



WELCOME

**ADDRESS AT THE WELCOME TO
THE HONOURABLE JUSTICE MICHAEL O'BRYAN,
JUDGE OF THE FEDERAL COURT OF AUSTRALIA
IN COURT 1 OF THE FEDERAL COURT OF AUSTRALIA ON
LEVEL 8 OF THE OWEN DIXON
COMMONWEALTH LAW COURTS BUILDING,
305 WILLIAM STREET, MELBOURNE ON
TUESDAY, 9 APRIL 2019 AT 9.30AM
BY MATTHEW COLLINS QC,
PRESIDENT OF THE VICTORIAN BAR**

May it please the Court.

I appear on behalf of the Australian Bar Association and the Victorian Bar to congratulate Your Honour on your appointment to this Court.

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

It is a particular pleasure for me to address the Court today, for two reasons: first, Your Honour and I took silk on the same day, 22 November 2011, although if memory serves my celebrations were a little more raucous than those of Your Honour's, which is not saying much. Secondly, when at law school, Your Honour, your wife Marnie, who is of course here today, and my partner, Leonard Vary, who is also here, were as thick as thieves. I can't speak for Marnie, but I can be confident that you approached your studies at law school more—how-shall-I-put-it—studiously, than Leonard.

Your Honour was born in Melbourne, growing up in Kew and educated at Xavier College. Your Honour went on to study law and science at Melbourne University, completing a Bachelor of Laws with Honours and a Bachelor of Science degree in 1985.

Your science degree was in mathematics and computer programming: the latter well ahead of the times, long before the days of the internet and ubiquitous handheld devices with more computing power than the Apollo 11 command module.

Your love of the law won over, but there are obvious complementarities between the immutable logic of mathematics and skilled computer programming on the one hand and, on the other, what are, at least in their finest expositions, the logical discipline of statutory and judge-made law.

There is also, however, in Your Honour's case, the matter of familial pedigree in the law, without which perhaps the family garage might have been turned, Steve Jobs-like, into an impromptu assembly line for the antipodean answer to the iPhone.

Your Honour's grandfather was the late the Honourable Sir Norman John O'Bryan KC, a former Justice of the Supreme Court of Victoria. Your Honour's father was the late



the Honourable Norman Michael O'Bryan QC, who served as a Justice of the Supreme Court of Victoria from 1977–92, continuing as a Reserve Judge until 2004.

Your Honour's brothers, Norman and Stephen, are both silks in active practice at the Victorian Bar; Stephen served from 2013–17 as the founding commissioner of IBAC, the Independent Broad-Based Anti-Corruption Commission.

Your Honour's sister, Katherine, is Associate to Justice John Digby and Your Honour's brother-in-law is Associate Justice Nemeer Mukhtar, the first person appointed as an Associate Justice of the Supreme Court in 2009.

It is wonderful to see so many of your family here today to celebrate Your Honour's appointment.

As I said, quite the legal pedigree—and notably not just in the practice of the law, but in the service of the Australian community through the acceptance of judicial appointment, a legacy to which Your Honour now adds.

Following your graduation from Melbourne University, Your Honour undertook Articles at Gillotts in 1986 with John Moir as your Principal. Gillotts merged with Ellison Hewison & Whitehead and with Minter Simpson & Co to become "Minter Ellison", where you remained as a solicitor, and began to develop your renowned expertise in competition and consumer law.

In 1988, Your Honour went to London to further pursue your legal career, spending two years at Simmons & Simmons, gaining invaluable experience in European competition law.

Your Honour returned to Melbourne in 1990, to Minter Ellison, where you were made partner in 1992. Your Honour practised in general corporate law, public company takeovers, capital raisings and broader issues of directors' duties and corporate governance, while maintaining a keen interest in competition and consumer law.

Your Honour was called to the Bar in May 2002 reading with Stewart Anderson (now QC). Last Friday, Stewart was appointed by the Governor-General in Council as a judge of this Court, with effect from 6 May 2019. As is well known, the relationship between mentors and readers at the Victorian Bar is among the most precious means by which we foster collegiality and excellence in the practice of the law. No doubt Your Honour has benefited greatly from Stewart's mentorship over the past 17 odd years. How wonderful, therefore, that Your Honour will have had a few weeks on the bench by the time he joins you next month. You will be able to return the favour, by teaching him everything there is to know about the job.

Your Honour is dedicated and determined, but understated; ambitious, yet shy and retiring.

At the start of the Hayne Royal Commission into Financial Services, many media outlets published "who's-who" style articles about the barristers who had been engaged to represent various parties. The Sydney Morning Herald described Your Honour as a "calm under pressure sort of guy" with an "enviable style and presence in court", picking up on a survey conducted by Chambers and Partners. I might say, you came out of that better than a number of others. I was dismissed, in the same article, as being "best known for [my] work in defamation law." Harsh, but fair. Another of our colleagues, who I won't name, although he would probably like me to, was described as "tall and tanned".



In the wide consultation which invariably takes place in preparation for a speech of this kind, the most consistent themes that were repeated about Your Honour were your humility and the meteoric rate at which you achieved your many accomplishments.

Your Honour's humility was evident in the approach you adopted in learning the trade of being a good barrister. Your Honour was a very experienced solicitor and partner when called to the Bar. But as a junior, you identified leaders from whom you were keen to learn. You actively sought them out and encouraged them, deftly, to take you under their wings: Alan Archibald QC and Neil Young QC being two of those leaders that you particularly admired. When Your Honour's first drafts were returned to you covered in red pen—something that, in settling drafts, had been your stock-in-trade as a senior partner at Minters—you did not flinch; instead taking it all in your stride—a “life learner” committed to being the best that you could be.

In turn, Your Honour became sought out by many of the more precocious juniors at the Victorian Bar. Two of them may have leaked to me a recent email exchange in which they discussed Your Honour. One of them, who may or may not be Caryn van Proctor, had toiled for hours over a research task you had allocated to her. Fifteen minutes after she emailed it to you, Your Honour responded simply: “Caryn, that is excellent.” Four minutes later, the junior who may or may not be Ms van Proctor, forwarded Your Honour's email to another junior working on the same matter, who may or may not be Geoffrey Kozminsky. Two minutes later, he responded: “That's what dreams are made of.” Seconds later, the first junior rejoined, “Straight onto the silk application form.” The email exchange ends, one minute later, with the second junior earnestly agreeing, “I think so.”

If studying computer programming in the late 1970s was not advanced enough, Your Honour sought to take a reader before you had reached the requisite minimum of 10 years' call. That required approaching the Bar Council and asking for an exemption. It was, naturally, granted. However, Nina Moncrief was to be Your Honour's only reader, as you were appointed silk during her reading period, and after only 9 years at the Bar: an extraordinary achievement.

As a barrister and as a silk, Your Honour made a name as a preeminent practitioner in competition and consumer law. Your Honour is very highly regarded for your expertise in this area.

Your Honour acted in many notable cases. One such matter was the Pilbara Rail Access cases, which involved applications by Fortescue Metals Group Ltd for access to four heavy haulage railways owned by Rio Tinto and BHP. Fortescue, a mining company operating in the Pilbara, sought to have the railways declared essential facilities in order to enable it to run its own trains on the lines. This was very significant litigation in which you were involved for the best part of a decade.

More recently, Your Honour, led by Alan Archibald QC, acted for the ANZ Banking Group in the Bank Fees Class Action which went to the High Court, which held that the late payment fees charged by ANZ on credit card accounts were not a penalty or otherwise unconscionable, unjust or unfair under the relevant statutory prohibitions; a significant win for your client.

I will stop there. One benefit of Your Honour's appointment and Mr Archibald's recent retirement is that I have picked up the final stages of that brief. With some limited exceptions, there is an ethical prohibition on barristers talking publicly about the cases in which they are to appear. It would be something of a first, not to mention a bad look, for the President of the Bar to be the subject of a disciplinary complaint arising out of something said before the Full Court of the Federal Court of Australia in a packed courtroom in the course of a judicial welcome speech.



Your Honour was a member of the panel appointed by the Commonwealth Government in 2014, along with Professor Ian Harper, Peter Anderson and Su McCluskey, to conduct a review of Australia's competition laws and policy. The "Harper Review", as it is now known, resulted in the enactment of the Competition and Consumer (Competition Policy Review) Act 2017 (Cth). The Harper Review was a comprehensive blueprint for reform, and its recommendations were the substantive underpinning of the resultant legislation. Of particular note were very significant changes made to laws concerning misuse of market power.

As an advocate, Your Honour had the admirable, but all-too-rare, ability to distil a case to three or four key points, focusing on the strengths of your client's case and the weaknesses in the other side's, prosecuting only those points rather than every matter raised. Your Honour's approach was always balanced, remaining open-minded and maintaining the ability to see both sides of a matter; traits that will serve Your Honour very well in your new role.

Your Honour's humility and modesty are markers of your deeply held Christian beliefs. Your Honour is a devout Anglican, deeply involved in the Anglican Church in Victoria, having held the position of Chairman of the Episcopal Standards Committee for the Anglican Dioceses of Melbourne, Ballarat and Wangaratta for five years between 2013 and 2018. That Committee was established as the Professional Standards Body for Bishops, underpinning the governance processes of the Anglican Church.

Your Honour is also committed to your family. Along with your wife of over 30 years, Marnie, and your four sons, Tom, Connor, Liam and Eamon, together you are a great team.

Tom and Connor have settled on careers in the law with Tom working at Minter Ellison and Connor at Arnold Bloch Liebler. Liam and Eamon are both medical students. Liam is unable to be here today as he is spending six months at Oxford University undertaking a research project. Eamon is in his penultimate year studying medicine at Melbourne University.

Despite being totally outnumbered by boys, Marnie manages you all, but particularly Your Honour. I am told that when Your Honour had to fly to San Francisco to interview experts for the *Visy v Amcor* class action defence, at Marnie's insistence you had to go out and buy yourself a whole new wardrobe before the trip, so unimpressed was Marnie with your proposed choices.

It would be remiss of me, too, not to mention Your Honour's support for Marnie as she undertook and successfully completed her PhD thesis, a study of the lived experience of Aboriginal and Torres Strait Islander students in Australian boarding schools. Together, you and Marnie have a profound commitment to redressing the disadvantages faced by Australia's first peoples. The learnings from Marnie's PhD thesis are already shaping improvements in educational practices for Australia's indigenous communities.

Your Honour is a mad keen Collingwood supporter; "fanatical" might be a better word. Your brother Norman, also a Collingwood supporter, describes being told by you, in no uncertain terms, that applauding the opposition when they made a good play against Collingwood was "totally unacceptable." Your Honour has somehow indoctrinated the whole family, with all four of your boys fervently barracking for the Pies.

What may be less known is Your Honour's passion for surfing. Your Honour first picked up a surfboard at the age of 6 and have been hooked ever since. Your Honour started



surfing on childhood family holidays to Lorne, where you now have a beach house and spend as much time as you can. Your love of surfing has enhanced your love of travel, taking you all over the world. Again, you have passed that love on to your sons who are also keen surfers.

For a generally quiet and reserved person Your Honour has chosen another unexpected hobby. You are a very good guitarist, having played in a number of bands with friends, possessed of a deep love for blues and roots music.

Perhaps this creative, artistic flair has been lost on your wife, Marnie... Giving evidence as a witness in a recent defamation case brought by a well-known Australian actor, who is also a close family friend—a story for another time—Marnie said, in answer to a question about how you knew the applicant and his wife: “We have been privileged to go to many dinner parties at their house, and many parties at their house. And for us, coming from a pretty staid, boring, professional kind of world...” Senior Counsel for the actor cut you off: “Slightly offensive to me”. Marnie: “Slightly offensive to all the lawyers in the room, I’m sorry.” Senior Counsel: “Given your husband is a barrister...” The presiding judge (interjecting): “But realistic.”

The Australian community is fortunate that practitioners of Your Honour’s experience and talent are prepared to accept appointments to judicial office. Preparedness to do so is a mark of commitment to public service in the interests of the administration of justice, shared by all those who sit on this Court, which in no small part furthers Australia’s enviable worldwide reputation as a country wholly committed to the rule of law.

On behalf of the Australian Bar Association and the Victorian Bar, I warmly congratulate Your Honour, and wish you long, satisfying and distinguished service as a Judge of this Court.

May it please the Court.