



Judicial Conference of Australia

GOVERNING COUNCIL

MINUTES OF MEETING: 2014/2

Held on **Saturday 14th June 2014** at the Old High Court Library, Supreme Court of Victoria, Melbourne.

The meeting commenced at 10.00 am.

Present

Justice Philip McMurdo (in the Chair)	Supreme Court of Queensland
Judge Michael Baumann, AM	Federal Circuit Court of Australia
Justice David Beech-Jones	Supreme Court of New South Wales
Chief Justice Alan Blow, OAM	Supreme Court of Tasmania
Chief Magistrate Elizabeth Bolton	Magistrates Court of South Australia
Judge Rosemary Davey	District Court of South Australia
Magistrate Karen Fryar, AM	Magistrates Court of the Australian Capital Territory
Justice Tim Ginnane	Supreme Court of Victoria
Magistrate Greg Grogin	Local Court of New South Wales
Justice Judith Kelly	Supreme Court of the Northern Territory
Chief Magistrate Peter Lauritsen	Magistrates Court of Victoria
Chief Magistrate John Lowndes	Magistrates Court of the Northern Territory
Justice Glenn Martin	Industrial Court of Queensland
Justice Peter Murphy	Family Court of Australia
Judge Garry Neilson	District Court of New South Wales
Justice Hilary Penfold, PSM	Supreme Court of the Australian Capital Territory
Justice Steven Rares	Federal Court of Australia
Judge Michael Shanahan	District Court of Queensland
Justice Terry Sheahan, AO	Land and Environment Court of New South Wales
Justice Michael Walton	Industrial Court of New South Wales
Judge Brian Withers	Supreme Court of South Australia

In attendance

Christopher Roper, AM Secretary

Apologies

Apologies were received from:

Magistrate Richard Bayly	Magistrates Court of Western Australia
Judge Wayne Chivell	District Court of South Australia
Judge Alan Fenbury	District Court of Western Australia
Senior Judge William Jennings	Industrial Relations Court of South Australia
Magistrate Don Jones	Magistrates Court of Tasmania
Judge Michael McNerney	County Court of Victoria
Justice Carmel McLure	Supreme Court of Western Australia
Magistrate Leane O'Shea	Magistrates Court of Queensland
Chief Judge John Pascoe AO, CVO	Federal Circuit Court of Australia

Alternates

<i>Alternate</i>	<i>Representating</i>
Judge Michael Baumann	Chief Judge John Pascoe
Judge Rosemary Davey	Judge Wayne Chivell
Judge Phillip Eaton	Judge Alan Fenbury
Judge Rachel Lewitan	Judge Michael McNerney

Resolved (2014/10)

That the apologies be noted and received.

1 New members and alternates

The President welcomed Justice Tim Ginnane who was attending as a new member of the Governing Council. He also welcomed Judge Michael Baumann, Judge Rosemary Davey, Judge Philip Eaton and Judge Rachel Lewitan 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 on 29th March 2014 had been circulated.

Resolved (2014/11)

That the minutes of the previous meeting held on 29th March 2014 be confirmed subject to corrections in regard to the attendance of Judges McInerney and Shanahan and Magistrate O'Shea.

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

The minutes of the Executive Committee meeting held on 1st May 2014 had been circulated.

Resolved (2014/12)

That the minutes of the meeting of the Executive Committee held on 1st May 2014 be noted.

Reports

4 President's Report

4.1 Taxation treatment of redundancy payments

The President reported that he had written to the Federal Treasurer, with a copy to the Attorney General, in regard to this matter. He said that he had put the case that the law should be amended.

4.2 Judges still subject to the superannuation surcharge

The President reported that he had written to the Federal Attorney General, as the Minister responsible for the Federal Court and Family Court, bringing to his attention the continuing anomaly in regard to those judges still affected by the superannuation surcharge. He said that, depending on the response, he would write to the Treasurer.

4.3 Submission to the Productivity Commission

The President referred to the submission that the JCA had made and noted that, in essence, it made two points –

- that many of the proposals were improper as they misunderstood what courts do in managing their own processes
- in particular, the proposals for recovery by government of the cost of providing courts was improper as it carried the premise that courts should be self-funding on the basis of a user-pays principle.

Justice Rares said that he had made a speech several weeks ago which made similar points; in particular that 'justice is not for sale'.

He said this was especially so when the government itself is a major user of the courts.

Judge Baumann said that he had met with the Productivity Commission and his view was that the Commission does not understand courts and there is a need to educate them.

Justice Ginnane said that there had been a submission from the Supreme Court of Victoria.

4.4 Papers prepared by Professor George Williams and Rebecca Ananian-Welsh

The President noted that the two papers had been received and that they were of outstanding quality. He said they would be discussed later in the meeting.

4.5 JCA's paper on the judicial appointments process

The President noted that the JCA paper on this topic was still being prepared, and that the current situation in Queensland illustrated the need for a policy as there were flaws in the system, not only in Queensland.

5 Secretary's report

A report had been circulated which included a list of the names of retired judges who had been proposed for a panel from whom names could be chosen when media comment was sought but the JCA was not able itself to comment. There was extensive discussion on this topic and it is, therefore, reported at the next item of this agenda.

The Secretary tabled a report on hits on the JCA's website since 1st April 2014 and there was some brief discussion.

6 Panel of retired judges available for media comment

There was extensive discussion of this matter.

Judge Eaton said that he would be concerned about the JCA delegating to others the capacity to speak, in effect, on its behalf. He said he was not sure if it would deal with the problem. He said it might place them in a difficult position. If it were shown that they were on a list, it may be seen as deceptive.

Justice Rares said that the JCA could say that, as serving judges, the office bearers of the JCA were unable to speak, but would provide a

list of former judges who could be approached. It would be a way of assisting the media to get someone to speak.

Justice Beech-Jones gave as an example of this situation, the current situation in Queensland where the JCA person would be a spokesman for a body on which there were serving Queensland judges.

Justice Ginnane asked if the JCA needed a panel. Judge Baumann said, in response, that the media will, in any event, find someone to give a newsworthy comment. The JCA by this means can suggest names of people who can add value.

Justice Martin asked, what if the person on the panel offered an opinion contrary to the JCA's position. Chief Justice Blow, in response, said that generally the JCA knows that the people on the panel will not say things which would be anathema to the JCA, so it would be better if the media were directed to these people.

Justice Murphy said that, given the principle would be that the JCA would refer the media to informed, intelligent people, the only need would be to be circumspect about the people who were on the panel.

The President said that the normal enquiry from the media was "can you comment on this?" to which his reply usually was "no, I am a sitting judge". The next question usually was "is there a retired judge I could talk to?" and his answer to date has been "no" – not because he has been worried about particular individuals but that it would put pressure on that person because the media would perceive that person as the judge's friend. He noted that it would not be so much of a problem if the enquiry were to go through the Secretariat as the reference by to name/s on the panel would not be made by a sitting judge.

He went on to say that it would be important that the referral to the person/s on the panel would need to be done carefully so that it did not have the JCA's 'brand' on it; thus a published list would be problematic. He said there would be a need for guidance to the Secretariat as to where enquiries would go.

Judge Davey noted that the JCA does not always have one mind on some issues. She said she would be uncomfortable with the idea of 'tame' retired judges. She said she would prefer that all retired members were approached and asked if they would be on a panel to speak to the media but on their own behalf.

Justice Penfold queried whether the JCA could give out these people's contact details.

Chief Magistrate Bolton observed that journalists are only interested in newsworthy comments and that they will go back to those who make the most newsworthy comment. Justice Beech-Jones said the proposed scheme would be better than the media just finding its own people.

Judge Baumann noted that a good comment may make the issue 'go away'. The panellists could talk about the position of judges, not the JCA's. They might say to the media that there was nothing in the matter.

The President proposed that the meeting focus on the suggestion from Judge Davey that all retired members be asked if they wished to go on the list, and if they were then would they provide their mobile telephone number? Justice Penfold said that the JCA should indicate to retired members the basis on which they would be asked. She observed that the first response to the proposed request would be "on what basis?".

Justice Walton said that his concern was that, whatever the JCA were to do, it would become the story if the journalist knew that the JCA does not have a position; that would provoke the JCA becoming 'the story'.

After some further discussion it was proposed as follows. Justice Kelly noted that the resolution would only be in principle at this stage and the details would be worked out later.

Resolved (2014/13)

That the Secretary be asked to prepare a list of retired judicial officers who are members of the JCA and who have indicated a preparedness to speak to the media at short notice on a question related to the courts, on the basis that the media could be provided by the JCA with the contact details of that person in answer to an enquiry from the media.

7 Treasurer's report

A profit & loss statement for the period to 31st March 2014 had been circulated, and was noted.

Judge Brian Withers, the Treasurer, reported that the JCA held a total of about \$536,500 in deposits.

Resolved (2014/14)

To note the financial report for the period to 31st March 2014.

8 Membership report

A membership report as at 4th June 2014 had been circulated, and was noted. The Treasurer noted that magistrates comprised about 40% of the membership of the JCA.

Activities, projects and matters of concern

9 2014 Colloquium

Justice Rares reported on the program. There was general agreement that the program was a very good one.

10 International Association of Judges

A discussion paper had been circulated. The President, in opening discussion, said that he considered it was hard to identify why the JCA should not become a member of the International Association of Judges (IAJ). He noted that the JCA's objects justified the JCA's membership.

Judge Withers said that he agreed that the JCA's objects were in line with membership of the IAJ and that it was appropriate that the JCA become a member. He said his concern was that the JCA only pay the membership fee and not support, at some time in the future, attendance at IAJ conferences and other activities. He said that he noted that delegates would support themselves but he suspected that, over time, the JCA would be asked to support attendance.

Justice Rares said that the issue would resolve itself over time. He said there would be members who would be able to attend without JCA financial support, and there may be an occasion when the JCA would decide to send someone for a particular reason.

Justice Martin said that he could see no potential conflict between the position of the JCA and the IAJ and, if such a situation were to arise, the solution would be to resign. He said there was some value, in a future situation, if an international body were to provide support to the JCA.

Judge Davey referred to the International Association of Women Judges, of which she is a Vice President. She said there had been no problems in regard to conflicts, and there had not been a need to pay for people to attend. But she said that the Australian branch had given assistance to judges in neighbouring countries to attend events. She said she strongly supported joining the IAJ.

Chief Magistrate Lowndes said that the Commonwealth Magistrates' and Judges' Association provided a precedent where there was a good working arrangement. He noted that there would be a need to give JCA members some value for belonging to the IAJ.

Justice Penfold said that she agreed with all that had been said but that she would prefer that the resolution said that JCA money could not be used for attendance. She said that magistrates could especially feel that their subscriptions were being used to assist judges to attend IAJ meetings.

The President said that he would write to all JCA members to explain the work that had been well done to date by members of the JCA at their own expense, and that the JCA had joined on the basis that attendance would be on the basis that those members would continue to pay or from their allowances.

Resolved (2014/15)

That the JCA should become the representative of the Australian judiciary in the International Association of Judges and that the President and Vice President be authorised to take any steps to that end.

Justice Walton noted that in the future a person from the JCA may take up an executive position in the IAJ or become involved in its regional work.

11 Papers on judicial independence and judicial officers holding vice regal roles

Two papers, prepared by Professor George Williams and Rebecca Ananian-Welsh, had been circulated. The President noted that the other topic being considered by the JCA was the provision of advice to holders of vice regal office, and that there was work still to be done on that. He reported that two judges who were no longer members of the Governing Council, Judge Jon Williams and Justice Richard White, were willing to continue to be involved.

There was discussion on what would now be done with the papers. It was noted that they should be put up on the JCA's website.

The President said that he was delighted with the quality and value of the papers, and that they showed the value of outsourcing this work.

He noted that in the judicial independence paper, there was a section where the authors identified gaps. He asked if the JCA should be taking up these gaps with the parliaments. He asked that members,

when reading the papers, consider matters requiring the JCA's attention.

Justice Kelly asked if would be possible to have a discussion on the papers on the JCA's website, in the Members Section. She suggested there be a blog where JCA members could make comments.

Justice Rares suggested that the papers be sent out to all members by email, but separately a month apart.

Chief Justice Blow suggested they be circulated through the Council of Chief Justices.

Judge Lewitan said the issue of judicial independence was particularly relevant in Victoria because the composition of the proposed Judicial Commission's complaints body would be different to the New South Wales model, and the proposed definition of misconduct would be much broader. Justice Rares said that the JCA should be commenting on this when the Bill becomes available, but Chief Magistrate Lauritsen said that the Bills would go to Parliament on 23rd June so that it was now too late to comment. It was noted that the Bills may not be passed.

The President observed that the JCA's policy is that the New South Wales model is the preferred model. He said that if the judiciary in Victoria wanted the JCA, at this late stage, to make an input the JCA was ready to do so.

12 Project: Development of a policy on the judicial appointment process

Justice Rares reported that some draft chapters had been prepared but he had not been able to progress the matter further. He noted that the current situation in Queensland threw up the question of process.

Several members of the Governing Council reported on the current process in their jurisdictions. Justice Ginnane mentioned that in England there is a lengthy bureaucratic process which was almost unworkable. Judge Davey said that she understood that the purpose of the English process was to change the profile of the judiciary, but it had not worked that way. It was agreed that Judge Davey join the sub committee considering this matter (other members being Justices Rares, Sheahan and Kelly, and Judge Baumann).

Justice Sheahan said that the JCA had to be careful, as a group representing the judiciary, in regard to the separation of powers. He said that not only should the Executive not interfere in the judiciary,

but also the judiciary should not interfere in the Executive's prerogative power to appoint judges.

Justice Kelly agreed and said that, whilst the judiciary may welcome certain processes, it was not for it to tell the Executive or parliament how to appoint judges. The President said that he felt the JCA could have a view on the process.

13 Project: development of JCA guidelines on the use of social media by judicial officers and the courts

Justice Rares reported that he had not been able to progress the matter since the last meeting.

14 Next meeting

The next meetings will be held in Noosa on Friday 10th and Saturday 11th October 2014.

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

Signed as a true record:

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President