20TH ANNIVERSARY OF THE VICTORIAN COURT OF APPEAL
PUBLIC SEMINAR
"What are Courts of Appeal good for?"
Thursday, 20 August 2015
4.30 pm Banco Court, Supreme Court of Victoria

The Advantages and Disadvantages of Permanent Intermediate Courts of Appeal

The Honourable Justice Margaret McMurdo AC*∇

Chief Justice Warren, Presidents Maxwell, McLure and Beazley, Justice Redlich, your Honours, ladies and gentlemen, friends and admirers of Victoria's Court of Appeal.

It is a great honour to be with you celebrating the 20th Anniversary of this fine institution. Personally, and on behalf of the judges of the Supreme Court of Queensland, and especially Queensland's judges of appeal, I congratulate the Victorian Court of Appeal on reaching this milestone. I thank all the judges who have constituted the court during that time for their important contribution to the administration of justice, and the development of jurisprudence, not only here in Victoria but nationally and throughout the common law world.

I warmly congratulate President Maxwell on reaching the personal landmark of a decade in this demanding role, and for his well-deserved honour, The Companion of the Order of Australia, awarded earlier this year for "eminent service to the law and to the judiciary, particularly administrative reform of the appeals process, through contributions to legal education and professional development, and as a leading supporter of human rights and civil liberties."

In addressing this evening's seminar topic, "What are Courts of Appeal good for?" it occurred to me that a suitable starting point was to discuss whether permanent intermediate courts of appeal like Victoria's were a good thing at all. By permanent intermediate courts of appeal I mean appeal courts of the kind now operating in Victoria, by contrast with full courts constituted by judges in rotation.

The first major permanent common law intermediate court of appeal was established in England in 1875.[1] The English Court of Appeal became a model to be emulated, although with

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* President, Court of Appeal, Supreme Court of Queensland.

∇ I gratefully acknowledge the assistance of my Associate, Anne Crittall LLB (Hons) for her research and editing assistance and my Executive Assistant, Kelly Morseu, for her typing and editing assistance.

1 *Supreme Court of Judicature Act* 1873, 36 and 37 Vict, c. 66.

local adaptations. Intermediate courts of appeal were subsequently established in Canada[2] and in 1957 reintroduced in New Zealand.[3]

Perhaps a little trans-Tasman rivalry triggered the debate as to whether permanent courts of appeal were desirable in Australia. In 1966, fifty years ago next year, Australia's largest and most litigious jurisdiction, New South Wales, established the country's first such court.[4] The New South Wales Court of Appeal deals only with civil matters. Its Court of Criminal Appeal continues to deal with criminal matters but in practice is commonly constituted by at least one Court of Appeal judge.

A quarter of a century later, and with the strong support of the legal profession, Queensland followed with its permanent Court of Appeal first sitting at the beginning of 1992.[5] The model adopted reflected Queensland's smaller population, with the Court hearing both civil and criminal appeals.

Even those who did law because they did not excel at maths can calculate that Victoria's permanent Court of Appeal must have been established in 1995, 20 years ago.[6] And Western Australia's permanent Court of Appeal followed in 2005.[7] As in Queensland, they both dealt with criminal and civil matters.

Others have discussed in depth the merits and demerits of permanent intermediate courts of appeal.[8] I will summarise the competing views.

The perceived advantages are as follows. First, the abolition in Australian jurisdictions of appeals to the Privy Council[9] and the introduction of the requirement of special leave to the

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2 See for example *The North-West Territories Act* (R.S.C. 1886, c. 50); *Judicature Act* (S.A. 1919, c. 3); *Judicature Act* (R.S. 1966, c. 240, s. 1); and *Judicature Act* (R.S.P.E.I. 1988, Cap. J-2.1).

3 *Judicature Act* 1908 (NZ) s 57; *Judicature Amendment Act* 1957 (NZ).

4 The New South Wales Court of Appeal was established by the *Supreme Court and Circuit Courts (Amendment) Act* 1965 (NSW) which was assented to on 29 October 1965. It commenced operation on 1 January 1966 and had its first sitting at the commencement of the law term that year.

5 The Queensland Court of Appeal was established by the *Supreme Court of Queensland Act* 1991 (Qld) which was assented to on 24 October 1991. It had its first sitting at the commencement of the law term in 1992.

6 The Victorian Court of Appeal was established by the *Constitution (Court of Appeal) Act* 1994 (Vic) which was assented to on 20 December 1994.

7 The Western Australian Court of Appeal was established by the *Acts Amendment (Court of Appeal) Act* 2004 (WA) which was assented to on 9 November 2004.

8 See for example Raymond Evershed, "The History of the Court of Appeal" (1951) 25 *Australian Law Journal* 386; and The Honourable Justice Michael Kirby AC CMG, "Permanent Appellate Courts – The New South Wales Court of Appeal Twenty Years On" (1987) 61 *Australian Law Journal* 391; "Permanent Appellate Courts – the Debate Continues" (1988) 4 *Australian Bar Review* 51; (1988) 18 *Queensland Law Society Journal* 5; and "Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal" (2008) *Sydney Law Review* Vol 30 (2): 177 – 207.

9 *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Australia Act* 1986 (Cth) s 11.

High Court of Australia,[10] means that for almost all litigants, both criminal and civil, intermediate courts of appeal are the final appellate court. It follows that they should be constituted by the brightest and best judges available, and administered effectively and efficiently. There is a perception that permanent appellate courts, with judges' chambers in close physical proximity, would improve the administration of justice through the more timely disposition of appeals by a discretely administered smaller court, able to speedily implement innovative practices. This is more difficult in a court which constantly varies in composition and which is administered together with a large trial court.

Second, it is considered that a permanent court of appeal with a highly qualified stable base of expert appellate judges, rather than a rotational full court or court of criminal appeal, would lead to greater certainty in judicial decision-making and better promote the orderly development of legal principles and the common law. It is recognised, correctly I think, that, while some judges excel at both trial and appellate work, appellate judges and trial judges require different skills; some fine trial judges do not excel at appellate work and some great appellate judges are unsuited to trial work.

This takes me to my third point. Some of the brightest lawyers who would seem to be highly suitable for appellate work may feel unsuited to trial work and may be more likely to take a judicial appointment to a permanent court of appeal rather than to a one-tier court.

Fourth, a permanent court of appeal arguably has greater apparent authority in determining disputes at appellate level than a rotational full court.

My final point is that a permanent court of appeal appears to offer more institutional appellate independence. It avoids the perception that a decision by Judges A, B and C on appeal from Judge X may be unconsciously affected by their concern that, in a rotational court, Judge X may be sitting on appeals from Judges A, B and C the following week.

The establishment of permanent courts of appeal is not without disadvantages or there would be more of them in Australia. There is a financial cost at least in the short term. It seems likely that in the less populated Australian jurisdictions, the cost of establishing a permanent court of appeal would be a disincentive. Further, the low numbers of supreme court judges in smaller jurisdictions would make the establishment of a permanent court of appeal less desirable or even impractical. This explains why jurisdictions like South Australia, Tasmania, the Northern Territory and the Australian Capital Territory have not followed Victoria's model.

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[10] *Judiciary Act* 1903 (Cth) s 35.

But cost factors do not explain why there is no permanent Australian Federal Court of Appeal. Perhaps it is in part because of the disruption which inevitably follows the establishment of a permanent court of appeal. Some existing judges are passed over, becoming less senior to those appointed to the new appellate court. Before the establishment of the New South Wales Court of Appeal, Mr Justice Jacobs sought to persuade the legislature to follow the English model so that the new judges of appeal would become more senior only to those Supreme Court judges appointed after them.[11] But the proposal was not accepted as it was thought it would detrimentally impact on the authority of the judges of appeal and of their court.[12]

The Honourable Justice Michael Kirby AC CMG has thoroughly chronicled the inevitable disturbance of seniority amongst the judges of the New South Wales Supreme Court in 1966, a phenomenon he labelled "supersession." [13] Unsurprisingly, supersession causes serious tension amongst existing judges. Supreme Court judges tend to be competitive, ambitious personalities who understandably feel personally hurt and perhaps professionally resentful at supersession. But as Kirby noted, there is a larger concern. Supersession can attack the court as an institution if parliament uses it to retaliate against judges who gave decisions adverse to the government of the day, or to reward judges whose decisions have been, or which the government hoped would be, favourable to them. The creation of a permanent court of appeal tends to disturb the constitutional relationship between the arms of government and, arguably, the independence of the court's highest judges; there will be an inevitable period of tension and re-adjustment. That was certainly the Queensland experience when its Court of Appeal was established. I apprehend that the same has been true, at least to some extent, here in Victoria and also in Western Australia.

But as Kirby explained, over time and with hindsight, it became clear that the establishment of the New South Wales Court of Appeal was a successful innovation aimed only at improving the efficiency and performance of the New South Wales Supreme Court. The sustained quality of appointments to it, and its work over many years, demonstrates that it has served the people of New South Wales very well indeed.[14] The same is true of the Victorian and Western Australian courts of appeal, as I hope it is of Queensland's.

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11 *Supreme Court of Judicature Act* 1873, ss 10 – 11.

12 The Honourable Justice Michael Kirby AC CMG, "Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal" (2008) *Sydney Law Review* Vol 30 (2): 177 – 207, 198.

13 Above, 177.

14 Above, 183.

Another criticism of permanent courts of appeal is that the judges lack exposure to first instance work and this makes them out of touch with the practicalities of running trials and the difficulties and nuances of sentencing, detrimentally impacting on their judgments. This argument is especially applied to appellate judges appointed directly from the Bar who have no trial judge experience. The difficulty has been overcome in all Australian jurisdictions, at least to some degree, by the practice of ensuring that some trial judges sit from time to time with the permanent judges of appeal, particularly in criminal matters. I have no doubt that regular input from capable, experienced, first instance judges in appellate decision-making is invaluable.

Another consideration thought to weigh against a permanent court of appeal is that some talented lawyers prefer to take a judicial appointment to a one-tier court where they can do both trial and appellate work. If given the choice of the trial division of a state Supreme Court or of the one-tier Federal Court, they may take the Federal Court. And some permanent appellate judges prefer the variety of work offered by a one-tier court. Some state judges have been lured to the Federal Court, at least in part, for that reason. On the other hand, judges have left the one-tier Federal Court to become permanent judges of appeal in state courts, apparently because of a preference for appellate work, so that perhaps this is not the most compelling of arguments.

Despite the legitimate arguments against permanent courts of appeal, on balance, I consider that, in the larger Australian jurisdictions, they have come to be seen, as they have in England and Wales, Canada and New Zealand, as a positive development in the administration of justice. The inevitable disruptions and tensions arising upon their establishment diminish over time. The limitations of permanent appeal judges' unfamiliarity with first instance work can be tempered by ensuring that many have trial experience before appointment and by some rotational assistance from first instance judges. Whilst the disadvantages of permanent courts of appeal are real, I consider that, over time, these are quickly outweighed by the considerable jurisprudential and administrative advantages.

I conclude by again congratulating the Victorian Court of Appeal and its judges on their first 20 years of service to the people of this state. I know that any resulting early tensions arising from this Court's establishment in 1995 have long since eased. I look forward to continuing the warm relationship between the Victorian and Queensland judges of appeal. On behalf of the Queensland judiciary I wish the Victorian Court of Appeal and its judges well as they continue their important contribution to Australian and common law jurisprudence.