



Judicial Conference of Australia

## GOVERNING COUNCIL

### MINUTES OF MEETING: 2018/2

Held on **Saturday 2<sup>nd</sup> June 2018** at the Supreme Court of New South Wales, Sydney.

The meeting commenced at 10.00am.

#### Present

Justice Robert Beech-Jones (in the Chair)	Supreme Court of New South Wales
Magistrate Jennifer Atkinson	Local Court of New South Wales
Justice Michael Baumann, AM	Family Court of Australia
Chief Justice Alan Blow, AO	Supreme Court of Tasmania
Justice John Burns	Supreme Court of the Australian Capital Territory
Judge Wayne Chivell	District Court of South Australia
Deputy Chief Magistrate Michael Daly	Magistrates Court of Tasmania
Judge Graham Dart	Supreme Court of South Australia
President Justice Steven Dolphin	South Australian Employment Tribunal
Justice Judith Kelly	Supreme Court of the Northern Territory
Justice Rene Le Miere	Supreme Court of Western Australia
Judge Rachelle Lewitan, AM	County Court of Victoria
Chief Judge John Lowndes	Local Court of the Northern Territory
Justice Glenn Martin, AM	Supreme Court of Queensland
Judge Garry Neilson	District Court of New South Wales
Deputy President Daniel O'Connor	Industrial Court of Queensland
Deputy Chief Magistrate Leanne O'Shea	Magistrates Court of Queensland
Judge Anthony Rafter, SC	District Court of Queensland
Magistrate Marc Sargent	Magistrates' Court of Victoria
Justice Terry Sheahan, AO	Land & Environment Court of New South Wales
Judge Andrew Stavrianou	District Court of Western Australia

Justice Michael Walton

Supreme Court of New South  
Wales

Judge Joshua Wilson

Federal Circuit Court of Australia

### **In attendance**

Christopher Roper, AM

Secretary

### **Apologies**

Apologies were received from:

Magistrate Karen Fryar, AM  
Justice Timothy Ginnane  
Magistrate Andree Horrigan

Magistrates Court of the ACT  
Supreme Court of Victoria  
Magistrates Court of Western  
Australia  
Federal Court of Australia  
Family Court of Australia  
International Association of  
Judges

Justice Neil McKerracher  
Justice Peter Murphy  
The Hon Tony Pagone

Resolved (2018/6)

That the apologies be noted and received.

The President welcomed Justice John Burns, President Justice Steven Dolphin and Judge Andrew Stavrianou, who were attending their first meeting of the Governing Council.

## **1 Confirmation of minutes of the previous meeting of the Governing Council**

The minutes of the meeting of the Governing Council held on 17<sup>th</sup> March 2018 had been circulated.

Resolved (2018/7)

That the minutes of the previous meeting held on 17<sup>th</sup> March 2018 be confirmed.

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

The minutes of the Executive Committee meeting held on 17<sup>th</sup> May 2018 had been circulated.

Resolved (2018/8)

That the minutes of the meeting of the Executive Committee held on 17<sup>th</sup> May 2018 be noted.

## President's Business

### 3 President's Report

The President reported as follows:

#### 3.1 *Taxation arrangements affecting pensions of retired judges*

The President referred to the note which had been circulated with the agenda papers, in which he recounted the effect on the pension schemes of some retired members of the JCA as a result of the changes made to the taxation of superannuation benefits in the 2016 Federal Budget. He mentioned that there had been representations to the JCA, by a number of members who were retired judges, that the changes were contrary to *Austin*.

*The following section is legally professionally privileged*

The President referred to the advice which the JCA had obtained from senior and junior counsel, the overall effect of which was that there was not the potential to challenge the legislation on the basis of *Austin* unless it could be shown that there was practical discrimination as between the retired judges and retired Federal judges or other high income earners.

The President noted that the problem with pursuing this approach was that the work would be intensive and expensive. He reported that the JCA had written to the Federal Treasury seeking information on its rationale for the changes; the effective answer to which was that the cap for accumulation funds schemes is \$1.6 million, and it is assumed that a judge would live for 16 years after retirement, hence a cap of \$16,000 per annum. He observed that the rationale was, on its face, rational. He said the question was whether the JCA should obtain an actuarial assessment to confirm this or otherwise, given that almost \$40,000 had already been spent on legal fees.

*End of privileged section*

The President said that his view was that the JCA had exhausted what it could do. He proposed that the Governing Council give power to the Executive Committee or the President, to bring this matter to an end.

*Resolved (2018/9)*

That, subject to seeing what the final cost of obtaining the actuarial report would be, the Governing Council authorises the Executive Committee to write to the former judges who have urged the JCA to challenge the legislation to inform them that the JCA does not propose to pursue the matter further.

It was agreed that, after the retired judges had been advised of this resolution it would be in order for Governing Council members to advise members of their courts of this decision.

#### 3.2 *Strengthening Australia's National Integrity System*

[Note: this item was incorrectly described as "Independent National Security Legislation Monitor" in the agenda papers]

A copy of a letter of invitation to the JCA to take part in this project including a workshop had been circulated. The President reported that it was the Executive Committee's view that the JCA should not become involved in this project, as it is a matter of political debate.

### 3.3 *Mandatory retirement age for magistrates in the ACT*

The President noted that the retirement age had now been changed to 70 years.

Resolved (2018/10)

That the President's Report be received.

## **4 Media releases and letters to the editor issued since the last meeting of the Governing Council**

The President drew members' attention to the one media release which had been circulated, and it was noted.

## **Administration and Membership**

### **5 Secretary's report**

#### *JCA's publications*

The Secretary reported that he had made only limited progress with his enquiries as to whether the JCA's two publications, *Working with the Media* and *Judge for Yourself: a Guide to Sentencing in Australia* needed updating. Members made several suggestions of media officers who could be contacted for advice in regard to the former. The Secretary said he had recently approached the CEO of the Sentencing Council of Victoria and he hoped to obtain the information in that way. He said that all that was being asked at this stage was whether the booklets needed updating: not the substance of the updating.

#### *Public officer*

The Secretary reported that with the retirement of Justice Penfold there was a need for the JCA to appoint a new public officer, who needed to be resident in the Australian Capital Territory. Justice Burns indicated his readiness to act as public officer.

Resolved (2018/11)

That the Hon Justice John Burns be appointed as public officer of the JCA.

### **6 Treasurer's report**

The profit and loss statement up to 31<sup>st</sup> March 2018, which had been circulated, and the bank balances, were noted. The Treasurer briefly reported.

## **7 Budget for the 2018 – 2019 financial year**

A copy of the budget for the 2018 – 2019 financial year, which had been circulated, and which had been approved by the Executive Committee, was noted.

### Resolved (2018/12)

That the membership fees for the forthcoming financial year be \$230 for full members, \$50 for retired judicial officers, and \$50 for new members.

## **8 Membership report**

A membership report had been circulated, and was noted.

## **Activities, projects and matters of concern**

## **9 Colloquium**

Justice Judith Kelly, the Vice President, noted that it would be unlikely that the Colloquium this year would produce a surplus due to two speakers being paid at a higher amount than the JCA has normally paid. However, there would be less travel costs than had been the case in previous years. She said that the Planning Committee had decided to maintain the registration fee at below \$1000, namely \$950.

Justice Kelly reported that there would not be a reception at Government House but it would be held in the Supreme Court Library.

It was agreed that Judge Wilson chair the session in which Professor Duffy would speak.

It was noted that the 2019 Colloquium in Darwin would be held in June 2019 and that it was desirable that members be advised of this earlier date as soon as possible, but not before the advertising material for this year's Colloquium had been distributed, in order to avoid confusion.

## **10 International Association of Judges**

Justice Martin reported that the IAJ had been maintaining its stance in regard to developments in Poland, Serbia and Turkey where the independence of the judiciary was being threatened. He said that it appeared that the Council of Europe was taking a stronger position on countries which were making changes similar to those in Poland.

Justice Martin also reported that the IAJ had been represented at the launch of the Global Judicial Integrity Network.

He also noted that the IAJ Annual Meeting would be held in Morocco at which there would be a contingent from Australia. He indicated that it would be possible for others to attend should they so wish.

## **11 Commonwealth Magistrates' and Judges' Association**

Chief Judge Lowndes noted that the *JCA's News & Media* had been keeping JCA members up to date with the work of the CMJA. He noted that two Commonwealth chief justices, in the Seychelles and in Lesotho, were embattled, and the CMJA had expressed concerns about the lack of due process in their cases. He noted that there appeared to be a developing trend in Commonwealth countries whereby spurious complaints were made about judges, often chief justices. He said that countries were trying to get around the Latimer House Principles in regard to the independence of the judiciary.

Chief Judge Lowndes then referred to the CMJA's Conference to be held in Brisbane later in the year. He noted that not many Australians had registered so far, and he urged members to encourage their colleagues to consider registering. He said that there would be a meeting of chief justices prior to the Conference. He reiterated that it was important that Australia be involved in the CMJA as other Commonwealth countries looked to Australia for its support.

## **12 Judicial Attitude Survey**

A letter to the President of the AIJA from Chief Justice Susan Kiefel on behalf of the Council of Chief Justices, had been circulated and was noted. Justice Martin observed that it was unlikely that this project would attract the support it needed to be successful and was unlikely to proceed.

## **13 Proposed changes to the courts hearing family law matters in Australia**

Members of the Governing Council were aware of the statement made by the Federal Attorney-General in regard to the proposed changes, and the subsequent commentary on those changes. The President reported that he had spoken to two JCA representatives from the affected courts who could not be at the meeting, Justices Murphy and McKerracher. The President said that he had also spoken to or received emails from a number of Family Court judges. The President said that there was no suggestion that the JCA should not speak on the merits of the proposed changes but that the Family Court judges felt strongly that the JCA should seek to respond to the attacks on individual judges which had been made as part of the commentary on the proposed changes.

Justice Martin said that he had had representations from several Family Court judges in Queensland who, whilst they were concerned about the uncertainty which the announcement had created, were mostly concerned about the unfounded and mischievous comments made about judges.

Justice Baumann provided some contextual information in regard to the percentages of family law work undertaken by the Family Court and the Federal Circuit Court. He noted that in 2009 it had been government policy that the two courts be combined but that that proposal had not proceeded. He noted that the Chief Justice of the Family Court had decided not to make a comment until the draft legislation was available. He said that judges of the Court were upset that their reputations were being tarnished by unsourced comments.

Judge Wilson reported that the Federal Circuit Court would not comment on government policy and would look at the legislation when it became available. He said the proposed changes were a matter for the legislature. However, at a personal level, journalists had been mischievous in their unattributed comments on some judges. He said the judges of his Court were too busy to be concerned about the comments. He said he supported the position which it was proposed the JCA should take.

Judge Chivell noted that some Family Court judges had mentioned a fighting fund and a constitutional challenge, and he queried whether this would affect the JCA.

The President reiterated that it was up to the Government to decide how it should structure the courts but the JCA should be concerned that there not be sledging of judges in the debate which accompanies that. He said that otherwise there could be two issues of concern to the JCA but that any considered view on them could not be reached until further details were available:

- Tenure – how will the Family Court judges’ commissions carry over to the new Court?
- The proposed appeal division of the Federal Court – what will happen to those judges of the Family Court’s appeal division who are not appointed to the Federal Court?

Justice Sheahan referred the meeting to statements by the Presidents of the Queensland and New South Wales Bars.

In response to a query, The President said that he thought the effect of the changes was to make the Federal Court the single supreme federal court under the High Court and given that he did not see the changes as part of an overall attempt to replace all federal courts with judges on different superannuation schemes and lower levels of remuneration.

Deputy Chief Magistrate O’Shea referred to the sending of family matters to State magistrates courts. She noted that, at present, appeals from those courts went to the Federal Circuit Court and that presumably they would now go to the new Federal Circuit and Family Court.

Deputy Chief Magistrate Daly queried what the real rationale for the changes was – was it to deal with the backlogs?

Justice Walton observed that there was a well laid track in the JCA dealing with matters such as the ones under discussion. The general approach has been not to become involved in the policy issues associated with the “restructuring” of courts but to confine attention to attacks on the standing and reputation of judges caught in, what might be called, a pre-change softening up process and issues of tenure and judicial independence if they arose (the legislature usually striving to avoid a conflict on those fronts).

The President summed up the discussion by saying that there appeared to be agreement that the JCA would not enter into the debate at this stage, but it would say that there should be no sledging and that the details of the proposal should ensure that judges’ tenure was respected. He said a media release would

be issued along these lines in the following week, and that those judges who had approached the JCA would be informed of its content and that it reflected the decision made at the Governing Council meeting.

**14 Next meeting**

It was noted that the next meetings would be held on Friday 5<sup>th</sup> and Saturday 6<sup>th</sup> October 2018 in Melbourne.

There being no further business, the meeting concluded at about 12.30 pm.

**Statutes Project**

Following the meeting a discussion was held with Dr Lisa Burton Crawford and Dr Janina Boughey of the Gilbert + Tobin Centre of Public Law in regard to the Statutes Project being conducted by that Centre. A brief paper outlining the project had been circulated, and members of the Governing Council responded to a series of questions in that paper.

Signed as a true record:

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President