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## FAREWELL

### **ADDRESS ON THE OCCASION OF THE RETIREMENT OF THE HONOURABLE JUSTICE MARK WEINBERG FROM THE SUPREME COURT OF VICTORIA BY DR MATTHEW COLLINS QC, PRESIDENT OF THE VICTORIAN BAR, AND PAUL HOLDENSON QC ON WEDNESDAY 9 MAY 2018 AT 5 PM IN THE BANCO COURT**

May it please the Court.

I appear, with my learned friend Mr Holdenson, on behalf of the Victorian Bar, to pay tribute to Your Honour's nearly 44 years' service in the Law since your admission to practice as a Barrister of the Supreme Court of New South Wales on the 26th of July 1974 – more correctly, Your Honour's service in the Law to date – you were, yesterday, appointed a Reserve Judge – so, happily, there is still much yet to come.

I also acknowledge the traditional owners of the land on which we meet and pay my respects to their elders past and present.

I ask Mr Holdenson to address the Court.

PAUL HOLDENSON QC

May it please the Court.

Your Honour was undoubtedly the best criminal appellate advocate of your generation.

And, for the best part of 20 years, Your Honour has been an outstanding Judge.



Your Honour was a little over 10 years on the Federal Court – beginning on Wednesday the 15th of July 1998 and finishing-up there on Friday the 19th of July 2008 – a few extra days taking you to the Friday. After the weekend off, you began in the Court of Appeal the following Monday the 22nd of July.

The Statute denied you that symmetry in this Court – your Commission ending at the stroke after midnight on the anniversary of your birth this Sunday – but yesterday you were, in the nick of time, appointed a Reserve Judge, effective Sunday.

Speaking for the Bar, I shall focus on Your Honour’s coming to, and career at, the Bar.

Like many whose academic excellence at Law School is drawing them to a career in the Academy, Your Honour did not seek the year’s Articles necessary for admission to practice.

You went straight into teaching – as a Research Assistant and Tutor at the Monash Law School.

On your return from Oxford, you went to the newly-established University of New South Wales Law School – as a Lecturer, then Senior Lecturer.

This was the key to your coming immediately to the Independent Bar. Instead of the 12 months’ Articles, Your Honour would have had to serve in Victoria, you were able to go directly to the New South Wales Bar.

You read with Michael Lazar – a colourful Common Lawyer, practising mostly in personal injuries cases – his Law School contemporaries called him, from those boisterous days, “Marcus Bullus”.



You were thrown in the deep end. On your first day of Reading, Lazar was multiple-booked – not uncommon at the Sydney Bar – and not exactly unknown at the Melbourne Bar. He sent you in to “hold the fort” – promising to be there before anything had to be done.

The case was called – Lazar was nowhere to be seen; and this was long before mobile phones.

A generous opponent suggested the matter be stood down so that his opponent’s learned Junior might be shown “the film” – of his client displaying physical prowess wholly inconsistent with the claimed residual injuries.

Your Honour promptly settled based on withdrawal of the claim, each side bearing its own costs – a remarkable result of which your Master – to your great relief – approved.

When, in 1975, you joined the Law Faculty of the University of Melbourne, you were granted reciprocal admission in Victoria – but the Bar required further Reading – which you did with Jack Fajgenbaum (now QC).

The Personal Injuries work of your New South Wales Pupil Master did not appeal; nor did the Insolvency work of your Victorian Pupil Master.

At your Welcome to the Federal Court, you said of Jack Fajgenbaum that he taught you a lot and “It was not his fault that [you] could not bring [yourself] to share his then passion for Insolvency Law and turned instead to Crime”.

At your Welcome , Your Honour paid tribute to Lillian Lieder as having started your career in appellate advocacy with a “flick-pass” brief in the Court of Criminal Appeal.



Lillian once had the temerity to criticise Your Honour’s dress sense – but, Your Honour, there is corroboration – in the form of the student-vote three years in a row as worst-dressed Law School Faculty member; and there is your Three-Stooges tie.

Lillian Lieder QC died in 2001 – in her early 50s – and all of us who knew and worked with her wish she was still with us. Lillian’s thoughtful, and always practical, generosity to so many of us was legendary.

Your Honour’s first 10 years’ practice at the Victorian Bar were, as we’ve heard, while you were a full-time Academic at the University of Melbourne.

You have confessed that you approached that first Court of Criminal Appeal argument as an Academic – that you delivered a substantially historical lecture to the Court for four days on a point that should have been disposed of in an hour.

Your Honour got off to a rocky start with Mr Justice Starke. Notoriously, His Honour did not have a high regard for Academics, and first saw you as “just an Academic” – from him, at the high end of the pejorative scale.

That quickly changed because Sir John saw that Your Honour’s analysis of the Criminal Law was invariably correct.

You also swiftly became the favourite Appellate Counsel of the great Mr Justice Crockett because you got right to the point.

Your Honour’s preparation of every case was painstaking and thorough. You spent hours in conference with your Juniors working on submissions – striving, in each and every set of submissions, for perfection.



Your Honour encouraged your Juniors; you expected us to “put in”; you recognised our contributions and recommended us to your Instructing Solicitors; and you loyally supported and protected us from criticism – whether in Court, in Chambers, or with Solicitors.

The scary part was that Your Honour’s respect for your Juniors extended to your “egalitarian” assumption that each of us had read and understood as many authorities as you had – a generous, but humbling and – though we surely did our best – an unwarranted assumption.

Your Honour was, and is, a giant in your knowledge and understanding of the law and the authorities.

Your Honour was, as Counsel, “no nonsense” and practical – and so were the Counsel you most admired: Leaders like Frank Vincent and Michael Black - and Jim Morrissey and Jack Winneke.

At the Victorian Bar, including Your Honour’s 3 years as Commonwealth DPP , Your Honour practised for some 22 ½ years as Counsel – of those, some 11 ½ years as Silk.

You consistently appeared in the High Court; in this Court; and in a number of interstate intermediate appellate Courts.

You appeared not only in Criminal Law but in Constitutional and Administrative Law cases involving difficult questions of, for example, statutory construction, jurisdiction and evidence.

In the limited time I have, I can single out only a few representative examples of significant cases Your Honour argued as Counsel.

The learned Solicitor mentioned He Kaw Teh in the High Court. This case involves the construction of criminal statutes and the mental



element of criminal offences created by statute. Your Honour appeared as a Junior without a Leader. You won against the odds. The Court's decision completely changed the law; and is still cited in Australian Criminal Courts almost daily.

Similarly, the High Court decision in *Alexander* is regularly cited today on the admissibility of eye witness identification evidence. In that case, you and Joseph Santamaria, both then still Juniors, appeared together.

Your Honour took Silk in 1986. There were, that year, 9 Victorian Silks. You were – with Michael Rozenes (now-retired Chief Judge of the County Court) and Ray Finkelstein (now retired Federal Court Judge and back at the Bar) – together – the first Monash Law Graduates to take Silk.

More remarkably, when Your Honour took Silk, although you were just under 11 years' call, and you'd been practising at the highest level as Counsel – it had all been while you were also a full-time Academic – and with increasingly substantial responsibilities in the University – for the last 4 years, Deputy Dean, Acting Dean and then Dean of the Faculty of Law.

You had, when you took Silk, only been practising at the Bar full-time for about a year – that has surely to be a record! – and a remarkable one!

Subsequent to your taking Silk, examples of significant High Court cases in which Your Honour appeared include *Grollo v Palmer* on warrants and the constitutional implications of Federal Court judges issuing warrants; and the Criminal cases of *Coco*, *Thompson* and *Osland*.

My favourite quotable quote from Your Honour as Counsel is your opening in the High Court when you sought Special Leave on the change in Victorian sentencing law that provided for the fixing of a minimum sentence in what had been a life sentence.



“Your Honours, the Special Leave point in this case is “What is the meaning of “life”.

There are a couple of good lines in the provocation case of Masciantonio. In the Court of Criminal Appeal, one Judge asked: “What are you going to do if we reject that argument?”

“I’ll go to another place, Your Honour, and have the decision reversed.”

The Court of Criminal Appeal dismissed your client’s appeal; and you did exactly that.

I was Your Honour’s Junior in the High Court – and there, Mr Justice Dawson threw Your Honour a curly question about the meaning of a passage in the Court’s decision in *Stingel* – an impenetrable decision which had been criticised in the Academy and in Law Reform Commissions.

Mr Justice Dawson had been a party to the unanimous decision in *Stingel*.

I quote from the Transcript: “It is a bit hard to ask me to explain what it means when Your Honour wrote it”.

Prime Minister Turnbull says that we all need to be “nimble” and “agile”.

To outward appearances, Your Honour was, as Counsel, way ahead in that game.

I think the real answer is that, over the course of 30 years as Counsel, you were so consistently correct that, when – on the few occasions that Your Honour was “mistaken” – and when, in the end, you saw the light – it seemed as though that had been your view all along – even to yourself.



For instance, in R v Moran & Mokbel, when we each appeared for co-accused at the Committal, I distinctly remember your reluctance to argue my “sufficiency-of-uncontradicted-evidence-of-conspiracy” point. I persuaded Your Honour to do so and, when it failed, you said “of course [it failed]” – it was rubbish.

You missed the trial, having been appointed to the Federal Court – but, doggedly, I ran it again – and lost on it again. And, once again, you said “of course”.

Undeterred, I ran it again, with Robert Redlich, in the Court of Appeal – and you said “whatever for?”

Then, five weeks later, when the appeal was allowed and the Court accepted the argument – I told you this over lunch – and Your Honour then owned the point! It had, you reflected, been simply a matter of time before everyone came to realise that your argument at the Committal was correct.

Not, I’m sure, the Prime Minister’s “nimbleness” and “agility” – rather that “It’s not easy being Green” – “It’s not easy being consistently correct” – and the memory plays tricks.

Your Honour’s service to the Community of the Bar was substantial.

There are those for whom the very word “Committee” is a pejorative term.

And there are few things more tedious than a chronicled list of years and Committees.





However, Your Honour served on several Committees at the Bar and that service should be mentioned – I give only the highlights:

Several years on the Committee of the Criminal Bar Association, including as Vice-Chairman;

A couple of years on the Ethics Committee – when, under the pre-1996 Statutes, that Committee was directly responsible for the investigation and summary dismissal or summary hearing of professional conduct matters and complaints;

For more than 2 years, as Chairman of the Holmes List Committee – the crucial years from the establishment of the List – Your Honour and Rose both moved to, and supported, Paul Holmes and his new List; and You also served nearly half a year in the Senior Category on the governing body, the Victorian Bar Council.

Your Honour's story is remarkable.

Your family is originally from Germany. Your parents fled the Nazi holocaust – and you were born in Sweden.

The family went first to the United States and you began school in Brooklyn. You were 10 when you came here – then it was Ripponlea Primary, Caulfield North Central, then Melbourne High – where your Matriculation results were spectacular: Victoria's top matriculant in the Humanities.

You were a trail-blazer, choosing Monash in only the third entry into the new Law School – a tiny Faculty of only ten or so, including Tutors;

You were a Lecturer in the University of New South Wales Law School in its second year of operation.



At the Bar, you were the inaugural Chairman of Paul Holmes’s List Committee.

Your Honour has distinguished yourself as a Scholar, Teacher, Academic and Dean; at the Independent Bar; and as the Commonwealth DPP; and now as Judge for the closest to 20 years that the age-discrimination in the Statutes will permit in the first instance – though, thankfully as, now, a Reserve Judge, Your Honour will be able to complete your ten years, and more, as a Judge of this Court.

Your prediction to your morning coffee companions at Speck in Queen Street that “Trump won’t win a single State” was, sadly, off the mark. But your contributions as Counsel and as a Judge have, for the most part, been spot-on.

On behalf of the Victorian Bar, I wish Your Honour all the very best in your seamless transition from Judge of Appeal to Reserve Judge – and in your eventual retirement.

May it please the Court.