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Swearing in Ceremony of The Honourable William Henric Nicholas QC as a Judge of the Supreme Court of New South Wales

In the Supreme Court
of New South Wales
Banco Court

SPIGELMAN CJ
AND THE JUDGES OF THE SUPREME COURT

Wednesday 5 February 2003

SWEARING IN CEREMONY OF
THE HONOURABLE WILLIAM HENRIC NICHOLAS QC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

Judgment

1 **NICHOLAS J:** Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court. May I present my Commission?

2 **SPIGELMAN CJ:** Thank you, Justice Nicholas. Please be seated whilst your Commission is read. Principal Registrar, please read the Commission.

(Commission read)

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

(Oaths taken)

3 Principal Registrar, I hand you the oaths to be placed amongst the Court archives and the Bible, so that it may have a customary inscription inserted in it in order to be presented to his Honour as a memento of this occasion.

4 Justice Nicholas, on behalf of all of the judges of this Court and on my own behalf, I congratulate you on your appointment and welcome you as a Judge of this Court. From a personal point of view, as many know, you and I shared adjoining chambers for over a decade at the bar. I am very pleased to be able to have you join me again, so that you and I may be of service to the people of this State for many years to come.

5 **MR M H TOBIAS QC ON BEHALF OF THE BAR ASSOCIATION OF NEW SOUTH WALES:** If the Court pleases. After November 1995, when my term as President of the New South Wales Bar Association came to a very timely end, and being very conscious of the fact that there is nothing quite so ex as an ex-president of any organisation - and in this regard the Bar Association is no exception - never in my wildest dreams did I contemplate the possibility of once again standing before this Court on behalf of the Bar to welcome to it a new judge. But when your Honour's appointment was announced I threw discretion to the winds and requested, with as much humility as I could muster, the President and, through him, the Attorney, to delegate to me the honour and privilege of welcoming your Honour to the Court. I am delighted to say that they readily and graciously agreed although they probably did so because, after 32 years of professional and social propinquity, they thought that I would be more knowledgeable of your Honour's peccadilloes than they or their researchers. Needless to say, both the Attorney and the President are delighted at your Honour's acceptance of this appointment and extend to you their personal congratulations and best wishes.

6 Although the disclosure in public of a person's age worries some, I am not embarrassed to disclose

that your Honour was born in Orange in 1941. Speaking from the perspective of someone born in 1939, that makes you quite young - well, relatively so. After the war your father became a grazier near Tumut where you and your three younger sisters were brought up. Being a country boy it was natural then, as it may even be today, for the major part of your education to have been undertaken at the Kings School, Parramatta. At that time, I was in the process of being educated - using the word in its loosest sense - at the Scots College. The only relevance of that otherwise irrelevant fact is that, being the grubby little boys that we no doubt were in those days, we regarded the natural adult vocation of all Kings School boys as being that of tractor salesmen. Given that the Kings School's alumni include both your Honour and the President, Mr Walker, it is clear that all that marching around in those Kings School military style uniforms was no handicap to your future success at the Bar.

7 Your Honour left the Kings School for Sydney University where you completed your Arts/Law degrees as a resident student of St Paul's College. Although ignorant of the matter until I very recently read of your appointment in The Sun Herald, you were known at school and university as "Spot" Nicholas because, like Mr Pat Rafter, you had a 20 cent size circle of white hair behind your left ear. That nickname would naturally have been incomprehensible to anyone who has met you since your early thirties when the rest of your otherwise dark hair started to join the spot. Your hair remains enviably thick: an envy which, deplorably I am told, you are not above exacerbating with wounding remarks to friends and colleagues who have not been so fortunate in that particular department. Justice O'Keefe be warned!

8 During your law course, you were articled to Major General John Broadbent, who is here today, at what was then Stephen Jaques & Stephen. After your graduation in 1964, Mr R P Meagher, as his Honour then was, moved your admission as a solicitor at the same time applying for a reduction in your articles so that you could take a working passage on a cargo ship to Europe, your job being to continually paint the hull. At a modestly higher level of endeavour, you worked for three months as a research assistant with the International Commission of Jurists in Geneva and, after touring France and Italy, applied in London to work for the Westminster City Council in the belief that that body automatically employed all Australians as swimming pool attendants, a vocation that apparently attracted your then reserves of intellect and energy. Instead you found yourself working in the commercial garbage handling facility in a crew otherwise composed of cold and homesick West Indians. You left the Council's employ when you realised that they were all being paid the equivalent of a meat pie per hour and would never see daylight.

9 On your return to Australia, you worked as an employed solicitor for two years before being admitted to the Bar on 21 October 1966. You spent much of your first year reading the great Russian novelists and waiting for the phone to ring. In your spare time, which was copious, you coached a Sydney University rugby team, joined, and later became vice president of, the Council for Civil Liberties and continued your education and/or life experiences by sitting through a lot of foreign and, therefore, subtitled movies depicting, artfully of course, various degrees of erotica. You read with Barry O'Keefe, now a Judge of the Court, although you seldom saw him as he was either too busy or you were at the cinema.

10 Your Honour joined the Sixth Floor Selborne Chambers 32 years ago in February 1971 acquiring the chambers of the then recently retired W A South. On elevation to the District Court bench of Brian Wall QC, your Honour occupied, and have occupied to this date, the chambers next to mine and which had previously been occupied originally by the great Eric Miller QC - KC and then QC - and, after Miller retired, the late, the Honourable Edwin Lusher QC.

11 Although by the time you ascended to the Sixth Floor, your practice was starting to flourish, it was during your early years in those chambers that it truly took off, particularly in the area of defamation law and practice. At that time two of the leading defamation counsel, if not the two leading defamation counsel, were D B Milne QC and M H McHugh as he then was, both of whom were colleagues in our chambers and both of whom held general retainers from Mirror Newspapers Limited, later News Limited. It was as a consequence of the good offices of both those eminent counsel that you were introduced to Ian Giddy, the then solicitor for Mirror Newspapers and, as they say, the rest is history. Although your Honour had a burgeoning practice in Common Law and Equity and, later, in the Commercial Division of this Court, it is in the area of Defamation and Media Law that you have made your particular mark being, I venture to say, for many years second only to Hughes QC as the leader of the Defamation and Media Law bar. In this regard, your Honour has held general retainers from both News Limited and John Fairfax Limited, and over the last 20 years at least you have appeared in most of the leading cases in this area of jurisprudence. What Mr Kerry Stokes will now do is anyone's guess.

12 Your Honour has made a significant contribution to a number of legal institutions. In 1997 and 1999, you had two stints as Assistant Commissioner of the Independent Commission Against Corruption and for some ten years you served as a member of the Legal Profession Disciplinary Tribunal and, after it was set up, the Legal Services Division of the Administrative Decisions Tribunal. You were a former member of the New South Wales Bar Association's Arbitrators Panel and for three years a member of the Council of the Bar Association. To top all that, you were a director for five years of Counsel's Chambers Limited. Your sense of public service extended to volunteering your services for the Bar Association's Olympic Pro Bono Scheme. You were called upon to represent pro bono a Cuban-born Canadian who was denied the right to compete for his adopted country because Cuba would not consent to a reduction in the IOC's three-year citizenship requirement. Unfortunately, your highly persuasive advocacy on his behalf fell on deaf ears.

13 Your Honour's interests have extended into many areas unassociated with the law. You spent some four years as chairman of the New South Wales Publications Classifications Board and for five years a trustee of the Centennial Park Trust. Despite its benign title, the former was a censorship body, your task being to ensure that the minds and sensitivities of the general population were not sullied by pornographic literature. I must say that I was not aware until I came to research this speech that you had been the censorship king of New South Wales, and I can now understand why you did not trumpet the fact, although when recently taken to task about it you assured me that you were only ever called upon to review student university publications and that you were extremely liberal, rejecting none of them. I am not too sure what to conclude from that fact except that it would be better not to speculate.

14 Further examples of your Honour's wide interests, particularly in the area of the Arts, is that you were, for six years, a director of the Sydney Theatre Company, for four years chairman of the Eleanor Dark Foundation/Veruna Writers Centre at Katoomba, and a director for 15 years until your retirement last October of the Blake Society for Religious Art, the body that awards the Blake Prize in that discipline. If that were not enough, you are currently chairman of the Kimberley Foundation of Australia which promotes research into ancient Aboriginal rock art in the Kimberley region.

15 Your interest in architecture is reflected in the fact that, together with your then floor colleague, Ken Carruthers, as his Honour then was, you commissioned the then relevantly unknown, but now world-renowned, architect, Mr Glen Murcutt to design for each of you a house on your adjoining properties at Mt Irvine and which, in 1980, won the Wilkinson Architectural Prize. Your contribution to the education of the young is exemplified by your membership since 1987 of the Council of St Paul's College of the University of Sydney and you are currently its chairman, having succeeded the late lamented Justice John Lehane. In addition, you have recently been instrumental in the establishment of a residential scholarship for an Aboriginal student at Sydney University.

16 Your early years as the son of a grazier have been reflected in your long interest in, and pursuit of, matters rural. You have been a Councillor of the Royal Agricultural Society of New South Wales since 1987 and you currently serve on its Arts & Crafts, Wine, Fine Food and Horse committees. Your Honour is seen daily during the annual Royal Easter Show, decked out with the official looking identification and badges and complete with well worn RM Williams riding boots and battered Akubra hat, regularly sampling the fine food and wine on exhibition, displaying great rigour and total dedication to your role as a committee man. I am not aware as to whether you have actually been seen in the Arts and Crafts exhibition, but I fear not. I guess jars of homemade jam and cake decoration are not your particular forte.

17 For many years you have been a commercial breeder of Aberdeen Angus cattle in partnership with your colleague, John Sackar QC, and you have both bred, vicariously that is, the grand champion bull at the Sydney and Brisbane shows in 1994 who, not surprisingly, then answered to the name of Magistrate. I am unsure whether due to these successes he was promoted to higher judicial office. Finally, unlike, I suspect, some of your judicial and former colleagues, you are disgustingly fit. You have run marathons in Honolulu, Paris and Melbourne and to this day, as I recently discovered, you still run lengthy distances three or four times a week.

18 Now that you have ascended the bench, this otherwise unjudicial activity will need to be satisfied. I suggest that you may join Justices Beaumont, Lindgren, Sackville, Gyles and Allsop of the Federal Court in their regular stroll around the Botanic Gardens during the lunch hour. You could do that, I suggest, in the company of your good friend Justice Meagher, where you could discuss the fallacies inherent in the fusion of law and equity or recent developments in Sepik River art.

19 In 1969, you married the well-known journalist Marion Macdonald. You have three children, Grace, Edward and Hugh. I am told that despite an immediate and sustained resistance to actual attendance in the labour ward and a tendency to get up and jog out of the house at the first pre-dawn cries of your infant children, you have been a devoted and involved father. You have travelled extensively with your family and, in 1984, took three months off from practice at the Bar so that they could live and be schooled in Paris.

20 In the 90s you developed an interest in Indo-China and you and your family have travelled several times to Vietnam, Laos, Myanmar and Cambodia. Your daughter Grace, who commenced her career as a journalist with News Limited, is now working for CARE International in Hanoi, whereas your son Edward, a solicitor, has recently taken three years leave of absence from Clayton Utz and is leaving tonight for Cambodia with his wife, Sarah, to work in a law firm in Phnom Penh. Your younger son, Hughie, a Bachelor of Arts graduate from Sydney University and a qualified audio engineer, is now pursuing a singer/songwriter career with the rock band "Live at Nine". Like all your family he will no doubt be highly successful in his chosen career so that you will be able to turn to him in the future as the major income producer of the family.

21 Your Honour now follows to the bench your paternal grandfather, Harold Sprent Nicholas, who was Chief Judge in Equity of this Court. Coincidentally, Wally South, whose chambers you first occupied on the Sixth Floor, had been his associate. Like your grandfather, who was a founding father of the Independent Theatre, a patron of the arts and a friend to many of the finest artists of his time, your Honour also has contributed significantly not only to the law but also to the land, the theatre and the arts. Your dedication to helping others less fortunate in the community has been mirrored not only by your daughter Grace, but also by your talented wife, Minny, to whom you are rightly devoted. She was a brilliant and witty journalist - her weekly column in the Saturday Herald being sadly missed - who now occupies much of her time personally cooking for, and feeding, the poor and destitute at Norman Andrews House located in the basement of the Chapel by the Sea at Bondi Beach.

22 Every year, just prior to 30 June, your Honour has put the hard word on your floor colleagues who have, according to Minny, responded generously to that charity. I serve fair warning upon your Honour's judicial colleagues that they can expect from you next June a pleading letter testing their generosity.

23 Your Honour, like myself, has had an aversion to new technology such as computers. Until recently, you and I were the only members of our chambers who did not possess in our rooms what I understand is called a "PC". However, some four months ago you relented and acquired what you told me was a very expensive state of the art machine. Although your ever-loyal secretary maintains that you have actually turned it on and even played with it, all I can say is that every time I have entered your chambers the screen was blank. But it certainly looked impressive, a fact which was, no doubt, not lost on your instructing solicitors.

24 Your Honour has already made a significant contribution to the law and to a large number of other fields of endeavour and to numerous community causes. Your great experience as a jury, trial and appellant advocate and your undoubted energy, work ethic and legal skills, coupled with your wide experience with the world and life in general, can only result in your Honour being a judge of great distinction, exhibiting all the wisdom, humility, judgment, commonsense and, not unimportantly, courtesy and humour, which your family, friends and colleagues have come to expect from you. Speaking for myself, I am deeply saddened at losing you as a floor colleague after 32 years and not only because I will no longer be able to borrow your copy of the Macquarie Dictionary. Your Honour has long accused me of being too mean to acquire my own, but then there was no necessity whilst yours was next door. Regrettably, you will now take it with you, never having to share it with me again.

25 My wife asked me whether she could read this speech in one of its earlier drafts. Having done so, her only criticism, which was somewhat devastating, was that she thought it read like an obituary. I prefer to think of it as the profession's version of "This is your Life", albeit without the feigned surprise and sudden cameo appearances of long lost and usually forgotten relatives and acquaintances. And, indeed, what a full and productive life it has been.

26 Your Honour now seeks to further that life and continue your ethic of public service by commencing a new and exciting phase of your career. You do so with the warmest best wishes of your friends and floor colleagues in particular and the Bar in general. We wish you every success and happiness during what will no doubt be a most productive term of office.

27 If the Court pleases.

28 **MR R BENJAMIN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court.

29 The solicitors who have known you have expressed great sadness at the loss to the bar caused by your departure. They report that you are generous to a fault in sharing your expertise, and comment that you are always willing to exchange views, contribute to ideas - apparently, notwithstanding the need to communicate across two large desks that you had in your chambers. This space accommodated your papers, books and, it seems recently, to display a large blank-screened computer.

30 These solicitors go on to report that their loss will be a great gain for the wider community by virtue of your service to it from the Supreme Court bench.

31 As your Honour knows, solicitors are skilled in collecting vast amounts of fact, some of great value, some of less value and some of little obvious value. This expertise is usually put to good use for occasions such as this.

32 However, for this welcome Mr Tobias was kind enough to provide me with an advanced copy of his speech. In it he notes that the bar thought he would be more knowledgeable about all facts of your Honour's life than would others. In that regard, there can be no doubt. He has covered the field.

33 Therefore, I add the support of the solicitors of New South Wales in celebrating with you, your family and the Court your appointment. We congratulate you and wish you many satisfying years on the bench.

34 May it please the Court.

35 **NICHOLAS J:** Chief Justice, your Honours, Mr Tobias, Mr Benjamin, members of the Bar, solicitors, my wife and family, ladies and gentlemen.

36 I am deeply grateful to you all for coming here today, no doubt at some inconvenience, and to you, Mr Tobias and Mr Benjamin, for what you have said. As I listened, I was set to wondering as to the scope of my recently acquired powers to order disclosure of sources. Perhaps it is preferable not to know, but your remarks are very generous indeed.

37 No man is an island entirely of itself, but before the bell tolls there is time for me today to recognise the forces which have shaped my progress. Luck and accident sometimes, but always people, and those outside the legal profession quite as much as those within it.

38 I am fortunate to be one of a large extended family - and Mr Tobias has made reference to them - a remarkable feature of which is that its members all get on quite well with each other. At the core, of course, are my wife, Minny, our daughter Grace, sons Edward and Hugh, and daughter-in-law Sarah. There is much to thank them for, and somehow or other they manage to make most things possible.

39 When my grandfather was appointed to this Court on 1 February 1935, my father was rising 20 years of age. You will readily understand how proud we are that he is here today, together with my mother, and my mother-in-law, Mrs Jean Macdonald.

40 With them is my master solicitor, Major General John Broadbent, past President of the Law Society. Affectionately known as "JRB", he is a fine soldier and an astute solicitor, with whom one always stands a little straighter. I am delighted that he is here and I owe much to him and former colleagues of the then Stephen Jaques & Stephen.

41 On coming to the bar in 1966, I went to Forbes Chambers joining about 20 others, most of whom were of less than seven or eight years standing, and almost all were to be appointed to one bench or another. Four of my colleagues from those days are on this bench today, as is Mr Justice O'Keefe whose busy practice I interrupted whilst reading with him. One could not have wished for a better introduction to the Bar. All were making their way and were quick to assist each other. The cab-rank rule genuinely operated, as did the longstanding tradition that barristers be ready for pro bono work

when required. In the 60s and the 70s seniors and juniors alike had plenty to do with matters such as protected tenancies, anti-Vietnam protests, conscientious objectors, street offences, obscenity prosecutions, anti-springbok demonstrations and the like, matters concerning freedoms, publications, powers of enforcement and detention. I rather suppose at the moment that there may well still be plenty to do if some proposals presently before the parliaments are enacted.

42 In those times, we learnt a lot from individuals who typically enrich the bar, such as Jim Staples, who taught us to think beyond the square, and Gordon Johnson, bane of bureaucrats and police, who almost alone funded a sort of legal aid scheme through the Council for Civil Liberties.

43 As Mr Tobias has indicated, over 30 years ago I was fortunate to obtain chambers on the Sixth Floor. As barristers and judges its members past and present have served, and continue to serve, the public with distinction. There I developed my practice and gained lasting friendships during an extremely happy time. Of course, a barrister depends much on others for skill, learning and standards of conduct, whether of the same chambers or not. I suppose there is no profession in the world where friendship is shown more freely and experience is shared more generously than at the Bar. Exemplars from whom I gained some understanding of the craft and integrity of the advocate during associations over many years include Douglas Milne, TEF Hughes, Justices Michael McHugh and David Hunt. They, like most of us here today I think, would be astonished that it should ever be thought necessary that the profession requires a statute to remind it of its duty as to the commencement and conduct of litigation.

44 Few, of course, survive without attentive clerks: Leon Gill, Les O'Brien, Michele Hedger and Sarah Barnes minded me well, and often softened the desert like appearance of the diary. The remarkable Ms Eva Adams has kept me tidy despite frequent distraction by Murray Tobias and Lucy McCallum.

45 I have been exceptionally fortunate in the support received from solicitors who have entrusted me with their work. One soon learns that without a close working relationship and mutual confidence between solicitor and barrister, the client's case will rarely be conducted to advantage. The advocate knows that the quality of the contribution from, and the degree of industry of, solicitors involved in litigation is often determinative of it. I remain thankful to those with whom I worked.

46 And so to the bench. My grandfather was sworn in as the eight puisne Judge of this Court 68 years ago when Sir Frederick Jordan was Chief Justice. Today I become the 48th judge of the present Court. The number has obviously increased, but the responsibility of course remains the same.

47 Indeed, a new trial judge has much to learn and the path may not always be clear. For example, it has recently been made plain to me that it is not for a trial judge to indulge in activism, and it is equally plain that judicial inertia will attract the stern gaze of the Chief Justice and, no doubt, of the Judicial Commission.

48 I suppose however, the primary role of the trial judge is clear enough. He or she is to find the facts. The task can be difficult and exacting, and the facts as found become the foundation upon which appellate courts must work in deciding whether or not to interfere. The judge is also required to apply the law (assuming, of course, principles and ratios which appellate courts describe as well settled can indeed be readily identified).

49 Some say that on appointment a gulf develops between a judge and counsel. I must say I see it differently. Fulfillment of the judge's duty in every case self-evidently involves reliance on the contribution of the profession. Although it is true that the object of a party is victory, and the conduct of a case is inevitably determined by what will influence the tribunal, counsel nevertheless share responsibility for its outcome.

50 And although I have been in a few, I doubt that a gladiatorial contest will always provide to the Court the assistance which leads to a just outcome. Litigants seek justice. A judge is more likely to deliver it if their case is conducted to the end that the truth is elucidated rather than obscured.

51 In conclusion, it is worth observing that these are anxious times in the wider community. The country is ravaged by a terrible drought, menaced by bush fires seemingly beyond human control, and threatened by a conflict about which people are deeply divided.

52 A ceremony such as today's reminds us of our institutions which remain constant through good

times and bad.

53 Thank you all for the very great honour that you have done me by attending this morning.
