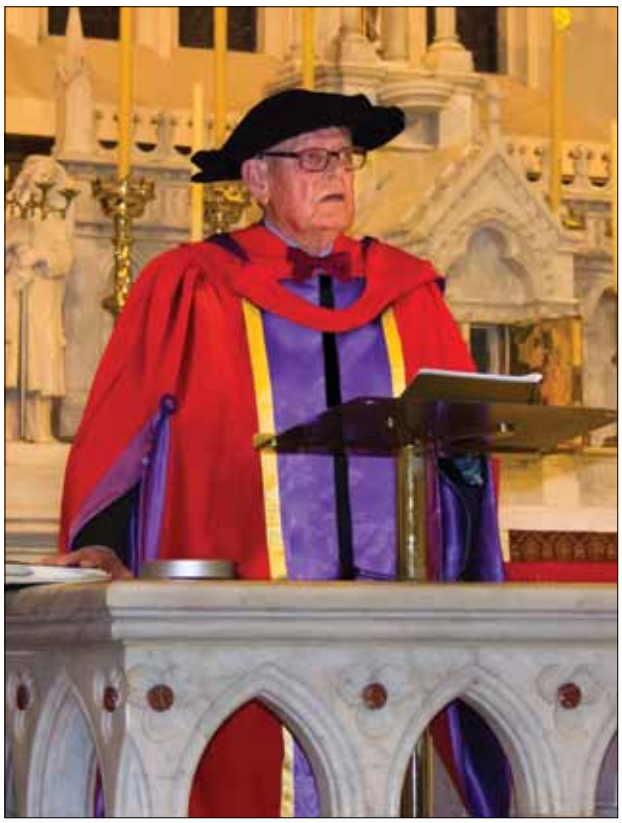
The soul of the law

The O'Dea Oration was delivered by the Hon TEF Hughes AO QC in July 2012 on the occasion of the conferral of his Honorary Doctorate of Laws by the University of Notre Dame Australia.

Chancellor, members of the board of Notre Dame University and those who have graciously attended this ceremony, I am grateful for the altogether too kind words of the chancellor. This ceremony is a very moving occasion for me, my wife and my granddaughter. I am so pleased to see here tonight two former members of the High Court, including a chief justice in Sir Anthony Mason; former member, a great friend and my opponent many times, Michael McHugh; and a present incumbent of the High Court, the Honourable Dyson Heydon with whom I did much work when we were barristers together. There are also people who have honoured me with their presence tonight who worked for me in many cases, including the Honourable Henric Nicholas of the Supreme Court. I could go on with more names and you will acquit me if any of them I have not mentioned because the list is very long. It is a delight to see in this congregation my personal assistant of 40 years, Anne Sloan, who worked for me and with me. She worked with great devotion, enormous efficiency and put up in a saintly way with my idiosyncrasies. My association with Anne Sloan was a chapter in my life for which I'm deeply grateful.

You may not be surprised to hear, I propose to talk to you about advocacy, because that has been what I have done professionally for many, many years. I am now in the evening of that career, the late evening, and I am spending much time in my new career as a grazier. What I should say at the outset is to apologise to those who know more about the law than I do. What I have to say is directed to the young people who have embarked on, are about to embark on a career at the bar or who are in active practice. I recognise with grateful thanks the great honour that I scarce deserve, which this ceremony has conferred upon me. It is my hope that the debt that I have incurred by the conferment of this honour I shall be able to repay in a tangible way; perhaps by participating in university activities on the subject that has been the fascination and main concentration of my life professionally. It is of enormous pleasure to me that in December my granddaughter, Daisy, will be a graduate of this university with a Diploma of Education, embarking on a career in teaching.

Advocacy is a subject that spans party differences. That fact struck me in a very realistic way when in September



1971, after the High Court announced its decision in the *Concrete Pipes Case*. This put an end to the doctrine of reserved state power, which had bedevilled the development of the corporations' power. On that occasion the Honourable Gough Whitlam, my political opponent, made a gracious speech in the house congratulating me on the effort. Well of course it was not my effort; I had a team of enormous talent working with me on the *Concrete Pipes*, including Robert Ellicott QC, William Deane QC, and as the one junior counsel on the case, Murray Gleeson, later chief justice of Australia. It was a great team effort.

Now, what are the qualities that are so important for an advocate at the bar to possess? I do not claim that I possess them in any full measure but they seem to include these: integrity, courage and competence. I would add resilience and the ability to react to fast moving situations in litigation. That is extremely important. I had the good fortune, even when I was a junior, to meet and have discussion about the law with Sir Owen Dixon, for whom I had a real reverence.

When on the occasion of my swearing in as a member of the Australian Parliament, I met Sir Owen - because he was there in his official capacity - he said to me, 'Well, Hughes, you can make a lawyer into a politician but reconversion is impossible'. I had to test that theory some years later when I was dismissed from my office by an incoming prime minister and replaced by another attorney general, a man for whom I had respect and who many think was unlucky not to be appointed to the High Court. His name was Nigel Bowen – he was my successor and immediate predecessor. So I had to put Sir Owen Dixon's proposition to the test. Singed as I was by the fires of politics, singed by the valedictory remarks of the prime minister who replaced John Gorton (McMahon said 'I've been under great pressure in the Party to get rid of you and I want you to go'). Well that was a challenge, and a challenge I have tried to meet. I carry my brief ministerial association with John Gorton as a badge of pride; Gorton, despite human faults – we all possess them – was a great prime minister in my view, with a vision for Australia which I was happy to share.

Now, Sir Owen put this challenge in the most charming way – I had not thought my ministerial career, if I were to have one, would be brief, but politics is full of unexpected surprises. I was able – which would not be possible today – to combine a degree of practice with my parliamentary duties and was able to get my hand in again. Journeys by car and train from Canberra to Yass to Sydney were involved to enable me to be in court the next morning. But that was feasible. And gradually the practice built up. My practice was never of the same planetary significance as that of my co-eval and great friend Sir Anthony Mason. He practised on the Elysian heights of equity; I was walking on the plains of the common law. But I have always valued my friendship and the ability to converse with Sir Anthony. Michael McHugh and I did many cases against each other, mostly very hard fought cases, but I look back with great pleasure on my relationship as a friend and opposing counsel with Michael McHugh, because in all the cases we ran against each other, we never had a personal difference or engaged in personal criticism. Everything was left or kept on a proper basis of forensic comradeship and as it turned out, friendship.

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A great need for the advocate is objectivity. One must not get too embroiled in the sentimental tensions of the client. One must be objective –that is part of being competent. I well remember occasions when it became necessary to tell the client and sometimes the solicitor that I was in command of the case and that if they did not agree with what I thought about the running of the case, it might be necessary to part company. It never became so, I am glad to say, but detachment and objectivity are of the essence of advocacy at the bar. In the '80s and the '90s, times were very different. We now have a bar that is short of work, chambers are available for acquisition by newcomers. There are vacancies that are not taken up. There is and always will be a pressing need in our society for an independent bar, but the bar cannot be complacent, it must knuckle down and adjust to the times, maintaining a spirit of optimism and a spirit of determination to maintain proper standards.

Sir Owen Dixon described advocacy as the soul of the law and went on to say that good advocacy is tact in action. That is, if I may say so, an outstandingly correct statement of what advocacy is all about. Tact is based on discretion and understanding of how to deal with difficult situations and how to adjust one's language to the exigencies of litigation. Tact in advocates is a primary quality to be cherished and pursued. Courtesy is vital to the efficient practice of advocacy: courtesy to the judge and to one's opponents. Legal literature is replete with stories of abrasive encounters between the likes of Sir Patrick Hastings and F E Smith and judges. Smith seemed to delight in scoring points off judges; that is a hindrance to good advocacy. After all, we are in a profession to practice the art of persuasion. You are not likely to persuade by rudeness, and even toward a difficult judge, it is utterly necessary to practise courtesy.

Another piece of advice that I would venture to give to those in or about to practice at the bar, is when you have a problem with your argument it is better in general to bring it to the fore, rather than hide it below the surface. If you try to hide it you will be found out and it is much better to face a problem in advance and perhaps in an understated way enlist the judge's aid

to deal with it. Michael Helsham - who became chief judge in Equity - was very good with a difficult judge who had good qualities, and I am talking about the late Justice Myers. Helsham found that if you did not face up to a problem and disclose it, Myers (who was very astute) would ferret it out. So it was better to get it out first. Helsham was very successful - his success rate before Justice Myers was remarkable. He became later an efficient chief judge in Equity with a penchant in giving unreserved judgements, a practice often very beneficial to litigants. They can always be appealed.

A primary duty of the advocate is complete candour and complete honesty. The late Peter Clyne was a contemporary of mine at the law school of the University of Sydney. He gave his name to a case in the *Commonwealth Law Reports* about the duty of barristers. He was a man of ability, but he had a fatal weakness – he was given to making charges of misconduct against people on the other side, knowing that he could not prove them. That was his undoing. It is a primary task of the advocate never to make a criticism of another person in court unless you have evidence to prove it. If you make unfounded allegations of misconduct against people in court, you have the advantage of absolute privilege, but that can be of no advantage at all because the reach of the disciplinary jurisdiction of the court to deal with professional misconduct of that kind is very strong indeed. There was a similar case in England where leading counsel suffered suspension for three years (he was lucky not to be disbarred) because in concert with the client - a police officer formerly holding commissioned rank – he concealed from the court - in a case where the plaintiff was the only witness, claiming false imprisonment - that the defendant [the police officer] had been demoted from commissioned rank between the events, giving rise to the case and the hearing. In concert with the client, he gave aid to concealing that truth, which went to the credibility of the client on a matter vital to the proceedings. So the reach of the disciplinary jurisdiction to control misconduct by barristers is a very wide reach and calls for salutary exercise.

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Much is said today about efficacy or lack of efficacy in cross examination. There are judges who discount the significance of cross examination. The problem may be that cross examination is not as well practised an aspect of advocacy as it ought to be. There are ways in which improvement can be made, and I ask whether there are any precepts that may be of general utility in the task of persuading the court to make a correct assessment of the credibility and viability of oral evidence. There are a few and I shall try to state them. I do so with considerable diffidence, because there are no absolute rules and this difficult and delicate judicial task is best left to intuition based on experience, in particular the experience of evaluating oral evidence in the light of written material. These are a few tentative ideas that I put for consideration:

In modern commercial litigation, allowance ought to be made for the fact that evidence in chief often takes the form of sworn verification of a written statement which is often lengthy, complex and drafted, or even crafted, by lawyers. The system does not really save costs, it probably increases them. The justification, however, is the imperative need for the saving of court time. It does however tend to put the witness at a disadvantage in that the first significant questions he or she has to answer are those of the cross-examiner. The witness has not time to warm up, adjust to the often strange atmosphere of the courtroom before being confronted with what may be hostile cross-examination. Moreover, verified statements of evidence may sometimes contain ill-advised passages that may well have been avoided if the testimony in chief had been adduced orally. So it will be necessary in fairness to make allowance in favour of the witness in weighing the effect of cross-examination. As to the overall persuasiveness of affidavit evidence, I recall the somewhat cynical remarks of Lord Dunedin, a Scots law lord, who sat in the Lords in the first third of last century – he said; 'The truth sometimes leaks out of an affidavit like water from the bottom of a well'.

Second, allowance has to made for performance of a

witness under cross-examination for any lack of grasp of any meaning of the questions put to them by the cross-examiner. That is why it is so important that questions be concise, self contained and phrased in good English. Is it perhaps because cross examination as an art is perceived to be withering on the vine these days that judges place less importance on it as a means of eliciting the truth.

Another factor is that the witness who 'unnecessarily' becomes argumentative may not be entitled to a great deal of credibility– here the emphasis is on the 'unnecessarily' because some cross examiners have a tendency to invite the witness to be argumentative. Yet another factor; while a non-responsive answer to a question in cross examination may be the product of nervousness, unfamiliarity with the courtroom environment, language difficulties, incomprehension or a combination of these factors, non responsive answers are often a giveaway sign of evasion by the witness who has something to hide. The cross-examiner should seek scope to insist on responsive answers. A preliminary question is of course whether the answer is truly non-responsive, and in this respect judicial and forensic perspectives may sometimes differ. One should be sure of one's ground before suggesting a witness has not answered the question. Another clue to the possible unreliability of evidence is sometimes gained when the witness is seen to be thinking ahead to the next question. I have always told witnesses to take each question as it comes, as a separate entity and not to look around corners anticipating the line of cross examination. It is often the giveaway sign. Those observations are offered tentatively but perhaps worth consideration.

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A characteristic of vital importance for advocacy, good advocacy, is the ability to make submissions in concise clear English.

These random thoughts, I offer tentatively. I have been very fortunate during my professional life as a leader in the quality of the assistance I have had from colleagues. Dyson Heydon and I had a big decision to make in one case that sticks in my memory – *United States Surgical Corporation*. It was a case in which there had been findings of fraudulent conduct by the judge at first instance and the Court of Appeal. In those days there was an appeal to the High Court as of right, and the decision had to be made as to whether we would try (it would have been an enormously difficult task) to overcome findings of fraudulent conduct which were the basis of imposition of a remedial constructive trust. A decision of some importance had to be made how best to conduct an appeal with not very propitious prospects of success. The decision was to confine the appeal to the one issue on which we thought there was some chance, albeit not very strong, of success and that was to confine the case on the appeal to the question whether all the circumstances gave rise to a fiduciary duty, because a constrictive trust was based, as it had to be, on fiduciary duty. Well by a narrow margin it worked, despite a very powerful dissenting judgement by Sir Anthony Mason. I suspect that if the same facts arose today, Sir Anthony's dissenting judgement would have been vindicated. Advocacy does call for judgement - judgement on the prospects, and making a decision not to pursue an argument which is probably doomed to failure.

I am very conscious of the honour that has been given to me by this University, the honour of delivering the Michael O'Dea Oration. I knew Michael's father, who was a highly competent lawyer. I appeared in cases against him and I think on one occasion in a case for him. The O'Dea tradition in the law is a very fine one and I am conscious of the fact that Michael O'Dea has done so much good for this University. I am grateful to you for listening and conscious of the fact that in being very moved by this occasion, my remarks have been somewhat halting. Thank you.