

**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**BELL CJ
AND JUDGES OF THE
SUPREME COURT**

THURSDAY 1 AUGUST 2024

**FAREWELL CEREMONIAL SITTING ON THE OCCASION OF
THE RETIREMENT OF JUSTICE ANTHONY MEAGHER**

- 1 **BELL CJ:** Your Excellency and Mr Wilson, distinguished judicial colleagues and former judicial colleagues, distinguished guests, ladies and gentlemen, all. I begin, as is customary and appropriate, with an acknowledgement of country and pay my own and the Court's sincere respects to the Gadigal of the Eora Nation, the traditional custodians of the land on which we meet, and their elders past and present. Those respects extend to all First Nations people.
- 2 Less than three months ago, we celebrated this Court's bicentenary. There were many highlights but arguably the most striking was the performance by the outstanding indigenous composer and musician, Mr William Barton, from up high in this very Banco Court during our ceremonial sitting.
- 3 That performance was beyond symbolic; it was profound and significant on many levels and was a moment in the Court's history that very few who were present on that occasion will ever forget. The Court has Justice Tony Meagher to thank for the idea of inviting William to perform and facilitating his introduction to the Court. Both sit on the board of the Sydney Symphony Orchestra.
- 4 This morning we gather to pay tribute to Justice Meagher more generally as he prepares to leave the Court on 12 August 2024 after slightly more than 13 years as a judge of appeal of the Court, having sat on more than 1,000 cases, some (but not all) of which I will mention in due course.

- 5 I welcome to the Court Justice Meagher's guests, friends and family, both present in Court and watching on the AVL from around the world. I make particular mention of his mother, Mrs Jill Meagher, at the ripe young age of 94 and to whom I know the judge is devoted. I also welcome his darling wife, Fran, to whom I believe he is equally devoted! Fran has been a great friend and strong supporter of the Court over many years as well as a personal friend of many of the current and former judges. I also welcome, in three parts with the benefit of AVL, their four children, Alex, Joanna, Henry and Saskia, their partners and the ever-growing brood of much adored grandchildren. There is never a shortage of Meaghers.
- 6 The attendance of so many current and former Chief Justices and judges of this and other courts, all of whose presence is acknowledged, is a testament to the high regard in which Justice Meagher is held. Many others have sent their apologies.
- 7 I also welcome members of the profession. It is fitting that the profession acknowledges the major contribution and public service of someone who was one of the most sought-after commercial silks in the country and a leader of the Bar when appointed directly to the Court of Appeal in 2011.
- 8 While the discharge of high judicial office is a privilege, the work of a judge is hard and relentless, requiring the utmost discipline, integrity and rigour, qualities which happily coalesced in the very fine man and judge we farewell today.
- 9 Practitioners and judges, both domestically and internationally, regularly comment on the high quality, industry and prodigious output of the New South Wales Court of Appeal. Over the last five years, for example, the Court of Appeal has heard and disposed of on average approximately 330 civil appeals a year, approximately 100 more per annum than the Full Court of the Federal Court and as many as the Courts of Appeal of the Supreme Courts of Victoria, Queensland and South Australia combined. It is a phenomenal caseload, especially when one appreciates that the work of the judges of appeal is

supplemented by regular participation in the work of the Court of Criminal Appeal as well as occasional hearings at first instance.

- 10 Justice Meagher has been a major contributor to the Court of Appeal's high reputation and to the Court more generally through his intellectual leadership, technical acumen, close attention to detail and pellucidly clear and spare draftsmanship. He is a sculptor of language and, in the words of one of his colleagues, a "keeper of the standards" (which I do not believe to be a reference to some obscure Jesuitical office).
- 11 He has also been the most civil and courteous of colleagues. Collegiality is far, far more than congeniality at a social event (although that is an important quality which he possesses coupled with a gentle but mischievous sense of humour, selectively deployed, often on me). True collegiality requires a deep understanding of and respect for the institution within which one works and respect for one's colleagues. In Justice Meagher's case, that respect is reciprocated by his past and present colleagues as well as the profession which has benefited enormously from the clarity of his judgments, and the concision and precision which he has brought to bear in what is an important body of judicial work.
- 12 His Honour came to the Court as one of the foremost insurance and reinsurance practitioners in the country, but that description understates the breadth of his acumen in commercial law more generally and the range of his work as a barrister. Unsurprisingly, however, it is in the realm of insurance law that one sees some of his most significant judgments and jurisprudential leadership, and appreciates the gap that his retirement will create.
- 13 A full study of those judgments would serve as a first-class primer for any insurance practitioner (and would be a riveting read, I am sure). But in all seriousness, part of the service this Court provides to the commercial community lies in the delivery of authoritative decisions on questions of commerce, prominent amongst which are questions relating to insurance and reinsurance. His record in this area has covered the field he has dealt with –

insurance brokers, policy construction, excess provisions, the concept of occurrences, the construction and application of various important provisions of the *Insurance Contracts Act*.

14 The following decisions, none of which was the subject of appeal, span the field and include cases dealing with:

- insurance brokers and policy construction (*Bon McArthur Transport Pty Ltd (In Liq) v Caruana* [2013] NSWCA 101; (2013) 63 MVR 417);
- interpretation of excess provisions and whether a particular provision applied to each occurrence which caused injury or damage rather than each claim made by an insured to an indemnity (*Australian Rail Track Corporation Ltd v QBE Insurance (Europe) Ltd* [2013] NSWCA 175; (2013) 17 ANZ Insurance Cases 61-971);
- the construction and application of s 54(1) of the *Insurance Contracts Act 1984* (Cth): *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* [2013] NSWCA 252; (2013) 302 ALR 732;
- the Torrens Assurance Fund and whether the Registrar-General could enforce a charge said to arise under s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) on insurance moneys payable by the insurer of solicitor whose conduct contributed to loss which was the subject of claim on Fund: *Registrar-General of New South Wales v LawCover Insurance Pty Ltd* [2014] NSWCA 241; (2014) 17 BPR 33, 235;
- liability under a group life insurance policy held by trustee of superannuation fund: *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* (2015) 89 NSWLR 412; [2015] NSWCA 104;
- indemnity insurance: *T&T Investments Australia Pty Limited v CGU Insurance Limited* [2016] NSWCA 227;
- property and liability insurance where the insured use of premises was as a brothel and where the appellant insured's sole director and manager were members of Comancheros bikie gang in circumstances where that association was not disclosed to respondent insurer at the time of renewal:

Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Limited [2017] NSWCA 71; (2017) 19 ANZ Insurance Cases 62-131;

- the duty of disclosure under the *Insurance Contracts Act 1984* (Cth) in relation to pollution cover: *Marketform Managing Agency Ltd v Amashaw Pty Ltd* (2018) 97 NSWLR 306; [2018] NSWCA 70;
- life insurance where the benefit was conditional on insurer's satisfaction as to insured member's total and permanent disablement: *MetLife Insurance Ltd v Hellessey* [2018] NSWCA 307;
- rectification of insurance policies relating to property insurance and industrial special risks: *Mobis Parts Australia Pty Ltd v XL Insurance Company SE* [2018] NSWCA 342; (2018) 363 ALR 730;
- double insurance, contribution between insurers and "other insurance" clauses: *Allianz Australia Insurance Ltd v Certain Underwriters at Lloyd's of London Subscribing to Policy Number B105809GCOM0430* [2019] NSWCA 271;
- "claims made and notified" policies and the proper construction of s 40(3) of the *Insurance Contracts Act 1984* (Cth)) *P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyd's Ltd* (2021) 105 NSWLR 110; [2021] NSWCA 136; and
- the proper construction of a life insurance policy where made between life insurer and trustee of superannuation fund in respect of portfolio of fund members: *Resolution Life Australasia Ltd v NM Superannuation Pty Ltd* [2023] NSWCA 138.

- 15 Another important insurance decision of note is his Honour's joint judgment with Justice Michael Ball in *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* (2020) 104 NSWLR 634; [2020] NSWCA 296 which concerned a number of important questions relating to insurance cover arising out of claims made as a result of the Covid-19 pandemic.

- 16 Mention should also be made of his Honour's forceful dissent in *Globe Church Incorporated v Allianz Australia Insurance Ltd* (2019) 99 NSWLR 470; [2019] NSWCA 27 on the question of when time runs for the purposes of an indemnity to hold the insured harmless, and when a cause of action for breach of a policy of indemnity assurance accrues. His decision, as well as the dissenting judgment of Justice Leeming in a five member bench appeal, has attracted academic attention in the United Kingdom and elsewhere in Australia.
- 17 His Honour has also participated in, and made significant and often substantial contributions to, a number of joint judgments of the Court in complex and important cases. These include his joint judgment with Simpson JA in *Fairfax Media Publications v Voller* (2020) 105 NSWLR 83; [2020] NSWCA 102 concerning liability for third party defamatory comments published on various newspapers' Facebook pages (a decision upheld in the High Court), *Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd* [2021] NSWCA 206; (2021) 393 ALR 162 (the Queensland Floods Class Action) and, most recently, the decision in *Berejikian v Independent Commission against Corruption* [2024] NSWCA 177.
- 18 As anyone who has had the privilege of sitting on appeal with Justice Meagher will attest, even if only concurring with the lead judgment, it will invariably have had significant input from, or been materially improved by, Justice Meagher's careful review and incisive suggestions in relation to earlier drafts, always proffered with great courtesy and respect. (It is a little like having one's homework marked, or submissions settled!)
- 19 As a cousin of the late Justice Roderick (Roddy) Pitt Meagher AO, erstwhile member of the Court of Appeal, it must be said that Justice Tony Meagher *generally* exercised considerably more self-discipline and self-control than his rather more rotund relation (just imagine Roddy wrestling with that alliterative phrase). I say "generally" because Justice Leeming has drawn my attention to this little gem from *Morgan v District Court of New South Wales* (2017) 94 NSWLR 463; [2017] NSWCA 105, an important jurisdictional error case (an area of the law that is now as elusive as the Scarlet Pimpernel). Justice

Meagher recounted that the applicant appeared in person, having declined the opportunity to be represented by a solicitor funded by a grant of legal aid. Her stated reason for having done so, said his Honour, quoting the applicant, was that as “a Druid (Celtic Pagan Priest) ... being represented by a solicitor in Court is not an option.” His Honour continued:

“According to Strabo, druids were once held in such high regard that they could quell any private or public dispute, including a stand-off between opposing armies: *Geographica* at 4.4.4. Their jurisdiction was divine and limitless. By contrast, and fortunately for the applicant, the jurisdiction of Australian inferior courts is statutory and limited.”

- 20 To return to serious matters, one challenge which faces judges of appeal who come to the Court with a background in civil and commercial law is that presented by the expectation that they will sit and indeed regularly preside on the Court of Criminal Appeal. This requires them to apply their technical ability and skill in legal reasoning to a very different area of the law.
- 21 In this context, Justice Meagher has made a significant contribution to the work of the Court of Criminal Appeal over the last 13 years, having sat on approximately 120 appeals or applications for leave to appeal in the Court of Criminal Appeal. He has regularly assumed the burden of writing the lead judgment in conviction appeals in that Court (see, for example, *ABR (a pseudonym) v R* [2020] NSWCCA 33; *Miller v R* [2022] NSWCCA 255; *LF v R* [2023] NSWCCA 232; *Hayne v R* [2024] NSWCCA 97) where, if challenge is made to the reasonableness of the verdict, the review of the trial record can be extremely onerous where the underlying trial has run for any significant length of time.
- 22 Two notable examples of his decisions in the Court of Criminal Appeal include *McPhillamy v R* [2017] NSWCCA 130 which was an appeal against conviction involving charges of acts of indecency committed on a young teenage boy involving tendency evidence, an area where there has not always been a consistency of approach. His Honour’s dissenting decision in the Court of Criminal Appeal was upheld in the High Court.

- 23 More recently, Justice Meagher's principled decision in *Lam v R* [2024] NSWCCA 6 was typical of his close and rigorous method of legal reasoning, with impeccable research in relation to the legislative and judicial history of the particular (and controversial) issue which that particular case raised.
- 24 Another important aspect of Justice Meagher's tenure on the Bench has been the way he has worked closely with his tippies and associates, all bright young lawyers, to introduce them to the need for intellectual and technical rigour as they embark on their careers. Many of them have already gone to the Bar and are bringing the benefits of their training with his Honour to their growing practices.
- 25 Justice Meagher's penchant for physical fitness and occasional extreme sports over his term as a senior judge is also well known ... although I have always found it curious that, while we have both been members of the same gym for many years, I have only ever seen him there a handful of times.
- 26 He is, in truth, something of a renaissance man, with his great professional success accompanied by his passion for the visual arts and music. It must be remarked, however, that not many renaissance men played 99 matches of first grade rugby union as a dashing inside centre for Eastwood. In the 1970s, you had to be quick and have strong instincts for self-preservation to avoid being vigorously rucked by a young Western Suburbs first grade flanker whose name was recorded in the match programs of the era simply as "F. Gleeson". That was "F" for Fabian. Who knew?
- 27 The rivalry between Meagher and Gleeson was replicated many years later when the Court of Appeal was being photographed. Our Court photographer was herding the proverbial group of cats when she started giving instructions to various judges by her previously unrevealed nicknames for them. One, no longer a member of the Bench, was referred to as "Judge Deathstare", to much mirth, but interest was piqued when she referred to another as "Judge Handsome". Many looked up to see to whom she was referring but none more quickly than Justice Meagher. His vanity, though swiftly engaged, was equally

rapidly dashed when he realised the photographer was directing her instructions to Justice Fabian Gleeson, his old nemesis from Concord Oval.

- 28 In farewelling Justice Meagher from the Court after 13 years, I do so not only on behalf of all his colleagues but also on my own behalf. We had worked together closely at the Bar and he has been one of my very best friends on the Court and a great source of advice, wise counsel and companionship over the last 5½ years. His colleagues on the Court will miss him enormously, for his friendship, collegiality and judicial leadership.
- 29 We wish his Honour well in his next chapter, including as a member of the Singapore International Commercial Court and, no doubt, as a much sought after arbitrator in commercial, maritime and insurance disputes. As for myself, I look forward to seeing him in the gym.
- 30 Mr Izzo, on behalf of the Bar, do you move?
- 31 **IZZO SC:** May it please the Court. I, too, begin by acknowledging the traditional owners of the land on which this Court sits, the Gadigal of the Eora Nation and pay my respects to their elders, past, present and emerging. I extend those respects to all First Nations people here today.
- 32 Today marks almost 13 years since your Honour Justice Meagher was sworn in as a judge of the Supreme Court and Justice of Appeal. I wish to echo the Chief Justice's particular acknowledgement of two very special people in your Honour's life who were present on that occasion and are present today. They are your mother, Mrs Jill Meagher and your wife, Fran, who has been your life partner since the very start of your career at the Bar.
- 33 I also welcome your Honour's siblings, Jo, Bill, Sandy, Lisa and Richard. Your son, Henry and his wife Annie and daughter Lucia and your other children and grandchildren watching from overseas.

- 34 For me, it is a very special privilege to give this address having, not only appeared before your Honour in the Court of Appeal, but also been briefed as your Honour's junior in those halcyon days when your Honour was a leader of the commercial bar. Some things have not changed in all that time. As a barrister and as a judge, your Honour has always displayed a formidable combination of deep learning, clear thought and robust commonsense, peppered with a wicked wit.
- 35 It might be said that all those qualities were on display in *Morgan v District Court of NSW* in the case of the druid, from which the Chief Justice quoted. The case is reported in the New South Wales Law Reports and it is remarkable among other reasons because the self-represented druid was successful in her application for judicial review, despite facing off against Mr Herzfeld, now Senior Counsel. In fairness to Mr Herzfeld jurisdictional error had been conceded by his client, so not even his ingenuity could make it an appropriate vehicle for an application for special leave to appeal. So it is, that your Honour's reported judgment remains the last word on the druids.
- 36 Among the hundreds of cases, which your Honour has decided since August 2011, are many in which your Honour gave the principal judgment. Those judgments are marked by a firm grasp of critical facts, a magisterial command of the law and its historical context and an intuitive understanding of principle. Your Honour's writing is careful, clear and logical and meets the essential requirement of judicial reasons. That they make plain to the parties why one of them has lost and the other has won.
- 37 Of particular note, is your Honour's judgment in *Lam v The King*, delivered in February this year, to which the Chief Justice referred. The case concerned the question of whether the now repealed offence of indecent assault upon a male can be committed by a woman. Your Honour's survey of the legislative history of the relevant provisions of the *Crimes Act*, your application of fundamental principles of statutory construction and your critical interrogation of previous authority, are the very model of detailed, careful and compelling legal analysis. Your Honour's judgment drew praise from the other members

of the Court who agreed with it, with Justices Garling and Weinstein complementing your comprehensive and scholarly analysis.

- 38 Your Honour is, of course, renowned for a deep knowledge and abiding interest in the law of insurance. The Supreme Court website has a list of speeches on the topic which your Honour has delivered. In particular, your Honour's paper on 'Insurance and the Courts' is a testament to your Honour's penchant for historical research and your absolute mastery of this area of the law.
- 39 Unsurprisingly, as the Chief Justice has indicated, your Honour gave many judgments in this area as a member of the Court of Appeal. In that regard it would be remiss of me not to single out *Globe Church Incorporated v Allianz Australia Insurance Ltd*, a case which was described to me as the one tragedy in your Honour's judicial life. As we have heard, your Honour was with Justice Leeming, one of two dissentients on a five member bench on of the Court of Appeal which had to determine the question of when a cause of action accrues for breach of a policy of indemnity insurance against property damage. Rumour has it that the successful insurer was so terrified that your dissenting judgment would be upheld by the High Court that it promptly settled the case before that could occur.
- 40 There are many other cases in which your Honour's leading judgment has made a significant contribution to the law. In addition to those, which the Chief Justice has mentioned, the following deserve a mention:
- *Tobin v Ezekiel* which addresses the operational of the doctrine suspicious circumstances in probate;
 - *DHJPM Pty Ltd v Blackthorn Resources* which dealt with the circumstances in which equitable estoppel may arise in commercial dealings;
 - *Gerace v Auzhair Supplies Pty Ltd* which dealt with the application of the limitation statute by analogy to equitable causes of action;

- *Dansar Pty Ltd v Byron Shire Council* which dealt with the question of whether a local authority owes a duty of care in relation to causation of economic loss resulting from refusal or delay to give development consent, the answer was no;
- *Rodny v Weisbord* which dealt with the requirements for the making of an informal will under the *Succession Act*;
- *Royal Caribbean Cruises Ltd v Rawlings*, a tort case, dealing with the common law power of a master of a ship, to arrest or confine any person on the vessel;
- and finally, just two days ago, your Honour gave the leading judgment in *Aidzan Pty Ltd (in liq) v K&A Laird (NSW) (in liq)*, a case concerning the notoriously complex question of when the knowledge of a director will be attributed to a company, when the director is asking for all of the company.

41 This prodigious output does not come without extraordinary industry. Your Honour's devoted tipstaves speak of a rigorous process of judgment writing involving many rounds of drafting and editing, and redrafting and re-editing, until the text has the focus and clarity your Honour desires. Your Honour is hardworking; regularly in chambers from 6.30am in the morning and often the last to leave.

42 It was noted at your Honour's swearing-in that you are fond of likening yourself to a duck that appears to be gliding calmly over the surface of the water while paddling furiously beneath it. I think the analogy is a little unfair; perhaps says more about your Honour's humility than anything else.

43 Your Honour, in Court, is courteous to a fault, restrained and softly spoken, spare and pointed in your questions. And, in the main, utterly inscrutable. I say in the main, because those rare moments in which there escapes from your Honour's countenance a flicker of the eyes, a raising of the brow, or even a lick

of the lips, one knows that your Honour has discovered the flaw in the argument or the solution to the case, and counsel can do little more but hope that it favours them and not their opponent.

- 44 Your Honour practised at the bar for some 30 years before appointment. One had the sense in appearing before you that not a day of that time had been forgotten. You respected counsel and what they were trying to do in their advocacy. You understood why particular submissions were being made and the decisions counsel had to make. You gave counsel an opportunity to develop an argument, and most importantly, to persuade you. You brought to every case an instinctive feeling for what was going on behind the scenes and how the world, in particular the commercial world, works.
- 45 Your Honour's accomplishment are not confined to the law. Your Honour's sporting prowess featured prominently at your swearing-in, and I will not recount it here.
- 46 Your Honour is a director at the Sydney Symphony Orchestra and a generous patron of that body and the arts generally. Your Honour went recently with a group of friends to the Kimberley for a week, taking a small plane and visiting indigenous art centres. Your Honour's art overflows your chambers and decorates the surrounding precinct. I am told that when the Supreme Court was flooded recently, there were whole colonies of art that had to be evacuated from the floors and walls of your chambers.
- 47 Your Honour's competitive streak is legendary. It has been said by your friend, Justice Robson, that your Honour is the most competitive person he knows; that you would compete with a stationary object. Indeed, at this point, I must beg to differ from the Chief Justice in relation to the issue concerning that unnamed Sydney gym. You see, Justice Robson tells me that your Honour is frequently to be seen at the gym, pushing the exercise bike to the limits of its working capacity. I am starting to wonder whether someone has been going to the wrong gym, or whether your Honour is going to tell them.

- 48 I enquired of Justice Robson whether there were any areas in which your Honour did not excel. He said he could not think of any in the short time which he complained I gave him. Justice Robson also reported that when he was appointed as a Judge of the Land and Environment Court, your Honour told him you could not wait to get your red pen out. He tells me he has been very careful since then.
- 49 Your former colleague at Fifth Floor St James' Hall and good friend, Noel Hutley SC tells his own story of your Honour's mischief-making. He says that when he was bailed up in hospital after falling ill overseas, the phone rang for him at Fifth Floor St James' chambers. The clerk had gone home, and the call switched to the answering machine; your Honour was in chambers and leapt to the phone, saying "You want Mr Hutley? Oh, he's dead, but I'm available."
- 50 Your Honour is an alumnus of Saint Ignatius' College. Preparing for this address, I managed to flick through the pages of magisterial history of that school published in 1989. As often happens, one's attention is attracted more by the pictures than the text. Leaping out at me from page 86 was a photograph taken in 1966 from a group of students mobbing some poor boy master who had been given of job of dolling out their pocket money. The caption discloses that the boy who jostled his way to the front taking pole position was a young Anthony Meagher, apparently the smallest of the group, but evidently the most tenacious. That famous competitive streak started young.
- 51 Your Honour, the profession and the people of New South Wales have benefitted from your energy, intellect, and experience for the last 13 years. For that, we are deeply grateful. We cannot wait to see where your Honour's talents will take you next.
- 52 I mentioned your Honour's family at the outset. Apparently, you have long been known in the Meagher family by the name Mr January. I infer that has something to do with the new life that the summer vacation breathes into a barrister. With your Honour's retirement, we can only hope that now will be January all the year round. May it please the Court.

- 53 **BELL CJ:** Ms Banks, the Immediate Past President of the Law Society of New South Wales.
- 54 **MS BANKS:** May it please the Court. I, too, acknowledge the Gadigal of the Eora Nation, the traditional owners of the land on which this Court stands, and I pay my respects to elders past and present. I acknowledge and extend my respects to all Aboriginal and Torres Strait Islander people who are with us today.
- 55 On behalf of the solicitors of New South Wales, it is a privilege to congratulate your Honour on what would soon be 13 years as a judge of this Court and the Court of Appeal of New South Wales.
- 56 I say soon because, as we know, today is not the last day. That your Honour's farewell ceremony comes before your retirement from this bench is, as I suspect, down to the timing of the Court. But it also reflects that there is simply a lot of work right to the very end, and for perhaps for one as dedicated to the law as your Honour, one could never let a farewell from the work get in the way of, well, the work.
- 57 In my team's research for this speech, this was a consistent theme. On this Court, your Honour has been recognised by colleagues as one with a quest for perfection in terms of the quality of the judgments this Court issues. With writing, that was second to none in terms of clarity of thought. At the same time, delivering concise judgments which made your Honour a very small moving target for criticism; however, most people outside these walls - outside of law - never contemplate, let alone understand, what the river of work means for those dealing with the cases. I raise that now not to evoke sympathy, but because the very dedicated legal work of your Honour has benefited many; many individuals and groups in countless ways. That also means, as one judge honestly put it,

“He is obviously going to be sorely missed; certainly one of the best commercial judges we have had. His construction of a contract in any dispute, large or your

small, is second to none. His enquiring mind to find the correct answer without prejudgment in all matters is also second to none.”

58 This talent has been backed by work, a trait that runs deep. One highly regarded barrister noted that at the Bar, your Honour was a prodigious worker, a product of both a thriving practice and an insistence on being familiar with every aspect of the case. The price was spending every Sunday in chambers and when your Honour’s appointment presented an opportunity to scale back this punishing schedule, the change was clear. As a Judge, your Honour has only spent every Sunday in chambers, applying the exact same diligence to the hearing and determination of your case load.

59 I have been reliably informed from this bench that your Honour’s car was certainly here last Sunday. Your Honour has days to go and is still working on judgments of a weekend. Yet despite this, your Honour’s demeanour on this bench has never been at fault. For one fellow Judge, this stretches back to his first recollection of your Honour from 1994. Your Honour, on opposing sides in the insolvency dispute *Commonwealth Bank of Australia v Butterell* which remains a leading case in this topic. Our informant commented:

“That whilst the hearing was conducted in a civil manner, your Honour was not an opponent to be trifled with. The oral advocacy was razor sharp, confident, clinical and direct.”

60 It was for him, an intellectually intimidating experience. But it was said that, insofar as your Honour suffered a small partial defeat, there was grace. Your Honour was too good mannered to express anything else. As a Judge, this good grace continued, collegiate, your Honour’s demeanour and approach has always been thoughtful, careful and measured. Consistent with your Honour’s respect for the process and for litigants.

61 Little did litigants know that when transplanted into the winter backcountry of Canada, your Honour’s approach to steep tree filled slopes of untracked powder displayed a tendency to recklessness. The words of one friend well acquainted with both these ski trips and legal definitions of recklessness. This

has remained a constant source of relaxation for your Honour whilst on the bench.

62 However, even paying due regard to your Honour's significant skill level, there has been a somewhat alarming disregard for stern warnings from ski guides not to ski down particular slopes. Particularly where a fearsome fate potentially awaited not only your Honour but your hapless but faithful ski buddy. Moreover, as night settled on the last day of such week-long adventures, your Honour apparently displayed a surprising comedic talent in hosting an awards night, delivering judgments of an entirely different kind. Some complimentary, on the efforts of various participants over the previous week. Those judgments were anything but reserved and are not available online, thankfully.

63 Of course, we are a long way from snow today and whatever your approach to moving through powder with nothing but gravity and sticks strapped to your feet. Here, your Honour has been a direct, serious and to the point Judge whilst maintaining a curious mind, especially with respect to all tenable arguments in a matter. Similarly, your diligence in all appeals, no matter the size of the claim or the status of the parties, has always been careful and considered.

64 And there has been a large variety of matters, many of which arise from challenging material facts, especially those concerning sexual assault, the effects of long-term drug use or loss of life. They extend even to matters involving the highest parts of our State's Government. But with all matters and especially the numerous self-represented litigants who have appeared before this Court, your Honour was said by both Judges and Court staff, that you have been gentle when needed, thoughtful and at all times fair.

65 Away from ski lodges, the judgments that are publicly available are those of an excellent legal writer. Clean prose, concerned with the need to take large complex factual scenarios and vast tracks of law and distil them down to their essence, weigh them and balance them appropriately and finally, turn this into digestible judgments. This is no easy task. But the relative brevity when

compared to the complexity has been notable in your Honour's judgments, making the hard seem easy.

66 Furthermore, to produce high quality judgments on appeal for over a decade is no walk in the park. This is, after all, a very highly regarded Court in our State and our nation. Before I go further, on behalf of the solicitors of New South Wales, I would like to thank your Honour for this serious contribution to the law and for the guidance it provides our profession and the wider benefit to our society. Nevertheless, when not laser-focused and identifying answers to legal questions, your Honour was said to have balanced the demands of this Court by remaining a warm, friendly and engaging person; never arrogant or displaying hubris.

67 A fellow Judge from another Court said that, "Your Honour was both brilliant and a very hard worker. But not showing a lack of sensitivity."

68 This can be seen in your Honour's love of music and as his Honour said, as both a friend and one who also appreciates painting:

"He has a true interests in the arts and to be fair to him, I wouldn't say this to his face, but he's got a good eye."

69 He added, he was not concerned about your prospects after the bench, as your Honour was confident, still quite youthful both in appearance and thinking. Although he quickly added with a smile, "this is not necessarily a compliment". He finally noted that your Honour's rarified mind in a Court of equally capable individuals has served a huge contribution to the accurate administration of justice in our State.

70 Fran, your wife, for her part is only mildly alarmed that her husband whom she has been in a relationship with since she was 15 and remembers your Honour as someone who used to avoid going out at University to focus on good marks, a perfectionist who works tirelessly - is now going to have lots of free time. She said:

“That it is unlikely to result in say, cleaning out the garage. But if it did so, it would be the best example of that that has ever been seen”.

71 Although, obviously all said in jest, it was noted with clear warmth that your Honour retires in no small part because of your love for your family and your desire to spend time with them. This has been mentioned by your Honour directly to the Law Society’s researchers. Getting to see your children and grandchildren more, and including those who live in London and Chicago, will be one of the greatest gifts of leaving this brilliant bench.

72 I bring it into focus today, not to reveal something hidden or to divert from the legal achievements that we are here to celebrate but rather because we are all more than the person that comes to work. Even work as a privileged, honourable and as important as this. This is part of what makes the law. The law is, after all, about people. It can be abstract, esoteric, convoluted, fractious and largely humourless. Yet behind all law, is a litigant, a defendant or a victim, a lawyer, Judges, Court staff and the apparatus of justice. Behind that is Parliament and those who vote them in.

73 All this and much more makes our law, so it is rather because of the position we are in today, that for once we get to celebrate your Honour’s contribution to this. And alongside a love of art, music and skiing and an appreciation of how important interesting ideas are to a life well-lived beyond this, there is a man who loves his family and an honourable Judge. On behalf of the more than 42,000 solicitors of this State, it is my privilege to convey our collective congratulations for your service to us all. As the Court pleases.

74 **BELL CJ:** Justice Meagher.

75 **MEAGHER JA:** Thank you Chief Justice, Mr Izzo and Ms Banks. You have said a lot which is flattering and you have spent a lot of time and for that, I thank you. Your Excellency, the Honourable Margaret Beazley AC KC, Dennis Wilson, Chief Justice Gageler and the other current and retired members of the High Court, the Federal Court, this Court, the Land and Environment Court, the

Industrial Relations Court, the District Court and the Local Court. And I also welcome members of the profession, my family and our friends.

- 76 I too acknowledge that we are on the country of the Gadigal people; which in its landscape, sky and waters holds the stories of their ancestors. I also pay my respect to their elders. There are a few other elders here today and not all of them retired Judges. For me, the most important is my mother. She remains lively, engaged and devoted to her now even larger family. Also present are four of my brothers and sisters, Jo, Sandy, Lisa and Richard. Our parents instilled in each of us from the outset, the importance of family and belonging.
- 77 They also gave each of us the opportunity to pursue careers such as I have done or as my wife Fran would have it, I have pursued my life in the law.
- 78 Our son, Henry, is here with Annie and their elder daughter Lucia. Our daughters, Alex and Saskia are in London. Alex and Chris with their children Zadie and Felix. Our third daughter Joanna and Tom live in Chicago with their son, Luca. You are beginning to see one of the reasons for my retirement from the Court.
- 79 I want to give you some history and some of you will be quite familiar with it. I was admitted to the Bar in 1982. Unlike most members of the Bar and all of the judges at that time, I was a graduate of the University of New South Wales, and in fact a graduate of its second year.
- 80 As I said on the occasion of my swearing-in, John Basten was one of my tutors. He is the only member of the Court of Appeal – and there are other judges here today in the divisions who have now come to the Court of Appeal such as Richard White who were on the Court when I was appointed – who has continued through the whole of that time, and as I said at my swearing-in, he was one of my tutors at university. He is now an Acting Judge but not it would seem in any temporary sense.

- 81 As the current Chief Justice wrote in 2022, John Basten was then and remains one of Australia's most significant jurists with an incisive mind, deep knowledge and understanding of the law and commitment to principle. However, there remains one possible blot on his copybook to which I referred on my swearing-in. I was recently asked about that matter by another member of the Court of Appeal. John taught one of the final year non-elective subjects, Law, Lawyers and Society. The marking system was straightforward, 50% for class performance and 50% for the end of term essay. I attended one class but managed to do well in the essay. John Basten failed me awarding none out of 50 for class performance and as I said to that member of this Court, let us call her Anna, "Can you believe that". There was a pause, "Yes".
- 82 As a family, we were known as the Cootamundra Meaghers, descended with a lot of other Meaghers from John Meagher who arrived in Sydney from County Clare in the 1860s. Roderick Pitt Meagher was a Temora Meagher and a second cousin of my father. The larger family conducted general stores in central and south western New South Wales. At times there were disagreements as to the management of the stores. I first met Roddy when he was briefed to pursue an interlocutory injunction for a client of Minter Simpson. I was a first year solicitor.
- 83 Following our first meeting and early on the morning of the hearing, I made the mistake of confiding in junior counsel, Mr Gummow, that there had been differences in relation to the conduct of the family business over the years. As the door to the crowded lift which was taking us to level eight of this building closed, Gummow turned to Roddy and said quite audibly, "Rod, you didn't tell me that there had been a feud in the family". Roddy said nothing. I learned something.
- 84 I want to acknowledge at this point the professional support and friendship of Paul Daley who was my clerk through the whole of my time at the bar. In May 1992, Allsop, Walker, Hutley, Foster, Garling and I set up level 5, St James' Hall Chambers which Dyson Heydon later dubbed the Dame Joan Sutherland Chambers and I will not say who he was talking about, perhaps ...

Notwithstanding that he remained the clerk of Eleven Wentworth Selborne, Paul Daley agreed to clerk for the six of us in the new chambers. At that time, we were all junior barristers.

85 Jim Spigelman invited me to join this Court in early 2011. I thank him for what I regard as his good judgment. I said, “yes” and have never regretted that decision. Jim retired before my appointment in August 2011. By that time, Tom Bathurst was Chief Justice and James Allsop, President of the Court of Appeal. Before his appointment to the Court, Tom Bathurst had been the leader of the Commercial Bar.

86 James Allsop and I started at the Bar as readers on Eleven Wentworth, each of us with R D Giles. He was known as tall thin Roger so as not confuse him with Lachlan’s father, R V Gyles, also a fine lawyer but with a quite different style of court craft. Tall thin Roger was a member of the Court of Appeal at the time of my appointment and retired in December 2011. I received an email from him last weekend apologising for his absence today and also seeking to turn my mind to future travel possibilities. His excuse was that he is in the middle of Davis Strait on route to Baffin Island in the Canadian north east which is a place I would like to visit.

87 In August 2011, the members of the Court of Appeal were Allsop P, Beazley, Giles, McColl, Basten, Campbell, Macfarlan, Young, Barrett and Whealy JJA – as we would refer to them in reasons – as well as Acting Justices Handley, Sackville and Tobias. Paddy Bergin was the Chief Judge in Equity and Peter McClellan the Chief Judge at Common Law.

88 I had done a lot of work with Ken Handley at the Bar and had been lectured in a good sense by Ron Sackville for a short time at university. I spent a brief period with Ken in the Court and more time with Ron. When presiding with Justice Sackville sitting to my left, I often felt like an umpire at an Australian Rules Football game. The parties would announce their appearances, I would then bounce the ball and sit back as Ron proceeded from the outset to ask counsel the difficult questions. Occasionally I had to blow the whistle.

89 I was obviously looking forward to working on this Court with James Allsop. However, he left the Court in February 2013, albeit to take up the position of Chief Justice of the Federal Court. James was replaced by the Governor, not then the Governor, who upon her appointment in 2019 as Governor was replaced by Andrew Bell; and for those of you who do not know him, he is the person on my left, the current Chief Justice. And some of his stories about the gymnasium are not accurate. I have seen him twice in four years. When Andrew was appointed Chief Justice, our current President, Justice Ward was appointed as President. Thus I have served under two Chief Justices and four Presidents.

90 There have been many humorous moments and I am now going to talk about Morgan and the District Court but I will assume that you all have been listening and have some knowledge as to the subject matter. Ms Morgan declined to be represented by a Legal Aid solicitor and you have been told why. She was ultimately successful and the State being represented only by junior counsel, a Mr Herzfeld. Justice Beazley presided as Acting Chief Justice. Early in Ms Morgan's argument, Justice Beazley requested that she bring the microphone down just a little bit towards her. Ms Morgan complied, leaning forward so that she was mouthing the microphone.

91 After a short period the following further exchange occurred:

“Beazley ACJ: We might just move that microphone away a little bit, I think it is--

Ms Morgan: Sorry I used to be singer, so you know we usually do the one inch of the mic thing.

Beazley ACJ: Sure I think it is reverberating just a little bit too much.”

92 We then proceeded to hear the balance of the argument. A year or so later, Justice Beazley and I were sitting on an appeal with Justice Macfarlan who prided himself on being a modern judge. He had his iPad in court and was giving the appearance of using it. Counsel for the appellant was in full flight until interrupted by Siri, “Can you say that again more slowly.” Counsel did so,

the argument continued, nothing was said from the bench and Siri remained silent thereafter.

- 93 When I started in the Court, Mary O'Connor who had been my secretary at the Bar for a number of years was my associate. Mary retired in September 2014. From then until March 2017, Trish Beazley performed that role and I thank each of them, especially for putting up with my less than occasional difficult moments.
- 94 From early August 2018, I moved to what was then referred to in the corridors of the Court as the "Leeming Payne" model, two law clerks or tipstaves, one sitting in the associate's chair and the other in the Tippy's chair. For me the task of these law graduates included typing my judgments. Over the years I have tried to treat them as you would treat "readers" who are like apprentices at the Bar. We discussed cases both before and after argument and they assisted in the researching and completion of judgments. There have been more than 13 tipstaves including my current tipstaves Codey Swadling and Lachlan Muir. Six of them are now at the New South Wales Bar and one has secured chambers at Brick Court in London. As to the others, one is an associate of a High Court Judge, another is working at the Crown Solicitor's Office and another is seeking admission to the New York Bar. A number of you are present today or have written to me upon learning of my retirement and I again thank you for doing so. I do not think I could have survived the countless hours in chambers if I did not have the benefit of my interactions with each of you. I trust that you will allow me to remain in touch and keep me updated about your future endeavours and successes.
- 95 During my time as a judge, the Court has had to deal with three events, each biblical in its own way. One a plague was COVID which I think we are trying hard to forget. One positive consequence is that it has resulted in a more effective use of improved audio visual technology. Another from the perspective of a judge is that it confirmed with respect to hearings involving substantive argument, the advantages and in my view, if at all possible, the necessity that the argument take place in person.

- 96 Each of the other two events involved a flood, which in each case was due to natural causes. The first in October 2017 in the reign of Chief Justice Bathurst and the other in September 2023 in the reign of Chief Justice Bell. The first involved the burst water pipe which flooded levels 5 and 6 and the foyers of this building and resulted in the Court being closed for over two weeks.
- 97 The second also started with a burst water pipe, but this time on level 19 of this building causing considerable damage and flooding to all floors down to the basement. Fortunately we were overseas on a holiday when this occurred. My only real concern was the reference to the basement, where my motor vehicle had been parked because it was thought to be safer there than at home in its garage. Fortunately although the flood was described as of biblical proportions there was no pooling of any water in the basement. From afar it seemed to me that the current Chief Justice dealt with this event, efficiently and effectively.
- 98 However, I remember receiving an email of 18 September 2023 which was signed, Noah Chief Justice, or more precisely, Noah CJ. I thought no doubt an illusion to the book of Genesis and Noah's role. I looked to see if there was anything else that the Chief Justice and Noah might have in common, other than dealing with the flood. There was a reference to Noah being the originator of vineyard cultivation, that intrigued me and I read on. At Genesis chapter 9, versus 20 and 21 it is said;

“After the great flood had subsided and ‘Noah began to be a farmer and he planted a vineyard and then drank of the wine’.”

And I will stop there but if any of you want to look further you can. I concluded that they might have had something else in common.

- 99 My 13 years on the Court of Appeal have been stimulating, often challenging and most satisfying. The Court's insatiable appetite for work continues as does the determination of its members to produce high quality judgments and to do so promptly. There is between each of its members, and I say for the last time, each of us, a preparedness to be persuaded as well as to persuade and to do so respectfully. I will miss working in such an environment and I will miss the

daily contact which I presently have with my colleagues, many of whom are close friends.

- 100 I have also sat on the Court of Criminal Appeal, almost always as the presiding judge and with two members of the Common Law Division. At the Bar, although I had much experience running complex commercial cases, I was not engaged at all in conducting the trial for an accused or in making submissions on sentencing. I thank the many judges in that division with whom I have sat for the benefit of their time and experience both in relation to some difficult appeals against conviction as well as the complex and nuanced exercise of sentencing.
- 101 More generally, I have been conscious of the advantages which an intermediate appellate court has in receiving meaningful materials in advance with the opportunity on most occasions to read and consider them before the hearing. That opportunity is not always enjoyed by judges especially in the District Court, either in its civil jurisdiction or in its criminal jurisdiction, particularly in relation to sentencing following a plea. These matters should always be kept in mind.
- 102 There are others here I would like to thank, the first, the Executive Director and Principal Registrar, Chris D'Aeth, who until recently had the overall responsibility for administering the Court and his acting, I think, successor Rebel Kenna. Any queries that I have addressed to either of them have been promptly responded to and acted on.
- 103 Secondly, I thank Jerry Riznyczok, the Registrar of the Court of Appeal from April 2010 until September 2023 and his successor for a brief time Karen Jones. I have very much enjoyed my many exchanges with Jerry and more recently Karen, usually about what to do with proposed referrals both before and after the event.
- 104 Thirdly, I thank Valentina Ortakovska in her role as the Court of Appeal's Senior Client Services Officer. She is the Registry face of the Court of Appeal and the most reliable source of information from the chambers' perspective as to the case management of an application or appeal.

105 Finally, I thank the IT and maintenance staff for keeping my prehistoric Department of Justice laptop on life support and also for dealing with the 19th century air conditioning which Reg Barrett would no doubt recall in its functioning. I also thank the library staff for their invaluable assistance, particularly in pursuing research into obscure topics, one of which arose in *Lam v R*.

106 Last but not least, I must thank Edwina Chapman and Jerry Thorovsky for all they have done in organising this farewell and the morning tea which follows.

107 For me, the reality of leaving the Court is daunting. For Fran, the reality of having me at home with time on my hands is even more daunting. However the prospect of having more time to spend together and with our family and friends is the principal reason for my stepping down from the Court. Unfortunately as a judge and as a barrister I have only really operated at one speed, except during January. Fran has always been the most important person in my life and I owe her much.

108 Again, I thank all of you for being here today.

109 **BELL CJ:** The Court will now adjourn.
