

# **EULOGY FOR THE HON. ANDREW ROGERS AO KC**

**St Stephen's Church**

**Macquarie St, Sydney**

**15 February 2024**

**The Hon. A S BELL**

**Chief Justice of New South Wales**

In the 200 year history of the Supreme Court of New South Wales, few judges have had as significant or as important an impact as the man whose death we mourn but whose life we honour and celebrate.

Andrew Rogers AO KC was a large intellect and a large personality. Urbane, charming and amusing, generous and broad-minded, fiercely intelligent, provocative and with boundless energy, a man ahead of his time and a citizen of the world, I liked and admired him enormously.

It is an honour and a privilege to have been asked by Helen to speak of his achievements in the law. In truth, that is too narrow a mandate, for his contribution as a lawyer went well beyond the law, and his legacy has and will continue to endure.

The Supreme Court had had a "commercial causes" list since 1903, and distinguished judges (including a future Chief Justice, Sir Philip Street) and a future High Court judge (Sir Cyril Walsh) had conducted that list but, with no disrespect to any of his predecessors, it was Andrew Rogers' ground breaking reforms in the 1980s that revolutionised the way commercial litigation was (and continues to be) conducted in this State.

Those reforms were in the spirit of the times: they broadly coincided with the floating of the Australian dollar in 1983 and the necessary and overdue opening up of the Australian economy. An influx of foreign banks, largely based in Sydney, with corresponding inflows of capital, required a legal environment that offered certainty,

predictability and efficient resolution of commercial disputes by a judiciary unencumbered by overly intricate procedures and with no tolerance for legalistic and expensive game-playing. Unnecessary cost and delay in commercial dispute resolution were (and remain) the enemies of commercial justice and a properly functioning economy.

Andrew Rogers had anticipated this from his earliest years on the Bench, having been appointed in 1979 at the very young age of 46, following a distinguished career at the Bar. With full licence from his friend, Sir Laurence Street, he approached his task with vigour.

The narrative of his reforms is well known to many in this congregation: the probing questions designed to flush out the strengths and weaknesses of the main issues and to limit the trial to those issues which were truly contestable; active (dare I say hyperactive) case management; unambiguously communicated expectations; energetic enforcement of those expectations; cutting to the quick; an intolerance for humbug or stalling tactics; and the use of innovative practices such as mediation, something which, at the time, was shocking to a conservative profession.

His technique and reforms quickly became known to the business community. Indeed, he kindly invited some of its leaders to come to Court to see what was happening! Friday 2 pm was a favoured time for such “audiences” which were designed to concentrate the mind. Captains of industry and senior partners were constrained to cancel their Friday lunch bookings at the Union and Australian Clubs.

His was the iron fist in the velvet glove. After a short time, no commercial barrister worth his or her salt would appear in the Commercial List on a Friday unprepared. As one such player recently recalled: “It was show and tell time”. Another said, possibly in a South African accent, that his life in front of the Chief Judge improved slightly when he inadvertently addressed him as “My Lord” as was the custom at the Jo’berg Bar! At 9.30 AM on a Friday morning, Court 11A had the feel of a modern day Colliseum, senior and junior counsel gathered around the Bar table, some distracted by solicitors giving last minute instructions, others chatting amongst themselves, often nervously, a sense of angst and anticipation hanging in the air.

Anecdotes abound. Most of the bruising has long since subsided.

While many barristers, who would go on to become senior commercial judges and practitioners found the Rogers revolution of the 1980s to be exhilarating, some speak of the burdens those reforms placed on practitioners. What has perhaps never properly been recognised, however, was the herculean burden assumed by the judge in order to bring his reforms to fruition: 80-100 matters in the Friday Commercial Division List every week. Andrew Rogers knew those cases and what each one was about. If he didn't, his penetrating forensic mind would discern the true issue with alacrity. He knew if one party was delinquent or playing for time. His feel for commerce guided him.

In short, the reforms he implemented only succeeded because he and his colleagues worked with huge energy and diligence (as they still do, following the Rogers blueprint). That was the quid pro quo. And this same diligence attended to the hearing and delivery of substantive judgments.

Andrew Rogers' reforms had a clarity of purpose to them. That purpose was not efficiency for efficiency's sake. One of his purposes was to ensure that the law could not be used as an instrument of either delay or oppression by those with superior resources and an appetite to defer the resolution of disputes they were likely to lose. "But what is your defence?", the unmistakeable voice would intone from the Bench, as a hapless barrister submitted that his client Bank would like to administer 120 interrogatories and needed more time to prepare them, a submission that would never be repeated.

Commercial disputes were not to be permitted to be tied up by excessive legalism or clever and expensive lawyering. Andrew Rogers' conviction was that that was fundamentally unjust, and, in his own words, "The courts fulfil a distinct social purpose. To put them out of reach by reason of the cost involved is unacceptable".

A by-product of his refreshing and dynamic approach to commercial litigation was to engender great respect for the Supreme Court of New South Wales. Andrew Rogers is rightly seen as responsible for the Court's pre-eminent reputation in commercial

dispute resolution, a reputation that continues to this day and is the envy of many other jurisdictions, both within Australia and abroad.

Chief Justice Gleeson said at the time of Andrew's retirement from the Bench:

The Commercial Division provides a fast track, but practitioners in that area are left in no doubt that it is also a hard track. To use a racing metaphor, the going in the Commercial Division is always firm. That suits some horses and riders better than others, but it suited me well as a barrister, and it suits me even better now."

It is important that Andrew Rogers' legacy as a great reformer and innovator not overshadow the fact that he was also a very fine lawyer, and the law reports of the 1980s are full of important decisions of his relating to foreign currency loans, directors' duties including the responsibilities of non-executive directors, domestic and international arbitration, Mareva injunctions, insurance, insolvency and cross-vesting.

His understanding of commerce inevitably also meant that he was an internationalist, and so many of the very many speeches he delivered during his time as a judge have or are informed by an international flavour. He was a firm friend of Sir Michael Kerr and Lord Mustill, those giants of English commercial law as well as Bob Alexander (Baron Alexander of Weedon). He was a kindred spirit of Lord Woolf whose own far-reaching procedural reforms in the United Kingdom owed much and drew heavily on what Andrew had implemented in the 1980s in New South Wales. It was no wonder that he was so warmly welcomed to the London-seated world of international commercial and maritime arbitration after his retirement from the Bench.

I have just this week asked the Law Courts Library to digitise the many speeches he delivered as a judge so that the profession has an electronic and readily accessible record of his insights, industry and intellect on a whole host of topics including alternative dispute resolution, arbitration, complex commercial litigation; corporate crashes, private international law; public policy, transnational litigation and the role of the managerial or interventionist judge.

His energy and intellect were also reflected in the many other positions he held both during and after his time on the Bench. These included as a part-time Commissioner on the NSW Law Reform Commission, a member of the Australian delegation to

UNCITRAL and a member of the consultative committee of the establishment of the Australian Commercial Disputes Centre. He was a Fellow of the Australian Institute of Arbitrators, a Fellow of the Chartered Institute of Arbitrators and Patron of the Corporate Lawyers Association of NSW. He was the inaugural Chancellor of Southern Cross University and an adviser to other universities.

He was also, of course, very amusing. Giving evidence in 1998 to a Senate Select Committee on Superannuation in relation to the merits of a then proposed Superannuation Complaints Tribunal to resolve superannuation disputes, he said:

“I support an indigent senator very well on the proceeds of arbitration. It is the most expensive form of dispute resolution known to mankind. I would strongly counsel you against even entertaining the idea of arbitration.”

Both during his time on the Court and afterwards in the university sector, at Clayton Utz and beyond, he was a mentor to many, including many young female practitioners embarking on their careers.

Andrew Rogers was a bright star in our firmament: not just a legal luminary but a man, known for his intellect, kindness, and humanity. He will be deeply missed but ever so warmly remembered, not just for his professional achievements but for the person he was:

- that unmistakeable voice, instantly recognisable across a crowded room;
- the beaming smile;
- the twinkling eye;
- the charm, always palpable.
- the anecdotes;
- the advice;
- the worldly wisdom;
- his pride in and love for his children, grand children and great grandchildren as well, of course, for Helen (as well as those large dogs of theirs!)

May a great man who did most important work rest in peace.