

**FAREWELL CEREMONY FOR THE HON. T F BATHURST AC
UPON THE OCCASION OF HIS RETIREMENT AS
CHIEF JUSTICE OF NEW SOUTH WALES**

Banco Court

28 February 2022

Occasional address

Justice A S Bell, President of the Court of Appeal

- 1 Your Excellency and Mrs Hurley, Your Excellency and Mr Wilson, Chief Justice and Mrs Bathurst, Mr Attorney, Ms Warner, Ms Weldon, distinguished guests, colleagues, members of the profession, ladies and gentlemen.

- 2 It is a pleasure, a privilege and an honour to speak on behalf of the judges of the Supreme Court of New South Wales whose enormous respect, Chief Justice, you have commanded these last 11 years. You have commanded that respect not because you have demanded it but because you have earned it. You have done so by force of your personal qualities – your integrity, your sound and shrewd judgment in matters both legal and nonlegal, your empathy and humanity, your wisdom, your practical common sense and your basic decency.

- 3 But before elaborating further on these qualities (and then turning to all of your countervailing vices!), let me begin by acknowledging and paying my respects to the Gadigal people of the Eora nation, their land and their leaders. And let me also, as you, Chief Justice, have so often and so sincerely done, acknowledge the regrettable reality that this nation's laws and legal system have so often in the past delivered the opposite of justice to our indigenous people.
- 4 In that context, your retirement overlaps with the launch of the Walama List pilot program in the District Court of New South Wales which you have supported through the work of the Judicial Commission's Ngarra Yura Committee. Let us hope that that initiative meets with the success it deserves. I know that that is your profound hope.
- 5 Both the State and the Supreme Court of New South Wales have been fortunate indeed to have had chief justices of the highest calibre throughout their history, two of whom join us in the Court today, and I acknowledge former Chief Justices Murray Gleeson and Jim Spigelman. Just as they had their own style and left their own distinctive marks, so too with the State's 17th Chief Justice, TF Bathurst, my good friend and, over these past 3 years *to the day*, my closest professional colleague.

- 6 With the exception of war-time Chief Justices Sir William Cullen and Sir Frederick Jordan, I suspect no other Chief Justice has had to confront the number and nature of challenges with which you have had to deal during your tenure.

- 7 You have led the Court and the profession through the terror, trauma and unspeakable tragedy of the Lindt Cafe siege; through the flooding of the Supreme Court Registry and the extended closure of the Queen's Square building; through the Stygian cloak of the bushfires and, of course, the greatest challenge of all, the COVID-19 pandemic during which, under your leadership, the Court continued to sit and deliver justice through a public health and social crisis unprecedented in our lifetimes.

- 8 Any one of these challenges would have been demanding. To have had to absorb the impact of, and to deal skilfully and sensitively with, all of them, as you have done, has been a challenge of biblical proportions in circumstances that called for great care, responsibility, flexibility and innovation. Indeed, some have said that the combination of fire, flood and plague and the fact that your official car is a Genesis has given the Bathurst Chief Justiceship a distinctive Old Testament flavour.

- 9 But seriously, these challenges of which I have spoken (and others of which I have not) were all profound and called for and received leadership of the highest calibre.
- 10 Ladies and gentlemen, the Chief Justice came to the Court with a reputation as the outstanding corporations and commercial lawyer of his generation. He was a silk for almost 25 years at the time of his appointment and had been President of both the NSW and Australian Bar Associations, playing a leading role in the introduction of the National Uniform Law designed to harmonise the regulation of the legal profession throughout the country.
- 11 The Chief Justice's translation to the Bench did not diminish his engagement with the practising profession: far from it. He has been the leader not only of this Court and the courts of New South Wales but also of the legal profession as a whole. His speeches on the admission of legal practitioners have drawn wide praise and admiration from newly admitted practitioners, their families and supporters. These are most important institutional occasions and his speeches have struck a consummate balance between the significance of the day for the newly admitted lawyers, the history of the Court and the meaning of being part of a profession, all underpinned by strong encouragement of and support for the profession's increasing diversity.

- 12 Beyond these countless ceremonies, the Chief Justice has delivered major addresses to the Law Society every year at the beginning of the Law Term, with his address last year on the subject of “Trust in the Judiciary” being a timely and deeply considered examination of the topic in the context of a much wider and important debate about trust in public institutions. It was an exceptional and significant address which repays close reading.
- 13 There is also an invaluable series of modestly entitled “tutorials” on the history of various legal topics delivered for and under the auspices of the Francis Forbes Society.
- 14 And there have been countless *other* speeches and lectures and engagements with the profession throughout the last 11 years, all of which have been full of insight, covering a wide array of subjects and all of which evidence the Chief Justice’s dedication to and diligence in the discharge of his high office. They are all available on the Court’s website.
- 15 Although steeped in commercial and corporate law, Chief Justice Bathurst quickly took to criminal law, presiding in the Court of Criminal Appeal in well over 300 cases, and regularly assuming writing responsibility in many of the most demanding, difficult and sensitive appeals, noting that

none are easy.¹ He quickly won the respect of that tough but fair audience, the judges of the Common Law Division, and more widely throughout the criminal law Bar. This is because (and it is obvious but should nevertheless be said) he is an exceptional lawyer, able to absorb and distil complex and often voluminous facts, to cut to the heart of the matter and then to apply the law, however complex the statutory framework may be.

16 On the Court of Appeal, the Chief Justice has sat across all areas of our diverse jurisdiction in an even greater number

¹ Examples of leading cases in the criminal sphere include: *R v Kinghorn* [2021] NSWCCA 313 (scope of the accusatorial principle and companion rule in respect of the compulsory examination of an accused prior to the laying of charges); *Xie v R* (2021) 386 ALR 371; [2021] NSWCCA 1 (challenge to admission of DNA evidence on the basis of new or fresh evidence; conduct said to evince consciousness of guilt; sufficient similarity as a basis for the probative value of proposed coincidence evidence); *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72; [2020] NSWCCA 48; (relationship between legal professional privilege and prosecutorial duty of disclosure) *WG v R*; *KG v R* [2020] NSWCCA 155 (scope of Crown's duty to call relevant witnesses); *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847; [2020] NSWCCA 150 (evidence of prior false allegations by complainant); *Park v The Queen* (2020) 282 A Crim R 551; [2020] NSWCCA 90, affirmed in *Park v The Queen* (2021) 95 ALJR 968; [2021] HCA 37 (sequence in which jurisdictional limits and sentence discounts fall to be considered); *Maitland v R*; *Macdonald v R* (2019) 99 NSWLR 376; [2019] NSWCCA 32 (mental element of the offence of wilful misconduct in public office); *Xiao v R* (2018) 96 NSWLR 1; *R v Lelikan* (2019) 101 NSWLR 490; [2019] NSWCCA 316 (relevant factors in the assessment of the objective seriousness of membership of a terrorist organisation); [2018] NSWCCA 4 (utilitarian value of a plea of guilty for Commonwealth offences); *Dickson v R* (2017) 94 NSWLR 476; [2017] NSWCCA 78 (physical presence as an element of joint criminal enterprise); *BM v R* [2017] NSWCCA 253 (assessment of the probative value of evidence affected by concoction and/or contamination); *Jonson v The Queen* (2016) 263 A Crim R 268; [2016] NSWCCA 286 (scope of the commission of an offence in a home as an aggravating factor); *Macdonald v R*; *Maitland v R* (2016) 93 NSWLR 736; [2016] NSWCCA 306 (scope of the accusatorial principle in respect of evidence given to the ICAC prior to the laying of charges); *Lehn v R* (2016) 93 NSWLR 205; [2016] NSWCCA 255 (scope of the re-sentencing exercise following discretionary error); *Garth v The Queen* (2016) 261 A Crim R 583; [2016] NSWCCA 203 (whether indictment disclosed an offence known to law; mandatory minimum sentences); *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384; [2016] NSWCCA 97 (non-publication orders; take down orders); *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309 (elements of the offence of wilful misconduct in public office); *X7 v The Queen* (2014) 246 A Crim R 402; [2014] NSWCCA 273 (whether a permanent stay of proceedings necessarily results from an illegal compulsory examination of the accused); *Lane v R* (2013) 241 A Crim R 321; [2013] NSWCCA 317 (circumstances in which an alternative charge of manslaughter should not be left to the jury); *Monis v The Queen*; *Droudin v The Queen* (2011) 215 A Crim R 64; [2011] NSWCCA 231, affirmed in *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4 (constitutional validity of the offence of using a postal service in an offensive manner).

of cases than in the CCA and, to my observation, could pick up a case with the speed and acuity I had seen firsthand at the Bar.² His feel for and great insight into the operations of commerce in particular have contributed hugely to the Court's reputation as the premier appellate commercial court in the country. The Bar Association instituted the annual Bathurst Lecture in recognition of this particular area of the Chief Justice's expertise and the law reports are replete with many of his important decisions in this and other areas.

17 It is a fact that no more than a handful of his decisions have been overturned in the High Court, and then usually only by

² Examples of leading cases in the civil sphere include: *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* [2021] NSWCA 332 (effect of COVID-19 Public Health Orders on a commercial sale contract); *Re Richards Contracting Co Management Pty Ltd* (2021) 104 NSWLR 385; [2021] NSWCA 34 (reinstatement of a de-registered company in the context of dust diseases litigation); *Lawrence v New South Wales* (2020) 103 NSWLR 401; [2020] NSWCA 248 (constitutional validity of the interim detention order scheme for terrorism offenders); *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186; [2020] NSWCA 109 (public assembly during the COVID-19 pandemic); *Chief Commissioner of State Revenue v Downer EDI Engineering Pty Ltd* (2020) 103 NSWLR 772; [2020] NSWCA 126 (whether payments made to subcontractors are exempt from payroll tax); *Attorney-General (NSW) v Melco Resorts Entertainment Ltd* (2020) 102 NSWLR 47; [2020] NSWCA 40 (power of a commissioner of inquiry to compel testimony or production of documents); *Globe Church Inc v Allianz Australia Insurance Ltd* (2019) 99 NSWLR 470; [2019] NSWCA 27 (limitation periods; implied term in an insurance policy requiring performance within a reasonable time); *Roads and Maritime Services (NSW) v Desane Properties Pty Ltd* (2018) 98 NSWLR 820; [2018] NSWCA 196 (essential pre-conditions to the compulsory acquisition of property); *Marroun v State Transit Authority* (2017) 96 NSWLR 295; [2017] NSWCA 273 (whether procedural unfairness gives rise to a question of law); *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12 (formation of a contract in the context of family arrangements); *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728; [2014] NSWCA 148 (shelf order to extend time to bring a voidable transaction application); *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher and Barnett* (2015) 89 NSWLR 110; [2015] NSWCA 85 (whether a litigation funding agreement is necessary for the winding up of a company in liquidation); *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141; [2013] NSWCA 102 (freezing orders where foreign proceedings are pending); *The Age Company Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 (constitutional validity of a court's power to order the disclosure of a confidential source of information in defamation proceedings); *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95 (construction of arbitration clauses); *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 (suppression orders and the principle of legality).

a bare majority. It is also a fact that he is always available to discuss the strength of the dissenting judgments!

- 18 One of the reasons that the Chief Justice has commanded such great respect is his exceptionally strong work ethic. I would characterise it as bordering on professional FOMO – the fear of missing out on an important or interesting case. This has seen him carry just as heavy a caseload as many appellate judges, notwithstanding the onerous administrative burdens of his office. The desire to be in court as frequently as possible, born of so many years at the Bar, never left him, although the move to the judiciary confined him to being in only one case at a time - a constraint which did not always apply in his pre-judicial life.
- 19 The task of a contemporary Chief Justice is far more involved and demanding than simply presiding on the Court of Criminal Appeal and Court of Appeal, as important and as core as those responsibilities undoubtedly are in terms of providing powerful intellectual leadership. I have already referred to the volume of extra-curricular engagement – the speeches, the book launches, the lectures, the moots, the award ceremonies, the conferences – all on top of administering the busiest Supreme Court in the country.

20 During his term of office, Chief Justice Bathurst has embraced technological adaptation and change and authorised the filming and live-streaming of high profile cases of public interest, bringing the work of the Court to the public. He has also encouraged the production of judgment summaries and associated social media both to facilitate the accurate reporting of cases and to foster a greater appreciation of the nature of the Court's work. These have been important initiatives, as was his early intervention in the reform of discovery in the Equity Division and particularly the Commercial List. This has been hugely significant in easing the cost burden of litigation and expediting the resolution of the real issues in dispute between the parties. In an international commercial judges forum held (by zoom) out of Singapore just last week, these reforms won widespread praise from Chief Justice Menon of Singapore and other judges throughout the region and have been or are in the process of being adopted in those jurisdictions.

21 In my time on the Court, the Chief Justice has also been instrumental in reforming the approach to listings on the civil side of the Common Law Division. These reforms are already proving extremely beneficial and will lead to much earlier resolution of cases.

- 22 Very significantly in my view, the Chief Justice has spoken often and openly about the importance of mental health, conscious of the stresses that modern judges (and practitioners) can find themselves under, whether through the sheer press of work or as a result of dealing on a regular basis with cases the subject matter of which puts the lie to the occasional refrain that judges and lawyers are out of touch. He has also been proactive and committed in seeking to ensure a safe and acceptable workplace culture and environment within the Court.
- 23 There is then the important work of the Judicial Commission of New South Wales of which the Chief Justice is President. That body oversees complaints against all judicial officers in New South Wales and also plays a very significant role in judicial education, not only in New South Wales but, in practical terms, throughout the country.
- 24 On the international side, the Chief Justice has played a leading role in the continuing vitality of LawAsia and has maintained and expanded the strong engagement of this Court with the judiciaries of the region, especially in the context of commercial litigation.
- 25 And on top of all those responsibilities are the obligations and duties of Lieutenant-Governor. The fact that both his

Excellency the Governor General and her Excellency the Governor are present today is a mark of the respect for and esteem in which they hold their trusty Lieutenant.

- 26 I have had the opportunity and privilege to observe the Chief Justice's style of leadership at close quarters these last three years. It has at all times been consultative yet authoritative, civil and unfailingly courteous but never stuffy, attractively understated rather than didactic and always highly strategic in the interests of the Court and the wider administration of justice in this State. He has been the master of the light touch and fostered strong collegiality within the Court. His leadership has been informed by his keen emotional intelligence and understanding of human nature.
- 27 The 17th Chief Justice of New South Wales is also extremely modest. That is a most admirable quality but, unlike what Winston Churchill once said of Mr Clement Atlee, Tom Bathurst has absolutely *nothing* to be modest about. Quite the opposite.
- 28 Having said that, we now have Robert Hannaford's outstanding portrait of the Chief Justice hanging in the Banco Court with an ever so subtle hint of a halo or is it an "aura" around his head? The great portraitist observed that

the Chief Justice was an ideal subject to paint because the two of them could talk for hours during sittings and the subject's lips didn't move – a phenomenon with which his colleagues have had to grapple for years!

- 29 On that (I hope not inappropriately light-hearted) note, may I thank you Chief Justice on behalf of the Court for your leadership, service, dedication and friendship. I personally will miss you enormously as I know will all of our colleagues.
- 30 We wish you and Robyn great health and happiness in the years ahead.
