



Farewell sitting of the Full Court for the Honourable Chief Justice Allsop AC

Adelaide, South Australia

9.34 AM, Friday, 24 February 2023

PRESIDING JUDGES:

THE HONOURABLE JAMES ALLSOP AC, Chief Justice
THE HONOURABLE JUSTICE BESANKO
THE HONOURABLE JUSTICE CHARLESWORTH
THE HONOURABLE JUSTICE O'SULLIVAN

GUESTS OF THE BENCH:

The Hon John von Doussa AO KC
The Hon Catherine Branson AC KC
The Hon John Mansfield AM KC
The Hon Richard White KC

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ALLSOP CJ: Welcome, everyone, to this sitting of the Court. It is not a ceremonial sitting of the Court to mark my retirement from judicial office, though, I am retiring and there will be a ceremonial sitting later in the month. First, and

importantly, I acknowledge the Traditional Custodians of the land on which we gather, the Kurna People, and pay my respects to the Elders, past, present and emerging. This sitting of the Resident Judges, Justices Besanko, Charlesworth and O'Sullivan, together with former judicial colleagues, The Honourable John von Doussa AO KC, The Honourable Catherine Branson AC KC, The Honourable John Mansfield AM KC, and the Honourable Richard White KC, is to allow me to thank, publicly, the Legal Profession, the Chief Justice and Judges of the Supreme Court and Judges of the Federal Circuit and Family Court of Australia, as well as my present and former colleagues, in the presence of their local profession.

I acknowledge the presence of the President of the Court of Appeal, the Honourable Justice Mark Livesey, together with colleagues from the Court of Appeal and the Supreme Court, Justices Doyle, Bochner and Kimber, Justice Kari of the Federal Circuit and Family Court of Australia, Division 1, Judge Dickson and Judge McGinn from Federal Circuit Court and Family Court, Division 2, Judge Slattery and Magistrate Panagiotidis as well as the wives of Justice Mansfield and Justice White, Kate Mansfield and Carmel Kerin. Unfortunately, Chief Justice Kourakis could not be here today nor could my former colleague and dear friend and teacher of justice, Paul Finn.

May I first thank the Profession. I begin with the Profession because of its importance to the administration of justice. There is a natural harmony and symmetry between the Profession of a State and its admitting Supreme Court. On the other hand, there is a certain asymmetry between a National Court and a State Profession. That asymmetry can inspire a weaker sense of association or relationship. A system of Federation places upon and demands of its citizens a duality of consciousness, State and Nation, but this is your Court and you are our profession, as it is the Court of the Profession of other States and Territories and of the Australian Polity and People.

The central place of an independent and learned profession in the administration of justice cannot be overlooked. Independence of the judiciary as a functioning third arm of government cannot be healthy and robust without an independent profession with an independent cast of mind, of duty and freedom of influence of the power of others. These are not considerations to justify protection of the Profession from scrutiny and criticism. They are considerations that give rise to the demands by the Courts of the Profession for lifelong learning, duties of unremitting honesty and service, shaped by the undivided loyalty to the client but within the framework of the duty to the Court. To paraphrase the great Cardozo, not the morals of the market place, honesty alone but the punctilio of an honour the most sensitive. The power of executive government, the power of wealth and privilege and the power of popular sentiment and opinion cannot be faced

effectively by the Courts without an independent and learned profession to stock its numbers and to assist in its deliberations by fearless advocacy.

Since I became a Judge in 2001, I have always received and seen the Court to receive the highest standards of assistance from the Profession in this State and in all States of the Commonwealth. For this, I wish to express my gratitude and the gratitude of the Court to the Profession of this State.

May I turn to the Supreme Court and the Federal Circuit and Family Court. I would first like to thank Chief Justice Kourakis and President Livesey and all the Judges of the Court of Appeal and the Supreme Court for their friendship, collegiality and cooperation in my time as Chief Justice. I very much appreciate it. I also wish to thank the Family and Federal Circuit Court Judges for their warm welcome in Adelaide at the times of my visits over the years.

The overlapping political and social organisation of a Federated Nation requires that difference and unity and local and national be reconciled and worked through in a daily process of mutual respect, friendship, collegiality and a proper rejection of institutional hubris drawn from the essential humility we must display. Whilst regular meetings of the Council of Chief Justices of Australia and New Zealand are an important feature in this regard, they are buttressed by the respectful, harmonious and collegiate relationships among the Judges of the State, Territory and Federal Courts. Such, of course, be assumed as natural, but that does not mean that such should not be remarked upon and be the subject of expressed thanks on appropriate occasions.

This does not merely reflect good professional manners among colleagues. This is a feature that is part of the constitutional reality of an integrated Federal, that is State and Commonwealth, Judiciary. It is the duty of Judges from all polities to give unsparing respect and support to each other. This was the vision of the first Chief Justice of the Court, Sir Nigel Bowen whose intellect, calm patience, grace and tact stamped the Court with a character it has not lost: one of politeness and intellectual practicality, in an integrated National Judicial system with strong and collegiate Supreme Courts. That Sir Nigel's vision has come to pass after early tribulations, is a tribute to the same qualities of patience, grace and tact of later Chief Justices, State and Federal such as Chief Justice Black and Chief Justice Kourakis, for which I thank Chief Justice Kourakis today, personally and publicly.

May I repeat my thanks to the Federal Circuit and Family Court Judges for their friendship over the years.

May I turn to my colleagues. One of the great gifts and privileges of the position of Judge and Chief Justice is to work closely with some remarkable people. Here today are some of those remarkable people. When I joined the Court in 2001, Justices von Doussa, Branson, Finn and Mansfield were well known to me from

my time at the Bar, appearing before them and reading their judgments. I was somewhat intimidated. I think a better word would be, somewhat in awe of their capacities, skills and wisdom as Lawyers and Judges. These views only became stronger as I grew to know them as colleagues. Justices Besanko, White, Charlesworth and O'Sullivan have, over their periods of time with me, exemplified all the qualities of great Federal Court Judges and have given me the warmth and friendship and confidence from their wisdom, for which I thank them.

If I may be forgiven for singling one out and saying something more about him. That is the Honourable Paul Finn who cannot be here today. He was one of the greatest legal thinkers to grace an Australian, indeed any, common law Court in the world of any generation. His human and legal insight was remarkable. Like Oliver Wendell Holmes, he understood and could convey a certain infinity in the law, an infinity which derived from the intertwining of theory and humanity from the recognition of the limits of textual definition and expression and of the importance of concepts of human decency. He was a great scholar and teacher before becoming a Judge, but his greatest teaching was done in his masterly judicial writing, in his persuasion of judicial colleagues in Australia and overseas, in particular in the Supreme Court in England.

The almost 22 years that the Commonwealth and the State of New South Wales have given me as a Judge, have provided me with the opportunity to think about and experience law and justice in a way and from a mode of attention that one does not experience in practice. That is that law is justice, that law is to be experienced not by reducing ideas through abstract and taxonomical arrangement to rules and principles alone, but also by recognising the human realities of experience and that law is concerned, primarily, with power and its limits and the protection of the individual, of the community and of a just democratic society, through it. That law is or can be seen as justice and not abstractedly separate from it in some reductionist-defined taxonomical way, comes from the recognition of deep human values that reside in the common law and in equity. Such values are derived from human exchange and experience, from the rejection of unfairness, from the dignity of the individual and the group, from the urge in humans for the requisite degree of certainty for the context and purpose at hand, and from human decency born of basal kindness and mercy. One lives these ideas and the physical reality of their experience in the daily work of this Court: the migration, the Native Title, the bankruptcy, employment and industrial relations, indeed, even the commercial work and regulatory work and constitutional problems and statutory construction, to a greater or lesser extent in all of the Court's work. This is so because these deep human values and their sources comprise the human tissue of the law which envelops, saturates and binds abstract ideas, rules and principles, otherwise expressed in bald text with all the power of text but also with all the limitations of text.

Courts are places where catastrophic experiences take place for litigants every day. That is the nature of the potential harm bound in the results of every case. This potential catastrophe is inextricably bound with the humiliation of powerlessness and being cast into the hands of others, cast into the hands of Lawyers and Judges. The Judges of this Court and, may I say, the Judges and former Judges of this Registry in particular, taught me this, for which I will always be grateful. This is not the occasion to thank all my family and those close to me and all they have done for me, but my partner, Sandy, is here today, and I wish to thank her for her love and support in the last six years in which I have been lucky enough to be with her.

Mr Hoffmann, immediate past President of the South Australian Bar Association.

MR M. HOFFMANN KC: If the Court pleases. It gives me great pleasure, on behalf of the South Australian Bar Association, to thank your Honour for your time as a Judicial Officer and, since 2013, as the Leader of this Court. Your Honour has innovated the operations of the Court, and I understand Justice Besanko will say something of that this morning. But from the Profession's point of view, those innovations and the efficiency and manner in which the Court operates under your Honour's leadership has been exemplary, has provided litigants with an efficient, quick and just outcome in what are often very difficult, complex, commercial disputes. All the while, your Honour has led a Court of 53 Judges which would be no small task, I have no doubt, your Honour.

Your Honour has also been most giving of your time to Professions and Bars around the country. Your Honour has been a prolific writer and publisher of papers. The Court's website has countless of them available to those who look. Your Honour was also kind enough to attend the South Australian Bar Association Conference and speak in 2018, and, your Honour, there is a standing invitation from the South Australian Bar Association if, in retirement, your Honour might be prepared to attend. It won't be at a caravan park, I can assure your Honour. Things have moved on, and I'm sure Justice Besanko will speak highly of the quality of the conference these days and what we have to offer, and I would hope your Honour would be prepared to accept an invitation, in due course. Otherwise, your Honour, without mirth, I truly and genuinely thank your Honour for your service and the way that your Honour has delivered it. As the Court pleases.

ALLSOP CJ: Thank you, Mr Hoffmann. Mr Marsh, President of the Law Society of South Australia.

MR J. MARSH: May it please the Court. On behalf of my Society's members, I thank your Honour for your service to our community. I wish, especially, to note that the character of your service has, perhaps more than any other modern Chief Judge, been shaped by the advent of the digital era. In your Honour's second year as Chief Justice, you presided over the introduction of the first electronic

court file in this Court. That first electronic file commenced operation in the South Australian District Registry, no doubt because it was recognised that our fused Profession has produced a unique breed of practitioner, resilient, resourceful, persuasive and devilishly handsome. I hope I can be forgiven some parochialism in expressing our gratitude for conferral of that small honour. I note also that the program has been a triumph.

Not all aspects of the digital era have such positive resonance. I'm not, for once, talking about cyber risk which my Law Claims. eople are keen for me to mention on every possible occasion. I'm talking about the ready availability of superficial metrics from which ill-informed criticisms of the Judiciary have been made. That's regrettable. It's sometimes said that it's the height of bad manners to quote back to a person in argument their prior statements. However, there is no argument at the Bar Table today, and so I quote your Honour when you said that the fundamental purpose of the Courts is:

the public and independent exercise of a species of governmental power of a particular and special protective kind, displaying equality before the law, impartiality, the appearance of impartiality, the right of a party to meet the case against him or her and the fair, and to the extent possible, correct determination of the issues in dispute. None of these characteristics can be measured. None can be translated into any metric. All are deeply important to the fabric of society.

Your Honour, these characteristics may not be able to be measured, but they can be felt and observed, and with your Honour, have been so felt and observed by the Profession and the community. Your Honour, on behalf of the Law Society of South Australia, I thank you for your contribution to ensuring that those immeasurable, essential characteristics of the exercise of judicial power have been preserved in your Court. Thank you, your Honour.

ALLSOP CJ: Thank you, Mr Marsh. Justice Besanko.

BESANKO J: Chief Justice, Judges of this Court, President of Appeal Livesey, Judges of the Court of Appeal and of the Supreme Court, Judges of other Courts and Tribunals, immediate past President of the South Australian Bar Association, President of the South Australian Law Society, ladies and gentlemen, it is a great pleasure to have the opportunity on behalf of the Judges of this Court in this Registry, both former and present Judges, to acknowledge your Honour's contribution as the fourth Chief Justice of the Federal Court of Australia.

By way of background, I have known your Honour for approximately 32 years. I met your Honour in the early 1990s when we were both briefed in a large commercial matter in this Registry of the Court. You appeared for one respondent in the matter, and I appeared for two other respondents. We worked together, and I got to know your Honour quite well. Even then, it was obvious to everyone that whilst the precise path was unclear, you were destined to make a very substantial contribution to the jurisprudence and administration of justice in this country.

Your Honour's judicial career spans over a period of 22 years. As it happens, my judicial career also spans over a period of 22 years. Subtracting periods when one or other of us was on another Court, I have had the pleasure of serving on the same Court with you for approximately 13 years. After your Honour's appointment in 2001, you served on this Court until 2008. Between June 2008 and February 2013, your Honour was the President of the New South Wales Court of Appeal, before your Honour's appointment as Chief Justice of this Court on 1 March 2013.

Your Honour is the fourth Chief Justice of the Court. Your Honour's tenure as Chief Justice has been marked by rapidly changing circumstances including a significant expansion in the Court's work and very substantial changes in technology. If I may say, the key features of your Honour's time as Chief Justice of the Court have been leadership and vision.

Most importantly, your Honour has been the intellectual leader of this Court, and your Honour has contributed significantly to the reputation of the Court. Your Honour's intellectual leadership is widely recognised within the Court and, I think, by the legal community. I have had the pleasure of sitting on a number of appeals with your Honour, and that has always been a very satisfying experience. Your Honour is well known for your penetrating insight and your ability to see every problem in its proper context, and I emphasise that word "context." Your Honour's contribution to the jurisprudence of this country will, no doubt, be the subject of academic description and debate, in due course. I cannot do that justice now. Of my own knowledge, your Honour has written significant and substantial judgments in the fields of insolvency law, insurance law, patent law, equity and, in particular, unconscionable conduct, public law, admiralty law and the list goes on.

I can remember one occasion which illustrates your Honour's thirst for legal knowledge and extensive scholarship. During your Honour's time as President of the Court of Appeal of New South Wales, which as we all know is an extremely demanding job, we saw each from time to time, but not very often. I was surprised, then, to receive a telephone call from your Honour in about 2010 or 2011. After the usual greetings, your Honour told me that you had read a judgment I had written in an admiralty matter and that the point was contentious and, for what it was worth, you agreed with my decision. I was surprised that your

Honour had the time to do that in the circumstances, but on reflection, it was no surprise, having regard to your Honour's deep learning and perhaps affection for all matters involving admiralty law.

Your Honour has made substantial changes to the internal structure of the Court with the introduction of the National Court Framework in 2014 which involved an internal reorganisation to recognise areas of expertise and provide appropriate registrar support for those areas. That was a major change, and I cannot do justice to it on this occasion. It is sufficient to say that your Honour's approach to administration has been marked by innovation and an ability to be quick to recognise that if processes and procedures, however well-established and time-honoured, are not working as best they might, then they are changed, modified and adapted. There is much more that can be said and, no doubt, will be said in due course than time permits this morning. One important feature is that your Honour has worked hard to give effect to the national character of the Court and that has certainly enhanced the profile of the smaller States when appropriate.

A matter which may not be widely known is your Honour consults widely within the Court on issues affecting the Court, with respect to matters that your Honour has the power to decide, alone. These are matters which may be internal to the Court or issues involving the Court's relationships with the public. There is a wide consultation structure and a number of Judges consulted and a range of views are obtained. As we all know, the consultation process is time consuming and can be exhausting, but your Honour undertakes it whether the issue be large or small, and that has been to the Court's benefit in terms of the best decision-making and in terms of the morale of the Judges.

The other matter which is in a similar vein and is probably not widely known, in the sense that there is no public face to it, is the extensive efforts your Honour makes in terms of pastoral care. There are over 50 Judges on the Court. Most of them are strong-willed and proud. The others are very strong-willed and proud. Almost everyone has issues from time to time that affect or could affect a Judge's ability to do their work. Your Honour has not only listened to problems but also observed them in advance and taken steps to address them. Your Honour has always been available by telephone, even on the weekends, to deal with problems, large or small. From a Judge asking to be permitted not to travel, perhaps because of a sickness in the family, to a problem requiring a lot more time. Dealing with this, as your Honour has done, has been quite a feat, considering that at the same time, your Honour has undertaken a full appellate load and from time to time not only sat at first instance but undertaken case management hearings.

As to the future, I understand your Honour may continue in a form of dispute resolution. I'm sure with your reputation and contacts here and abroad there will

be much work on offer should you choose to pursue it. I'm confident some form of teaching will find its way into your Honour's future activities. Your Honour has, to my observation, a strong inclination in that respect. No doubt, there will be other offers from governments and others. Amidst all that, we hope that you and Sandy have the opportunity to read, travel and enjoy family during your post-judicial career.

ALLSOP CJ: Thank you, Justice Besanko. The Court will now adjourn.

