

# **Ceremonial Sitting on the Retirement of the Honourable Justice Richard Refshauge SC**

**Thursday 11 May 2017**

Chief Justice, Chief Magistrate, Mr Attorney, Mr Archer, Ms Avery, judicial colleagues past and present, distinguished guests, fellow lawyers, my family, friends and all. I acknowledge the traditional owners of the land on which we are meeting and pay my respects to their elders, past, present and future. I acknowledge the contribution that they make to Australian culture and I especially welcome any Aboriginal and Torres Strait Islander people who are present with us today.

I was very humbled by the excessively generous comments of those who have spoken. I very much appreciate the sentiments that have been expressed. Clearly, however, none of the speakers were aware that one of the most recent judgments that I have delivered was concerned with misrepresentations and misleading and deceptive conduct, so that I can with confidence urge any who may seek to rely on what has been said to exercise great caution. It would be a grave mistake.

Those of you who know me will also know that I see an important part of the law as the collective wisdom of judges in which is found the common law. That led to my friend Bryan Meagher SC suggesting at the launch of the ACT Law Reports that a decision of mine reported in the first volume had more authorities cited than all of the other reported cases combined, and my case was only an appeal from a Magistrates Court decision on a sentence for a drink driving offence. Nevertheless, I do see the need to be very grounded in precedent as the bedrock for the rule of law and to distinguish it from the rule of individual judges; so I sought authority on today's sittings, and it is always good to start with one's own Court.

I found [2017] ACTSCFC 1, a Full Court decision entitled *In Re A Ceremonial Sitting*. In it the subject of the sitting, Mossop J, was also the subject of some remarks which extolled his virtues in what I thought was a much more restrained and accurate way than those directed towards me. His Honour then said:

It is only at funerals and swearing-in ceremonies that such kind things are said about the subject of the occasion. That puts the nature of these proceedings, not a swearing-in, in a nice perspective. If eulogies they were, it was comforting to hear them and I hope that I may remain upright beyond the end of the ceremony.

It reminds me a little of the words that Shakespeare put in the mouth of Antony in the famous "Friends, Romans and Countrymen" speech after the death of Julius Caesar. He had Antony say, "The evil that men do lives after them, the good is oft interred with their bones."

Fortunately, for those like me appearing quite spritely at this funeral, I think Shakespeare was being a touch ironic; I certainly hope so.

I have been warned this morning that morning tea is sumptuous, and so I should not speak for my usual excessive length; 35 pages is likely to be enough. I had thought it proper to reserve my decision, but this assemblage cannot reassemble in 12 months' time. Crispin J said at his retirement, "It's customary to give retiring judges the luxury of boring people witless" - I think he said "witless" - "by talking about themselves and pontificating about the law and life in general."

I don't propose to do so, nor to set out an apologia of my life. My views have been set out in the judgments I've written and in the debates that I've had with counsel during hearings, welcome to me, but barely tolerated by long-suffering advocates who were nevertheless gracious enough to engage with me and not show their frustrations overtly.

I want to say a few things about the Court, for it has been the focus of my pre-judicial practice as well as the Court in which I have served. The building was where I commenced practice, for in those days, it housed the Magistrates Court and the Conciliation and Arbitration Commission, as well as ancillary services such as the marriage room, where the sheriff's officers now congregate, I first entered with trepidation, now as though I own it, because from about 5 o'clock I do.

It is perhaps fitting that I retire just before the building, now creaking from its old age and struggling into the 21<sup>st</sup> century, is to be largely replaced and partially re-engineered into a more fit-for-purpose building. At the time when I joined the Court, it had been judicially populated by those elevated from the ranks of local practitioners after a period when most of the appointments came from interstate. This trend has largely been reversed and we are seeing the benefits, not only of local appointments, but that cross-pollination which is as welcome as the recognition of talent from within the local profession.

It has been a very collegial Court, and I have welcomed and flourished in the camaraderie of my colleagues, all of whom are very skilled jurists. I particularly enjoyed the passionate commitment of the Chief Justice to a creative and efficient Court, the intellectual rigour of Penfold J, the pragmatism of Burns J, the wicked wit of Elkaim J, and the legal acumen of Mossop J. I enjoy the warm friendship of them all, as I did my past colleagues, including PNG Justice Higgins, the Honourable Malcolm Gray and David Harper.

I thank you, Mr Attorney, for the appointment of such a distinguished jurist as Mossop J to succeed me, briefly to be first and, hopefully, the first of many, sixth judge of this Court. His intellectual stature and legal acumen is of the highest order and he will bring distinction to

the work of the Court. It can be regarded as a compliment to the occupant of a position when the successor appointed to the post is so much more qualified and competent; at least I prefer that explanation to the suggestion that we have to get in someone good to make up for mess that had been left behind.

Mossop J has already become a great addition to the Court. Mr Attorney, you and my clerical friends, will well understand my allusion to those whose shoes I am not worthy to bear. The others will have to be satisfied with my observation that I could never reach his Honour's height.

The work of the Court is demanding and the work continues to grow, as does the city. We are fortunate that we are still able to call on the Federal Court to make available judges from that Court as additional judges to assist with our work, and I'm grateful for North J of that Court who has been able to join us today. I thank too those from that Court who have sent their best wishes to me but could not be here. I have enjoyed working with them and benefited from their experiences and insights, their wise advice and examples, as well as their warm friendliness.

We have also been much assisted by acting judges, and I'm grateful that Ashford AJ is joining us today, who have been willingly undertaking much work alongside us. I was particularly delighted to be working again with Walmsley AJ, a former law partner of mine, but who has forsaken the delights of joining us this morning to visit South America. If that's what retired judges do, then I have a lot of good things to look forward to and enjoy.

My time in the Court has been challenging. Having been the Director of Public Prosecutions immediately before my appointment, I had to take on largely civil work, which I had not done for about 10 years. One of the first cases I was allocated was the Commonwealth's claim against Davis Samuel and Ors to recover money, which I ultimately held had not been properly disbursed to them.

The case started less than six months after I had been appointed and the hearing went for 51 days. The submissions by the parties were in large bound volumes and the exhibits occupied over 60 lever arch files. Unsurprisingly, it was difficult to find a decent period of time to concentrate on the judgment, and the time I did spend delayed other judgments. It was unsurprising, but personally devastating when the result of that delay was a complaint by the Bar Association that I was not a fit person to be a judge. It is hard to hear such judgement of one's peers.

With generous assistance from the then Attorney-General, Simon Corbell, I was given time out of Court and managed to complete the judgment and deliver all 500 pages of it, handwritten. No successful appeal has been able to overturn it, largely because no Appeal

Court has yet managed to address the issues. It is perhaps fitting that the case has spawned 11 decisions of mine, the first of which was delivered in the year of my appointment, and the last in the year of my retirement.

Delay in delivery of judgments has plagued my term. I'm not going to provide a justification or an explanation. I know how problematic that can be for litigants, their lawyers, their families and, indeed, the Court. I am confident, however, that whatever failings I have in this area I cannot be accused of not working hard and not contributing to the Court and the community. There are still some decisions that I have not delivered, and it is a matter of great personal regret, and I hope to be able to rectify that in the very near future.

Judicial work is challenging. The complexity of life in our society and the ever-expanding laws being made and the ingenuity of litigants make that so. None is more challenging than sentencing. I find it the hardest because a judge exercises a coercive power of the state, and it can be so common for sentence that it risks ceasing to require a careful thought, ensuring a balance of the need to vindicate any victim, to protect the community and to respect the interests of the offender.

Crimes can cause deep hurt and irremediable damage. The courts cannot repair or resolve those consequences, and revenge does not provide the solace that victims seek. Taking victims seriously, especially by respectful participation in the thought processes, is now an accepted part of sentencing practice. The development of restorative justice gives back to victims a degree of control and respectful participation. That, of course, does not replace the need for the community, through the court, to establish standards of conduct and ensure that bad behaviour does have consequences.

Let me say clearly that the constant barrage of commentary that says sentencing by Australian judges is weakly merciful or too lenient, is fake news; not in the sense that the leader of the free world uses the term, as meaning news that is true but not liked, it is in fact wrong to say that sentences by Australian courts are too lenient. We know that because, apart from anything else, we know from comprehensive and rigorous expert studies, such as that headed by the present Governor of Tasmania, that when the public is fully informed, when they know the facts of the case, the circumstances of the victim and the circumstances of the offender, they are more often likely to identify a less severe sentence than those severe sentences that are imposed by the judge.

That became clear to me, and these views are regrettably widespread, when a sentence of mine was criticised by a local senior academic, who had never read the judgment that I delivered, because it was not published for months after I had delivered it, had never been in

Court, had never heard the facts and nevertheless, as a senior academic, felt it proper to publicly make that comment.

My approach to sentencing has been informed by my Anglican faith, a cradle Anglican of the more reserved and private kind; I do not wear my faith too clearly on my sleeve, and possibly to the despair of my co-religionists, do not engage in proselytising. What it teaches me, however, is the worth of each individual. To put it in theological terms, I see in other people the image of the Divine. That does not mean that there are no sanctions, even severe sanctions, for crime; but it means that I refuse to dehumanise other people and I accord them the respect to which they are entitled as human beings, regardless of their crimes, for which, of course, they must be punished. It is too easy to discriminate, to treat people as less equal, to oppress them if they are dehumanised and identified as "the other", the lesser. Differences are then used to create a less equal world of the kind that we had when slavery was rife. Now we use terms like "Muslim", "boat-people", "refugee", "welfare cheat", and "paedophile" to dehumanise them and justify treating them as less than human. I will not do that.

I said I was not going to down the Crispin soapbox route. It was beyond reasonable doubt that I could not resist the temptation. Let me now do what should be done in such features and acknowledge the people that have made my professional career and my life so fulfilling. I have had an extraordinarily fortunate life, that I cannot cease to count my blessings. I have worked with many amazing and dedicated people. I had some impressive teachers, I had some great university lecturers such as the late, much-lamented, Leslie Zines. I was inspired to take an interest in civil procedure by Alan Hogan, deputy and then director of the ANU Legal Workshop, later first Master of the Supreme Court and first editor of Civil Procedure ACT. I am honoured, Alan, that you are joining us today.

As I mentioned when I was sworn in as a judge – and those words come back to haunt you, so be careful – I owe a great debt to my first employer Neil Macphillamy who was a great mentor, an impressive solicitor and a great boss. I learnt an enormous amount from Sir Richard Blackburn, first Chief Justice of this Court before whom I regularly appeared, especially on Fridays. He and the Honourable Russell Fox and the Honourable Xavier Connor taught me much about court craft, advocacy and the lawyer – and the law.

My first solicitor, who managed to persuade Joske J to award me substantial damages for a broken leg, was the now Honourable John Gallop, and I am also delighted to see him here with us. I instructed him when he went to the Bar in many cases, appeared before him many times when he went to the Bench, and was briefly his colleague on the Bench when we called him back to sentence the absconder Peter Daniels Clarke II. He was also my pro bono client when he asked me into incorporate the Judicial College of Australia. I have appeared before many of the judges of this Court, and they have all been of great assistance in teaching me

how to conduct a practice and be a judge. I always enjoyed appearing before the Honourable Jeffrey Miles, who has also honoured me by his presence today. Especially I used to appear before his Honour on Friday afternoons for urgent injunctions. They do not seem to be so common these days.

I recall one occasion when I was desperately trying to get a Mareva injunction for the X-rated video industry when his long-suffering wife Trish appeared at the back of the Court, apparently impatient about departing on the weekend trip that they were about to engage in, and it rather limited my description of the subject matter.

I have also had the privilege of appearing before the magistrates of this Territory, and also learnt much of my advocacy and court craft before them. We are well-served on the Magistrates' Bench and I am proud to call them my friends. I am delighted to see so many of them here. I am delighted also to see Peter Dingwall, Michael Soames and Maria Doogan who have been able to join us.

We have a great Registry team led by my long-time friend Philip Kellow, who brings a breadth of experience from the Commonwealth sphere and has used it for our benefit. We have a friendly, efficient, and flexible staff in the Registry. We in the Supreme Court see them too infrequently since the integration of the one Registry, but a number do venture over to this building; especially when my orders are overly complex, indecipherable, or simply do not add up – which means most of the time.

I have published more decisions correcting my sentencing errors than all the other judges put together. I do think such matters must be done publicly, but I do think that I do need to get my maths better. Still, yesterday I sentenced a young man to prison – yes, critics of my sentencing practice, I do sentence to people to prisons, and lengthy terms of prison if they deserve it – for 41 offences, and I got it pretty right – a bit late, but I did get it pretty right.

The Court has been extremely well-served by the Supreme Court Registry team, the Registrar and her staff, who, for the most part, are dedicated, willing and able. I have no cause for complaint and every cause for gratitude, as do, I am sure, my colleagues. I have had close personal friendship with all the registrars - Zedekiah Hartstein, Brian Proctor, Peter Dingwall, Alan Towe, Jill Secoster, and our present Registrar Annie Glover who has been so helpful to me as a new, and now as a retiring judge. Together with, especially the Senior Deputy Registrar Grant Kenneally, the Deputy Registrar Willy Corbie, and the List Clerk and Secretary to the Legal Practitioners' Admission Board, Gaeleen Curley, the Court works extraordinarily well and I have been extraordinarily lucky to have worked with them. Together with the registrars' personal assistant Irene Brown, they have excellently supported the Court, made

my life a pleasure, and I am privileged to call them friends. I thank them for everything they have done to make my judicial life easier.

We are also fortunate to have a most dedicated band of sheriff's officers under the leadership of Simone Peisker, our Sheriff. I have had nothing but excellent assistance from them, in and out of the Court, and I was honoured when they wanted to have me pose for a photograph with them all yesterday. They have a happy knack of making me sure that my status is assured but not over-inflated. I am proud to be a member of the legal profession; it is essential to the health of a democracy to have an independent, robust, and active legal profession. I thank all my colleagues in the profession who have appeared before me and made the judicial task easier and more helpful. Many who could not join us today have sent their good wishes, and that is much appreciated.

My commitment to the profession has led to me participate as often as I am asked or can do so in learning and mentoring opportunities for members of the profession and I am proud to have taught Pleadings to ANU students for over 30 years. I was chuffed when, at the Federal and Supreme Court judges' conference in January this year, a judge of another court came over to me and told me how he had remembered and valued those lectures – I think he works in crime! The continuing legal education, moots for students, and introductory talks to visiting students from Alabama, have all, I hope, helped new lawyers, and certainly given me heart and satisfaction.

My editorship of Civil Procedure ACT produces, I hope, a valuable core resource to the profession and has eased the load of those who work through the complex rules now required for challenging litigation. My 10 years as DPP was a rewarding but challenging one, though I suspect that some who are still working there think of me sometimes as an apostate when I fail to give the maximum possible sentence for every offender who comes into my Court. I am proud of the work that the Office did in the time that I was there in actively assisting in the establishment of the family violence intervention program, the sexual assault reform programme, the Galambany Court, restorative justice, and the new Sentencing Acts, and the increase of women in the office, especially in senior positions.

I am particularly delighted that all but two of my associates have been able to attend today. Oxford was too far away to expect Leila Tai to travel for the occasion, and unfortunately John Nolic has been stricken with the 'flu. The relationship between judge and associate is a special one, with the two working closely day by day. I have been well-served by my associates who were often much brighter – well, always much brighter – and smarter lawyers than I was, but who generously put up with my pontifications about law and practice. They have all been a great support to me and I have appreciated their legal work and friendship. I enjoy the ongoing contact I have with all when I can.

Of all the workers with whom I have been blessed to spend my working life, the greatest thanks must go to my personal assistant Annette Hawken, who has followed me from my Macphillamy Cummins Gibson days, to Deacons Graham and James, to the DPP, and to the Court. We have worked together for over 30 years. It has been an incredible experience from which I have benefited much more than she; after all, her writing is pretty easy to read. I thank her for her tireless productivity, her placid acceptance of my impossible demands, her efficiency, stability, and, most of all, her friendship. This is the last parting of many; but this time it is a parting, not merely a transition.

How does a judge avoid going insane? I involve myself in community affairs, in a suite of activities that may resonate with you, Mr Attorney. I am involved in my church, the arts and social justice issues. Many of those have mentioned and I won't list them – It's boring to all of you – but what it has given me is an understanding of the fact that there is out there people of incredible talent, incredible commitment that have nothing to do with law, who don't know and don't want to know anything about it, but who labour for the good of our community, underpaid, under-recognised, and it is the duty of all of those, like, me, to support them and to give them encouragement.

The most important support, however, is my family. I am so proud of what my children Christina and Kim have achieved and can boast for hours – but morning tea comes on and I notice people fast falling asleep, as jurors tend to do when I instruct them. The greatest support of all is, of course, Barbara my wife whose patience would be worthy of a hundred saints. She has suffered my unceasing work for years now; I'm back at weekends, late night forays in the office, early morning in caftans – I don't do that much now. It used to be said of women facing the prospect of a retiring husband that she married him for better or worse but not for lunch. The problem is, I'm fortunate to live close by and be able to go home for lunch most days. The challenge for Barbara is having me around between meals, not just at meals; and even, horror of horrors, at the weekends. We may even have to talk to each other. She has been the most solid support and the love of my life and I certainly could not have achieved half of what I have done had I not been supported by her in sickness – and there has been enough of that – and in health. It is beyond reasonable doubt that my commission ends at midnight and I will then retire.

Once again, I think you all for the honour and generosity you have given in attending today, it is a great privilege to celebrate this occasion with you all, and I very much appreciate it.