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JUSTICES OF THE HIGH COURT OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

THE HONOURABLE SUSAN MARY KIEFEL, AC, CHIEF JUSTICE
(retired November 2023)

THE HONOURABLE STEPHEN JOHN GAGELER, AC, CHIEF JUSTICE
(appointed November 2023)

THE HONOURABLE MICHELLE MARJORIE GORDON, AC

THE HONOURABLE JAMES JOSHUA EDELMAN, AC

THE HONOURABLE SIMON HARRY PETER STEWARD, AC

THE HONOURABLE JACQUELINE SARAH GLEESON

THE HONOURABLE JAYNE MARGARET JAGOT

THE HONOURABLE ROBERT THOMAS BEECH-JONES
(appointed November 2023)

ATTORNEY-GENERAL

THE HONOURABLE MARK DREYFUS, KC

RETIREMENT OF
CHIEF JUSTICE SUSAN MARY KIEFEL

On 16 October 2023, to mark the retirement of the Honourable SUSAN MARY KIEFEL AC to the office of Chief Justice of the High Court of Australia, addresses were delivered before the High Court in Canberra by the Honourable Mark Dreyfus KC MP, Attorney-General for the Commonwealth, Mr Luke Murphy, President of the Law Council of Australia and Mr Peter Dunning KC, President of the Australian Bar Association.

In reply, CHIEF JUSTICE KIEFEL said:

Mr Attorney, Mr Murphy and Mr Dunning, thank you for your kind words and your good wishes.

I am grateful for the attendance of everyone here today for this ceremony and for the trouble many have taken to be here. I extend the welcome of the Court.

I am pleased to have joining us on the Bench former Chief Justices the Honourable Murray Gleeson and the Honourable Robert French together with other former colleagues, the Honourable Kenneth Hayne, the Honourable Susan Crennan, the Honourable Geoffrey Nettle, the Honourable Virginia Bell and the Honourable Patrick Keane. The Honourable William Gummow is with us in Court, and Justice Beech-Jones, who will soon join the Court, is also present in court.

I am honoured that the other members of the Council of Chief Justices of Australia and New Zealand are here today: the Chief Justice of New Zealand, The Right Honourable Dame Helen Winkelmann and the Chief Justices of the States and Territories. I have had the privilege of chairing meetings with the Council and have valued the opportunity to discuss issues affecting the judiciary in Australia, New Zealand and more recently the Pacific region.

I acknowledge the presence of the Deputy President of the Australian Senate and the Shadow Attorney-General.

Counsel at the Bar Table including the Solicitors-General of the Commonwealth and of the States and Territories together with the President of the Bar Associations of the States and Territories. Presidents of Law Societies are also present in Court as are the Presidents of the

Australian Academy of Law, the Australian Judicial Officers' Association and the Australasian Institute of Judicial Administration.

I am especially pleased to have here today my husband, members of my family and many friends. I am grateful that many of my former associates are here as well as former executive assistants.

I am proud to have been a member of the Australian judiciary for the past 30 years. I have learned much from other judges and have made many friends amongst them. My service on various courts has enabled me to appreciate and value the work of trial judges as well as our appellate courts. My time on this Court has allowed me to observe the work of judges of other courts in Australia. I can attest to the high standard of the work of judges in Australia and to their diligence. Judges bear a great responsibility in the work that they do. The appointment of judges is also a great responsibility.

I believe that most lawyers who accept appointment as judges have a sense of vocation. They understand that it is a public duty which they are undertaking and that it will consume a large part of their life. They know that the work of the courts is essential to our society and they appreciate that as judges they collectively form part of an institution and that it is the maintenance of that institution and its reputation which is important.

The existence of a competent, independent, impartial, dedicated and ethical judiciary is largely taken for granted in our society. It should not be. An understanding of our system of law and the governance of our society should be regarded as fundamental to the education of every person.

During my time as Chief Justice the courts in Australia faced a great challenge brought about by the COVID-19 pandemic. The virus and public health measures taken to avoid its spread caused great disruption, including to the courts and to the administration of justice in this country. As a result of travel restrictions and restrictions on social interaction many hearings, both trials and appeals, had to be conducted, in whole or in part, remote from courtrooms. When in-person hearings became possible, requirements such as social distancing created other difficulties.

It is a credit to the courts and their staff, particularly those supporting the technology necessary for the hearings, that they adapted

to difficult situations as they arose and dealt with the many technological issues that were presented by video-link hearings. The legal profession is also to be commended for working within the limitations of such hearings. I think it would generally be accepted that not only are hearings by this method challenging, they are also exhausting.

It may be that one result of the experiences of this period will be that the use of video-link will be maintained for some hearings, particularly of short matters, because of their cost effectiveness and now that courts and the profession have become more familiar with their use. But I believe the experience of these hearings also confirmed the importance of in-person hearings. From the perspective of an appellate court, such as this Court, in-person hearings are essential for proper advocacy and for dialogue with the Bench.

My journey to a life in the law has sometimes been remarked upon as unusual and for that reason, of interest. Of course, it is not so interesting for the person, who is simply making their way as best they can. But if my experience has encouraged others to aspire to being a lawyer, then I am pleased.

I enjoyed my career as a barrister and developed an enduring respect for the legal profession, the Bar in particular. It is often said, for it is true, that the courts could not function without the assistance of a legal profession which has high standards of legal skills and ethical behaviour and whose members are conscious of their duties to the court. The importance of the quality of legal argument has been even more evident to me as a member of this Court.

I took appointment as a judge at a relatively young age. I have never regretted that decision. I had always assumed that I would find the work of a judge to be satisfying and that it would provide me with a sense that what I was doing was worthwhile. That assumption proved correct.

My appointment was not the only one made of a relatively young woman silk or lawyer at the time. I believe many women took early appointment out of a sense of duty. The general view then was that it would be beneficial to the profession for women to be part of the judiciary and for society more generally to see women in positions of authority.

Much has been achieved since then. It is my hope that now women lawyers will not feel the same sense of duty to accept

appointment at an early age. There is still much to be done within the profession to advance women, particularly as leaders in it and as advocates in the highest courts. That may be better assisted by women remaining as senior counsel at the Bar or as senior solicitors and having a longer experience of leadership roles whilst at the same time providing a role model and being a mentor to other lawyers.

At my swearing-in as Chief Justice, I said that there seemed to be no reason why the appointment of women to this Court would not be maintained, if not improved. Since then there has been a period, albeit brief, on this Court where the majority of its members have been women.

It has been an honour to be a judge of all the courts on which I have served. But this ceremony today marks my impending retirement from this Court and from the office of Chief Justice. It has been a great privilege to have served as a Justice of this Court and to have been the Chief Justice of a court which states and develops the law for our society.

I believe that this Court has maintained a high reputation and the confidence of the community since its inception. The public perception of the judges of the Court as independent is critical to the regard in which it is held. It is achieved in large part by the separation of powers for which our *Constitution* provides and by the respect afforded by each of the branches of government to the role of the other branches. That respect is maintained on the part of the Court by its Justices being conscious of its constitutional role and its limits.

The High Court is probably best known as a court which deals with questions concerning our *Constitution*. It is less well known that it hears appeals from other courts in all manner of matters, subject to leave being granted. A significant part of its work involves criminal appeals because of the importance which is placed upon the process of a criminal trial being fair and free of error. Such is the value placed upon a person's liberty.

Justices of the Court must routinely deal with many areas of the law. It would be almost impossible for a person to be appointed to the Court to have in-depth knowledge of every area of the law. But it is to be expected that they will have sufficient depth of knowledge of the law and its principles to be able to fill the gaps in their knowledge. Needless to say, this requires much dedication and hard work.

I have previously expressed my views about judgment-writing. I am unable to let this occasion pass without recording them. I believe that it is preferable, where possible, for there to be fewer judgments so that the Court is seen to speak with a stronger voice. This is especially important in the area of criminal law, where trial judges must look to the Court for guidance. A substantial majority judgment makes the reasoning of the Court clearer and the principle to be applied by lower courts more readily discernible. This is not to say that there will not be dissenting judgments, respectfully stated. On occasions a Justice may feel it necessary to state different reasoning to the same conclusion. I was especially proud, during my time as Chief Justice, when the Court was able to speak with one voice in some difficult and important matters despite some colleagues having held different views in the past.

I am grateful to my colleagues past and present for the many valuable discussions we have had in the course of decision-making. I have had the good fortune to observe some of the best legal minds in the country at work. I thank them for their collegiality and for the support which has been given to me as Chief Justice, especially in difficult times.

I thank the Chief Executive and Principal Registrar, Ms Philippa Lynch for her advice and assistance, especially during the pandemic, and I thank her predecessor, Mr Andrew Phelan. The Court is fortunate to have highly professional staff of long standing who have worked with many Chief Justices. I take this opportunity to thank the Senior Registrar, Ms Carolyn Rogers, the Senior Executive Deputy Registrar, Mr Ben Wickham and the Court's Publications Manager, Mr Stan Emmerson as well as the Deputy Registrars. I thank all the Court staff for their dedication and service to the Court, their support of me as Chief Justice and their co-operation during the pandemic.

I thank the 45 talented and able young lawyers who have been my associates since I first became a judge. Their enthusiasm for the law has at times sustained me.

Judges, especially Chief Justices, cannot carry out their role without professional administrative assistance. I have been fortunate to have had that support during my time on the Court from my Executive Assistants in Brisbane and in Canberra.

I thank my family, my sister in particular, for their understanding and support. My most heartfelt thanks are reserved for my

husband, Michael, whose support and counsel I have always been able to rely upon.

It remains to congratulate my colleague and successor, Justice Stephen Gageler and Justice Beech-Jones and to wish them and the Court well for the future.

Thank you all for attending today.

APPOINTMENT OF
CHIEF JUSTICE STEPHEN JOHN GAGELER

On Monday, 6 November 2023, to mark the swearing-in of the Honourable STEPHEN JOHN GAGELER AC to the office of Chief Justice of the High Court of Australia, addresses were delivered before the High Court in Canberra by Mr Tony McAvoy SC, National Aboriginal and Torres Strait Islander Legal Services, Dr Stephen Donaghue KC, Solicitor-General of the Commonwealth of Australia, Mr Greg McIntyre SC, President-Elect of the Law Council of Australia, Mr Peter Dunning KC, President of the Australian Bar Association and Dr Ruth Higgins SC, President of the New South Wales Bar Association.

In reply, CHIEF JUSTICE GAGELER said: --

Together with Mr McAvoy and other speakers from the Bar table, I begin by acknowledging the traditional owners and custodians of the land on which we are gathered. I acknowledge the Ngunnawal people and the Ngambri people who hold deep and abiding ties to this part of Australia. This being a ceremonial sitting at the seat of national government of a court having nationwide jurisdiction, I also acknowledge traditional owners and custodians of lands in all parts of the continent of Australia, of Tasmania, of the Torres Strait Islands, and of other coastal islands. I do so in the place – in the very court room – where traditional laws and customs of Aboriginal and Torres Strait Islander peoples were first recognised by the common law of Australia in the decision of this Court in *Mabo v Queensland [No 2]*.

I acknowledge the presence in this court room of His Excellency the Governor-General, former Chief Justices and former Justices of this Court, the Chief Justice of New Zealand, the Chief Judge of the United States Court of Appeals for the Sixth Circuit, the Chief Justice of the Supreme Court of each State and of the Northern Territory, the Chief Justice of the Federal Court of Australia, the Chief Justice and Deputy Chief Justice of the Federal Circuit Court and Family Court of Australia, sitting and retired judges of each of those courts and other Australian courts, the Shadow Attorney-General of the Commonwealth, the Solicitors-General of the Commonwealth and of each State and Territory, representatives and members of the Australian legal profession and of the Australian legal academy, members of my family – including, in particular, my father, John; two of my three siblings; my wife, Carla; our

children, Elizabeth, Francis, and Benjamin – friends, other invited guests, and members of the public.

I also acknowledge the many people who are joining this ceremony remotely in other court rooms in this building as well as in other locations throughout Australia and elsewhere. They include Her Excellency the Governor of New South Wales in Sydney and, most importantly, my mother, Patricia, in Newcastle. I speak on behalf of the entire Court when I say we are honoured by the participation of all of you in this ceremonial sitting.

Mr McAvoy, Mr Donaghue, Mr McIntyre, Mr Dunning, Ms Higgins. Thank you each for your carefully crafted remarks. And, yes, Ms Higgins, I have read Sir Matthew Hale's rules many times and I do try to abide by them.

My family's previous most momentous engagement with the legal system was in 1814, at the Old Bailey. It did not go so well. The family journey from there and then to here and now is, I believe – and I hope will remain – a quintessentially Australian story. No one is self-made, least of all me.

I am the product of decent, hardworking parents who raised me happily in a small rural community. I am a product of a long-established system of local state school education. The one-teacher primary school in the one-room weatherboard building where my father was educated before me and where I started and completed most of my primary school education was established in 1877, barely a decade after Sir Henry Parkes' *Public Schools Act* of 1866 and barely two decades after the introduction of responsible government in New South Wales. My attendance at the same local high school that both of my parents had attended, some 40 kilometres away, was facilitated by a one-and-a-half-hour each way trek most days for six years across partially-sealed roads in a government-funded school bus.

I am the product of a tertiary education here in Canberra at the Australian National University, established under the Chifley Government and expanded under the Menzies Government. My attendance as the first in my family and the first in my local community ever to have attended any university was made possible by the Tertiary Education Assistance Scheme introduced under the Whitlam Government. The education I was empowered to receive here was

supplemented but not surpassed by my subsequent postgraduate study in the United States.

I am the product of a professional, apolitical, and efficient public service, in which I was fortunate to work at an early stage of my legal career and with which I was again fortunate to interact during the four years I spent as Commonwealth Solicitor-General. My professional identity has been moulded by nearly two decades spent in private practice in the interim as a junior and then senior member of a skilled, ethical, independent, and increasingly national Bar.

As much as anything else, I am the product of this institution. I am steeped in its history. I recognise that I have now become absorbed into that history. My first full-time job was in this building. So now too will be my last.

At every step that has led to this point, I have benefited from accessible structures and transparent processes which have created pathways and presented opportunities to learn and to serve. And at every step, I have benefited from the encouragement and example of individuals: some extraordinary, most delightfully ordinary, all considerate and generous. Many I thanked by name in this court room when I was sworn in as a Justice 11 years ago. The focus of the swearing-in of a Chief Justice is properly more institutional than personal. I will therefore not repeat my earlier statements of appreciation. I will only amplify them in one respect and update them in another.

The amplification is in respect of Sir Anthony Mason, a towering figure in Australian law who has been a friend and wise counsellor for 40 years. I spoke of him 11 years ago as the exemplar of legal method and the master of judicial technique. I should then have added – and I do now add – that he was and remains the personification of sagacity. By his presence with us on the Bench today at the age of 98, he does me, my current judicial colleagues, and the institution he once led, great honour.

The updating of my earlier statements of appreciation is in respect of four successors to Sir Anthony in the office that I now hold, two of whom are also present on the Bench today. Those who are present are: the Honourable Murray Gleeson, to whose brevity and acuity I still aspire, and the Honourable Susan Kiefel, under whose dignified and

courageous leadership of the Court I was privileged to serve for the past six years. I regret the unavoidable absence from the bench today of the Honourable Robert French, who welcomed me to the Court as a Justice 11 years ago and who shepherded me through the transition from legal practitioner to judicial officer. In my thoughts on this occasion is also the late Sir Gerard Brennan, whose warm personal advice I appreciated during my early years on the Court and whose well-articulated conception of the judicial vocation has profoundly influenced my own.

The Australian *Constitution* establishes an integrated system of Australian courts. The constitutionally-established system of Australian courts comprises State and Territory courts just as it comprises this Court and other federal courts created by the Commonwealth Parliament. The *Constitution* places this Court at the apex of that system and specifically describes it as "a federal Supreme Court".

Having relinquished my former office as a Justice of this constitutionally-designated federal Supreme Court, I have today assumed the distinct and unique constitutional office constitutionally designated simply as that of "Chief Justice". I have done so conscious of the unique systemic responsibility which comes with that unique constitutional office. Sir Owen Dixon, on being sworn into the office in 1952, noted that it was Sir William Cullen, then Chief Justice of New South Wales, when addressing Sir Adrian Knox on his appointment in 1919, who first referred to the office as that of Chief Justice of Australia.

Sir Owen said in 1952 that he thought it then apparent that the judicial system within Australia was an "integral whole" and should be recognised as a "unit in judicial administration". Delivering the first "State of the Australian Judicature" address as Chief Justice of Australia 25 years later, Sir Garfield Barwick said that it seemed to him that Australia was then slowly developing a sense of unity in the administration of the law.

The trend towards practical integration so tentatively observed by Sir Owen and Sir Garfield was to accelerate under subsequent Chief Justices. Especially after the *Australia Act* of 1986, the unity long perceived in constitutional theory became increasingly reflected in institutional practice. An occasion of immense symbolic significance at the time and potentially of even greater practical significance in retrospect occurred in 1993, when the Conference of Chief Justices of

State Supreme Courts – which had been formed in 1962 – reconstituted itself as the Council of Chief Justices and invited the Chief Justice of this Court by virtue of that office to become its permanent chair. The membership of the Council has expanded now to include the Chief Justices of the Territories, of the Federal Court, the Federal Circuit Court and Family Court, as well as the Chief Justice of New Zealand.

The upshot is that I find myself assuming the office of Chief Justice of Australia at a time of maturation of the process of practical integration of the Australian court system.

It is also a time of emergent challenges and opportunities. Recent events across a range of comparable jurisdictions have underscored the criticality to democratic order and individual liberty of the existence of a judicial branch of government that is, and that is trusted by other branches of government and by the people to be, at once competent, impartial, and independent. Those same global events have demonstrated that those qualities are susceptible to erosion from within the judicial branch just as they can be vulnerable to external assault.

The lesson for us nationally in an increasingly interconnected world is that the time is past when the actuality and the perception of competence, impartiality, and independence on the part of the Australian judiciary can be taken for granted or can be treated as the sole concern of the political branches of government. The essential qualities of the Australian judiciary must be promoted and projected from within the Australian judiciary itself.

To that end, and to the related end of continuing to foster cohesiveness and efficiency in the administration of justice, I look forward to participating in the ongoing work of the Council of Chief Justices of Australia and New Zealand. To those same ends, I hope to work in collaboration with other national and sub-national organisations including those which may yet come to exist.

Looking outwards from Australia, as both my predecessor the Honourable Susan Kiefel and the Chief Justice of New Zealand, Dame Helen Winkelmann, have impressed upon me, opportunities are increasingly emerging for the Australian judiciary to cooperate in a range of mutually beneficial ways with the judiciaries of other countries especially in the Asia-Pacific region. I hope to explore and, where practicable, make good on those opportunities.

My focus on the unique systemic responsibilities associated with my new office should not be thought to be at the expense of the role I have performed as a Justice and will continue to perform as Chief Justice in the discharge of the core collective responsibility of this Court for overseeing the maintenance and development of legal principle within Australia. The system-wide perspective I bring to my new office nevertheless affects my perception of how that core responsibility is appropriately discharged.

Within our integrated system, State, Territory, and federal trial courts and State, Territory, and federal courts constituted as intermediate courts of appeal each perform distinct and complementary roles. The role of this Court as the ultimate appellate court is distinct from and complementary to both of those roles. A strength of our legal tradition is that the maintenance and development of legal principle within it depends less on legal theory than on accumulated experience. It is incumbent on an ultimate appellate court operating within such a tradition to respect and to seek to learn from the contemporary experience of the practical outworking of legal principle in other courts. And it is appropriate that such a court ordinarily confine its discretionary intervention to those cases in which some systemic benefit can be added by that intervention.

The need, in short, is to listen more than to speak, to speak only when and insofar as there is something that needs to be said, and to speak always with a consciousness of the systemic impact of what is said.

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Corrigendum

275 CLR 463 at 469, paragraph 2, line 17: For "*Taylor v Owens*" read "*Taylor v Owners*".

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