

**THE HON. KEN HANDLEY AO C STJ QC**

**Edited transcript of interview with Juliette Brodsky, 27 July 2017**

**1. EARLY YEARS**

Q *Ken Handley QC, thank you very much for making the time for the NSW Bar. You have been retired now, since 2012, from the NSW Court of Appeal, and that, I believe, included the maximum possible time as an acting judge. You've been described by the-then Chief Justice, Jim Spigelman, as a "lawyer's lawyer" which is a very considerable degree of praise. And that's because of your "encyclopaedic knowledge of case law though the common law world". That's just a few of your very many achievements. I'd like to start however with a look at your earliest years and where you grew up. I believe your father worked in Fiji and that was the beginning of your long association with Fiji.*

A It was.

Q *Tell me a little bit about your father. I believe he was a secretary, is that right, of the Colonial Sugar Refining Company?*

A No, he was middle management.

Q *So, how did that come about – how did he come to be working (in Fiji)?*

A I'm not too sure about the details. He was an asthmatic and Sydney wasn't very user-friendly for him, so he chose to join the CSR and be posted to Fiji where the tropical climate was better for his asthma. He was there for a quarter of century.

Q *And you visited there quite frequently too?*

A I grew up there as a boy until Pearl Harbour. At that time, my parents decided that I should be sent to Australia, to boarding school. No-one knew whether the Japanese were going to be stopped, so I was packed off to boarding school at the age of six.

Q *And that was Beecroft Grammar?*

A Beecroft Grammar.

Q *That's harsh for a little boy at that time?*

A I don't remember it as harsh. It was a big adventure.

Q *Some I've interviewed weren't too fond of boarding school but it was different for you?*

A Hmmm, yes. I didn't know anything else much, only being six. I don't remember it being harsh, or being unhappy.

Q *Were you the only child?*

A Yes.

## 2. CRANBROOK

Q *So you were at Beecroft Grammar for some years, before you went to Cranbrook.*

A '42-'45.

Q *Were you a bookish child?*

A I don't remember being bookish at Beecroft Grammar, but I was bookish at Cranbrook.

Q *I believe at one point, you aspired to be a librarian.*

A Well, I was on the library staff - as a career?

Q: *As a boy, you were thinking about that.*

A: Well, I certainly did a lot of work in the library, did a lot of voluntary reading in the library. I don't remember aspiring to be a librarian as a career.

Q *When you were at Cranbrook, was C.A. Bell one of your favourite teachers? Your English teacher, I believe.*

A Yes, yes, yes.

Q *What did "C.A" stand for?*

A Don't know - he was known as "Cabbie".

Q *Cabbie?*

A Well, C.A.B.

Q *Was he an important early influence for you?*

A Yes, he taught me rigour in English literature and language. The most important influence on my life was Harry Nicholson who taught me history and gave me a love of learning, which has carried on to this day, leading me to write books and articles.

Q *Ancient or modern history?*

A Both.

Q *What did you like best ? Which periods of history mostly interested you?*

- A All history.
- Q *Tell me a bit more about Cranbrook – when you went there, did you win a scholarship?*
- A I did.
- Q *Oh, that was a feather in your cap.*
- A It's the only reason my parents were able to send me there. They couldn't afford to do it on a full-fee basis.
- Q *So you sat the (entrance) exam, aged 11?*
- A I forget. Somehow or other, I got a scholarship.
- Q *Cranbrook was established in 1918 and had been going some years by then. It would have been impacted during the Depression and the war - how many boarders were there at the time, do you remember?*
- A No idea.
- Q *Do you remember much about how the school felt to you, when you transferred from Beecroft to Cranbrook?*
- A It just seemed like a normal transition. Beecroft Grammar was a junior school – I went in at first year high school. I didn't have any basis for comparison - it seemed to be alright. I made some friends and got on with school life – sport and study.
- Q *Did any friends, like you, go into law? Friends who are still friends today?*
- A No.
- Q *What do you remember most fondly about Cranbrook?*
- A The love of learning that it gave me, and the all-round person that it tried to make me, in sport, debating and study – it's the all-round person that I appreciated getting at Cranbrook.
- Q *That still seems to be their ethos today - I know you've continued your involvement with Cranbrook.*
- A I tried to give back.
- Q *You gave a talk or wrote a paper during your time at Cranbrook about bodgies and widgies.*
- A Forgotten.
- Q *I just wondered because that was a youth movement at the time -*
- A It was.
- Q *You said something about their desire to wear clothes to get attention.*

- A Did I? Where'd you get this from?
- Q *Oh, just digging around. But I was curious because there's some lovely footage of bodgies and widgees you can now see.*
- A Heavens.
- Q *So, you didn't aspire to be a bodgie?*
- A No, no, no. I was a curious outsider.

### 3. SYDNEY UNIVERSITY

- Q *When you went to the University of Sydney, had you by then decided you'd like to do law? You did arts and then law in that order?*
- A Yes, but I did arts with the idea of going into law. I didn't get a Commonwealth scholarship for Arts 1, but I did well enough in Arts 1 to get a Commonwealth scholarship for Arts 2 and law.
- Q *You did very well at university – were there important lecturers at the time who were influential for you later?*
- A Well, I remember Ken Jacobs in equity, and Bill Morrison on torts.
- Q *Did Ken Jacobs ultimately play a role in your deciding to ultimately practise in equity? Was he perhaps a formative influence?*
- A No, I was actually attracted to equity because it was more intellectual than common law and that's where my interest and perhaps my capacity lay.
- Q *Do you recall any interesting contemporaries while you were at university? People like Clive James were there, almost at the same time you were there.*
- A I had no contact with Clive James, the author. I managed to pass him by somehow. But I admire him now very much.
- Q *Did you aspire to work on *Honi Soit*, the student newspaper?*
- A No. I did write an article for *Honi Soit*, but that's all.
- Q *What was the article about?*
- A Liberalism.
- Q *Oh really? Did it get a reaction?*
- A Not particularly. I wanted to make a point.
- Q *What was the point?*
- A That liberalism was worthwhile. Liberal values were worthwhile.

- Q *Was there some mood at the time at the University that declared or thought otherwise?*
- A No. I was a member of the Liberal Club and later became its secretary. There was a Labor club, a libertarian society, and a Fabian society and the communists, so I just wanted to put it in the mix of ideas.
- Q *Did you debate much in the club?*
- A No, I was involved in its administration.
- Q *So in those years, you did very well and graduated with distinctions – you had first class honours in law, I believe.*
- A I had the misfortune of joining the year with Roddy Meagher.
- Q: *Who you later sat with on the bench.*
- A: He got the medal.
- Q *He pipped you.*
- A He did. I was fourth. Four of us got first class honours – Roddy was number one and I might have been number four. One became a solicitor and the other joined Foreign Affairs because he couldn't stand more than one file on his desk. That just left Roddy Meagher and I.
- Q *Were there many women studying law at the time you were there?*
- A Very few. Two only.
- Q *Did they continue into the law?*
- A Yes, one became a senior associate at Allens and one married a solicitor and became a partner in a small firm.
- Q *Did you meet your own wife at university?*
- A No. Later on. She didn't go to university. She was a mother until the youngest child was old enough and then she was free to go to university - she did a mature age arts degree.

#### **4. ASSOCIATE TO JUSTICE BRUCE MCFARLAN**

- Q *After that, you became associate to Justice Bruce Macfarlan.*
- A I did.
- Q *Who was also from Cranbrook – he was the first old Cranbrookian to become a judge. What was it like working for him? This was in 1959?*
- A It was a fantastic opportunity. He was a fantastic judge and a very urbane man. He gave me certain liberties to do research in his cases, which I greatly valued. Being in court almost every day in the

associate's box, you just got a feel for evidence and the way cases should be conducted, which is very hard to get as a solicitor looking the other way. I was more than ready when I went to the Bar, feeling I'd had quite a bit of court experience, not as an actor but as a customer. I was looking at the product being delivered to the judge over there, and I was also receiving it.

Q *What was Macfarlan's style like in court?*

A Relaxed.

Q *Did you seek consciously to emulate his style?*

A No, I think I just sought to be myself.

Q *A relaxed style indicates mastery of a subject. Would you describe him that way?*

A Oh, yes, he was comfortable with his view of the law and view of the facts.

Q *Was there any case that he heard that particularly struck you while you were his associate?*

A Well, not for legal reasons, but he tried the Kingsgrove Slasher. You probably weren't even born then!

Q *No. Tell us about it.*

A (The Kingsgrove Slasher) was a married man. His wife was terrified about the Kingsgrove Slasher but didn't realise she was married to him. He'd climb up buildings and into flats and slash women with a knife. Didn't kill them, didn't rape them – just slashed them. Horrifying experience. Eventually they caught him. He was tried and pleaded guilty and the judge had to sentence him. That was a notorious case of the day, in 1959. Didn't have any legal merit, but it was a high-profile case.

Q *What happened to (the Kingsgrove Slasher)?*

A He went to jail for a long time. The judge had two daughters.

Q *Ah. I can see what you're getting at. Did they find out why he did it?*

A Some psychological aberration. There was psychiatric evidence given. He was given the Rorschach test, which the Crown Prosecutor, Bill Knight poured scorn on but having done psychology for a couple of years in my arts degree, I thought it was interesting.

Q *What were your own views about the test?*

A Very hard to calibrate it.

Q *Did you do much devilling for Bruce Macfarlan?*

A Yes, quite a bit.

Q *Did you enjoy it? Were you able to bring a wider dimension to the research work ?*

A Oh, yes, he used me as the research assistant and I was very happy to adopt that role.

Q *Did you feel in particular that you helped him with any cases? Some insight you had which perhaps he hadn't thought of, himself?*

A I think I got the ammunition that backed up his instinct.

## **5. ADMISSION TO PRACTICE AND READING WITH SIR LAURENCE STREET**

Q *Would you have liked to continue as an associate, or by then had you formed the ambition to go to the Bar?*

A It was always a stepping-stone to the Bar. I forget now exactly why I went in February, as opposed to staying longer. I suspect that I'd lined up to go in February from the solicitor's office, Dawson Waldron, but the opportunity to become Bruce Macfarlan's associate just accelerated my departure from Dawson Waldron. It didn't affect when I went to the Bar.

Q *How long were you at Dawson and Waldron?*

A Four and a half years.

Q *And you did your articles there.*

A Three years' articles and eighteen months as a solicitor.

Q *But there was never any doubt in your mind about your going to the Bar?*

A No. I was encouraged to stay on with a view to becoming a partner, but that had no attraction for me – I wanted to move on.

Q *Were your parents there at the time of your admission?*

A I think they must have been, but I can't remember.

Q *Were there photographs from that day?*

A No.

Q *Who was in your intake on the day of your admission?*

A No idea.

Q *Was Janet Coombs in your intake? She was admitted to the Bar in 1959.*

- A I don't remember being admitted with Janet.
- Q *There were so few women at the Bar at that time. You didn't encounter any, in those early years?*
- A No. I had a woman pupil in 1970, a couple of years before I took silk - Patricia Voss.
- Q *Oh, Pat Voss. She was a chemist before she went to the Bar.*
- A She was. I was early in having a woman pupil. She did quite well at the Bar. Then she married an engineer and went to live in Goulburn, which rather cramped her style.
- Q: *You regarded her as having potential.*
- A: Oh, yes. She had potential and she did succeed, not like a rocket, but a slow fire. She did well.
- Q *Your English teacher "Cabbie" introduced you to Sir Laurence Street, or Laurence Street as he was at that time. You actually read with Laurence Street. How influential was he for you?*
- A Well... he was a very good pupil master. I had a few cases with him and did some devilling for him. I got busy quite quickly, so it was not really a very effective pupillage in the sense of twelve months' mentoring - I only had two or three months of mentoring. As my practice took off, I saw less and less of Laurence, but we remained good friends. He didn't resent it.

## 6. EARLY YEARS AT THE BAR

- Q *You took off quite quickly – that wasn't always the case for young barristers. What contributed to your hitting the ground running?*
- A First of all, my contemporaries briefed me and Dawson Waldron briefed me. That's where I got my start. My first brief came ten days after I commenced at the Bar. They were long ten days, I can tell you!
- Q *Tell me about it – do you remember that brief ?*
- A I can't remember what it was, but I remember it arriving. I'd ask my clerk "Anything for me?" No...." After ten days, the first brief – wow! It was from a contemporary from law school.
- Q *Who was your clerk?*
- A Edgar Marks, no, Norman Marks. 12<sup>th</sup> floor.
- Q *Yes, I heard a bit about the different clerks over the years at that time. Did you have a good relationship (with Norman Marks)?*



- A Oh, very good – he helped me get on to the floor and I was a very loyal supporter of Norman. Some members of the floor weren't so supportive of him and resented the commission under which he was remunerated, but I just took it as part of the system.
- Q *Was he a fiery personality?*
- A No, he was quietly efficient.
- Q *But there was one clerk I was told who was fiery.*
- A That was Harry Peel. He was on the 8<sup>th</sup> floor.
- Q *Who else was on your floor at the time?*
- A *Ken Jacobs. Vernon Watson. Tex McInerney. Mervin Finlay. Neil Campbell. Forbes Officer. Dennis Mahoney. Denys Needham. David Rofe. Robert Conacher.*
- Q *Who were you close to?*
- A I was close to Vernon Watson – we did an article together for the Sydney Law Review. I briefed him when I was at Dawson's. I was also close to Ken Jacobs, at that stage. When he went to the bench after a few months, I was able to get chambers on the floor instead of being a floater.
- Q *I know that floaters had a bit of a thin time. Today, they call it "hot-desking". But that's what you had to do if you were a floater; you were lucky to get a bit of a desk to work on, which could be unsettling if you were a person of orderly habits?*
- A Well, yes. You were not quite there, and it could be a bit awkward if someone turned up and you couldn't have chambers. I don't remember that - I must have been able to finesse it somehow. I don't remember having to cancel a conference or apologise for the fact I didn't have chambers.
- Q *You mentioned Denys Needham (later Justice Needham) a few moments ago. I came across a 1985 speech by the-then Justice Michael Kirby, who said that when he came to the 12<sup>th</sup> floor of Wentworth Chambers, you were just leaving to go to another floor, and the leader of the floor at the time, Denys Needham, viewed you as a bit of a "radical".*
- A Heavens!
- Q *He appointed Michael Kirby to take over your vacated chambers and I wanted to know how you were perceived as a radical.*
- A I wasn't aware that I'd had this dubious honour. I don't remember that at all.
- Q *Was it perhaps a tongue in cheek reference by Denys Needham?*

A Ah. That's probably right. Tongue in cheek - that's the best explanation, I think.

## 7. "SMALL BOY, HIGH COURT JUDGE"

Q *So, in those early years at the Bar, are there any cases where you did particularly well, or conversely where you were disappointed?*

A One's always disappointed in one's losses. My career at the criminal bar came to a grinding halt after two trials and two convictions. The case that stands out early on is Owen and O'Connor. A High Court judge, Sir William Owen had a dispute with his neighbours about a lane, which the neighbours had built over, to some extent. So Sir William Owen sued the two neighbours. I appeared for one neighbour. Bob Hope and Denys Needham appeared for the other neighbour. Kerrigan and O'Riley appeared for Sir William. I won. Bob Hope and Needham lost. Just hard work on my part – I discovered a defence, which wasn't available to Hope. My client had a defence, which I identified and it succeeded. It was in front of Sir Bernard Sugerman. I regarded that as quite a success story. It came from the solicitor who'd given me the two briefs in the criminal cases which I'd lost. He'd decided I had no future at the criminal bar but I had a future at the civil bar.

Q *What was the defence that you found?*

A The infringement on the right of way by my client didn't really interfere with anything that Sir William could have got from the right of way. He wasn't the owner of the lane – he'd just had rights to use it, as a lane. My client's infringement on the right of way by permanent construction wasn't sufficiently serious to affect his rights – he exited the lane from somewhere else, without hindrance. It wasn't a vehicle lane – it was a pedestrian lane. I suppose it was a very obvious point, but I found the case law that supported it and Sir Bernard Sugerman accepted it.

Q *Did you use diagrams to illustrate your point?*

A No. I think there was probably a survey in evidence in the plaintiff's case, which made the point for me on a factual basis. Anyway, there it is. I was rather proud of that. I didn't have to cross-examine Sir William.

Q *Would you have wanted to?*

A No.

Q *Really, why?*

A Oh well - small boy, High Court judge, you know...

Q *Do you think it's interesting that there's more use of visual cues these days?*

- A No, that's obvious – if the technology is there, it should be used.
- Q *But you were able to make your points without it, through your use of case law.*
- A I had to find it, but I found it.
- Q *Yours has been described as a “pitiless precision” in terms of your approach to research. Is that an accurate characterisation?*
- A I tried to turn over every stone.
- Q *But are you also good at knowing which stones are not worth keeping? Or do you like to keep a bit of everything, just in case?*
- A I think I had the capacity to discard the marginal and the irrelevant and focus on the arguable and the good.
- Q *Why I ask is because others I've interviewed – one or two people I've interviewed decried the “everything but the kitchen sink” approach when it comes to amassing evidence and constructing a case.*
- A Yes, no capacity to discard the marginal, the irrelevant and the hopeless - it's all in - hoping that something will get through.
- Q *Has that increased over the years – that tendency? Were people more economical when you started out at the Bar, in terms of their research?*
- A Well, at that stage it was all manual - you couldn't use computers then to do a lot of research for you. You had to go to the books and follow through the leads, so to that extent, it imposed a discipline on the research you undertook.
- Q *Would you have liked to get more criminal briefs?*
- A I think I would have liked a broader Tom Hughes-like practice. But it wasn't to be my lot. I didn't have any experience as a solicitor or articulated clerk in crime. I definitely was a novice. I never did much jury work, so I never honed jury advocacy skills, either as a junior or as a silk. So, that really ruled out crime for me, except at the appellate level.

## **8. LEADERS OF THE BAR IN THE 1960S AND APPEARING BEFORE THE PRIVY COUNCIL**

- Q *Did you ever for amusement go to the Darlington Court to observe some other people in action?*
- A No, I'd been up there as a judge's associate. I'd done criminal trials at Darlington and on circuit as associate to McFarlan, but that was the extent of my practical criminal experience.
- Q *The leaders of the Bar in the 1960s – did you observe any in action?*

- A Oh, yes, Barwick, Bowen, Holmes, Officer, Smythe, Shand, Merrick Miller – one saw them all.
- Q *Who impressed you most?*
- A Well, Barwick was fantastic. I didn't try to put them in a pecking order – I just took from each of them what they could show me or I could learn from them. I wasn't interested in trying to set up a popularity chart. Each was different, with a different mix of skills.
- Q *Sir Laurence Street mentioned that he would sometimes accompany Barwick, as a junior. He would worry about some detail about a case, but Barwick was never worried about what he was going to do, but five minutes before court proceedings would make minute notes on a blotter.*
- A I never was Barwick's junior - I instructed him as a solicitor, in conference – not in court. I instructed Bowen in court. I was junior to and instructed Ellicott, Mason and Street. Not so much Mason, as he became Solicitor General so soon.
- Q *One of the things I noticed when I read about Bruce Macfarlan – by 1971, he was the sole judge in admiralty.*
- A Yes.
- Q *Why the only one? You did a lot of work in shipping, Sir Laurence Street did some as well – were there many of you working in that area?*
- A It was a very small admiralty bar.
- Q *How many in those days?*
- A Six or seven.
- Q *You got a lot of work; you appeared before the Privy Council a number of times.*
- A I did.
- Q *What was that like ? That would have been interesting.*
- A It was – it took you out of your comfort zone. You prepared very thoroughly. There was a five-judge bench, with some very great legal minds, some pedestrian.
- Q *Did you appear before Lord Denning?*
- A No, I did not appear before Lord Denning - he had stood down from the House of Lords to become Master of the Rolls. My first trip to England was in '67. I appeared over there between '67 and '86 in something like twenty cases. Some of them were only leave applications. To cope, one had to broaden one's research and approach. It was a great privilege to be able to appear over there.

Q *Did your appearances in any way deepen your interest in certain areas of law, to influence the books you were later to write?*

A No, I didn't do any cases before the Privy Council on res judicata, or fraud. I lie - I did two fraud cases (there). One was an estoppel case. No, I didn't get interested in these topics because of the Privy Council. Didn't do any harm, but that wasn't the cause.

Q *What I suppose I'm fishing for here, is your interest in common law - given how much we inherited of the tradition from England, and how much it furnished your desire to write books.*

A It certainly was a big factor. One of the purposes of writing my books is to try and keep English and Australian law in those topics more or less in synch. So we can draw on what they are doing and they draw on what we're doing. It's a two-way traffic. We're not just a receiver – we're also a contributor. I refer to that in my prefaces.

Q *How much are we contributors? I don't often hear many people talking about that.*

A In the last couple of years, they referred to a number of Australian cases in the Supreme Court, which they'd got from my book on fraud. I can't prove that, but it's significant that bits I quoted in my book turned up in judgments in the Supreme Court. The most recent case, *Zurich Insurance v Heywood* last year, they referred to a decision of the High Court, and decisions of our Court of Appeal. They also referred to an article by me in the Law Quarterly Review, which they were kind enough to say was impressive. Earlier there was another case about continuing representations where they cited a decision by the Supreme Court of Victoria, which someone plucked out of my book - whether it was counsel or the bench, I don't know. So I'm contributing to the two-way traffic.

Q *I interviewed a law lecturer some years ago who said our common law system doesn't sufficiently entrench notions of responsibility to others. He said this dated back to Matthew Hale. Would you agree with that observation?*

A I wouldn't agree with that. That's a factor of the human rights movement – that there's an emphasis on rights but no emphasis on responsibilities. That's recent – that's not common law - it's come from human rights in statute and in political dialogue.

## 9. SPECIALISATION AND ARBITRATION

Q *Have you had much opportunity to compare legal systems with our own?*

A Only with some countries in the common law world: New Zealand, tropical islands in the Pacific, England. My research is not confined to

Australia and Britain – it's looked at Hong Kong, Singapore, Ireland, Canada and Malaysia.

Q *That would have been useful, too, for your now-career as an arbitrator.*

A I haven't had a great deal of work as an arbitrator. I've enjoyed what I have done. But I'm 82 now, and people think "82 - he won't be there long enough to make an award – we'll have to start again". Whatever it is, I haven't been a raging success as an arbitrator.

Q *We'll return to that subject later. In those days, there was an argument about whether a young barrister should specialise – some tended to the view that it was better to have a general practice – others became specialists. Yours was a general commercial equity and appellate practice, and intellectual property and shipping – were you starting to specialise by default?*

A Well, during my time as a tipstaff, I had time in the evening; my work was 9 – 5 or 8 - 6. I read textbooks on patents, income tax, company law, administrative law and evidence. I'd written material for the Sydney Law Review on trademarks, valuation and long service leave, so that indicated where I was going. The solicitors briefed me in those sorts of cases, and didn't ask me to deal with broken bones, or burglars or worse. So I didn't specialise so much – I prepared for specialisation, but the specialisation came from the votes of the solicitors – the consumers.

Q *And accordingly you went in that direction. When you were a senior junior, and before you took silk, did you have many readers?*

A I had about seven.

Q *You mentioned Patricia Voss as being one....*

A Yes. Garry Downes, Patricia Voss, Brian Rayment, Joe Moore. Both Downes and Rayment took silk; Pat Moore (previously Voss) took a husband.

Q *What about David Bennett?*

A Oh, David Bennett – he was my first pupil. How silly of me to forget David.

Q *Garry Downes – I interviewed him for the Chartered Institute of Arbitrators' commemorative slideshow. Was it Garry who encouraged you to go into arbitration?*

A No, no, no, it was a natural movement. You cease to be a judge and you want to remain active. I remained active on the Courts of Appeal on Tonga and Kiribati. I was active for a while as a part time expatriate judge in the Supreme Court of Fiji following my retirement here, and arbitration was an extension of that, as are my books and my articles.

Q *Did you talk nevertheless with Garry about arbitration and where it's all heading? It's becoming quite big now internationally.*

A We've had a bit of chat about it, but it's really about what he's doing rather than what I'm doing. He's rather given up on arbitration, I think.

Q *Do you think arbitration as a method of dispute resolution is on the rise or plateauing?*

A It's on the rise because international trade and commerce are on the rise and neither party wants to have to litigate in the other party's jurisdiction. So a neutral forum for dispute resolution makes a lot of sense for international business.

Q *If you were starting your career again, would arbitration be one of the strings to your bow?*

A At the Bar? Oh yes. I did some arbitrations at the Bar. As a barrister, I was chairman of the Presbyterian property commission. We had to divide the assets of the Presbyterian Church, in all six states and two mainland territories. We worked over two years, not continuously but on weekends. That was a big arbitration. None of our decisions were challenged at the time. The only decision which was successfully challenged later was one we'd made by consent. We'd had no jurisdiction to make it apparently. I don't regard that as a defeat.

Q *You're actually not a member of the Chartered Institute of Arbitrators.*

A No.

Q *Why is that?*

A I'm a member of the London Court of International Arbitration. I've had work from southern Africa – from an institution there. I haven't had any work from the LCIA, and I haven't had any Australian arbitrations. Don't ask me why. Maybe it's the 77 bit. And of course, the solicitors who briefed me at the Bar had all retired by the time I retired as a judge. I have no contact with the litigation solicitors, except those that would see me in the Court of Appeal.

## 10. TAKING SILK

Q *When you took silk, had you applied many times previously?*

A No. I was invited to apply, not because there were few silks in '72, but there had been a number of appointments to the bench after the applications for silk had closed that year. Mahoney, Samuels, Glass, and (the Chief Justice) Sir John Kerr thought there should be a supplementary list. So Rogers, Lockhart and I were invited to apply, so naturally we did. So in February '73, I took silk. The first and only time I applied.

- Q *That's good - did you have much to do with Sir John Kerr?*
- A Not a great deal. I appeared before him. I knew him at the Bar. He never led me. He was chairman of the Bar, but I wasn't on the Bar Council at the time.
- Q *When did you become a member of the Bar Council?*
- A Sometime in the 80s.
- Q *I know you eventually became President, in the late 80s.*
- A '87 – '89.
- Q *Were you on the Bar Council for about a decade?*
- A Not as long as that – probably about five or six years.
- Q *You've been involved quite extensively in governance - has governance always been a passion of yours?*
- A It's a way of contributing – putting something back to the Bar, putting back to Cranbrook as an ex-pupil, putting back to the Church, putting back to the University. And putting back into the Australians for a Constitutional Monarchy, St John's Ambulance and the Presbyterian Church, not that I was a Presbyterian.
- Q *No, you were an Anglican.*
- A Yes.
- Q *I ask because these days, it's somewhat more common to see people in governance because of CV-building, rather than a desire to give back.*
- A CVs didn't exist when I was a young man. In the past, you either got the job or you didn't. You applied, you went to an interview, and bingo you were selected or you weren't. The idea of having elaborate CVs – they're a byproduct of computers. People wouldn't get a job in those days, just on a CV.
- Q *After you took silk, did your workflow fall away or were you as busy as ever?*
- A I was as busy as ever. I think I could have taken silk earlier but I was doing such good work as a junior – I had been to the Privy Council as a junior, appearing on my own, several times. I had the best of both worlds – I was junior to Samuels, Glass, Street, Mason and Ellicott and I was also doing good cases on my own. So, no need to take silk. In fact, I thought that taking silk would end the experience I received as a junior in big cases.
- Q *Were you regretful, momentarily, at taking silk?*



- A No, not at all. Being invited to apply, and secondly there was no falling away of my practice.
- Q *When I interviewed Michael McHugh, he spoke of (Harold) Glass very highly.*
- A Yes, he had a good mind.
- Q *Was he influential for you, too?*
- A More as a judge than as a silk. I liked his style as a judge – concise and clear. Generally right.
- Q: *He was an interesting figure for you.*
- A He led me in copyright cases. A solicitor briefed him who had the retainer for APRA – the Australian Performing Rights Association. Colin Marks was the solicitor. We did a couple of copyright cases together – won both them.
- Q *If anything now, in the internet age, issues like intellectual property and copyright are bigger.*
- A Oh, yes.
- Q *Have you been monitoring these developments?*
- A Not since I went to the Court of Appeal. Some trial work was still being done in the Supreme Court – appellate work was in the Federal Court. I was cut off from it on the Court of Appeal, so I ceased to take a great interest in patent law, and only a general interest in copyright law and trademark law. I wouldn't have the skills as a practitioner these days in IP.
- Q *If anything, it's become more complicated now with the internet – policing intellectual theft is harder because of global jurisdictions?*
- A I know that as a citizen, but I don't know that as a lawyer. The sorts of cases I did in patent law were simple cases scientifically compared with some of the cases today.
- Q *Would you get your teeth into it now, if you started again?*
- A No, I wouldn't start again. I wouldn't try to catch up on 29 years of not being a practitioner in the area.

## 11. CAMP HANDLEY AND THE MERITS OF STAYING FIT

- Q *You led a team of barristers in a major case against some banks. You set up "Camp Handley".*
- A Yes, that's true.

Q *What's Camp Handley exactly?*

A We had a big team – maybe three silks and two juniors. There was always a risk that no one would feel really committed to the case. They'd dart off to do their own. So I wanted to put them into a "concentration camp", throw away the key and get them to work on this case, and nothing else. My precedent for that was Doc Evatt in the bank nationalisation case, where he took his team for the High Court constitutional case to a hotel in the Dandenongs outside Melbourne and in effect locked them in to work on the case. I thought that was a very good example of what we should be doing for the Commonwealth Bank in this case, and it worked.

Q *No distractions.*

A No, they weren't darting off to do their own case or have a conference with some client – they were quarantined from professional distractions. Not from personal distractions, but professional distractions.

Q *Didn't David Bennett send out for smoked salmon?*

A Oh, yes, he was something of a gourmand and he was not very happy with the bill of fare. It was a Commonwealth Bank training complex, I think, somewhere up in the North Shore.

Q *Have you tried to repeat that experience?*

A No. That was the only time.

Q *And what was the outcome of the case as a result of your sequestering yourself?*

A We lost the case before the Federal Court in the first instance, and we appealed. We were doing rather well on appeal and I think that we would have won on the appeal, but there was a political deal between (Paul) Keating who was Prime Minister and (Barrie) Unsworth who was Premier and facing a real challenge from (Nick) Greiner in a forthcoming election. If NSW had lost the case against the Commonwealth Bank, it would have been a bad political move. Keating directed the Commonwealth Bank to settle, which the Commonwealth Bank was quite prepared to do. Unsworth was pleased, the State Bank was pleased, everyone was happy – except the barristers. But we'd argued the case.

Q *As thoroughly as you were able.*

A Indeed.

Q *In all those years, the Bar can be a sedentary profession. You're well-known at the Bar for using the stairwell. Has it always been part of your ethos to stay physically fit?*

- A Indeed. I've never joined a gym but I've always tried to stay fit and have a sensible diet.
- Q *I know that when I interviewed (retired clerk) Paul Daley, he encouraged his barristers to do lots of rowing – he was a bit of a fitness advocate. Did you try to take it a little further?*
- A No, I've lived by example, not by prescription.
- Q *Your family – are they similarly active?*
- A Yes, yes. Not my wife in particular, but my walking up and down the stairs to work in chambers made me fit enough to trek the Himalayas.
- Q *When did you do that?*
- A '87 and '89.
- Q *That must have been wonderful.*
- A I took my four boys the first time, the three youngest the second time. The eldest was in the College of Law at that stage and couldn't come. That was a wonderful experience, walking and enjoying the scenery. It was very tough, but as I say, walking up and down the stairs in this building was good enough.

## **12. PRESIDENT OF THE BAR ASSOCIATION AND THE QUESTION OF HUMAN RIGHTS**

- Q *President of the Bar Association, in the late 80s as you mentioned – were those interesting times at the Bar?*
- A They were. The Labor Government was trying to abolish common law rights for workers and road accident victims. I was involved in the fight against that. We eventually rolled it back to some extent, in terms of workers' rights and more fully in accident victims' rights. That was successful, in the public interest as well as the interests of the Bar. That required a certain amount of skill and persistence.
- Q *Which issues would you lobby on now if you were President of the Bar?*
- A No comment. Don't know enough about it.
- Q *But more broadly, are there issues happening in the economy that you're concerned about, particularly when it comes to workers' rights?*
- A I don't know enough about what's left and what's been taken. I know they've been reduced. One of the problems is the abuse of the system by applicants who lie or exaggerate, doctors who accommodate them and solicitors who act for them. This eventually produces a reaction.

The government can't afford to maintain rights at that level, so everyone suffers.

Q *You're talking about workers' compensation.*

A And road accident victims, too.

Q *You made a very interesting comment – in fact you've made it a number of times - that there are no actual rights, when you talk about human rights. You've said it in a very particular kind of way – you've brought more meaning to this, than people might necessarily assume.*

A Well, the common law did not have human rights; it has human liberties. So, you are free unless there's a warrant for your arrest. You couldn't be arrested just because the policeman didn't like you; he had to have a warrant and a legal basis for interfering with your personal freedom. That's a liberty. The mistake that's been made is to convert liberties into actual actionable rights, which changes the dynamic completely. But I haven't really made a study of this – it's not part of my expertise, just my impression that human rights have been blown out of all proportion.

Q *How would you go about it, then, if you were in a position to make a difference?*

A I'd repeal the Human Rights Commission.

Q *You would, would you?*

A Yes.

Q *But what would act as a safeguard instead?*

A The common law.

Q *You feel that's sufficiently strong, and that people's understanding of it is sufficient, to protect them?*

A Yes, I'm not in favour of the human rights movement and the people who commit to human rights are trying to push out the envelope all the time.

Q *You mentioned (in a paper for the Menzies Research Centre) your concern for the potential for "government by litigation" as an extension of this.*

A Indeed.

Q *Is that happening now?*

A To some extent. I mean, there's a public housing building near the southern end of the Harbour Bridge –

Q *The Sirius Building.*

A Yes. Now, that contains x number of public tenants. If that could be sold for market value, and the money used for public housing – you’d be able to house more people away from the views of the harbour – probably three times more public housing tenants than those living there now. That decision should be left to government. It’s just been upset by the Land and Environment Court, and the government’s been ordered to re-exercise its powers. Now they may come to the same decision. Meantime, there are 70,000 people in the public housing queue, paying rents they can’t afford, or they’re homeless or whatever – it makes no sense to have public housing tenants enjoying a harbour view, where the rent is a fraction of the market value of those rooms. That’s a form of government by litigation. We also see it in relation to coal mining and other forms of development. The government can’t act because there’s an endangered species – some sort of frog. Meanwhile people are out of work - you’ve got half a million unemployed. I don’t think it’s a good idea. But I’m a spectator, a fly on the wall, not an expert in this area at all.

Q *You did say in one of your writings that judges have opinions just like anybody else –*

A Oh, sure.

Q *But you’ve always been rather concerned about governments who overstep the mark. In your piece “Who is the Master?” that you wrote for the Menzies Research Centre, you had questions about the efficacy –*

A In a democracy, there should be an equal vote, instead of a non-elected, non-democratically accountable nine or seven or three judges.

Q *Against that, and with all your years on the bench, people have always wanted an umpire, though, haven’t they? That counter-balances, doesn’t it?*

A We have a democratic umpire called an election, or you take your case to a judge. Anyway, I don’t think government by litigation is a smart way of going about governing a country.

Q *It can certainly create an environment of instability.*

A Yes. And paralysis.

Q *Paralysis by analysis?*

A Mm, yes.

### 13. APPOINTMENT TO THE BENCH

Q *When I interviewed Sir Laurence Street a few years ago, he told me an interesting thing. He said that when he was on the bench, “you’re conscious that too slavish an adherence to precedent or to the letter of*

*the law quite often will work injustice, so you try and find some way to work around it. That's really the origins of equity, chancery law".*

A That's true.

Q *You agree?*

A Yes.

Q *Is that similar to the approach you brought during to your time on the bench?*

A Well.... I think you could say so.

Q *When you were appointed to the bench, from my readings, you said you were ready at the time "to take on the role of a referee" (as you put it). What do you think best characterised your approach as a judge during your time on the Supreme Court?*

A Heavens, that's for the consumer to say, not the producer (to say).

Q *You were described as extremely rigorous – you were also described as quite a talker!*

A I think I talked less as I got older.

Q *They said that you added an hour to each of the cases.*

A Well, interesting comment. I did talk a bit, probing the argument, putting in my spoke. I didn't think I talked as much as some of my colleagues, but anyway, the beauty's in the eye of the beholder.

Q *You certainly presided over a great many cases. You said yourself you were a team player.*

A Spigelman said that.

Q *But you've always been a team player - that's been your approach, giving back, being a team player and working in with people?*

A I think I was a team player on the Bar Council, and a team player as a judge. The capacity to be a team player as a barrister is rather limited. Within limits, you try and support your client and your solicitor and your junior.

Q *In 2016, John Basten made a speech on judicial review in state jurisdictions, and he said that "much of the development of administrative law which occurred from about 1990 was unfamiliar territory both for those appearing and those dealing with cases in the State." He said: "An important exception to that proposition, was to be found in an earlier generation who knew their judicial review principles." He cited you – he said you were "an example of a judge who brought to the State jurisdiction a deep knowledge of administrative law principles established in industrial and tax cases".*

A I also read a book on admin law in the six months when I was a tipstaff – De Smith’s “Judicial Review of Administrative Action”. Yes, that was a nice compliment – I wasn’t aware of it until you told me.

Q *I get the impression from that speech that there’s less attention these days paid to the bricks and mortar of the law?*

A Can’t comment.

Q *But given your area of specialisation and what you know?*

A There’s a risk that some judges - who don’t fully understand the law in some area and the reasons behind it, which are rational and reasonable - take a superficial view without knowing what lies under the surface. But that’s just my impression.

#### 14. ESTOPPEL

Q *Is this why you wrote books on interesting areas of law, like estoppel and res judicata?*

A There’s two reasons: first of all, judges get sabbatical leave, which I wanted to use constructively for the community, not just lie on a beach at the Riviera or Gold Coast. Secondly, I wanted to, as it were, document where I’d reached in the law so that the next generation would pick up where I stopped and not have to start again at the beginning. They would be able to do better since there’d be a clear statement, I hope, of the foundations, which they could build on more readily than if they had to go back to square one.

Q *Can you explain a bit about the legal doctrine of estoppel? I understand it comes from an ancient Greek word meaning “broken flax”?*

A No, it comes from the French word “estop”. In French, they have an “e” in front of things. We’ve dropped the “e” in English so the French “estoppal” becomes “stop” in English. You have “coup d’etat”, “esprit de corps”, “ecole” – all these French expressions where we dropped the “e” in English. So, no, behind the French, there may be some Greek – but I’m not aware of the Greek, only the French.

Q *Is it true, that there was a time when the Mason High Court made some pronouncements about trying to simplify estoppel and you disagreed?*

A That’s true.

Q *What was it that you weren’t happy about? I believe they were trying to bundle estoppel together. You believe in separating it out?*

A They were trying to make estoppel do the work of contract. I’ve written two articles in the ALJ about the High Court’s attempts to move the goal posts in estoppel. I thought some of their statements were superficial, wrong and not good policy. I had initially taken the High

Court judgments on face value. When I was researching for my book on estoppel, I went back to the beginning and worked forward from that. So when I got to the High Court cases, I realised how superficial they were. I had to write about it.

Q *What was the result of your writing?*

A I think by and large, many statements in those cases are “man overboard”, now.

Q *Oh, really?*

A Well, the High Court has had two to three goes at estoppel since the Mason Court. Those cases were correctly decided, it's just that there was some loose language and very poor law. In the most recent cases, the High Court has gone back to the earlier English decisions and Australian decisions. They've rather ignored the wider language in the three Mason Court decisions. In the intermediate courts of appeal, the wider and novel language in *Waltons v Maher* has been confined to cases where all the terms of the intended contract are agreed, it's just that there hasn't been a final tying of the knot. Estoppel can do that. That's a very narrow basis, compared with the initial reaction of the profession and the judges, “Oh, hey, wow, this is fantastic - we can do what we like”. That's all gone. It's a work in progress, but –

Q *You sound a little pessimistic.*

A No, no, I'm not pessimistic. What the High Court has been doing is dropping hints and chipping away at the edges. They haven't actually repudiated the wider language or the reasoning behind it. Perhaps they never will, but meanwhile it's blithely ignored. I made this point in an article in the ALJ last year – “*Waltons and Maher* today”.

Q *Has anyone taken you up on some of the points you made?*

A The Victorian judges suggested that I'm all wrong. So far, the Court of Appeal in NSW has held the new line. I wrote some of the decisions or participated in them. It's held here. The Victorian Court of Appeal was overruled recently by the High Court in *Crown Hotels*, for a very shoddy piece of work. So I don't worry about their criticisms.

## 15. “THE KEN HANDLEY AMENDMENT” AND THE PROBLEM OF UNREPORTED CASES

Q *When you retired from the Supreme Court, you'd sat on 1500 published cases. Jim Spigelman said at your retirement that over 50% involved substantive judgments and that all of those cases had your detailed attention. It's nice that there's the “Ken Handley amendment” that enables judges to sit longer (than the official retirement age).*



A It's economical for the government, for the state. It's beneficial for the court and the judges. I'm not the only one who's taken advantage of it. It's done regularly now.

Q *Should they extend judges' retirement age? It's 72 here (NSW).*

A There should be no upper limit. Within that five year window, reappointment requires the Attorney General to say "I've got the money" and the Chief Justice to say "he or she is worth it". They seem to me to be adequate safeguards and you don't need a 77 year cap. I was sounded out whether I would come back another year. I was 77; I decided it was time to go. In view of what happened - my arbitration practice didn't take off like a rocket - I wouldn't have minded being there for another year or two.

Q *Do you think these days, cases are becoming more complex and parties more intractable?*

A Yes, it's caused by the photocopier, the computer and emails.

Q *Technology.*

A Technology.

Q *Yet earlier, you were saying you would have taken advantage of it, if it had been around?*

A Well yes, taken advantage of it to produce maps and diagrams to show where the plaintiff's title begins and finishes, and the defendant's title begins and finishes – that sort of thing. There's a lot of email correspondence. You've got no alternative, but to get on top of it, put it all before the court, even though in the long run, it might not amount to a row of beans. You can't just ignore it – you've got to go with the flow.

Q *But it's a tool at the end of the day?*

A Yes, the tool is taking over. One of the other problems of course is unreported judgments which multiply and mostly they don't add anything but complication and expense.

Q *You say "unreported" –*

A Not in the Law Reports – of course, they're available - they're reported in that sense. They're not secret. But instead of having one High Court case or one English case or one Court of Appeal case and saying "here's the principle we apply in this case and we don't fiddle with it", judges like to put their own words on it and imperceptibly they move the goal posts.

Q *And you feel this should be observed, noted and publicised?*

A Yes.

Q *Who should do that?*

- A Judges, counsel and academic lawyers.
- Q *And they're not doing this, or they're not wanting to?*
- A Well, counsel cite unreported cases and judges then feel it necessary to deal with them, and the judgments get longer and slower. Whereas if you stick to the core case in the High Court, or Court of Appeal or the House of Lords, and work off that to the facts of the present case - unless there's some real development in the unreported cases.... One of my colleagues went through all the cases on "unsafe" and "unsatisfactory" – something like 98 unreported cases in the Court of Criminal Appeal. Crazy. Ultimately, he didn't publish the judgment because one of his colleagues said it was a lot of nonsense. Judgments in the Court of Appeal these days include a lot of unreported cases, which shouldn't be there.
- Q *So, in a sense, everyone's unwittingly contributing to this complexity?*
- A Indeed. No-one's solely to blame.

## 16. THE RULE OF LAW IN FIJI

- Q *I'd like to turn to the Fiji Court of Appeal on which you sat as one of the judges –*
- A And on the Fijian Supreme Court –
- Q *Yes. You were one of the three judges on their Court of Appeal who had to determine whether the 1997 Fiji constitution had been abrogated by the military coup of the previous year.*
- A Yes, there were five of us.
- Q *I know that the Court unanimously held that the constitution remained in force as the supreme law of Fiji. But the military government actually accepted the ruling and resigned. That must have been an interesting experience for you. There was a lot of security needed there at the time, with the worry about snipers and so on. And yet they actually accepted your ruling.*
- A Well, the military government wasn't as extreme as the people behind the attempted coup. They'd ceased to be a military government by the time we gave our decision because it was a civilian government, put in place by the military. I haven't had to think of this for a while. Yes, go on.
- Q *That must have been an interesting experience. Would you say that Fiji continues to be at risk – they've had several coups over the years -*
- A There's been three coups – two succeeded, one failed. The Rambuka and Bainimarama coups succeeded. The Speight coup failed eventually, although it pulled down the previous government.

(Laisenia) Qarase was the prime minister when we gave our decision. It was a civilian government put there by the military.

Q *What were your main reflections or feelings about the state of affairs in Fiji as far as the upholding of the rule of law, the constitution, was concerned? In other words, although it was peculiar to their society, could something like that ever happen here?*

A No. I don't think there's any risk of the army here attempting a coup. The country's too big apart from anything else. In Fiji, you capture Suva, you capture the country. If you capture Canberra, you don't capture Australia – our very size and ethos protect us. Here the military has no political ambitions.

Q *Do you think in Fiji, there's not sufficient separation of the powers?*

A The problem is, they don't need an army the size they have. They're great supporters of the UN. They're very good, disciplined peacekeepers; the UN is fond of them. But they have an army of about 10,000 and they've got nothing better to do in Fiji except plot coups. If they'd had a police force and a token army, there wouldn't have been any coups.

Q *Were you ever in a position to make any recommendations on what they should do?*

A No.

Q *Were you asked ?*

A If the UN had ceased employing the Fijian troops as peacekeepers, the Fijian government would have had to cut the army numbers down. They couldn't have afforded it. The only reason they can afford it is because the UN pays about two-thirds of the cost. But the UN was so keen on these peacekeepers, they weren't prepared to go along with Australia and New Zealand on this. That would have put an end to the coup – because they would have had to discharge the army.

Q *If they're that fond of them as peacekeepers, surely there's plenty of work for them to do in other parts of the world?*

A Yes, but to maintain 5000 troops overseas....

Q *It's expensive - yes.*

A You need the same base as back home.

Q *How about Tonga? You've had a lot to do with Tonga as well. Do you think about the different approaches to justice and whether we could borrow from Melanesian or Polynesian wisdom, for example?*

A Apart from land law which builds on habits and traditions of the society, the rest of the law is basically English law, so there's no scope for a Polynesian or Melanesian twist, except on the facts. You have to be

sensitive to local problems, local difficulties, local desires and local customs – you don't behave like a bull in a china shop.

Q *I can't imagine your doing that.*

A Oh, it's been known to happen, by Australian judges going to the South Pacific. The record's not good in some cases, in Samoa in particular.

Q *It's like you say, they've got to have a certain sensitivity to local mores. Did you know of one of the early women barristers, the late Ann Bernard? She was in Fiji.*

A I don't know about her as a human being – but I brought her portrait to the Bar.

Q *You brought that in, did you?*

A I brought that in.

Q *Did you make the purchase?*

A No, I offered a good home for it. The same artist was responsible for the portrait of Sir Frederick Jordan that hangs in the Court of Appeal in the President's Court – I'm responsible for that too.

Q *Mary Edwards.*

A Yes.

Q *Were you interested in Ann Bernard's career at all?*

A I took a little interest in it and looked at one of her cases where she appeared in the Full Court before Sir Frederick Jordan – she lost. Ex party Walsh.

Q *That was Adela Pankhurst Walsh, the suffragette's daughter. Ann Bernard was a junior to Sir Garfield Barwick on a couple of occasions.*

A I can't comment – I was in short pants or diapers at that time. But I did know that she appeared for Pankhurst Walsh, in order to put some background to get the Bar to take this portrait.

Q Ann had a practice in Fiji. I interviewed her former business partner – he was here at the Bar too.

A Indian name? Karam Ramrakha?

Q Yes, that's it. He provided a reminiscence on her. She had a practice there for a number of years.

A Indeed.

## 17. HONOURS AND REPAIRING WOUNDS

Q *Just touching on extracurricular activities. You were president, as you mentioned before, of Cranbrook school council. Did things go smoothly there?*

A The situation was volatile because the Council had refused to extend the headmaster's contract and he had some support in the community. The President of the Council at the time that decision was made found his position untenable, and the vice president wouldn't step up. I was tapped on the shoulder. I was a backbencher, I never sought promotion within the Council – I was tapped on the shoulder and stepped up -

Q *In the best Westminster tradition –*

A Well, anyway, that calmed things down. The headmaster left and we replaced him, and bingo, I was President for a number of years until 2009. 1999 until 2009, I think.

Q *And you still go back to address functions there.*

A Yes, when invited to old boys' functions, I go.

Q *There's quite a few old Cranbrookians at the Bar and bench.*

A Bob Macfarlan is on the bench. I think he's the only one at the moment, but there's certainly some at the Bar.

Q *That experience have been interesting in light of your sitting on that case when Scots College dismissed its principal, not long ago.*

A I didn't sit on the case – I was asked by the dismissed Council to give my opinion.

Q *That the Trustees of the Presbyterian Church acted invalidly.*

A They did. That's my view - the ousted Council weren't prepared to take it to law, and they didn't get the numbers in the General Assembly.

Q *Do you think other schools will heed that example?*

A It's very peculiar to the Presbyterian church, that the Trustees who own Scots' property could dismiss the Council, just like that, and put a new Council in. Cranbrook's not under the control of the Anglican Synod. Cranbrook's constitution as an Anglican school has two clergy on the Council and two nominees of the Archbishop on a council of 15, so it's a minority position. Same with Kambala, same with Ascham. On the other hand, Shore, Kings, Barker, Trinity – they're under the control of Synod. They could, in theory, legislate to sack the Council, but it's never happened, and they never would do that. The Presbyterians have made a rod for their own back by doing what they've done, but only time will tell.

Q *You were Chancellor of the Sydney Anglican church.*

- A Yes, I was Chancellor from 1980 to 2003.
- Q *But you were first appointed Advocate in 1970.*
- A I was.
- Q *Before you took up that role in 1970, there was a case where the Diocese was sued in the Supreme Court. I believe you felt it your duty to prevent that happening again.*
- A The Kings School chaplain case, *Baker v Gough*.
- Q *You made an interesting comment, you said that “God does not bless purely commercial enterprises undertaken on behalf of the Diocese” –*
- A That was 2003, when I left – my last speech to the Standing Committee. They’d forgotten about that when they geared up the investment portfolio and lost a lot of money in the GFC.
- Q *You would have advised against that.*
- A I hope so. The examples I gave included the Catholic Church, the Presbyterian church, the Anglican church, in Sydney and elsewhere in Australia and in Britain, the Vatican – it’s happened again and again. People think, “I’m a leading Catholic, what I do to make money for the Church – it’s a good cause – God will look after the project”. It doesn’t happen. It’s a form of corporate greed. The same rules apply to any investment.
- Q *Have you written much about this?*
- A No.
- Q *Would you want to?*
- A Not particularly.
- Q *You don’t think it’s needed?*
- A It is needed. I would do it if I was asked, by the Archbishop or by the Standing Committee. But I think the wound is too deep.
- Q *It sounds as though you could be involved in helping repair the wound.*
- A Yes.... Next time, I see the Archbishop, I’ll ask him about it.
- Q *It seems like a good time for you to do that.*
- A Mmmmm. It reminds me when the-then Governor of the Reserve Bank, Sir Harold Knight in Standing Committee mentioned there arose a generation of who “knew not Joseph”. Joseph became the leader (of the Israelites) and protected Egypt against seven years of famine. Seven fat years and seven lean years. There was persecution of the Jews in a later generation, and there arose a generation that “knew not

Joseph". So, there arose a new generation that knew not my advice about God not blessing the business enterprises of the Church.

## 18. "NASHO", ST JOHN'S AND FINAL REFLECTIONS

Q *I was struck by the fact that in one of your papers, you mentioned admiring (former Victorian Chief Justice) Sir Edmund Herring as "a soldier, a scholar and a saint" – does that sum up a little bit about you?*

A I wasn't much of a soldier, but I was in the university regiment and in the North Shore regiment for quite a number of years as a citizen soldier and got to the rank of lieutenant when I came to the Bar. I was in line for promotion to captain when I would have been responsible for the administration of a company. But I couldn't see how the Bar and the regiment could mix. As captain, you've got to make sure there's food, blankets, water, kerosene, lamps.... I thought I could let down a client or let down the company - I couldn't do both. I moved on to the reserve officers. But it was an interesting experience, having been a private, then a lance-corporal, the lowest of the low. In the North Shore regiment, we had members who weren't from university or from Teachers' College. They were different but they were the salt of the earth – and you had to earn their respect. You weren't entitled to it, just because you were a lieutenant. It was an interesting time. I valued it.

Q *That coloured the rest of your approach to life?*

A Oh, yes. Problem-solving in the army, tactics – it was a good way of approaching any problem. When I went on National Service – compulsorily – not as a volunteer. On the first day, we had university students, teachers' college students, coalminers from the Hunter Valley, dairy farmers, tradesmen, apprentices, fifty of us all thrown together in a big tent. On the first day, you think "Like him, don't like the look of him" and so on. At the end of the first three months, verdicts had often changed. It made you a little less confident in your ability to judge by appearances, which was a valuable lesson. But for National Service, one would have had very little contact with some of those persons. You'd meet someone who hadn't been to private school, may not have been from a happy home, would never go to university, but yet they're the salt of the earth.

Q *So "Nasho" was a great equaliser.*

A It was a community builder, I'd put it. It didn't equalise – it didn't make them university students or me a coal miner - but it made me respect other people for what they were, not what they couldn't be. I realised they were good blokes with a certain commonsense intelligence, which not all the university students had.

Q *You became a Commander of the Order of St John. That was by invitation-only.*

- A I was first an Officer and then a Commander.
- Q When did you become involved?
- A My predecessor as the president of St John's Ambulance NSW was Sir Laurence Street, and in 2006, he was reducing his commitments. They had to find a successor. He suggested me. They appointed me as President and later made me first an Officer and then a Commander in the Order.
- Q *Their mission, I believe, is to "prevent and relieve sickness and injury, and to act to enhance the health and well-being of people anywhere in the world".*
- A Indeed, indeed. It's a marvelous body. It works out in practical terms Jesus' parable of the Good Samaritan; which is the first example in literature of a stranger giving first aid to a stranger.
- Q *That's right. You also received the Order of Australia, again for your services to the law and religion.*
- A The Bar and as Chancellor.
- Q *That was a very special recognition of your work and ethos.*
- A It was. I hope so.
- Q *You also received an honorary doctorate from Sydney University.*
- A I did.
- Q *Did that come as a surprise?*
- A Yes, Kim Santow, then Chancellor of the University, was behind it - based on my books and as a graduate of the university.
- Q *Are you writing any more books?*
- A Not at the moment. But subject to paperwork, there will be another edition of *Res Judicata*, which will be my swan song. For some years, my editor was pressing me for a new edition and I was pushing back, saying it's too soon, there's not enough new cases to justify it. I don't have a contract and the tools of trade until that's signed, I can't work effectively, though I keep in touch.
- Q *What else are you doing with your time?*
- A I seem to attract pro bono work. David, my eldest son who runs Sculpture by the Sea, attracts legal problems with Sculpture by the Sea like you wouldn't hear. Copyright, employment, landlord and tenant, contracts with councils, and so on.
- Q *He would know where to turn!*



A He turns to me. Andrew Bell SC is his chairman, but he is busy. I am the first cab on the rank. I've got a pro bono advice pending, and I am working on a paper for the Australian Law Journal. I'm about to go to Kiribati to hear about 15 appeals and will be there for a week. The Court will give judgment at the end of the week in most, if not all of those cases. It's pressure cooking.

Q *But stimulating.*

A I wouldn't have it any other way.

Q *Do you have any concluding remarks or any reflection you'd like to leave for the record?*

A No, I won't preach to the current Bar; I don't know enough about the pressures, the competition and direct briefings – I don't have a feel for all that. I'm a creature of my own time and have to leave it to others to deal with.

Q *But on the whole, you'd say, a satisfying life and career?*

A Oh, heavens, yes. It's been a privilege. I've had about five careers: articulated clerk, solicitor, junior, silk, judge, retired, active, arbitrator, consultant, still a judge. It's a real privilege to be a barrister and a judge.

Q *Well, Ken Handley, thank you for your time.*

A Thank you.

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