Remarks of the Chief Justice at the launch of 'Binding Authority: 150 Years of Authorised Law Reporting in Victoria'

Friday 30 May 2025

Distinguished guests.

The Nobel Prize winning economists Acemoglu, Robinson and Johnson, hypothesise that nations prosper in terms of security, wealth and social harmony when there are strong, enduring and inclusive economic and political institutions that underpin the rule of law.

From its commencement in 1852, this Court has been an example of one of those enduring institutions that has proved essential to the establishment and maintenance of the rule of law. Its pivotal role in the social and economic fabric of our society continues today. To recognise the central and valuable role it has played in the prosperity of the State does not entail an uncritical view of the history of this Court and this State. The Yoorrook Justice Commission has powerfully brought forward the terrible toll of that history on First Nations peoples which continues to be felt today. Rather, it reminds us that the value of the institution is maintained through the continued learning, understanding and development of the law that we see reflected in this volume.

In considering this Court as an institution, the point may be made that this 19th century building, which remains largely unchanged, is not the Supreme Court. Rather it both houses and symbolises the Court. When it was built it stood as a grand statement of the rule of law in a small but growing and ambitious society.

It is not a coincidence that at the core of the building is the library. One of the most beautiful rooms in the country, it was plainly intended that at the centre of the court complex would be a room devoted to knowledge and learning.

This stunning room, where judges have resorted to find the answers to the myriad legal problems that have confronted them, lies at the heart of the Court.

And the gem in the library's collection is the Victorian Reports.

And in making the statement, I accept a degree of self-interest: as the Chief Justice of the Court and an occasional author in the Reports.

It might seem an overblown statement. After all, legally the reports do not stand as the final word: there are reports which contain authority binding on this Court and which hold greater precedential value. The Commonwealth Law Reports now solely fulfil that role and in earlier times the same could be said of the English Reports. And the collection of monographs is outstanding in its scale and scope and complemented by the latest technology.

But I maintain the point. The Victorian Reports were the first official authorised reports in Australia. They stand as a record of this Court and its interaction with the people and institutions of the State. They are also a repository of authority. In a system of precedent, which is not the slavish following of that decided before, authority is of cardinal importance. The judgments recorded in the Victorian Reports have provided the basis for innumerable arguments and judgments in the Court and have been the first point of call for many barristers looking to sustain a case. The use of authority remains

one of the most important and elusive arts of the advocate. Without the Victorian Reports the discipline of authority would have been much harder, perhaps impossible, to achieve.

And they provide more. As Ken Hayne writes, the VRs reflect not only a legal history, but a social history as well, providing an account of the changing fortunes of the Victorian colony and later State, through periods of boom and bust.

It is fitting therefore to publish a compilation of greatest hits, and the 150th anniversary of the first volume provides a suitable occasion.

The introductory chapters set the scene. They contain a fascinating history of law reporting and the provenance of the Victorian Reports.

What follows is a carefully curated selection of cases in chronological order, explained by insightful commentary that seeks to place each case in its legal and historical context.

The decision to place the cases in date order is both logical and helpful. But that sequence should not be taken to suggest that the law, and especially the common law, is a linear progression. Rather the work of the Supreme Court, as a superior court of record, shows the law to be iterative; we see patterns, repetitions and places where the law returns full circle. We see judges of different decades confronting the same problems and bringing to bear the same legal analysis and skills that Sir Owen Dixon explained as belonging to the judicial method. In this volume we can see differences in rhythms, cadence, syntax and occasionally language that hint at the age of the case, but undeniably we see the uniformity of the judicial method across the years.

Reflecting that iterative approach, I propose to offer some observations by theme: people, pivotal moments in the history of Victoria, and the propounding of legal principle.

I start with the **people**. I start with people for two reasons. First, judging is a human endeavour and focused on resolving actual disputes between people including those with legal personality. Judicial decision making is about human judges resolving disputes about human matters. Second, as many judges have said, the cases we hear belong to the parties and the most important person in a court is the losing party.

We see in the volume, some interaction between the Court and First Nations peoples. Reflecting the broader truth, that connection has been episodic, incomplete and unsatisfying. In 1885 in the course of considering whether an English law prohibiting Sunday trading had been received into the law of the colony, Holroyd J said:

> In determining that the restrictive law before mentioned was reasonably capable of being applied in New South Wales in 1828, I have altogether put out of mind the aboriginal inhabitants. The Imperial Parliament was not thinking of them. From the first the English have occupied Australia as if it were an uninhabited and desert country. The native population were not conquered, but the English Government and afterwards the colonial authorities, assumed jurisdiction over them as if they were strangers who had immigrated into British territory, and punished them for disobeying laws which they could hardly understand, and which were palpably inapplicable to their condition.

In 1951 and 1976, the Court considered whether Aboriginal people could be the subject of a

charitable trust. As Ian Murray and John Heard note in their thought provoking contribution, an affirmative answer to that question was given on the basis that Aboriginal people were in need but without considering the other broader bases on which the charitable disposition could have been sustained, highlighting the unduly narrow and pejorative lens with which First Nations people have so often been viewed.

The volume also contains a diverse cast of individual characters. In *Re Lamont*, we have the German divorcee spiritualist accused of exercising undue influence on a tremendously rich Scottish bachelor. Her efforts produced a masterclass on undue influence in the context of a grant of probate. In *Re Bond Brewing* we see a story of corporate raiders of the 1980s, one of whom had a nemesis described as 'a bastard…greedy, ruthless and arrogant, a capitalist red in tooth and claw'. In *R v Tait* and *R v Ryan & Walker* we see the prisoners Tait and Ryan. The former got a reprieve while the latter was the last man to be hanged in Australia, in 1967.

The other group of people whose life and work emerges from the pages is the judges.

We see the Supreme Court judge as generalist. Mark Weinberg tests the mettle of perhaps our finest judge, Sir Leo Cussen as a criminal lawyer. As Mark writes, Cussen J did not have a background in criminal law, yet his criminal law judgments were superb. Georgina Schoff notes his contribution to the law of defamation highlighting his learned but practical approach that we all seek to emulate.

Justice Menhennitt, an equity lawyer known for his expertise in trade practices, appears as a thoughtful judge whose charge to the jury in a prosecution for an unlawful abortion stood as the law for 39 years, until legislation was passed in 2008. Usually a case is known by the name of the

parties, but this is a rare example where the name of the judge formed part of the vernacular with 'the Menhennitt Ruling'. Bronwyn Naylor includes a photo of Menhennitt J, a nice feature replicated elsewhere in the volume.

Justice Sholl is lauded in Nicolas Dour's chapter for the 'burning forensic intensity' of his judgments. In his farewell speech, Sholl J explained his objectives when writing judgments 'first, to satisfy the parties that their versions of the facts had been, at least, understood; secondly, to satisfy counsel that their arguments had been appreciated and considered; and thirdly, to instruct teachers and students of the law'. We also see decisions of Supreme Court judges before they were appointed to the High Court (Fullagar J and Hayne J).

In the Victorian Reports we also see the career arc of the Bar. I would not be alone in admitting that when I look at a report, I start with the judge and then go immediately to the names of those who argued the case. We see individuals, such as Holroyd J, Williams J, a'Beckett J and Starke J, who earlier in the volume appear before the Court, and later in the volume are on the Bench. Further still into the volume we see cases argued by former Chief Justices of the Supreme Court (Winneke CJ, Young CJ), former Justices of the High Court (Higgins J, Menzies J and Aickin J), and even a former Chief Justice of the High Court and Governor-General of Australia (Sir Isaac Isaacs).

Counsel such as Merralls, Tadgell, Dawson, Habersberger all appear in the volume arguing cases as junior counsel. In one of the included cases, Allan Archibald takes on EW Gillard when both were junior. There are many here and at the Bar who could not conceive of a time when Archibald was not a silk.

Something not so easily seen in much of the period 1875 to 2025, is diversity in the legal profession and on the Bench. However in Part VI of the volume on 'Modern times: The 21st century', we begin to see a legal profession that more closely resembles the make-up of the Victorian community, and of course law reporting will continue to bear witness to the changes in the composition of the Bench and the legal profession.

Next we can see the ebb and flow of **commercial and social life** in Victoria. When asked what was the greatest challenge for a statesman, Prime Minister Harold Macmillan said 'Events, dear boy, events'. And so it is in the life of a Court. As Chief Justice Marilyn Warren noted, 'when significant moments in Port Phillip's and Victoria's history occurred, the Supreme Court was often at the forefront'.

The effects of the Victorian gold rush are reflected in the pages of the very first volume of the Victorian Law Reports – a mining case determined by the Court of the Chief Judge of Mines.

The downturn is discernible by volume 19 of the Victorian Law Reports, where we see what Ian Paterson has labelled the 'Meltdown of Marvellous Melbourne'. Commodity prices were falling in the early 1890s, a series of building societies and banks collapsed, and the Commercial Bank of Australia turned to the Supreme Court for approval of a proposed scheme of arrangement.

One hundred years later we see the cycle again, with the 1980s as the era of entrepreneurs and their extravagances, and the 90s seeing Australia enter into recession. In the Supreme Court, a banking syndicate obtained an order for the appointment of receivers and managers, and the Appeal Division later overturned the order, describing it as 'perhaps the most momentous ex parte order

ever made by an Australian court', as it resulted in the control of billions of dollars changing hands. Ray Finkelstein writes a wonderful piece that may be seen to favour the forensic judgment of the trial judge.

The Supreme Court was not immune from the polarised political climate and anxieties around communism following World War 2. A serving judge took on a role I can hardly imagine being done today – Justice Charles Lowe was commissioned to conduct a 'Royal Commission Inquiring into the Origins, Aims, Objects and Funds of the Communist Party in Victoria'. Later, the Court was the scene for a criminal libel prosecution of communist author Frank Hardy, in relation to his book 'Power Without Glory', which became the most talked about book in the country. Jon Faine has included the front page of The Herald, which reported that cheers and clapping broke out in the upper gallery of the court when Hardy was found not guilty.

That is not the only example in the volume of such human reactions to decisions in the Supreme Court. One chapter recounts junior counsel's vivid memories of the crowd responding to the guilty verdict in *R v Lowery and King* with cheers and feet stomping. The level of public engagement in cases before the Supreme Court can be such that the decision or verdict is itself a moment in history, with people remembering the weather and where they were at the time.

This being Victoria, sport, especially football, and the arts also appear on the page.

Finally much emerges from the book about legal **principle**: constitutional law, equity, judicial review, criminal law. The breadth of legal principle engaged in the cases in this volume reflects the diversity of the jurisdiction and the place that this Court holds.

It is inevitable now to see constitutional law in Australia as the study of the Commonwealth Constitution. This collection reminds us that before federation a different constitutional paradigm was at work. In *Toy v Musgrove* the limits of responsible government in Victoria under the *Constitution Act 1855* were tested in the Supreme Court, and the result influenced the drafting of the Commonwealth Constitution. Charles Parkinson writes a most interesting reflection on constitutional principles in the context of the British Empire.

The volume is also testament to the Supreme Court's contribution to the development of the common law of Australia. I mention some examples.

In *Dyer v The Trustees, Executors and Agency Co Ltd*, the Court held that a variation power in a trust deed could not be used to allow trust moneys to be used in such a way as would depart from the original purpose of the gift. The case later became the foundation of the 'substratum' doctrine. Justice Gobbo's judgment in *Dahl v Grice* on proof of causation in civil claims, Justice McGarvie's analysis of the duty of a trustee in *Karger v Paul* and Justice Ormiston's analysis of implied contracts in *Vroom* remain seminal. As Katy Barnett explains, the latter not free from doctrinal controversy.

In *R v Storey*, a five judge bench of the Court of Appeal held that in sentencing, facts adverse to the offender's interests must not be taken into account unless established beyond reasonable doubt, but facts favourable to the offender may be considered if proved on the balance of probabilities. *Storey* settled the law in Victoria and was approved by the High Court. And in *Quach* the elements of misconduct in public office are authoritatively determined.

The depth of learning and judicial acumen revealed by the judgments in this collection is daunting. They are brought to life by imaginative and interesting commentary. Unlike Law Reports which are not books to be read cover to cover, this volume draws the reader in from the beginning and each chapter opens up new insights and characters.

My present colleagues and I who make up the bench of the Court will gain much from this volume. It stands as a reminder of the quality of the judges who have sat on this Court before us, the importance of our work to the society as a whole and the central role that the Court plays in the democracy, prosperity and security of the State.

It is a privilege to launch this book. It is a fascinating collection and a tremendous achievement.

I congratulate all those who have contributed to the book coming into being. In particular may I congratulate and thank: the Chairs of the Council of Law Reporting in Victoria who supported this project, Justice Macaulay, Justice Button and Justice Gorton; Peter Willis, the Editor of the Victorian Reports; the Editorial Committee chaired by the Hon Julie Dodds-Streeton; the Hon Pamela Tate, who assisted in the identification of cases; the publisher represented by Michael Green SC; and the Director of the Law Library of Victoria and Supreme Court Librarian, Laurie Atkinson.

Finally can I thank each of the authors of the chapters in the volume for their insight and the judges of the Court who have written such marvellous judgments.

Thank you.