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IN THE SUPREME COURT	5
ADELAIDE	6 7
CORAM: KOURAKIS CJ, KELLY P, LOVELL, DOYLE, LIVESEY, BLEBY JJA	8 9 10
SPECIAL SITTING	11
ON THE ESTABLISHMENT OF THE COURT OF APPEAL DIVISION OF THE SUPREME COURT OF SOUTH AUSTRALIA	12 13 14 15 16 17 18 19
TRANSCRIPT OF PROCEEDINGS	20 21 22
TUESDAY, 9 FEBRUARY 2021 AT 9.30 A.M.	23 24 25 26
MR M. WAIT SC SOLICITOR-GENERAL	27
MS V. CHAPMAN MP ATTORNEY-GENERAL	28
MR M. HINTON QC DIRECTOR OF PUBLIC PROSECUTIONS	29
MS L. STEIN CROWN SOLICITOR	30
MS R. SANDFORD FOR LAW SOCIETY OF SA	31
MR M. HOFFMANN QC FOR SA BAR ASSOCIATION	32 33
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KOURAKIS CJ: I welcome you to this ceremonial sitting 1
of the court to mark the establishment of the Court of 2
Appeal Division. This is a significant occasion in the 3
long history of this court. 4

In the ordinary course of a ceremonial sitting, 5
all of the Judges of the Court would take their seats 6
on the Bench. However, given the particular purpose of 7
this sitting, the Judges have decided that only the 8
Judges comprising the Court of Appeal would sit on the 9
Bench with the remainder of the Judges attending in the 10
well of the Court. 11

The Court of Appeal Division of this Court was 12
established by the Supreme Court (Court of Appeal) 13
Amendment Act 2019 (SA) which was assented to on 14
19 December 2019 and commenced its operation on the 15
1st of January this year. 16

By s.6A of the Supreme Court Act, the Supreme 17
Court is now constituted of the General Division and 18
the Court of Appeal. The General Division consists of 19
the Chief Justice and the Puisne Judges of the Court 20
who are not appointed to the Court of Appeal. The 21
Court of Appeal consists of the Chief Justice, the 22
President and the Puisne Judges of the Supreme Court 23
who are appointed to the Court of Appeal. The Masters 24
serve in both divisions. 25

The President of the Court of Appeal Division is 26
responsible, subject to the Chief Justice's directions, 27
for the administration of the Court of Appeal. 28

The jurisdiction of the Court of Appeal is to 29
hear and determine appeals from a single Judge of this 30
Court, and certain other courts, and to hear and 31
determine questions of law referred to, or reserved 32
for, its consideration. 33

I congratulate President Kelly and the 34
Puisne Judges of the Court of Appeal, Justices Lovell, 35
Doyle, Livesey and Bleby, on their appointments. 36

All Puisne Judges, in whichever division they 37
serve, are styled Justice of the Supreme Court of South 38

Australia. 1

The two divisions of the Court will not operate 2
as impermeable silos but will support each other by the 3
movement of judges between the divisions when it is 4
necessary or appropriate to do so. 5

Before the commencement of the Court of Appeal, 6
the Puisne Judges of the Court sat regularly in both 7
its appellate and general jurisdictions. Drawing on 8
the combined experience and legal knowledge of all of 9
the Judges of the Court, the appeal judgments of this 10
Court have long enjoyed a solid reputation for their 11
soundness and timeliness. The Court of Appeal is 12
resourced, both in the number of its judges and in 13
their combined legal knowledge and judicial experience, 14
to continue and build on that tradition. 15

Such is my regard for all of the Judges of this 16
Court, that I am confident that the Court will continue 17
to provide exemplary service in the administration of 18
justice, in both of its Divisions, for the common 19
welfare of the people of this State. 20

CHIEF JUSTICE: Attorney-General. 21

MS CHAPMAN: May it please the court, it is with 22
pleasure that I address the honourable court on behalf 23
of the South Australian Government, to mark, as you 24
have said, Chief Justice, a major step forward for the 25
administration of justice in our State. In pursuing 26
this reform, the Government's aim has been to improve 27
the function and efficiency of our justice system. 28

The advantages of a dedicated Court of Appeal 29
have long been reviewed and considered around 30
Australia. An early reference can be found as far back 31
as June 1937, in a note published by the then editor of 32
the Australian Law Journal, Mr B.J. Sugerma KC, in 33
which he stated, and I quote: 34
'The problems which present themselves to the courts at 35
the present day are much more complicated and difficult 36
than those of a century, or even half a century, ago 37
for their adequate solution, ample time for 38

consideration, and the ability to give them attention 1
undisturbed by the demands of work of a different kind 2
are required. 3

These things are much more possible in a serene 4
atmosphere of a permanent Court of Appeal than in a 5
court constituted anew each term, as is often happens 6
for each case, and from amongst judges that most of 7
whom's time is taken up in coping with the work of 8
first instance.' 9

Then there was the 1951 address of the 10
Right Honourable Sir Raymond Evershed, then Master of 11
the Rolls, on the occasion of having received an 12
honorary degree of Doctor of Laws from the University 13
of Melbourne. In his address, he advanced numerous 14
arguments for the establishment of permanent appellate 15
courts. He emphasised the different functions and 16
skills involved in appellate work; the likely 17
improvement in the quality of judicial performance; 18
that the principled development of the law is more 19
likely to be ensured; that a court of rotating judges 20
of equal membership does not have the necessary primacy 21
it needs as the court of final resort; and that only by 22
separation from the trial court could the reality and 23
appearance of complete independence be secured. 24

A slightly more contemporary proponent of the 25
permanent appellate courts is none other than the 26
Honourable Justice Michael Kirby ACCMG. Justice Kirby 27
has written and spoken publicly on this topic, and has 28
long advocated for the establishment of permanent 29
courts of appeal around Australia. He has similarly 30
identified reasons of function and efficiency, the need 31
for conceptualising the law and developing coherent 32
legal principle, manifest independence, and perhaps, 33
obvious fact, that skills in trial and appellate 34
advocacy differ, as do the skills required in trial and 35
appellate judicial work. It follows that our judicial 36
institutions should reflect that obvious fact. 37

Justice Kirby has also spoken about a further 38

practical consideration, being that a permanent
appellate court can permit the introduction of
innovative practices, which may be harder to attain in
a court of constantly varied membership. Victoria
experienced such advantages following the establishment
of the Court of Appeal in 1994. When reflecting on the
20th anniversary of its establishment, in August 2015,
Justice Robert Redlich illustrated that numerous
innovative practices had been adopted by that court.

Early in its history, the court introduced a
self-represented litigant coordinator, which, with
recourse, the bar's pro bono scheme dramatically
improved the court's handling of cases involving
unrepresented litigants. In 2006, the court introduced
the Civil Practice Statement, a pilot program of the
time, for front-end case management of civil appeals.
Appellate-level mediation was also introduced, which
proved successful in reducing the number of pending
appeal cases.

Innovative practices such as these dramatically
improve the Court of Appeal's ability to deal promptly
with urgent matters. There is perhaps no better
example of this than the appeal in the Australian Grand
Prix case, which was heard and determined within 24
hours of the decision of the primary judge.

The experience of other jurisdictions around
Australia has also revealed remarkable capacity that
permanent appellate courts have in being able to
quickly adapt to modern issues which have emerged in
litigation, such as the advances in technology, the new
and diverse forms of communication, as well as the
advancing tempo of litigation.

Indeed, the second decade of Victoria's Court
of Appeal was a period of rapid and significant
technological and legislative change. Despite this,
only a small proportion of cases reached the
High Court.

Well, South Australia now has a dedicated Court

of Appeal. Following the lead of England and 1
New Zealand, New South Wales established a Court of 2
Appeal in 1965; Queensland, Victoria and 3
Western Australia then followed in 2001. 4

Prior to establishing the court, the Western 5
Australians carefully considered its desirability and 6
feasibility, and provided a report to government. Our 7
government has had the benefit of considering that 8
report, which concluded that courts of appeal raised 9
standards generally in the courts and the legal 10
profession, improved the quality and consistency of 11
appellate judgments, increased the speed of delivery of 12
such judgments, and involved shorter hearings. 13

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The report also found that the principled 1
development of the law was facilitated, and any 2
perception that appellate judges might be reluctant to 3
overturn the judgments if members were of the same 4
court had been removed and a strong sense of 5
collegiality had been developed. For these reasons, it 6
concluded that the establishment of a Court of Appeal 7
in Western Australia would advance the administration 8
of justice in that State. 9

These arguments remain as valid now as they did 10
back then. And to quote the New South Wales Attorney- 11
General, Gabrielle Upton MP: 12
'Where, when and how justice is done must continue to 13
evolve. Just as our community expects our health and 14
education services to be modern, to be efficient and to 15
be effective, our modern justice system must also 16
strive to be so too.' 17

The bill that was presented to and passed the 18
South Australian Parliament was broadly modelled on the 19
legislation which established Western Australia's Court 20
of Appeal. I take this opportunity to thank the South 21
Australian Bar Association, the Law Society of South 22
Australia and the Legal Services Commission for 23
submissions provided during the consultation on the 24
draft bill presented by our government. 25

I also wish to thank those members of the South 26
Australian bar, many of whom are present today, for not 27
only throwing their support behind this proposal but 28
also making yourselves available to members of the 29
Parliament, to provide your own views and practical 30
insights on the proposal. They have greatly 31
appreciated that opportunity to hear firsthand from 32
members of the profession when considering such an 33
important piece of legislation. 34

I wish to acknowledge and thank you, Chief 35
Justice, and the Courts Administration Authority for 36
the work that you have undertaken in facilitating the 37
establishment of the new court and the approach you 38

have during this time. 1

I congratulate the newly-appointed President of 2
the Court of Appeal, her Honour Justice Kelly. The 3
depth of her experience and her leadership abilities 4
make her ideally suited to this position. Justice 5
Kelly is one of the most senior members of the 6
judiciary in South Australia and is now the only 7
serving woman President of a Court of Appeal in 8
Australia. Her appointment is a significant milestone 9
for women in the law and women generally in South 10
Australia. 11

In a distinguished career spanning more than 12
40 years, Justice Kelly has also served as a District 13
Court Judge, a prosecutor with the Commonwealth 14
Director of Public Prosecutions and South Australia's 15
Office of the DPP. Throughout her career she has 16
maintained focus on advancing the rights of victims of 17
violence in all of its forms, representing the 18
interests of Aboriginal people, advancing gender 19
equality and improving the lives of women. 20

I also wish to congratulate the inaugural 21
members of the Court of Appeal. 22

The first appointment to this court was his 23
Honour Justice Livesey in January last year. Justice 24
Livesey has a distinguished career over more than three 25
decades. He is a highly-respected litigator, 26
particularly within the civil and commercial 27
jurisdictions and has served in numerous professional 28
appointments including as President of both the South 29
Australian and Australian Bar Associations and he is an 30
International Fellow of the International Academy of 31
Trial Lawyers. His extensive appellate experience will 32
be invaluable to this court. 33

His Honour Justice Bleby was the second 34
appointment to the new court, appointed in May last 35
year. His Honour also has had a distinguished career, 36
having been South Australia's Solicitor-General and 37
prior to that he worked in the private sector, the 38

Crown Solicitor's Office and the Office of the Director of Public Prosecutions. 1
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Then in December last year, together with her Honour Justice Kelly, their Honours Justices Lovell and Doyle were appointed. 3
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His Honour Justice Lovell has worked in the legal profession for more than four decades, including in private practice, a Judge in the District Court, at the Crown Prosecution Office, now the DPP, and most recently as a Justice of the Supreme Court. 6
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His Honour Justice Doyle has extensive experience in commercial and civil law as well as criminal appeals, with five years experience as a Supreme Court Judge. 11
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One of the government's key justice priorities is to modernise our courts and to meet, not only our needs now, but those well into the future. The combined experience of those who have been appointed will serve the court and the State with distinction now and in the years to come. 15
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I conclude with a quote of Justice Kirby, who said of permanent appellant courts:
'Reform is not change for its own sake but change for the better.'
Indeed it is. May it please the court. 21
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KOURAKIS CJ: Ms Sandford, President of the Law Society. 26

MS SANDFORD: May it please the court. It is both a privilege and a pleasure to acknowledge, on behalf of the members of the legal profession of this State, through the Law Society of South Australia, the establishment of the State's first Court of Appeal. 27
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The establishment of this honourable court marks a new era for the judicial system in South Australia. It brings our State into line with the other Australian jurisdictions that already have a dedicated court of appeal. 32
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In our hierarchical court system, the Court of Appeal will become the final authority in this State. 37
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As SA's ultimate arbiter of justice, the Court of Appeal will play an important role in establishing the precedents which shape the common law in this State. The decisions handed down by this court therefore will be critical in the maintenance of a fair and stable justice system. It is a heavy responsibility to bear but the Society has absolute confidence that the esteemed justices of this court are up to the task.

We note that the Court of Appeal has been set up as a division of the Supreme Court with the current Chief Justice remaining as the primary judicial officer of the State. The Society supports this structure and looks forward to a collaborative and cohesive court that delivers judgments of explicative excellence.

The Society congratulates the honourable Justice Kelly upon her appointment as the President of the Court of Appeal and warmly welcomes her to the role. I am particularly delighted that a woman of Justice Kelly's calibre has been appointed to this prestigious role as the inaugural President.

Her Honour is an experienced and respected jurist who is known to the profession to be extremely knowledgeable, direct and efficient. Her Honour has been a Justice of the Supreme Court since 2007, having previously been a District Court Judge since 2003.

Colleagues with experience in appearing before Justice Kelly have noted her Honour places a particular emphasis on clarity of reasons for judgment, which is key to assuring confidence and stability in the justice system and highly appreciated by the parties to a matter and the profession.

The Society notes the strong, constructive working relationship President Kelly has had with the Chief Justice during Justice Kelly's period as a Justice of the Supreme Court since 2007, which augers well for the commencement of the Court of Appeal.

The Society also welcomes the appointments of the other four judges to this new court: Justices

Livesey, Bleby, Lovell and Doyle. Their honours all 1
had distinguished legal careers prior to their judicial 2
appointments and are held in high esteem by fellow 3
members of the profession. I commend the Attorney for 4
assembling a judicial panel of such formidable 5
intellect. 6

The State is fortunate to have judicial officers 7
of the calibre of the Chief Justice and justices that 8
comprise the Court of Appeal to oversee and undertake 9
the important appellate work required of this 10
jurisdiction. 11

On behalf of the Society, its members and the 12
wider South Australian legal community, I express the 13
utmost confidence that your Honours will exercise their 14
duties in this new jurisdiction in a manner that befits 15
the eminent role this new court will have in the 16
justice system in this State and I wish you well. 17

May it please the court. 18

KOURAKIS CJ: Mr Hoffmann, President of the Bar 19
Association. 20

MR HOFFMANN: If the court pleases, it's my pleasure, on 21
behalf of the South Australian Bar Association, to mark 22
this occasion of the establishment of the Appeal 23
Division of the Supreme Court of South Australia. 24

The court, as we all know, is steeped in 25
history, having been established five days after the 26
South Australian colony was established in 1837. This 27
change, the establishment of a division of the court to 28
solely deal with appeals, marks a very significant 29
change in the structure of the court and a change that 30
is welcomed by the South Australian Bar Association. 31

Your Honours collectively have over 100 years 32
of experience across a very broad range of legal 33
discourse. The business of the Supreme Court of South 34
Australia covers an extraordinary compass. A review of 35
the judgments of Justice Kelly, of Justice Lovell and 36
more recently of Justices Doyle, Livesey and Bleby 37
reveal the breadth of that discourse. 38

Your Honours are all extremely well-qualified, 1
as the court has heard this morning and I won't travel 2
over that territory. I do mark though, on behalf of 3
the South Australian Bar Association, the significance 4
of the appointment of Your Honour, Madam President 5
Justice Kelly. This is a most significant advancement 6
for women in the profession and in the judiciary and 7
it's significant to note that here we have your Honour 8
as President, the Attorney-General, the Crown Solicitor 9
and the President of the Law Society of South Australia 10
all being women and that, when one looks at the history 11
of the court and the profession in this State, is 12
something of a sea-change, putting it mildly. So your 13
Honour, we very much welcome you and commend you on 14
your very significant appointment. 15

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I wanted then to touch on the issue around 1
efficiency and the burden of the court. Much has been 2
said of that by the Attorney this morning. It's 3
important to note that the workload of the court is 4
enormous, both for now the general division, but also 5
for the appeal division and it's hoped that the 6
establishment of a permanent Court of Appeal will help 7
to lessen that burden. 8

Members of the community are likely not aware 9
that the appointment to a position of a justice of this 10
court is not a nine to five job. The hours are huge, 11
the pressure is enormous. It's also as well to note 12
that aside from writing judgments and dealing with 13
trials there are many other tasks that might be 14
assigned, for example, dealing with the new ECMS system 15
or writing new rules. These are enormous tasks and 16
they're not readily apparent from statistics. It's 17
hoped that through the appointment of the Court of 18
Appeal that your Honours will be able to share the 19
burden. 20

It's interesting to note that those who are 21
newly appointed quite often say 'Well, I've got 16 22
judgments to write, it's not quite as easy as I thought 23
it might be'. So, your Honours, the South Australian 24
Bar Association acknowledges that that is an enormous 25
burden and one that where a permanent Court of Appeal, 26
we hope, will be in a position to discharge the 27
appellate jurisdiction without the burden of ongoing 28
trials and trial work and the ever building pile of 29
work. 30

That's not to say that it's going to be easy. I 31
have no doubt that there's an enormous burden that the 32
members of the Court of Appeal will have to deal with, 33
but it's hoped, by the South Australian Bar Association 34
that this advancement will certainly facilitate the 35
workload of the court and it's welcomed. So I 36
congratulate the court. If it pleases the court. 37

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KOURAKIS CJ: Justice Kelly inaugural president of the Court of Appeal. 1
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KELLY P: As others have already remarked, the establishment of a Court of Appeal as a division of the Supreme Court is the latest step in the history of one of the oldest courts in Australia. By any measure, this is a significant milestone in the history of the Supreme Court. 3
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I am honoured to play a small part in this, even if only for a brief moment in time. I am by no means the first woman to preside over a Court of Appeal in Australia. That trail having been blazed by the likes of such luminaries as former Presidents Margaret McMurdo in Queensland, Carmel McLure in Western Australia and the redoubtable Margaret Beazley, now Governor of New South Wales. 9
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This court has, although small in size, played a significant role in the development of South Australian and Australian and common law jurisprudence generally. The Supreme Court has had the very good fortune of attracting some of the best legal minds in Australia to its bench. I'm thinking particularly now of John Doyle, who we all know, was the greatest High Court Judge who never was. 17
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It is the aspiration of each and every member of this court to continue that tradition by producing quality judgments in a timely fashion that achieve the highest standards of justice according to law. 25
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In the coming months we intend to pay close attention to identifying the best practices necessary to discharge that responsibility and to maintain the confidence of the community and the legal profession. And not least to ensure that that pesky judicial conduct commissioner doesn't get her foot in our door. We must all play our part. 29
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I am pleased to say that we have commenced a productive and constructive conversation with the profession. With that approach I am very confident 36
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that the Supreme Court will continue to serve the 1
interests of the South Australian community. Thank you 2
for your attendance today, all of you. 3
ADJOURNED 9.55 A.M. 4

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