

AN INSIGHT INTO APPELLATE JUSTICE IN NEW SOUTH WALES

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Introduction

- 1 The earliest colonial judicial system in New South Wales was established by Letters Patent dated 2 April 1787,¹ shortly prior to the First Fleet's departure from England. The Letters Patent, known as the First Charter of Justice, established a Court of Civil Jurisdiction, to be constituted by the Deputy Judge-Advocate and two "*fit and proper persons*", and a Court of Criminal Jurisdiction, to be constituted by the Deputy Judge-Advocate and six military personnel.²
- 2 The Letters Patent made provision for an appeal to the Governor, with a further right of appeal to the King in Council if more than 300 pounds was involved.³ It was nearly forty years later, in 1823, when the Charter of Justice established the Supreme Court of New South Wales and made it a court of record.⁴ The Charter named the first Chief Justice as Sir Francis Forbes, whom we now honour in this lecture series.
- 3 The Charter provided a limited right of appeal to the Privy Council from decisions of the New South Wales Court of Appeals – a body which Meagher, Gummow and Lehane point out was "*a judicial body whose existence was*

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¹ Made under the *New South Wales Act 1797*, 27 Geo. IV, c. 2 B and C 18.

² This is not a lecture about New South Wales' legal dynasties, but a paper such as this would not be complete without reference to the Garling or Street families. The position of Deputy Judge-Advocate was later held by Frederick Garling, who assumed the role in an acting capacity in 1815 following the death of Ellis Bent.

³ New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965, 1342 (A.D. Bridges).

⁴ JD Heydon, MJ Leeming and PG Turner, *Equity: Doctrines and Remedies* (Butterworths, 5th Ed, 2015) 13.

assumed by the Charter but not defined therein".⁵ The authors refer to the 1823 Act, which provides that the Governor of New South Wales shall act as a Court of Appeals from the Supreme Court of New South Wales. This Court of Appeals was abolished in 1828. An alternative provision for appeals was not then made until 1850, when an Order-in-Council granted an appeal as of right from the Supreme Court to the Privy Council for matters involving more than 500 pounds.⁶

- 4 By the mid-Nineteenth Century, courts across Australia were gaining recognition as appellate bodies in their own right.⁷ Legislatures bestowed a variety of appellate style functions on Supreme Courts. In New South Wales, the *Administration of Justice Act 1841* (NSW) recognised a full court of the Supreme Court as an appellate body.⁸ The *Supreme Court Appellate Jurisdiction Act 1884* (NSW) was later passed to regulate the constitution of the Supreme Court sitting in Banco, with section 2 providing that "*the Court on the hearing of any such appeal or motion shall consist of three judges*".
- 5 In the criminal context, there was no provision for appeals in the first days of the colony. This accorded with English legal practice of the time.⁹ However, relief against guilty verdicts was available in the form of an executive pardon, granted by the Governor. It would appear that the pardon was used with some liberality. The first pardon was granted on 11 February 1788, less than three weeks after the First Fleet's arrival at Botany Bay, on the first day of operation of the Court of Criminal Jurisdiction, in the case of *R v Cole*.¹⁰

⁵ Ibid.

⁶ Ibid, citing the Order-in-Council of 13 November 1850.

⁷ Alex C. Castles, *An Australian Legal History* (The Book Company Limited, 1982) 334-5.

⁸ Ibid.

⁹ Criminal appeals were not introduced in England to a substantial extent until the passing of the *Criminal Appeal Act 1907*: Lester B. Orfield, 'History of Criminal Appeal in England' (1936) 4(1) *Missouri Law Review* 326, 326.

¹⁰ [1788] NSWKR 3.

- 6 Whilst the purpose of the Governor’s pardon was not the correction of error, it operated to ameliorate a harsh outcome resulting from the apparent misapplication of legal principle.
- 7 *R v Sherman and Freeman*¹¹ was heard less than three weeks after *R v Cole*. The two accused in that case were found guilty of the taking of 15 half pounds of flour. Sherman was sentenced to 300 lashes but was pardoned. Freeman, the ringleader, was sentenced to death. He was also pardoned – on the foot of the gallows – but only on the condition that he assist the Governor by becoming the colony’s first public executioner.
- 8 The Court of Appeal was established in its current, permanent form in 1965 by the *Supreme Court and Circuit Courts (Amendment) Bill*,¹² becoming the first separate intermediate appellate court in Australia. The Court celebrated its 50th anniversary last year. Prior to the creation of the Court, the Chief Justice selected a Full Court at the beginning of each term to hear appeals.
- 9 Much has been written about the events of 1965, and the so-called “storm in a teacup” that ensued when the permanent Court was created. It was considered particularly controversial that the new Court disturbed the established seniority, rank and precedence of the Supreme Court justices.¹³ Lawyers are notorious gossips, and the professional gossip of the time was

¹¹ [1788] NSWKR 4.

¹² In 1965, the Court of Appeal comprised the President Sir Gordon Wallace and six judges of appeal: Sir Bernard Sugerman, The Hon Charles McLelland, Sir Cyril Walsh, Sir Kenneth Jacobs, The Hon Kenneth Asprey and The Hon John Holmes Dashwood. Sir Bernard Sugerman and Sir Kenneth Jacobs later served as President of the Court from 1970-1972 and 1972-1974 respectively. Their Honours were followed as President by The Hon Athol Moffitt (1974-1984), The Hon Michael Kirby (1984-1996), The Hon Dennis Mahoney (1996-1997), The Hon Keith Mason (1997-2008), The Hon James Allsop (2008-2013) and The Hon Margaret Beazley (2013-present).

¹³ See, eg, Michael Kirby, ‘Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal’ (2008) 30 *Sydney Law Review* 177, 181.

that the Liberal Party established the Court of Appeal to reconfigure the bench after two decades of Labor government.¹⁴

- 10 However, gossip is also notoriously unreliable. Recourse to historical archives demonstrates that the legislators were pursuing three major goals by the establishment of a permanent Court: efficiency, collegiality and expertise. This paper discusses these three aims and their unique relevance to intermediate appellate courts. It will then consider the jurisprudence of the Court in the context of legal, political and societal issues of the last 50 years, and the way that various judges have navigated the transition from this Court to the High Court of Australia.

The importance of permanent appellate courts

- 11 Efficient courts are an essential accessory to commercial activity, as the High Court explained in *Aon Risk Services Australia Ltd v Australian National University*.¹⁵ In that case, Justice Heydon, after observing that “*commercial life depends on the timely and just payment of money*”, stated that “*the efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce*”.¹⁶ Litigation has the potential to generate financial uncertainty and hardship, as well as reputational damage. This impact is worsened if proceedings are unduly drawn out and delayed.
- 12 It is for this reason that efficient administration of justice was a central goal of the legislature in establishing a permanent Court of Appeal. Arguably, it was the primary goal.
- 13 The impracticality of the Full Court system was made plain by Attorney General Sir Malcolm McCaw in the Bill’s Second Reading Speech. McCaw lamented that under a rotational system, “*judges who sit on an appeal can be*

¹⁴ Ibid 180.

¹⁵ [2009] HCA 27; (2009) 239 CLR 175.

¹⁶ Ibid [137] (Heydon J).

called away to *nisi prius* work sitting with juries, even away in the country on circuit work, remote from their libraries and without the immediate opportunity of conference of the appellate tribunal'.¹⁷ Existing inefficiencies in the Court's conduct were exacerbated by an increasing volume and complexity of litigation and appeals, which had more than doubled since 1948.¹⁸ This was probably attributable to a number of factors: the advent of the modern motor vehicle and the consequent motor vehicle accident claims,¹⁹ an increase in landlord/tenant cases, and an emerging class of appeals arising from statutory tribunals.²⁰ By 1965, the number of Supreme Court judges had been increased to 25 to account for this rapidly expanding workload.²¹

- 14 It is also clear that efficiency was a major impetus for reform across the Tasman, where a permanent Court of Appeal had been established in 1957. As early as 1934, an article in the *New Zealand Law Journal* pointed to the inconvenience of an appeal court that repeatedly switched between judges.²² In one important case involving ownership of the bed of the Whanganui River, Justice Northcroft died before expressing his view, such was the delay in exchanging draft judgments.²³
- 15 The New Zealand reforms proved to be extremely successful, and became a major influence on the decision to move to a permanent model in New South

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 1965, 1261 (Sir Malcolm Kenneth McCaw).

¹⁸ *Ibid.*

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965, 1341 (A.D. Bridges).

²⁰ Letter from Sir Kenneth Street to Robert Reginald Downing, 5 June 1958, cited in Michael Kirby, above n 14, 188.

²¹ New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965, 1342 (A.D. Bridges). There are now 59 judges of the Supreme Court (including Acting Justices, Acting Justices of Appeal and the Chief Justice), 10 of whom are Judges of Appeal.

²² C H Weston, 'The Court of Appeal: A Suggested Reform' (1934) 10 *New Zealand Law Journal* 180; C H Weston, 'Retirement of the Chief Justice' (1946) 22 *New Zealand Law Journal* 187, 192, both cited in Peter Spiller, *New Zealand Court of Appeal 1958 – 1996: A History* (Thompson Brookers, 2002) 2.

²³ Spiller, above n 23, 2.

Wales. Indeed, Sir Leslie Herron, Chief Justice of New South Wales from 1962 to 1972, visited New Zealand and remarked that “*internal difficulties*” caused by the establishment of a permanent Court of Appeal were “*successfully negotiated in New Zealand, where the reform now works well*”.²⁴

16 Attorney General McCaw also expressed his approval for the New Zealand model: “*it appears, for quite good reason, that the [NSW] bill has been modelled on the New Zealand legislation*”.²⁵ It was also highlighted that the drafters had regard to legislation in Ontario and England, where permanent courts of appeal were established in 1881 and 1934 respectively.²⁶

17 Attorney General McCaw stressed – on a number of occasions – that the Court of Appeal would be a division of the Supreme Court, rather than a separate or new court entirely.²⁷ This was important to preserve existing appeal rights to the High Court and Privy Council. Accordingly, section 21B(1) of the Act expressly provided that: “*there shall be a division of the Court to be called the Court of Appeal*”.²⁸

18 The legislative statement in s 38 of the *Supreme Court Act 1970* is a little different. The section bears the heading “*Divisions of [the] Court*”, and provides that “for the more convenient despatch of business the Court shall be divided into: (a) the Court of Appeal and ((b) the following Divisions: (i) the Common Law Division; and (ii) the Equity Division”. The wording of s 38 is

²⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965, 1344 (A.D. Bridges).

²⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 1965, 1264 (Sir Malcolm Kenneth McCaw).

²⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965, 1342 (A.D. Bridges).

²⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 1965, 1261, 1263 (Sir Malcolm Kenneth McCaw).

²⁸ *Supreme Court and Circuit Courts (Amendment) Act 1965* s 21B(1).

undoubtedly the source of Michael Kirby's firmly held view,²⁹ and the one which seems to have held at least sway with successive Presidents.

- 19 The second goal of a permanent Court of Appeal – collegiality – is strongly linked to efficiency. A permanent court promotes physical collegiality, which in turn stimulates judicial camaraderie, communication and greater intellectual collaboration. McCaw reflected on these benefits in the Bill's Second Reading Speech, arguing that "*this measure will allow members of the judiciary to sit more frequently together to learn and to make best use of the faculty of the combined judicial operation*".³⁰

- 20 The third goal of a permanent court – expertise – recognises that appellate and trial judges exercise different (but equally essential) judicial functions. Trial judges are required to follow complicated factual scenarios,³¹ direct juries, make rulings on the admissibility of evidence, and assess the character and credibility of witnesses. In contrast, the appellate function places greater emphasis on "*theory, principle and conceptualisation*" of the law.³² By practicing one of these disciplines on a permanent basis, a judge's skillset is strengthened.

- 21 As the New South Wales Court of Appeal is a generalist appellate court which does not have specialist lists, each judge hears the full range of civil matters. However, throughout the Court's history judges known for a particular area of expertise have significantly contributed to jurisprudence and legal debate in their respective fields.

²⁹ See, eg, Kirby, above n 14, 194.

³⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 1965, 1263 (Sir Malcolm Kenneth McCaw).

³¹ Michael Kirby, 'Permanent Appellate Courts – The Debate Continues' (1988) 3 *Australian Bar Review* 51, 56-7.

³² *Ibid.*

- 22 Handley JA is a well-known expert in the area of estoppel. While on the bench, he sat on a number of significant estoppel cases and delivered judgments which expanded the Court's jurisprudence in this area.³³ In *Saleh v Romanous*³⁴, his Honour held that a collateral promise which is not able to be enforced as a contract can still be enforced as a promissory estoppel, enforceable as an equitable restraint on the exercise or enforcement of the promisor's rights. The High Court refused special leave to appeal.³⁵ His Honour has also written extensively on this topic in an extra-curial capacity, including the publication of a book *Estoppel by Conduct and Election*.³⁶
- 23 In a similar manner, Justice Keith Mason is known for his expertise in restitution, and has co-authored a leading text on the topic.³⁷ Justice Campbell is widely recognised for his expertise in contract law, and Chief Justice Allsop is well-known for his interest in and contribution to the jurisprudence of maritime law. However, the Supreme Court is rarely a port of call for that area of jurisprudence.³⁸ Thus it is to Chief Justice Allsop's contribution, whilst President of the Court, to contract law to which I make reference. In *Franklins Pty Ltd v Metcash Trading Ltd*,³⁹ for example, his Honour considered the use of surrounding circumstances in the interpretation of contracts.

³³ See, for example, *DeLaforce v Simpson-Cook* (2010) 78 NSWLR 483; *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728.

³⁴ (2010) 79 NSWLR 453.

³⁵ *Saleh v Romanous* [2011] HCATrans 101.

³⁶ K R Handley, *Estoppel by Conduct and Election* (Thomson, 2nd ed, 2016).

³⁷ See, eg, Keith Mason, John Carter, Greg Tolhurst, *Mason and Carter's Restitution Law in Australia* (Butterworths, 3rd ed, 2016);

³⁸ The following two cases might be considered Maritime cases: *J Gasden Pty Ltd v Australian Coastal Shipping Commission* [1977] 1 NSWLR 575, which concerned an action in negligence against a shipowner for water damage, and *CSL Australia Pty Ltd v Formosa* (2009) 235 FLR 273; [2009] NSWCA 363, which concerned a claim for personal injury damages for an accident which occurred on board a ship and the question of whether the dispute was in federal jurisdiction (the Court on this occasion was constituted Allsop P, Basten J and Handley AJA).

³⁹ [2009] NSWCA 407.

24 In *United Group Rail Services Limited v Rail Corporation New South Wales*,⁴⁰ his Honour considered the requirement for certainty with respect to an agreement to undertake genuine and good faith negotiations in a commercial dispute resolution clause. Having set out the contractual term in issue his Honour referred not only to New South Wales law⁴¹ but to international commercial law cases⁴² and stated that:

“So reading the clause, it can be seen to require the totality of likely disputes between the parties to be dealt with by the clause. No evidence is needed to appreciate that an engineering contract for the designing and building of new rolling stock for Railcorp could lead to complex disputes, which, if litigated, could be productive of very large legal and associated forensic costs. As I said in *Comandate Marine Corporation*...:

‘[192] ... An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. Disputes arising from commercial bargains are unavoidable. They are part of the activity of commerce itself. Parties therefore often deal with the possibility of their occurrence in advance by the terms of their bargain ...’”

Changing Court of Appeal jurisprudence

25 Whilst the areas of tort, contract and equity as well as cases of judicial review have been and remain a constant feature of the Court of Appeal’s jurisprudence in its fifty year history, the jurisprudence of the Court is both reactive to and is often integral to the social, medical and political issues of the day. So too is the Court’s jurisprudence impacted by innovative or remedial legislative regimes.

⁴⁰ [2009] NSWCA 177.

⁴¹ *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165–166 (Gleeson CJ, Meagher JA and Sheller JA agreeing); *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87 [162]–[187] (Allsop J, Finn J and Finkelstein J agreeing).

⁴² *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd’s Rep 254 at 260 [31]; *David L Threlkeld & Co Inc v Metallgesellschaft Ltd (London)* 923 F 2d 245 (2nd Cir 1991).

26 Contract law cases involving ships and sailors⁴³ have given way to cases involving the carriage of livestock by air and the application of international conventions.⁴⁴ The Court now deals with cases involving data integration software,⁴⁵ defamation over the internet,⁴⁶ and the leasing of electricity poles.⁴⁷ The legal issues coming before the Court will continue to evolve, undoubtedly requiring the Courts to consider the complex range of legal and ethical questions surrounding drones and driverless motor vehicles, or the legal implications arising from the use of blockchain and bitcoin technology.

Decisions of significant social impact

27 Judges are not politicians. Our task is not to take pre-determined stances, but to decide cases upon the facts established by the evidence and having regard to the submissions of the parties made in open court.⁴⁸ Equally, notwithstanding the fact finding function of judges, especially at first instance, judges are not juries, which exist to “personify the people”.⁴⁹

28 However, the Court’s jurisprudence is not divorced from social standards. The Court’s jurisprudence is significantly shaped by societal and political issues of the day, encompassed as they become in the litigation before the Courts.

29 Some proceedings specifically challenge the Court’s thinking on prevailing or emerging community values, itself raising the question as to what are “community values”.

⁴³ See, eg, *J Gasden Pty Ltd v Australian Coastal Shipping Commission* [1977] 1 NSWLR 575.

⁴⁴ *Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd* [2017] NSWCA 216.

⁴⁵ *Semantic Software Asia Pty Ltd v Ebbsfleet Pty Ltd* (heard 14-15 September 2017).

⁴⁶ See, eg, *State of New South Wales v Frawley* [2006] NSWCA 317.

⁴⁷ *Streetscape Projects (Australia) Pty Ltd v City of Sydney (No 2)* [2013] NSWCA 240.

⁴⁸ Anthony Mason, ‘The Courts and Public Opinion’ (Speech delivered at the National Institute of Government and Law Public Lecture, Parliament House, Canberra, 20 March 2002).

⁴⁹ *Ibid.*

30 In *Norrie v NSW Register of Births, Deaths and Marriages*,⁵⁰ the Court of Appeal found that as a matter of construction, the word “sex” does not bear a binary of “male” or “female”. While the case was brought in the context of increased understanding about transsexuality and intersexuality, I acknowledged that:

“Matters such as gender identity and sexual preferences are often overlain with social, moral and religious considerations that may vary widely in different segments of the community. The law's role in the regulation of such matters may itself be controversial or, at the least, influenced by the different views within the community on such matters.”⁵¹

31 Nevertheless, I concluded that:

“...the fact that particular language may be in a state of evolution and that a changed or extended meaning may not have universal acceptance, does not mean that the traditional meaning of the word must be taken as the meaning of the word as a matter of common usage.”⁵²

32 The evolution of language, to say nothing of the changes in society, is also evident in *House of Peace Pty Ltd v Bankstown City Council*,⁵³ where the Court was asked to construe the meaning of the word “church” within the context of a 1954 development consent. President Mason, with whom Justices Stein and Giles agreed, held that:

“The 1954 consent was not concerned to ensure that liturgy remained orthodox according to Christian standards. It was concerned to authorise the use of a building inter alia as a “church”, the word being apt to the proposed building but illustrative of the genus of a place of public worship being the relevant purpose in the County of Cumberland Planning Scheme.”⁵⁴

⁵⁰ (2013) 84 NSWLR 697.

⁵¹ Ibid 733 (Beazley ACJ).

⁵² Ibid.

⁵³ (2000) NSWLR 498.

⁵⁴ Ibid 511.

Accordingly, “church” was deemed sufficiently wide to encompass a proposed use in 1995 as a mosque.

- 33 It is not correct to say therefore that the law always follows, dealing only with past events.
- 34 *Gradidge v Grace Brothers*⁵⁵ is one illustration. Ms Gradidge was deaf, and was accordingly provided with an interpreter to translate the hearing into sign language. While Ms Gradidge was being examined as a witness, counsel for Grace Brothers objected to the interpreter translating an argument concerning the admissibility of certain evidence. It argued that there was no means of checking what was being said, and that it gave the impression of a private conversation between the witness and interpreter. The trial judge directed that the interpreter should desist. The interpreter refused, and so the matter was adjourned.
- 35 The Court of Appeal unanimously held that the trial judge erred in law by making this direction. An earlier High Court decision⁵⁶ held that witnesses are not entitled, as of right, to give evidence in their “*native tongue*” through an interpreter.⁵⁷ However, President Kirby distinguished this authority: the interpretation here was not necessary to translate the language of a witness, but to ensure basic communication with a party.⁵⁸
- 36 Since *Gradidge*, significant strides have been made in providing deaf litigants, defendants and witnesses with access to interpreters. The Supreme Court does not charge a fee to defendants using an interpreter in criminal matters. Professional interpreters are provided by the Languagee Services division of

⁵⁵ (1988) 93 FLR 414.

⁵⁶ *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464.

⁵⁷ *Ibid.*

⁵⁸ *Gradidge v Grace Brothers Ltd* (1988) 93 FLR 414, 424.

Multicultural NSW, which provides interpretation and translation of 100 dialects and languages, including Auslan.⁵⁹

- 37 Interestingly, the High Court recently held in *Lyons v Queensland*⁶⁰ that the Queensland Court of Appeal did not err in holding that Ms Lyons – who is deaf – was not discriminated against when she was excluded from jury service. This is not necessarily inconsistent with *Gradidge* because the Court’s reasoning turned substantially upon the mechanics of the *Jury Act 1995* (Qld) and the common law surrounding jury secrecy.
- 38 The Court’s jurisprudence is equally shaped by the manner in which matters are brought before it. This is particularly apparent when the Court is asked to decide appeals as a matter of urgency. In *First Pacific Advisors LLC v Boart Longyear Limited*⁶¹ the Court dismissed an appeal brought by First Pacific against orders made under s 411 of the *Corporations Act* convening meetings of Boart’s creditors, which were to consider two schemes of arrangement. These orders were made by Justice Black on 10 May 2017, who heard the matter on 4 and 5 May.⁶² Given the urgency of the impending deadline, the Court of Appeal heard the matter two weeks later on 23 May. Chief Justice Bathurst, myself and Justice Leeming concurring, delivered a decision only 3 days later on 26 May. In a context of increased global connectivity and the rapidity of commercial dealings via the internet, these scenarios will only become more frequent.

Decisions of significant political impact

⁵⁹ Supreme Court of New South Wales, *Interpreters and Translators* (10 February 2017) <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_facilitiesupport/sco2_interpretersandtranslators.aspx>.

⁶⁰ [2016] HCA 38.

⁶¹ [2017] NSWCA 116.

⁶² *In the matter of Boart Longyear Limited* [2017] NSWSC 567.

39 The Court of Appeal is also not immune from considering key political issues of the day. A quintessential example is the *Spycatcher Case*,⁶³ in which the United Kingdom Government sought an injunction against Heinemann Publishers to restrain the publication of Mr Wright's memoirs *Spycatcher*. The claim was made on the basis that Mr Wright drew substantially upon confidential knowledge and information acquired during his employment at the British Security Service (MI5). A majority of this Court (Chief Justice Street dissenting) dismissed the appeal, although differed on the basis for rewarding relief.

40 Justice McHugh held that, in the absence of a contract between the parties, the appellant could only succeed by establishing that the disclosure of the information would be detrimental to the public interest of the United Kingdom, and that Australian courts will not hear an action requiring them to make such a judgment. In contrast, President Kirby relied on principles of private international law – a view ultimately endorsed by the High Court, which found:

“...the action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign State. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service as "part of the Defence Forces of the country"...”⁶⁴

41 The Hon Justice Kirby has also cited *Spycatcher* as evidence of the evolution of legal independence in Australia from the United Kingdom. His Honour held that that the United Kingdom should be classified as a “*foreign state*”,⁶⁵ and rejected that special significance should be attached to comity between countries of the Commonwealth, as “*to say otherwise is to deny the self-respect and independence of the members of the Commonwealth of Nations*”.⁶⁶

⁶³ *AG (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86.

⁶⁴ *AG (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 46.

⁶⁵ *AG (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 138.

⁶⁶ *Ibid.*

- 42 In more recent times, the Court has again been asked to consider questions with political implications. Cases surrounding the Obeid family (both civil and criminal) ⁶⁷ and cases examining the jurisdiction and conduct of ICAC investigations are key examples. In *Cunneen v Independent Commission Against Corruption*,⁶⁸ the Court held that conduct “adversely affecting” the honest and impartial exercise of official functions must affect the *probity* of the function, not simply its *efficacy*. Legislative amendments reversing this decision were upheld by the Court of Appeal (and later the High Court) in *Duncan v Independent Commission Against Corruption*.⁶⁹
- 43 In that case, the Court of Appeal held that ICAC was required to identify a relevant government function before determining whether the conduct in question “could adversely affect” the exercise of this function, which in this case was limited to the body responsible for determining the future granting of a mining lease.⁷⁰
- 44 These cases illustrate the nature of the interface between the Court and government: namely that of administrative law oversight, not merits review. In *Duncan* it was the review of a report of a statutory body charged with investigating governmental corruption.
- 45 Administrative law oversight of government functions is not limited to issues such as corrupt conduct. For example, it lies at the heart of the series of cases the Court has considered over the last year regarding the legality of the

⁶⁷ See *Obeid v R* [2017] NSWCCA 221. Earlier this month, the Court of Appeal heard an appeal from the Supreme Court decision in *Obeid v Ipp* [2016] NSWSC 1376.

⁶⁸ [2014] NSWCA 421, 5 December 2014. This decision was upheld by the High Court in *ICAC v Cunneen* [2015] HCA 14.

⁶⁹ [2016] NSWCA 143.

⁷⁰ *Ibid* [194], [460], [613]-[614]. The Court’s finding that a director’s duties pursuant to s 184(1) of the *Corporations Act 2001* (Cth) may not be fully satisfied by directors removing themselves from positions of potential conflict as the Act also imposes positive duties of disclosure on company directors is also worthy of note: [473]; [623]-[641].

procedure by which the proposed local council amalgamations were being conducted.⁷¹

- 46 A key issue in these cases was the role of external expertise in government decision-making and the extent to which, as a matter of legal principle, any such advice or material should be made available to the public. In both the *Ku-ring-gai Council*⁷² and *Hunter's Hill Council*⁷³ proceedings the Court split on this issue, demonstrating the complexity of modern political and societal issues and their legal implications.
- 47 In a similar vein, and in response to growing environmental concerns, the Court has increasingly been asked to consider cases concerning the approval of mines⁷⁴ or, more recently, coal seam gas exploration.⁷⁵ The most recent of these cases was *4nature Incorporated v Centennial Springvale Pty Ltd*,⁷⁶ where the Court held that a development consent granted to extend the Springvale coal mine was invalid. It should be noted that once again, in these cases the Court is engaged in an administrative law assessment of the decision-making process and is not directing its attention to the merits of the actual decision.
- 48 Thus, while the Court of Appeal is often called to consider questions of political import, the distinction between the legislative and judicial branches of government remains essential. This much was emphasised in the *BLF* case,

⁷¹ *Hunter's Hill Council v Minister for Local Government*; *Lane Cove Council v Minister for Local Government*; *Mosman Municipal Council v Minister for Local Government*; *North Sydney Council v Minister for Local Government*; *Strathfield Municipal Council v Minister for Local Government* [2017] NSWCA 188; *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54; *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380.

⁷² [2017] NSWCA 54.

⁷³ [2017] NSWCA 188.

⁷⁴ See, eg, *Ashton Coal Operations Pty Ltd v Hunter Environment Lobby Inc* [2015] NSWCA 358; *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105.

⁷⁵ *People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd* [2017] NSWCA 46.

⁷⁶ [2017] NSWCA 191.

where President Kirby rejected the notion that the right to have an appeal determined by this Court ran “so deep” that the legislature cannot disturb it. His Honour:

“[did] so in recognition of years of unbroken constitutional law and tradition in Australia and, beforehand, in the United Kingdom... I also do so in recognition of the dangers which may attend the development by judges (as distinct from the development by the people's representatives) of a doctrine of fundamental rights more potent than Parliamentary legislation. Such extra-constitutional notions must be viewed with reservation not only because they lack the legitimacy that attaches to the enactments ultimately sanctioned by the people. But also because, once allowed, there is no logical limit to their ambit.”⁷⁷

Medical influences

- 49 The Court’s jurisprudence has also been shaped by medical trends in the community, as evidenced by a substantial volume of asbestos litigation. At one point these cases were raising questions of foreseeability. Once that was settled, the focus turned to complex questions of causation,
- 50 The long latency period of asbestos diseases makes reconstructing the facts of exposure extremely challenging.⁷⁸ Workers may have been exposed to asbestos when working for multiple employers, or in non-work related contexts. If a plaintiff has a history of smoking, this can also “*muddy the diagnosis*”.⁷⁹
- 51 One response was an increased reliance on epidemiological evidence. Epidemiologists study the distribution and determinants of disease in human populations, making judgments about whether a statistical pattern proves a

⁷⁷ *Building Construction Employees and Builder’s Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405 (Kirby P).

⁷⁸ Neil Gunningham, ‘Asbestos-Related Diseases and Workers’ Compensation’ (2012) 34 *Sydney Law Review* 269, 270.

⁷⁹ *Ibid.*

“cause and effect” relationship. In *Seltsam v McGuinness*,⁸⁰ the Court of Appeal considered the admissibility of this type of evidence (which in this case, was adduced to demonstrate an association between asbestos exposure and renal cell carcinoma). Chief Justice Spigelman noted that “*this was a case of significance for the appellants beyond the individual case. It was fought below and in this Court as if it were a test case*”.⁸¹

52 Chief Justice Spigelman outlined the application of this type of evidence:

“With respect to many diseases, medical science is able to give clear and direct evidence of a causal relationship between a particular act or omission and a specific injury or disease. There are, however, fields of inquiry where medical science is not able to give evidence of that character... Epidemiological evidence may be able to fill the gap. It is of particular potential utility in the field of what is often referred to as toxic torts, especially in case of diseases with long latency periods.”⁸²

53 However, his Honour went on to caution that:

“The courts must determine the existence of a causal relationship on the balance of probabilities. However, as is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form strands in a cable of a circumstantial case.”⁸³

54 A related question of causation came before this Court in *Bendix Mintex v Barnes*.⁸⁴ In that case, the plaintiff was exposed to asbestos on two occasions: during his employment by Bendix Mintex, and at an earlier stage during his service with the UK Royal Navy. Allowing Mintex’s appeal, Mason P supported a statement by the Full Court of the Supreme Court of South

⁸⁰ (2000) 49 NSWLR 262.

⁸¹ Ibid [185].

⁸² Ibid [93]

⁸³ Ibid [98].

⁸⁴ (1997) 42 NSWLR 307.

Australia that “*the law does not equate the situation where the defendant materially increased the risk of injury with one where the defendant materially contributed to the injury*”.⁸⁵

- 55 The impact of asbestos litigation also extended to corporations law. In *CSR v Wren*,⁸⁶ the Court of Appeal held that CSR’s direction, control and involvement in the operation of its subsidiary company, Asbestos Products Pty Ltd, was sufficient to establish a relationship between CSR and an employee of Asbestos Products. This relationship gave rise to a duty of care, which was co-extensive with that owed by the employer to an employee. Justice Stein, who was a member of the bench, later reflected that the case was a “*real eye-opener to corporate manoeuvrers denying damages to workers suffering from mesothelioma*”.
- 56 Asbestos litigation is likely to continue to impact the jurisprudence of this Court. As recently as 2006, the Court of Appeal was asked in *Seltsam v McNeill*⁸⁷ to consider whether the asbestos manufacturer Seltsam owed a duty of care to home handymen and low-intensity casual end users. This Court answered in the negative. Experts advise that asbestos disease cases will peak in 2020, generating a significant caseload for the Dust Disease Tribunal⁸⁸ – and perhaps also this Court.
- 57 Courts are also increasingly being asked to decide complex questions relating to modern reproductive technology, including surrogacy and IVF treatment. Like the asbestos cases, these often raise complex questions of causation, and require the court to navigate both legal and ethical quandaries.

⁸⁵ Ibid, citing *Pibworth v Bevan M Roberts Pty Ltd* (1994) 176 LSJS 39.

⁸⁶ (1997) 44 NSWLR 463.

⁸⁷ [2006] NSWCA 158.

⁸⁸ Jane Southward, ‘Joanne Wade: Asbestos Lawyer’ (April 2017) *Law Society Journal* 50, 51.

58 In *Waller v James*,⁸⁹ a couple raised concerns with their IVF specialist that any child they conceived may inherit his father's genetic condition. The specialist provided the couple with the contact details of a genetic counsellor, but did not fully explain why he was referring the couple to the counsellor. The couple did not consult the counsellor, and the child was born with the genetic condition. At four days old, the child suffered a stroke and was left profoundly disabled.

59 The primary judge found that the specialist owed the couple a duty of care to provide information relating to the importance of genetic counselling, and breached that duty by failing to explain to the couple the reasons for referral. However, the claim failed on causation: the hereditary condition did not cause, or materially contribute to, the stroke.⁹⁰

60 This Court dismissed the couple's appeal. In holding that the right to plan a family is an interest capable of being protected by law, I noted that the nature of IVF technology had influenced the outcome of the proceedings:

“The appellants...were vulnerable in the sense that they were under the professional care of an IVF specialist and were dependent upon him for all aspects of treatment, including providing them with relevant information. This included information as to the importance of understanding genetic factors before undertaking IVF treatment.”⁹¹

However, the claim failed on causation on the basis, as found by the primary judge, that the hereditary condition did not cause, or materially contribute to, the stroke.

Innovative/remedial legislative intervention

⁸⁹ [2015] NSWCA 232.

⁹⁰ *Waller v James* [2013] NSWSC 497.

⁹¹ *Waller v James* (2015) 90 NSWLR 634, 660.

- 61 The Court’s jurisprudence has also been shaped by legislative developments, particularly where Parliament intervened with innovative or remedial legislation.
- 62 This is perhaps most evident in the introduction of the *Civil Liability Act 2002* (NSW) in 2002, and similar enactments across the country. The narrative surrounding the introduction CLA’s introduction was of an increasingly litigious culture, courts recognising a duty of care in an ever expanding range of circumstances, and an insurance industry in a state of crisis.⁹² The CLA was introduced with the aim of encouraging greater “*personal responsibility*” and sending “*a clear message to the courts that ... liability for insignificant risk is too easily imposed*”.⁹³ Demonstrating the role played by external expertise in government decision-making, particular emphasis was placed on a PricewaterhouseCoopers report which calculated that the reforms would bring about a 17.5 per cent reduction in the cost of personal injury claims, a 14 per cent reduction in the cost of public liability claims as a while and a 12 per cent reduction in public liability premiums.⁹⁴
- 63 Today, torts cases still make up a significant portion of the Court’s caseload – in 2016, they were the second largest substantive topic area considered by the court, comprising approximately 15% of proceedings (closely followed by administrative law and contract cases, which each comprise 12%). A not insignificant portion of these cases continue to be typical “slip and fall” scenarios.⁹⁵ However, the day when there would be week-long listings of damages cases are long gone.
- 64 Other significant legislation includes the *Australian Consumer Law*, the *Personal Properties and Securities Act* (particularly in respect of fixed and

⁹² See, eg, Michael Pelly, *The Smiler: Murray Gleeson* (Federation Press, 2014) 238-9.

⁹³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764 (Bob Carr).

⁹⁴ *Ibid.*

⁹⁵ See, eg, *Sutherland Shire Council v Henshaw* [2004] NSWCA 386; *Woolworths Ltd v McQuillan* 2016/302301.

floating charges), the *National Credit Code* and the *Contracts Review Act* all of which feature in modern jurisprudence.

- 65 A noteworthy Court of Appeal decision in relation to the latter is *West v AGC (Advances) Ltd*,⁹⁶ in which the Court explored the interaction between the new *Contracts Review Act*, and classical contract theory in New South Wales. Justice McHugh found:

“The *Contracts Review Act 1980* is beneficial legislation. It must be interpreted liberally. But it operates within and not outside the domain of the law of contract.”⁹⁷

- 66 Another increased legislative impact has arisen with the introduction of uniform legislation across the country. This is seen, for example, in the *Corporations Act*, *Defamation Act* and *Legal Profession Act*. In *Australian Securities Commission v Marlborough Gold Mines Ltd*,⁹⁸ the High Court laid down the principle that:

“uniformity of decision in the interpretation of uniform national legislation ... is a sufficiently important consideration to require that an intermediate appellate court ... should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong”.⁹⁹

- 67 The New South Wales Court of Appeal finds itself in a position where it must consider a broader range of authorities than it once would have. This has the positive effect of increasing dialogue between judges who sit on intermediate appellate courts, creating an increased degree of interconnectedness across

⁹⁶ (1986) 5 NSWLR 610.

⁹⁷ Ibid 631 (McHugh JA).

⁹⁸ (1993) 177 CLR 485.

⁹⁹ Ibid at 492.

the Australian jurisdiction. (At the least, it has given rise to some lively interstate jurisprudential debate.¹⁰⁰)

- 68 A third impact of increased legislative intervention is a widening of the Court of Appeal's jurisdiction, through both expanded supervision over a greater number of statutory tribunals, and new avenues of appeal. Proceedings that invoke the Court's supervisory jurisdiction have long been a central aspect of the Court's work.¹⁰¹ However, over the past six years, these proceedings have increased from seven to twelve per cent of the Court's new cases.
- 69 The relationship between the Court's jurisprudence and legislative change goes both ways as the jurisprudence of appellate courts can directly result in Parliament acting to amend or introduce legislation. In *R v Young*,¹⁰² a five judge bench considered whether a defendant charged with sexual assault should be granted access to the patient's notes and records of the complainant's psychologist. The Court held that provisions of the *Evidence Act 1995* (NSW) which provided that evidence of "*protected sexual assault communications*" was not to be adduced if it would disclose a "*protected confidence*" or "*the contents of a document recording a protected confidence*"¹⁰³ did not apply in this case and that there was no other legal principle preventing the defendant from accessing the patient's notes.
- 70 In dissent, I held that the situation attracted a public interest immunity against disclosure on the basis that non-disclosure served the public interest by "*protecting victims and promoting victims' recovery from sexual assault; facilitating the effective operation of sexual assault services; and encouraging*

¹⁰⁰ See, eg, the debate between the New South Wales and Victorian Courts of Appeal regarding tendency evidence prior to the High Court's decision in *Hughes v The Queen* [2017] HCA 20; *Hughes v R* [2015] NSWCCA 330; *Velkoski v The Queen* (2014) 45 VR 680.

¹⁰¹ See, for example, *Herron v McGregor* (1986) 6 NSWLR 246, where the Court of Appeal held that the Supreme Court has power to stay proceedings in disciplinary proceedings, on the ground that their continuation is harsh and oppressive, and an abuse of process.

¹⁰² (1999) 46 NSWLR 681; [1999] NSWCCA 166.

¹⁰³ See *Evidence Act 1995* (NSW) Div 1B, Pt 3.10 (as it then was).

complainants to report the crime of sexual assault to police".¹⁰⁴ Later that year, and explicitly in response to the decision in *Young*, Parliament expanded the scope of the relevant provisions of the *Evidence Act 1995* (NSW) to protect such evidence from disclosure.¹⁰⁵

Pathways to the High Court

71 I propose to conclude by examining how judges of the Court of Appeal, who are later elevated to the High Court, have navigated this transition. It is a well-worn path: eight judges of the Court of Appeal have been appointed to the High Court.

72 This does not mean, however, that the two benches have always seen eye to eye. In fact, there have been a number of notable disagreements. One of the most commonly cited instances of this is *Farah Constructions v Say-Dee Pty Ltd*, in which the Court of Appeal found that a constructive trust should be imposed by reason of liability for restitution based on unjust enrichment.¹⁰⁶ In a judgment written in particularly strong language, the High Court reversed this decision on the basis that not only did it cause confusion and result in injustice to the parties, but that it was not open to the Court of Appeal to depart from seriously considered dicta of the High Court on this issue.¹⁰⁷ Despite this – or perhaps because of it – the former President of the Court of Appeal, Justice Keith Mason, names his concurrence as “*easily*” his most memorable judgment.

73 Another notable example is the case of *Public Service Board of New South Wales v Osmond*,¹⁰⁸ in which the High Court reversed a Court of Appeal

¹⁰⁴ (1999) 46 NSWLR 681; [1999] NSWCCA 166 [214].

¹⁰⁵ See Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999 (NSW); Explanatory Memorandum, Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999 (NSW) 1.

¹⁰⁶ *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309.

¹⁰⁷ *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89.

¹⁰⁸ (1986) 159 CLR 656.

decision which held that in dismissing an appeal made to it by an unsuccessful applicant for promotion, the principles of natural justice required the Public Service Board of New South Wales to give reasons for its decision. The High Court held that there is no justification for regarding rules that govern the exercise of judicial functions as necessarily applicable to administrative functions.

- 74 In some instances, the expertise of New South Wales Court of Appeal judges has carried through to the High Court. This is most evident in the case of judges known for their particular expertise in a certain area. Justice Bell, for example, is widely recognised for her expertise in criminal law and procedure,¹⁰⁹ evident from her time on the Court of Appeal, and particularly when sitting in over 130 cases on the Court of Criminal Appeal. It continues to be seen in her judgments on the High Court, where her Honour has sat on a number of significant criminal cases including *PGA v The Queen*¹¹⁰, *The Queen v Baden-Clay*¹¹¹ and *Hughes v The Queen*.¹¹²
- 75 Sir Kenneth Jacobs, who sat on the NSW Court of Appeal from 1966 to 1974, also made the transition to the High Court. Sir Kenneth's expertise in equity and trusts is renowned – his book *The Law of Trusts in New South Wales*, now known as *Jacobs on Trusts*, is staple reading for practitioners and law students alike. This expertise is clearly reflected in Sir Kenneth's work on both courts. For example, his dissent in the Court of Appeal decision *DPC Estates*

¹⁰⁹ See, eg, Ceremonial Sitting to Mark the Occasion of the Swearing-In of the Honourable Virginia Margaret Bell as a Justice of the High Court of Australia, 3 February 2009.

¹¹⁰ [2012] HCA 21.

¹¹¹ [2016] HA 35.

¹¹² [2017] HCA 20.

*Pty Ltd v Grey and Consul Pty Ltd*¹¹³ was “drawn upon” by Justice Stephen when allowing the appeal in the High Court.¹¹⁴

- 76 Yet, it was Sir Kenneth’s broad approach to interpreting precedent that significantly influenced the judicial method of both courts. A former student of Professor Julius Stone, Sir Kenneth believed that legal certainty was best achieved where the “*elements which go into creative choice*” are explicitly stated, so that “*the true scope of the decision may be...directly observed*”.¹¹⁵ One illustration is Sir Kenneth’s dissenting judgment in *HC Sleigh v South Australia*,¹¹⁶ which considered whether licence fees for retail sales of petrol were an excise duty. Sir Kenneth identified that two earlier High Court decisions were a “*bulge*” in a “*coherent*” – albeit “*complex*” - pattern of decisions on the meaning of excise.¹¹⁷
- 77 Sir Kenneth distinguished later cases from earlier precedent by focusing ‘*scrupulously*’ on their facts.¹¹⁸ In *Caltex Oil v The Dredge ‘Willemstad’*,¹¹⁹ the High Court found Caltex was entitled to damages for damage to its underwater pipeline during dredging operations. Sir Kenneth based this liability on his analysis of the case’s precise physical circumstances, the ‘*physical propinquity*’ of the terminal and refinery.¹²⁰
- 78 Other judges have approached their role on the New South Wales Court of Appeal and the High Court differently. This is most likely testament to the

¹¹³ [1974] 1 NSWLR 443.

¹¹⁴ *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012).

¹¹⁵ Tony Blackshield and Mark Mackrell, *Jacobs, Kenneth Sydney*, High Court of Australia <http://www.hcourt.gov.au/assets/justices/coper_hca6_jacobs.pdf>.

¹¹⁶ (1977) 136 CLR 475.

¹¹⁷ *Ibid* at 523-4.

¹¹⁸ Blackshield and Mackrell, above n 135.

¹¹⁹ (1976) 136 CLR 529.

¹²⁰ Blackshield and Mackrell, above n 135.

unique role of intermediate appellate courts, particularly when contrasted with the High Court as the apex appellate court in Australia.

79 Justice Heydon was not always a renowned “dissenter”, and did not wear this epithet on the Court of Appeal. His Honour grew into it slowly as his “*anger*” built at the direction the majority judgments in the High Court were taking in constitutional cases – and his increasing willingness to express his aversion.¹²¹ In the early years of Justice Heydon’s High Court career, his Honour sat with the “*centre*” of the Court.¹²² By frequently joining Chief Justice Gleeson and Justices Gummow and Hayne, Justice Heydon formed part of an “*unassailable majority bloc*”,¹²³ and dissented in less than eight per cent of cases.¹²⁴

80 Over time, it became increasingly evident in Constitutional cases that the Court would not regress to a traditional formalism of the pre-Mason years. With this revelation Justice Heydon’s rates of dissent increased significantly – reaching 44 per cent in Constitutional cases by 2012.¹²⁵ Gabrielle Appleby and Heather Roberts argue that:¹²⁶

“...Heydon J had established a reputation for being a lone and somewhat curmudgeonly dissenting voice on the High Court. At his retirement, his disagreement and disappointment with the Court’s increasing departure from traditional, formalistic judicial method was well documented in a series of increasingly acerbic judgments. This was not the voice that had first spoken from the bench in 2003...”¹²⁷

¹²¹ Gabrielle Appleby and Heather Roberts, ‘He Who Would Not Be Muzzled: Justice Heydon’s Last Dissent in *Monis v The Queen* (2013)’ in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 335, 344.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Joe McIntyre, ‘In Defence of Judicial Dissent’ (2016) 37 *Adelaide Law Review* 431, 435.

¹²⁵ *Ibid.* 436.

¹²⁶ Appleby and Roberts, above n 141, 335.

¹²⁷ *Ibid.*

81 It must be acknowledged that his Honour's change in approach was attributable – in part – to the opportunity to hear Constitutional cases on the High Court. It was in this domain where the deepest lines were drawn between members of the bench.

82 Justice Kirby, too, inherited his reputation as the “*great dissenter*” after leaving the Court of Appeal. Although Kirby's Presidency in the Court of Appeal did not pass without controversy,¹²⁸ a letter from Sir Laurence Street in 1985 reflected that:

“...I am proud indeed of the significant life that your leadership has given to our Court of Appeal – a lift in both professional stature and authority as well as in the whole atmosphere that now pervades that Court in both internal cohesion and collegiate philosophy as well as its public face in the Courtroom in dealing with the profession and litigants...”¹²⁹

83 Yet, on the High Court Bench, Justice Kirby assumed the status of “*outsider*”.¹³⁰ Commentators attribute this to a range of causes – his tendency to dissent, his high public profile, and the Heffernan allegations later proven to be untrue.¹³¹ Whether deliberately or merely as a reaction to his media treatment, Justice Kirby's judicial ‘character’ evolved markedly.

84 Sir Anthony Mason also approached his role on the Court of Appeal and High Court differently. Sir Anthony served on the Court of Appeal from 1969 until 1972, and was then appointed to the High Court and served as Chief Justice from 1987 to 1995.

85 Sir Anthony's Chief Justiceship coincided with the introduction of the *Australia Act 1986* (Cth), which marked the final step in severing legal ties with the

¹²⁸ See, eg, Daryl Dellora, *Michael Kirby: Law, Love & Life* (Viking, 2012) 218-19.

¹²⁹ Ibid 219.

¹³⁰ Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: the 2004 Statistics’ (2005) 28(1) *University of New South Wales Law Journal* 14.

¹³¹ Dellora, above n 148, 255-6, 277-8.

United Kingdom. This is seen as marking a shift by which the authority of the Constitution moved from a function of its status as legislative enactment of the British parliament to the authority of the Australian people.¹³² In turn, this marked a shift in the way that the members of the Mason Court conceived of their role. Understanding their role as being to interpret the Constitution as underpinned by popular will, as opposed to imperial enactment, the Court's decision-making took account of a broader range of sources than strict legal principle, for example, community values and standards.¹³³ The Court is seen as having departed from the "avowedly legalistic approach" of its predecessors, both with regard to constitutional interpretation and in legal reasoning more generally.¹³⁴

- 86 Sir Anthony's approach to legal reasoning in this period of his career can be distinguished from that more traditional approach he took on the Court of Appeal. This suggests that although the elevation of judges may mean that the jurisprudence of the Court of Appeal carries through to, or finds expression in, that of the High Court, certain elements of each Court's jurisprudence are unique to their position within Australia's judicial hierarchy.
- 87 Other judges have approached their seats on the Court of Appeal and High Court differently for reasons relating to underlying fundamental questions regarding the administration of justice. Attorney General Daryl Williams characterised Murray Gleeson's tenure as Chief Justice of New South Wales as one of "practical innovation".¹³⁵ His Honour considered undue and avoidable delay to be a form of injustice, and that the Court's response was

¹³² Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 24.

¹³³ Rosalind Dixon and George Williams, *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2016) 246.

¹³⁴ *Ibid* 246.

¹³⁵ Ceremonial Sitting to Mark the Occasion of the Swearing-In of the Honourable Anthony Murray Gleeson AC as Chief Justice of the High Court of Australia, 22 May 1998.

*“as important an aspect of the administration of justice as the way in which individual judges decide particular cases”.*¹³⁶

- 88 In 1988, an audit revealed that significant delays were affecting the Supreme Court, including up to six and a half years’ delay in the building and construction list. The Chief Justice responded with a package of structural reforms, including the creation of the position of Public Information Officer and the early adoption of case management strategies.¹³⁷ In 1992, a special sitting of the Court was devised to tackle what was considered a “service delivery problem”.¹³⁸ The Chief Justice purportedly divided all judges into teams, each with its own registrar and colour coded “team” tee-shirts. The strategy paid off – the Court’s outstanding caseload was reduced from 470 to 138 in just two weeks.¹³⁹
- 89 When sworn in as Chief Justice of the High Court, the President of the Law Council indicated a “confident expectation” on behalf of the profession that innovation would be a continuing theme in Gleeson’s Chief Justiceship of the country.¹⁴⁰ The Brennan Court had already made significant progress in modernising the High Court, including introducing the case management software Lotus Notes in 1998. In a speech delivered to the Supreme Court of Japan in 2000, his Honour spoke of case management in the past tense – as if it had been accepted and accomplished. His Honour said:

“Case management has been accepted by the judiciary, principally because there is no other practical method of coping with the expanding workload. ... Instead of simply deciding each case in turn as it finds its way to the head of a queue, judges have assumed the

¹³⁶ ‘Supreme Court Annual Review’ (1990) *Bar News* Spring, 4.

¹³⁷ Ceremonial Sitting to Mark the Occasion of the Swearing-In of the Honourable Anthony Murray Gleeson AC as Chief Justice of the High Court of Australia, 22 May 1998.

¹³⁸ Pelly, above n 107, 149.

¹³⁹ *Ibid*, 153.

¹⁴⁰ Ceremonial Sitting to Mark the Occasion of the Swearing-In of the Honourable Anthony Murray Gleeson AC as Chief Justice of the High Court of Australia, 22 May 1998.

management of the queue. Instead of allowing the lawyers for the parties to run cases at their own pace, judges have taken to directing more closely the conduct of trials. They have done this out of necessity, and with varying degrees of enthusiasm.”¹⁴¹

Conclusion

90 The relationship between Court of Appeal and High Court jurisprudence is not confined to the influence of judges who have subsequently been elevated. When asked to identify notable decisions for the Court of Appeal's 50th Anniversary Sitting, many judges pointed to decisions which were subsequently upheld by the High Court or decisions in which special leave to appeal to the High Court was refused entirely,¹⁴² or decisions which in some other way shaped the Court's jurisprudence.

91 It is not unusual for voices in the media to argue that judges are “out of touch”.¹⁴³ This criticism is not new and arises most frequently in the aftermath of sentencing in high-profile criminal trials - but is also occasionally levelled against judges who solely preside over appellate proceedings. When the Court was first established in 1965, ex-Attorney General Reg Downing noted that “*any court of appeal, even the highest in the land... are sometimes criticised because its judges by continually sitting in appeal lose to some degree the common touch and become academic rather than practical*”.¹⁴⁴

92 To the public, appellate justice may always seem shrouded in mystery – wrought with legalese, technicalities, and lacking the relatable workings of a trial made so familiar by *CSI*, *Suits* and *Law and Order*. However, the time has come, when the occasion presents, when judges are increasingly

¹⁴¹ Chief Justice Murray Gleeson, ‘Current Issues for the Australian Judiciary’ (Speech delivered at the Supreme Court of Japan, Tokyo, 17 January 2000).

¹⁴² For example, Bryson JA named *Yeshiva Properties v Marshall* [2005] NSWCA 386, *Seltsam v McNeil* [2006] NSWCA 158 and *Sutherland Shire Council v Henshaw* [2004] NSWCA 386.

¹⁴³ See discussion in Murray Gleeson, ‘Out of Touch or Out of Reach?’ (Paper presented at the Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004).

¹⁴⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965, 1348 (Robert Reginald Downing).

encouraged to assume an active role in explaining “*what we do and why*”.¹⁴⁵ Indeed, our Chief Justice urged in a recent speech that “*the judiciary is ready and committed to better explaining how we function and listening to community concerns.*”¹⁴⁶ Tonight’s lecture is one such example. So too are the Court’s Facebook and Twitter accounts, where concise summaries of recent judgments are regularly posted. The tipstaves and researchers tell us that it is no mean feat to distil the intricacies of the *Corporations Act* or contractual damages into a 40 character tweet. Nevertheless, we appear to be doing something right. Since the Chief Justice delivered his speech in February of this year, to which I have made reference, we have gained 2,000 more followers – 6,600 in all.

93 I commenced this article by outlining the three goals of the NSW Parliament in establishing a permanent appellate court - an efficient capacity to manage a large volume of complex cases, a need for collegiality, and the development of judicial expertise in the appellate jurisdiction. The long and colourful history of this court demonstrates these qualities in practice. In particular, the Court has adeptly responded to a great range of external developments – be they legislative, political, social, medical or technological. With the pace of these developments ever increasing with the exponential growth of technology’s influence on our lives, the challenge is for this Court – more than ever – to continue its role in the administration of justice in New South Wales in a way that responds to the statutory command of the just, quick and cheap determination of the dispute before it, and to do so at the high intellectual level it always done.

¹⁴⁵ Chief Justice Bathurst, ‘Doing Right by “All Manner of People”: Building a More Inclusive Legal System’ (Speech delivered at the Opening of Law Term Dinner, 1 February 2017).

¹⁴⁶ Ibid.