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Swearing-In Ceremony Of The Honourable David Jacob Hammerschlag

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND JUDGES OF
THE
SUPREME COURT

Tuesday 30
January 2007

Swearing-In Ceremony Of The Honourable David Jacob Hammerschlag As A Judge Of The Supreme Court Of New South Wales

Judgment

1 **HAMMERSCHLAG J:** Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court. I present to you my Commission.

2 **SPIGELMAN CJ:** Thank you, Justice Hammerschlag. Please be seated whilst the Commission is read. Principal Registrar, please read the Commission.

(Commission read)

Justice Hammerschlag, I ask you to please rise and take the oaths of office, first the oath of allegiance and then the judicial oath.

(Oaths of Office taken)

3 Principal Registrar, I hand to you the forms containing the oaths so they may be placed amongst the records of the Court and the Bible so that it may have the the customary inscription placed in it and presented to his Honour as a memento of this occasion.

4 Justice Hammerschlag, on my own behalf and on behalf of all the Judges of the Court, I congratulate you on your appointment. I look forward to serving the people of this State for many years together with you.

5 **MR M SLATTERY QC, PRESIDENT, NEW SOUTH WALES BAR ASSOCIATION:** On behalf of the New South Wales Bar I congratulate your Honour upon your appointment to the Bench of this Court.

6 Your Honour was asked some years ago by one of your solicitors why, despite the long hours and the stress of practice at the bar you were a barrister. You simply replied, "I love to fight cases and to win". May I say that in your Honour's case we never doubted that.

7 Your Honour comes to this Court after a journey across the world and another through the law. In both these journeys your Honour has proved your remarkable gifts of intellect, of application to the law and of confident persuasion. All of these are sustained by your Honour's determination, your irrepressible optimism and your sense of theatre. One discovers these traits early in your Honour.

8 Your Honour's early life was one of prodigious achievement. You matriculated to University in South Africa in 1971 at the age of only 15. By the age of 18 you had graduated in Arts from the University of

Witwatersrand. At 20 you commenced Articles of Clerkship. At 21 the University of Witwatersrand conferred a Bachelor of Laws on you and at 22, in 1978, you were admitted as a solicitor in the Supreme Court of South Africa. By the age of 26 you had been accepted into partnership at Werksmans, a large commercial law firm in Johannesburg.

9 Your Honour would always be drawn by nature to advocacy and in 1983 you went to the Bar in South Africa.

10 Behind this rapid progress though lay another experience that undoubtedly helped shape your Honour's decisive and commanding courtroom style. During the same period you completed National Service and then became a reserve lawyer in the South African Defence Force. From the air-conditioned comfort and order of a law firm in Johannesburg you were often called out at short notice into a very different world to try and dispense military justice in the field. In your mid 20s you investigated and brought to trial several murders and atrocities by South African soldiers in South West Africa and other misconduct by troops against the civilian populations during elections in Zimbabwe. This duty was difficult and at time dangerous. Your advice was not always welcome.

11 As you struggled to maintain the rule of law in this testing military environment, you no doubt drew some comfort from George Clemenceau's depressing comment on that subject, that "military justice is to justice what military music is to music".

12 The individual importance of lawyers such as your Honour who maintained liberal and tolerant values through your legal work in South Africa is not to be underestimated. After all it was a Jewish solicitor in Johannesburg called Lazar Sidelsky who gave Nelson Mandela his first opportunity in the law as an articled clerk in 1942.

13 In 1985 you decided to emigrate to Australia. You arrived in 1986 and, with your usual thoroughness, after first scouting out the opportunities. One Friday, late in 1985, you flew out from Johannesburg to Sydney and were interviewed by Julian Bloch, a partner at Freehills. By the mid-1980s Julian's other job was as a part-time migration agent for Australian-bound South African lawyers. In that role he expected some little time with your Honour but your Honour made an immediate impact at this interview. You were first noticed for your special South African brand of chutzpah. When you rang on arrival and said, "I'd like to see you today", he asked you, "How much time have you got?" You shocked him with your characteristic assumption of inevitable success; you replied, "I'm flying back on Monday".

14 Despite or perhaps because of this, he telephoned fellow partner, Kevin Broadley, saying, "Drop what you're doing and come and meet this lawyer. God forbid he might go to Mallesons or even Allens". They offered your Honour employment on the spot. They later checked your references back in Johannesburg only to be told by the President of the Johannesburg Bar, "If you've got him, don't let him go". They succeeded in that for about five years.

15 It will come as no surprise to your colleagues at the Bar that you also impressed Julian Bloch because you told him not only about the cases that you had won but about the cases you lost and should have won.

16 Leaving the Dutch-Roman system was not always plain sailing for your Honour. Shortly after commencing at Freehills you prepared a draft affidavit for the late Peter Hely QC, as he then was. Hely looked it over, handed it back and commented that it appeared to him you had drafted it in Boer. You became an Australian Citizen in Australia's Bicentennial year. Citizenship tests were less onerous in those days but you passed the really hard one though straight away; you abandoned the Springboks for the Wallabies.

17 Your Honour came to Australia towards the end of a wave of immensely talented lawyers who emigrated from South Africa commencing in the early 1960s. One of the very first of these was a leader of the South African Bar, Irving Frankel QC, who immigrated in 1964 and became a partner of Stephen Jaques and Stephen. It is fitting to acknowledge now, on this occasion, how lawyers like your Honour have enriched the practice of the law in this State and indeed the jurisprudence of this Court; that is, those lawyers who emigrated in this way from South Africa.

18 Your Honour was not averse to using your immigrant status occasionally as a badge of honour.

During the Orange Grove Inquiry, appearing for Mr Frank Lowy, your Honour was testing a witness with one of your usual tough-minded cross-examinations. In a degree of frustration Counsel Assisting sought to interrupt the flow by submitting to the Commissioner that you were cross-examining, "... like a refugee from the adversary system". Your Honour quickly seized the initiative by drawing on the Commissioner's heartstrings and you said, "Actually I am a refugee but not from the adversary system".

19 It was hardly surprising, given your fiercely independent outlook, that your Honour was determined to practice as a barrister in New South Wales as you'd done in South Africa. That was evident from your time as a newly-appointed solicitor at Freehills when you showed what you could do. In the first few months you appeared alone as a solicitor against both senior and junior counsel seeking to enforce a charge on behalf of a major bank. You won, with the charge being set aside. I should mention for the record this event occurred in Brisbane not Sydney.

20 In 1991 you came to the Bar. Your Honour has long been in demand as one of the preferred commercial counsel practising in this State because, with your finely tuned equity mind, also comes an instinctive understanding of business and a capacity to simplify the most complex of business transactions.

21 You immediately acquired a practice of immense variety that was the envy of your peers, not that any of them ever admit to envy. You relished the challenge of taking on complex cases. You took particular pleasure in attempting to unlock the true effect of the most opaque commercial transactions. You were loved by your juniors but feared by your opponents. Your solicitors and clients enjoyed their time with you; they always knew that they were in safe hands.

22 So successful were you as a commercial junior that in 2000 and in near record time, you were appointed a Senior Counsel. As a junior you had often worked with three barristers who later became Judges of the Federal Court; Justice Roger Gyles, Justice Alan Goldberg and the late Justice Peter Hely. It did not come as a surprise to those who knew how much you admired them that as a silk your commercial practice would follow their leading example and deploy your legal intelligence and commercial experience, not only in celebrated commercial cases but by moving seamlessly and, it must be said, courageously, in and out of criminal matters.

23 You had an intuitive understanding of the criminal jury, perhaps it was due to your Peter Pan like charm, but you were often successful with juries. Your criminal cases have a ready public familiarity with names like Hannes, Ronan, Wilkie, Mainprize and Adler. Whether for prosecution or defence, you fought with the same commitment that you did in civil matters. You were always able to get your message across to juries, loud and clear. In the middle of one of your Honour's criminal cases, the jury sent a note to the judge. The judge read it out to the Court. It said, "Would all counsel other than Mr Hammerschlag please speak more loudly".

24 It is to be wondered why not that practice at the Bar is not often classified among the performing arts. Your Honour's court craft however blends the two disciplines. There was little to smile about during the 2002 HIH Royal Commission. Despite this, as counsel, your Honour together with the late Christopher Gee QC successfully managed to maintain the Commission's morale with deftly placed items of set piece theatre. Your Honour's hostile cross-examination of the solicitor and Chairman of FAI, Mr John Landerer, was perhaps the high point of this art. Your Honour's opening words to the witness caused a frisson at the Commission. You simply said, "Mr Landerer, I appear for your friend Rodney Adler".

25 Your Honour then cross-examined Mr Landerer to suggest that in preparing FAI's response to HIH's 1998 takeover offer, that Landerer had not separated his role as Chairman from his firm's role as solicitor for the company. Your Honour ended the cross-examination with these four questions:

Q. Mr Landerer, I want to suggest to you that as a consequence of your position as Chairman and solicitor, your roles in either of those capacities were, from time to time, often blurred?

A. I wouldn't accept that suggestion, sir.

Q. In relation to the Part B, you say, do you, that your non-equity partner in your firm, Mr Mark Houston, looked after that?

A. That's correct.

Q. And you say that you saw no difficulty with that?

A. That's correct, Mr Hammerschlag.

26 And then your Honour asked:

Q. You didn't say to him, "Houston, we have a problem?"

27 The transcript records the witness giving the answer:

A. No, I didn't and I don't see what's so funny about that.

Your Honour then responded with great empathy, "Neither do I".

28 Justice Owen later said that this moment was the highlight of the whole Royal Commission.

29 Your Honour's wit and courtroom timing were well appreciated by your clients, who always had the utmost confidence in you. At the end of a recent case one thanked you with the gift of a hand-drawn cartoon which well captures your art. You keep it among your treasures in chambers. The cartoonist has you cross-examining a witness this way:

Hammerschlag: I put it to you that you will say the first thing that comes into your head.

Witness: Nonsense.

Hammerschlag: I rest my case.

30 Your Honour has a well developed taste for the politically incorrect. Long ago when he was President of our Court of Appeal Justice Kirby decreed that Latin should not be used either in submissions or judgments. Determined to rebel against this orthodoxy, your Honour and fellow classics scholar, Bernie Coles QC, decided to commence your own insurgency. In the regular insolvency cases you had against each other, your Honour and Coles QC competed to see how many Latin phrases could be included in a morning's submissions. We understand that The Honourable R P Meagher QC is proposing to subscribe to your judgments.

31 Some people think that a barrister's chambers can provide a degree of insight into his or her personality. Conducting elementary psychoanalysis on your Honour's chambers reveals that your Honour is the New South Wales Bar's own Walt Disney. Your chambers house a collection of dolls and figurines from Toy Story, Monsters Inc and the Simpsons, which, no doubt, help to inspire your more creative arguments.

32 By some whimsy of fate, your Honour was gifted with a surname which translated into English actually means, "hammer blow". Your Honour's cross-examinations always gave due honour to this heritage. They were strong, unflinching and determined but nevertheless economical. You asked the hard questions, whatever they were. Your solicitors gathered in anticipation to watch you perform. You became widely known to them as "the hammer" or even "the Messerschmitt". Time on your feet was known as "hammer time", no doubt for the witnesses under your examination "getting hammered" developed a whole new meaning.

33 Your Honour is a man of conspicuous idealism, conspicuous faith and conspicuous commitment to the community. You balance your work with family time and leisure time. A few years ago you decided

to take a sabbatical for six months. Apart from your golf you spent much of your time as a volunteer ferrying elderly and immobile residents of Ku-ring-gai to and fro. They were immensely entertained later to find out that they had been transported about by senior counsel. They will be even more astonished to discover their driver is now one of Her Majesty's judges.

34 Your Honour is now fifty and since coming to the Bar you have more than once confided to your friends that at that age, "I'll quit the law and try something else". We're glad that your Honour changed your mind, at least we hope you have.

35 The Bar has been privileged to have the benefit of your Honour's professional energy and dedication for the last sixteen years. Now the people of this State will have the privilege of you serving them as a judge. The New South Wales Bar congratulates you and wishes you well as a judge of this great Court.

36 May it please the Court.

37 MR G DUNLEVY, PRESIDENT, THE LAW SOCIETY OF NEW SOUTH WALES: It is an absolute privilege to speak today on behalf of the solicitors of New South Wales and applaud your Honour's elevation. This elevation marks an important milestone in what can only be referred to as an exemplary legal career.

38 Your Honour was first admitted as a solicitor in the Supreme Court of South Africa and a Notary Public in 1978. The process was obviously a very enjoyable one for your Honour; indeed your Honour appeared to enjoy it so much that it was something you felt compelled to do again. And so it was in 1988 that you joined our fold as a solicitor in New South Wales and ultimately became a partner at Freehill Hollingdale & Page.

39 Since being called to the Bar in 1991, your Honour has earned a strong reputation as a barrister of choice for the solicitors of this State. Indeed, in many circles, your Honour is called "the solicitor's friend".

40 As a barrister, your Honour has been known to display continually superior professionalism, utmost integrity and an encyclopaedic knowledge of all things legal. Your Honour has always been regarded as the barrister upon whom solicitors call when the cards are really down. This is because your Honour possesses a unique talent for finding solutions when none seem apparent. And your Honour never shies away from cases which others deem to be too hard.

41 As you can imagine with such traits and attributes, your Honour was a barrister that solicitors were always keen to have on their side. But I would mention that there are other and many would argue more important reasons that the solicitors of New South Wales will greatly miss conferences with your Honour. One is your Honour's wonderful sense of humour, as well as your ability to tell a story like no-one else. The other, of course, is your Honour's great charm and your ability to always bring something of infinite worth to the table, more often than not Lindt chocolates.

42 We solicitors will deeply miss your Honour's vast collection of ties which can be rivalled by no other barrister which any solicitor can name. But I believe it's most regretful that your Honour's elevation means that our mere words at conference will no longer trigger a musical response from your Honour. There is certainly no other barrister of whom I have been informed upon whom we can count on to break into song at any moment.

43 On an occasion such as this, it's fitting to consider your Honour's personal legacy to the profession as you rise to the Bench. As we are all aware, the law is a profession that can leave very little time for outside pursuits. And the law is certainly not well known for providing the best possible conditions for attaining the ultimate work/life balance. For your Honour, however, career achievements have always flourished alongside an impressive, healthy range of other life feats and a true blue enjoyment of life.

44 Regardless of tight time and work commitments, your Honour has always been able to fit in a social coffee and a chat with friends or colleagues and to play your beloved game of golf, as well as to watch the cartoons you so dearly love. In fact some of your Honour's colleagues are concerned that your elevation may interfere with your regular violin lessons or indeed even affect your golf handicap.

However, I don't think they need to be worried about those issues.

45 Professional wins and accolades have only ever acted to complement your Honour's many family, sporting, artistic, spiritual and social interests. And all of those accomplishments, I'm sure that they will continue. Your Honour truly exemplifies a healthy work/life balance and shows it can be achieved if life is approached with a measured commitment to important things.

46 Your Honour, I take this opportunity to applaud you for the role you've played as a mentor and inspiration to many solicitors over the years and to particularly thank you for gifting your robust and balanced approach to the law and life to those around you. It's something which we should all strive towards.

47 Your Honour, in closing, may I once again congratulate you on this well-deserved appointment. Your distinguished career, your rare talents, your amazing approach to life and your commitment to people and the delivery of justice will make you a remarkable addition to the Supreme Court Bench.

48 On behalf of the more than 20,000 solicitors of this State, I wish you all the best in your new judicial role.

49 As the Court pleases.

50 **HAMMERSCHLAG J:** Mr Slattery and Mr Dunlevy thank you for your good wishes and in particular your well-articulated exaggerations of my forensic abilities and achievements. The 11th of July 1986 was a pivotal day in my life and the lives of my wife, Toby and our daughters, Keren and Judith. That Sydney winter's day marked the commencement of life in a new home and in what has undoubtedly for us been a lucky country. Things were exciting during our first few weeks not dampened by the cold or the dense grey structures of North Bondi where we were billeted.

51 Indeed, Keren, then four years old, seemed to think that the move had imbued her dad with magical powers. She asked me how I had made our swimming pool disappear.

52 We couldn't afford Bellevue Hill, it seemed we had no option but to slide into the anonymity of St Ives. The following week I started work with Freehill Hollingdale & Page as a paralegal, pending requalification in New South Wales. We had no family in Sydney and my knowledge of precisely where I was in the city was scant. In about the middle of the week it began to rain and it kept on raining. After two days of relentless rain, earlier than normal the office emptied somewhat eerily. I walked underground to Martin Place Station to go home. Writing on a large blackboard there proclaimed that all trains had been cancelled due to flooding in the tunnels. There were no cabs and the rain was pelting down without cease.

53 I trudged back to the office and called Toby to ask her to pick me up. She said, "I don't know where you are. I don't even know where I am. I couldn't drive in this weather even if I tried, but more importantly Judith" who was then seventeen months old, "has been fed and put to bed and she's not going out in this weather". I came to the disconsolate conclusion that my only option was to sleep in the office. Luckily the phone rang. It was a partner of the firm for whom I had left a message earlier in the day. He asked me how I was getting home given the weather and I replied that it appeared I wasn't. His car was in the basement and he drove me home.

54 I realised then the importance of one's background and history in a place and that I did not have one in my new country. This was something that was repeatedly brought home to me in a professional context in the next few years. To my good fortune the firm understood better than did I the displacement that I was facing and I was the beneficiary of compassionate adjustments to facilitate my adaptation.

55 Apart from the debt of gratitude I owe to that firm, for having given me a go, I wish to acknowledge the assistance and friendship of David Myles Bennett QC of Melbourne, then a Sydney partner of that firm – known by those who know him as "the real David Bennett" – who is here today. I have to admit that my morale was somewhat dented when the Solicitors Admission Board ruled that I was required to complete seven subjects including family law and tax for admission, whereas the previous year a maximum of three subjects had been sufficient for South Africans. At the time I think I put it down to

an entirely irrational fear by the Board that given a feared influx of South Africans the barrier had to be raised; otherwise it could even happen that one of us might ultimately find his or her way onto the Supreme Court of New South Wales.

56 At this point I took the red bag which I had been given in 1983 by Clive Cohen SC, after a trip to the appellate division in Bloomfountain in a case called Nash, and stowed it deep in my cupboard. I started attending lectures at the Law Extension Committee three or four nights a week. I retrieved that red bag in the year 2000. Armed with my pass in family law, I was admitted to practise in this Court in 1988. There were two further important milestones that year; firstly we were privileged to become Bicentennial year new Australians and secondly, I was invited to join the Freehills partnership.

57 What did take some time, was shifting emotional support from the Springboks to the Wallabies. I think, on reflection, that I managed that just before the 1995 World Cup just in time to see my new team lose. I have to say, however, that there has been no success in any transition to Vegemite and none is on the horizon. I'm afraid the accent is also here to stay. Notwithstanding this, I consider myself privileged to be able to call myself Australian.

58 Shortly after I was admitted, I found myself having to appear before the Chief Judge of the Commercial Division as it then was, in a contested matter, counsel having become unavailable on short notice. I received a lukewarm reception. I initially put it down to the fact that the Chief Judge was having difficulty with my foreign accent or maybe because I was having difficulty with his. Things did, I must say, seem to change rapidly when due to an ingrained habit I called him "My Lord".

59 One of the undoubted highlights of my five years at Freehills was my victory in the inaugural firm talent quest where I played a selection of Jose Feliciano numbers including "Mama Don't Allow". I am remembered for that performance; I am not remembered for any forensic ones. The partners' lunch on Friday was also a highlight. There was always fish, usually kosher.

60 My years as a solicitor brought me into contact with many solicitors and with leading members of the Bar. Later, I was privileged to be briefed with and taught by many of the counsel I had briefed. I include in that number Chief Justice Gleeson, Chief Justice Spigelman, Peter McClellan, Roger V Gyles, Murray Tobias and the late Peter Hely. These and many others gave me the opportunity of building or perhaps rebuilding a background in my profession. I had the good fortune to be a founder member of 11 St James Hall, led by John Spender. I stayed on that floor for sixteen happy years. John is another person to whom I wish to express my gratitude. When John retired from practice to take up a diplomatic post we were lucky enough to entice Peter McClellan to join us and lead the floor. Peter is another friend to whom I owe a debt of gratitude. I must, however, say that he should bear some responsibility for the predicament in which I now find myself.

61 I have been the recipient of kindness and friendship across the spectrum of the profession and more than anything what my friends and colleagues in Australia have given me is a background and history in my new country without which today would be inconceivable. By 3000 year old tradition a man should have a teacher and a friend. I have been fortunate enough to have had many teachers and friends in my professional life.

62 I loved practice as a barrister and as a solicitor, both in South Africa and in Australia. In South Africa I had the good fortune to be mentored by a solicitor, David Judah, a leading practitioner and as a barrister by I A Maissels QC, undoubtedly one of the greatest practitioners ever in that country, known for his defence of Nelson Mandela in the first treason trial.

63 I have had and I am grateful for the support of solicitors across the spectrum from sole practitioners, country and metropolitan, to the large firms who have entrusted me with significant and complex civil and criminal matters. I am honoured by the presence of so many solicitors in Court today. I have loved my work and I've tried to do the best I could, albeit that I have been acutely aware of my shortcomings.

64 Speaking further of friends, Toby and my daughters have undoubtedly been my best friends; I have had their unwavering support and understanding. They have put up with gruelling hours and the stresses which go with it. I wish to thank my clerk, Sally Hickey and latterly, Julia Chapman and my secretary, Anne-Marie Levy for their loyal, tolerant and invaluable assistance they have given me.

65 I wish to thank the number juniors over the past six and a half years who have put up with my idiosyncrasies and vicissitudes. In particular I wish to thank them for the numerous times they stopped me from going wrong when I would undoubtedly have done so.

66 I deeply regret that neither my parents nor my in-laws are with me to share in this occasion. I am truly honoured by the presence in Court today of so many friends and colleagues.

67 I am aware of the gravity of the trust now placed in me. I know how difficult it is to get the basics right. I will do my best. I only hope my best is good enough. Thank you all for your attendance.
