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TRANSCRIPT OF PROCEEDINGS

O/N H-1661873

FEDERAL COURT OF AUSTRALIA

CEREMONIAL SITTING OF THE FULL COURT

TO FAREWELL

THE HONOURABLE GEOFFREY FLICK SC

THE HONOURABLE LESLIE BAIN ALLSOP, Chief Justice
THE HONOURABLE JUSTICE RARES
THE HONOURABLE GEOFFREY FLICK SC
THE HONOURABLE JUSTICE PERRAM
THE HONOURABLE JUSTICE JAGOT
THE HONOURABLE JUSTICE NICHOLAS
THE HONOURABLE JUSTICE YATES
THE HONOURABLE JUSTICE BROMBERG
THE HONOURABLE JUSTICE KATZMANN
THE HONOURABLE JUSTICE GRIFFITHS
THE HONOURABLE JUSTICE FARRELL
THE HONOURABLE JUSTICE WIGNEY
THE HONOURABLE JUSTICE PERRY
THE HONOURABLE JUSTICE MARKOVIC
THE HONOURABLE JUSTICE BROMWICH
THE HONOURABLE JUSTICE BURLEY
THE HONOURABLE JUSTICE LEE
THE HONOURABLE JUSTICE THAWLEY
THE HONOURABLE JUSTICE STEWART
THE HONOURABLE JUSTICE ABRAHAM
THE HONOURABLE JUSTICE HALLEY
THE HONOURABLE JUSTICE CHEESEMAN
THE HONOURABLE JUSTICE GOODMAN

SYDNEY

9.30 AM, FRIDAY, 4 MARCH 2022

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

ASSOCIATE: Farewell of the Honourable Geoffrey Flick.

ALLSOP CJ: May I welcome everyone who is here in person or by video to this delayed ceremonial sitting of the Court to mark the retirement of the Honourable Geoffrey Flick, and to farewell a valued colleague and friend, and a judge of great experience and ability. May I first acknowledge the traditional custodians of this land upon which we meet today, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging, and pay my respects to the traditional owners and custodians of the lands wherever this live stream is being seen and heard.

It is a great pleasure to be able to welcome you to this ceremonial sitting today. These ceremonial occasions provide an invaluable opportunity to acknowledge the service of judges to the Court and to the public, as well as particular contributions to the law and the Judiciary.

We are today joined on the Bench by all of the current Sydney Judges, as well as Justice Bromberg from the Victorian District Registry. Justice Greenwood from the Queensland District Registry has been prevented from attending today by reason of the floods in Brisbane, and he sends his particular and special apologies. Justice Besanko is not able to be with us by reason of his obligations sitting today, and Justice Banks-Smith sends her apologies.

I especially welcome today all of Justice Flick's personal guests, particularly Kim, your wife; and your children, Allan, Giles and Marnie; Kirsty, your daughter-in-law; Ed, your son-in-law; and Zoe, your soon-to-be daughter-in-law, if I may put it that way; and your granddaughter, Calli-Rose – your new job.

Might I also acknowledge the large number of distinguished guests, including the Honourable Chief Justice Bathurst on his last day, and his wife, Robyn; the President of the Court of Appeal, the Honourable Justice Andrew Bell on his last day, I think, as President, before assuming responsibility as Chief Justice; Chief Judge of the Land and Environment Court, Justice Preston; the Honourable Judge Dale of the Federal Circuit and Family Court of Australia; Deputy President McCabe; retired judges of the Federal Court, the Honourable Kevin Lindgren, the Honourable Arthur Emmett, together with his wife, Sylvia, formerly a Judge of the Federal Circuit Court, the Honourable Roger Gyles, the Honourable Peter Jacobson, the Honourable Richard Edmonds, and the Honourable Dennis Cowdroy.

May I go off script for a moment, with the permission of Justice Flick. This is the only public occasion of the Court that I will have the opportunity on behalf of the Court before Chief Justice Bathurst's retirement to express my and the Court's gratitude for the close and cordial relations between the Supreme Court and the

Federal Court in our time working together. It is not new. It carries on a fine tradition that has always existed. This is as it should be in a federal polity. It is our duty. It does not need to be said, but it should be said. Not a word of rivalry, nor a word of tension; only cooperation and mutual respect and assistance at all times. May I thank you, Chief Justice.

There are apologies, including the Commonwealth Attorney-General; the Chief Justice of the High Court, Chief Justice Kiefel; Chief Justice Alstergren; the Governor of New South Wales, Her Excellency the Honourable Margaret Beazley; the Solicitor-General for New South Wales; and the Honourable Alan Robertson.

Commencing as a Judge of the Federal Court on 15 October 2007, you served on the Bench for almost 15 years, after 14 years as Senior Counsel and 11 years before that as a barrister, after a distinguished career as an academic. As a judge of this Court, you heard and determined a vast array of cases, most notably in the areas of public law, employment, defamation and crime, all over the country, including in the Australian Capital Territory.

With your balanced and careful approach to the law, you have made significant contributions to practice and procedure, including in 2008 in *SZKLO,*[1] and in 2009 in the *Australian Postal Corporation*,[2] you provided guidance on the proper role of a judge sitting in the appellate jurisdiction and the centrality of adequate reasons to the proper exercise of judicial power.

In 2012,[3] you set out the appropriate focal length to be applied to reasons of an administrative decision-maker, and the need to exercise caution in applying *Wu Shan Liang*,[4] a case we are always referred to by the Minister. In 2014, you set down guiding principles on appeals from and standards of evidence in the Administrative Appeals Tribunal in *Sullivan*;[5] and in 2021, as a member of the Full Court Bench, you made clear that certification of pleadings imposes an intellectual discipline upon lawyers and a duty to conduct litigation in accordance with the overarching purpose of the Act.[6]

You have provided authoritative guidance on the "no-evidence" ground in *Dunghutti*:[7] on estoppel and abuse of process in the context of extradition in *Brock*;[8] on the fair operation of the National Disability Insurance Scheme in *WRMF*;[9] on the

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[1] *SZKLO v Minister for Immigration and Citizenship* (2008) 247 ALR 582.
[2] *Australian Postal Corp v Hughes* (2009) 111 ALD 579.
[3] *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 290 ALR 326.
[4] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272.
[5] *Sullivan v Civil Aviation Safety Authority* (2014) 322 ALR 581.
[6] *Sabapathy v Jetstar* (2021) 283 FCR 348.
[7] *Dunghutti Elders Council (Aboriginal Corporations) RNTBC v Registrar v Aboriginal and Torres Strait Islander Corporation* (2011) 279 ALR 138.
[8] *Brock v Minister for Justice and Customs* (2007) 243 ALR 315.
[9] *National Disability Insurance Agency v WRMF* (2020) 378 ALR 449 (Flick, Mortimer, Banks-Smith JJ).

tort of passing off and its interaction with misleading and deceptive conduct;[10] and on the power of a local registration authority under the *Mutual Recognition Act 1992* (Cth), affirmed in *Andriotis*.[11]

You have been a member of many enduring migration Full Court Benches, in cases such as *SZQRB*,[12] which set down the test for complementary protection, and *ARJ17*,[13] which ensured statutory power was required for a policy of mobile phone confiscation from detainees in immigration detention. You always recognised the legal and human importance of these migration cases. Their volume requires hard work and discipline, and their importance should never be underestimated, as you always recognised.

You have also been heavily involved in the employment practice area, and in the last few years you have heard and dismissed many claims, notably, recently, by *ALDI v the Transport Workers' Union* in relation to their dispute.[14] You dismissed an appeal from a class action by underpaid workers on the Pilbara natural gas plant,[15] and in *Bay Street Appeal*,[16] sitting together with myself and Justice White, we dealt with industrial activity as defined and the limits of the operation of the *Fair Work Act 2009* (Cth).

In 2015, you decided an important case on the misuse of market power and its interaction with the pharmaceutical patent of a cholesterol drug in the *ACCC v Pfizer*,[17] and last year dealt with one of the first cases of defamation by social media, making the consequential findings as to whether a Twitter account could be considered a news medium.[18]

In each of your cases, your reasons were expressed clearly and eloquently (though always in the passive voice) and with regard to the entire human context of the proceeding. In your final judgment, dealing with the dispute between New South Wales Trains and the Union concerning the new fleet of electronic trains, you took a moment to explain the name of the new fleet, Mariyung, was drawn from the language of the Darug nation, meaning "emu", and that the people of the Darug nation were the traditional custodians of what is now large swathes of Western Sydney.[19]

Your practice has been broad, and your contribution to this Court and the public at large profound. You disposed of matters and delivered judgments with impressive

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[10] *AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd (No 2)* (2009) 262 ALR 458.
[11] *Andriotis v Victorian Building Authority* (2018) 259 FCR 354 (Flick, Bromberg, Rangiah JJ).
[12] *Minister for Immigration and Citizenship v SZQRB* (2013) 296 ALR 525 (Lander, Besanko, Gordon, Flick, Jagot JJ).
[13] *ARJ17 v Minister for Immigration and Border Protection* (2018) 360 ALR 64 (Rares, Flick, Rangiah JJ).
[14] *ALDI Foods Pty Limited v Transport Workers' Union* [2020] FCA 269.
[15] *Thiess Pty Ltd v Frank Sheehan* [2020] FCAFC 198 (Flick, Kerr, Snaden JJ).
[16] *CFMMEU v ABCC* [2020] FCAFC 192.
[17] *ACCC v Pfizer Australia Pty Ltd* (2015) 323 ALR 429.
[18] *Kumova v Davison* [2021] FCA 753.
[19] *NSW Trains v Australian Rail, Tram and Bus Industry Union* [2021] FCA 883.

promptness. Over the last 10 years, barring a couple of matters, every one of your single judgments were delivered within less than six months. Those who understand the nature, press and flow of work of the Court will understand the impressive feat involved in this, and the reason you're always here before anyone else.

You contributed your services to the Library Committee for many years, from September 2008 to April 2017, and also you were a member of the Judgments Template and Style Guide Committees.

You have been a wonderful colleague. There have been idiosyncrasies: the football jerseys, the absolute insistence on the passive voice, the occasional playful abruptness, taking my car park space this morning. You are not renowned for your love of monthly Judges' business lunch meetings. So much so that when the day before your birthday came last year, signalling the eve of the end of your judicial tenure, the sound of the swinging door to your chambers and the call of the lift button seemed to indicate a lack of desire for a farewell, as did the unanswered calls to you about the subject before and around that time. No doubt you were on the beach at Forster. I'm very glad that you called me, asking in that mock confrontational style when your farewell was to be.

COVID has delayed it but I'm very pleased that we are here.

Your independence and strength of intellect brought to the judicial task were legendary. You dislike humbug, cant and pretention. Despite an occasional aloof veneer, your judicial work in the Court reflected a demand for human decency and for respect of the judicial function, demands that saw, on occasions, the need to confront the Executive.

I have sought your help on many occasions. You have always responded with energy, wisdom and clarity. You have never let the Court down. You have never complained. You always did what was asked of you with dispatch, clarity and intellectual rigour and correctness. The public could not have been served better than in the living embodiment of judicial independence you have shown.

I am, I should say, in possession of a letter written to you when you joined the 21st floor, then "led", as he would have it, by then Justice Peter Jacobson as self-styled Sydney Senior Puisne Judge, who is here today. The letter reflects a failed attempt by colleagues to enforce a dress code on the floor that banned rugby sweaters and T-shirts, other than in January, and that prescribed the size, design and frequency of washing of such attire if worn in January. The abject and complete failure of control by your colleagues, lacking in statutory authority as it was, is another testament to your independence and insistence on individuality in what is otherwise a demanding existence of judgment production.

Thank you for your time on the court, for your friendship and for your wisdom. You will be greatly missed as a colleague. The people of Australia have been well and faithfully served. On behalf of all the judges of the Court, may I wish you and Kim a joyous, restful and rewarding retirement.

Ms Supit, Director of the Australian Government Solicitor, Sydney, on behalf of the Attorney-General.

MS J. SUPIT: May it please the court. I would like to begin also by acknowledging the Gadigal people of the Eora nation, the traditional custodians of this land, and pay my respect to their elders, past and present. I would like to extend that respect to any Indigenous people present today. It is a great privilege to be here today on behalf of the government and the people of Australia to celebrate your Honour's time as a judge of the Federal Court. The Attorney-General, Senator the Honourable Michaelia Cash, regrets that she cannot be here to share this occasion with you. She has, however, asked that I convey the government's sincere appreciation to your Honour's contribution and distinguished service to the work of the Federal Court, and pass on her best wishes for your future endeavours.

Your Honour retires after 15 years of dedicated service to the Federal Court of Australia. Today marks the celebration of a long and distinguished career in which you have devoted yourself to the improvement of the law and the legal profession. That so many of your colleagues in the judiciary and the legal profession are here today is testament to the high regard in which your colleagues hold your Honour. Time does not permit a full exposition of your Honour's achievements and the contributions you have made to the law. Therefore, this morning I will focus on some key achievements that mark your distinguished career. Your Honour obtained your Bachelor of Laws degree in 1974 from the University of Sydney.

Your Honour was dedicated to expanding your legal knowledge, and in 1977 your Honour continued your legal studies through Cambridge University, matriculating with a Bachelor of Laws and a Doctorate in Philosophy. Your Honour's commitment to legal education is a valuable trait from which the court and the profession have both benefited. In 1974, your Honour was admitted to the Supreme Court of New South Wales. In 1978, you commenced as a Bigelow teaching fellow at the law school at the University of Chicago, teaching American Constitutional Law, and shortly after you commenced working as a lecturer at the University of Sydney.

From 1982, you practised as a barrister in New South Wales. Your Honour's extensive experience culminated in your appointment as senior counsel in 1993. Prior to your appointment as a judge, your Honour was a member of the Sixth Floor Selborne Wentworth Chambers, practising widely in many aspects of law, but especially in administrative law. Your Honour was appointed as a judge to the Federal Court of Australia in 2007. Your colleagues have stated that your vast knowledge and experience have been a great asset to the Federal Court. Over your extensive career, your Honour has been a member of a number of committees and advisory groups, including the Law Council of Australia and the Australian Law Reform Commission.

Your Honour was also a former Director of Research of the Administrative Review Council from 1981 to 1982. In particular, I note your Honour's significant contribution as a member of the Advisory Committee in the Federal Civil and Administrative Penalties Report in 2002. Your Honour's book, Natural Justice: Principles and Practical Application, was referred to as a source of authority several

times throughout the report. Your Honour has made a substantial contribution to the academic landscape by authoring several legal publications, including Natural Justice, Civil Liberties in Australia, Federal Administrative Law, Federal Court Practice, and High Court Practice.

As the above works demonstrate, your Honour is a well-known author and practitioner in the area of administrative law, and a strong proponent of natural justice principles and practice. Your Honour's expertise in legal principles and natural justice was an excellent basis for your appointment as a judge in 2007. Since your appointment, your Honour has worked on a number of high profiles cases, including ACCC v Pfizer Australia, where the ACCC alleged that Pfizer misused its market power leading up to the expiry of exclusive patents. Your Honour's decision to dismiss the application was upheld on appeal Your Honour has been a champion for the rights of workers, focused on the protection of vulnerable people, and regularly exercised compassion, understanding and common sense with those you interacted with.

In 2020, you fined a large business who had systematically underpaid almost 100 workers and created false documents to cover up their misconduct. Most of these workers were young migrants on international student and working holiday visa. In another case, Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Proprietary Limited, your Honour found that a subcontractor was culpable for underpaying its workers despite and especially because they used a labour hire company to attempt to avoid their employment obligations. Many of these employees were vulnerable and did not speak fluent English.

I am told that as a judge, you have been known for your commitment to fairness and justice, your patience with unrepresented litigants, and your ability to draw no distinction between cases regardless of public opinion or pressure is to be admired. I will now turn to your Honour's personal attributes. In preparing this speech, your family has described you as a kind, funny and principled man, devoted both to the law and to your family. Your family is a priority for you, choosing to start work at 4 am in the morning for many years in order to return at 5 pm to see your children. I am told that your Honour is looking forward to spending your retirement travelling and devoting more time to your family, especially your grandchildren.

In particular, I hear that you have dedicated a room in your house for your granddaughters, filled with more toys than what they have at home. I am also told that you have been an inspiration to your children, evidenced by the fact that Allan, who was mentioned earlier, has followed in your footsteps, becoming a lawyer and very soon a barrister. Your Honour, it is indeed a privilege to be here today to celebrate your remarkable career. Your professionalism, your dedication and your commitment to the improvement of the legal profession and judiciary are truly an example for us all. Your Honour, on behalf of the government and the people of Australia, I thank the extraordinary contribution that you have made to the administration of justice in Australia, and wish you all the very best as you commence this new chapter in your life. May it please the court.

ALLSOP CJ: Thank you, Mr Supit. Mr McHugh, President of the New South Wales Bar Association and representing the Australian Bar Association.

MR M. McHUGH SC: May it please the Court. It is an honour to appear this morning on behalf of the New South Wales and Australian Bar Associations. I wish to begin by acknowledging the traditional custodians of the land on which we meet, and I pay my respects to their Elders past and present. I extend that respect to other First Nations people who may be joining us today.

Chief Justice Allsop, Honourable Justices, distinguished guests, colleagues, we live in interesting temporal times. At the end of this month, the Bar Association will hold its annual Bench and Bar Dinner, which is to say our 2020 dinner. Another Bench and Bar Dinner will be held in September. The Women Lawyers' Association of New South Wales will celebrate the winners of last year's awards at a gala dinner next week.

It therefore came as no surprise that the Honourable Justice Flick had in fact retired from the Bench in October 2021. Is this morning's ceremony a 2021 sitting, only deferred? In which case, if the Court pleases, I will continue to address the Honourable Dr Geoffrey Flick as Justice Flick and as your Honour.

One thing is abundantly clear: to join a roll of former Judges of this Court is a signal honour for any Australian lawyer. I'm pleased to have this opportunity to briefly reflect on a career in the law spanning nearly five decades, and to recognise the significant contribution which Justice Flick has made, especially to Commonwealth Administrative Law, first as a teacher and scholar, then as counsel, Senior Counsel and a Judge of this Honourable Court.

Justice Flick, your Honour graduated, as we've heard, from the University of Sydney with a Bachelor of Laws in 1973, and joined the Roll of Barristers in February 1974. Yet it was the call of academia that your Honour heard first. Your Honour attended, as we've heard, Cambridge University, obtaining a postgraduate degree in law, followed by a doctorate in philosophy at Downing College, and, as we've heard, the Bigelow Teaching Fellowship at the University of Chicago in the mid-70s, and became a byfellow at Downing College, Cambridge in '76 to '77.

Your Honour returned to Australia and joined the faculty at the Sydney Law School. Pausing there, I can only observe what can only be an apocryphal anecdote. Your Honour was paged from a squash court with the announcement, "Dr Flick, there's an emergency. Please come to reception." There your Honour found a person bleeding badly from a head wound, and, so the story goes, stated, "I'm not a medical doctor, but I could write him a will." As I say, it could only be apocryphal.

In January 1981, your Honour replaced Dr Graham Taylor as a director of research at the Federal Government's Administrative Review Council. This was a time of novel changes in Federal Administrative Law. They culminated in the inception of the Commonwealth Ombudsman, the commencement in October 1980 of the ADJR Act, the passage of the Freedom of Information Act in 1981, and the formation of the Administrative Appeals Tribunal.

One who can attest to their significance is none other than Michael Kirby, who also served on that council. He described them at your Honour's silk bows in 1993 as

heady days, working with wonderful people, led by Sir Gerard Brennan, performing labours of very great importance, and as trailblazers throughout the common law world.

Your Honour continued to publish notable authorities on Administrative Law and practice and procedure, as we have heard. In January 1982, your Honour crossed Phillip Street to begin practising at the New South Wales Bar, and took a room on what is now Sixth Floor Selborne/Wentworth Chambers, then headed by Barry O'Keefe QC. Your membership was proposed by Roger Gyles QC and Garry Downes, both of whom, coincidentally, were appointed to the Bench of this Court.

Your Honour remained on the Sixth Floor for the next quarter of a century, building up a thriving Constitutional and Administrative Law practice, with a side of anti-dumping case. I was referred to one such matter, Schaefer Waste Technologies v CEO Customs, involving a challenge to duties on wheelie bins made in Malaysia. I'm told that your Honour's case against the Commonwealth hinged on the comparative strength of your client's bin lids.

Your Honour was renowned was for arriving at chambers early, usually before 5 am, so as to leave to spend time with your family. Your Honour took silk in 1993, among the first of the SCs. Your Honour appeared in a number of notable High Court cases, including with Spigelman QC in the matter of Newcrest Mining, regarding the validity of certain mining leases in the Northern Territory. Other matters include the Commonwealth v Oates, the Health Insurance Commission v Peverill, Mutual Pools & Staff, and in the early 2000s your Honour appeared in Foxtel v the ACCC, as well as Telstra v Seven Cable Television.

Remarkably, your Honour found the time to make other contributions to the law, for example, on the advisory committee to an important ALRC inquiry which produced the report Principled Regulation: Federal Civil and Administrative Penalties in Australia, 2002. As we've heard, your Honour was appointed to the Bench of this Court in October 2007. It would appear that your Honour has published over 800 judgments, both at first instance and as a member of the Full Court.

Your Honour's own judgments were, as we've heard, written in a distinct third-person style, what the grammarians may call the present perfect tense in the passive voice – "it is concluded that" – which some, it must be said, unfairly, thought suggested that the universe had arrived at the conclusion, rather than a Judge of the Federal Court. Certainly your Honour's judgments were erudite and highly principled, with one Senior Counsel also observing that your Honour was no shrinking violet, necessarily finding government overreach, even contempt, when warranted and necessary.

Your Honour could not have dispatched such a case load without a Trojan work ethic. The consensus among counsel is that your Honour was efficient and always extremely well prepared. Similarly, council were expected to be across their brief. Some have described your Honour as abrupt. However, as we know, brevity equals clarity in the law.

And I know from direct experience that your Honour certainly exuded patience at times, my having once responded to your Honour using the loaded phrase "appellable error" in respect of a novel point in a defamation matter – that Twitter case that the Chief Justice referred to. Needless to say, your Honour was not dissuaded on the point. There was no appeal. The judgment was clearly correct.

Your Honour has exceptional experience in Administrative Law generally, and especially in migration matters. Some of the cases most often mentioned are AFX17 v the Minister, on the duty to make a decision within a reasonable time; Ali v the Minister, on assessing non-refoulement obligations in decisions to cancel visas on character grounds; and Islam v Cash, on what is entailed by real, genuine and proper treatment of a relevant consideration. As we have heard, your Honour has also taken part in some of the most important Full Court judgments in Migration Law, including the Minister v CLV16, Muggeridge v the Minister, and, as we've heard, the Minister v SZQRB.

Justice Flick, in preparing this speech, I did inquire as to what might be your plans for post-judicial life. To the best of everyone's knowledge, there is little or no prospect of your Honour appearing in arbitrations, nor might we expect a return to academic life. There are no discernible agrarian tendencies. While I'm told that your Honour has nautical interests, it's doubtful that we shall see them as an entrant in the Great Bar Boat Race, since the vessel concerned emits carbon, and would thus constitute, if not illegal, an unwelcome maritime arrival.

Nevertheless, the Bar recognises and congratulates your Honour's academic achievements, your successful practice at the Bar, and undoubted service to the community. Australian jurisprudence, particularly Administrative Law, is better placed for these efforts. We owe your Honour a genuine debt of gratitude, and the Bar wishes your Honour well. May it please the Court.

ALLSOP CJ: Thank you, Mr McHugh. I now invite Mr Tass Liveris, President of the Law Council of Australia, to address us from Darwin. Mr Liveris.

MR T. LIVERIS: May it please the Court. I thank the Court for enabling my appearance to be made this morning by audiovisual link, and, if the Court will further indulge me, I will take up my learned friend Mr McHugh SCs creative points, and approach this address as a 2021 sitting held in 2022 and refer to the Honourable Dr Geoffrey Flick SC as your Honour. Before I do, I acknowledge the traditional owners of the country on which we all meet, and pay my respects to Elders past, present and emerging, and I also extend that respect to Aboriginal and Torres Strait Islander peoples here today.

It is a great honour for me to address the Court on behalf of the Australian legal profession and also the Law Society of New South Wales – the presence of whose President, Joanne van der Plaat, I acknowledge – to pay tribute to your Honour's immense contribution to this Court and to the administration of justice over 14 remarkable years.

Turning first to your Honour's remarkable academic achievements at Cambridge, it holds such a special place for you that you returned there for your wedding in the

Downing College chapel. Your supervisor, the late Sir David Williams, to whom you dedicated Federal Administrative Law, was your Honour's best man. Sir David believed reasonableness was a vital judicial standard for upholding civil liberties. To him, human fallibility warranted constant scrutiny of law-making and law-makers, rather than government operating in a political and legal vacuum.

Your Honour's decades of service to justice have echoed and applied these principles. At the Bar table, your Honour was robust and fearless, undaunted by any deficits in judicial patience. Your Honour saw being a barrister as a privilege, appreciating the singular opportunity to work with experts from differing disciplines and to work with exceptional people. This included the late Sir Maurice Byers who even provided a critique of your work Natural Justice with a Post-It Note review that does not bear repeating. Your Honour also served as junior to the likes of then Murray Gleeson QC. When you asked someone how you should prepare for a conference with Gleeson QC, you were simply told, "Thoroughly".

On the Bench, your Honour has been known for fairness, succinctness and firm principles. Counsel knew they had to be prepared and get to the point. After all, you were meticulously prepared. Unaccustomed barristers would come into court, give three hours of lavish oral submissions, before your Honour would say, "I have read your submissions. Don't repeat them. I have a few questions for you," and those prepared submissions would then promptly exit via the window as counsel instead dealt with the stickiest but most informed of judicial questions. And another way to say this is that your Honour gave counsel an opportunity to hone their skills, albeit in intense ways.

Still, some counsel came to recognise and enjoy prompting in your Honour a smile. Your Honour's priorities have been determining parties' rights and serving the interests of justice without fear or favour, no matter the profile or power of the person in question. Your Honour sat on the Palace Papers case which saw your dissenting judgment later upheld by the High Court, as well as cases involving the powers of Ministers for Immigration and landmark Union cases. All matters were important to you, reported or not, as they were important for government policy, for the court, but above all, for litigants. Your Honour has exhibited respect and empathy for litigants, particularly those self-represented with whom you had boundless patience and those in migration matters.

You would routinely reserve your judgments, giving your decision the utmost consideration. As we have heard, your Honour is alive to the cause of the underdog, attuned to any disadvantage, inequality or unfairness, and indeed, in Warrell v Walton, counsel for the applicant recalls the sympathy and understanding that your Honour had for the predicament of the litigants and the unfairness that was created. The judicial task required your Honour to draw from diverse sources. Searching for the correct interpretation of the term "bargain" in the absence of the statutory definition involved recourse to the new shorter Oxford English Dictionary, the Macquarie Dictionary and the exchange between Brian and the street merchants in Monty Python's Life of Brian.

As both barrister and judge, your Honour began your day at dawn. Complex hearings sometimes necessitated commencing even earlier at witching hour, and this

meant 9 am hearings were more commonly characterised in your docket than 10.15, and counsel were often directed to have submissions to your Honour "by 4.30 am tomorrow morning". For your Honour, leaving at 4.30 pm meant a full 12-hour day, and more importantly, getting home to your family before they went to sleep. Your expertise and prolific scholarship have been a gift to this jurisdiction. Your Honour literally wrote the book on High Court Practice, Federal Court Practice and Federal Administrative Law, and although you still edit the High Court Practice with your son, I am told that your Honour's singular role in editing the other services has had to be replaced by teams of five or six.

Your Honour is a devoted father and grandfather and retirement will doubtless grant you more opportunity for providing to your grandchildren some of the experiences that you gave your children in their early years, building cubby houses, stringing up flying foxes, outfitting houses with perilous gymnastic equipment, and spending hours in line at theme parks despite an aversion to heights, and I believe your Honour has already provided electronic water pistols and a 10-foot inflatable boat filled on lung power alone when your air pump failed. Less conventional has been your Honour's strategy of using a tried and tested mantra of jurisdictional error to try and soothe grandchildren to sleep.

I am informed that this prompts the same two reactions exhibited in certain counsel: tears or, more successfully, fatigue. As grandfather, you go by the sobriquet of "Grumps". This is a moniker that follows you to the bar of the licensed variety where your habit of ordering a vodka, lime and soda, but with fresh lime, not lime cordial, and in a tall glass, not a low ball, has resulted in the bar staff christening such a concoction as a "grumpy". One now needs only say, "I'll have a schooner and a grumpy," which it must be said attains your Honour's Holy Grail of getting to the point. Your Honour wrote in Natural Justice that:

> *The rule of law contrasts the supremacy of law with the supremacy of arbitrary power, and maintains that an individual is entitled to equality before the law and should not be subject to the arbitrary whim of the ruling class.*

Fidelity to this truth of our democracy and determination that anyone may seek justice before the court, no matter the governmental or administrative power in question, has been your Honour's guiding light. It is also the content of your legacy. On behalf of the Australian Legal Profession, I thank your Honour for your distinguished tenure as a judge of the court and wish you the very best for your retirement. If the court pleases.

ALLSOP CJ: Thank you, Mr Liveris. I should also first apologise and acknowledge at the Bar table Ms Joanne van der Plaat who is President of the New South Wales Law Society upon whose behalf Mr Liveris spoke. Thank you for attending. Justice Flick.

FLICK J: Can I reserve or not?

ALLSOP CJ: You can reserve. And I was going to exercise a residual authority to a right of reply, but - - -

FLICK J: Chief Justice, distinguished guests, Ms Supit, Mr McHugh, Ms van der Plaat, members of the profession, ladies and gentlemen, the one advantage of the COVID lockdown is that it has enabled me to crystallise my thoughts as to what I would wish to say should an occasion like this present itself. That opportunity has yielded three or four matters. Before embarking upon any of them, however, I was reminded yesterday as to the fact that today would be the ideal opportunity, if not the last opportunity, to say whatever I wished free from the prospect of anything said being the subject of pesky scrutiny on appeal.

Within that absence of constraint, may I start by doing that which I have done for a great part of the last 14 years, namely, by disagreeing with what – with much of what has been said. Although I appreciate the spirit in which Ms Supit, Mr McHugh, Ms van der Plaat have each expressed themselves, they have been gravely misled by the sources of their observations – and I can quite easily guess at least some of those sources – much of what has been said can only be characterised as exaggerations divorced from any certain factual foundation. My progress in the law, with all humility, but with a view tempered by reality, has been one more characterised by being in the right place at the right time, rather than by a progression dictated by any real ability.

That progression starts with meeting, whilst he was in Sydney, Professor Clive Parry of Cambridge University. It was Clive who invited me to come to what he called a "real university" rather than what he called a "technical college". My grades from Sydney University would certainly not otherwise have warranted admission. Whilst at Cambridge, I had the very great privilege of coming under the guidance, influence and protection of a lifelong friend, Professor Sir David Williams and his wife Lady Sally Williams. David was to be the best man at our wedding, a day which I recall was ANZAC Day. The influence of Sir David over so many lawyers, including John Griffiths of this court, with whom he had a much closer relationship, was truly amazing.

I also had the privilege of meeting at Cambridge Professor Gareth Jones. It was Gareth who secured a position for me teaching at the University of Chicago. It was Gareth who secured a position for me teaching at the University of Chicago. My funds to remain in Cambridge had, perhaps not surprisingly, dried up a year earlier than expected after too many study sessions at the pub inconveniently located just around the corner from my old college, namely, The Little Rose. Times, however, change. The pub is no longer there. In its place nowadays is a rather fancy restaurant.

After my return from Cambridge, my good fortune continued. At the Bar I came under the influence of such persons as Tommy B, as he can at least from tomorrow henceforth be known, namely, the Chief Justice of that other lesser court downstairs, and of Michael Kirby. At the bar, I also formed close friendships with others, including Roger Gyles, who initially persuaded me to "stop wasting my time" and come to the Bar. I also later came under the influence of Justices Downes and Lindgren. It is a mark of each of these people that they are probably unaware of or have forgotten the influence they exerted over a very junior practitioner. More recently, others have exerted an influence – such as Justice Thawley.

A friend of particular note is my long-time luncheon companion and confidante, Michael Cashion. Some say it was only Michael who could put up with me on such repeated occasions and over such a lengthy period of time. One other friend, however, I have known much longer. That's Trevor Matthews. He has the good fortune of not being a lawyer, but a person whom I have known for about, on my count, 65 years.

The purpose in referring to these people is simply to demonstrate that I have had a very fortunate life. It has been a progression in the law which has far exceeded my very limited ability, a progression, as I say, more dictated by being in the right place at the right time, and meeting a bunch of very generous friends. To all of these people and to many others I owe an incredible debt of gratitude. I have had a life and a professional career which a kid from Punchbowl certainly could never have contemplated.

The second thing I would like to say – and this will be unexpected to those to whom it is directed – is that I have thoroughly enjoyed my time on the Bench. And that has been largely due to my fellow Judges. Appointment as a Judge throws you into a mixing bowl of people with many different backgrounds and experiences, many of whom you have not spent much time with or even known whilst at the Bar. But I have enjoyed working with each of my fellow Judges, both past and present.

Many of you approach the resolution of a case from a very different standpoint from my own. Many of you have had no hesitation, perhaps regrettably, in expressing those contrary views with a considerable degree of passion and conviction. Sometimes I agree. The public, I suspect, knows little of the emotional energy which goes into the writing of a judgment. The public has little knowledge of the fact that, on some occasions, a fairly well-advanced judgment has been written and regarded as a final draft, only to be later abandoned to the dustbin, and the drafting process started afresh.

The views of those members of the Full Court with whom I have initially disagreed have later prevailed. Not always. Whatever the outcome may have been, I will miss those exchanges and will sorely miss the opportunity to come into your chambers with, quite frankly, a less than courteous announcement of my presence – I thought I would get that reaction – much to the shock of executive assistants and associates. To each of you I extend my profound appreciation.

The third thing I would like to say is the personal support of my colleagues at the Bar and those on the Bench has been essential to my inadequate attempts to decide cases in accordance with the judicial oath. Sometimes, this has led me to take a course which met with some considerable resistance.

One such attempt, at which I took umbrage, from the outset of my appointment, was any conclusion that a civil penalty imposed under the Fair Work Act upon a union official for his own egregious conduct could be paid. Umbrage was any conclusion that a civil penalty imposed under the Fair Work Act and imposed upon a union official for his own egregious conduct could be paid by the rank and file members.

Such a conclusion seemed, to me, at least, to act as little deterrence to the union official, who probably wore the judgment more as a badge of courage, rather than any personal deterrence to his own future conduct. The only way deterrence was effective, in my view, was if the penalty was to be paid out of the hip pocket of the union official and no others. My own views in this regard now seem to be gaining momentum.

On another front, I have been constantly reminded by my mates at the Bar that it is this Court which stands, at a very practical level, between the considerable resources of the Commonwealth and the rights of individual citizens. Sometimes this Court can do little to protect the citizen, but that in some cases is the result of laws which, with great respect, commend little praise and have even less moral integrity.

There is nothing, with respect, to commend a law, for example, which permits an immigrant to be detained for prolonged and independent periods of time, even though the relevant Commonwealth officers responsible for the continuing detention are pursuing no legitimate purpose, or, indeed, any purpose, to secure the immigrant's removal from Australia.

I have long rebelled against such a construction of the law and, quite frankly, sought to avoid such a result by other means. It has not proved an easy task. The Full Court of this Court and the High Court quite frequently stood in my way. Hopefully, however, the law will be changed, or my own dissenting views may some day prevail.

In many cases that come before a Court, the law is not subject to such criticism. One party normally wins; the other loses. Unlike the practice at the Bar, however, when opinions seldom saw the light of day, the opinions or judgments of Judges are very different. Those judgments are quite properly exposed to scrutiny by the profession, academia, other Judges and the media. The prospect of having one's reasoning exposed to such scrutiny is not a job for the faint-hearted.

Throughout my time on the Bench, I have nevertheless not sought to insulate a judgment or conclusion by means of any exercise of discretion or by findings of fact dependent upon assessment of a witness's credit. I have always attempted to leave open for scrutiny my own reasoning and findings of fact, and left it to others agree or, erroneously, disagree.

In a few cases, it has proved necessary to go beyond merely resolving competing facts and attempting to apply the law. In some cases, what emerged was a manifest abuse of power. That is another of the things which has long attracted my judicial ire. Whoever it may be that has abused the power vested, I have long believed that such abuse should be called out for what it is. Sometimes the job of a Judge requires adverse findings to be made against individuals or institutions. Criticisms, however,

should not be made, at least in my opinion, unless it is necessary for the resolution of the case at hand.

Criticism may sometimes be directed to individuals. Over the years, I have been very conscious of the fact I have criticised persons, ranging from senior executives of employers who have treated employees in a very shabby fashion, criticism of union officials who have blatantly abused their power at the expense of the members, and even of government ministers who have made decisions and pursued a course of conduct which I believed was manifestly in excess of the authority vested in them by the legislature.

Each of those criticisms I adhere to, whether they be reversed on appeal or otherwise. When reversed on appeal, I reconsidered the views previously expressed. On occasions, I accept that I got it wrong. On other occasions, it remains a matter for the Full Court or the High Court to remain accountable for their own errors. Confidence in one's own judgments – I should perhaps add – is essential to judicial survival. The criticism I have made of litigants would not have been made unless I believed them to have been warranted. On many occasions, but not universally, those who have been criticised have properly regarded the criticism as a legitimate part of the independence of the judiciary and a legitimate part of the judicial process. On isolated occasions, some have pursued a different course, but a strength of the judicial system in Australia is that its judiciary is exposed to public scrutiny.

On occasions, some litigants have pursued a course of attempting to garner support from newspapers in levelling criticism against particular decisions. On other occasions, the press has itself picked up and run with criticism or, on some occasions, support for a particular decision. Whatever the slant taken, the exposure of judgments to legitimate public scrutiny – don't worry, I'm reaching the end – is a thing to be cherished. Just as parties may be exposed to judicial criticism, judges must also accept that they too are accountable, but views may differ as to what criticism legitimately falls on one side of the line and that which falls on the other side of the line.

In times past, it was a part of the role of the Attorney-General to intervene when it was thought that that line had been crossed. That is a role which seems to have been erroneously abandoned by those who have more recently occupied the position of the Attorney, but such is life. But these are the realities confronting judges. It is a job which requires the much-needed assistance of a strong and independent Bar. To those of the Bar to whom I have been what some have called this morning abrupt, I can only express my genuine appreciation for the perseverance with which submissions have been advanced. It has proved amazing that submissions which have been labelled during the course of a hearing as nonsense seem to have assumed greater merit upon reconsideration in the solitude of chambers.

It's especially pleasing to see that some members of the Bar whom I have – I have written here "persecuted", and that's as good a word as any – that some members of the Bar whom I have persecuted over the years have been able to attend. Their

resilience under fire has proved commendable. It's also pleasing to see many of my former associates present, including my last associate, Mr George Napier, who continues to occupy his position at the associate's table this morning. Each associate sought to temper my wrath or enthusiasm for a particular viewpoint. I am glad that they did so. The job of a judge requires the continued appointment to the Bench of practitioners with diverse views and abilities, but above all, an independence of mind and an independence of political judgment. Such are the characteristics of the judges who to this day have been appointed.

The last comment I would wish to make is that over the years I have attended many occasions such as the present, but it has taken me all this time to realise that such occasions have very little to do with the judge who is the present target of public comment. Such occasions, I believe, should be more about those who stand behind the judge and who make it all possible. The public again, I suspect, do not fully appreciate the toll that the responsibilities of a judge take on a judge's family. In my own case, I have had the great fortune to be blessed by – it says here "undeserved", but very supportive family. My wife has long put up with endless recounts of judicial outings and musings as to what is "the right thing to do".

She has tolerated an absence of mindedness when I have been more preoccupied with the mental drafting of a judgment than attending to the realities of everyday family life. To her – they're back. To her, it is inadequate to simply say thank you, but I nevertheless thank her for her support. It should be acknowledged, I think, that she gave up her own career in the law and an offer of partnership to look after the three kids, and for that, I thank her. I am needless to say greatly chuffed at the fact that Kim and each of our three children are present. Allan is here with his wife Kirsty and the irrepressible Calli-Rose. Regrettably, her little sister Scout Evie is a tad too young to be here. It is Kirsty's parents Brad and Jen who are minding Scout Evie, and I'm sorry that they cannot be here. Allan, as you have been told, is soon to follow the path of practising at the Bar. He will soon abandon the ranks of senior associate, Clayton Utz. At the Bar I have no doubt that he will prove to be a better lawyer than I ever was.

Giles is here with his partner Zoe. Giles has quite wisely not pursued a life in law, but has pursued a course in emergency medicine at St Vincent's. It has proved a tough time for him and his fellow practitioners over the past few months. Marnie is here with her husband Ed. Marnie initially pursued the law but committed the heresy of saying she never understood public law. For what it is worth, I can now acknowledge that neither did I. Insofar as the concept of jurisdictional error was concerned, the only definition that I really understood was taking the Yass turnoff when driving to Canberra. Others have pejoratively referred to public law as nothing more than statutory construction. Marnie has pursued a course in veterinary science,

I thank each of you for coming. May I again thank all of those present for your presence. You have shown the court a great respect. I'm out of here.

ALLSOP CJ: The court will now adjourn.
