

CEREMONIAL SITTINGS

RECOGNISING 25 YEARS OF THE QUEENSLAND COURT OF APPEAL

BANCO COURT – SUPREME COURT OF QLD

3 FEBRUARY 2017 AT 9.15AM *

Chief Justice Martin, Acting Chief Justice May, Presidents Maxwell, Beazley, Buss and Kos, your Honours, Attorney-General, Shadow Attorney-General, retired judges, past Attorneys-General, Director-General and officers of the Department of Justice and Attorney-General, members of the legal profession and academy, and members of the broader community, the Court of Appeal is honoured by your presence.

I am delighted to be joined on the Bench, not only by Chief Justice Holmes and the judges of appeal, but also by all available judges of the trial division. This is fitting. With the exception of the so recently appointed Justice Brown, all have sat regularly in the Court of Appeal. Her Honour will soon join their number. The appellate role of the Chief Justice and trial division judges during the last 25 years cannot be under-estimated. They have not only assisted in disposing of this Court's heavy workload but also contributed enormously to appellate

* Justice Margaret McMurdo AC, President, Court of Appeal
Supreme Court of Queensland

jurisprudence. They are listed in your program¹ and include now Chief Justice Kiefel of the High Court of Australia who is unable to be present because of Canberra court commitments. I sincerely thank every judge, current and former, who has assisted in this Court's appellate work over the past quarter century. I also thank those who will make a future appellate contribution. In this I can include Justice Brown.

Chief Justice, Attorney, Mr Hughes, Ms Smyth, on behalf of the Court of Appeal, thank you for your generous words.

The *Supreme Court of Queensland Act* which established the Court of Appeal came into effect on 24 October 1991. The inaugural President and judges of appeal, Justices Fitzgerald, Davies, McPherson and Pincus, were sworn in on 16 December 1991. The Court of Appeal first sat on 28 January 1992. President Fitzgerald and Justices McPherson and Davies heard two routine matters.² Another Court of Appeal constituted by Chief Justice Macrossan and Justices Pincus and Byrne heard former Police Commissioner Lewis's appeal against conviction

¹ Macrossan CJ, de Jersey CJ, Carmody CJ, Holmes CJ, Ambrose J, Applegarth J, Atkinson J, Boddice J, Bond J, Burns J, Byrne J, Chesterman J, Cullinane J, Dalton J, Daubney J, de Jersey J, Demack J, Derrington J, Douglas J (Robert), Douglas J (James), Dowsett J, Dutney J, Flanagan J, Fryberg J, Helman J, Henry J, Holmes J, Jackson J, Jones J, Kiefel J, Lee J, Lyons J (Ann), Lyons J (Peter), Mackenzie J, Martin J, McMeekin J, Muir J, McMurdo J (Philip), Moynihan SJA, Mullins J, North J, Philippides J, Shepherdson J, Thomas J (David), Thomas J (James), White J, Williams J, Wilson J (Alan), Wilson J (Margaret).

² John McKenna QC, Supreme Court of Queensland, Supreme Court of Queensland Library, 2012, 170; *Eamon Pty Ltd and Ors v Sanwa Home Australia (formerly Balfield Pty Ltd)* [1992] QCA 1; *R v Vanbrugh* [1992] QCA 6.

and application for leave to appeal against sentence.³ For obvious reasons, President Fitzgerald could not sit on that appeal!

The inaugural President and judges of appeal had each been at the pinnacle of the Queensland Bar during, arguably, its most glittering era to date. All were brilliant, respected and industrious. Each worked tirelessly in fulfilling their court responsibilities and strove to deliver judgments promptly. The new Court of Appeal adopted efficient administrative and computer systems in a state-of-the-art registry. Novelty then, the Court required parties to file written outlines of argument in a format which fostered *ex tempore* reasons. Their Honours eschewed wigs and wore simple silks' robes. In a welcome development for the profession, the Court operated on fixed hearing dates rather than a running list. Usually the Court was constituted by three judges but, on occasion, five.⁴

The Litigation Reform Commission was also established. Work pressures led President Fitzgerald to resign as Commission Chair during 1992 and six months later Justice McPherson also resigned. Justices Pincus and Davies, with the assistance of trial division judges, Justice James Thomas AM and Justice John Byrne RFD, then led its work, aided by

³ *R v Lewis* [1992] QCA 223; [1994] 1 Qd R 613.

⁴ See, eg *R v Morrison* [1998] QCA 162; *Schiliro v Peppercorn Childcare Centres Pty Ltd (No. 2)* [2000] QCA 18; *I & L Securities P/L v HTW Valuers (Bne) P/L* [2000] QCA 383; and *R v Lacey; ex-parte A-G (Qld)* [2009] QCA 274.

other judges and members of the profession. The Attorney has set out its many achievements in civil and criminal procedural reform.⁵

Following a change of government in 1997 and the *Courts Reform Amendment Act*, the Litigation Reform Commission was abolished and the administrative structure of the Court of Appeal and the nature of its work significantly altered. President Fitzgerald resigned, effective from 30 June 1998. Soon after, Attorney-General Matt Foley announced the appointment of Justice Thomas as an additional judge of appeal and me as President. I was on a precipitous learning curve. I gratefully accepted the generous counsel of my older and wiser colleagues, taking on a full judicial sitting load in addition to my new administrative duties. I was especially grateful for the advice and support of Justices Pincus and Thomas.

By November 1998, the Court of Appeal's judgments were accessible on the internet through AustLii. The following year, the Court of Appeal sat

⁵ In civil law the Commission carried out important work: developing alternative dispute resolution; allowing evidence to be taken by phone and video; providing for pre-trial exchange of witness statements and documents; limiting the range of disclosable documents, including by third parties, and the costs of disclosure; developing rules for filing by post; requiring parties to exchange expert opinions pre-trial, even if unhelpful to one party, with a single, court-appointed expert at trial; developing case management; and laying the groundwork, commenced by Justice Glen Williams in the 1980's, for the *Uniform Civil Procedure Rules*. The Commission also carried out important work in criminal procedural reform: widening the pool of jurors under the *Jury Act*; drafting parts of the *Penalties and Sentences Act* and the *Juvenile Justice Act* to obtain more consistent and principled sentencing; recommending amendments to the *Evidence Act*⁶ for children and vulnerable and protected witnesses, and allowing prisoners to appear at bail and appeal hearings by videolink; drafting new *Criminal Practice Rules*; and setting up the successful committals project: McKenna, above note 1, 177.

for the first time in Townsville. A northern appellate sittings, alternating between Townsville and Cairns, has since become an annual fixture, popular with judges, and the North Queensland profession and wider community alike.

Many appellate litigants are self-represented. At the suggestion of Justice Pincus, the judges, with the assistance of the professional associations, established a criminal law pro bono scheme for the most serious cases. The scheme has operated effectively since 2001. The Court of Appeal is grateful to the many participating barristers, as well as to the many practitioners providing pro bono assistance outside the scheme.

Justice Pincus, now deceased, retired in 2001. I am delighted that Mrs Gillian Pincus, and their son, Tom Pincus of the Queensland Bar, are present this morning. Justice Pincus was replaced by Justice Glen Williams. The following year, Justice Thomas retired and was replaced by Justice John Jerrard. Justice Davies AO retired in 2005 and was replaced by Patrick Keane SG QC, now Justice Keane of the High Court of Australia, like Chief Justice Kiefel unable to attend because of Canberra court commitments. Following the retirement in 2006 of the last inaugural judge of appeal, Justice McPherson CBE, now deceased,

(and I note with pleasure the presence of Mrs Jacqui McPherson), Justice Kate Holmes, now our Chief Justice, joined the Court.

2007 was an eventful year for the Court of Appeal. It assisted the Queensland Public Interest Law Clearing House (QPILCH) to establish its Self-Representation Civil Law Service, which provides valuable assistance to self-represented civil appellate litigants and is highly regarded throughout Australia. The then Senior Deputy-Registrar (Appeals), Mr Neville Greig, introduced searchable electronic appeal record books. Since then, the Court has often conducted complex appeals electronically. And in response to the Court's gruelling workload and many pleas in annual reports, an additional judge of appeal, Justice John Muir, was appointed, bringing the number of appellate judges including the President to its present complement, six.

Justice Williams AO retired in 2008 and was replaced by Hugh Fraser QC. Whilst Justice Jerrard battled ill health, Justices Kenneth Mackenzie and Margaret White (the first woman judge of the Supreme Court) were commissioned as acting judges of appeal. I am delighted to see Justice Jerrard here today. Following his resignation at the end of 2008, Justice Richard Chesterman RFD was appointed.

When Justice Keane became Chief Justice of the Federal Court in 2010, Justice White joined the Court of Appeal on a permanent basis.

2011 and 2012 saw more changes to the Court's make-up. Whilst Justice Holmes was Queensland Floods Commissioner, Justice Margaret Wilson was commissioned as an additional judge of appeal. And following Justice Chesterman AO's resignation, Robert Gotterson QC was appointed.

The appeal judges gave careful attention to the design of their new courtroom during the planning stages of this award-winning building, to which we moved in late 2012. The low bench and close proximity of the bar table fosters dialogue between judges and advocates. There is impressive technology and secure access for litigants in custody. The high ceilings, natural light and calming ambience are appreciated by all who use it. I concede, however, that despite the best architectural efforts, there are times when that sense of calm is dissipated! This Banco Court with its stunning Sally Gabori mural is also regularly used as a functional appellate courtroom.

The constitution of the Court changed again between 2013 and 2015. Philip Morrison QC replaced Justice White AO on her retirement in 2013. The following year Justice Philippides replaced Justice Muir on his

retirement. In 2015 when Justice Holmes was sworn in as Chief Justice, Justice Philip McMurdo was appointed to the Court. No more could we be distinguished, as his Honour has often joked, as the appealing one and the trying one! His Honour has also pointed out that I have had the pleasure of sitting with every judge of appeal save for the first, President Fitzgerald, and the last, him!

Attorney, Mr Hughes and Ms Smyth, I am confident that you, the President of the Women Lawyers Association of Queensland, Ms Cassandra Heilbronn, and, indeed, everyone present, will be pleased that the percentage of women barristers appearing in the Court of Appeal has steadily increased since 1992. During the last financial year it was 19.7 per cent, at last approaching parity with the 22 per cent of women practising at the Queensland Bar. But still room for improvement!

The Court of Appeal's achievements over the past 25 years do not result solely from the judges' hard work. On their behalf, I thank our excellent support staff who provide the oil to keep the appellate cogs turning: our clever newly-graduated associates who re-energise us each year; the Research Officer; the Executive Assistants and Executive Secretaries; and Registry and court employees. I am pleased so many present and past staff members are here today. I particularly note those who have

held or acted in the key role of Deputy-Registrar (Appeals): Jo Sherman; Alison Standfield; Robyn Hill; Marie Leishman; Neville Greig; Neil Hanson; Peter O'Sullivan; Jason Schubert; Tracey Dutton and, currently, Janette Conway.

Mr Hughes and Ms Smyth, the Court of Appeal has been well-served by both branches of the legal profession. The professional associations work closely with the judges to continually improve appellate practice and procedure. Appellate practitioners generally maintain the best traditions of officers of the court. The quality of written and oral appellate submissions is, for the most part, pleasing, whether from silks and juniors in private practice, in the Office of the Commonwealth or State Director of Public Prosecutions, in Legal Aid Queensland, or, on occasions, solicitor advocates. I sincerely thank the profession for assisting in the administration of appellate justice over the past quarter century.

Under its current administrative model, the Court of Appeal could not function without the support of and a respectful working relationship with the Executive, though always cognisant of judicial independence and our separate roles in the governance of Queensland. Attorney, I warmly welcome your assistance and that of past Attorneys-General, Wells,

Sheldon, Beanland, Foley, Welford, Lavarch, Shine, Dick, Lucas and Bleijie, most of whom I am delighted to see are present.

Some speakers have mentioned notable decisions of the Court of Appeal. Important as they are, they are not the full measure of this Court's worth. Judges of appeal, like all this State's judicial officers represented here this morning, diligently act according to their oaths or affirmations of office, no matter how routine the case, how foolish the submission, or how onerous the workload. During the past 25 years, the Court has disposed of more than 15,000 matters in a timely fashion. During that period, the trial division, the District and Magistrates Courts, and Queensland tribunals between them have disposed of many hundreds of thousands of matters. Yet the successful appeals to this Court each year are comparatively few. And last financial year this Court disposed of 619 matters with just three successful appeals to the High Court of Australia. This suggests that, while we must always strive to improve and refine, Queensland's justice system with the Court of Appeal at its apex is functioning well.

Thank you for allowing me this atypical retrospective indulgence. The Court of Appeal's focus is ordinarily on the work before it and on positive reform. For example, this year the Court, with Legal Aid Queensland

and the Queensland Director of Public Prosecutions, is trialling the electronic filing of outlines of argument, with hyperlinks to electronic appeal record books and authorities. If successful, e-filing will be used more broadly.

I anticipate that, with the ongoing dedicated assistance of Court and registry staff and the legal profession, and appropriate resourcing from the Executive, the judges of appeal, together with the Chief Justice and the trial division judges, will continue to initiate positive reforms and to deliver timely and equal appellate justice according to law, into the next quarter century and beyond.