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Swearing in ceremony of the Honourable Stephen Craig Rothman SC as A Judge Of The Supreme Court Of New South Wales

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT

Tuesday 3 May 2005

SWEARING IN CEREMONY OF THE HONOURABLE STEPHEN CRAIG ROTHMAN SC AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

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

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

(Commission read.)

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

(Oaths of office taken.)

3 Principal Registrar, I hand to you the forms containing the oaths so they may be placed amongst the records of the Court and the Bible so that it may have the customary inscription placed in it and given to Justice Rothman as a memento of this occasion.

4 Justice Rothman, on my behalf and on behalf of all of the Judges of this Court I congratulate you on your appointment and welcome you as a colleague of this Court. It is of great significance for this Court to have within its ranks the full range of legal learning and practice, in your appointment, as to the diversity of the Court by reason of your practice in the legal profession of this State. I welcome you on behalf of all the Judges.

5 **MR I G HARRISON SC PRESIDENT NEW SOUTH WALES BAR ASSOCIATION:** May it please the Court. It gives me great pleasure on behalf of the barristers of this State to welcome your Honour as the newest Judge of this Court. Today's ceremony is ancient in origin and despite recent very high authority in this Court, published as recently as yesterday, your Honour is in fact being sworn in today and not admitted as a legal practitioner. Whatever may be the true level of genuine debate about the issue, history will record that you were sworn in as a Judge of this Court on 3 May 2005.

6 You were born in the early fifties and grew up in Sydney. You attended Rose Bay Primary School and Vaucluse Boys' High School. Mr Schwartz informs me that you went to Sunday School four times a week. You graduated from the University of New South Wales with Degrees in Arts and Law.

7 Your Honour came to the Bar in 1982. You took Silk on the same day as me in 1995. I can confirm from my own observations of you professionally and otherwise since then that your appointment today is well deserved.

8 You practised principally, but not exclusively, in the Industrial Relations Commission. You have,

however, not limited your professional endeavours to an analysis of contracts whereby a person performs work in any industry or to a quest for orders declaring such contracts wholly or partly void, or varying them, if they are found to be unfair. Having said that, however, I note that it was coincidentally my pleasure to have been in Court when you recently argued a series of cases in the High Court Special Leave List dealing with the way in which s106 of the *Industrial Relations Act* ought to be interpreted and to the extent to which the Commission's decisions are amenable to appellate review.

9 You are always late. This morning was no exception. Judges apparently refer to you as the late Stephen Rothman.

10 Your cases have included significant issues of constitutional law, administrative law and human rights. You were a founding member of the International Centre on Trade Union Rights, a body which was granted observer status to the International Labour Organisation. You worked in Paris for a short time in that capacity.

11 You were selected by the ILO to advise the Soviet Union on attempts it was undertaking to establish free trade unions. For that purpose, together with advocates from Europe, you met and worked with former Soviet Premier Mikhail Gorbachev and members of his Government in 1987 and 1988.

12 Your Honour was involved in some seminal constitutional and human rights cases concerned with issues including the implied guarantees in the Australian Constitution involving the right to strike, the right to work and choose one's employer, anti-victimisation provisions and the status of trade unions. Most recently you have been involved in cases involving the protection of persons applying for refugee status under Australia's current immigration laws, including two significant cases dealing with racial vilification and freedom of speech. *Tobin v Jones* and *Jones v Scully*, both cases taken by you pro bono, clearly record your significant contribution to this area of the law.

13 You are an exemplar of the cab rank rule appearing for both sides of the industrial equation and ethnic and religious backgrounds. You appeared for the owners of the Gretley Colliery, a well-known piece of litigation, and for Channel 7 in a well-publicised dispute with one of its former presenters.

14 In 1979 you were elected as a Member of the Council of the New South Wales Board of Jewish Education. In 1982 you were elected to the Executive of that body and served successfully as its Honorary Secretary, Vice-President and ultimately its President, which position you held from 1993 until 1995. You served on the Board of Moriah College from 1993 rising to the President of the Moriah College Board in 1996 in which capacity you served until 1998.

15 In that year you became an Executive Member of the New South Wales Jewish Board of Deputies and a Member of the Executive Council of Australian Jewry. You served in several capacities for that body, culminating in your election as President of the New South Wales Jewish Board of Deputies in 2000 from which time you served out the maximum four-year term as President.

16 Your other communal positions are, quite literally, too numerous to mention, but bespeak an ongoing and unselfish contribution to others in the community.

17 Presumably in anticipation of my speaking today I yesterday received a document of questionable provenance setting out material relating to your Honour under a series of headings. These headings included things like "Notable Cases - Industrial Relations", "Practising and the Cab Rank Rule", "Notable Cases - Racial Vilification", and so on. All of these headings sat on top of a wealth of information about your Honour, some of which I have referred to earlier. One of the headings under which I was provided with information was "amusing anecdotes". The only thing that appeared under that heading was the word "none". With any luck this story will now qualify as the first entry under that heading.

18 The depth and breadth of your Honour's professional and extra curricular experiences, as his Honour the Chief Justice referred to, will serve you well as a Member of this Court. On behalf of the Bar of New South Wales, I congratulate you and wish you well. If the Court pleases.

19 **MR J E McINTYRE PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. It is my pleasure to speak today on behalf of the Solicitors of New South Wales to congratulate

your Honour on your appointment to the Supreme Court Bench.

20 Despite what my colleague Mr Harrison says, I have it on good authority that your Honour's commitment to justice stretches all the way back to childhood and a certain Superman outfit. Your elevation to the Supreme Court Bench today gives you a red cloak of a slightly different cut but it is encouraging to know that your passion for social justice is undiminished.

21 Your Honour, I am reliably informed that one of the inevitable by-products of the appointment of new Judges in the Supreme Court is a certain shuffling of offices. Unfortunately, you Honour, they could not find you one with a telephone box so we do not expect to see your other red outfit any time soon.

22 I am told that you studied Arts and Law at the University of New South Wales before marrying your charming wife, Sandra, in 1974. Together you have raised three children.

23 Shortly after your marriage you joined the Building Workers Industrial Union of Australia as a National Officer responsible for various of the union's activities. So enthusiastic were you in that role that at a very early age your children could recite the union's anthem by heart and, in fact, for some time, believed it was the National anthem.

24 Your three children describe your Honour as someone who always puts his heart and soul into whatever you undertake. You can be justifiably proud of them. Your elder daughter Carli, has followed you into the legal profession as a solicitor for the Aboriginal Legal Service, while your son David is in his third year of Law. Your younger daughter Sasha intends to follow a different profession studying medicine in Western Australia. Obviously your example of professional responsibility in service to the community has been passed on to them.

25 Your Honour is highly regarded by your colleagues as a person who always takes time to listen and takes a genuine interest in others. You have shown great compassion and consistently have embraced the idea of social justice throughout your career. Outside of the legal profession you have made a unique contribution to the community in many capacities, many of which have been touched on by Mr Harrison. For several years you have supported and assisted with raising funds for the Bob Greenwood Scholarship Foundation, which affords indigenous students the opportunity to study law. You were also a Member of the General Sir John Monash Foundation, a body that offers scholarships in a similar way to the Fulbright and Rhodes scholarships operating in other countries.

26 I have been told, however, that when it comes to exercise your Honour takes Oscar Wilde's approach, "Whenever I feel the urge to exercise, I lie down until it passes". Hyperbole perhaps in your case because I am informed that you do take a routine Saturday walk. Never letting exercise get in the way of a good discussion, however, I am told your best friend can only get a word in edge-ways if he takes you up a steep hill.

27 Your Honour's reputation for assisting the wider Australian community and for the rights of all persons was aptly demonstrated in more recent years when as counsel you represented all members of the Australian Jewish Community before the Federal Court and the Human Rights and Equal Opportunities Commission, where you successfully argued issues involving racial discrimination and racial vilification. In particular, you properly put before the Court and Commission the principles which needed to be considered and enunciated in determining whether material was likely to offend, insult, and humiliate or intimidate.

28 Your Honour's most recent success was in the High Court in the matter of *Blackadder v Ramsey Butchering Service*. I need to resist the temptation to expand too greatly on the theory that your client had a cunning plan, but it is without doubt that the acceptance of your persuasive argument has set a ground-breaking precedent in industrial law.

29 I am also aware that your Honour was briefed in two recent cases of particular importance to your Honour. It is worth noting that in both of those matters you argued tirelessly against the Court of Appeal and will no doubt await their outcomes with intense interest in your new judicial role.

30 Your Honour, your enormous contributions to the legal profession and wider community will assist you greatly in your new judicial role and on behalf of the Solicitors of this State I congratulate you on

your appointment and wish you many satisfying years on the Bench. As the Court pleases.

31 **ROTHMAN J:** Chief Justice, President of the New South Wales Bar Association, Ian Harrison SC, President of the NSW Law Society, Mr McIntyre, ladies and gentlemen.

32 I well recall when Harrison and I took our bows in the High Court - I was late then too - as the Senior new Silk of the day, Harrison spoke at the dinner imitating to perfection the voice of David Bennett QC. I should be thankful that he does not hear me often enough to mimic. One of the downsides of being appointed is that I will miss much my jousts with the High Court, but no doubt will read their transcript with interest.

33 The two branches of the legal profession now, far more than in the past, are equal and essential partners in the process of litigation and I am indebted to both Presidents for their kind and generous words, filled, as is customary, with more than a little hyperbole and flattery for all of which, I might add, I am grateful. I am especially grateful for all that was not said; and could have been!

34 I should perhaps add, although now is not the time to make corrections, that there were a number of inaccuracies in both statements, although I know the lengths to which, in particular, Mr McIntyre, as all good solicitors do, researched the task at hand.

35 I appreciate the difficulty of the task given to you both and the manner of its completion.

36 I would like to thank all of you here today for taking the time out of very busy practices to come to this ceremony. I have not yet forgotten how difficult that can be.

37 I have had an unusual practice at the Bar in a number of ways but mostly in that I have practised as much out of New South Wales as within it. I am most grateful that practitioners from States other than this one have flown up especially for this occasion and I am also greatly appreciative of the attendance of Judges, outside of this Court, who have been considered by me as friends, even though some, at least, I have known only in their current role.

38 Most importantly, I am thankful that my family is with me today. It would be unfair to Sandra, my wife of 31 years, and quite inaccurate to confine her role only to one supporting me in all that I have done. She is a person in her own right, a pharmacist, and in my absences interstate or in Chambers has borne the primary responsibility for the greatest achievement of all, our children, Carli, David and Sasha, each of whom is our pride and joy and makes all effort worthwhile.

39 In some senses it is I that have supported my wife, who has had the far more important and challenging task.

40 I, on the other hand, have been at the Bar for twenty-three years, ten of them as Silk, and have not at any stage considered it a burden. My background has been as a child of parents who lived in Australia, through the depression, an immigrant father born in China, and a mother born here of immigrant parents. Both of my parents are, thank God, here today to share this moment. They, together with my wife and children, have, in very different ways, struggled to ensure that I have had the time and space to lunge at the many windmills that have appeared.

41 This is a moment which I have approached with knowledge of the great responsibility involved, especially having regard to the stature and status of this Court as a pre-eminent Court in this great country.

42 The responsibility of the task ahead has been a little daunting. Notwithstanding my specialised area of practice, I have always managed to do cases outside the area of speciality, because ultimately one's capacity as a lawyer is improved as a consequence.

43 However, in facing the task ahead, I have drawn predominantly upon the two greatest mentors of my life. The first of them, very few know of, was my maternal grandfather who, through his understanding and knowledge of religious philosophy, imparted in me an understanding that all members of our species, human kind, having been created in the image of God, are entitled, equally, to the respect associated with that status regardless of their gender, race, colour, creed or religion and that none of us has, as of right, privileges not accorded to all.

44 The other mentor, Pat Clancy, was just as devout, but was an atheist, probably the leading Australian Communist of his time, who from a totally different humanist aspect, taught me the very same lessons. From each of them I have learnt the basic tenets which have guided my life, namely, to accord respect to all human kind; to understand that truly civilised society entitles each of us to our basic needs and an equal opportunity to reach our potential; and that, as part of human society, each of us has a duty to give back to society to the extent to which we are able.

45 It is that last duty which has always guided me to seek to empower the disempowered; to pursue justice; and to implement steps to ensure a fair society.

46 I have been blessed in that endeavour in coming from a community that has suffered over thousands of years the persecution that comes from being a minority and as a consequence I have been given an understanding of the suffering of others and the support and confidence to rail against it. The exploration of the proper construction and operation of the racial vilification laws was one example; the work in establishing scholarships for indigenous students of law was another. I have had the opportunity to alter the operation of the law as it affects Australian society and it has been a labour of great love. Every case in which rights are enforced or denied defines the democracy in which we live. Every time a steer jumps a fence and a person is injured and is granted or denied rights, society is defined. Every balancing of defendants' and victims' rights is a defining of democracy.

47 The autochthonous form of democracy which is Australia has largely been kind to my community; not so our indigenous inhabitants whose traditional ownership of this land I acknowledge and who still suffer the effects of our actions. Ours is a society which does not seek to merge differences by creating one from many, but to encourage diversity within our values including a fundamental egalitarianism and respect.

48 It is said that our values are under attack and that laws are necessary for the protection of our society. But the greater the attack, the more vigilant we must be to ensure the continuation of democratic precepts and the inculcation of fairness.

49 Democracy is more than the rule of the majority; it is the equal treatment of all, including the minority. The rule of law is "a great inheritance which has guaranteed the rights that, as individuals and as a nation, we have cherished". Essential to the operation of the rule of law is the legitimacy of the institutions which administer it. The Supreme Court of New South Wales epitomises that legitimacy. Essential to that democracy and essential to that legitimacy is the independent unbiased application, equally amongst its citizens, of the law. Once we embark, as a society, upon a course which undermines the legitimacy of the institutions in our democracy or undermines the rule of law, we will begin to erode the very democracy that we seek to protect.

50 I have been truly honoured to have been a barrister. During that time I have sought to fight for those rights and have believed, fundamentally, in the essential nature and importance of the rule of law and the democracy which it underpins. As essential as it is to have courts exercise power in a way that this great institution does, it is equally important to have advocates of daring and courage who are prepared to stand up for the protection of rights of those who inhabit, or would inhabit, this country. The more unpopular the cause, the greater the need for advocates to ensure that the rights of those that represent that cause are not eroded. "Institutional legitimacy", to use a phrase of one of the Judges of the High Court of Australia, is guaranteed only with the partnership between Judges exercising unbiased judgment independently of the State and counsel who are prepared to agitate for it.

51 This Supreme Court of New South Wales is one which has stood at the forefront of the protection of human rights in the Common Law world. It is a humbling experience for me to count myself among its members. I pray that I will live up to its reputation. Thank you.
