

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

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

Thursday 7 March 2013

**SWEARING IN CEREMONY OF
THE HONOURABLE JUSTICE ARTHUR ROBERT EMMETT
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES
AND AS A JUDGE OF APPEAL**

- 1 **EMMETT 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 to you my Commissions.

(Commissions read)

(Oaths of office taken)

- 2 **BATHURST CJ:** Justice Emmett, on behalf of all members of the Court and myself can I say how delighted we are that you have joined us and we do hope you have a very happy time on this Court as you had in your previous occupation.

- 3 **THE HONOURABLE GREG SMITH SC MP ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour, on behalf of the State of New South Wales and the New South Wales Bar it is my great pleasure to congratulate you on your appointment as a judge of appeal of the Supreme Court. I would also like to extend my congratulations to your wife of nearly thirty-seven years, Federal Magistrate Sylvia Emmett, your six children, Laurence, Hilary, Robert, James, Phoebe Jane and Christopher, and six grandchildren.

- 4 You were born in 1943 in Crows Nest New South Wales. Your early education was at Lane Cove Public School, Artarmon opportunity class and North Sydney Boys High School. You then went on to study arts and law at the University of Sydney and were conferred a Bachelor of Arts in 1964, a Bachelor of Laws in 1967 and Master of Laws with Honours in 1976. In 2009 the University of Sydney conferred on you the degree of Doctor of Laws honoris causa.
- 5 Your early career as a commercial solicitor began when you came to the attention of the Honourable Trevor Morling QC while delivering goods from your father's shop. He introduced you to one of the senior partners of what was then Dawson Waldron Edwards & Nicholls. You went on to serve articles of clerkship with the firm from 1964 to 1967 when you were admitted as a solicitor in New South Wales. Between 1968 and 1970 you worked in Sydney for Dawson Waldron, as it was then known. and in London for Clifford Turner & Co, as that firm was then known. You became an Associate of Dawson Waldron in 1970 and a partner in 1971. While a solicitor you engaged in a wide range of commercial transactions with an emphasis on merges, acquisitions and corporate finance.
- 6 In 1978 you were admitted as a barrister in New South Wales and were subsequently admitted in other jurisdictions. You were appointed Queens Counsel for New South Wales in 1985 and for other Australian jurisdictions soon after. Known to be one of the leading commercial barristers in the country you have practised in commercial litigation in almost every Supreme Court in Australia and you appeared on many occasions in the High Court and appeared in the last appeal from Australia to the Privy Council ably supported I hear by your wife and her brother, Alexander 'Sandy' Street SC, who is at the bar table here today.
- 7 The quick thinking, clear-mindedness and efficiency you bring to your judicial duties is highlighted by your ability to deliver ex tempore judgments in presiding over complex matters. Appointed as a Federal Court judge in

1997 you have since been a member of competition, corporations, patents, admiralty and taxation panels of the Federal Court and are presently the senior puisne judge in the New South Wales registry of the Court. You have for some years acted as the registry's corporations judge, list judge and appeals judge. Since April 2001 you have been a presidential member of the Copyright Tribunal becoming president in 2007. You have also served as a part-time commissioner of the Australian Law Reform Commission serving on the division dealing with the enquiry into discovery.

- 8 A further testament to your pre-eminence in commercial law is your membership of the panel of recognised international market experts, a body established in The Hague to assist judicial system in the settlement of disputes on complex financial transactions chaired by Lord Woolf of Barnes, former Lord Chief Justice of England and Wales.
- 9 Known for your generosity, while a solicitor you served on several committees of the Law Society of New South Wales and as a barrister several committees of the New South Wales Bar Association. You were a governor of Winifred West schools from 1999 to 2004 and chairman of governors from 2004 until May 2007. You have also been a fellow trustee of Sydney Grammar School since 2001. Presently the Challis Lecturer in Roman Law you have been teaching Roman law at Sydney University since 1978 and also teach Roman law at the University of New South Wales. For several years you taught real property for the Law Extension Committee of the University of Sydney. You have been described as an extremely fine teacher. I understand that the numbers of students studying Roman law which you teach as a comparative law topic has grown significantly in the time since you have been teaching the subject, no mean feat.
- 10 Your contribution to legal education has also extended to the world of legal publishing. You have been a consultant editor and contributor to a number of publications including the Butterworths Australian Legal Dictionary, the Concise Australian Legal Dictionary and Trust Law Australia. You are

presently general editor of Butterworths Corporation Law Bulletin and a member of the editorial board of the Journal of Banking and Finance Law in Practice.

- 11 Now, we get to the more serious stuff: A keen cricketer, who is particularly renowned as a handy bowler, you were part of the Wentworth Wombats touring party to England in 2009. We understand you bowled your overs in a single spell to prevent seizing up. I have some camaraderie with you on that. In between bowling out the odd barrister you are also known as a railway buff, reputed to be able to recite in order the name of every London tube station. I hear that you had a miniature train that snaked through the garden of your property at Bowral and a model train complete with tracks and stations can be found in your chambers. I must tell my colleague, Gladys Berejiklian, of that, we may need those, who knows - I'm only joking.
- 12 You also have a reputation for being without question one of the most law abiding citizens to have walked the earth, particularly with regard to traffic laws. I have heard that you will not cross a road within the prescribed distance from a marked foot crossing and only then smartly at a ninety degree angle to each kerb. You would be very noticeable in this city. I also understand that some years ago now you and your wife, Sylvia, owned a small fox terrier dog that had a tendency to wander off. As the registered owner of the beast you were horrified to find in the post one day a cunningly worded invitation from the local council to attend the then Hornsby Court of Petty Sessions to answer the egregious allegation of dog not on lead. With top self-representation your Honour's brush with the law had a happy ending, thanks to s 556A of the *Crimes Act*, now s 10. Your blemish-free existence on this moral coil was maintained and you slept soundly for the first time in weeks. The dog was acquitted.
- 13 Your colleagues describe you as a gentleman in the truest sense of those words and as somebody who is able to bring both an eye for detail and commonsense to your judgments. I am delighted to be welcoming a

person of your strengths, integrity and experience to the role of a judge of appeal of the Supreme Court of New South Wales.

14 **MR JOHN DOBSON PRESIDENT LAW SOCIETY OF NEW SOUTH**

WALES: In early Roman times the first day of the new year was observed on 1 March and declared a public holiday. It kicked off a month of special festivals to honour Mars, the God of War, and mark the start of the military campaign period. The original Roman calendar was based on the first three phases of the moon, the sighting of the new moon heralded the first day of the new month known as the kalends. As a fall back position, Ms Manuel sought leave to amend her notice of appeal to include a ground impugning the order for costs made by the primary judge. Leave to amend was opposed by Mr Lane.

15 On 4 April 2012, the primary judge ordered that Ms Manuel pay Mr Lane's costs of the proceeding prior to 17 June 2011 on the ordinary basis and from 17 June 2012 on the indemnity basis. Ms Manuel now appears to contend that his Honour erred in failing to have regard to submissions made on the question of costs. In her written submissions on the question of costs of 29 February 2012, Ms Manuel began with the proposition when determining Mr Lane's entitlements, the Court used a list of the parties' assets and liabilities that did not take into account their respective legal fees. The submission referred to the fact that Mr Lane had given evidence that his legal costs amounted to \$150 000, which he had paid, but that Ms Manuel did not quantify her liability for costs although it was submitted, and accepted by his Honour, that her unpaid costs should be regarded as being of a similar amount to those incurred by Mr Lane.

16 Ms Manuel contended that, because the primary judge did not add back the amount of the costs paid by Mr Lane, the pool of property was reduced by costs of approximately \$150 000 expended by Mr Lane. She contended that, it was "palpably unfair" for the Court to make an order that Mr Lane be reimbursed for monies that were not taken into account when determining the pool of property available for division between the parties.

She contended that Mr Lane was, in essence, double dipping and that she was being asked to pay for a liability already incurred, while the money used by Mr Lane to pay those costs had not been taken into account by the primary judge when determining what order should be made under the Act. Ms Manuel contended that the manner in which his Honour dealt with the issue of costs would preclude the Court from making an order that Ms Manuel pay Mr Lane's costs. He said that, in circumstances where Mr Lane was not required to account for the legal costs he paid, she should not be ordered to pay those costs.

- 17 from which the word calendar was derived. The emergence of the first moon's quarter was referred to as the nones. In March that day it fell on the seventh of the month. While the Romans did not deem this a public holiday it was still a significant day in the calendar and today is not exception.
- 18 In deference to your Honour's propensity to advise colleagues as to the Roman holiday most proximate to the day on which you meet I would venture that 1 March, the festival in honour of the goddess of the year, Anna Perenna, would be the closest on this occasion. It has been said that 1 March was a day when one should have a drink for each further year of life one wanted to live. Perhaps we should consider it fortunate that your Honour's swearing-in falls on the seventh.
- 19 Your Honour, on behalf of the solicitors of New South Wales and the many young lawyers to whom you have imparted your wisdom and passion for the law and legal history I am pleased to add my congratulations and well wishes. Growing up in Sydney's lower north shore your late father, Arthur, and mother, Phoebe, instilled in you and your brother, Stuart, a keen understanding of the value of a good education, hard work and a healthy respect for authority and the rule of law. Your Honour showed early promise when you were admitted to opportunity classes in late primary school prior to enrolling at North Sydney Boys High where you excelled both academically and as a wicket keeper for the first eleven team. You

further perfected the later skills during your clerkship at Dawson Waldron with the assistance of erasers, rubber bands and cardboard bats before graduating to the dizzy heights of the eleventh floor of Wentworth Chambers Wombats. This was in addition to your long association with the local Lane Cover club, a season for Highgate in London as well as the roles as cricket administrator.

- 20 While your Honour's initial career leanings were in the field of medical science exposure to detective stories in your mid teens whetted your interest for legal science. You have never looked back. Indeed, the breadth and depth of the cases that have come before your Honour in the course of some forty-six years of service to the profession would have afforded you many opportunities to indulge those earlier interests. As a solicitor and later partner with Dawson Waldron for some eleven years your Honour was a member of the Young Lawyers Committee from 1972 to 1975 following which you served three years on the Society's Professional Office Administration Committee. If you are still a member of the Law Society today your years of service would be approaching those whom we affectionately recognise as the golden oldies.
- 21 While your Honour has moved on you have continued to give back to the profession, mentoring and nurturing the legal professionals of the future and instilling in them the values, traditions and ethical behaviours essential for upholding the rule of law and the proper administration of justice. Your Honour has made an immense contribution to the education of law students and young lawyers, shared your knowledge with great passion and enthusiasm. Such is your calling that when you began teaching Roman law at Sydney University you lectured for no monetary gain as the subject was not compulsory for the undergraduate degree. For more than thirty years your Honour has sought to demonstrate the importance of Roman law, now legal tradition, as an insight into comparative law. As your Honour has remarked, the great genius of the Roman jurists was to have devised the institutional scheme that enabled students to get an overall view of the law. Recently your Honour reminded young lawyers at

a seminar on intellectual property and technological law of the continued relevance of Justinian's text book for law students, The Institutes published in 533AD, and in particular the principles of practice for lawyers being to practise honourably, not cause unnecessary harm to the other side and to give each party what he is entitled to under law. Such is the extent of your Honour's abiding interest in Roman law your much loved family pooch is named Tribonian after a jurist appointed by the Emperor Justinian the First to prepare the new Imperial code, the Corpus Juris Civilis.

22 With your wife, Sylvia, a Federal Magistrate, and three of your sons in the law that is quite an achievement for one family, despite that fact that your in-laws remain 'Streets' ahead when it comes to generations of lawyers. While your three lawyer sons say they had no pressure to follow a legal path one of them does recall your Honour saying that if he was good at primary school he could study Latin when he went to big school. Interestingly, such a compelling call to action failed to deter your sons from pursuing a career in law. On Monday of this week I attended and spoke at the swearing-in of his Honour, Justice Allsop AO as Chief Justice of the Federal Court of Australia who noted in his address the mutual respect and comity of Federal and State jurisdictions and the shared utilisation of talent. One of the collaborations between the Federal and Supreme Court jurisdictions in which your Honour has been a keen player is the biannual judges' series. Not only have you championed these collaborations, your indomitable charm has leant sway to corralling others into participating. Always ready to rise to the challenge one of your favourite presentations is on the matters relating to affidavits, the good, the bad and the ugly. Invariably your presentations on such matters are witty and always engaging.

23 For your Honour, the members of the Supreme Court bench would be well known to you. I am sure you will miss some aspects of the judicial challenges of being a trial judge but on the positive side, as you have remarked in a recent presentation, the appellate court has the advantage of the findings made by the trial judge. At this juncture I think it may be an

opportune time for your Honour to consider the Lex Cornelia, a system of Ancient Rome as referred to in your swearing-in the Federal Court in 1997 and perhaps issue an edict publicly committing to a philosophical and practical statement of your intentions. Your Honour, we wish you well.

24 **EMMETT JA:** Chief Justice, Mr Attorney, Mr Dobson, judicial colleagues both old and new, members of my family, ladies and gentlemen: I have often said that I could not imagine a better job than the one I have had for the last sixteen years on the Federal Court of Australia. However, I am certain that my limited time on this great colonial court will be at least as rewarding as my time on the Federal Court. I served under two exceptional men as Chief Justice, Michael Black and Patrick Keane, Michael also shared my very rational interest in railways.

25 The President of the Law Society spoke of the change of the beginning of the year. When Protestant England finally adopted Pope Gregory the Thirteenth's changes to the calendar devised by Julius Caesar, eleven days were omitted from the year 1751. The first day of the year was also changed from 25 March to 1 January. But for the changes, today might have been twenty-sixth February and I would then have been able to experience several days under the Presidency of James Allsop rather than several days under his Chief Justiceship. In whatever capacity service under James Allsop was destined to be short.

26 I leave the Federal Court with what I believe are long-lasting friendships, many of which began before my appointment. I will always treasure those friendships.

27 I am delighted now to be able to serve under the Chief Justiceship of Tom Bathurst and the Presidency of Margaret Beazley, both of whom are friends of long-standing. As a bonus, I have as new colleagues, Rob Macfarlan and Tony Meagher, who have been very close friends for well over thirty years. I am very much looking forward to serving with all my new colleagues on the Supreme Court. Apart from acting judges, I think

only two of them, Margaret Beazley and Carolyn Simpson, were on the Court when I left the Bar at the end of 1996.

- 28 It is fifty years this week since I began studying law across the road, not in the monstrosity presently standing in Phillip Street as the old law school, but in its predecessor, on the site now occupied by the Leagues Club. I was taught bankruptcy by Laurence Street, who some years later became my father-in-law. I am very pleased that he is here today in the Banco Court in which he was the first to preside in 1977, although it has been somewhat modernised since he last presided in it.
- 29 Allusion has already been made to my late parents and the opportunity that they afforded me to study law. My father could not wait to leave school when he turned fifteen. That was in the late 1920s at the height of the great depression. He had hoped to go into the Police Force as his father, grandfather and great-grandfather had done, as distinct from my wife whose father, grandfather and great-grandfather achieved much higher things. Because of a minor defect in his eyesight my father was not accepted into the Police Force. My mother, on the other hand, was made to leave school against her will at the age of twelve. Her family saw no point in wasting education on a mere girl. My parents used to speak of the difficulties of looking for work during the depression. However, they managed to get by and ultimately they brought a greengrocer's shop at Northwood, where they toiled for twenty-five years bringing up my younger brother, Stuart, and me. My mother's lack of the education she had craved was I am sure an important factor in her insistence that my brother and I seize every opportunity for education that was available to us. She often said she did not want us to spend our lives with our hands in the spud bag. In those days potatoes came in large hessian bags covered in dirt, not nicely washed in clear plastic bags as they seem to these days. It is wonderful that my brother is able to share this day today.
- 30 in the early 1960s, as I think Mr Dobson said, it was necessary to serve articles of clerkship to qualify for admission to practise. While I was

studying I earned my keep at home by delivering goods and vegetables to my parents customers in Northwood and Longueville and, as he indicated, one of those customers was the Morling family. Trevor arranged for me to meet Dawson Waldron Edwards & Nicholls, where I spent some fourteen years. I am delighted that Trevor is here today. I am equally pleased to have some of my former partners at Dawson Waldron here today, Nicholas Carson, Donald Magarey, Dennis Scott and Ian Betts.

- 31 When I went to the Bar I was given exceptional opportunities by two men, David Bennett and Richard Conti. I read with David, who had preceded me as an articled clerk at Dawson Waldron Edwards & Nicholls. He taught me much about the LORE of the Bar. I joined the eleventh floor where Richard was one of the leaders. Richard very much took me under his wing. The legendary Paul Daley was our clerk then and continues as the doyen of barristers' clerks. I am delighted that there are many members of the eleventh floor here today, particularly John Maconachie.
- 32 Over the years, there have been several translations between the Sydney Federal Court and the Supreme Court of New South Wales. Sir Nigel Bowen was Chief Judge in Equity when he was appointed as the Federal Court's first Chief Justice. Sir William Deane, Ian Sheppard and Michael Foster followed him to the Federal Court. In the other direction, I was preceded by Margaret Beazley and James Allsop, who has traversed in both directions.
- 33 Despite, or perhaps because of, those movements, there has always been great comity between the two Courts. That is probably just as well, since we share this building and share the Law Courts Library. That comity has been engendered at least in part by the attendance of judges of both Courts at occasional joint lunches. Shortly after my appointment to the Federal Court, Ken Handley asked me to take on the responsibility for arranging the lunches and I have been doing so ever since. In discharging that responsibility over the years, as I think somebody remarked, I have endeavoured to include something interesting in the invitation to the lunch

about the date of the lunch. Accordingly, my colleagues on both Courts will not be surprised to hear that I am going to say something about today's date, I suspect they will be disappointed if I did not.

34 Today is 7 March. As Mr Dobson said, that is the nones of March. On the nones of March in 161, Marcus Aurelius became Emperor of Rome. He succeeded his father-in-law, something I suppose I am doing, Antoninus Pius who, it is said, died of acute indigestion brought on by eating too much cheese. The nones of March was also the birthday of the Roman Emperor Geta, who succeeded his father, Septimius Severus, in AD211. Septimius had succeeded Commodus, the idiot son of Marcus Aurelius, about whom the film, *Gladiator*, with Russell Crowe was made in 2000. Mention of Geta is an excuse to tell of the circumstances of the demise of Papinian, the greatest of the classical Roman jurists. He was a close friend of Septimius. I find it a profoundly inspiring story for lawyers, which I never tire of retelling.

35 On his death bed, Septimius appointed his two sons, Caracalla and Geta, to succeed him as joint rulers. Caracalla disliked the idea of sharing power with his brother and had him murdered, thereby committing the terrible crime of parricide. Parricide is the killing of a very close relative. As any of my former Roman law students will know, the punishment for parricide was to be sown into a sack with a dog, a cock, a snake and a monkey and thrown into a nearby sea or river. Caracalla did not like the idea of that. Papinian, as the leading jurist at the time, was asked by Caracalla for a legal justification for the death of Geta. The noble response of Papinian was that it is easier to commit parricide than to justify it. He refused to give any legal justification for Geta's murder. For that he himself was put to death. I hope, Mr Attorney, that the Government of New South Wales will not treat its leading jurists in that way simply because it does not get the advice or decisions that it wants.

36 The time of Marcus Aurelius and his four predecessors is regarded by many as the zenith of Roman civilisation, marked as it was by the classical

period of Roman jurisprudence, and the rule of law under the Pax Romana established by the Emperor Augustus. The great historian, Edward Gibbon, described that time as a period in the history of the world during which the condition of the human race was the most happy and prosperous. One might hope that the condition of the people of New South Wales, and its Supreme Court, can be described for many years to come as happy and prosperous.

37 I am thrilled to have dear friends, as well as members of my family, here today, especially my darling Sylvie and four of our six children, Robert, James, Peach and Christopher. The other two, Laurence and Hilary, live overseas. I am pleased that the four that are here have their wonderful partners with them. They all know how much they mean to me. I am especially happy that my five year old granddaughter, Emily, has been allowed to take the morning off from her first term at school.

38 You all do me a great honour by your presence this morning, maximas vobis gratias ago, I thank you all very much.
