

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
FAREWELL CEREMONY FOR THE HONOURABLE JUSTICE
PETER DAVID MCCLELLAN AM UPON THE OCCASION OF HIS
RETIREMENT AS A JUDGE OF THE COURT OF APPEAL OF THE
SUPREME COURT OF NEW SOUTH WALES
8 FEBRUARY 2018*

1. We are here this morning to mark the retirement of the Honourable Justice Peter McClellan from the Court of Appeal of the Supreme Court of New South Wales. Today, we wish to show our gratitude for the enormous contribution you have made over your time as a judge of both the Common Law and Equity Divisions, the Chief Judge of the Land and Environment Court and at Common Law, a judge of the Court of Appeal and as Chair of the Royal Commission.
2. You were sworn in to this court seventeen years and nine days ago. On that occasion you noted your awareness that you would be soon asked to decide cases in areas you had not extensively practised, and that you were conscious of the challenges you faced in that regard. As it has turned out, there was no need for such humility. Although you came from a successful Land and Environment Court practice at the bar, you cannot be so easily pigeon-holed. Even while at the bar you ran matters in varied areas, including complex commercial cases, and you in fact ran the Commercial List while a member of the Equity Division, with great success – although perhaps not with quite the brutal efficiency of your good friend and golfing companion Justice Hammerschlag. We'll get on to the golfing addiction a bit later ...
3. Following that you moved down the road, as Chief Judge of the Land and Environment Court, and there you made important contributions to the development of planning and environment law in this State. You spent two

* I express my thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

years at that Court before being sworn in as Chief Judge of the Common Law Division.

4. Your time in charge of the division coincided with a period of great change. A number of judges retired, and many new judges came on in their stead. Those who were appointed during your time have commented on the care you showed them, making a point to assist them with the transition. All the common law judges could always count on you to be empathetic and supportive when they had a personal or family matter arise.
5. The common law division is probably the busiest and most diverse area of the Court, dealing with matters of administrative law, possession, defamation, and of course crime. You conducted a number of trials, and took on many Court of Criminal Appeal cases, including the challenging *Wood*¹ conviction appeal, and the question of a permanent stay in *Gilham*.²
6. Now, at this point I might note that this list of expertise reads somewhat like the entire curriculum of a law degree. Most of us narrowed our practice as we moved further along in years, but you seem to have expanded it in every possible direction. But this makes sense to those who know you because – as one of your former floor members has described it – you are a lawyer of such quality you could take any brief that was put in front of you. In addition to this natural ability in such a wide variety of matters, you are extremely efficient, with a strong work ethic. Not only did you take on a number of challenging and high profile criminal cases, at one point you dedicated your entire January holiday to finishing a judgment before the law term resumed, somewhat to the horror of your fellow judges who thought they would be soon forced to emulate you.
7. It is because of these twin attributes – extraordinary ability and work ethic – that there was no better person to Chair the Royal Commission into Institutional Responses to Child Sexual Abuse. Your conduct of that Commission has been widely and justly praised. You showed compassion to

¹ *Wood v The Queen* (2012) 84 NSWLR 581; [2012] NSWCCA 21.

² *Gilham v The Queen* (2007) 73 NSWLR 308; [2007] NSWCCA 323.

survivors, working hard to gain their trust and listening to their stories with patience and kindness. Your meticulous interrogation of the facts has shone a light on failures and the work you have done will, with a good measure of hard work into the future, ensure such individual and institutional tragedies are not repeated.

8. To take on the Royal Commission could not be without its personal tolls. In particular, you took on this job at the very end of your career, a career which itself could not have been without challenges and burdens. Again, however, it makes sense to those who know you, because you have always had a heightened sense of public duty. You performed an enormous act of public service, and for that there are many people around this country who are truly grateful.
9. Now, a farewell speech cannot merely be all respect and gratitude. In conducting my due diligence for this speech, I of course approached old colleagues and staff, trying my hardest to dig up some idiosyncratic behaviour or habits to expose. Unfortunately as it turns out, all of your former and current staff are unfailingly loyal.
10. They instead informed me that they have too been beneficiaries of your immense sense of service, in offering your time and expertise to mentor them. They have praised your willingness to discuss cases with them, bring them into matters, how you valued their opinions and assistance and made time for their questions and queries. They noted that after they had left chambers, you maintained a keen interest in how their careers were going, always offering a listening ear and advice should they need it.
11. Now of course all of these responses were far too nice for my purposes. So, I pressed them for some piece of gossip – what was he like when you did something wrong – hoping, of course, for a good story. Instead, the memories they had were that you were unfailingly patient, reserved and gentle in your criticism. You never let your staff feel they had made a mistake, instead saying more obliquely – “maybe we should take another look at that”, or “maybe we could revisit that”.

12. It became obvious I would have to turn elsewhere – thankfully you have some good friends – perhaps not so good after this address – who are still on the bench. The common theme was clear – you are entirely obsessed with golf. I managed to wrestle out one story in which your characteristic patience and reserved nature was broken.
13. I was told that you are frequently involved in golf competitions – foursomes – in which two players take turns in playing the one ball. Of course this can be a lot of fun, but also somewhat stressful, particularly when one player is far better than the other – and the less skilled player puts the better one in what might be described as some awkward, if not impossible, situations. Now as we have heard, there is very little that you do which you don't do well – and golf is no exception. Your judicial golfing partner recalls one such game where he hooked a shot straight into the forest, and finally managed to break your patience – of course the only outward sign was some inaudible muttering.
14. Another of your judicial golfing partners commented that although everyone knew you were golf obsessed, you generally aimed to maintain a healthy separation between your work and personal life, and your golf and personal life. At the first you are quite successful. The latter you find more difficult. It is rumoured that you frequently practice putting on the lounge room carpet – one day on the way to the golf course, your partner, Justice Jagot, who we are delighted to have join us on the bench today, had to call and inform you that you had left your putter on the lounge room floor.
15. Now Justice Jagot is not a golfer herself, but seems to tolerate your obsession – and in fact travelled with you to the US Masters, which you described as the “trip of a lifetime”. It is reported, however, that her Honour has had a significant impact on your golf attire, you having become in recent years “hyper fashion conscious” on the green. Colour coordinated clothing has not, unfortunately, improved your golf – or the real problem perhaps, your golfing partners.
16. Now of course, much like you are not to be pigeon-holed in your legal life, so too in your personal – apart from being a star golf enthusiast and player, you share some of your brother Mike's talents for music. It's rumoured that you

have delighted guests at parties with performances. I did think to arrange a backing band and put you on the spot here today, but that might have stretched judicial collegiality a thread too far.

17. Aside from these extra-curricular talents it is important to recognise the significant contribution you have made to the common law of this country through your judgments. I intend to focus on those in the criminal sphere, firstly because your insight in this area is all the more remarkable as it was not your primary area of practice, and secondly because you contributed to and wrote a number of judgments that are continually cited in appellate courts. A few rate special mention – *De La Rosa*,³ in 2010, which set out guiding principles of sentencing for drug importation offences, and the relevance of an offender’s mental health at sentence. As every judge knows, sentencing is one of the most difficult, and inevitably controversial, tasks of a judicial officer. Your views, informed as they are by a wealth of knowledge and strong practical sense, have been of particular benefit to the legal profession – reflected in the fact it has been cited over 800 times in just 7 years. You similarly articulated principles relevant to the sentencing of young people in *KT v The Queen*,⁴ which has helped judges since find the difficult balance between lenience and mercy for youth and deterring anti-social behaviour. It is a decision that characterising your unwavering commitment to both equality and the rule of law. The final I will mention is *Belghar*,⁵ which clarified the principles to be applied on an application for a trial by judge alone, which I and many others have had reason to rely upon in the succeeding years.

18. Your extensive expertise in criminal law is reflected not only in your judgments but in your many speeches and publications concerning, amongst other topics, juries, sentencing and white collar crime. You had a prodigious output of papers during your time at the bench which certainly puts me and probably most others here to shame.

³ *De La Rosa v The Queen* (2012) NSWLR 1; [2010] NSWCCA 194.

⁴ *KT v The Queen* [2008] NSWCCA 51.

⁵ *R v Belghar* [2012] NSWCCA 86; (2012) 217 A Crim R 1.

19. Now, you have been telling everyone so far that you don't plan to work again. Those who know you best say it's just not possible. Your work ethic will compel you back into some form of public service once again, and we will be the richer for it.

20. So, on behalf of all the judges of this Court, the staff who worked with you at the Royal Commission over the past 5 years and the public whom you have so diligently served nearly your entire life, I would like to thank you, sincerely, for your exceptional service to administration of justice in this State. We wish you all the very best for your retirement and look forward to the contributions you will inevitably continue to make to public life over the years to come.