

**TRANSCRIPT OF PROCEEDINGS**

**SUPREME COURT OF THE  
AUSTRALIAN CAPITAL TERRITORY**

**CEREMONIAL SITTING**

**for the Swearing In of**

**MALCOLM FORGAN GRAY QC**

**As a judge of the Supreme Court**

**at**

**CANBERRA**

**9.30 AM, THURSDAY, 12 OCTOBER 2000**

THE REGISTRAR: Ceremonial sitting for the swearing in of the Honourable Justice Gray.

5 GRAY J: Chief Justice, I have the honour to announce that I have been appointed to judge of this court. I present to you my commission of appointment.

10 MILES CJ: Thank you, Justice Gray. Mr Registrar, please read the commission.

15 THE REGISTRAR: Supreme Court Act 1933. Commission. The Australian Capital Territory Executive, pursuant to subsection 41 of the Supreme Court Act, 1930, hereby appoints Malcom Forgan Gray as a resident judge of the Supreme Court of the Australian Capital Territory, commencing on 12 October 2000, dated 9 October 2000, and the commission is signed by the Attorney-General, Gary Humphries and Minister Michael Moore.

20 MILES CJ: Madam Sheriff, please hand me the affirmation of office. Justice Gray, I invite you to take the affirmation of office in accordance with the Supreme Court Act.

25 GRAY J: I, Malcolm Forgan Gray, do solemnly and sincerely affirm that I will be faithful and bear true allegiance to her Majesty, Queen Elizabeth II, and her heirs and successors, in the office of judge of the Supreme Court of the Australian Capital Territory, that I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.

30 MILES CJ: Thank you, Justice Gray. I invite you to sit, to subscribe to the affirmation of office, and I will witness it. Mr Registrar, please place this document with the records of the court. Justice Gray, the members of the Supreme Court of the Australian Capital Territory welcome you, and assure you of their support and good will. Mr Attorney.

35 THE ATTORNEY-GENERAL: May it please the court. It is a great pleasure to welcome your Honour as a resident judge of the Supreme Court of the Australian Capital Territory. Your arrival and your contribution to the court has been much anticipated. Your Honour brings  
40 to this court valuable experience and insights gained from a diverse, and really quite extraordinary career in the service of the law. Your career has spanned the full spectrum of the administration of justice, from within government as Solicitor-General of South Australia, to representation of indigent accused in New South Wales and South Australia, to fighting  
45 organised and corporate crime across Australia and internationally with

the National Crime Authority.

5 Your Honour was admitted to practise in 1964 in South Australia. South Australia is, of course, similar to the ACT in that there is no statutory distinction within the ranks of the profession. You are an exemplar of the quality of legal practitioner who can emanate from the ranks of a unified profession as much as from a divided legal profession.

10 In 1966 you joined the Office of the Crown Solicitor in South Australia. This was the first of many positions of public service within the law. In 1978, your legal skills and experience were recognised and you were appointed as the Solicitor-General of South Australia. During the following years, you were a frequent visitor to Canberra when you represented the state of South Australia before the High Court.

15 Indeed, the current Solicitor-General of South Australia indicates that delays and changes to hearing timetables allowed you the opportunity to seek out the Epicurean delights of the city, such as they were in the early 1980s. I understand that you also encouraged others to join you in this pursuit, culminating on one occasion in your being admonished by your junior supervisor, now a judge of the Federal Court, on your return to South Australia, for delivering your junior counsel back to the office three days late, in a state very much the worse for wear, apparently a victim of the potency of Canberra region wines.

20 Your Honour took silk in South Australia in 1982. New South Wales became a beneficiary of your professional services in 1986, when you were appointed Senior Public Defender, and two years later, Crown Advocate. You were also appointed a Queen's Counsel in New South Wales in 1986. These appointments are something of a compliment to your Honour's expertise and ability, since New South Wales is not known for recognising that exceptional legal skills exist outside its own borders.

35 You continued your commitment to the law and public service upon your return to South Australia in 1989 with your appointment as Chief Counsel for the South Australian Legal Services Commission, the provider of legal aid in that state. During this time your eloquence on behalf of your clients was demonstrated graphically in one matter, where you defended a client against a very serious assault charge. Your Honour is apparently acquainted with the joys of cycling, and during that particularly trial, which was heard over several days, you happened to have an accident on your push bike. This accident left you with very obvious injuries, which, although not life threatening, I am pleased note, are reported to have had rather a technicolour effect and must have been very painful. The Crown  
45 in that matter relates that it was a tribute to your persuasive powers that

the jury acquitted your client of assault, despite the appearance that your client really was a very violent man.

5 It was crime fighting, though, rather than criminal defence, that was to become your next role. In 1991, you were appointed a member of the National Crime Authority. Much of your work at the time involved the use of the controversial coercive powers of the NCA to require witnesses to answer questions and produce documents. You went on to represent the National Crime Authority in the important case of *NCA v A1 & A2*, a significant case that confirmed the general nature of references to the NCA.

15 Recent years have seen you practice at the private bar in South Australia and in New South Wales, in areas of criminal, administrative, industrial, commercial and constitutional law. Your commitment to service of the law has continued with a variety of appointments, including president of the South Australian Bar Association, Vice-President of the Australian Bar Association, and Vice-President of the Arts/Law Centre of Australia.

20 You are clearly a man of great energy and diverse interests. Your colleagues all speak not only of your intellectual acuity and technical legal skills, but also of your warmth and your humanity. It is these characteristics which your Honour brings to this court. Your Honour will enjoy a number of benefits on the bench, including security of tenure, an attribute which I respect, and indeed regard with some jealousy.

25 This, of course, is a small court, and the extent of attention and scrutiny by the local media and by an articulate population is considerable, probably second only to the High Court of Australia. This presents both opportunities and risks. In a small setting, a well-cut diamond will stand out, but then so will a lump of coal. I would respectfully suggest to your Honour that your Honour see the extent of public scrutiny at the bench here as an opportunity to better illuminate the community as to the value of independent and vigorous judicial discretion.

35 Your arrival on the bench, as I've indicated, has been much anticipated. Your Honour's identity has been speculated to be variously a senior ACT practitioner, a Magistrate, a woman, even a politician. At the end of the day, the qualities which have led your Honour to this high office are quite straightforward and designed to serve one purpose. They are the qualities of outstanding knowledge of, and experience in the law, and for the sole purpose of contributing to the calibre of the work done by this honourable court.

45 I have every confidence that these attributes will serve the community

well in years to come. On behalf of the ACT community, I wish you well as you face this challenge. May it please the court.

MILES CJ: The president of the ACT Bar Association.

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MR PURNELL: Chief Justice, your Honours, Master, Mr Attorney, Chief Magistrate, distinguished guests, fellow practitioners. The ACT Bar Association welcomes your Honour's appointment. We are delighted that an experienced practising barrister with impeccable credentials has been appointed to replace Gallop J.

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The last appointment to this court from South Australia was the former Chief Justice, Sir Richard Blackburn, a much beloved judge, a decorated soldier, competent pilot, and respected scholar. Sir Richard demonstrated that excellence in imports from South Australia is not only contained in glass bottles restrained by corks.

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Your Honour is appointed to this court in what is euphemistically referred to by some commentators as "interesting times." Not only is society in general in a dynamic state, with governments and leaders changing. But the profession is also undergoing dramatic changes. There are overdue moves towards the establishment of a national profession, and there's agitation in some quarters for multi-disciplinary practices, where apparently, it's envisaged, that on a one-stop visit you can have your will drawn up, give instructions on medical negligence, get your tax return done, your teeth drilled, your hair cut, and your piles removed.

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Judges, too, face a different future. Gone are the days when judicial independence was forever guaranteed. Gone are the days when judges were immune from attack and scrutiny of the media. Gone are the days when all Attorneys-General believed that it was their role to defend the courts and individual judges. It is in this climate that demands are being made for more efficiency from the courts and the profession. The public is apparently, and one would say quite reasonably, demanding more access to justice, and for that justice to be less expensive.

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There are, of course, quite proper demands being made from National and State and Territory bodies for increases in legal aid. There is perpetual resistance to that, and the granting of legal aid is such that the courts and politicians are relying more and more upon the profession to perform pro bono work. This has resulted in the bar, everywhere in Australia, doing more pro bono work than ever before. This is not necessarily a bad thing. However, pro bono work should not be seen as a substitute for tax-funded legal aid. Rather, it should complement it.

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There are also proposals to bring in legislation which will challenge the independence of the bar as an institution, with proposals to ensure that barristers are specialists of practitioner's advocates, will be forced to give up that role and operate in partnerships or corporations.

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It is in this environment that your Honour commences your judicial duties in this court. However, there is one thing that shall remain constant so long as the independent bar exists, and that is that the court, and your Honour as a member of it, can always rely upon the bar for collegiality, assistance in court, and support for the rule of law, and a dram at the end of the day.

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The ACT Bar welcomes your Honour's appointment. We look forward to appearing before you. From your CV, you have an obvious interest in matters thespian. We assure you that there will be plenty of opportunities for you to indulge your interest in full in that regard.

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There is, as you would expect, the ever-present speculation on your appointment, as to whether you will be perceived as pro-Crown or pro-accused, pro-plaintiff or pro-defendant, pro-government or pro-individual, mean or generous on damages. These speculations, as your Honour is aware, always occur on new appointments.

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The Bar extends a most warm welcome not only to you, but to your wife Laura and your children. We hope and know that you will quickly become part of our community. We trust that you and your wife will enjoy our beautiful city and the many delights that it has to offer. Although I'm reliably informed that your wife apparently has a passion for Aussie Rules, and the Bar undertakes a re-education program so that your Honour will be familiar with two words, and your wife and children: Brumbies and Raiders.

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We are confident that we will enjoy your time on the bench, and the Bar in particular looks forward to forging close ties with you, your wife, and your family. May it please the court.

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MILES CJ: The President of the Law Society.

MR CHENOWETH: May it please the court. I rise to support the sentiments of the Attorney-General and Mr Purnell in welcoming your Honour as a judge of this court and of the Territory. When Mr Gallop J retired, there was great interest and speculation in the Territory on his replacement.

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With a small bench of four resident judges, a court of superior jurisdiction

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5 must deal with a wide range of matters. As the Attorney has indicated, the position of a judge of the Supreme Court in this Territory is of great importance to the people here. Judges of this court must deal with a wide range of matters, and be able to sit on cases and cover aspects of the law that in larger courts, sitting in specialist divisions, judges do not always face. We are fortunate that in this court, the judges have demonstrated their capacity to deal with such matters.

10 Your Honour, your reputation indicates to all of us that you will similarly distinguish yourself. The process of appointment of a new judge has, of course, been a matter of considerable professional and public interest. It's been the subject of letters in the Canberra Times, and possibly editorials. That newspaper, and Mr Purnell indicates, keeps a close eye on matters legal in the Territory, which is to the advantage of the community generally. And so the process of appointment was one in which the public, as well as the profession, took an active interest.

20 It's a measure of the development of the profession in the Territory that a number of members of the local profession were seen by their peers as suitable for consideration by the Attorney-General in relation to this appointment. Indeed, it would reflect poorly on the local profession if this were not so.

25 The Attorney-General, in promulgating his guidelines, and in engaging in a wide and consultative process, has, I believe, and the Society believes, achieved a most outstanding outcome. The Society applauds the Attorney on the outcome of that search, and commends the government for being able to persuade your Honour to accept this high office. The local profession applauds that appointment.

30 Your Honour has had long experience in the law, to which earlier speakers have referred. Your experience as Solicitor-General, as public defender, as Crown Advocate, and as Director of Public Prosecutions, as well as counsel at the independent bar, has given your Honour that well rounded appreciation of the law, but also an insight into human beings, such a necessary mark of a good judge. In the difficult business of assessing the rights and wrongs of cases, and the failings and potential of humans, there can be no better experience than having seen the profession from all sides.

40 Your Honour, you follow a great South Australian in being appointed to this bench. Sir Richard Blackburn was, of course, our first Chief Justice. His name is honoured in the Society's annual lecture, and in the name of leading counsel's chambers in this territory. There was also a strong connection with this Territory and the state of South Australia, in that we have a unified system of practitioners, where legal practitioners may

choose to practise as a solicitor, or as a barrister, or as both. In both the state and the Territory, a separate bar association has developed amongst those who practise exclusively as barristers, for the benefit of the profession generally, and the public.

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There is of course a strong tradition in this Territory of practitioners appearing both as barristers and solicitors in this court, and in other courts in the Territory. Your Honour will no doubt be familiar with this tradition, and appreciate its virtues.

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The court may pardon me if, originally as a Victorian lawyer, I give the last word to that other great Victorian lawyer, and former Chief Justice of the High Court, Sir Owen Dixon. When he first presided as Chief Justice in Perth in 1952, Sir Owen said, "There is nothing more important to the court than its relations to the legal profession." I'm sure this sentiment is held not only by your Honour, but all members of the bench, and it is one to which the Law Society subscribes.

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Your Honour, the Law Society welcomes you warmly to the territory and the bench of the Supreme Court, and looks forward to working with you over many years. May it please the court.

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MILES CJ: Mr Barrett, for the South Australian Bar Association.

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MR BARRETT: May it please the court. On behalf of the legal profession in South Australia, I congratulate you, Justice Gray, on your appointment as a judge of this court. The Law Society and the Bar Association warmly extend their best wishes to you in your new role. The Bar Association wishes particularly to thank you for your considerable work for the Bar. Your second term as president is brought to an end by your elevation to the bench.

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As was mentioned by the acting president at a farewell function for you last week, your persuasive, fair, and patient manner has led to the deliberations of the association, sometimes on hotly debated topics, smoothly to reach resolution, sometimes to the surprise of many.

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If, as experience tends to show, the behaviour of an individual transported to the bench closely resembles his or her behaviour at the bar, the profession and the community of the ACT will have reason to be well satisfied with their out of town selection. Your personal characteristics, together with your widely recognised erudition in the law, leave the South Australian profession with truly mixed feelings about your move to Canberra. The ACT's gain is very much our loss.

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5 Out of deference to this court, and to the profession here, whose occasion  
this is, and for another reason, I have about ten seconds to go. Various of  
us in Adelaide have been approached to provide the local profession with  
a more detailed profile of you than they presently have; to tell them the  
10 stories that, for good or ill, get told on occasions such as this. By and  
large, we've forborne from doing so. But we have been told of a  
welcoming dinner to be hosted shortly by the ACT Bar Association. Your  
Honour, there is still time, and there has always been a mechanism for the  
continued suppression of information that may add to the liveliness of that  
15 occasion. You know our addresses and our telephone numbers.

Our congratulations and our best wishes to you and to your wife Laura  
remain free.

15 MILES CJ: Justice Gray.

20 GRAY J: Chief Justice, Mr Attorney, Mr Purnell, Mr Chenoweth,  
Mr Barrett, and all of you who are here present, and do me the honour of  
attending my swearing in. Each of those of you that have spoken have  
been more than generous in the warmth of your welcome, and the remarks  
that you've made. Indeed, Mr Attorney and Mr Chenoweth, in relation to  
your specific remarks, I wondered whether the qualities that you referred  
to in a person - and I, on this occasion emphatically used the gender  
neutral person - is the person who's sitting here where I'm sitting now.  
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However, your remarks do give me - all of your remarks give me a  
formidable reputation to live up to, and to prevent the real truth from  
being discovered, and to that end, I'm quite happy to appoint Mr Barrett  
as a reverse bag man to pay that sort of material.  
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Mr Attorney, I'm very conscious of the honour that your government does  
me, and the trust and the responsibility that goes with the office.  
Reference has been made to me being an appointee from South Australia,  
and indeed I follow the extraordinarily successful appointment of  
35 Sir Richard Blackburn. That is an awesome footstep to follow. But there  
is more to it than just that.

40 Sir Richard lectured me in the law of contract in Adelaide University, and  
the nature of the man was an impressive ability to remember his students,  
no matter that they had not distinguished themselves in his subject. And I  
can fairly say that he had had influence on my legal career, and it's very  
satisfying to be appointed to the same court that he led with such  
distinction.

45 Perhaps the greatest influence on me, however, was provided by the

5 Honourable Dr Howard Zelling, to whom I was articled. His health prevents he and his wife Cirsca from being here today, but his dedication to the law, tolerance, kindness, was a great example to me. He was later part of an extraordinary court led by the Honourable Dr John Breigh, which included Dame Roma Mitchell, who as well was the active patron of the chambers which I eventually joined, and the Honourable George Walters, who was a great mentor of mine in my early days. All of those persons had a significant effect on my career in the law, and I'll always be grateful for their assistance, tolerance, and forbearance.

10 I did law from the purist of ideological reasons. I was hopeless at arithmetic, and my parents wanted me to be an industrial chemist. To them, however, I owe an immense debt for the educational opportunities they gave me, as well as the love and support that they provided. As has been said, over time I've had experience of the law in a variety of roles. I do hope that that experience gives me some balance, or at least some appreciation of different perspectives.

20 I've enjoyed the comradeship and friendship of the members of Mitchell Chambers, which I leave, and in particular that of Gordon Barrett, who has journeyed far to attend this event, perhaps for personal gain. But perhaps also, in the same way as those who goes to a judges retirement to make sure they do go. Apart from anything, he has treated me kindly in his remarks.

25 My past times in the Crown Solicitor's office as Solicitor-General for South Australia, public defender in New South Wales, the Legal Services Commission in South Australia, and at the bar have all given me associations that I treasure, and have been very important to me. I am delighted, indeed, at the presence here today of former and present public defenders. I very much value the privilege of having been one of them.

35 Coming to a different jurisdiction, as I have had experience in, has its perils. When I was in New South Wales, I was making what I thought was an eloquent plea on sentence appeal before the Court of Criminal Appeal, when I referred to my client as coming from Koogara. I was gently advised by Sir Lawrence Treat that in New South Wales it's usually referred to as Kogarah.

40 The Territory presents similar challenges. I found when I came to stay here, as we - in a nearby suburb, as we in South Australia would say, Marnooka, which I now know is Manuka. And you, Mr Chenoweth, you present me with another challenge, and I wonder where it will all end.

45 That emphasises the importance that I place on the assistance that the

profession here can give me to avoid, as I must now say in the trade, a  
putable error. And the reliance that I place upon an independent bar to  
carry out their functions as officers of the court to guide and assist me.  
I'm very much aware of the all-important role that both solicitors and  
5 barristers play in the administration of justice, and I know that I can count  
on your assistance. I very much need it.

Finally, I wish to acknowledge the support of my family. I've been  
impeccably brought up by my children, and my failings are not theirs.  
10 Rebecca and Toby are here today, and I know how much Sarah and Anna  
would wish to be present. I'm extremely proud of all of them, and the fact  
that Rebecca and Toby are providing a second wave of children, one of  
whom is here today to keep me in line.

15 My wife Laura has exhibited an unfailing and unflagging patience with  
me, and I'm aware of the saying that behind every successful man, there is  
a very astonished woman. But in this case, much of the credit is due to  
Laura's love and support. To everyone whom I've recently spoken to in  
20 the Territory, may I express my gratitude for the warmth of my welcome,  
and the offers of assistance that I've been given. I very much appreciate  
it. Thank you all for coming here today, and I shall do my very best to  
give a good account of the confidence that you repose in me.

25 MILES CJ: The court will now adjourn.

**ADJOURNED**

**[10.03 am]**