

HONOURING JUSTICE JANE MATHEWS AO

*The Hon Justice MJ Beazley AO**

President, New South Wales Court of Appeal

Introduction: Musical excerpt from Das Rhinegold

- 1 Like the grand opera she so loves, Jane Hamilton Matthews' life is a grand one, filled with music, people, good wine and good food – all backed up by an extraordinary CV. Unlike the sad endings of many an operatic hero, Jane is and has remained a hero – a hero of the legal profession, of the arts and of education.
- 2 I have deliberately described Jane as a hero of the legal profession because, as the person in NSW who has perhaps most tipped the scales of justice, she opened the way for women to more easily to take their place in the legal profession, including on the bench.¹ As she said at her swearing in as a Supreme Court judge, she hoped that the significance of her appointment as the first woman judge of the NSW Supreme Court, after 27 years of an already full and trail blazing legal career, went beyond her and attached to women practitioners generally.
- 3 With her appointment and her subsequent championing of women in the law, Jane almost singlehandedly changed the face of the NSW judiciary.² The numbers of women judicial officers is a matter of record. More importantly, female appointments are no longer a matter of comment. Jane led that

* I wish to express my thanks to my Researcher, Brigid McManus, for her research and assistance in the preparation of this paper.

¹ Slide: Woman tips the scales of justice

² Slide: New judge seeks justice for women in law

change with her sharp intellect, by dint of hard work and with a superb judicial temperament, all essential attributes of a judicial officer.

- 4 But let me fill in some of the spaces before and after that momentous day on 7 July 1987, although as I said to Jane, I have 15 minutes to say what should be in a book. Indeed, one might say that she's had as many appointments as a hypochondriac has with a doctor and as many farewells as Dame Nellie Melba!
- 5 I suspect very few would know that Jane is a Wollongong girl, although her parents sent her over the mountain to school at Frensham which she sheerly hated – feigning illnesses to be sent home. Her perfectly healthy appendix was removed during this time. Indeed, Ken Handley, speaking for the Bar at Jane's swearing in, referred to her time there as introducing her to the "*rougher side of life*". I think in today's jargon, they would call that "*developing resilience*".
- 6 Sydney University Law School was next – where Jane shared lectures with Murray Gleeson and David Hill and graduated with Honours. Jane then went on to be the first female articled clerk at Dawson Waldron. A stint in Wollongong, then at Allen, Allen and Helmsley followed – David Bennett being one her peers. Jane was called to the bar in 1969, where Sir Laurence Street was her tutor in the days when there were still Masters and pupils.
- 7 Jane's significant briefs at the bar include stints as counsel assisting the Royal Commission into Human Relationships between 1974 and 1977 and as junior counsel assisting the Royal Commission into NSW Prisons from 1977 to 1978. This was followed by three years as a Crown Prosecutor, a time that Jane describes as marking the beginning of a lifelong love of the criminal law. But more of that later.

- 8 The District Court came next in 1980.³ One day early in her time as a District Court judge, a 15 year old Richard Button had been sent by his solicitor father, who expected Richard to follow in his footsteps, to assist with a number of matters in the Parramatta Local Court. Richard was “*bored to sobs*” and decided that his father’s ambitions for him would forever remain a pipedream. However, to alleviate his boredom on the day, Richard wandered across the road to the District Court. There, a very young Mathews DCJ was summing up to a jury. The young man was entranced and hooked. The rest, of course, is history. Richard Button subsequently became a prosecutor and was sworn in as a Supreme Court judge on 12 June 2012.
- 9 During her time on the District Court, Jane was appointed as the Senior Judicial Member of the Equal Opportunity Tribunal. I want to pause for a moment to focus on just one of her landmark decisions in the Tribunal, because it demonstrates how acutely Jane was attuned to what was really involved in discrimination, including at the hands of the bureaucracy.⁴
- 10 The case was *Leves v Minister for Education*.⁵ Melinda Leves was a student at Canterbury Girls High School. Her twin brother was a student at Canterbury Boys. At Canterbury Boys, her brother could study, amongst other subjects, computer science and industrial arts. At Canterbury Girls, Melinda could study domestic science and textiles – euphemisms for cooking and sewing. And this was 1986. I should add that John Basten was Melinda’s counsel.
- 11 Besides taking various technical points to stymy the complaint, including challenging Melinda Leves’ standing to bring the complaint, the State’s response to the complaint was that Melinda could change schools. This would have been highly disruptive, educationally and personally. Melinda’s

³ Slide: Photo with Chief Judge Staunton QC

⁴ Slide: *Leves v Minister for Education*

⁵ (1986) EOC.

complaint was upheld by the Tribunal and the Minister's appeal was dismissed.⁶ The Tribunal also accepted a second complaint by Melinda Leves as a representative complaint for current and future students in the school.

- 12 The judgment exemplifies clear judicial thinking, strict adherence to the statute, and a practical understanding of appropriate remedies, which in itself was of major significance because it involved a massive shift in educational policies and resourcing.
- 13 Just as Jane changed the legal landscape for women, so she did for education of girls – all by being an extremely good lawyer with a deep understanding of social issues.
- 14 In addition to her decision in *Leves*, Jane has also made an important contribution to education through serving as Deputy Chancellor at the University of New South Wales from 1992 to 1999.⁷ She was not, however, the first Mathews to serve in this position! Her father, Francis Mackenzie Mathews, served as Deputy Chancellor from 1976 to 1981. Jane has also been awarded honorary degrees by the University of Sydney and the University of Wollongong.⁸
- 15 *Leves* was also not the only case in which Jane's judgments had a profound social impact. In *R v Harris and McGuinness*,⁹ Jane wrote the lead judgment in the Court of Criminal Appeal – in what was the last case presided over by Sir Laurence Street, who expressed his agreement with Jane's judgment.
- 16 The case was before the Court of Criminal Appeal by way of a stated case and required the determination of the sex, within the criminal law, of the

⁶ *Haines v Leves* (1987) 8 NSWLR 442.

⁷ Slide: Former officers of the University

⁸ Slide: Legal identities receive honorary awards

⁹ (1988) 17 NSWLR 168.

appellants who were, as was said in the judgment, transsexuals – but in today’s idiom would be known as transgender. The offence was one of an act of indecency between adult males. The conduct was consensual. The Court did not follow the then accepted English authority that, notwithstanding that a person had had re-assignment surgery, the person remained male for the purposes of the law. The implications of the decision, given in 1988, would be obvious to you. Not only was the judgment groundbreaking, it involved a scholarly and comparative excursus of the law, domestically and internationally, and relevant medical and legal literature. Again, the judgment is an exemplification of superb judgment writing.

- 17 In the meantime, Jane featured in an article in the Sunday Telegraph on the 10 most influential women in the State¹⁰ and continued to speak out for the rights of women lawyers.¹¹ It was not only important that Jane was prepared to speak out – the fact that this attracted the attention of the major newspapers of the day was itself hugely significant. It is hard for an entire profession to ignore the headlines forever.¹²
- 18 Another momentous occasion occurred when Jane, again single handedly established the Australian Association of Women Judges, serving as its President from 2001 to 2006. In 2004 Jane became President of the International Association of Women Judges. This is an association that has over 5000 members and was formed at a time when women were outliers, both in the profession and in the judiciary. It could be a lonely place and, unless you have experienced it, it is not necessarily easy to appreciate how isolating it can be to be flying solo all the time. There is a wonderful expression “*peer deprivation*” used to describe this experience and the Association of Women Judges filled a huge need at the time.

¹⁰ Slides: Power Women and accompanying article

¹¹ Slides: The invisible bar; Change on the bench a priority; Judge urges court role for women’s groups; Inequality still stands as a bar to women

¹² Slide: Photo with Quentin Bryce AD, CVO and Justice Ruth McColl AO.

- 19 The Association has maintained its relevance and momentum by the close relationship it has built with women judges in the Asia Pacific region, particularly in Papua New Guinea. As a result of the Australian Association supporting one PNG magistrate to attend a four day international conference, the magistrate, who was so inspired by the experience, returned to PNG and established a court program relating to domestic violence matters. A year later, she came to Sydney to do a Masters of Law and has continued to play a leadership and mentoring role in the PNG magistracy.
- 20 Jane has also used her position to advocate for other marginalized or victimized groups. For example, between 1993 and 1995 she was a Trustee of the Aids Trust of Australia.
- 21 In 1994 the Supreme Court lost Jane to the Federal Court and the Administrative Appeals Tribunal.¹³ Again she spoke up when necessary.¹⁴ Jane was later appointed as Deputy President of the Native Title Tribunal.¹⁵
- 22 During this period Jane was nominated by the Minister for Aboriginal and Torres Strait Islander Affairs to prepare a report under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in relation to a claim by the Njaringeri women to prevent the building of the controversial Hindmarsh Island bridge.¹⁶ This nomination was challenged and the High Court ruled that it was not constitutionally compatible with the holding of office as a judge appointed under Ch III of the Constitution.¹⁷
- 23 The inquiry, and the legal challenge to it, brought forth a swathe of publicity, some of it seemingly personal if headlines are anything to go by. It also raised the question of what work a sitting judge can do in what was

¹³ Slide: NSW judge for a Federal Court

¹⁴ Slide: Changes a bureaucratic nightmare

¹⁵ Slide: Appointment of deputy presidents and members of the national Native Title Tribunal

¹⁶ Slides: Judge to heard new inquiry on SA bridge; Move to bar judge on bridge inquiry; Women's secrets material destroyed; Challenge halts Hindmarsh report; Decision today on fitness of judge for Hindmarsh job; Legal threat to Hindmarsh bridge

¹⁷ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

described as a “*personal capacity*” for the executive government, without calling into question their independent judicial functions. Jane has described the political controversy surrounding this project as “*very difficult and distressing*” and a “*lowlight of her career*”. Jane’s own comments on this time are included as an addendum to this speech.

24 In 2001 Jane returned to the Supreme Court as an Acting judge.¹⁸ The attached slides are a glimpse of her daily judicial fare – and that of other trial judges. Although this next slide is from her first appointment on the Supreme Court, it shows Jane’s recognition of the need for those involved in the legal process to understand the law, and her willingness to explain it.¹⁹ Jane has also sat on some truly horrific cases, for example, the brutal murder by Ivan Milat’s great nephew in which Jane had to listen countless times to a recording of the murder.²⁰

25 Earlier this year, Jane delivered sentence in a case in which, as we see unfortunately too often, a woman was killed by her former boyfriend.²¹ Her Honour again understood the necessary demarcation between concern for those who are affected by decisions of the Court and judicial impartiality. She said to the victim’s family:

“You have lost a beautiful, much-loved and highly-valued person who was central to your lives ... You will no doubt think the sentence I am about to impose is completely inadequate, given the extent of your loss. I hope that you will understand that sentencing is a complex process and there are many factors to be taken into account.”

26 Fortunately, it wasn’t always grim.²²

27 And despite the pioneering place Jane has in the history of the NSW legal profession and the tough work she has had to do, she was never an angel

¹⁸ Slide: Interview – Acting Justice Jane Mathews AO

¹⁹ Slide: Judge sacks jury

²⁰ Slides: Milat gets 43 years, Diego Carbone found guilty

²¹ Slide: Ex-boyfriend sentenced to 13 years jail for murder of Sydney pastry chef

²² Slide: Judge gets the giggles but keeps the whip hand

but always at the forefront of things. As a young lawyer, she used to play black jack in the illegal casinos in the Cross. And of course, the parties in the share house in Darlinghurst – of which I will say nothing more!

28 But what about the music?²³ It has been so much about the music.²⁴ Her active contribution to Sydney’s musical scene is none other than amazing.²⁵ She has been an extreme and generous patron of the arts. There are a number of musical groups in this city that would not be viable without her financial support.

29 I commenced by describing Jane as a hero in the law, music and education.²⁶ Let me conclude by reading out the commendation on her Order of Australia, awarded in 2005. The commendation was for “*service to the judiciary, to the legal profession, to the University of New South Wales, and to music*”. I rest my case.

²³ Slide: This judge knows the score

²⁴ Slide: Wagner groupies and virgins

²⁵ Slide: Patron of the Arts

²⁶ Slide: Photo of Jane

Addendum

- 31 Jane Mathews described her involvement in the Hindmarsh Bridge Inquiry in the following terms:

During most of my seven years on the Federal Court I was president of the AAT, and also Deputy President of the newly formed NTT, under the inspired leadership of Bob French. I loved my time on both tribunals. Indeed, I was lucky enough to mediate the first settlement under the *Native Title Act 1993* (Cth). That was one of the real highlights. The worst lowlight also involved Indigenous issues, when I was asked by Paul Keating to be the reporter in relation to a claim under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) by the Njaringeri women to prevent the building of a bridge to Hindmarsh Island in South Australia. So I moved my base to Adelaide, and rented a house there for six months. The women claimed that this was a sacred site, because of what has become known as “*secret women’s business*”. Mr Keating appointed a female Minister to deal with this issue, so that there was an all-female line for the women to tell their stories to. Then, not long after I started, there was a Federal election, and Labour lost. The incoming PM refused my entreaties to also appoint a woman to deal with the Hindmarsh issue, and the Minister for Aboriginal Affairs was a man, who had to see the material and make the final decision. So the women went to water, and refused to tell their stories. I found that a very difficult and distressing time. Generally, however, my years on the AAT were incredibly interesting and rewarding.