

# How did this boy from the bush become head of the highest court in the land?

By Anastasia Safioleas for *Judgment: Cases That Changed Australia*

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As chief justice of the High Court of Australia, Stephen Gageler oversees cases that have helped shape Australia. (*MODE Imagery/Paul Chapman*)

Within an imposing wood-paneled room in Canberra, ordinary people come before a bench of justices to present their case.

The High Court is where laws are challenged and legal minds tackle principles that shape the nation's future. It also has the final say on how Australian law is interpreted and applied.

Stephen Gageler is the 14th chief justice of the High Court of Australia.

It's a role that effectively puts him in charge of the "timeliness and the quality of the output of the court".

Under his watch, the court has ruled on matters like the watershed moment indefinite immigration detention was declared unlawful, Australian fashion designer Katie Perry's legal battle with singer Katy Perry and, more recently, Bruce Lehrmann's ultimately failed bid for an appeal.

But who is Chief Justice Gageler and what was his journey to becoming Australia's chief justice like?

He sat down for a chat with Euahleyai/Gamilaroi woman Larissa Behrendt, professor of law and director of ABC iview's Judgment: Cases That Changed Australia, about growing up in rural Australia and what it's like to oversee the highest court in the land.



Larissa Behrendt is laureate fellow at the Jumbunna Institute of Indigenous Education and Research at the University of Technology Sydney. *(Image courtesy UTS)*

### **Where did you grow up?**

I was born into and raised in a very small rural community in the Upper Hunter [region] in New South Wales. The population of Sandy Hollow — where I grew up — was 150.

I had no family background in law. My father was a sawmiller, his father was a sawmiller — they were in partnership together. My mother was a hairdresser.

My schooling was a one-teacher primary school just out of Sandy Hollow. And then I went to the public high school in Muswellbrook, which was 40km away. I travelled by bus over corrugated roads, one-and-a-half hours each way, each day of my high schooling to go to school.

### **What sparked your interest in law?**

My interest in law came in year 9 ... when there was an opportunity for work experience. And the work experience for me was in a local solicitor's office.

I sat in the solicitor's office, and I also went to the local Court of Petty Sessions [Magistrates Court], and I thought, "This is a pretty interesting process". I was impressed by the plea in mitigation for a traffic fine that I saw. And I was impressed by the way the magistrate carefully listened to the plea, and the way the magistrate showed compassion and common sense and was extremely decisive.

I told the solicitor that I thought this was a pretty good system, particularly the court work. He said there's another branch of the profession where they just go to court. And so he put me in touch with Bryan Beaumont, a barrister who later became a distinguished judge of the Federal Court.

He graciously spent time with me. He told me that if I wanted to join that branch of the profession, I really should go to university, get a good law degree, become a judge's associate, get a master's degree, and then think about turning up at the bar.

Well, I took all that to heart and about 10, 12 years later, I called him up and I said: "I've done all that. I'm ready."



Stephen Gageler grew up in Sandy Hollow in regional New South Wales and attended a one-teacher primary school. (AAP: Alan Porritt)

### **What was it like being the first in your family to think about applying for law school?**

It was not daunting because nobody ever told me that I couldn't do it. And I was fortunate to have graduated from high school at a time after the Whitlam reforms to education, when tertiary education assistance was available.

So, the financial barrier to attending university had been removed. In my case, it would've been a real barrier.

I felt that I would be uncomfortable going from such a small community to study in Sydney. So, I chose to go to the Australian National University in Canberra.

### **What are your memories of law school?**

I confess to have been a little surprised to find myself in law school in first year, studying a subject called Legal Method, and I was actually extremely good at it. To me that was a little disappointing. [Laughs]

I thought that I would be in the company of people who would have a greater grasp of this subject matter than me. I gradually became comfortable with the idea of actually being pretty good at it myself.

### **What kind of student were you?**

I was very involved in social activities and the organisation of social activities. I played sport. I was also engaged in a number of organisations within the law school, including the ANU Law Students' Society. I remember organising as a student a legal advice service, which didn't last very long, and it wasn't particularly well-organised, but it was something that I attempted.

I did a double degree in economics and law. The economics degree finished after three years, and I had to make a difficult decision; whether I was going to become an economist or a lawyer. And at one stage, I was very seriously considering honours in economics and pursuing a career in economics. I think I made the right choice. Although I've doubted it at times in my career.



Dennis Rose QC (right) and Stephen Gageler (left) at the High Court of Australia on the day of a hearing in 1993. (*High Court of Australia*)

**Early in your legal career you were an associate to a former High Court chief justice. How was that?**

A judge's associate is a young graduate lawyer who works with a judge, typically for a period of a year or so. In my case, it was two years. [They] assist the judge in performing the judicial task. Some of the assistance is entirely mechanical — fetching books, proofreading. But some of the assistance is more conceptual and analytical. It can involve doing research for the judge.

I was fortunate to work with Sir Anthony Mason from 1983 through to 1985. I started in the middle of the Tasmanian Dam case. I arrived in the court to start work on the second day of the argument in that case. So, my introduction to the High Court was high drama. This was a high-stakes case being played out.

**Do you remember the first time you appeared in a formal capacity before the High Court?**

I was assistant to the solicitor-general, Gavan Griffith. I was appearing in the High Court as his junior on a constitutional matter, and he graciously allowed me to present the argument to the court.

I felt exhilarated. I was relatively young to be performing a task like that and I, frankly, thoroughly enjoyed it.



Stephen Gageler being sworn in as Chief Justice on November 6, 2023. (*High Court of Australia*)

**I wonder if a young Stephen ever imagined the path from that first exhilarating appearance to a position on the bench of the High Court. Can you tell us what happened when you were offered a position on the bench of the High Court?**

The process was a telephone call from the attorney-general to ask me whether I would be prepared to accept, if offered. That was step one in the process, from my perspective.

Step two was to be told that there would be a cabinet meeting when my name would be going forward, and that I would receive a telephone call at a particular time in the evening to tell me the result.

Step three was to receive that telephone call somewhat later than the appointed time, which left me, I recall, walking the streets of Canberra after dinner wondering what was happening for an hour or two.

**You've now been at the helm of the High Court for just over two years. How many cases does the court look at each year?**

The High Court has two categories of cases that come before it. One is the category of cases in its appellate jurisdiction. The other is a much smaller group of cases in its original jurisdiction [these cases begin in the High Court itself].

The appellate jurisdiction of the High Court is to hear appeals from state, territory and federal courts throughout Australia. We have about 800 applications per year for special leave to appeal. Realistically, we can hear about 50 cases a year so we have a filtering system — a rationing system — and we do that by considering each of the 800 applications to determine whether they warrant our attention.

Typically, we are concerned with whether the issue of law that is sought to be raised for our attention is of national significance or at least sufficiently important to require the attention of a national Supreme Court.



Stephen Gageler says formulating a judgment can be a "very lonely, painstaking exercise". (AAP: Lukas Coch)

### **How do you prepare for a hearing?**

Each judge will prepare for a hearing slightly differently. My practice in an appeal is to have read the judgment under appeal, and to have read the written submissions of the parties, generally starting with the reply of the appellant, which crystallises the issues between the parties.

I won't read into the footnotes, typically, and I quite deliberately do not want to go beyond having a sense of the issues between the parties and how those issues are joined. I seek to avoid forming a judgment too early.

### **And at the other end of proceedings, how do you formulate a judgment?**

A judge will be focused on the issue that is presented in the case. The judge will have his or her thinking shaped by the course of the argument. And in a collegiate court such as my own, the judges will confer, they will deliberate and, to a meaningful extent, their own views will be shaped by considering the opinions of their colleagues.

The actual decision-making process can be a very lonely, painstaking exercise in very deep thinking and careful deliberation. And often to reach the result, to reach a conclusion, involves writing out the reasons, reaching forks in the road, and then determining — on a provisional basis — a path forward, which might have to be revised as the writing continues and that route does not seem to be as attractive as it first appeared.

So, it's writing, thinking, revising, and then doing the whole process over again. That's what's involved.

### **What are the strengths of the Australian court system?**

The judges of every court in Australia are sworn to a single duty, which is to do justice according to law.

The performance of that duty by members of a collegiate court inevitably involves differences of perspective amongst the judges as to what justice, according to law, is required in a particular context.



The High Court of Australia, located in Canberra on the shores of Lake Burley Griffin, is the highest court of the land. (ABC News: Gregory Nelson)

The High Court has the hardest cases and is required to take on the hardest cases. For all that, in my experience the members of the High Court have been respectful of each other's views and have worked together as best they can to perform their collective duty to provide an institutional outcome that is optimal in the circumstances.

Occasionally judges are just unable to agree, and one of the strengths in our system is that it permits dissent.

It acknowledges in that way, and encourages to some extent, a diversity of opinion. And it will also tolerate, perhaps encourage slightly less, concurring judgments where judges agree with the result but prefer to express their own reasons in their own words.

### **How has the High Court shaped Australia?**

There's no doubt that the High Court's performance of its functions has significantly shaped Australian society.

It needs to be clearly understood how that has occurred. The High Court does not and has never had an agenda. What it has done is decided cases in real time that have come before it and in doing so laid down principles that have guided legislative and executive action for the future.

***Quotes lightly edited for clarity and brevity.***