



Judicial Conference of Australia

GOVERNING COUNCIL

MINUTES OF MEETING: 2013/2

Held on **Saturday 20th July 2013** at the Supreme Court of New South Wales, Sydney.

The meeting commenced at 10.00 am.

Present

Justice Philip McMurdo (in the Chair)	Supreme Court of Queensland
Judge Michael Baumann	Federal Circuit Court of Australia
Justice Robert Beech-Jones	Supreme Court of New South Wales
Chief Justice Alan Blow, OAM	Supreme Court of Tasmania
Judge Rosemary Davey	District Court of South Australia
Magistrate Greg Grogin	Local Court of New South Wales
Justice Judith Kelly	Supreme Court of the Northern Territory
Justice Peter Murphy	Family Court of Australia
Judge Gary Neilson	District Court of New South Wales
Judge David Parsons	County Court of Victoria
Justice Hilary Penfold, PSM	Supreme Court of the Australian Capital Territory
Justice Steven Rares	Federal Court of Australia
Justice Terry Sheahan, AO	Land and Environment Court of New South Wales
Justice Michael Walton	Industrial Court of New South Wales

In attendance

Christopher Roper, AM	Secretary
Dominie McNeil	Secretariat Administrative Assistant
Jeremy Leith	Secretariat Administrative Assistant

Apologies

Apologies were received from:

Magistrate Richard Bayly	Magistrates Court of Western
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Justice David Beach	Australia
Chief Magistrate Elizabeth Bolton	Supreme Court of Victoria
	Magistrates Court of South
	Australia
Judge Wayne Chivell	District Court of South Australia
Judge Allan Fenbury	District Court of Western
	Australia
Magistrate Karen Fryar, AM	Magistrates Court of the
	Australian Capital Territory
Chief Magistrate Hilary Hannam	Magistrates Court of the Northern
	Territory
Magistrate Don Jones	Magistrates Court of Tasmania
Chief Magistrate Peter Lauritsen	Magistrates Court of Victoria
Judge Michael McNerney	County Court of Victoria
Justice Carmel McLure	Supreme Court of Western
	Australia
Chief Judge John Pascoe AO, CVO	Federal Circuit Court of Australia
Judge Michael Shanahan	District Court of Queensland
Justice Richard White	Supreme Court of South Australia
Judge Brian Withers	Treasurer
Justice Peter Young	Family Court of Australia

Alternates

<i>Alternate</i>	<i>Representating</i>
Judge Michael Baumann	Chief Judge John Pascoe
Judge Rosemary Davey	Judge Wayne Chivell
Judge David Parsons	Judge Michael McNerney

Resolved (2013/8)

That the apologies be noted and received.

1 New members and alternates

The President welcomed Justice Robert Beech-Jones, Magistrate Greg Grogin, Judge Gary Neilson and Justice Peter Murphy who were attending as new members of the Governing Council. He also welcomed Judge Michael Baumann, Judge Rosemary Davey and Judge David Parsons who were attending as alternates.

2 Confirmation of minutes of the previous meeting of the Governing Council

The minutes of the meeting of the Governing Council held 23rd March 2013 had been circulated.

Resolved (2013/9)

That the minutes of the previous meeting held on 23rd March 2013 be confirmed.

3 Minutes of meeting of the Executive Committee held since the last meeting

The minutes of the Executive Committee meeting held on 18th April 2013 had been circulated.

Resolved (2013/10)

That the minutes of the meeting of the Executive Committee held on 18th April 2013 be noted.

Reports

4 President's Report

4.1 Family Court of Western Australia

The President reported that he had received a reply from the Chief Judge of the Family Court of Western Australia (which was tabled) in which he said that he considered the existing arrangement, whereby the Court was represented on the Governing Council by the representative of the Family Court of Australia, was sufficient.

4.2 New South Wales Statutory and Other Offices Remuneration Amendment (Judicial and other Office Holders) Act 2013

The President referred to a response he had received from the New South Wales Treasurer (which was tabled). He suggested that there was no more that the JCA could do. There was some discussion. The President noted that the Commonwealth Remuneration Tribunal had awarded at 2.4% increase from 1st July. Chief Justice Blow observed that as long as the statute was on the statute books there was always the risk that the Government might do something which infringed judicial independence.

Judge Baumann reported on a decision of the Commonwealth Tribunal which had set the salaries of Federal Circuit Court judges at 84.7% of superior federal court judges but, it said, not on a relativity basis.

The President noted that judicial salaries in Queensland and Victoria were directly linked to federal salaries so that, in effect, the Commonwealth Tribunal fixed salaries for judges in those States. He considered this was much better than the New South Wales situation. He reported that a State tribunal was being reintroduced in Queensland for parliamentarians.

4.3 Superannuation changes in light of the Federal budget

The President reported that in early May he had written to the Federal Treasurer in regard to two matters, with copies to the Federal Minister for Superannuation and the Federal Attorney General. He said he had not received a reply to the letter, and did not expect now to receive one in light of the forthcoming election. The two matters were (1) the proposed change to the concessional rate for contributions to superannuation funds for people earning more than \$300,000, and (2) the proposed change to the tax-free status of income on retirement from superannuation funds if the income is over \$100,000. He noted that the second matter did not apply to judges who received judicial pensions and they paid tax on their pensions. He said that the Commonwealth Attorney General had issued a statement that it would not apply to Commonwealth judges. The President said that, as far as he could track, no Bill had been introduced in regard to the second proposal.

Justice Kelly pointed out that, in regard to the second matter, there was a possible anomaly in regard to Territory judges. The President said that it was in regard to the first matter that it was of concern that Territory judges had not been specifically exempted.

There was a consensus that there was no purpose in writing further to the Treasurer prior to the election.

There was some discussion of various anomalies, including those federal judges appointed between 1997 and 2005 who are still affected by the surcharge, Supreme Court judges in Tasmania, and judges of the Federal Circuit Court.

4.4 Issue arising from a proposal for webstreaming in Western Australia

The President reported that he had received a reply from the Attorney General of Western Australia (a copy of the letter was tabled). The President recounted the series of events. He said he had been contacted by the Chief Justice of Western Australia who believed that the issue involved an issue of judicial independence. He said the Chief Justice wanted to apply allocated funds for IT for the purpose of

webstreaming. The Attorney General had written to the Chief Justice saying why he considered that should not be done, and also setting out a case against webstreaming. The Chief Justice had responded that this was a matter for the courts. The Attorney General had then said that the Executive decided what funds to allocate to the courts and that he would not approve of their use for webstreaming. The Chief Justice then issued a press release claiming an interference in the Court's management of its own business.

The President said he and the Vice President, after liaising with Justice McLure, had concluded that the Chief Justice was right, and had issued a media release supporting his viewpoint, as well as writing to the Attorney General supporting the Chief Justice's position.

The President then went on to say that the JCA's position did not have the unanimous support of the judges of the Supreme Court of Western Australia.

Chief Justice Blow said that the JCA's media release did not enter into the question of the accuracy of the Attorney's statement that no funds were available from an existing allocation.

Justice Rares said that this matter raised a wider issue in regard to court governance – why should the Executive tell the courts how to administer the courts? He observed that in the United States all courts have one line item budgets. He raised the question of whether the JCA should look at the Executive's influence over the day to day running of courts.

Judge Davey said that in South Australia there was a separate courts administration system, the Courts Administration Authority, but there were still arguments about the money allocated to the Authority.

The President said that the Western Australian incident provided an example of the shortcomings of the funding model used in most States. He said the JCA needed to develop a view on whether judicial independence was sufficiently protected where the courts do not have control over their own budgets.

Resolved (2013/11)

To endorse the steps taken by the President and Vice President in issuing a media release in support of the position of the Chief Justice of Western Australia.

5 Secretary's report

A report had been circulated.

JCA's website

The Secretary outlined his proposal that the Content Management System (CMS) of the JCA's website be upgraded, and that it was likely that the cost could be up to \$15,000.

The Governing Council supported the proposal to upgrade the CMS and made the following additional suggestions for consideration –

- That the website itself should be upgraded, in its appearance and to make it more user-friendly.
- That the weekly media clippings could be included in the Members Only section as a permanent record.
- That there be a link to the judicial protocols on the Australasian Institute of Judicial Administration's website. [Note: this is a reference to the *Guide to Judicial Conduct*.]
- That media releases should be immediately uploaded to the website and be immediately accessible on the home page.

It was suggested that the Secretariat liaise with the various courts to arrange for a hyperlink from the courts' websites to the JCA's website.

Justice Walton observed that the website has two functions – for members and for the public, notably the media. He said it was important that the improvements to the website bears these dual functions in mind. He noted that Facebook was, apparently, now used more often than websites as a means of obtaining information, and questioned whether the JCA should have a Facebook page. There was some discussion of this proposal and there was support for it being explored further.

Resolved (2013/12)

To authorise the Secretary to proceed with the upgrade of the CMS and the website generally, and that the Secretary now obtain precise details of what the designers would be able to do, and at what cost.

Membership renewal process

The meeting then discussed the Secretary's proposal that he investigate how the membership renewal process might be streamlined by removing the necessity for returning the membership

renewal form and, instead, enable members to confirm or update their details online. It was agreed that if such a system were introduced members should still be left with the option of completing the process in paper form.

Dominic McNeil

The President noted that Dominic McNeil was present at the meeting and would shortly be leaving the JCA in order to study overseas. He proposed the following resolution, which was passed unanimously.

Resolved (2013/13)

To record the appreciation of the Governing Council for the contribution of Dominic McNeil to the work of the JCA.

6 Treasurer's report

A profit & loss statement for the period 1st April to 30th June 2013 had been circulated, and an updated version had been tabled, and was noted.

The Secretary was asked to enquire how the total figure for Membership Fees was arrived at, and how expenditure for the Colloquium was dealt with and reported.

Resolved (2013/13)

To note the financial report for the period 1st April to 30th June 2013.

7 Membership report

A membership report as at 12th July 2013 had been circulated, and an updated version was tabled. The following decisions was made –

Resolved (2013/14)

1. That the President write to those justices of the High Court who are not members of the JCA inviting them to join.
2. That the Secretary distribute to members of the Governing Council lists of members from their respective courts who have renewed and who have not renewed.
3. That Justice Michael Walton contact the Industrial Court of South Australia inviting its judges to join the JCA and raising the possibility of representation on the Governing Council.

Activities, projects and matters of concern

8 2013 Colloquium

Chief Justice Blow reported that the planning for the Colloquium was complete. He reminded members that the early bird registration expired in early August and asked that they encourage members of the courts to register.

He said that Chief Justice Bathurst had asked for suggestions of topics for his keynote address on the interaction between the Courts and the Executive, and the following suggestions were made –

- Budgetary matters, *ie.* the setting of the courts' budgets (*cf.* the recent situations in Western Australia and South Australia).
- The holding of the office of Lieutenant Governor by Chief Justices.
- The day to day running of the courts and the interference of the Executive, *eg.* management of stationery or the email addresses allocated to judicial officers.
- The selection process for judicial officers, particularly in view of the recent English experience.

Judicial appointment process

In discussing the last of those suggestions for Bathurst CJ, it was proposed that it was desirable that the JCA should have a position on the selection process; so that it could have such a position in advance of any controversy arising in regard to a particular appointment. There was then some discussion, particularly in regard to the merits of an advertisement/interview process and the older process whereby the Attorney General informally consulted and then approached candidates.

Resolved (2013/15)

That:

1. The JCA consider the development of a policy in regard to the process of selection of appointees to judicial office.
2. A committee be formed to develop a draft policy, and that it include at least one female member.
3. The President arrange the constitution of the committee.

The Secretary was asked to circulate to Governing Council members the Chesterman Report, which had been prepared during the Presidency of Justice McColl, together with a paper prepared by Professor John Williams.

The President said that he would email to all Governing Council members inviting them to volunteer for the committee.

Future Colloquia

In regard to colloquia after 2013, the President reported that the proposed 2014 Colloquium in Brisbane would precede the G20 Summit also to be held in Brisbane, and it was clear that hotel rates were being increased because of that. He therefore suggested that the 2014 Colloquium might be held on the Sunshine Coast. The Secretary was asked to approach AM Meetings Plus to request that they explore what options would be available.

In regard to the colloquium to be held in 2016, it was resolved as follows.

Resolved (2013/16)

That the 2016 Colloquium be held in Canberra.

9 Judicial advice to holders of vice regal office

The President reported that the committee was not yet ready to report, however Judge Jon Williams had prepared a memorandum and the other members of the committee were in substantial agreement with it. He said that the effect of the committee's report would be that judges should not be advising governors. He said the consideration of the matter had thrown up the question of whether judges should act as lieutenant governors. He said the report would not deal with this matter but would flag it as an issue.

10 Possible research project on the independence of the judiciary

A memorandum prepared by the Secretary had been circulated. The memorandum proposed that the JCA commission an academic to undertake a study of decisions of Australian courts on the independence of the judiciary. The proposal was supported by the President and the meeting.

Resolved (2013/17)

To commission a review by an academic lawyer of the judgments of Australian courts concerning the independence of the judiciary from the Executive arm of government in relation to the governance of the Commonwealth, and the States and Territories.

It was noted that the report would initially come to the JCA when a decision would be made as to whether to publish it. The issue of whether the academic would also want to publish the work in an academic journal would need to be explored. The Secretary was asked to check with the AJJA what its practice was in this regard.

The President proposed that the Secretary now look at the detail of how the project might be initiated and undertaken, and report to the Executive Committee. This report would include how academics would be identified and the person selected.

11 Guidelines for the use of social media by judicial officers and courts

The following documents had been circulated –

- An American Bar Association Formal Opinion on “Judge’s Use of Electronic Social Networking Media”.
- An extract from the United Kingdom *Guide to Judicial Conduct, 2013*.
- A paper by Judge Judith Gibson, “Should Judges Use Social Media?”.

Justice Rares introduced this item. He said that a number of issues arose, such as whether a judge should be identified on Facebook, *eg.* in photos, or by indicating who the judge’s family was. He said that one issue was that security questions arose. He asked if the JCA should develop protocols or point out to members the security and exposure issues involved.

Resolved (2013/18)

That the JCA develop guidelines for the use of social media by judicial officers and courts.

The Secretary was asked to circulate to Governing Council members a recent article on the topic in the New South Wales *Judicial Officers' Bulletin*.

12 Judicial independence, separation of powers, the executive and the press

Two articles in *The Advertiser*, reporting a statement by Chief Justice Kourakis in regard to the effect of funding cuts, and a response from Attorney General Rau, had been circulated. Justice Kelly introduced this item. She said that the statement of the Attorney General of South Australia, in particular that the judiciary was a government agency, indicated a lack of understanding of the separation of powers and the independence of the judiciary. She said that she felt that on each occasion where this occurred the JCA should write to editors of newspapers correcting this misunderstanding.

Justice Sheahan referred to a similar situation in New South Wales with reductions in funding resulting in the closing of several Local Courts.

The President said that the Attorney General appeared to be attempting to avoid the Government's responsibility to appoint judges.

18 Next meetings

The next meetings will be held in Sydney during the Colloquium on Friday 11th and Saturday 12th October 2013.

There being no further business, the meeting concluded at 1.15pm.

Signed as a true record:

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President