

# Federal Court

## Justice Richard Tracey



ON 26 July 2006, Richard Tracey was sworn in and welcomed as a Judge of the Federal Court of Australia. He is a popular man. It was a well-deserved and popular appointment. Needless to say, the Court was packed, and the mood was warm and happy.

The speakers (including the Commonwealth Solicitor-General, David Bennett AO QC and the Chairman of the Bar, Kate McMillan S.C.) painted a true picture of the man.

As counsel, Richard Tracey met Sir Owen Dixon's paradigm, namely that "counsel ... brings his learning, ability, character and firmness of mind to the conduct of cases, and maintains the very high tradition of honour and independence of English advocacy".<sup>1</sup>

Richard's late father, Eustace Richard Tracey, was a managing clerk in the law practice of Senator George Hannan. Honesty and integrity were his watchwords — as Senator Hannan has observed, no mean qualities for his sons to inherit.

It is thus surely no surprise that Richard Tracey studied Law — distinguishing himself as a student; as a teacher; and as a barrister.

He and his younger brother, Rowan, began their schooling at South Yarra State School and Toorak Central School. Each in turn won year-nine merit selection to Melbourne High School. Richard went on to an Honours Degree at the University of

Melbourne, and a two-year Associateship with Sir Richard Eggleston. Rowan went on to the Royal Military College, Duntroon, where he was the Senior Under-Officer; the Battalion Sergeant-Major; and won the Sword of Honour.

Another inheritance from his father is that Richard is not one for fleeting fancies, or, for that matter, fleeting friendships.

Eustace Tracey served nearly 50 years on the Australia Day Council — its secretary for more than 20 of those years. He was awarded the Medal of the Order of Australia and, by the Polish government, for his good works for the Melbourne Polish community, the Order of St Mary.

So also, Richard has served the community steadfastly. Many activities that he began at Melbourne High he dedicated himself to for decades afterwards.

Richard was a football umpire at Melbourne High. Forty years later, he is a life member, and former President, of the Umpires Association — having umpired for many years, including being a field umpire in VAFA grand final matches in 1982, 1983, 1984 and 1985.

Richard brought certain characteristics to the umpiring world such that it is now said that his Honour was truly a man ahead of his time. He was the man "who invented flooding". Described as "not the fittest nor the fastest umpire but the most formal", it has been suggested that he was not always able to keep up with the play, and took his time to arrive at the scene to dispense umpiring justice.

Players had the time to question his decisions. Being the gentleman that he is, he always provided further and better particulars. Spectators would join in the debate, resulting in endless light hearted abuse — such as, "How would you know? You were 50 metres behind the play"; "Lose weight you're too slow"; "You're too academic"; "Typical professor's interpretation".

Richard was always able to laugh at himself and the game continued. He also regularly stayed on after the game and had a drink with players and spectators from both sides; and the banter about his umpiring would continue with good humour. Richard is, and remains, a

much loved character within the ranks of Victorian Amateur football.

His Honour is a fervent Collingwood supporter. In the long 32-year drought from its premiership win in 1958 to its next win in 1990, Collingwood was in nine intervening Grand Finals. Richard was at every one. History does not relate how it was that he came to be on vacation, away from Melbourne, for the 1990 Grand Final — but he was. And, of course, Collingwood won.

Another commitment that began at Melbourne High that His Honour continues to this day is to service in the armed forces. Richard was an outstanding Cadet Under-Officer at Melbourne High. Upon leaving school, he became a Lieutenant of Cadets, and continued to serve in the Melbourne High Cadet Corps — not a widely popular extra-curricular activity of university students in the late sixties. His Honour is, of course, now a Colonel in the Army Reserve, with 30 years service and the Reserve Forces Decoration.

Newman does not leap out as the obvious College of choice in the 1960s for a Protestant from Melbourne High. However, Justice Hayne was senior law tutor, and Newman tutorials in Law were good — even rivalling Merralls' Trinity stable of Law tutors and tutorials. John Grigsby, a newly arrived History master at Melbourne High, and fellow officer of cadets, was a resident tutor in British History (Law) at Newman.

Immediately nick-named "Tracker Dick", Richard was the first, and perhaps only, Protestant President of the Newman College Students' Club. He was quick to assimilate. A photograph in the Newman magazine shows his obvious proficiency in swinging the thurible to produce veritable clouds of incense.

It was during his time as a tutor at Newman that Richard met his future wife, Hilary, then a law student resident at St Hilda's College. Hilary is the daughter of Mr Des and Mrs Mary Cain. Mr Des Cain is well remembered as the senior partner with the firm of Oakley Thompson & Co.

Some of the students from St Hilda's, including Kate McMillan and Richard's good friend, Julianne Parsons, were unwitting participants in his court-

ship when, after each weekly tutorial in administrative law at Newman, they were required to accompany Hilary to the Clyde Hotel where they conveniently “bumped” into Richard.

Hilary provided a breadth to Richard Tracey’s lifestyle that was previously unknown to him. He joined in with Hilary’s love of racehorses, even to the extent of breeding and racing quite a few. The Traceys struck early success, and one of their horses was good enough to run second at Flemington on Oaks Day. Several others were quite accomplished performers. However, as His Honour has come to realise, the slow ones eat just as much as the fast ones and the fast ones usually break down!

Hilary and Richard are the proud parents of Jack (a law graduate from Melbourne University and Associate to Mr Justice Callaway of the Supreme Court), Phillip (who is employed in the Registry of the Victorian Court of Appeal), Fiona (who is studying Arts at Melbourne University) and Rosie who is in Year 11 at Loreto Mandeville Hall.

For more than 40 years now, Richard has organised annual dinners of the General Committee members of the Newman Students’ Club from his era.

For some 20 years, the last eight as President, His Honour has served on the Committee of the Newman Old Collegians. He is also Vice-Chairman of the St Mary’s Council, the Catholic Archbishop being ex officio Chairman.

With all that, one may wonder how Richard found time to teach and practise Law.

For many years he did both. He was a full-time teacher at the University of Melbourne. For part of that time, he was also Sub-Dean. He was, at the same time, a part-time Presiding Member of the Social Security Appeals Tribunal — and heard over a thousand appeals. He often appeared in the Federal Court — as did a few other Melbourne academics, such as Justice Weinberg and Dr Ian Hardingham QC. Richard also appeared regularly for students, without fee, in the Magistrates’ Court.

In 1979, Richard co-authored *Administrative Law*, a work that was to become a leading text on the subject, and which has since been re-published in three further editions.

In getting admitted to practice, Richard timed things perfectly. By the time he had finished his two-year associateship with Sir Richard Eggleston, and taught 18 months at Melbourne, and a year in Illinois, the

ACT six-months Legal Workshop course was up and running. That was significantly more palatable than the whole year’s articles required in Victoria.

However, in waiting until 1982 to come to the Victorian Bar, Richard delayed too long. By then, the Bar Readers’ course had become an additional requirement.

Based on his two-year associateship and extensive trial and appellate experience, Richard sought a waiver. He had even judged moots in the earlier Readers’ courses.

The Bar Applications Review Committee was unmoved. With characteristic good grace, Richard accepted the ruling, and threw himself wholeheartedly into the course. He was what the instructors termed a “very lively” participant.

Richard read with Graeme Uren QC, and had one reader, Richard Waddell. He was granted silk in 1991, after only nine years full-time practice as a junior at the Victorian Bar.

Richard was Chairman of his List Committee for 10 years, and was a Bar appointee on both the Users’ Committee and the Migration List Users’ Group of the Federal Court. He also served on the Bar Academic & CLE Committee. For six years, he was one of the Bar appointees to the Legal Profession Tribunal.

Nor did Richard’s scholarship end upon taking up full time practice. Apart from contributing to further editions of Administrative Law, he established, as founding editor, the *Australian Journal of Administrative Law* in 1993. Published quarterly, it has been described as “an important journal” and “a tremendous resource”, publishing articles that are both theoretical and practical. His Honour has been editor for more than 12 years.

In 2003, upon the recommendation of the Council of Law Reporting in Victoria, Richard was appointed the editor of the *Victorian Reports*. It is the editor who decides which judgments are sufficiently significant to merit publication. This involves review of all Court of Appeal judgments, and of those trial division judgments referred to the editor. Richard took pains to recruit good reporters, and to encourage and support the twelve or so reporters in their work.

Richard had a vast practice, especially in administrative law (at both State and Federal levels) and in industrial and military law. He was for many years senior counsel of choice for the Commonwealth in immigration and general administrative law matters. He was briefed with the

Solicitor-General in the Tampa litigation in 2001 and more recently in the High Court challenge to the Workchoices legislation. Between 2001 and 2003 he was Senior Counsel assisting the Royal Commission into the Building and Construction Industry.

On 9 March 2005, Richard had the rare distinction of winning two High Court appeals on the one day, namely in the industrial law matters of *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd*<sup>2</sup> and *Ancor Ltd v CFMEU*.<sup>3</sup> He was still winning them even after his appointment; see *McKinnon v Secretary, Department of Treasury*.<sup>4</sup>

From time to time, Richard appeared against government interests, notably in Minister of State for *Immigration & Ethnic Affairs v Teoh*,<sup>5</sup> a significant High Court decision on international conventions ratified by Australia giving rise to legitimate expectations.

Richard’s capacity for work was prodigious. Indeed, the broad smiles of his fellow administrative and industrial law silks present at the welcome reflected not only their shared joy for his Honour in his appointment, but their delight at the significant prospective increase in calls on their services.

Even on vacation, Richard took professional telephone calls. Some years ago, he was holidaying at Port Douglas. He didn’t then have a mobile. However, with an immediate family of six, there would usually be someone in the beachside unit to take the call. One day, he’d been called up from the beach about six times in a single morning. Another barrister might have tired of this, but Richard still went up to take the seventh call — a pleasant surprise, because it wasn’t one of his Commonwealth instructors. It was notification that he’d won a Mercedes in a raffle.

Although “learned in the law”, Richard has not always displayed the same aptitude in matters mechanical. With the brief in a recent security-related case came a massive, combination-lock safe in which to keep the nation’s secrets secure. They certainly were secure — secure even from Richard. Passers by his chambers were treated to the spectacle of Richard crouched in front of the safe, muttering darkly. More than once, he had to resort to summoning a Commonwealth instructor to come and open the safe.

In another mechanical lapse, years earlier, Richard put the wrong brake fluid in his old brown Holden Kingswood. In the



ordinary course, this might not have mattered much. However, he was on Mount Kosciusko. The nearest service station was about 40 kilometres down a steep, winding, dirt road. With only first gear and the hand brake, Richard made much better time than he could ever have wished.

Before this appointment, Richard had a couple of brushes with Chapter III of the Commonwealth Constitution.

In 1988, there was a challenge to his jurisdiction as a Defence Force Magistrate on the ground that he was not a Chapter III judge. The High Court upheld his ruling that he didn't need to be — that military justice is outside Chapter III; *Re Tracey; ex parte Ryan*.<sup>6</sup>

Between 1997 and 2000, Richard served as a part time hearing commissioner of the Commonwealth Human Rights and Equal Opportunity Commission. Such commissioners not being Chapter III judges, decisions they made could not be enforced directly; see *Brandy v HREOC*.<sup>7</sup> To obtain an enforceable decision, parties needed to re-run their cases from scratch in the Federal Court. However, by judicious “case management”, Richard saved all the parties who came before him that expense and trouble, by guiding them to settlement in every single case. Happily, in his new capacity, His Honour is free to exercise the judicial power of the Commonwealth without fear of a prerogative writ.

In all his many endeavours, Richard has been conscientious, thorough, unflappable and steadfast — and his humanity and humour have shown through.

The Victorian Bar wishes the Honourable Justice Richard Tracey long and satisfying service as a Judge of the Federal Court of Australia.

#### Notes

1. Sir Owen Dixon, Address on taking the oath of office as Chief Justice of the High Court of Australia on 21 April 1952 — *Jesting Pilate* pp 245–46 (Law Book Company 1965).
2. (2005) 214 ALR 24.
3. (2005) 214 ALR 56.
4. [2006] HCA 45 (6 Sept 2006).
5. (1995) 183 CLR 273.
6. (1989) 166 CLR 518.
7. (1995) 183 CLR 245.