

The swearing in of The Honourable Justice Dyson Heydon

as a judge of the Court of Appeal and Supreme Court, 14 February 2000



An eminent member of the New South Wales Bar, Dyson Heydon QC, was sworn in as a Justice of the Supreme Court and of the Court of Appeal on 14 February 2000.

Some of the highlights of his life and career, as recounted by the President of the NSW Bar Association, McColl S.C. and the President of the Law Society of NSW, Mr North at the swearing in, are as follows.

Dyson Heydon was born on 1 March 1943 in Ottawa, Canada. He was educated in London, Rio de Janeiro and Wellington before attending Shore School and St Paul's College at the University of Sydney. In 1964 he graduated from the University of Sydney with First Class Honours in his Bachelor of Arts degree and the University Medal in

History. In the same year he was awarded a Rhodes Scholarship, which took him to Oxford where he studied Undergraduate Law. In 1966 he was awarded the Martin Wronker Prize for the top First Class Honours degree in Law. He then undertook the BCL and in 1967 was awarded the Vinerian Scholarship for receiving the highest First Class degree in that course. He subsequently became a fellow of, and tutor at, Keble College, Oxford from 1967 to 1973. He lectured in Evidence and Trusts at the Inns of Courts School in London from 1969 to 1972. He was a visiting lecturer at the University of Ghana in 1969.

Dyson Heydon has long had a keen interest in sport. At Oxford he played in the Barnacles cricket team and rugby.

Dyson Heydon returned to Australia in 1973 and at the age of 30 was appointed Professor of Law at Sydney University. He taught and wrote in the areas of Equity, Evidence, Commercial and Company Law and Restrictive Trade Practices. In 1978 he was appointed Dean of the Sydney University Law School. He has been a prolific writer on diverse legal subjects, including *The Restraint of Trade Doctrine*, published in 1971 (2nd edition 1999), *Economic Torts* in 1973 (2nd edition 1978), *Case Book on Evidence* in 1975, *Cases and Material on Equity* in 1975 (these latter works going into several editions) and *Heydon and Donald on Trade Practices Law* in 1978 (subsequently updated as *Trade Practices Law*). He has been for many years the Editor of *Cross on Evidence* (Australian edition).

Dyson Heydon commenced active practice at the New South Wales Bar in 1979, creating, along with Meagher, Gummow and others, a powerful presence on Eighth Floor Selborne. He rapidly acquired an extensive practice, regularly appearing in High, Federal and Supreme Courts in a wide range of areas including Trade Practices, Company Law, Equity and Trusts. His Honour took Silk in 1987 after eight years full-time practice. In addition to appearing as Counsel in many cases, his writings have been cited with almost universal approval across the superior Courts of Australia.

His Honour had an extensive advisory practice, providing comprehensive and learned advice both in conference and in writing across many legal areas. Mr North noted, on behalf of the solicitors' branch of the profession, Heydon's willingness to confer with and advise solicitors and clients on difficult questions on short notice.

Heydon commenced editing the *Australian Law Reports* in 1980, the *New South Wales Law Reports* in 1981 and in 1985 the new *Australian Bar Review*. He continued to publish many articles in law journals. He was a member of the Bar Council from 1982 to 1987 and since that time he has provided great services in appearing for and advising the Bar Association without charge in many difficult matters, including the Bar's relationship with government.

He is married to Pamela with four children, Victoria, Christina, Nicholas and Alexander, aged 16, 15, 13 and 11.

A more personal view on his Honour's attributes was expressed by Ian Jackman at the 15 Bobber for his Honour:

One of the first things you noticed when you walked into Heydon's chambers on 8 Selborne was a very large bust



Heydon and the First Duke of Wellington

of the First Duke of Wellington. There is perhaps nothing unusual about adopting the Iron Duke as a role model, especially among judges of appeal. The interesting thing was that in the way that the room was ordered (if that is the right expression), the Duke stood a fairly comfortable distance to the left of where Heydon himself was positioned. In the full spectrum of political views, that probably placed his Honour somewhere between Prince Metternich and Evelyn Waugh.

It should not be thought that Heydon lacks the Iron Duke's moderation in his social and political opinions. Like the Duke, one might be forgiven for thinking that he sees the world as having steadily declined since the happy 1820s. But whereas the Duke's downfall was his opposition to any democratic reform, therein lay one of Heydon's greatest triumphs. As a floor leader, and as a forensic leader, so benevolent was the dictatorship that no cries for reform from his juniors was ever heard. No floor meetings were held or desired. The occasional call for public speaking at floor dinners, or even a choice of menu, was quickly suppressed. As Churchill said of his war cabinet: 'All I wanted was compliance with my wishes, after reasonable discussion'.

I have been trying to trace these views through some of his Honour's early life and work. As professor of Law at Sydney University in the turbulent early 1970's, his views were not entirely at one with the spirit of the times. He once said to a university audience that: 'Dr Johnson's view that patriotism is the last refuge of a scoundrel must have been formed without foreseeing the possibility inherent in the words "educational reform".' Even earlier, in an article for the *Australian Dictionary of Biography* on James Macarthur written at the age of 20, he commented of Macarthur that: "His conservative beliefs accorded with a conservative character: rational, steady, sane". Macarthur, it was said, insisted on respect for the "tenuous bonds" holding society together, which "'wild democracy' could imperil". It must be stressed that the article is purely a work of biography, from which the author's personal views were strictly detached, and I should add that the expression "wild democracy" was placed in quotation marks to make it clear that the idea was Macarthur's.

One can go further back still. There was a prominent member of Sydney's ecclesiastical community in the 19th Century called Mr J K Heydon. He was an avid reader and book buyer. It should not be thought for a moment that that gentleman could possibly have been related. Moreover, J K Heydon's biographer (by sheer coincidence Sir Peter Heydon) remarked that his "combative zest" involved "a constant risk of excess in anything he took seriously". Again, I don't suggest there is a trace of that in his Honour, although there are art dealers and champagne merchants in Sydney who may not necessarily agree.

Heydon has always taken on a workload that should have been outlawed by some post-Dickensian Factory Act. No efforts were spared in anything he touched.

After a distinguished academic career, Heydon spent only eight years at the junior Bar, after which he commenced practice as a Silk. On top of that, he has written seven books and countless articles and reviews, edited two series of law reports, and has given his time freely for a very large number of causes, both within the legal profession and in the community at large. If that were

not enough, he has raised and educated four children. I suppose if you can fill a pram, you might as well fill a boat. As Fred Trueman said when he eventually hung up his cricket boots, someone some day would break his record, he just wanted to make sure the person would be very tired when he did.

One hears about legal life from many different people, with very different narrative gifts. But to have a drink in Heydon's room in the evening, especially on a Friday evening, was to see life coerced into a rather closer resemblance to literature, by his Honour's characteristic tact, humour and originality. If these occasions had not actually taken place, a very skilful novelist would have been required to invent them. He occasionally remarked that the most difficult aspect of a barrister's work, the part where you really earned your fees, was listening to your opponents' speeches. So I will not prolong this painful and unremunerated activity.

In the face of this extraordinary career, another of his Honour's qualities is his humility and willingness to appreciate the skills and achievements of others, as illustrated by his words at his swearing in on 14 February 2000:

Chief Justice, your Honours, ladies and gentlemen. I must thank Miss McColl and Mr North for their kindly but exaggerated praise, and I must thank everyone present for taking the trouble to attend.

I am deeply conscious of the honour of having been appointed to so famous a court, whose decisions on any difficult point of general law are closely examined by interested persons all over the world.

This has been so of the Court of Appeal in particular from its earliest years. Initially the Court possessed the profound and formidable mind of Sir Cyril Walsh. Moving to later times, on any day from the early 1970s to the middle of the 1980s a Bench of the Court might be composed of Justices Hope, Glass and Hutley. Lawyers still read their judgments often, and they will continue to do so for many decades. They directed oral argument straight to the vital points. They left no hearer in doubt as to their position, but they always remained open to argument so long as it was put in a reasoned and direct way. Was there in those days any intermediate Appellate Court in the common law world who surpassed them or even equalled them? Indeed, was there a final Appellate Court of their calibre?

I have been fortunate in my professional career in many ways. First, the good judgment and self-sacrifice of my parents made possible an education in which I have encountered many good teachers at all stages. Of these, the greatest was Leonard Hubert Hoffmann at University College Oxford. Whatever impact the tactics of General Pinochet's lawyers will have on Lord Hoffmann's reputation, my recollection of his supreme powers of lucid analysis will remain fresh and clear.

Next, when I began to practice at the Bar, I was lucky to join the Eighth Floor of Selborne Chambers. Amongst its members, or ex-members who were still closely associated with it, were a number of barristers who were extremely capable in diverse ways. Others have said that the floor was the best in Phillip Street, which is a mundane proposition I have never heard disputed. I think that one can go further than that. Kenny, Glass, Kearney, Reynolds, Gummow, McInerney and Meagher — the great tradition of the Australian Bar lies there.

I owe a great debt to the staff of the floor, particularly my successive clerks Mr Bill McMahon and Mrs Dianne Strathdee, and my successive secretaries, Mrs Geraldine Clayton and Mrs Sally Flynn. It is thanks to them that my chambers were maintained in a state of tidiness which has become proverbial in Phillip Street.

Next, I was fortunate in being able to work, particularly in earlier years, with some exceptionally able counsel. The Bar is not an easy institution for outsiders to understand. Barristers have no perpetual clients, no perpetual friends and no perpetual enemies.

They have only obligations to the client of the moment, to the Court, to witnesses, to opposing parties and to professional rivals. The world has little understanding of the duty of the Bar to represent the unpopular, the unpleasant and the unfashionable. Litigation necessarily involves intense conflicts - tempered by professional courtesy, but hard and bitter struggles, nonetheless. Agonising decisions have to be faced, the strain on barristers affects not only them but their families. To my own family, I must express regret for the impact that my practice has had on them.

But the predicament of counsel accords one type of intense pleasure. There can be pleasure when Silk and juniors seek to resolve the problems of the current day in debate how an argument is best to be put; which witnesses should be called; what line of cross-examination should be taken. The pleasure was greatest when the case was difficult, and there was no risk of sentimental distraction by the presence of any moral merit in the client, either in general or in the particular case. The commercial scene is such that we in New South Wales have been extraordinarily blessed in this respect.

I experienced the pleasure I have been describing in the company at various times of Justice Hely, Chief Justice Gleeson, Mr Justice Meagher and the Hon T E F Hughes QC. While they are rich in differences, they did share a sure sense of judgment in selecting the issues on which to fight and clear headedness in fighting them. They were simple, compact and trenchant in style. You could never misunderstand them.

I read with Peter Hely. At the time he was the colossus of the junior Bar, with no time to see the many nervous Silks who depended on him and little time to see readers. But later I saw his powers in the thorough preparation of complex litigation. There was a striking contrast between the serene elegance of his presentation and the prodigious labour beforehand which made it possible.

Murray Gleeson's most striking characteristic was that while in consultation with counsel he was extraordinarily genial and affable;* once solicitors and clients entered the room, he took on a dreadful remoteness and a truly Gladstonian *terribilita*.

Rod Meagher was in my judgment the great master of the type of cross-examination which while it does not aggressively confront the witness elicits many damning admissions favourable to his own client's case. He did this with a series of extremely short, courteous and friendly inquiries to which assent was almost invariably given.

Those three counsel have left the Bar. Tom Hughes alone remains. For 51 years he has shown the heart and mind of a great fighter. He has been the exemplar of presence and of dominance and lack of fear in the courtroom. It is heartening that he can continue, apparently indefinitely, to assist new generations of juniors. I hope that those juniors will be as lucky as I have been in the professional contacts that I have made.

The Bar wishes his Honour well in what will continue to be an illustrious legal career.

The Editor