

**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**BATHURST CJ
AND THE JUDGES OF THE
SUPREME COURT**

Monday 8 February 2016

**CEREMONIAL SITTING
OF THE NEW SOUTH WALES COURT OF APPEAL
TO MARK THE 50TH ANNIVERSARY
OF THE FIRST SITTING OF THE COURT**

- 1 **BATHURST CJ:** I welcome you all here today for this occasion. Madam Attorney.

- 2 **THE HONOURABLE GABRIELLE UPTON MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** May it please the Court. The Honourable Tom Bathurst AC, Chief Justice of New South Wales, The Honourable Margaret Beazley AO, President of Court of Appeal, His Excellency General The Honourable David Hurley AC, Governor of New South Wales and Mrs Hurley, your Honours, distinguished guests, ladies and gentlemen, I address this Honourable Court on behalf of the New South Wales Government on the occasion of a significant milestone in the New South Wales Court of Appeal's history. The Court of Appeal has reached its golden anniversary, 50 years since it first sat in the old Banco Court.

- 3 In pondering the justification for a system of appeals, Drewry, Bloom-Cooper, Blake, in their monograph, the Court of Appeal, cite seven reasons, namely:

“Appellate courts:

1. Enable aggrieved litigants to have their decisions reviewed for mistakes by a multi-judge bench;
2. To promote public trust and confidence in the justice system;
3. To seek to achieve a fair and correct decision in a particular case that comes before them;
4. Enhance judicial accountability;
5. Develop and refine legal doctrine;
6. Promote consistency through precedent; and
7. Provide trial judges with a means of assessing their metal.”

4 And in serving such purposes, the New South Wales Court of Appeal has developed a rich and distinguished legacy that has been enhanced by first class legal minds. Its judgments are routinely cited around the nation and indeed by foreign courts.

5 The Court of Appeal is fearless and independent, and we, and I, as part of the New South Wales Government, value and honour those qualities. They are fundamental to upholding the rule of law and giving practical expression to the separation of powers doctrine. Of course, courts in all jurisdictions will at times make decisions that are not generally popular, but it is the independence of that decision-making, regardless of popular opinion, that is fundamental to our democracy.

6 With the Court’s indulgence I would like to reflect on some history. The establishment of the Court in 1966 was well received. Even prior to this it had many years of conceptual support from Chief Justices advocating the need for a permanent appellate jurisdiction with the New South Wales Supreme Court. Most notably it was Sir Kenneth Street who first raised the concept when he wrote to the then Attorney General Downing in 1958. Many discussions ensued between the Chief Justice and Downing over the years concerning the proposal, until it was ultimately shelved when Chief Justice Street’s tenure concluded at the beginning of 1960.

- 7 It was not until Chief Justice Herron was appointed and a new Government elected that the concept of an established appellate jurisdiction within the Supreme Court finally came to fruition. The concept had the strong backing of the New South Wales Bar Association and most of the legal profession, and this is the kind of support for a form that would surely warm the cockles of any Attorney General's heart.
- 8 On 30 September 1965 the Bill for the creation of the Court of Appeal was introduced into the New South Wales Legislative Assembly, however the Government of the day, like the one now, did not hold the majority in the Legislative Council. It was quite a task for the Government to ensure the passage of its reforms without a major amendment through the Upper House, and may I say not much has changed in that regard since then.
- 9 The Second Reading Speech after the introduction of the Bill by the then Attorney General Ken McCaw, set out that, "The purpose of the Court was to provide greater uniformity, cohesiveness and quicker decisions." The Bill was eventually passed and on 1 January 1966 the New South Wales Court of Appeal came into existence. The then Honourable Mr Justice Wallace was appointed the Court's first President, whom incidentally was a strong advocate for a long time for a speedier approach to justice.
- 10 It was evident that the work of a judge sitting on the Court of Appeal was going to be substantially different from that of a court of first instance. In an address to a legal academic gathering at the University of Melbourne in 1951, the then Master of the Rolls, Sir Raymond Evershed said:
- "The judicial function is not quite the same in an appellate court as it is in a court of first instance. In a court of first instance the duty of the Judge is to sift the evidence and to reach a conclusion as best he can and as quickly as he can. Despatch is, of course, important no less in the Court of Appeal, but it must be subject to due deliberation if an appellate court is justifiable at all."
- 11 Not only did Sir Raymond discuss the necessary difference between the appellate court and a court of first instance, but also the need to

permanently differentiate between judges of appeal and judges sitting in the first instance. He stated, “There was no obvious primacy in a court of judges rotating between appeal matters and trial matters.” Sir Raymond also warned that:

“By operating in a rotation system between appellate work and trial work, appeal judges might be timid in their decisions regarding their colleagues’ judgments because those colleagues might later sit in appeal on their own judicial performance.”

12 “It is the importance of due deliberation of the merits during appeal work”, Sir Raymond remarked, “that ensures that justice is served and that precedent is established, even under the pressures of an ever increasing caseload and the pace of litigation.”

13 The Honourable Arthur Bridges, leader of the Government in the Legislative Council, made an observation about the enormous volume of work of the Court during the 1965 Legislative Council debate. He said:

“The increased complexity of cases and the enormous increase in the tempo of litigation with the advent of the modern motor vehicle have had the inevitable result of increasing the number of Supreme Court judges.”

14 Some 50 years on the observation about the increasing tempo of litigation still applies, however the provocateur is no longer the modern motor vehicle, but, amongst other things, technology and the diverse forms of communication that has led to a virtually borderless and complex community.

15 From the New South Wales Government’s perspective where, when and how justice is done must continue to evolve. Just as our community expects our health and education services to be modern, to be efficient, to be effective, our modern justice system must also strive to be so too. Through the application of its founding principles of uniformity, cohesiveness and quicker decisions, articulated by the then Attorney

General McCaw, the Court of Appeal continues to work hard to support the Government's vision for justice.

16 Your Honours, today we mark the 50th anniversary of the New South Wales Court of Appeal's first sitting. On behalf of the New South Wales Government, I congratulate the Court on reaching this significant milestone. I pay tribute to the President of the Court, past Presidents and the past and present Justices of Appeal, who have served a vital role in the development of law throughout our land and beyond. You have served to strengthen the community's confidence in our judicial system, and helped underpin their sense of safety and of wellbeing. I thank you sincerely for these indelible contributions. May it please the Court.

17 **MR N HUTLEY SC PRESIDENT NEW SOUTH WALES BAR**

ASSOCIATION : May it please the Court. In 1965 the Court of Appeal took a form which was shaped by conditions and concerns of the time in part. As the then President of the Court of Appeal, Justice Michael Kirby observed in 1987:

"It is rare for a graduation address to influence the structure of a country's court, however study of the evolution of the policy which culminated in *Act No. 12 of 1965, the Supreme Court and Circuit Courts (Amendment) Act* discloses the significance of the address of the Master of the Roll, Sir Raymond Evershed, delivered on 22 August 1951 in Melbourne. The address was published in that October's part of the *Australian Law Journal* under the heading 'The history of the Court of Appeal'. No country reference was necessary at that time."

18 At that time all States operated under a Full Court system, New South Wales had done so for over a century. In the middle of last century the system of local appellate review was governed by the *Criminal Appeal Act of 1912* and the *Supreme Court and Circuit Courts Act of 1900*. The former provided that the Supreme Court should be a Court of Criminal Appeal and was to be constituted by a bench of three judges, selected by the Chief Justice. It operated as a Full Court. The later Act provided for

appeals before up to two benches in bank of this Court. The constitution of the bench was similarly controlled by the Chief Justice.

- 19 Appeals from the Supreme Court lay both to the High Court and the Privy Council. Section 73 of the Constitution secured the former and dictated the structure of any development of a local appeal court. In *Stewart v The King* in the High Court, the Court had rejected a challenge to its power to determine an appeal from the Court of Criminal Appeal, holding that the 1912 Act did not create a new court distinct from the Supreme Court, but rather directed the Supreme Court to act as the Court of Criminal Appeal. Then arose Sir Raymond's address which dealt, as the Attorney General has observed, with the advantages as, he perceived them, of a permanent Court of Appeal, which included that:

“The dedicated character of such a body would augment the quality of judgments and the development of the law through the appointment of lawyers with abilities and skills apt for appellate work and the constant close cooperation of a small group of judges.”

- 20 Around that time a number of provinces of Canada and New Zealand established separate Courts of Appeal. In the years after the Second World War, the Full Court system came under increasing pressure as appeals in kindred proceedings multiplied both within the Court and from the District Court, the Magistrates Courts and various other bodies such as the Workers Compensation Commission. In fact between 1948 and 1964 the annual volume of appeals grew from 134 to 289, and in mid-1965 the anticipated delay in obtaining a hearing was about one year. These matters contributed to significant concerns at executive, judicial and professional levels that change was required.
- 21 As the Attorney General has observed, in 1958 the then Chief Justice Sir Kenneth Street wrote to the Attorney General advocating the adoption of a separate Court of Appeal. In July 1962 the New South Wales Bar Association advocated the same Court, citing the views expressed by the

Master of the Rolls in support. The Association put forward a Draft Bill in 1963, which appears to have been influential.

- 22 In 1962 the Law Society of New Zealand wrote to the New South Wales Bar Association expressing the view that unlike its Court of Appeal, it might be preferable to retain a Full Court format in relation to crime as it was important that presiding judges “Retain close touch with the atmosphere of criminal trials”. Such was the position also in England.
- 23 There then followed a period in which the structure and powers of the Court were worked out essentially between the executive and the then Chief Justice Leslie Herron. The respective roles of the Chief Justice and the President were settled.
- 24 On 30 September Attorney General McCaw introduced a bill into the Legislative Assembly. He described the proposed changes “A notable landmark in the judicial history of New South Wales,” and stated that in the comments of the Master of the Rolls it may be found a raise on debt for the establishment of a permanent Court of Appeal.
- 25 The bill did not affect the operation of the *Court of Criminal Appeal Act* and its Full Court character has continued. With a few exceptions the Court of Appeal inherited the business of the Full Court beyond appeals, including prerogative relief, contempt and the admission and disciplining of legal practitioners. The bill provided that there shall be a division of the Court to be called the Court of Appeal for reasons a little obscure. That was abandoned in 1970 and the term “division” no longer appears.
- 26 The Court was to comprise the Chief Justice, the President and not more than six Judges of Appeal. Judges of Appeal were also to be judges of the Court. Clause 21(6) granted to Judges of Appeal seniority, rank and precedence over all puisne judges of the Court, and to the President the same over all Judges of Appeal. Provision was also made for the Chief

Justice to nominate additional Judges of Appeal for matters current before the Court of Appeal.

- 27 In Parliament the only real subject of contention was cl 21C(6). The establishment of the Court required the selection of up to seven individuals as Judges of Appeal, thus disturbing the order of seniority in the Court unless subcl (6) was abandoned. This was a matter of great concern at the time to many judges of the Court, and as the former President observed in another article of his, *Judicial Supersession: The Controversial Establishment of the Court of Appeal* - might I say, with respect, a real page turner - that existing order was:

“Designed to fix the seniority within the Court so that, by reference to that clear standard, the deployment of the judges could be made within the Court in a manner that the judges, other members of the Court, the legal profession and the community could evaluate objectively.”

- 28 A number of opponents to change were the judges of the Court who themselves were ultimately appointed to the Court of Appeal. The opposition to this re-ordering was led in the Legislative Council by the former Attorney General, The Honourable R R Downing. He pointed to a number of matters such as the potential for such a change in precedent to reduce the esteem in which the Court of Criminal Appeal would be held, where the Full Court structure would continue to apply. The Government insisted on the change and the opposition allowed the bill to pass unamended. It received the Royal assent on 29 October 1965.
- 29 It appears that the change sadly engendered bitterness between some members of the Court, which endured for many years, otherwise the fears of its opponents proved without substance. On 3 November the Executive Council approved the commencement date of 1 January 1966 and the initial appointments to the Court were made.

30 Queensland, Victoria and Western Australia have each adopted the Court of Appeal model, but have included Criminal Appeals. Only Western Australia has not adopted the seniority approach of New South Wales. As to the division between division and emanation, the results are mixed. South Australia and Tasmania retain Full Courts. They operate in the Federal Court and the Supreme Court of Northern Territory. The Australian Capital Territory has what might be called a hybrid, owing to the service of non-resident judges. Thus, in conclusion, our Court of Appeal is a somewhat unique product of the conditions which were maintained in the mid-20th century in this State. If the Court pleases.

31 **MR G ULMAN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:**
May it please the Court. The 12 October 1965 was a pivotal moment in legal history when the then Liberal Government's Attorney General, Kenneth McCaw, a solicitor, introduced for a second time the *Supreme Court and Circuit Courts (Amendment) Bill*, the legislation which would create a permanent appellate court in this State. The legislation was multiple years and governments in the making. Its genesis can be found on the other side of the House, when the Labor Party was in government. In the end, though, it was the Askin Government that brought about the establishment of the Court of Appeal on 1 January 1966. As we have heard, Attorney General McCaw described the legislation as a landmark in judicial history.

32 *Hansard* also records the words of the then member for Randwick, who would later become Federal Attorney General and Deputy Prime Minister, The Honourable Lionel Bowen, when he rose to speak. On this occasion he was not speaking for the people of Randwick, but for the legal profession when he declared his wholehearted support for the principle of the Bill. He said it was, "Most acceptable to the profession and that it deserved implementation without any political heat."

33 According to Attorney General McCaw, the legal professional, the judiciary and the litigants of this State all needed this Court to be established. In a

paper that we have heard mentioned, published in 2008 by the then High Court Justice Michael Kirby as he then was, he referred to a significant address in 1951 at the University of Melbourne by Sir Raymond Evershed, who was the Master of the Rolls at the time. Bear in mind that this was 100 years after the establishment of the Chancery Court of Appeal. Speaking with the authority that comes from the English experience, Sir Raymond foreshadowed the innovation which would grip the Premier State 15 years later. He described the process of a Court of Appeal as “the combined judicial operation”. This, according to Sir Raymond, was achieved not by putting questions “merely to demolish an argument, to vex counsel or to indicate superiority of intellect. They are (he said) put as often to indicate to colleagues that your own apprehension of the case may not be quite in accord with what you understand to be theirs.”

- 34 Some 25 years later Attorney General McCaw also adopted the term “combined judicial operations” in his Second Reading Speech. He was somewhat less delicate when he described it as “Two heads are better than one, if they truly work together”.
- 35 The establishment of a permanent appellate court in New South Wales was as much a matter of pragmatism as it was of judicial principle. In 1912 a body of rotating judges of the Supreme Court formed the New South Wales Court of Criminal Appeal. In the absence of a corresponding arrangement in civil courts, a growing backlog of cases was generating a deadlock that someone needed to break. Much like today, the legal profession in 1965 was alarmed by these backlogs and delays in hearings.
- 36 Buoyed by the international progress in Canada and New Zealand, the profession believed that permanent employment of Judges of Appeal was the best way to break the backlog. As the first, most populous and probably the most litigious State, New South Wales was the natural choice for Australia’s first intermediate appellate court. The Court’s establishment was an ambitious institutional reform, a reform significant not just for the State, but for the country as the first of its kind in Australia.

- 37 The Government of the day was determined to be perceived as a force for bold law reform and the people of New South Wales were all the better for it. The creation of the Court was the first in a chain reaction of law reforms across the country, with other States and territories replicating the changes in their own jurisdictions.
- 38 Before concluding, I would like to briefly step back in time, back to the early part of 1966, following the Court's establishment, and make a few observations that touch on the legal landscape at the time. Reading some of the cases decided in the first few months of 1966 it is hard not to take notice of some of the legal personalities who appeared before the Court and the impact that they had on the law of this State and beyond. A few stand out and I shall mention their names as they appeared in the reports at the time. They include A F Mason QC, J W Smyth QC, L Murphy QC, Ms C W Backhouse, M D Finlay, C R Allen, E G McGregor, N K Wran and H H Glass.
- 39 As for their instructor firms, some mentioned in the reports still continue to this day under their 1966 names; for example, Shaw McDonald and McCulloch & Buggy. Not unexpectedly after 50 years there are other firms, such as Stephen Jaques & Stephen, Dawson Waldron Edwards & Nicholls, and Ebsworth & Ebsworth, who have been reshaped and rebadged by the mergers. There are, not unsurprisingly, other firms that have simply ceased to exist. I also note that the Law Society, under the then presidency of Allen Allen & Hemsley partner, William Stephenson, as part of its regulatory function, was a frequent supplier of work to the Court of Appeal. I have been able to find at least four reported cases that were decided by the Court between February and May 1966, all, I might add, decided in favour of the Society.
- 40 Chief Justice Bathurst has said that at its best the Court functions as a select collection of the State's finest legal minds. The quality of the appellate judgments and indeed the fine reputation of our Judges of

Appeal speaks for itself. It was the Honourable Michael Kirby who said that this Court was “An innovation sustained by its results”. Looking around me this morning at the Judges of Appeal, former Judges, and thinking of the judgments that have arisen within this Court, his words could not ring more true. As the Court pleases.

- 41 **BEAZLEY P:** Thank you, Chief Justice. 14 February 1966 ushered in a dramatic change in the coinage of our nation from pounds, shillings and pence to decimal currency. On the Monday before that, that well-known jingle, *14 February 1966* (I will not sing it, but you will all remember it), jangled across the airwaves for the last time, a similarly fundamental but less heralded change was made to the coinage of the New South Wales judicial system.
- 42 On 8 February 1966, seven judges: Justice Herron, the then Chief Justice, and Justices Wallace, Sugerman, McLelland, Walsh, Jacobs, Asprey and Holmes, filed onto the bench of the Banco Court in the old Supreme Court building in King Street, and in about 500 words, the Chief Justice announced the day as one of special significance, “for it marks the first sitting of a new division of the Supreme Court, called the Court of Appeal.”
- 43 The Chief Justice announced that Justice Wallace was the President and that the assembled judges had been duly appointed by commission to be Judges of Appeal. The Chief Justice continued:
- “We set about our new statutory tasks with enthusiasm and with determination, so far as practical, to dispose of the list with dispatch, with economy to the litigants and with a minimum of delay, keeping steadily in mind the importance of the matters entrusted to us.”
- 44 The Chief Justice concluded by calling for the cooperation of the profession and he then declared the first term of 1966 open. The then Chief Justice having taken control of that ceremony, I acknowledge the graciousness of the present Chief Justice, The Honourable T F Bathurst

AC in providing me with the opportunity to speak for the Court on this occasion.

- 45 Something else not shared by that historic occasion with today's ceremony is the presence of the Profession. By happenchance, a young solicitor had a little time to spare in the week prior to his admission to the Bar and wandered into the open courtroom, almost the sole observer of that momentous occasion. The Honourable John Bryson QC, Judge of the Court of Appeal from 2004 to 2007, and a judge of the Equity Division from 1988, recalls that there was scarcely room for all judges on the bench of the Banco Court, in the then Supreme Court building in King Street, as they sat uncomfortably crowded together in long wigs and full ceremonial robes. He counts that poorly attended, slightly embarrassing occasion as part of his personal legal history. It is fitting that he is here today, this time sitting on the bench as a former judge of the Court of Appeal.
- 46 Following the Chief Justice's declaration of the opening of the law term, the Court was reconstituted. The President and Justices Jacobs and Asprey proceeded to hear the Court's first case, *Chirray v Christoforidis*, a damages claim arising from a motor vehicle. The Honourable Peter Young QC, then a junior of two years' standing, appeared for the respondent plaintiff, and Longsworth QC and Waddy for the appellant insurer. Whilst the young Mr Young had been stunningly successful before the jury, Longsworth QC prevailed before the new appellate court in a judgment delivered ex tempore. The jury verdict of 7,324 pounds and five shillings was reduced to 4,342 pounds and that ubiquitous five shillings. The Court papers for both the trial at first instance and the Court of Appeal are here with us on the bench today [a slim folder comprising half a dozen pages]. I commend them to your reading [laughter].
- 47 Whether that experience prompted Mr Young to focus on the law of equity, where he pursued his illustrious career as a barrister, a Judge of the Equity Division, Chief Judge in Equity and as a Judge of Appeal, is a story to be left to his telling.

- 48 The bound judgments for 1966 which we have on the bench this morning are as tactile as they are insightful, the cast of the typewriter clearly felt on every page, and only a rare overtyping of a spelling error to be found. In the 401 judgments delivered that year, there was a proliferation of *ex tempore* judgments and, in a computer-less age, fewer words were used in the administration of appellate justice in New South Wales than has occurred in later eras of the Court. There are, however, indications that the wheel is turning full circle.
- 49 Since the appointment of the first six Judges of Appeal, there have been 51 further appointments to the Court, including a further eight Presidents: Bernard Sugerman, Kenneth Jacobs, whose wig I wear, Athol Moffitt, Michael Kirby, Dennis Mahoney, Keith Mason, James Allsop and myself. Four of us are on the bench this morning and another, Chief Justice Allsop, has just slipped in to the body of the Court, having been detained by official duties. In that time, five Justices have followed Sir Leslie Herron, Sir John Kerr, Sir Laurence Street, Murray Gleeson, James Spigelman, who sits with us today, and our present Chief Justice.
- 50 As we have heard today and as is well chronicled, the relations between the new court and the trial judges of the Supreme Court were severely affected by the judicial supersession that invariably occurs with the creation of a new appellate court. Our sister court in New Zealand, now presided over by President Justice Ellen France, also present today (as are Presidents McMurdo and Maxwell from Queensland and Victoria), experienced the same birthing pains nearly a decade earlier, when it established its Court of Appeal. The deeply felt wounds in that Court are revealed in correspondence between Justice North, one of the appointed judges, and Justice Adams, who was not accorded the honour.
- 51 As Justice Adams wrote to Justice North, in sentiments which I think would have been reflected in this Court, he said:

“I regard it as an insult that a junior judge and an outsider should have been appointed without even inquiring whether I was prepared to act. And this is the thing that hurts, not one of my brethren took the trouble to inquire what my wishes or desires might be.”

- 52 Despite those sad words, the correspondence between those judges was nonetheless polite and even gentle. Not so in New South Wales, a robust jurisdiction at any time. It is said, for example, of Justice Else-Mitchell, and I quote, “That he resented the Court’s creation and opposed it with vigour”.
- 53 Although Chief Justice Herron pronounced the Court to be a division of the Supreme Court, later commentators, by reference to s 38 of the *Supreme Court Act*, have described the Court of Appeal as “A court within a court”. That interpretation invokes for me an image of the cathedral which sits inside the mosque building in Cordoba in Spain. The analogy is totally visual, not an accurate representation of the history of those amazing structures, but nonetheless I think it says it well.
- 54 Whatever be the proper construction of s 38, the reality is that through successful Chief Justices the Supreme Court as a whole has developed as a cohesive, collegiate body, with all judges committed to the mutual goal of administering justice according to law in accordance with our judicial oaths.
- 55 It is a truism that changes in legislation can have an impact upon the workload of the Court, as can the exigencies occurring in jurisdictions from which appeals lie to the Court. Recent changes in motor accident legislation are the classic example.
- 56 Likewise changes in dispute resolution processes have had their impact. The result, either appropriately or contrarily, depending upon one’s point of view, is that the work of the Court has become increasingly complex and the workload consequentially more onerous, albeit of huge interest and often of great public importance. The challenges to planning approvals for major infrastructure works, the proper construction of the preference

provisions of the *Corporations Act*, and the meaning of the many important contracts that fall to be construed by the Court are a miniscule sampling of the Court's daily fare.

57 The constant theme throughout the history of the Court has been the reduction of delays and the need for efficiency and economy, not only on the part of the Court but on the part of the Profession as well. The Court throughout its history has striven to ensure that matters are heard and determined as expeditiously as possible. We are greatly assisted in our work by the Registrar of the Court and our small Registry, today represented by Harry Jones, Karla Worboys and Jane Yesma, and by legally qualified research staff. They deserve recognition and praise for the work they do.

58 The words of Chief Justice Herron on 8 February 1966, and the sentiments therein expressed at that first ceremonial sitting of the Court, were not only historically significant but were prophetic. The Judges of the Court for the past 50 years have been, and are, as enthusiastic and as determined as the first Judges of Appeal, which has given this Court its reputation as a highly accomplished intermediate Court of Appeal. Likewise, the cooperation of the Profession is as essential and integral today to the efficiency of the Court as it was then. As to the future, there are some who predict that our judgments will be written by robots. All that can be said if that should occur, is we wish them the best of luck [much laughter].

59 **BATHURST CJ:** The Court will now adjourn
