciences.

**Most people in everyday life think analogically**, and that's one reason, in my view, that **those trained in the law rise to positions of power and influence out of proportion to their numbers** – because they think and speak in ways that easily connect with the ways of thinking of most people in any walk of life.

So, that's my story...and I'm sticking with it.

In closing, let us remember that **life is a constant call to action**, and in acting we must accommodate ourselves to the often **conflicting interests** of others, as we strive to **make the world a better place**.

As time passes, we resolve those conflicting interests by **argument**. **Thomas Aquinas** wrote that “Civilization is constituted by conversation – that is, by argument.”<sup>6</sup>

Theologian **Michael Novak** says civilized people treat each other as reasonable – that's why they argue. Barbarians club each other.<sup>7</sup> So when people disagree and have conflicting interests, **we should welcome argument**.<sup>8</sup>

It is in that process of give-and-take, thrust and parry, point and counterpoint that those who live the life of law help us to resolve the

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<sup>6</sup> G.K. Chesterton reminded us that arguing is not the same as quarrelling. According to Chesterton, “The principal objection to a quarrel is that it interrupts a good argument.”

<sup>7</sup> Michael Novak, “Divergent paths and common values in Old Europe and the United States,” Paper delivered for the F.A. Hayek Foundation in Bratislava, Slovakia on July 3, 2003.

<sup>8</sup> Unfortunately, there are some who do not want to argue. They just want to get their way, without regard for facts and data and no matter who is hurt. When they hold positions of power and influence, it is called “arrogance” and the arrogance of power is a disease that afflicts many governments around the world – even democratic governments, especially in societies where the people have become complacent or the government has accumulated too much unfettered power.

issues...and it is **with great admiration that tonight we honor those in this profession who make things work for everyone. Good onya...and good evening.**

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