

**THE LAND AND  
ENVIRONMENT COURT  
OF NEW SOUTH WALES  
BANCO COURT**

**PRESTON CJ AND  
THE JUDGES OF THE  
LAND AND ENVIRONMENT COURT**

**TUESDAY 2 MARCH 2010**

**SWEARING IN CEREMONY OF  
THE HONOURABLE MALCOLM GRAEME CRAIG  
AS A JUSTICE OF THE LAND AND ENVIRONMENT COURT OF  
NEW SOUTH WALES**

1 **CRAIG J:** Chief Judge, I have the honour to announce that I have been appointed a judge of the Land and Environment Court. I present to you my commission.

2 **PRESTON CJ:** Thank you Justice Craig. Please be seated while the commission is read. Acting Registrar would you please read the commission.

(Commission read)

(Oaths of office taken)

3 I now invite you to resume your seat and to subscribe the oaths after which I will attest them.

4 Acting Registrar, I hand to you the form containing the oaths so that they may be placed amongst the records of the court and the Bible on which

they have been sworn so they may have the customary inscription placed in it and presented to his Honour as a memento of this occasion.

5 Justice Craig I welcome you to the court both on my own behalf and on behalf of all of the judges and commissioners of the court. Mr Bathurst do you move?

6 **MR TOM BATHURST QC, PRESIDENT, NEW SOUTH WALES BAR ASSOCIATION:** May it please the court. On behalf of all members of the Bar of New South Wales it gives me great pleasure to congratulate your Honour on your appointment and to welcome you to your new career.

7 Like many distinguished judges before you your Honour completed secondary schooling at Fort Street Boys High and went on to study law at the University of Sydney on a Commonwealth scholarship. Your Honour graduated in 1967.

8 Your Honour practised as a solicitor both in Sydney and in Mudgee for a period of about ten years following graduation and was called to the bar in July 1977. Your Honour read with Mr Tamberlin QC who of course went on to become a distinguished Federal Court judge. Your Honour practised from 16th Floor, Wardell Chambers until 2003, rapidly establishing a practice primarily centred on Local Government and Environmental Law but including Administrative Law, Equity and Property Law. It was your Honour's extensive knowledge of law in those areas which made your Honour such a formidable advocate in the Land and Environment Court matters.

9 As a junior your Honour appeared in a number of famous, and for that matter, notorious cases. Early in your career, your Honour was led by Mr Tobias QC as his Honour then was in *Wentworth v Woollahra Municipal Council*. That was then one of the most important cases on the limit upon recovery of equitable damages for breach of a planning instrument.

- 10 More notoriously, your Honour was led by Mr Hemmings QC in *Sydney City Council v Ke-Su Investments*, the case involving a well known brothel at the time, A Touch of Class. The importance of this case was shown by the fact that, as well as your Honour, counsel who appeared include the present Chief Justice of NSW, the present Chief Judge in Common Law, your pupil master Mr Tamberlin QC, Mr Tobias QC as his Honour then was, and the late David Officer QC.
- 11 I don't know whether this distinguished rank of counsel was due to the importance of the issues involved or the importance that particular institution played in the life of various parts of the Sydney community at the time. I had occasion to discuss the view that Mr Tobias was forced to have of the brothel during his Honour's 15 bobber. I assume your Honour did not have such an experience, as your Honour was, I think, acting for the Minister.
- 12 The political nature of the areas with which the Land and Environment Court involves itself must lead to the temptation only to appear for the side which a barrister believes to be morally or politically correct. Your Honour in the finest tradition of the bar resisted this temptation. Your Honour appeared for brothels, religious schools, pubs, clubs, quarries on the one hand and also for councils, agencies and other interest groups seeking to close them down or prevent them being built.
- 13 Your Honour took silk in 1989 after only twelve years at the bar. That was a remarkable achievement at the time considering the pressure which existed to impose a rule or convention that barristers should serve fourteen years as a junior before being appointed silk. It was an appointment that was richly deserved. Your Honour's practice continued to expand and your reputation continued to grow during the period you took silk. The important cases on which your Honour appeared are far too numerous to mention but your ingenuity when encountering almost insuperable difficulties can be demonstrated by one of your submissions in a case, *Broken Head Protection Committee v Byron Shire Council*.

- 14 Your Honour appeared for a mining company on a challenge to approval of a quarry. The objectors claimed the land was inhabited by numerous threatened species of fauna and in particular a mammal and in particular one known as the long-nosed potoroo, which as all those here today will know is a mammal commonly known as a rat kangaroo and believed by some to be one of Australia's most endangered mammals. It was established apparently that a potoroo had been sighted in the area surrounding the quarry but undeterred or in desperation your Honour suggested that one would be forgiven for thinking there was only one potoroo in New South Wales which travelled from quarry to quarry when appeals to the Land and Environment Court were commenced.
- 15 Your Honour was universally liked and admired by your juniors and those who instructed you. Everybody I have spoken to commented on the quality of your preparation and your willingness to engage with those assisting you and absorb and take on their ideas.
- 16 Your Honour established Martin Place Chambers in 2003. The chambers of course have been better known as Malcolm's Planning Chambers, referring to the benevolent dictatorship you exercised on the floor and your refusal to tolerate what is the bane of all counsel's chambers, namely floor meetings. Your Honour gave distinguished service to the bar. From 2003 to 2008 you were the convenor of the Environmental and Local Government section of the Bar Association and most importantly from 1989 to 2009 a Director of the Barristers' Sickness and Accident Fund and for fifteen of those years, Chairman of that fund. There are many barristers who have to thank you for your tireless work in that capacity.
- 17 In addition, your Honour found time to be a part time Commissioner of the New South Wales Law Reform Commission between 1991 and 1995 and for three years between 2001 and 2007 president of the Environment and Planning Law Association. You were noted for organising conferences at places some would consider somewhat exotic. They included the

Wollongong Buddhist Temple, Sydney Olympic Park, Mount Panorama Racetrack and Penrith Panthers Leagues Club.

- 18 Notwithstanding all these activities, your Honour still found time to enjoy yourself. Your Honour is a confirmed Francophile, an accomplished skier and your Honour maintains a keen interest in art being a member of the NSW Art Gallery Society. One of the oddities in visiting your chambers was that on the floor there is a rather large work of art being I think a street scene from Italy. It was on the floor I'm told because there was apparently a rule in your chambers that art could not be hung. I don't know whether it's true and I certainly don't know what Mr Meagher QC would have thought of it.
- 19 The Land and Environment Court plays an increasingly important role in the life of the community at the present time. The Court and the community are fortunate that a person of your skill and experience is prepared to join it. On behalf of all members of the bar I congratulate you and wish you well in your new career. May it please the court.
- 20 **PRESTON CJ:** Ms Macken do you move?
- 21 **MS MARY MACKEN, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** May it please the court. In 1973 the release of the large family car, the Leyland P76 caused much excitement in motoring circles with its roomy interior, rack and pinion steering, concealed windscreen wipers and flat wedge shape. The motoring magazine, Wheels, described it as the most important car of the year. In the New South Wales mid-west town of Mudgee the sight of such a car in the 70s was noteworthy. The rumoured occupant at the time may have been test driving it for his father, an executive at Leyland Motors, or perhaps being one of three sons he liked the idea of being one of the Leyland Brothers. Whatever the reason, the P76 slogan of "Anything but average" could well have been attributed to the driver. Today your Honour drives a Mercedes CLK 350 for which the

brand advertising slogan is “Unlike any other”. Perhaps that’s all that needs to be said.

- 22 Your Honour the solicitors of New South Wales have much pleasure in welcoming you to the bench and congratulating you on your appointment. Your Honour was born on the date of the allied invasion of Normandy, 6 June, being the day of operation “Overlord”. This auspicious birth date perhaps presaged your Honour’s future occupation.
- 23 Your Honour was the eldest of three boys, Malcolm, John and David, to parents Douglas Malcolm and Beryl. Your Honour excelled at Dobroyd Point Public School becoming dux of the school which ensured your place at Fort Street Boys High. While neither parent demonstrated interest in the law, other than to ensure their boys stayed on the right side of it, the influence of your Latin teacher and your love of the international language of science and scholarship made it clear that your Honour was destined for a career in academia or the law.
- 24 With your eyes firmly set on a life in the law your Honour completed a Bachelor of Laws at the University of Sydney and became articled to Anthony McDonald in the city. Heeding McDonald’s advice to “Go west young man and gain a broader experience of all aspects of the law”, your Honour landed in a small country practice in Mudgee, now Hannaford Cox Connellan & McFarland, where you focused on matters of civil and criminal litigation. Articled clerk to your Honour at this time was Chris Cox who described you as “A very meticulous, thorough and exceptionally nice fellow. A smart dresser and very involved in the local Apex Club”.
- 25 A regular visitor to Mudgee was former Federal Court Judge Murray Wilcox AO who is credited with having some influence on your later decision to move to the bar where you were duly admitted in 1977. At the bar your Honour proved to be the complete barrister, a gifted advocate and polished courtroom performer which one of your colleagues noted was sometimes a difficult task given the merits of some appeals.

- 26 In addition to your Honour's noted cases, the wide spectrum of clients for which your Honour has appeared include the Catholic Church, the Coptic Church and diverse brothel owners. Your Honour has still found time to regularly undertake pro bono work. Some pro bono cases have proved to be a little bit more protracted than expected. For example, a recent case your Honour did for the Environmental Defender's Office on a one day reduced rate fixed fee actually ran for ten days.
- 27 As to Malcolm Craig the man, your colleagues have described your Honour as the Giorgio Armani of the Land and Environment Court, always perfectly dressed and not a hair out of place. However that appearance belies the fact that you are as much at home at an INXS or Rolling Stones concert as you are at the opera, particularly when it comes to Puccini's works. In the sporting arena your Honour's early enthusiasm for rugby has endured through the years, from captaining the under 16 school rugby team to university competitions and as a member of the Central West Rugby Union team. Your Honour proved to be a formidable oarsman in the 60s with the Haberfield Rowing Club and in more recent years, as my friend said, your activities have included snow skiing.
- 28 As my friend said, a lover of all things French, the country, the food, the films and the wine. In the last seven years your Honour has not missed one of the annual Martin Place Chambers Champagne Appreciation, Education and Tasting nights. Perhaps your Honour has some sympathy for the observations of Napoleon Bonaparte "Je bois du champagne quand je gagne a celebrate et je boire du champagne quand je perds pour me consoler", "I drink champagne when I win to celebrate and I drink champagne when I lose to console myself".
- 29 Your daughter Belinda often accompanies you on these occasions. One of four children, Belinda is an executive in an international bank and spends her time between Sydney and Manila. Daughter Hannah is at university and Joshua looking to join the Royal Australian Army. Only

Andrew has followed his father into law and has spent the last ten years at Freshfields in London. Your Honour's family extends to the four legged variety where you've demonstrated a passion for showing Siberian huskies and Alaskan malamutes as well as breeding and showing Akitas, one of which went by the name of Yamato Count Monte Cristo, aka Monty.

30 I'm sure your Honour will bring to the court as diligent a judicial approach as you've dispensed as a member of the judicial panel of the Royal New South Wales Canine Council, otherwise known as DOGS NSW. That said, in relation to studies showing a marked similarity between dog and owner, perhaps colleagues and clients should be aware that the breed of dog your Honour favours suggests a tendency towards stubbornness, hyperactivity, independence and resourcefulness. It remains to be seen whether your bark is worse than your bite although a howl is probably more in keeping with these sub-artic breeds.

31 As head of chambers, your Honour has never had to resort to a bark but has led firmly, as my friend said, dispensing with the need for too many meetings resulting in an extremely cohesive floor. The floor's joy in your Honour's appointment is tinged with regret at your leaving. You will be missed by members and staff alike.

32 On behalf of the Law Society of New South Wales I wish your Honour every success in your new role on the Land and Environment Court bench. As the court pleases.

33 **PRESTON CJ:** Mr Craig, I invite you to reply.

34 **CRAIG J:** Thank you Chief Judge. Your Honours, professional colleagues, ladies and gentlemen. Today is an extraordinary one in my professional life. It is both extraordinarily challenging and extraordinarily happy. Notwithstanding my years of practice, first as a solicitor and then as a barrister, the announcement of my appointment as a judge has brought with it a sense of rejuvenation, indeed excitement that I have



found difficult to suppress. If I may apply a military analogy, in my blue knapsack as a very junior barrister I suspect that I subconsciously carried in it the aspiration that one day I may hold the notional field marshal's baton or more realistically the notional field officer's sword in the form of a judicial commission. That subconscious aspiration has now been realised.

35 The realisation is made the more significant and enjoyable by your attendance today, sharing this important occasion with me. I am very grateful to you all for so doing. I am particularly honoured by the presence of the Chief Justice of New South Wales along with a number of judges from other courts both State and Federal as well as former judges, including former judges of this court.

36 My particular thanks must be conveyed to you Mr Bathurst and Mrs Macken for the generosity of your remarks. On an occasion such as this, but if I may say so only on such an occasion, are you forgiven for indulging in hyperbole. As I listened to your generous remarks I conjured images of silk purses woven from sow's ears, an exercise that appropriately reflects more favourably upon the weaver's art rather than the raw material with which he or she is provided.

37 When commencing practice at the bar in 1977, the term "Environmental Law" as descriptive of an area of legal discourse or even practice was generally foreign among practitioners at that time. In my time as a tutor for the Law Extension Committee of the University of Sydney, what now falls within the rubric of environmental law were the subjects entitled "town planning law" and "local government law". Those discreet areas of both statutory and common law discourse first fell within the rubric of environmental law upon the enactment of the *Environmental Planning and Assessment Act* in 1979. For the first time in State legislation that Act defined the word "environment" and contained objectives relevant to both town planning law and local government law which enjoined the need to consider the environment when a statutory authority exercised powers under that legislation.

- 38 It was upon the enactment of the *Land and Environment Court Act* in 1979 that this court was constituted and was vested with jurisdiction that had hitherto been exercised by the Local Government Appeals Tribunal, the Land and Valuation Court and the Supreme Court pertaining to matters that now fall within the generic description of environmental law.
- 39 I am proud to join a court which since 1980 has had the function as a court of first instance to develop the jurisprudence appropriate to the administration and application of environmental laws in this state. As a relatively young statutory court, it has already taken significant steps in that regard. However the ever changing provisions of environmental legislation coupled, importantly, with the heightened awareness in the community of the fragility of our environment, have meant and continue to mean that the development of the law in this area remains dynamic. I trust that I have the capacity to make a contribution to this important area of the law which is at least complimentary to that which has already been made by present members of this court as well as by those who have served it in the past.
- 40 There are many, too numerous to nominate individually, who in their own way have made a significant contribution to my career. To all of you I express my gratitude. Notwithstanding the very great assistance I have received from so many, I trust I will be forgiven for mentioning just a few by name.
- 41 Before doing that, however, I must acknowledge my debt to the state. The system of public education in this state provided me with the opportunity to attend, as you have heard, Fort Street Boys High, a school that provided secondary education which I do not believe was surpassed by any other. I was also given the opportunity by the state to undertake my university education with the benefit of a Commonwealth scholarship. Without that assistance it is doubtful that my parents could have sustained me financially in undertaking tertiary studies. By serving on this court I now

have the opportunity to repay a very small portion of the debt which I believe I owe to the community.

- 42 As has been recited, my initial guide and mentor when both contemplating and then commencing practice at the bar was the honourable Murray Wilcox QC. Murray encouraged me to make the bold move from country solicitor to Sydney barrister. He was instrumental in introducing me to other young barristers whose careers he was then nurturing at the bar and whose professional comradeship I so enjoyed. They included Peter McClellan, as his Honour then was, and John Karkar of the Victorian Bar. In turn Murray arranged for me to read with the honourable Brian Tamberlin QC who was a wonderful pupil master. The variety of work to which he was able to introduce me and the intellectual stimulation which he afforded was an experience for which I will be forever grateful.
- 43 In my years as a junior barrister I had the privilege of being briefed on many occasions with Murray Tobias QC, as his Honour then was. I saw him then as an outstanding barrister. His critique of my work as a junior was always constructive and I owe him much for what he taught me both in discussion and by example as an advocate. Undoubtedly when I took silk and we opposed each other, his critiques, at least in court, were less constructive. Alas, he will continue to critique my work from the lofty heights of the Court of Appeal. Murray was and remains a firm friend.
- 44 In my years as a member of 16th Floor Wardell Chambers I was fortunate to have as fellow floor members two great exemplars of the barrister's craft. They were the honourable Tom Hughes QC and Robert Ellicott QC. Tom, I am delighted to see, is here today. Their learning, skill, experience and dedication to practice set an example for all who had chambers on that floor.
- 45 While there were many pearls of wisdom which Tom cast in my direction and to which this swine was grateful, one such pearl became particularly pertinent in later years. At a meeting of the board or management

committee of that floor Tom, very quickly after some brief discussion, applied the guillotine to debate, using his best parliamentary or former parliamentary skill. It was a discussion about the grievance of some barrister on the floor that had been brought for consideration. Tom terminated the discussion by standing, looking across his shoulder and with jaw slightly jutting in his most formidable forensic pose said “You know, Malcolm, there's only one way to govern a floor of barristers and that is by doing so as a benevolent dictator”. I sought to adopt that approach when I became head of Martin Place Chambers, I fear not with the same success as Tom enjoyed at 16 Wardell.

46 Apart from benefiting from the fine example set by Tom and Bob I also had the benefit of having Belinda Lyus as my clerk. Belinda was a protégé of the late Les O'Brien, a doyen among barristers' clerks. Belinda was a loyal and hardworking clerk who played a significant part in assisting me to build and sustain a busy practice. I express my gratitude to her.

47 In the context of my work environment, no period of practice at the bar has been happier than my past seven years at Martin Place Chambers. It may be the great diversity and background of its members, it may be the mix of male and female practitioners, it may be the diverse extracurricular interests the members of those chambers pursue which were but some of the factors contributing to the enjoyment of my time in those chambers. Whatever the reason, it is a most harmonious and congenial group of barristers, a number of whom I count among my friends.

48 In truth there are two further factors that explain the contentedness which I have enjoyed at those chambers. Those factors may succinctly be summarised as ‘clerk’ and ‘personal assistant’. Michele Kearns, my clerk, has been tireless in working for each and every floor member. Clerking is her life. I have not known anyone to open as many doors, maintain as many contacts, obtain as many tickets or organise as many functions as she is able to do while at the same time keeping a floor of twenty idiosyncratic individuals contented in both professional and personal life. To Michele I offer my deep thanks.

- 49 Kerri Burgess has been my personal assistant for the past five years. She has done far more than type submissions, advices, letters or the occasional memorandum of fees. She has in every sense been a personal assistant without whose dedication, tolerance and equanimity, the conduct of my practice would have suffered severely. I owe her a great debt of gratitude. My practice as a barrister would not have existed without the constant support of a large number of solicitors. For those who have had the courage to brief me and the forbearance to tolerate my idiosyncrasies I gratefully acknowledge your support.
- 50 In similar vein, I acknowledge the assistance which I received from a number of members of the junior bar who were briefed with me. A number have prevented me from committing the most egregious heresies. More often than I would care to admit, some taught me the law. Almost always the collaborative contribution that we made to the preparation of an advice or the presentation of a case exceeded the contribution that we, as individuals, would have been capable of making.
- 51 The last but in many ways the most important debt of gratitude I must express is that owed to my family. Sadly my father, Douglas, died eight years ago this month but I am most fortunate that my mother Beryl is here today. I know that dad, who was a devoted family man, would have been glowing in the enjoyment of today's ceremony.
- 52 My mother and father sacrificed much to provide opportunities for my brothers and for me. For those sacrifices we owe them much. The delight that my mother has derived from my appointment perhaps provides some satisfaction to her for the sacrifices made and the devotion she has given to all of us.
- 53 I am delighted that my brothers John and David and David's wife Catherine are able to be present today to witness this ceremony.

54 My children deserve special mention for the great pride and joy that they have brought me, the things that they have taught me and the tolerance they have shown to an all too often preoccupied dad. My daughter Belinda has taken the day from busy commercial employment to be here. Regrettably Andrew, presently practising in London, could not be here but has acknowledged the occasion in other ways. I'm also delighted that Hannah has forsaken her first day of university term to be here. Regrettably Josh could not attend but has recognised the occasion in an appropriate way.

55 For the love and counsel of Trisha which she has given to me both generally and in addressing my transition from barrister to judge I will forever be grateful. That support and affection has been reinforced by her daughter Gina whose presence today I fondly acknowledge.

56 On the occasion of his farewell from the Supreme Court in November last, Justice David Ipp quoted from the 1884 writing of Lord Bowen. Notwithstanding its antiquity, the extract cited by his Honour resonated with me. It reads as follows:

“As for the law, it is no use following it, unless you acquire a passion for it. ... I don't mean a passion for its archaisms, or for books, or for conveyancing; but a passion for the way business is done, a liking to be in Court and watch the contest, a passion to know which side is right, how a point ought to be decided”.

For his part, David Ipp remarked, “that passion has been my touchstone and motivating force.”

57 In striving to fulfil the judicial oath that I have earlier taken I also want to acknowledge that same passion and motivating force as I embark upon my duties as a judge of this court. I am greatly encouraged in assaying that task by the warmth of the welcome that I have received from all members of the court, judges and commissioners alike. Thank you again

for the honour that you do, not just to me but to this court, by your attendance today.

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