Farewell Speech of Francis Marks 6 July, 2012.

Thank you for the unduly kind remarks that have been made this morning.

It is important to me that I acknowledge the wonderful help, encouragement and support that I have received over the last 19 years. For me, becoming a judge involved a steep learning curve. I hope I have learned well enough.

The acknowledgements that I wish to make are made in no particular order and are necessarily brief.

I have had a great deal of help from all of my colleagues, both past and present, during the last 19 years. Although, to some extent, judges work alone, except when participating in appellate benches, the ability to liaise with colleagues is an important part of judicial life.

I wish to also acknowledge the assistance and support provided by the succession of Registrars and all of the administrative staff of the Commission throughout the last 19 years. This acknowledgement extends also to the staff of my colleagues. What the parties in proceedings see is but a manifestation of an efficient and effective operation conducted through the Registry. Whilst all of the Industrial Registrars with whom I have worked have been excellent in all ways, the person with the outstanding talent as a humorous entertainer is Mick Grimson. He is a wonderful human being in every way, and I hope that he stays on as Registrar with this Tribunal or any of its possible manifestations for many years.

Judges work as part of a small, and essential team.As you can imagine, I have had a number of associates and research assistants over the years and all of them have helped me immensely. My current staff, Ruth Evatt and Lauren Fieldus, are no exception. I have kept in touch with a number of my previous staff and I look forward to following their successful careers. Thank you all for allowing me to function as effectively and efficiently as I have.

The court reporters are an integral part of the team that allows proceedings to be conducted efficiently and effectively. I have enjoyed wonderful relationships with the many proficient court reporters who have assisted me over the years. They have had to include both my bad

jokes as well as some of the few that evoked genuine laughter from those appearing. (I remember fondly the exchange I had with Greg Selig when he was a TWU official. At one stage in his career he had very long hair. He appeared one day shorn. I commented about his short haircut. He responded that I was only jealous.) Thank you to all the court reporters for faithfully reporting the proceedings before me and assisting in their conduct.

Obviously, proceedings cannot be conducted without the assistance of counsel and solicitors. Judges rely upon the expertise and competence of advocates in presenting the respective cases on behalf of their clients and in making the judge's task that much easier by presenting all of the relevant facts and principles of law. My task over the years has been made that much easier because of the contribution made by advocates, and especially legal practitioner advocates. I also enjoyed the intellectual challenge of interacting with counsel during the course of submissions. I understand that I have a reputation for engaging in discussion during submissions, rather than listening mutely and then trying to work it all out later. This is part of the Socratic method which I embraced whilst on the Law Faculty at University of New South Wales many years ago. It has never left me. There are a number of counsel in particular with whom I enjoy such discussions. I know some of them looked forward to the intellectual workout, and I regret that others did not. I remember apologising to Mark Cahill after a long session in which we had discussed the construction of particular provisions of the Occupational Health and Safety legislation and their application to the facts in the case. I told Mark I was sorry that I had subjected him to such an intense session. He replied, "That's all right, your Honour. You lectured me a Law School and I'm used to you by now." Both counsel and solicitors have been extraordinarily helpful to my staff from time to time and their contribution is sincerely acknowledged.

A large part of my work has involved sitting as the Industrial Tribunal. Over the years, I have either been on or headed up several industrial panels. In preparing this speech, I have tried to think about the various industries with which I have been involved. Certainly, I was exposed to some dining experiences with the Restaurant and Clubs industries. I spent some time in the Local Government area and, more recently, I've heard a series of cases involving an allowance to engineering professionals.

It seems that most of my time has been spent with transport and prisons. Transport has always been a challenging area. I know from my experience that transport operators work

under incredible cost and productivity pressures. This in turn is passed on to the drivers themselves. The situation is complicated because many drivers operate as so-called self-employed contractors. This is notwithstanding the fact that they perform work only for the one organisation and performance of that work is highly regulated. I have a lot of sympathy for owner-drivers who, in many cases, have spent a lot of money buying into a run and, in all cases, in purchasing or leasing vehicles, often with their houses used as collateral for the purchase price. I know that the regulation of industries is out of favour with economists and politicians, who prefer to rely on free market forces, but in my view this is a counter productive approach when competition creates margins that are so thin that business becomes problematical.

Surprising as it may seem, I have had a lot of fun and thoroughly enjoyed myself working closely with the PSA and Corrective Services New South Wales over many years. This is because I have been fortunate enough to work with a great bunch of people on both sides of the industrial fence. In large measure, I think I enjoy the respect and support of both sides in endeavouring to resolve issues which come up from time to time. Sadly, some of those issues have been serious, involving the closure of correctional centres, the restructuring of others and the implementation of a number of measures, all designed to reduce the cost of operating the Department. Notwithstanding these difficulties, we have all been able to operate in a constructive manner because of the goodwill and good humour of the personnel on each side. I would like to think that over my time with prisons, industrial disputation has been kept to a minimum.

I will miss my engagement with all of the regulars who have appeared in front of me from time to time over the years and I know that they will remain in the good hands of some other member of the Commission, hopefully whose jokes might be of a higher standard than mine.

My retirement has come earlier than I had anticipated, and coincided with four weeks planned leave involving overseas travel throughout all of June. I regret that I was unable to stay on until December for reasons of significance, and which are not related in any way to my state of health including, hopefully, any intellectual capacity. I regret any disruption to proceedings before the Commission and Court caused by my somewhat precipitous departure.

I hope I have not omitted to acknowledge any group. If I have done so, I promise it is entirely inadvertent.

I should, however, acknowledge the support and encouragement of my family over the years. Both Audrey and, now, Rose have been fully supportive of me in dealing with whatever stresses and strains might have been associated with my work, although I don't think there have been many of them. My four children, Danny, Claudie, Benjy and Leah have all gotten used to the fact that I was appointed a judge and they have all provided me with the absolute joy and pleasure that one derives from children. Rose has seven grandchildren and I have six, so between us we shall continue to live full family lives. As yet, my two younger children have neither married or reproduced, so there is always the prospect of even more grandchildren.

I want to say something about industrial relations. I have had some little experience in this area over the last 40 plus years. I may also have caused the odd bit of industrial strife.

I am deeply concerned with what is happening now, under a regime that started with WorkChoices and has continued under FairWork, so I am not taking political sides.

Under the long standing NSW system, now largely confined to the public sector, if a party wanted to negotiate an enterprise agreement, and succeeded, the IRC would make a consent award, without too many hassles. If there were problems in reaching agreement, or even getting another party to the table, a dispute would be notified, and within days the parties would be with a member of the Commission, talking about trying to get some form of agreement.

There are many examples of the constructive assistance the IRC of NSW has provided over many years. Let me mention briefly only two. In the Hunter Region the IRC has helped negotiate enterprise agreements over the last 30 years. These include major infrastructure projects costing billions of dollars. A recent submission to government by the Industrial Relations Society Newcastle Branch identified 25 such projects since 2000. Deputy President Harrison is recognised as an industrial relations hero in the Hunter region. Similar great work has been done in the Illawarra by Vice President Justice Walton and his team with Bluescope Steel and Boral, and other entities. The IRC worked with these entities over some time,

resulting in a diminution in industrial action, increased productivity and a focus on industrial relations at the shop floor level. There are too many other examples of similar work by IRC members throughout NSW to mention.

All of us at the IRC have always enjoyed the confidence and respect of our regular clientele and it has been very rare for recommendations made in conciliation to be rejected (except in disputes which are politically based, where there is often no real solution). We have a " no industrial action policy", because the parties can always get a 1st hearing within a few days, or hours if necessary, and we can mostly take the heat out of the dispute very quickly. Industrial action never helps resolve anything, other than to ensure a very quick hearing before the IRC. On the contrary, industrial action only inflames the situation, and makes the inevitable settlement harder.

The FairWork regime is an entirely different story. It is convoluted and complex. By way of example, when trying to negotiate an enterprise agreement employers must notify employees of the right to be represented by bargaining representatives; FWA may make a determination that a majority of employees covered by a proposed single enterprise agreement want to bargain with the employer; if there is controversy over which employees are to be covered FWA may issue a scoping order; a long list of specified good faith bargaining requirements must be complied with; and FWA may make a bargaining order specifying what will constitute bargaining and what the parties must do to bargain. If the employees are not satisfied with progress in the negotiations, and convince FWA they are genuinely trying to reach agreement, FWA can make a protected action ballot order. A ballot is then held, and if there is a vote in favour of protected industrial action, the employees can go on strike without any fear of any adverse action under any law. FWA can only intervene in limited circumstances to put a stop to the industrial action, and such intervention is also a legal minefield, as a close reading of the recent AIPA case in the Federal Court demonstrates.

All protected industrial action is taken for the sole purpose of forcing the employer into submission. I can't see what good that does for good industrial relations. It seems to me that the FairWork Act is designed to push the employee parties into industrial action, rather than forcing realistic negotiations, and that action is protected from any claim for loss suffered by an employer.

So far, I have not even mentioned any assistance to the parties in resolving the underlying dispute. Sadly, FWA has limited powers to do anything.

Oh, I should add that my copy of the compilation of the Fair work legislation runs to about 2500 pages of very small print. You can find what you need in the NSW Industrial Relations Act in less time than it takes to drink a cappuccino at Bar Luca next door, (a frequent haunt of counsel preparing for a hearing on the morning of a case).

The upshot is that I'll take the NSW system any day over the federal system. It is not predicated on the fallacy that the parties can always bargain for and negotiate a settlement. Of course they can in many cases, but we are not concerned with the easy situations. The industrial relations system is designed to deal with industrial disputes, which by definition are matters where there is noagreement. These need to be dealt with efficiently and effectively. The market forces free association theory behind the FairWork Act assumes that human beings always behave fairly and responsibly. The recent sub-prime mortgage debacle, which contributed to our global financial crisis, proves this theory to be dead wrong. The perceived wisdom has always been that industrial disputes are best resolved by conciliation and arbitration. This is enshrined in the Australian Constitution. Sadly, since WorkChoices and now the Fairwork model, the Australian industrial relations
system has strayed from this approach to solving industrial disputes.

And, while I am in full flight, I should mention in passing that the centralisation of industrial relations throughout Australia in Melbourne has created a great deal of authority in the one area, and in the hands of a few, has created standards that are not necessarily reflective of industrial relations needs in other parts of Australia and has arguably detracted from the flexibility needed to enhance productivity. That must be a topic for another day.

Out of adversity, there always comes some good. I understand from comments made to me since I announced my retirement that, for reasons that I need not state, there is an incredible growth industry in private mediation in industrial matters. Perhaps, after all, I might, even at my advanced age, be the right person in the right place.

Fortunately for you, time does not permit me to say any more. There is never enough time to say all the things that one wants to say, and to acknowledge all the wonderful people that

deserve to be acknowledged. May I end by thanking the President, Justice Boland for giving me the opportunity to bring closure to my 19 years of service to this wonderful tribunal. This will go a long way to ease the pain of leaving a position which I have thoroughly enjoyed, and which has given me great personal satisfaction. I wish the remaining members of the IRC well, and I know that this iconic institution will continue to serve the people of NSW well in whatever form the government determines.