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The day Gaudron put Chief Justice in his place

This extract from Michael Pelly's new book, Murray Gleeson: The Smiler, provides a rare insight into the personal dynamics between the judges of the High Court

MICHAEL PELLY

WHEN Murray Gleeson took his oath as Australia's 11th Chief Justice on May 22, 1998, he had dominated every work situation he had been in for the past 20 years — as head of chambers, leader of the bar and Chief Justice of NSW.

He had become used to getting his own way and to exercising an unquestioned authority. A week later, he received a not-so gentle reminder that he was on very different turf at the first formal meeting of the High Court justices.

Held in the court's conference room on the ninth floor, it was the monthly rundown of the court's business. Gleeson acted as chairman and the other six justices as co-directors. The court's chief executive, Chris Doogan, sat to Gleeson's immediate left, taking formal minutes.

After accepting the record of the previous meeting, Gleeson moved to the first item, a minor administrative issue. "I have decided to accept the recommendation on this matter," he said.

The court's longest-serving judge, Mary Gaudron, was seated directly opposite Gleeson. She cleared her throat, shifted her weight to the left, put an elbow on the table and let out a chuckle as she looked straight ahead.

"Only if we agree. You're no longer in NSW. We all decide. It's not first among equals. We are all equal."

Gaudron was right; the High Court Act said all members of the court were equally responsible for its administration.

Gleeson never used the words "I have decided" in a board meeting again. However, he still took the view that being Chief Justice was a much more important job than being a justice. He was the one who dealt with the government and he thought that dealing with the press — and other aspects of public relations — was also best left to the Chief Justice.

That first meeting marked the start of a uneasy relationship with Gaudron. She made no secret of the fact she did not get on with the new Chief Justice. They were very different personalities. He was the establishment figure who never seemed to get flustered. She had overcome blatant sexism early in her career to become a trailblazer for female lawyers, and could be disarmingly frank in personal conversations. Gleeson did not seek her counsel when he arrived, so Gaudron went to see him — at the urging of the other judges — to discuss issues like the preparation of judgments. It was not appreciated. Gleeson was keen to press the court to deliver faster — and clearer — judgments. After a hearing concluded — usually at 4.15pm — the justices would gather in Gleeson's chambers on the ninth floor. Tea and coffee was served, along with raisin toast.

'Only if we agree. You're [Gleeson] no longer in NSW. We all decide. It's not first among equals. We are all equal'

MARY GAUDRON
FORMER HIGH COURT JUDGE

Gleeson said there was never reluctance to offer an opinion. "None of them were wallflowers. There were no shrinking violets on that court."

And all considered themselves capable of doing the top job. "Maybe one or two of them might have reflected upon the circumstance that if outcomes of elections had been different they might have been Chief Justice at some point."

Bill Gummow proved his biggest ally when it came to developing a majority judgment of the court. In fact, Michael McHugh described Gummow as a "great judicial politician — he always had three votes".

Others were less inclined to sign up to a universal opinion. Ian Callinan felt it carried with it the danger of compromise. Michael Kirby also did his own thing, but that was more because his work methods excluded any alliance building.

A significant problem, McHugh said, was that "the Kirby judgment in 95 per cent of cases bore little resemblance to the draft he first sent around".

"He got it out very fast. Callinan was faster but Kirby was very fast. He claimed he had a bad memory and had to get it out while he remembered. But then, when he read other people's judgments, he would change his — and frequently criticise people. It was always done in the last two days [before the judgment was to be delivered]."

Kirby's late changes — and frequent absences — had been a longstanding issue. Gleeson's predecessor as Chief Justice, Sir Gerard Brennan even introduced a rule in 1997 that there were to be no changes within three days of delivering a judgment.

"It was really aimed at Kirby," said McHugh. "They would come in at the last minute and you wouldn't have an opportunity to deal with it. It upset the proofreading, it upset the printing of the judgments, and so on. It probably overstates it to say they were fundamental, but they were always significant changes, and frequently very significant changes ... almost a rewrite in many cases. That caused a problem."

McHugh said another problem with Kirby had to do with his reasoning.

"The prospect of agreeing with Michael's reasoning — whether they agreed with the result or not — was fairly negligible. He resented that. There's no way Gummow was going to agree with him. There's no way Hayne was going to agree with him. The prospects of me agreeing with him were pretty remote, unless I wrote the judgment."

Gummow and Ken Hayne were given the job most often, if they didn't volunteer. They sat next to each other during hearings and it was unusual for them not to write together, especially in cases involving constitutional law. "They were always on the phone to each other," said McHugh. "You would walk in and the associate would say, 'He's on the phone to Justice Hayne'."

Until Gaudron left the court in 2003, she would usually side with Gummow and Hayne.

Gaudron got on very well with the pair and enjoyed working with them. McHugh said this left the other members of the court with little influence on the outcome of the case.

"I regard Murray and myself as irrelevant players while we were on that court together, for the reason that Gummow and Hayne always seemed to come together. And they usually had Mary ... Callinan and Kirby would always be on opposite sides. So, as long as those three were there, it didn't matter what they decided, they would either pick up Callinan or pick up Kirby."

This in an edited extract from Murray Gleeson: The Smiler (Federation Press)

Inquiry a chance to roll back civil rights curbs

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While in opposition in 2012, Brandis attacked Labor's push for a privacy tort as part of a "gradual, Fabian-like erosion of traditional rights and freedoms in the name of political correctness".

It was an excellent observation. And the fact that the freedoms inquiry has been launched demonstrates a stark contrast of intentions between this government and its predecessor. Under the previous Gillard government, the trend was very clearly in the opposite direction — it was away from freedom rather than towards it.

This authoritarian streak was expressed in the form of several dangerous policies. Perhaps the most egregious was then attorney-general Nicola Roxon's dangerous Human Rights and Anti-Discrimination Bill 2012.

This extraordinary bill would have made it unlawful to offend or insult another person on the basis of their political opinion.

The bill would have presumed defendants to be guilty until they proved their innocence, and they would have to pay costs even if they were found to be innocent.

At the same time, then communications minister Senator Stephen Conroy was attempting to impose massive new government controls over the media through his media regulation proposal.

The list goes on. The proposal to force internet service providers to store data on customers' internet usage through a mandatory data retention regime, the proposal to introduce an internet filter, and other proposed laws would have placed restrictions on some of our most important human rights.

Each of these laws would be caught by the terms of reference now in the hands of the ALRC. And we're all better off that none of them became law.

But there are dozens of existing laws that do restrict these freedoms, and they must be repealed. Section 18C of the Racial Discrimination Act is the most prominent example. To the Abbott government's credit its exposure draft legislation represents almost a full repeal.

The freedoms inquiry represents a departure from the unrelenting willingness of previous governments to place increasing restrictions on liberal democratic rights. The ALRC inquiry is a welcome first step but it won't achieve anything without action from the government.

The Abbott government must prosecute the case for nothing less than liberal democracy — that human rights don't need to be rebalanced, they need to be restored.

Simon Breheny is director of the legal rights project at the Institute of Public Affairs.

Class actions 'rare, no need for crackdown'

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risks associated with a judgment and the costs of trial," the Allens paper said. "Plaintiff law firms have focused on shareholder class actions as a significant business opportunity, particularly in the wake of the downturn in their personal injury practices following legislative reform."

Mr Watson said the Allens data indicated that the number of shareholder class actions filed — as opposed to those merely threatened — was running at an average of just three a year.

"If you compare the number of filings, there is simply no evidence of any outbreak, flood, whatever over-the-top language you want to use," Mr Watson said.

"We are a million miles away from the US in terms of number of actions. What we do not have, as some suggest, is an outbreak of US-style litigation."

The litigation funder that was established by Maurice Blackburn, Claims Funding Australia, is a trust whose beneficiaries are principals of the law firm.

Litigation funders charge a proportion of any damages awarded to the parties they finance. Australian solicitors are not permitted to charge this form of fee.

After Senator Brandis first voiced concern about this arrangement Maurice Blackburn withdrew an application in which it had been seeking a declaration from the Federal Court endorsing the firm's proposal to run a class action that was to be financed by CFA.

HOW AUSTRALIA COMPARES

Maurice Blackburn's research shows class actions are seventeen times more common in the United States

	Australia	US	Difference (nominal and %)
Total class actions filed in Federal Courts	254* (1992-2009)	16,700** (2001-2006)	
Average number of class actions filed in Federal Courts per year	14.64	3340	3326 22,814% 228 times
Class actions per 24m people (Australian population) per year	14.64	258.58	243.94 1766% 17 times
Federal Court class actions filed per million people per year	0.61	10.77	10.16 1766% 17 times

* Professor Vince Morabito, An Empirical Study of Australia's Class Action Regimes (Second Report), September 2010.

** Thomas Willging and Emery Lee III, Federal Judicial Center, The Impact of the Class Action Fairness Act of 2005 on the Federal Courts, April 2007

Source: Maurice Blackburn

Judge quits over email to friend

SAM MOOY

Randall Rader has resigned as chief judge of the US Court of Appeals for the Federal Circuit, effective today

ASHBY JONES
BRENT KENDALL
NEW YORK

THE top judge of a US federal appellate court has resigned from his leadership position on the bench and apologised for an "inexcusably careless" action that breached his ethical obligation.

In an open letter addressed to his colleagues and posted on the website of the US Court of Appeals for the Federal Circuit, Randall R. Rader said he regretted sending a laudatory email to a lawyer who had appeared before the court.

The judge sent the email in March to Edward Reines, a patent lawyer at Weil Gotshal & Manges in Silicon Valley. The email, which was reviewed by *The Wall Street Journal*, described a recent conversation in which another judge purportedly told Judge Rader that Mr Reines was "impressive in every way".

In the email, Judge Rader said: "I was really proud to be your friend", and encouraged Mr Reines "to let others see this message". He signed the note: "Your friend for life, rrr."

Mr Reines shared the email with a potential client, according to a person familiar with the matter. The email, which circulated to other lawyers, raised questions among lawyers in the patent bar because Mr Reines had appeared before the court — a key venue in US patent law — in prior cases.

A spokeswoman for Weil Gotshal did not respond to a request for comment. Nor did Mr Reines.

Judge Rader doesn't identify the lawyer by name in his apology letter, which said: "I did not and would never compromise my impartiality in judging any case before me." But he said the email was "a breach of the ethical obligation not to lend the prestige of the judicial office to advance the private interests of others".

He wrote: "I am truly sorry for the lapse and will work diligently to ensure that it does not recur."

Edward Reines

The obligation cited by Judge Rader, whose resignation will become effective today, is included in a written code of conduct that governs US judges.

He will be replaced as head of the 18-judge, Washington DC-based court by a current judge, Sharon Prost. Judge Rader will stay on the court as a circuit judge.

His resignation comes weeks after he recused himself from a pair of patent cases in which Mr Reines participated after the court took key actions in both cases. Judge Rader originally participated in the cases.

Earlier this month, the Federal Circuit disclosed that he was now recused, and reissued an opinion in one case and a judicial order in another.

The Federal Circuit is one of 13 federal appeals courts throughout the US, one notch below the US Supreme Court. Unlike the other federal appeals courts, the Federal Circuit specialises largely in one area of the law: patents.

The court's profile has skyrocketed recently, alongside the rise of big-dollar patent disputes such as those between Apple and Samsung. Judges from the Federal Circuit and lawyers often appear together on panel discussions in Washington and Silicon Valley.

Judge Rader was nominated to a seat on the circuit in 1990 by president George HW Bush, and became chief judge in 2010. He was both praised and criticised for an off-the-bench outspokenness on patent law. Court observers see him as a strong voice for the rights of patent holders.

THE WALL STREET JOURNAL

Hughes appointment set an alarming precedent

PREJUDICE

CHRIS MERRITT

WHEN Jim Spigelman launched Michael Pelly's book on Tuesday, he had an audience that will take some beating.

About 200 people packed in to the Federal Court in Sydney to hear Spigelman — a former NSW Chief Justice — and to honour the subject of the book, former High Court chief justice Murray Gleeson.

John Howard was there along with vast numbers of current and former judges, including a wheelchair-bound Laurence Street, who is also a former chief justice of NSW.

The High Court contingent included former chief justice Gerard Brennan, former judge Michael McHugh and the Sydney-based members of the current High Court, Stephen Gageler and Virginia Bell.

Three former NSW attorneys-general turned up, Bob Debus, John Hatzistergos and Greg Smith — Pelly's old boss.

ONE of the strengths of Pelly's book is the fact that he plays a straight bat. He lays out the facts and leaves it to readers to draw their conclusions.

So what is the lesson from the chapter in which former attorney-general Daryl Williams outlines how he went about interviewing candidates for the judiciary? The former AG was open with Pelly and clearly sees nothing wrong with what he did. It is, however, an extremely risky course — which can be seen from the fate of Albert Piddington.

Piddington was appointed to the High Court in 1913 by Billy Hughes, who was then attorney-general, and resigned a month later without taking his seat. The question is why?

There had been an exchange of telegrams in which Piddington had been questioned, on behalf of Hughes and before his appointment, about the relative power of the states and the federal government.

He favoured the federal government and was appointed, triggering a storm of opposition from barristers who believed Piddington was not up to the job. The judge wilted and resigned, citing the telegrams and concern for the court's independence.

The fact that Williams had been personally interviewing candidates for the High Court has been known since 2002, but Pelly's book fills in the details.

He makes it clear Williams was interviewing would-be judges in 1998 — five years earlier than previously thought.

In 2002, after Williams' practice became public, his staff told your columnist the interviews had been confined to candidates he did not know.

As a Perth silk, Williams might not have known some of the leading lights of the bar in other parts of the country.

But Gleeson, when interviewed by Williams in 1998, had been chief justice of NSW and they were not strangers.

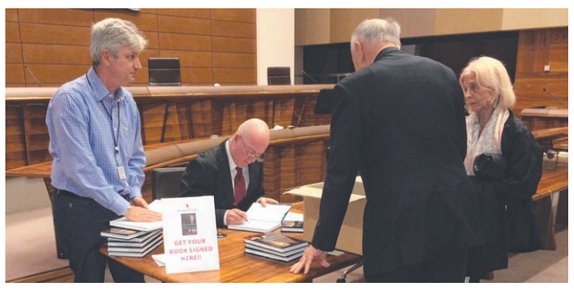
Pelly writes that Williams had known Gleeson from his days at the bar and had appeared against him in a contractual dispute that reached the High Court in 1984.

It needs to be kept in mind that when Gleeson agreed to meet Williams in 1998, he thought the Attorney-General wanted his views on potential candidates for the High Court.

In 2005, Gleeson said he was opposed to interviews with potential candidates for bench. After Piddington, that's understandable.

MORE

www.theaustralian.com.au/business/legal-affairs
for the full text of Jim Spigelman's remarks, plus Steve Mark and Tahlia Gordon on regulatory change



Michael Pelly signs copies of his book at its launch

Women raise the bar to hold a majority in Law Institute of Victoria

CHRIS MERRITT

THE demographic change that is transforming the legal profession has given the Law Institute of Victoria a female majority.

Women make up 51 per cent of the Law Institute's 18,430 members, and are an overwhelming 62 per cent of the 9403 members of the institute's Young Lawyers section.

Institute president Geoff Bowyer said the proportion of women among the Law Institute's members has been rising for at least a decade, particularly in the Young Lawyers section that is open to law students.

"It's a terrific outcome. It's a recognition that women have a key role to play in our profession," he said.

"Previously perhaps women might have thought the profession was the province of men, but over the past 20 years there had been a concerted trend towards women seeing the law as a career."

While women already have the numbers inside the Law Institute, they amount to just 46.6 per cent of the overall number of practising solicitors in Victoria.

The difference appears to be due to two factors: membership of the Law Institute's Young Lawyers section is open to law students, and about 24 per cent of the state's practising solicitors are not members of the Law Institute.

The female majority at the Law Institute has come to light soon after the NSW Law Society released figures showing women make up 48.6 per cent of that state's practising solicitors and are expected to form a majority within 12 months.

Mr Bowyer said that even though the number of women solicitors was growing faster than the number of men, the profession still needed to address the low proportion of women among law firm partners. *The Australian*'s latest survey of the leading firms shows that the overall proportion of female partners — equity and salaried — is roughly unchanged at 20.8 per cent of the total.

Mr Bowyer said the broader sample used in the Law Council's national study of attrition and re-engagement rates for women lawyers indicated that women accounted for just 11 per cent of partners.

He said the cost of replacing experienced young lawyers meant it was economically unsustainable for law firms to fail to address the high attrition rate among young women lawyers.

"There is an enormous financial cost to doing business if you are going to sit idly by while women — who are increasingly going to be the majority of the profession — are going to move out of the profession within four to five years," Mr Bowyer said.