



JUDICIAL CONFERENCE OF AUSTRALIA

**GOVERNING COUNCIL**  
**MINUTES OF MEETING: 2011/1**

Held on **Saturday 12<sup>th</sup> March 2011** at the Supreme Court of New South Wales, Queens Square, Sydney.

**Present**

Justice David Harper AM (in the Chair)	Supreme Court of Victoria
Federal Magistrate Michael Baumann (alternate)	Federal Magistrates Court of Australia
Justice Robert Benjamin (alternate)	Family Court of Australia
Magistrate John Birch	Magistrates Court of the Northern Territory
Justice Alan Blow, OAM	Supreme Court of Tasmania
Chief Magistrate Elizabeth Bolton	Magistrates Court of South Australia
Judge Wayne Chivell (alternate)	District Court of South Australia
Magistrate Maria Doogan	Magistrates Court of the Australian Capital Territory
Judge Allan Fenbury	District Court of Western Australia
Justice Peter Garling	Supreme Court of New South Wales
Magistrate Julie Huber	Local Court of New South Wales
Magistrate Don Jones	Magistrates Court of Tasmania
Justice Judith Kelly	Supreme Court of the Northern Territory
Deputy Chief Magistrate Peter Lauritsen (alternate)	Magistrates Court of Victoria
Justice Glenn Martin	Co-opted
Justice Michael Murray	Supreme Court of Western Australia
Judge Michael McInerney	County Court of Victoria
Justice Philip McMurdo	Supreme Court of Queensland
Magistrate Leanne O'Shea	Magistrates Court of Queensland
Justice Hilary Penfold	Supreme Court of the ACT
Judge Michael Shanahan	District Court of Queensland
Justice Terry Sheahan, AO	Land and Environment Court of New South Wales
Justice Margaret Stone	Federal Court of Australia
Justice Michael Walton	Industrial Court of New South Wales
Justice Richard White	Supreme Court of South Australia
Judge Jon Williams	District Court of New South Wales

## In attendance

Christopher Roper, AM

Secretary

## Apologies

Apologies were received from:

Chief Magistrate Ian Gray  
Chief Magistrate Steven Heath

Judge Geoff Muecke  
Chief Federal Magistrate John Pascoe  
AO, CVO  
Judge Brian Withers  
Justice Peter Young

Magistrates Court of Victoria  
Magistrates Court of Western  
Australia  
District Court of South Australia  
Federal Magistrates Court of  
Australia  
Treasurer  
Family Court of Australia

## Alternates attending

### *Alternate*

Federal Magistrate Michael Baumann  
Justice Robert Benjamin  
Judge Wayne Chivell  
Deputy Chief Magistrate Peter Lauritsen

### *Representative*

Chief Federal Magistrate John Pascoe  
Justice Peter Young  
Judge Geoff Muecke  
Chief Magistrate Ian Gray

### Resolved

That the apologies be noted and received.

The Chair welcomed those attending as alternates for Governing Council members.

## 1 Confirmation of minutes of the previous meetings of the Governing Council

The minutes of the meetings of the Governing Council held on 9<sup>th</sup> October 2010 had been circulated.

### Resolved

That the minutes of the previous meetings held on 9<sup>th</sup> October 2010 be confirmed, subject to the deletion of the words “ an open” in the second sentence under the heading *Meeting with the Tasmanian Attorney General* and replacing them with the word “a”.

### Resolved

That the minutes of the meetings of the Governing Council held on 9<sup>th</sup> October 2010 be uploaded to the Members' Section of the JCA's website subject to the deletion of all sentences after the first sentence under the heading *Meeting with the Tasmanian Attorney General* and the addition to the first sentence of the words “concerning judicial pensions and superannuation”.

That the Members' Section of the JCA's website contain the following words in the part containing minutes of Governing Council meetings –

“Occasionally some material may be redacted from the minutes. Further information can be obtained, if required, from your Court's representative on the Governing Council.”

## **2 Minutes of the meetings of the Executive Committee held since the last meeting**

The minutes of the Executive Committee meetings held on 18<sup>th</sup> November 2010 and 24<sup>th</sup> February 2011 had been circulated.

### Resolved

That the minutes of the meetings of the Executive Committee held on 18<sup>th</sup> November 2010 and 24<sup>th</sup> February 2011 be noted.

## **Reports & Administration of the JCA**

### **3 President's Report**

The President reported on the following matters –

#### *Dinner for Justice Ruth McColl*

He reported that the dinner had been very successful and he congratulated Justice Garling on its organisation.

#### *Maconochie matter*

He reported that this matter had been dormant since the last meeting of the Governing Council.

#### *Judicial Registrars in Victoria*

He reported that several Judicial Registrars had been appointed under s 113F of the *Supreme Court Act*. He noted that they all had the immunities of a judge and the same tenure. There was some discussion of the relevant factors to determine whether a person was exercising judicial functions including immunities, tenure and the title used. It was noted that the title “Registrar” did not necessarily mean that a person was exercising primarily administrative functions.

### Resolved

To accept that the office of Judicial Registrar in the Supreme Court of Victoria qualifies for membership of the Judicial Conference of Australia.

*Note: Subsequently it was ascertained that the Judicial Registrars did not have tenure. As the resolution was passed on that basis, it has been held in suspense until the matter is further considered by the Governing Council.*

Justice Walton reminded members that several years ago a person had been rejected for membership, and suggested the correspondence be checked to see what was the basis of the rejection.

Deputy Chief Magistrate Lauritsen reported that there were six Judicial Registrars in the Magistrates Court of Victoria who are appointed for a term of years and have similar immunities. Their work, which is delegated by magistrates, is largely judicial but includes some of the administrative work which magistrates already perform. He suggested that they may well seek membership on the basis of the Supreme Court's Judicial Registrars being accepted for membership.

#### *Complaints against Judicial Officers Project*

The President reported that the outcome of a recent meeting of the Standing Committee of Attorneys General was that the ministers agreed that complaints handling would take place in individual jurisdictions and the proposal to have a national complaints handling body had been abandoned. He said that he understood the Commonwealth Attorney General would attempt to set up a system for federal judicial officers.

The President then reported that a bill to establish a complaints handling body had been introduced into the Victorian Parliament before the Election but had not been reached before Parliament was prorogued. He reported that the new Government was not interested in pursuing this proposal, although it would pursue the proposal to establish an anti-corruption body, although it would not (properly) consider complaints in regard to judicial conduct.

Several members reported that there were no proposals in their jurisdictions to establish such a body.

Justice McMurdo pointed out that, in some cases, because there is no clear path for making a complaint, litigants will go to the anti-corruption body, which was an undesirable situation.

Justice Garling noted that the word "corruption" can be sprinkled through a letter of complaint which means that the court officer receiving the letter of complaint is obliged to send it on to the corruption commission. Justice Murray stated that in Western Australia the relevant statute forbids such complaints being referred to the Crime and Corruption Commission.

Judge Williams raised the question of whether there would be value in the JCA developing a model system which would, of course, be non-binding but may be of assistance to smaller jurisdictions. The President said that a model system, in general terms, was in the two reports of the Committee, and they could be provided to heads of jurisdiction.

#### *Retired Judicial Officers Committee*

Justice Garling reported that a number of responses had been received to the questionnaire and that when sufficient were received the results would be collated. The Secretary reported that the 14 who had so far responded to the questionnaire

had indicated what tasks they would be willing to perform, if approached. He said that it would be necessary to decide what should now be done with this list, which could include a note on the JCA's website as to its availability, as well as approaches being made to attorneys-general and others. He said that the other part of the survey sought a small range of information, and the Retired Judicial Officers Committee would need to decide, at some stage, what reports should be produced from the information collected, and what should be done with the reports.

It was noted that it would be necessary to continue to survey, from time to time, members of the JCA who had retired so that the list was kept up to date.

The President noted that with the establishment of this list the JCA should advise its retired members that this is something that the JCA can do for them. He said it would be useful if Governing Council members could advise him and the Secretariat of members who were at the point of retirement.

#### *Justice Giudice*

The President reminded members that Justice Giudice had been asked questions about his judicial work by a Senate Committee but that he had refused to answer the questions, and they had not been pursued. The President said that Justice Giudice had asked the JCA to put the matter on hold and that he would come back to the JCA if the need arose.

#### *Superannuation for Tasmanian judges*

This item was dealt with at item 10 below.

### **4 Secretary's report**

A report from the Secretary had been circulated and was noted.

### **5 Treasurer's report**

A profit and loss statement for the period 1<sup>st</sup> September to 31<sup>st</sup> December 2010 had been circulated and was noted. The Secretary reported that the financial situation was healthy with over \$106,000 in the two bank accounts and \$314,000 on term deposit.

Justice Benjamin suggested that, at the time of renewal of membership, those from the year prior to the previous year be invited to consider recommencing their membership. The Secretary said that this could be done with the existing database, and he would do it.

### **6 Membership report**

A membership report as at 1<sup>st</sup> September to 31<sup>st</sup> December 2010 had been circulated and was noted. The Secretary reported that membership now stood at 612.

Chief Magistrate Bolton noted that magistrates had the lowest proportion of members and suggested that there could be a link between their level of membership and the

support the JCA was able to give to magistrates in regard to their superannuation arrangements.

## Activities, projects and matters of concern

### 7 2011 Colloquium

Justice Martin reported that the Planning Committee had had several meetings, and that –

- invitations had been sent to the Administrator of the Northern Territory and to Simon McKeon, the Australian of the Year, and that replies were yet to be received
- the Saturday sessions would be on social networking – how courts can be affected, and innovations in trial management – in particular in small and specialist jurisdictions
- the Sunday sessions would be on indigenous issues and a joint session with the NJCA at which Chief Justice Martin would speak on what do we want from judicial education.

Justice Martin mentioned that it would be necessary to finish earlier on the Sunday so that participants could catch flights out of Alice Springs.

He also noted that, as there were not potential speakers locally in Alice Springs, it would be necessary to bring them in and this would increase the cost. He suggested that the surplus from the 2010 Colloquium could be notionally applied to the 2011 Colloquium to cover these costs.

He said that an after-dinner speaker had not yet been arranged.

### 9 Superannuation surcharge and federal and Northern Territory judges

The President stated that there was nothing further to report in regard to this matter.

### 10 Judicial pension entitlements

### 11 Superannuation for magistrates

Justice Sheahan stated that he had nothing further to report. He said a harmonised national arrangement in regard to judicial pensions would require cooperation amongst the attorneys general. He said that some disparities between jurisdictions did exist, such as a widow/widower in New South Wales receiving 50% of the former judge's pension whereas in some other jurisdictions it was 68%.

The President said that the JCA could write to the attorneys general pointing out the disparities but that there were some dangers in this as this might encourage the adoption of the lowest common denominator.

Justice White suggested that there could be a trade-off whereby judges could accept a later retirement age, and hence a longer working life, in return for a better pension.

He noted that governments are only interested in keeping down costs, not in ensuring that judges are content in their work.

Judge Shanahan suggested that a targeted approach would be better, focussing on the most disadvantaged.

Justice McMurdo asked if the JCA needed to look at the wider issue that it was essential that all judges should have a pension as part of their remuneration.

Justice Blow outlined the situation in Tasmania as reported in the minutes of the previous Executive Committee meeting. He said that he had a draft letter for the President to send to the Tasmanian Attorney General. Although he felt there was no chance of pensions being reintroduced or the superannuation contribution being increased, he felt it was important to maintain pressure on the Government. Magistrate Jones sought clarification that the meeting with the Attorney General dealt only with judges, not magistrates.

Federal Magistrate Baumann outlined the position in regard to federal magistrates. He said that when the Federal Magistrates Court was established, federal magistrates were specifically excluded from the federal judges' pension scheme but that their 'employer contribution' was set at 13.1%. He said that since then federal magistrates' salaries have gone up and, as a result, the actual value of the 13.1% has also increased. He observed that senior public servants receive an employer contribution of 15.4%.

He said that the impact of the new Excess Contributions Tax would be that there would be a diminution in the value of this benefit as the new tax cuts in at \$25,000, and that amount is lower than 9% of judicial salaries.

Federal Magistrate Baumann read extracts from a letter from the Law Council of Australia to the Commonwealth Attorney General in which the Law Council asked that federal magistrates be included in the judicial pension arrangements or that the employer contributions to their superannuation scheme be increased. He said that he considered that the situation was one which could be described as "the thin edge of the wedge" and that eventually governments would seek to have all judges in superannuation schemes with a 9% contribution (or 12% if that change is made by the federal Government). He said that the federal magistrates had taken advice three times from Daryl Dixon & Associates. He said that whilst it was probably true that pensions would be reintroduced it was important not to give up and to argue the principles. He agreed that the risk was that, by putting a spotlight on the differences, governments could be encouraged to go for the lowest common denominator.

Magistrate Huber said that the report, which had been sent to the JCA by Chief Magistrate Henson with his letter, showed that the average magistrate in New South Wales would be able to live for two to three years on their superannuation, after which they would need to receive the old age pension. It was agreed that the report be circulated to Governing Council members.

The President said that he had received from Chief Magistrate Gray a similar report prepared by Mercer Wealth Solutions in 2009. He said he had not heard from the Magistrates Courts in the Northern Territory, Queensland and Tasmania but he assumed their position was similar. He noted that the JCA also had the material from New Zealand provided by Justice Miller.

Magistrate O'Shea said that, as any excess over \$25,000 would be taxed as from 2012 at the marginal rate, there would be no value in receiving a contribution of higher than 9%.

The President said that it would be good to get a united position from the Magistrates Courts. The JCA would agree that a contribution of 9% was unsatisfactory. In whatever submissions it made, it would need to take into account the tax implications.

Justice Stone said that she considered it would be preferable that the JCA had a considered position on post-judicial retirement at a higher level of generality. She said that there were many factors; one of which was governments' reluctance to provide a pension. Another factor was some judicial officers going back into practice or other forms of work. She said that it would then be possible to go down from this general position to what was appropriate. She said that she thought the risk could be minimised by having a principled position.

Justice Walton observed that the 9% contribution applies to all members of the community, and that it is formulated on the basis of a lifetime of employment. He said this needed to be addressed in the development of the principled position.

Deputy Chief Magistrate Lauritsen said that in Victoria the magistrates had argued the case but had got nowhere. He said he felt a principled position might force the debate forward because otherwise it was getting nowhere.

Federal Magistrate Baumann said he would support Justice Stone's proposal as it would elevate the debate beyond apparent self-interest.

The President suggested that a sub-committee be formed to develop a statement. The following were appointed to the sub-committee –

Justice McMurdo (as chair)  
Federal Magistrate Baumann  
Justice Blow  
Chief Magistrate Bolton  
Magistrate Huber  
Magistrate Jones  
Deputy Chief Magistrate Lauritsen  
Magistrate O'Shea  
Justice Walton  
Judge Williams

Chief Magistrate Bolton observed that the Association of Australian Magistrates had done a lot of work and it would be good to involve the AAM so as not to reinvent the wheel. The President said that he would contact Magistrate Levine, the President of the AAM, about the contribution it might make.

It was suggested it would be interesting to find the research which had been done for politicians in regard to their contribution. Justice Benjamin suggested that there has been work done by the OECD on corrupt and non-corrupt courts, and also by the Council of Economic Development in Australia in regard to the ageing of the Australian population and the impact of defined pension schemes on the States. He said this work would help the JCA understand how thought is being formulated in regard to this issue, which in turn would be useful when making submissions to government.

Judge McInerney noted that the Remuneration Tribunal in Victoria had recommended a re-look at the Sholl amendment.

## **12 Anonymising of private and confidential matters in transcripts, sentencing remarks and judgments project**

An outline of a report had been circulated together with a paper prepared by Justice Debra Mullins. Judge Shanahan said that in Queensland the prohibitions in all legislation had been identified and were included in the Associates' Handbook, which is accessible to judges. He noted that there were other things which were of a privacy nature.

Justice Murray said that the Western Australian policy covers everything that the judges write and publish.

Justice Penfold said that there was a need to incorporate the overarching principle that everything a court does is in public and thus the privacy requirements are an exception to that.

It was suggested that there would be value in having a model policy. Judge McInerney said that the matter had been brought to the JCA because the County Court in Victoria was struggling with this issue and he thought there would be value in there being a model policy.

Justice Murray said that the policy in Western Australia had been in existence for long enough to show that it was practicable.

Justice Sheahan said that the policy of the Land & Environment Court of NSW, published in June 2010, was on its website.

Justice McMurdo said that he would approach Justice Mullins to see if she would be able to prepare a draft policy for consideration by the JCA.

## **13 The role of the JCA (particularly but not only in regard to issues in the media)**

The President, in opening the discussion, observed that individual jurisdictions will have their own policies but that there are areas where the JCA could be a repository of thought on matters of general interest to the Australian judiciary. He said that the JCA could assemble material which would be, in effect, a corporate memory and could assist individual judicial officers. He said that the more acute issue was how to respond to attacks in the media.

The President said that there had been no response from the *Herald-Sun* to the letter he had sent them (which had been circulated with the agenda). Subsequently there had been an article and an editorial in the *Sunday Herald-Sun* which had been circulated with the last distribution of media clippings. He said that he had, on the previous day, written again to the *Herald-Sun* resending the material.

There was then general discussion on this issue.

Justice Kelly suggested that a letter be written to *The Age* recounting what had happened and the non-response from the *Herald-Sun*.

Judge Shanahan suggested that the JCA could issue a press release.

The President reported the Chief Judge Rozenes had asked if the letter could go onto the County Court's website and he said he had agreed to that and the meeting endorsed that decision. It was then –

Resolved:

*That the letter from the President to the Herald-Sun be uploaded to the JCA's website as a matter of priority.*

Justice Murray said that in this situation there was a need to move quickly and he suggested that the Governing Council should be happy to accept the judgement of the President and Vice President as to when to move. He then went on to say that he believed the JCA should appoint a media adviser and he felt it would be worth the expenditure. He mentioned his own Court's adviser, Val Buchanan, and it was discussed whether she might be available to do piecework for the JCA.

After further discussion on this matter, it was agreed that the President and Vice President be authorised to make enquiries as to who might be appointed.

It was suggested that Prue Vines might be able to give general advice as to an appropriate person. Justice Benjamin suggested there could be value in talking to the Law Societies in Queensland, New South Wales and Victoria.

Justice Sheahan argued that the central need is for strategic advice, in addition to any assistance in dealing with a specific issue. He said the JCA needed to be clear as to what it wanted this person to do.

Justice Penfold said that the JCA also needed to be clear as to what situations it would respond to.

Justice Walton agreed and quoted the advice he had received which was that the first thing would be to define our purpose. He agreed that there is a distinction between responding to specific situations and being strategic.

Justice Penfold referred to the request made at an earlier meeting as to what support was available for victims in the various jurisdictions. She said that she had some material which she would forward to the Secretariat for circulation. Judge Shanahan said that the JCA should look at what support was provided but he did not see it as part of the addressing of problems created by the media. Justice Stone noted that there is nevertheless a perception which needed to be addressed.

There being no further business, the meeting concluded at about 12.45 pm.

Signed as a true record:

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President