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Swearing in Ceremony of John Basten QC

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**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT**

Monday 2 May 2005

**SWEARING IN CEREMONY OF
THE HONOURABLE JOHN BASTEN QC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES
and a judge of appeal**

1 **BASTEN JA:** Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court and a Judge of Appeal. I present my Commissions.

2 **SPIGELMAN CJ:** Thank you, Justice Basten. Please be seated while the Commissions are read. Principal Registrar, would you please read the commissions?

(Commissions read.)

Justice Basten, I ask you to rise and take the oaths of office, first the oath of allegiance and then the judicial oath.

(Oaths of Office taken.)

Principal Registrar, I hand to you the oaths so that they may be filed in the Court archives.

3 Justice Basten, on behalf of all members of this Court and on my own behalf, I congratulate you on your appointment. Your Honour has had a wide and diverse career at the Bar. In recent years particularly your Honour has had appellate practice of the highest order and highest quality. I look forward to serving with you as a Judge of this Court and a Judge of Appeal for many years to come.

4 **THE HONOURABLE R J DEBUS MP ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour, it is my great pleasure to congratulate you on your appointment to the Supreme Court Bench as a judge of Appeal on behalf of the Bar. Your Honour has achieved a great deal in your legal career. As a judge of Appeal of the Supreme Court I am sure that you will serve the people of New South Wales in a manner that befits this prestigious role.

5 I understand that in 1970 you were awarded a Bachelor of Laws with Honours by the University of Adelaide. You then went on to receive your Bachelor of Civil Laws from the University of Oxford in 1972.

6 You were a Teaching Fellow at the University of Chicago Law School from 1972 to 1973 and you then went on to work at Freehill Hollingdale & Page, solicitors in Sydney. You were a Lecturer and Senior Lecturer in the Faculty of Law at that hotbed of legal activism, the University of New South Wales from 1974 to 1982. Your Honour is remembered there with great affection although not for your then sartorial tastes, best described, I understand, as those of a hippie.

7 In fact, bearing in mind the new dignities you are to attain, teams of skilled computer hackers have been working over the weekend in the university library archive to delete photos of your Honour in old copies of Tharunka and other student publications of the day. Leather waistcoats, colourful corduroy trousers and a regrettable amount of facial hair have all been tactfully obliterated.

8 From July 1982 to the present you have been practising as a barrister at the New South Wales Bar. The areas of law in which you have practised include administrative and constitutional law, native title and Aboriginal land rights, discrimination and human rights, general appellate, immigration and professional discipline.

9 I understand that at an early point you appeared before the former Dean of your old University Sackville J. During the course of argument you made a lengthy pause. When Sackville J enquired if anything were wrong you answered, "I'm sorry your Honour, I was just thinking." Showing the spirit of mutual support for which the academic world is justly famous, Sackville J replied, "Thinking? There is something very different about you!"

10 Overcoming such obstacles you were nevertheless appointed Queen's Counsel in December 1992. Your Honour has had a great deal of advocacy experience in the area of criminal law, leading to an interest in the reform of the prison system. In this regard you have been very active, particularly between 1981 and 1997 when you were the Chair of the Prisoners' Legal Service Advisory Committee of the New South Wales Legal Aid Commission.

11 Your work has been instrumental in the setting up of the community legal centre movement in Australia. You were a member of the management committee of the Redfern Legal Centre from 1977 to 1983. Your work in this area of justice has caused Bell J to describe you as "an inspiration to a generation of public interest lawyers".

12 You have also been extremely active in the area of native title and land rights. You were engaged by the Northern and Central Land Councils from 1996 to 2005 to advise and provide representation regarding complex legal issues in the developing field of native title and land rights legislation.

13 You have provided representation to Aboriginal or Islander groups regarding every major or significant native title or land rights case during your career at the Bar, including the High Court cases of Ward, Yanner, Yorta Yorta, Hayes, Risk, and the Federal Court claims of Yulara, Lardil, Goomana and Director of Fisheries. Your contribution to the development of native title law and the construction of the Native Title Act is in fact unsurpassed. I understand that apart from representing several Aboriginal groups in relation to the 1993 legislation you were engaged by the National Indigenous Working Group to provide representation regarding the 1998 amendments to that Act. Your comprehensive contribution, through the provision of representation and the development of law to both Aboriginal interests and Australian society is, in short, remarkable and distinguished.

14 Your Honour's ideas are well published in a vast array of law journals ranging from the University of New South Wales Law Journal to the Journal of Legal Profession to the Australian Law Journal and the Federal Law Review. Topics of interest to you have included judicial accountability, prisoners' rights, legal aid, community legal centres, disputes involving the Commonwealth Government, judicial review and ouster clauses. You have also co-edited the Legal Services Bulletin.

15 You have held a number of important memberships and positions during your legal career. You were a part time Commissioner of the Law Reform Commission during its class actions reference from 1986 to 1987. You were a part time Human Rights and Equal Opportunity Commissioner between 1994 and 1997.

16 You are still remembered with great affection there for your intellect, creativity and your modesty. Not for you the era of "power lunches" with haughty demands for bottles of Grange Hermitage and fatted calves; you brought your humble sandwich each day in a brown paper bag and worked long hours for the various causes in which you were engaged. No doubt a remnant - a most meritorious one - of your youthful hippie past.

17 You were a Commissioner of the New South Wales Law Reform Commission's reference on this State's Anti-Discrimination Act and an advisory committee member on the Australian Law Reform Commission's reference on genetic information. Between 2003 and 2004 you were the Assistant

Commissioner of the Independent Commission Against Corruption.

18 Your Honour continues to be open to new intellectual experiences. I am told that during a recent trip to the Tanami Desert in the Northern Territory your family found you sitting Buddha-like under a tree, reading a treatise on the concept of infinity. We can only assume that this is part of your Honour's quest to develop infinite wisdom and we wish your Honour luck with that quest.

19 You are the proud partner of Gig and father of Sam, who are both here today to celebrate your appointment. Those present today, including your immediate family and myself wish you the best in the endeavour before you as you embark on another stage of an already stellar legal career.

20 May it please the court.

21 **MR J E McINTYRE PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the court. Your Honour, on behalf of the solicitors of the State of New South Wales it gives me great pleasure to congratulate you on your appointment as a judge of the Supreme Court.

22 You are known as a generous and compassionate man who has made a sterling contribution to the community as a member of the practising legal profession and that will be greatly missed. The energy and expertise you have devoted over the years to pro bono matters, including many complex matters which often ran for extensive periods of time are testimony to your sense of public duty.

23 Throughout your career you have applied a tremendous intellect, rigour and expert knowledge in a variety of areas of the law, many of which centre on the concepts of human rights, discrimination, professional discipline and immigration matters. Your Honour's knowledge in relation to native title legislation has already been referred to by the Attorney but it bears repeating because I am told your knowledge in this area is said to be legendary. You were one of Australia's pre-eminent lawyers in terms of understanding this highly complex piece of legislation and you have appeared on many occasions before the High Court to argue points in relation to it.

24 It is very pertinent that you were a pioneer of the first Community Legal Centre established in Redfern, which was opened in 1977. This remarkable organisation was a groundbreaking achievement; and provided then and continues to do now legal access and advice to disadvantaged and marginalised communities in that area and was the forerunner of many others throughout New South Wales. Your vision and commitment to uphold the principle that justice should be accessible to all has set a trend - there are now more than thirty-three such community legal centres operating throughout New South Wales.

25 Your Honour is a prolific legal author and editor on a variety of legal topics. Generations of students and legal practitioners have relied on your articles, many of which you co-wrote with other eminent members of the profession. You played an active role in publishing many articles and have been a member of a number of editorial committees.

26 It therefore comes as no surprise that your Honour has an extremely active and inquiring mind. While some of us may enjoy the occasional light read, I am told that your Honour's definition of light reading consists of the New York Review of Books.

27 I am also told that your Honour loves a good adventure. It's been a long standing tradition of yours to take the family camping at least once a year to some of the most remote destinations in Central Australia. Your Honour may not be renowned for being a handyman, but when it comes to the bush I am told you are a survivor. I understand that on one occasion your exceptional outdoor survival skills prevented your family's tent from collapsing in a severe storm. The next morning you awoke and couldn't understand why everyone else had disappeared - the campsite was entirely deserted. Yours was the only tent that remained intact. Perhaps this is the source of the description of you as unflappable.

28 I am confident that these survival skills will stand you in good stead for when you enter the media spotlight during your transition to the Bench.

29 I am told that you are extremely devoted to your family and that you make it a habit to always be

home in time for dinner so that you can enjoy your family's company. I am also told that your twelve year old son, Sam, has inherited your Honour's inquisitive mind and debating skills. I am told that it is not unusual to see the two of you arguing the principles of cosmology at the breakfast table on a Sunday morning.

30 Your Honour's commitment to the improvement of our legal system and to assisting members of the community and the legal profession is widely regarded and highly respected.

31 Your Honour, the solicitors of this State applaud your elevation to the Bench and wish you many satisfying and rewarding years as a judge of the Supreme Court and the Court of Appeal.

32 As the court pleases.

33 **BASTEN JA:** I am most grateful, Mr Attorney and Mr McIntyre, for your generous, indeed very generous words of welcome. Today is obviously a special day for me but its significance is increased immeasurably by the presence of so many of my family, friends and colleagues. May I thank you all for your presence this morning.

34 As the Attorney noted, my first job in Sydney was with Freehill Hollingdale & Page, Solicitors. Santow JA, then an influential partner with the firm, provided a kind of legal soup kitchen for refugees from South Africa - I was only from South Australia but I received a similar welcome. There is a nice symmetry for me in the opportunity after thirty years of our divergent ways to work again with my first mentor in Sydney.

35 I also owe a debt of gratitude to many for guidance and support in my early days of practice. It is invidious to be selective, but I should acknowledge Professor Neil Rees, now at the University of Newcastle but then at Kingsford Legal Centre, who introduced me to discrimination law; and to David Bennett QC, now Commonwealth Solicitor-General, who led me in my first over-ambitious foray into the High Court.

36 I joined Frederick Jordan Chambers nearly twenty-five years ago when it was establishing the strength and reputation it enjoys today. Over the years our second floor developed into, as I believe, as diverse and congenial a community as one could find at the Bar. Needless to say the cohesion and effective operation of a large chambers such as Frederick Jordan requires first class support services and I pay tribute to the work of our clerk, Barry Doorey and all his staff, in which group I include the ever-reliable librarians and, essential these days, the IT staff.

37 I have also shared the assistance of a number of excellent research assistants whose abilities have greatly enhanced my practice and are now appropriately reflected in their subsequent careers. But of those who helped me to find my feet in Frederick Jordan Chambers, Ian Barker QC and Greg James J were extraordinarily generous with their time and encouragement. It is a matter of personal regret that the latter until very recently, Greg James J of this Court, has been forced into early retirement by his failing eyesight.

38 More generally I owe much to the many colleagues with whom I worked at the Bar. As they will attest I had a discouraging habit of rewriting unexceptionable draft advices and submissions as I struggled to come to grips with issues they had already mastered. Hearing of various aspects of my earlier activities immediately brings to my mind the contributions of the many others who participated. For example in the early days of the Community Legal Centres there were dedicated individuals, not only lawyers, who were convinced that the rule of law could not be more than an abstract concept unless serious efforts were made to extend the availability of legal services to a broader section of the community. Many such people have been credited with involvement in the establishment of Redfern Legal Centre. Indeed, so many have been publicly credited with that involvement that we used to joke that anyone concerned about social justice expected to be granted that accolade, whether or not they had ever set foot on the premises. However, more seriously, there were many committed volunteers who provided thousands of hours to the establishment and operation of community legal centres before they became an accepted part of the delivery of legal aid in New South Wales and, indeed, across the country.

39 Many of those early participants are with us and hold honourable positions in the community. So far as Redfern is concerned, they include Virginia Bell J and Terry Buddin J of this Court and George

Sdnkowski, now a magistrate. Some, however, are no longer with us. Among these are John Kirkwood and Phillip Molan. John devoted much of his time to maintaining almost single-handedly the high standards of practice at the Redfern Legal Centre; tragically John died from a brain tumour, still a young man. Phil Molan was a founder of Fitzroy Legal Service, Melbourne, before he came to the Public Interest Advocacy Centre here in Sydney. He spent several years as an honourable and humane magistrate before succumbing to cancer in 1997.

40 Similarly, in relation to land rights and native title litigation, my contribution was entirely dependent on the dogged efficiency and legal creativity of practitioners working for various land councils around Australia, including the Northern and Central Land Councils in the Northern Territory; the Torres Strait Regional Authority; the Cape York Land Council; the Kimberley Land Council; the Aboriginal Legal Rights Movement in South Australia; and the Carpentaria Land Council through Chalk & Fitzgerald. As Andrew Chalk said on a recent occasion, none of us who knew him can forget the extraordinary contribution to this work made by the late Ron Castan, QC. In the 1970s Ron was led to wonder, while working on a case involving customary land law in Papua New Guinea, why the legal circumstances of indigenous Australians were seen to be so different. The result, of course, was *Mabo*, which he argued for the claimants.

41 Although it has been lightly touched upon from the Bar table, it is clear that much of my recent legal work has been undertaken in Federal jurisdiction. The daunting challenge of coming to grips again with the full expanse of State jurisdiction is mitigated by three considerations. First, I am privileged to join a Court, the members of which have extraordinary breadth of legal experience and depth of intellectual expertise.

42 Secondly, I know from experience that the Court can rely on the highest standards of assistance from the legal profession in this State. Thirdly, I am reassured by the thought that much of the Court's jurisdiction is concerned with questions of law, a growing proportion of which involves statutory construction. By that I do not seek to convey that issues of statutory interpretation are either easy or mundane, but simply that the relevant principles are of general application within our national legal system. However, what is surprising is how little attention is paid to the underlying principles. We tend to get by with an incoherent jumble of maxims and presumptions and no clear priority for their application in particular circumstances.

43 It might surprise many, though perhaps not so many in this audience, to suggest that principles of statutory construction are of fundamental constitutional importance. In public law they define the proper boundaries between the Parliament and the Executive, and between both Parliament and the Executive on the one hand and the courts on the other. But how many legislators in conferring a statutory power on a Government officer think about whether that power will be constrained by some implied principles of procedural fairness governing its execution and about what those principles may be? How clearly do we, when articulating a presumption that the Parliament does not intend to interfere with fundamental human rights and freedoms, appreciate that we are formulating a principle with constitutional significance because it accords a certain level of power to the judiciary at the expense of the legislature?

44 When we are told that the State constitution embodies no principle of separation of powers, we should realise that such a statement cannot be taken too far. In a famous passage in *Quin's case*, Sir Gerard Brennan explained that to allow judicial review to question the merits of administrative action, as opposed to its legality, would be to permit the judiciary to impinge on the functions of the Executive. That canonical statement, containing an inherent assumption about the separate spheres of the administration and the judiciary was made in relation to an exercise of State power.

45 These thoughts are not, I am sure, entirely novel to any of you. The importance of principles of statutory construction has been articulated in many judgments of this Court and particularly in a number of judgments of the Chief Justice. Very recently this theme was picked up by the Bar Association in organising a conference on the topic of statutory construction, which drew a distinguished audience on a pleasant autumn weekend in Sydney, something which might well have been unthinkable ten, or perhaps even five years ago.

46 May I finish on a personal note. Today is a celebration of two birthdays, neither of them mine. Both are tinged with sadness. One is that of former judge of Appeal, Simon Sheller, whom I am honoured to replace. His great achievements were celebrated here last Friday: his courtesy, legal learning, insight and elegance of writing are ideals which I can honour by seeking to emulate.

47 Today is also the 102nd anniversary of the birth of my father, Henry. For many years I was under the misapprehension that I had chosen to study law in a fit of mild rebellion, there being no lawyer in our family. However, my brother Tony was amused recently to hear of that conceit and disabused me of it, assuring me that the decision had been made by my father, who guided me deftly, and all unsuspecting into a path he thought might suit me. Today confirms the soundness of his judgment, although he did not survive to witness it.

48 My mother Mildred, who raised me with skills of a less argumentative kind, cannot be with us today but will reach her 100th birthday later this month. I also pay tribute to the contribution of my late godmother, Mollie Adams, whose gifts from my birth to her death stay with me. Today's events bear witness to one of their common achievements. I am grateful to them and to members of my family here today. Thank you all, again, for your presence.
