

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

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

Monday 4 July 2011

**SWEARING IN CEREMONY OF
THE HONOURABLE ASHLEY BLACK
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

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

(Commission read)

(Oaths of office taken)

- 2 **BATHURST CJ:** Justice Black on behalf of all of the judges of the Court and my own behalf I congratulate you and welcome you as a member of the Court. I have had the pleasure of working with you over a number of years and I know you will be a notable addition to the Court.

- 3 **THE HONOURABLE GREG SMITH SC MP ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour on behalf of the State of New South Wales and the New South Wales Bar it is my great pleasure to congratulate you on your appointment to the bench of the Supreme Court. You are highly regarded as one of the nation's leading commercial lawyers and a scholar whose prolific output has benefited the entire profession and the nation.

- 4 You gave a hint of this promise when being educated at the Sydney Church of England Grammar School or Shore as it is better known. You excelled academically and were selected in the GPS, New South Wales and Australian Schoolboy debating teams for 1977. You are in good

company. The other person who made all three teams was Anthony Fisher, who we now know as Bishop of the Catholic Diocese of Parramatta. Yet law was not your first choice at university. You did a year of medicine before switching over and then teaming up again with the young Mr Fisher in the Sydney University debating team. After winning the national championship you travelled to Canada to compete and swept the opposition at McGill University in Montreal.

5 The pair of you then set off on a tour of North America for several weeks with a ticket that allowed for unlimited flights. It was partly to satisfy your interest in American history. Bishop Fisher reports that even then you were a man who liked leaving little to chance. Indeed meticulous preparation has become a hallmark of your career. Whenever there was a flight to catch you ensured that both of you were three hours early so there were no hiccups, until you got to Mexico. With the usual three hours to kill your companion suggested you should use the time to spend your remaining Mexican money. One can only imagine what you said to the then Mr Fisher when you realised that one of those announcements in Spanish was a final call for your flight. Next thing you were in an airport buggy tearing down the tarmac after your plane. I am told and I have no cause to doubt a man of the cloth that the pilot noticed the waving arms and mercifully brought the aircraft to a halt on the tarmac. The stairway was lowered and soon you were on board vowing never to listen to that Fisher bloke again.

6 In 1983 you graduated from the University of Sydney with a Bachelor of Arts with first class honours. Three years later you earned a Bachelor of Laws also with first class honours. During 1988 you were an associate to Justice Lockhart of the Federal Court of Australia before joining Mallesons Stephen Jaques as a solicitor in 1989. In 1992 you received a Master of Laws with first class honours again. The University of Sydney also awarded you the Law Graduates Association Medal.

- 7 In 1995 you were made a partner of Mallesons and have remained with the firm since specialising in commercial litigation with a particular interest in Corporations Law, Financial Services and Regulatory Matters. Such is your expertise, that I understand the Rules Committee of the Federal Court effectively seconded you to rewrite the Corporations Rules and that was more than twenty years ago.
- 8 You advised several major Australian Corporations in significant dispute matters acting for Telstra in proceedings to injunct the satellite joint venture between Australis Media Limited and Optus Vision, for AMP in relation to the GIO Scheme of Arrangement and for Hungry Jack's Pty Ltd in substantial proceedings against Burger King Corporation in the Commercial Division. No Big Macs there.
- 9 You have extensive experience in the conduct of regulatory matters and have acted in numerous Australian Securities and Investments Commission (ASIC) regulatory inquiries. These include licensing matters and allegations of breach of the continuous disclosure provisions, market manipulation, insider trading and breach of the takeover provisions. You have also conducted the defence of criminal proceedings brought by ASIC in Corporations Act matters.
- 10 With your substantial experience in the conduct of complex corporate litigation, you are the litigator of choice for the big investment banks and have acted for Credit Suisse, Macquarie Group Ltd, National Australia Bank and UBS among others. In your spare time you are an Adjunct Professor in the Faculty of Law at the University of Sydney and a Visiting Fellow in the Faculty of Law at the University of New South Wales. You lecture in post-graduate courses at both universities in the area of financial services regulation and in fiduciary duties and conflicts of interest.
- 11 Demonstrating your enthusiastic interest in academia you are also a prolific author of legal publications. You are the joint author of Austin and Black's Annotations to the Corporations Act and you are also joint author

of Securities and Financial Services Law. You have published a long list of articles on companies law and financial services law and you retain your interest in history with American history still getting top billing.

- 12 During 2002 to 2005 you served as a member of the Legal Subcommittee of the Corporations and Markets Advisory Committee which provides independent advice to government on issues that arise in corporations and financial markets law and practice. All this has contributed to your reputation as an outstanding commercial litigator with a tremendous capacity for working through detail but never losing sight of the bigger picture. You are also renowned for hard work and discipline and meticulous preparation. It is just as well there are others aside from your debating team mate who can pierce that armour.
- 13 Many years ago you offered to drive a friend from Canberra to Sydney when you were both working over summer at the Australian National University. The trip began badly when your Honour filled the car up with diesel rather than unleaded. Then the fanbelt went just outside Marulan. Alas your comprehensive knowledge of the Corporations Act provided little assistance. The total trip, ten hours.
- 14 The story of your journey here would not be complete without mention of your wife Leonie whom you married in 1991 with Bishop Fisher as your best man. I am reliably informed he was three hours early. Leonie is principal of Manly Village Primary School and I am told works as hard as you do. Though it is not all hard work, you enjoy good food and wine, why not, and are excellent ballroom dancers. You also share a love of colourfully named cats, the only problem being that you are extremely allergic to them. Despite this your fondness for felines has seen you persevere, sneezing your way through almost two decades of cat ownership. One can only hope that you are not allergic to rabbit fur. You are enthusiastic travellers and each year sees you heading off to exotic locations, taking a cruise or flying to Europe to embark on a grand gourmet tour.

- 15 You worked at Mallesons with Justice Julie Ward for many years and by all accounts you were a great team, not only in the firm but as lunch companions with no shortage of good stories. I suspect some of them have been passed to the young lawyers at the firm along with some valuable tips on how to be someone who earns the respect of their peers and the admiration of their clients. This capacity to foster and nurture talent is a quality you share with Justice Ward.
- 16 You also meet one of the benchmarks for being a good boss. You inspire loyalty in those you work with and those who work for you tend to stay for a long time. Of course it is also possible that this loyalty is otherwise inspired that you do not mind helping out even when you have a full plate. You would have also passed on the importance of being calm, polite, courteous and respectful. Can I suggest those qualities might be tested by some of the advocates that happen to appear before you.
- 17 I suspect the bench will be more than a match for the bar especially as you are invariably the best prepared lawyer in any room. One leading silk discovered this to his cost when cross-examining you on an interlocutory application in the complex Ingot proceedings. Those who were there report that each question was hit for six with your Honour having scored a century before lunch. It confirmed the view of many that you would have been a fine barrister. Indeed you have surprised many by resisting the move. But you will now be in court everyday and the gathering here today, the large gathering here, shows your friends and colleagues believe you will be an excellent judge, being regarded as perceptive, thoughtful, fair, objective and balanced in your judgment is a good start.
- 18 I, and all here today, believe you will make a great contribution to the administration of justice in New South Wales and I wish you all the best in your new role.

- 19 **Mr S WESTGARTH PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** The firm of Mallesons Stephen Jaques is proving to be a fertile training ground for future members of the judiciary. In this jurisdiction alone the bench has acquired Justice Barrett in 2001 and in 2008 Justice Julie Ward. Your Honour is the latest member of that firm to be elevated to the bench of this Court. As was commented in the press following Justice Ward's appointment, "There must be something in the water at Mallesons".
- 20 Today on behalf of the solicitors of New South Wales I am delighted to welcome another appointment from the solicitor ranks to the Supreme Court bench and to congratulate your Honour on your achievement. However, the Court's gain is accompanied by another's loss. For Mallesons and the clients for whom you have been acting your elevation is a significant loss. In-house counsel at a major accounting firm has informed my researchers that in recent times they have not only lost your Honour as one of their legal advisors but also the Chief Justice and in 2008 Justice Ward.
- 21 It would appear from your Honour's school records that you have always been a very high achiever distinguishing yourself in almost every aspect of school life, other than sport. As we have heard your Honour attended Shore in North Sydney from 1972 to 1977. Your Honour was a prefect and a sergeant in the school cadets, senior school librarian, captain of the debating team and a member of the State and Australian debating teams. Academically your Honour excelled in the Higher School Certificate, your Honour received level 1 marks in English, Maths, French, Physics, Chemistry and General Studies. Your Honour was awarded the school prize for Latin, English, Divinity and Debating. In addition you were dux of the school in 1977. With this scholastic background the choices for tertiary study were many and perhaps your Honour may have felt a little overwhelmed by the many options, apparently moving from medicine to American History and then to law.

- 22 Your Honour graduated from the University of Sydney with Bachelor degrees in Arts and Law both with first class honours and then later with a Master of Laws also with first class honours as well as being awarded the Graduate Association Medal. Your Honour's interest in corporations law was apparently fuelled by the enthusiasm also of your lecturer, Professor Jennifer Hill, professor of corporate law at Sydney University Law School.
- 23 Your Honour was admitted in 1987, your Honour became an associate to the former Federal Court judge the late John Lockhart in 1988 and then you had a role in drafting amendments to the Federal Court Rules. The following year your Honour started at Mallesons, initially in the mergers and acquisitions group before moving to the area of commercial disputes and litigation. Your Honour's supervising partner and subsequently your sponsor for your admission as a partner to the firm was your Supreme Court colleague Justice Ward.
- 24 Justice Ward's recommendation was particularly commendable given that your Honour failed to embrace her abhorrence of the use of split infinitives. No doubt your Honour has fond memories of her red pen markings as a result of this non-compliance. One can only hope that your Honour chooses to not continue such practice on the Bench.
- 25 One of your Honour's memorable cases *Hungry Jack's Pty Ltd v Burger King Corporation* provided a substantial win for your Honour's team over a four month period on behalf of your client and franchisee Hungry Jack's. It also provided ample time to familiarise yourself with Hungry Jack's menu. Indeed on the very question of operational improvements, such was your Honour's ingenuity you managed to have your opponent's witness concede the weakness of their case from the witness box. While the case fell short of determining the truth of the advertising slogan "The burgers are better at Hungry Jack's", it did establish the concept of good faith in contract negotiations.

- 26 During the amendment application in another significant case, *Ingot Capital v Macquarie Equity Capital Markets*, a case which ultimately went on for 108 days before Justice McDougall, your Honour put on an affidavit outlining the difficulties you would have in responding to the amended pleadings that the plaintiffs proposed to file. Your Honour was cross-examined at length on the affidavit and I understand that you disobeyed the advice you normally give to witnesses by arguing with the cross-examiner and not answering the question. Instead your Honour asserted the question posed was wrong and that the cross-examiner's understanding of his own client's case was incorrect. At the end of the cross-examination one of the counsel for one of the other parties made the audible remark that the cross-examiner's performance was akin to "shooting a jumbo jet with a water pistol".
- 27 Both within and outside the courtroom your Honour has a way of conveying very politely the fact that the other person may have got it wrong. As opposed to suggesting that the person is completely wrong your Honour would quietly venture the following "Just let me test that for the moment". Your Honour's academic works are too numerous to mention but I do wish to commend your Honour's contribution as co-author of *Austin and Black's Annotations to the Corporations Act*, a comprehensive source of reference and a pathway to the case law. Former Supreme Court judge and co-author, Bob Austin, has described your Honour as a 'tower of strength' particularly during the latter stages of the project when he was caught up with one of the biggest civil cases in Supreme Court history. Your Honour, he said, forged ahead and did more than your fair share to facilitate its publication. Efficient and helpful, nothing was too much trouble, he has said.
- 28 In launching the reference last year, former Chief Justice, the Honourable James Spigelman AC, described it as an invaluable tool for lawyers and the judiciary and indeed expressed some relief that despite the inclusion of the authors' surnames in the title, which is usually reserved for those who have passed on, that you are both very much alive and well. Your Honour

has described your personal commitment to this text as a lifetime sentence of updating corporations law.

- 29 Mallesons' co-workers refer to your Honour as the quiet achiever, a workaholic with a brilliant brain, a clever litigator who will be an immense loss to that firm. Very supportive of colleagues and staff, your Honour has also been a great mentor to junior lawyers. Happy to share their pain your Honour could often be seen at the photocopier at night doing your own copying.
- 30 Additionally your Honour is also noted for being able to write verbatim as you are speaking, giving advice or during a conference call. Your Honour displays a genuine love of academic pursuits and a desire to share your endeavours with others. In 2009 your Honour was a panel speaker at the Law Society's Corporate Lawyers and Price Waterhouse Coopers Ethics Seminar entitled "Risking it all". Your Honour is renowned for running one or two postgraduate courses every semester at New South Wales and Sydney Universities even during your leave periods. Your Honour is Adjunct Professor in the Faculty of Law at the Sydney University and a Visiting Fellow at the Faculty of Law at the University of New South Wales.
- 31 Such is your pursuit of all matters cerebral, one would imagine there is little left for other interests. I am reliably informed, however, that your early morning regime includes a forty-minute workout on the treadmill and you enjoy kayaking. I was rather intrigued to discover that your Honour loves cats and has two cats, one of whom I understand has since passed on, named after Greek gods, Zeus God of the Sky and Poseidon God of the Sea. This foray into Greek mythology seems to be a marked departure from your Honour's reputation as a keen American History buff and after many years of US travel more recently your Honour has taken to other cruising to far off lands with your wife Leonie, who is Principal of Manly Village Public School.

- 32 Both of you are dedicated to your respective careers, it is not unusual to find one end of the dining room table stacked with Leonie's educational materials and your Honour's affidavits at the other end. Your Honour is also a wine connoisseur with a notable cellar so it is perhaps not surprising that your courtship with Leonie was conducted in the Hunter Valley vineyards and the wedding held in the Hunter Valley at Singleton. I understand Rocky Road Pie remains a favourite dessert from those days.
- 33 Your Honour I trust the road ahead will be anything but rocky and that you will assume the new role with the grace and humility that have been the hallmarks of your professional life to date. On behalf of the solicitors of New South Wales I wish you every success on the bench.
- 34 **BLACK J:** Mr Attorney, Chief Justice, your Honours, ladies and gentlemen, I must first congratulate the Attorney and Mr Westgarth on the geographical breadth and thoroughness of chronology of their researches which have unearthed several matters which might otherwise have been lost to my recollection and to history.
- 35 Thank you for joining me today as I take, what is for me, a very large step and for the Court a very small step in a very substantial tradition. I today pass from being a temporary custodian of the long tradition of a law firm to being a temporary custodian of the even longer tradition of this Court, to adopt the attractive description adopted by Chief Justice Spigelman in his speech at the Court's 175th anniversary in 1999 and by Justice Barrett in his swearing in.
- 36 It is a matter of particular satisfaction to me that the fact of my appointment to the Court from that other branch of the profession does not seem to have been regarded as particularly unusual. That is of course because it is not. The challenges which will face me in transitioning from a solicitor's practice to the bench will be substantial and I certainly do not underrate them. However, the path which I now thread has been trodden before, not least by the late Justice Santow and by Justice Austin, Justice Barrett,

Justice Ward and Justice Ball in this Court and by the late Justice Lehane and by Justices Stone and Jagot in the Federal Court of Australia. I aspire to making the same successful transition to the bench that each of them made.

37 This swearing-in also provides an opportunity for me to reflect on various happy influences in my professional career. I was very fortunate while a second year student in graduate law in 1985 to be taught equity at the University of Sydney law school by teachers including Messrs Meagher, Gummow, Lehane and Heydon. Those lectures, taught in a now less fashionable lecture style in a very large lecture theatre, had an immediate impact upon me and my professional direction. In 1986 I was again fortunate to being exposed to company law taught by a then very young Jennifer Hill who was in due course to become Professor Hill.

38 In 1988, I had the great privilege of spending a year as a judge's associate to the late Justice John Lockhart in the Federal Court of Australia. I need to tell none of the lawyers here today that his Honour was a man of great intelligence, integrity and charm. I would be very satisfied with my own time on the bench if I can show a portion of his Honour's qualities.

39 I was also very fortunate with those I worked at Mallesons Stephen Jaques. That good fortune began when I worked as a summer clerk for a young partner named Richard White. I subsequently worked for a happy eighteen months for John Atkin in the corporate section of the firm. After I returned to the firm's litigation group, as it was known in those days, I had the privilege of working with Justice Ward who was my supervisor as a young solicitor and with Gerald Raftesath whose influence has been acknowledged in many previous swearings-in. I am therefore a survivor of her Honour's famed red pen. I see many around this Courtroom who have had a shared experience in this regard. I was planning to announce that I would not dream of using a split infinitive in public but the comments made today suggest that my own assessment of my aversion to split infinitives may not be shared by all.

- 40 I was also fortunate that throughout the whole of my time with Mallesons there were lawyers with very strong academic interests within the firm, a commitment exemplified and promoted throughout by John Stumbles and continued by others who have had a range of involvements in post-graduate teaching. I have throughout my professional life had the very real pleasure of myself teaching post-graduate courses. I am grateful to the University of Sydney, particularly Professors Austin and Hill, and the University of New South Wales, initially Professor Redmond and later Professor Dimity Kingsford Smith for allowing me to do so and ignoring the fact that I had remained steadfastly loyal to my roots and continued largely to teach in an unfashionable lecture style while others moved on to much more ideologically sound approaches.
- 41 I should also acknowledge my debt to Professor Bob Baxt and Professor Harold Ford who many years ago invited me to become involved with a short text on securities industry law which in later years has become a longer text on securities industry law and which kept me usefully occupied over several editions and about fifteen years. More recently, Professor Austin was kind enough to invite me to join him in spending the last several years in writing a set of annotations to the *Corporations Act*.
- 42 It is a pleasure that so many from the bar, the profession and from clients for whom I acted have been able to be here today. I have been very fortunate in the clients for whom I have acted throughout the years and particularly in dealing with so many executives and general counsel who have been persons of great intelligence and integrity. I have also been very fortunate in the younger solicitors with whom I worked over the years although I have to confess, I am afraid, that a disturbingly large number of them seem now to be resident in Wentworth and Selborne Chambers. To paraphrase *The Importance of Being Earnest*, to lose one promising young solicitor in that manner is a misfortune but to lose so many looks like carelessness.

- 43 Finally I have been blessed with my wife of 18 years, Leonie, who has supported me through practice, teaching and writing throughout. Her own very strong commitment to serving the community good in the New South Wales public school system will serve as an example to me.
- 44 I look forward to making a contribution to the work of the Court in years to come and repaying the confidence which the community has placed in me by this appointment.
