Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal

THE HON JUSTICE MICHAEL KIRBY AC CMG*

Abstract

In 1965 the New South Wales Court of Appeal was established comprising a President and six permanent Judges of Appeal. It replaced the former Full Court arrangements. The change altered the seniority of Judges within the State Supreme Court and caused serious tensions amongst its members. This article explains the clash of principles governing judicial supersession that accompanied the transition. By reference to archival materials the author traces the history of the legislation, addresses the suggestion of political motives for the move and explains the reasons that lay behind the change. The success of the new appellate arrangements led to copies in other State and federal courts.

1. A Permanent Appellate Court

The creation of the new Court of Appeal for New South Wales, with effect from 1 January 1966, and the consequent passing over of commissioned judges of the Supreme Court of the State who were not appointed to the new appellate court, produced sharp feelings of resentment amongst many of those judges. Suddenly and unexpectedly their seniority within the Supreme Court was disturbed, affecting the work they did and perceptions of their status in the legal profession and the community.

In our legal tradition, such disturbance of seniority amongst the judges ('supersession') other than by appointment of a judge to the separate office of Chief Justice, is a relatively rare and serious constitutional step. Citizens and some lawyers may wonder what all the fuss is about. However, the basic reason for the concern has to do with the independence of courts, the integrity of their internal arrangements affecting already appointed judges and the convention that those arrangements will normally be left to the courts themselves, once their members are commissioned. They will not be juggled or manipulated by the other branches of government with their often different and sometimes antagonistic or inconsistent agendas.

Formal constitutional provisions frequently forbid the diminution, during service, of the remuneration payable to judges.[1] Other constitutional entitlements[2]

* Justice of the High Court of Australia. Formerly President of the New South Wales Court of Appeal (1984–96). The writer acknowledges the comments of two anonymous reviewers of an earlier draft which led to substantial revisions of this article.

1 See, for example, *Australian Constitution* s 72(iii) in respect of federal judges.

and well-established conventions[3] restrain supersession in the form of the abolition of courts and the non-reappointment of commissioned judges of the former court to the replacement.[4] Interference by the executive and the legislature in the rank and status of judges arguably involves a breach of a basic principle protective of the independence of the judiciary.[5]

In some countries, at least in respect of the final appellate court, supersession in the appointment as Chief Justice of a judge other than the most senior puisne judge has been known to create constitutional uproar.[6] In India, it resulted in a decision of the Supreme Court designed effectively to entrench the right of seniority in appointments to the office of Chief Justice and to preserve the influence of the judges over all future judicial appointments to that court.[7] Governmental 'consultation' with the judges, as provided in the Indian Constitution, became, in effect, a requirement for the judiciary's 'consent', bringing with it new constitutional problems and institutional deficiencies.

Australia has not developed a legal principle forbidding judicial supersession like that now observed in India. The appointment of a puisne judge other than the most senior in rank to the separate office of Chief Justice is quite common in Australia.[8] Nevertheless, the displacement of the seniority of the judges of the Supreme Court of New South Wales at the end of 1965, by the creation of the new Court of Appeal, was quite exceptional in Australian history. It led to feelings of resentment and bitterness. As will be shown, such reactions were anticipated both by the State Chief Justice of the day and by the State government. In the end, however, they were regarded as unavoidable if the desirable object of creating a separate Court of Appeal within the Supreme Court was to be attained.

At the time of the events recorded in this story, the writer was a student at the Sydney University Law School. The personalities who were to play a part in the story were frequent visitors to the Law School. Then, more than now, the practising profession and the judiciary played a very active role in legal education.

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2 See, for example, *Constitution Act* 1902 (NSW) s 56.

3 *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268 at 278–280 (Kirby P). See Anne Twomey, *The Constitution of New South Wales* (2004) at 745–746.

4 Michael Kirby, 'Abolition of Courts and Non-Reappointment of Judicial Officers' (1995) 12 *Australian Bar Review* 181.

5 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, UN Doc A/CONF.121/22/Rev.1 (1985), endorsed by GA Res 40/32 (1985) and GA Res 40/146 (1985). See below n93 and accompanying text.

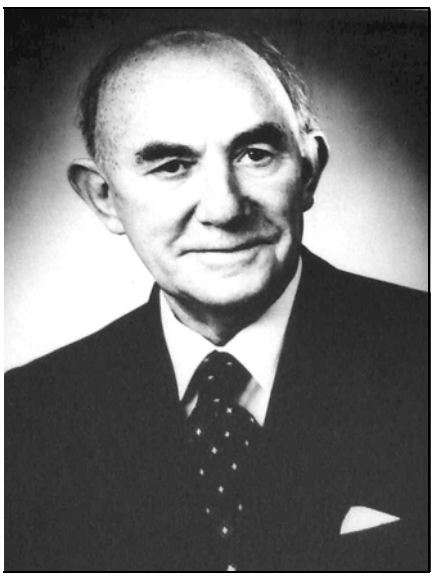
6 A serious conflict arose in India in 1973 concerning the appointment of the Chief Justice of India, following supersession of senior judges. Justice H R Khanna was passed over following an important decision adverse to the government of Mrs Indira Gandhi during the 'Emergency'. Justice Khanna resigned immediately. See M L Ahuja, *Eminent Indians: Legal Luminaries* (2006) at 80; Granville Austin, *Working a Democratic Constitution: The Indian Experience* (1999) at 278ff.

7 *SCAORA (Supreme Court Advocates-On-Record Association) v Union of India* (1993) 4 SCC 441. See also Austin, above n6 at 528–533.

8 Thus, at the time of his appointment as Chief Justice of New South Wales in June 1974, in succession to Sir John Kerr, Mr Justice L W Street was a Judge of Appeal and third in the order of seniority behind Justices Asprey and Moffitt.

In the nature of the comparatively small community, comprising the Bench and Bar, solicitors and law students, the judicial objections to the creation of a separate Court of Appeal quickly became known. The displacement of seniority eventually became a matter of public and media comment.

The creation of the Court of Appeal was one of three important innovations in the administration of justice in the State proposed by the newly elected government led by Mr Robin Askin, as Premier. That government had been elected to office in the State election held on 1 May 1965. It succeeded the Australian Labor Party government which had been in office for 24 years. The other two innovations were the establishment of a Law Reform Commission for the State[9] and the termination of jury trials in road accident cases.[10] The latter proposal was very controversial within the legal profession. Some of its members feared (correctly, as it turned out) that the move would be but the first step in the abolition, or containment, of the 'fault' principle and the imposition of restrictions on the recovery of compensation by injured persons.[11]



The Hon Sir Gordon Wallace (d. 1987)
Judge, Supreme Court of New South Wales, 1960 to 1970 First President of the Court of Appeal, Supreme Court of New South Wales, 1966 to 1970

In opposition, the new government had expressed concern about delays in the courts. One of the chief judicial critics of delay was Mr Justice Gordon Wallace, a comparatively recent appointee to the Supreme Court. In a paper delivered to the Australian Legal Convention in 1963, two years before the election of the Askin government, Mr Justice Wallace had nailed his colours to the mast of greater efficiency in the State Supreme Court.[12] It was a declaration that did not go unnoticed in State political circles.

The creation of the Court of Appeal was effected by the *Supreme Court and Circuit Courts (Amendment) Act* 1965 (NSW). This was to occasion the greatest constitutional change on the part of the new government.[13] How and why did this change come about? Why, once accomplished, did

9 *Law Reform Commission Act* 1967 (NSW). See 'Current Topics' (1965) 39 *Australian Law Journal* 77 at 79; 'Personalia' (1965) 39 *Australian Law Journal* 321 at 322. See also the paper by A L Goodhart, 'Law Reform in England' (1959) 33 *Australian Law Journal* 126, which reflected the temper of the times.

10 *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) s 5. See 'Current Topics', above n9 at 80.

11 *Civil Liability Act* 2002 (NSW).

it come to serve as a model in other Australian states and territories and in the federal Family Court? Why did it create such strong feelings in the State judiciary at the time — including on the part of some of those whose advancement to a new and more serious judicial office was assured?

In the professional gossip of the time, it was frequently suggested that the new Court of Appeal was established by the new government to reconfigure the Supreme Court of New South Wales, its judges all having been appointed over more than two decades by State governments formed by the Australian Labor Party. The legal profession in New South Wales had then recently witnessed the appointment as the State's Chief Justice, of the Right Hon Dr H V Evatt. Immediately before his appointment he had been the leader of the federal parliamentary Labor Party and Opposition. Although Dr Evatt had been a brilliant scholar, a distinguished Justice of the High Court in the 1930s, a considerable Minister and Attorney-General in the war-time government of Australia and a participant in the foundation of the United Nations, where he served as President of the General Assembly, his deteriorating mental powers in the 1960s were all too evident. This became painfully clear once he assumed the office of Chief Justice. His physical and intellectual decline had drawn attention to the politics of judicial appointments in a way that was less commonly considered in the 1960s than it has since become. The determination of the new State government to appoint judges who were perceived to be more congenial to its philosophy was widely suggested to be the *real* reason for the creation of the Court of Appeal and the supersession of established judges by the Judges of Appeal, appointed by the new government.

For many years, this hypothesis was widely believed. It gained some credence from earlier political links with the Liberal Party of two at least of the new Judges of Appeal, most notably Mr Justice Wallace, who was ultimately appointed the foundation President of the Court of Appeal.

History teaches that the choices made by governments for appointments to judicial and other offices often have a complex provenance. In the matter of judicial appointments, no government of politicians is entirely immune from the desire to advance appointees who, they hope, will evince on the Bench values and attitudes to legal choices in general harmony with those of the appointing government. However, as I shall show, a study of the official records of the time demonstrates beyond doubt that the creation of the New South Wales Court of Appeal was not simply a political manoeuvre by a newly elected government, avid to exercise the new-found spoils of office and determined to stamp on the Supreme Court of the State senior appointees of its own general persuasion.

If the politics of appointments was a factor at all in the constitution of the new court, it appears to have been one of lesser importance. In effect, the contemporaneous records give the lie to the professional gossip of the times. They demonstrate that a separate Court of Appeal was a long time coming in New South Wales. The pain of the creation was anticipated by the successive governments that planned the innovation. The establishment of the court was generally supported by

12 Gordon Wallace, 'Speedier Justice (and Trial by Ambush)' (1961) 35 *Australian Law Journal* 124.

13 'Current Topics' (1965) 39 *Australian Law Journal* 217.

the Bar and the legal profession. Substantially, the establishment of a permanent intermediate court for New South Wales responded to widely perceived professional needs and specifically the backlog in appellate decision-making and the demonstrated defects of the rotational arrangements that had preceded the creation of the new court.

The judges appointed to the new court were objectively lawyers of high standing and experience. Mr Justice Wallace, for example, had served as President of the New South Wales Bar Association, was a greatly respected advocate and had co-authored an important textbook on company law. All of the other Judges of Appeal were very senior lawyers. In retrospect, the success of the new Court within a short time after its establishment, demonstrates their talent and appears to vindicate the choices made as being meritorious, well-deserved and certainly acceptable.

So should the suggested problem of supersession be dismissed as no more than the product of egotistical resentments of elderly lawyers with not enough on their minds? Should their complaints be rejected so as not to trouble a later generation? In short, was the supposed issue of supersession in 1966 nothing more than a storm in a teacup?

2. Issue of Principle or Storm in a Teacup?

It is important at the outset of this history to explain the debate that broke out in 1966. Nothing else would illuminate the deep divisions that were then created and that affected relationships in the Supreme Court of New South Wales for at least twenty years.

There is no doubt that there were elements of personal hurt and professional envy in the objections of some of the judges of the Supreme Court who were passed over. Their disgruntlement was probably fuelled by the high feelings of self esteem that tend to go with the personalities attracted to the life of the advocate. Such feelings tend to become enlarged upon appointment to a prestigious public office in the judiciary of an Australian State Supreme Court.

In 1967 such an appointment was, if anything, more prestigious than today. There were virtually no federal courts, save for the High Court of Australia. The State Supreme Courts were smaller in number. Each of the judges of those courts was a personality well known throughout the State legal profession and widely known in the community. The prestige of these judges was inherited in New South Wales from predecessors who stretched back to the first creation of the colonial Supreme Court pursuant to the *Australian Courts Act* 1828.[14] The judges would have understood that this prestige was not enjoyed by the holders solely for their own benefit. It was the outcome of more than a century and a half of careful, faithful, generally competent and respected public service by the office-holders. Moreover, the prestige was an important ingredient immuring the Supreme Court

14 *Australian Courts Act* 1828 (Imp) 9 Geo 4, c 83. The story of the successive Charters of Justice, the first of which dates to 2 April 1787, is conveniently told in R P Meagher, W M C Gummow & J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) at 10–12.

judges from defiance by the opinionated and powerful members of the State government and Parliament. If they stopped to think about their motivation in the controversy that broke out in 1966, many of the judges would have seen the 'interference' of the government in the established seniority of the judges of the Supreme Court as another assault upon the powers of, and respect due to, the Supreme Court as an institution. It was thus to be resisted on that basis, not merely for causes of personal hurt.

In support of these conclusions, the objectors who were passed over could mount several arguments. Historically, nothing analogous had been attempted in New South Wales or any other Australian colony or state since the earliest colonial days. Specifically, no government or parliament had ever tried to change seniority within a Supreme Court once that seniority was established by the date of a judge's commission, save for the occasional issue of a fresh commission as Chief Justice.

The new Judges of Appeal in New South Wales were not appointed to a different court — as happened when the High Court of Australia was set above the State courts, following the adoption of the federal Constitution in 1901.[15] The Judges of Appeal and the other judges were all to be members of the *same* court. However, they were to have their seniority changed without their consent in ways that, usually, would have been quite unexpected and unpredictable at the time of their accepting appointment. When this happened, return to practice at the Bar was generally thought to be impossible and unethical, and certainly it would have been very difficult for those affected.

Most importantly, the change of seniority affected the work which the judges severally performed. The generally more prestigious, collegiate and intellectually stimulating work of appeals and judicial review would largely be taken away from the judges most senior in service. If this could be done so easily by a State government and parliament, it would be a precedent that could be misused to retaliate against judges who had rendered decisions adverse to government. Or it could be used to reward with advancement judges or lawyers whose decisions on the Bench were hoped, or expected, to be more favourable to the government exercising the power of preferment.[16]

The objectors were also entitled to point to the particularity with which matters of appointment are ordinarily specified in the language of judicial and other commissions from the Crown by reference to dates and order of precedence. This was not just a question of the order in which the commission-holder processes into the Banco Court for hearings, ceremonies or to church services. It was designed to fix the seniority within the court so that, by reference to that clear standard, the deployment of the judges could be made within the court in a manner that the judge, other members of the court, the legal profession and the community could see and evaluate objectively.

15 *Australian Constitution* s 71.

16 See *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 132 (Kirby J) where partly analogous arguments were advanced to object to the institutional enhancement of the State Supreme Court by the appointment of a substantially permanent cohort of acting judges, renewable annually at the choice of the executive government.

As against such arguments there are rebuttals that defenders of the supersession could invoke. First and foremost, it will be the thesis of this article that the contemporaneous records contain clear evidence that the overwhelming purpose of the government, like its predecessor, was to improve the efficiency and performance standards of the State Supreme Court. There is no recorded evidence that an ulterior motive explained the advancement of some judges and the supersession of others. Even if recording such motivations might not be expected, for reasons of politics and prudence, professional estimates of suitability at the time, within the organised legal profession, did not rise to a level that suggested that any of the appointees to the new Court of Appeal was unsuitable or unworthy. Quite the contrary.

Once a proper purpose for establishing the new appellate court is acknowledged, under the constitutional appointing arrangements uniformly followed without exception before 1966, the privilege and duty of appointment belonged to the executive government, which duty it exercised. There was nothing formally unusual in the course that was followed or in the qualifications of those appointed. The reasons why a separate court was not established will be explained.[17] At least in the present case the most acute of the problems of judicial supersession, which follows the abolition of a previous court and appointment of some only of the previous office-holders to the new court, did not arise.[18]

Generally speaking, the power of judicial appointment and the deployment of office holders, should be arranged in a way that best advances the attainment of justice and the service of the people of the community affected.[19] Where an important and valuable change is introduced to this end, an impact on individuals may sometimes be inescapable. Questions of comparative merit in appointments to public office are inescapable. Thus, attempts are now being made in many jurisdictions in Australia and elsewhere to enhance the transparency of the judicial appointments process. But, in the words of the popular saying, it is impossible to make an omelette without breaking eggs. The defenders of what occurred in 1966 were entitled to say that what happened was justified retrospectively by the sustained quality of the permanent appellate court that was thereby created for the judicial business of the most populous State of Australia and so for the service of the people of the State.

Nevertheless, the objectors had a point that such an alteration in the rank and work of appointed Supreme Court judges was unique in Australian judicial history. The high public officials affected were not consulted or dealt with candidly. The constitutional relationship between the branches of government was unexpectedly disturbed. Many of those judges superseded would have considered that they had been demoted in rank in a very public way. This destabilised the manifest independence of the State's highest judges. It was therefore not a trivial or purely

17 See below Part 4 at the discussion of *Stewart v The King* (1921) 29 CLR 234.

18 Compare *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.

19 Christopher L Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (2007) at 164.

personal affair. Unless judges are vigilant in cases of such disturbance, the government and Parliament might use such a precedent to diminish Supreme Court judges to mere public servants rather than constitutional office-holders with vital duties as guardians of the public against the misuse of government power.[20]

3. The Idea of a Permanent Appellate Court

As a derivative legal culture in the middle of the 20th century, Australia had been accustomed to copying legal and institutional ideas from other countries, principally England. Appeal was not, as such, a procedure known to the common law.[21] As Sir Raymond Evershed MR told his audience in an address at the University of Melbourne in August 1951, it was 'a strange thing when the long history of English law is considered, that until 1873 … there was no Court of Appeal in England, i.e. no court before which a case, having been tried at first instance, could be reheard and determined upon its merits'.[22] The procedure that came closest to appeal was the writ of error in the Exchequer Chamber. But this was a remedy offered by another court in its original jurisdiction. It was not relief granted by a court exercising appellate jurisdiction, including by orders directed to its own judgments and orders.

The Chancery Court of Appeal, established in the 19th century, became the model for the general Court of Appeal later created in England as part of the *Judicature Act* reforms. Those reforms were subsequently imitated in various parts of the British empire, including Australia, as colonies and dominions established their own courts and sought to provide a similar facility for appellate review. The other model for a national appellate court was the Supreme Court of the United States of America, established by art III of the Constitution of that country and given effect by the United States *Judiciary Act of 1789*, 1 Stat. 73, creating a Supreme Court and a three-tiered federal judicial structure.

The interposition of the Court of Appeal in England produced 'two tier appeals', with a further avenue of appeal to the House of Lords, either by leave of the Court of Appeal or by the Law Lords themselves. However, as Sir Raymond Evershed explained in 1951, '[t]he Court of Appeal is the final court, in fact, for ninety-five per cent of the civil cases'.[23] The same was quickly to prove the case after the creation of the Australian permanent courts of appeal.[24]

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20 The Supreme Courts of the State are specifically recognised by the *Australian Constitution* s 73(ii) and linked by the facility of appeal to the High Court. See *Kable v DPP (NSW)* (1996) 189 CLR 51 at 100–103 (Gaudron J); 115–116 (McHugh J); 140–142 (Gummow J).

21 *Attorney-General v Sillem* (1864) 10 HLC 704 at 720–721; 11 ER 1200 at 1207–1208 (Lord Westbury LC); *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553 (Isaacs J); *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108 (Dixon J); *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225 (Rich, Dixon, Evatt & McTiernan JJ); *Grierson v The King* (1938) 60 CLR 431 at 436 (Dixon J); *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 322 (Kirby J).

22 Raymond Evershed, 'The History of the Court of Appeal' (1951) 25 *Australian Law Journal* 386 at 387.

23 Ibid.

Apart from the separate national final courts of appeal established for the dominions of the Empire — the Supreme Court of Canada, the High Court of Australia, the Appellate Division of the Supreme Court of South Africa and the Federal Court of India (the predecessor to the Supreme Court of India) — in the provinces and states of the British dominions and colonies it was common for an internal system of appeal to be established. Typically, this involved appeals from the judgments and orders of single judges of the Supreme Court, or of courts below it, to a Full Court, sitting in banc. The judges who participated in the appellate sittings were trial judges who took turns in discharging the appellate functions according to assignments made by the Chief Justice.

These arrangements were known to the British judges. Accordingly, as Evershed described it in his Melbourne speech, they occasionally asked themselves: 'Would it be better that intermediate appellate work should be done (as you do it in this State) by the judges of first instance sitting in banc?'.[25] The Master of the Rolls acknowledged that the establishment of such an arrangement had been considered in England by a reform committee which he had created. However, he told the Melbourne audience (which would have included judges of the Supreme Court of Victoria who participated in such a system):

> in England (and I speak of course only of England) I think there are solid reasons for maintaining the *status quo*. In the first place the court may be said, by the distinction of its members in the past, to have worked its passage to approval. … And there are further reasons. It is said that judges sitting temporarily on appeal over their brethren may think over much of what may happen later when their own cases come up for review. I do not myself attach too much importance to this. But the problem is very different when there are but ten or a dozen judges altogether, and when there are (as with us), three or four times that number. … Moreover — and this I believe myself to be the most serious point — the judicial function is not quite the same in an appellate court as it is in a court of first instance. In a court of first instance the duty of the judge is to sift the evidence and to reach a conclusion as best he can, and as quickly as he can … Dispatch is of course important no less in the Court of Appeal, but it must be subject to due deliberation if an appellate court is justifiable at all. … [Questions are] not put merely to demolish an argument, to vex Counsel or to indicate superiority of intellect. [They are] put as often as not to indicate to your colleagues that your own apprehension of the case may not be quite in accord with what you understand to be theirs. It is by such means that the combined judicial operation is achieved ….[26]

The speech by Evershed, which was widely publicised in legal circles in a country whose courts were then still subject to appeals to the Privy Council and whose lawyers were still accustomed to looking to England for wisdom and intellectual leadership in the law, left a mark on its listeners. This was especially so because of the growing professional anxiety about appellate institutional arrangements in Australia, including serious backlogs in the New South Wales courts in disposing of cases both at trial and on appeal.

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24 Michael Kirby, 'Permanent Appellate Courts — The New South Wales Court of Appeal Twenty Years On' (1987) 61 *Australian Law Journal* 391 at 393 (Table 1), 394 (Table 2).

25 Evershed, above n22 at 388.

26 Id at 388–389.

In New South Wales, the earliest provision for appeals contemplated first recourse to a 'local Court of Appeal' comprising the Governor in Council. Later this arrangement was changed to provide rights to appeal, or to seek special leave to appeal, to the Judicial Committee of the Privy Council in London and then, additionally, after 1845 by appeal to the Supreme Court itself 'in banco'.[27] These were the avenues of appeal that continued until early in the 20th century when the High Court of Australia was created and, copying an English statutory reform,[28] a Court of Criminal Appeal was established for the State by the *Criminal Appeal Act* 1912 (NSW). That change, together with similar moves in all of the Australian States, was the last institutional innovation in Australia's superior courts before the Court of Appeal of New South Wales was created in 1965. For the hearing of criminal appeals, the courts of criminal appeal did not, in practice, significantly vary the internal institutional arrangements of the Supreme Courts. In such courts the participating judges were assigned to participate, by rotation and by decision of the Chief Justice of the Supreme Court, effectively in the same way as had been the case in civil appeals.

Apart from Evershed's speech of 1951 and the growing interest in law reform over the ensuing decade, two further developments occurred, providing overseas models that stimulated the imagination of the legal profession in Australia. One was the creation of permanent provincial courts of appeal in Canada, resulting in a flow of excellent and well reasoned decisions from the intermediate courts of that country, especially the Ontario Court of Appeal and the British Columbia Court of Appeal.[29] Because the system of law in Canada was so obviously similar to that of Australia, the example of the courts of the Canadian provinces began to be noticed by Australian judges and practitioners. If 95 per cent of cases concluded at the intermediate level and if the final appellate court could not feasibly continue to receive appeals as of right, certainly in large numbers,[30] the need for intermediate appellate courts of uniformly high capacity and reputation to perform efficiently the bulk of appellate work of the nation became clear.

It was one thing to have before Australian legal imaginations the model of the Court of Appeal of England and Wales (then usually described in Australia simply as 'the Court of Appeal') and to have the example of the successful export of this idea to Canada. But when in 1957 the Parliament of New Zealand re-established a separate Court of Appeal for that nation, the merits of having a distinct court to discharge the appellate functions of the Supreme Court of New South Wales became a source of more vigorous professional discussion. Initially, the focus of the discussion was in New South Wales because that State, with the largest

27 Kirby, above n24 at 397.

28 *Criminal Appeal Act 1907* (UK).

29 Kirby, above n24 at 400.

30 Special leave to appeal was made a universal requirement for appeals to the High Court by amendment to the *Judiciary Act* 1903 (Cth) s 35(2), introduced by the *Judiciary Amendment Act (No 2)* 1984 (Cth) s 3(1). The constitutional validity of the statutory provisions was upheld in *Carson v John Fairfax and Sons Ltd (Receivers and Managers Apptd)* (1993) 173 CLR 194 at 218 (the Court).

population and highest levels of litigation in Australia, was experiencing serious backlogs in hearings and the disposition of appeals. Improvement in the administration of justice began to capture professional and political attention. Inevitably, the model across the Tasman became a source of stimulation to Australian innovation.

The New Zealand creation was given a further boost in Australia by the visit to Perth, for the 11th Australian Legal Convention, of Mr Justice Gresson, President of the new New Zealand Court of Appeal. In a note on his participation in that Convention, Mr Justice Gresson recounted the opportunities he had enjoyed to describe 'the operation of the newly-constituted Court of Appeal in New Zealand'.[31] He described the numerous meetings he had with judges of all Australian jurisdictions as well as Australian barristers and solicitors. He pronounced himself satisfied that New Zealand was approaching the general task of law reform in a more efficient way, and had achieved more than 'had any State in Australia'.[32] Although Sir Kenneth Gresson was doubtless polite to his Australian hosts, he might occasionally have acted as a proselytiser for his own court, feeling (as he confessed he did) like 'any "kid" brother … thrilled to be invited or even permitted to join in the activities of his elders and to participate in their fun and games'.[33]

In a very short time, word of the successful New Zealand experiment came to the attention of the New South Wales Attorney-General, the Hon Reg Downing MLC. He was a barrister and a respected member of the Labor government of New South Wales. Reportedly, in Cabinet, he had opposed the appointment of Dr H V Evatt as Chief Justice of the State, only to be overridden by the felt needs of political expediency amongst his party colleagues.[34] Downing's own approach to law was careful and serious-minded, as the documents of his Department, now disclosed, demonstrate.

4. The Plans of the Labor Government 1958–63

The point is now reached where the behind-the-scenes developments concerning the later creation of the New South Wales Court of Appeal are revealed in the files of departmental materials procured from the New South Wales State archives. Against the backdrop just described, these records disclose that the process leading to the establishment of the new permanent Court of Appeal was a long one and actually began during the Heffron Labor government's tenure in the State.

31 Kenneth Gresson, 'The Eleventh Australian Legal Convention' (1959) 35 *New Zealand Law Journal* 217 at 217.

32 Id at 218.

33 Kenneth Gresson, 'The Eleventh Australian Legal Convention' (1959) 35 *New Zealand Law Journal* 217 at 217.

34 Ken Buckley, Barbara Dale & Wayne Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (1994) at 403. According to this book the Cabinet vote was at first evenly divided; the other candidate was Mr John Kerr QC: at 403–404.

On 5 June 1958, the Chief Justice of the Supreme Court of New South Wales (the Hon Sir Kenneth Street KCMG) wrote to Attorney-General Downing. He referred to a 'conversation with yourself in recent times' in which he had 'occasionally adverted to the desirability, if not the necessity, of giving legislative attention to the structure and organisation of the Supreme Court of this State'. He took the opportunity of his letter to 'place certain matters before you in the hope that they might receive the consideration of the Government'.

After recounting the growth in the business of the Supreme Court ('phenomenal'), and of the District Court, and the consequent doubling of the number of judges of those courts in the previous ten years, Chief Justice Street pointed out that, as a 'necessary result' the 'number of appeals is growing every year'.[35] Some steps had been taken to improve the handling of appeals. However, the problem of coping with the workload had been exacerbated by increased appellate work in the field of landlord and tenant cases, appeals from magistrates and from other tribunals created by statute or proceedings brought before the Supreme Court by the use of the prerogative writs. Whereas in 1948 the Full Court of the State had disposed of 134 civil and 97 criminal appeals, in 1957 the corresponding figures were 253 and 134. The result was a significant increase in delay in dispositions. This was unacceptable. The Chief Justice wrote:

> I have come definitely to the conclusion that the provision should be made for two appeal courts, sitting regularly, and the organisation of the Court should be remodelled on the lines of the English *Judicature Act*, to provide for the Supreme Court being constituted in two divisions, namely, an appellate division and a division covering all the courts of first instance. There should be a Court of Appeal, with judges specifically appointed to that office in a sufficient number to enable two appeal courts to sit constantly and contemporaneously.[36]

Chief Justice K W Street speculated on the additional qualifications that might be appropriate for appointment to such an appellate court. However, he insisted that any judge of the Supreme Court should be available to sit as an additional judge of the Court of Appeal, if so designated by the Chief Justice, 'in the same manner as the Lord Chancellor may now do in England'. He proposed that the then new court building in Hospital Road, Sydney, could be made available for an appeal court. He asked the government to consider the matter and give its approval to the general idea.

With commendable promptness, the Under-Secretary of the Department of Attorney-General and of Justice on 23 June 1958 sent a substantial minute to the Attorney-General.[37] This reviewed and summarised the suggestions of the Chief

35 Letter from Chief Justice Kenneth Street to Attorney-General Robert Downing, 5 June 1958.

36 Id at 2.

37 According to Mr Trevor W Haines AO, past Under-Secretary and then Secretary of the New South Wales Attorney-General's Department (1978–91), the minutes referred to in this article were probably drafted by Mr W A Robey, then the Assistant Under-Secretary responsible for Attorney-General's matters. He prepared minutes and correspondence at the time for Attorneys-General Downing and McCaw: Letter from Trevor Haines to the author, 5 January 2008.

Justice, laying emphasis, in support of the need for action, on the incontestably substantial increase in the appellate business of the Supreme Court.

The departmental minute indicated that the Minister might wish to consider more generally the '[j]udicate [*sic*] system and discard the system of special pleading which has survived in New South Wales, although discarded in other States and England for some time'.[38] The minute reminded the Attorney-General, on the basis of past evidence of opposition from the New South Wales Bar, that resistance could be expected to the latter proposal.

As to the broader proposal, including the suggested use of the new court building in Sydney, the minute suggested that 'there would be little, if any chance … of implementing such a recommendation for some time'. Instead, it proposed that the Minister might suggest 'that the results desired by the Chief Justice could be achieved by retention of the present procedure in the Supreme Court, but a reorganisation of the judges along the lines suggested'. If a stalling action was the wish of the Under-Secretary, he then made a serious blunder. He proposed that the Minister 'might wish to be favoured with the views of the Assistant Law Officer' (the Solicitor-General for the State).[39] Attorney-General Downing took up that suggestion.

The result was a consultation with Mr H A Snelling QC, a distinguished and wily law officer who immediately prepared a detailed minute of 1 July 1958, much more in harmony with the ideas of the Chief Justice. Amongst the points made by Mr Snelling were that a 'proposed Court of Appeal could overcome the arrears of civil and criminal appeals, allowing (as he had thought for some time) for 'two full courts [to] sit continuously until the appellate work is up to date'. The anticipated quantity of work was not the only consideration on his mind:

> It would no doubt be advisable that these two courts be comprised of judges able to produce the best possible appellate judgments and that the personnel of the courts be changed as little as possible until arrears are overhauled … If these measures necessitate immediate appointment of one or more additional judges such appointments should be made though not necessarily as a recognition that there should be a permanent increase in the total number of judges.[40]

Qualifying the Head of Department's menacing reference to the *Judicature Act* system, the Solicitor-General went on:

> I do not read the Chief Justice's letter as carrying the implication of the introduction of the judicature system in toto, but merely as a proposal to constitute a Court of Appeal as a separate entity. If in due course this proposal is decided to be necessary I would not anticipate any real opposition from the profession.[41]

38 Minute of the Under-Secretary of the Department of Attorney-General and of Justice to Attorney-General Robert Downing, 23 June 1958.

39 Ibid.

40 Minute of Solicitor-General H A Snelling to Attorney-General Robert Downing, 1 July 1958.

41 Ibid.

The foregoing minute was sent to the Under-Secretary on 9 July 1958 together with a covering note reminding him that a Court of Appeal had recently been constituted in New Zealand. Copies of the New Zealand Act for this purpose and the Second Reading Speech were attached. Also attached were copies of the relevant provisions of the Ontario *Judicature Act* with the note:

> In that province and in some other provinces of Canada, it has apparently been found desirable to constitute a separate Court of Appeal within the Supreme Court replacing the former Appellate Division of the Court.[42]

The result of this exchange was a resubmission of the matter to Attorney-General Downing under cover of a further minute from the Under-Secretary of 28 August 1958. Skating over the clear preference and foreign analogies drawn to notice by the Solicitor-General, the Under-Secretary stated:

> Mr Snelling feels that the above arrangements could be made without any formal constitution, for the present, of a separate Court of Appeal, but this could be considered (perhaps by an *ad hoc* committee) when arrears are overtaken.[43]

However, honesty required him to acknowledge that Mr Snelling 'rather favours working towards the possible evolution of a Court of Appeal'.[44] Reference was made to the New Zealand and Canadian innovations. The Attorney-General was invited to consider whether the Solicitor-General's minutes and the foreign material might be made available to the Chief Justice.

This Attorney-General Downing agreed to on 28 August 1958. Accordingly, he signed a prepared letter of 17 October 1958 to Chief Justice K W Street sending copies of the New Zealand and Canadian legislation and making the point that reform in New Zealand had been necessitated by the special inconvenience of constituting Full Courts of the then Supreme Court of New Zealand from judges drawn from the four main cities of that country. Clearly enough, the Under-Secretary was not as inspired by the idea of a permanent Court of Appeal for the State as was the Solicitor-General.

At this stage, the proposal went into apparent hibernation. Sir Kenneth Street's ten year term as Chief Justice concluded on 27 January 1960. Between February 1960 and October 1962, much of the Attorney-General's attention would have been focussed on the incapacities of new Chief Justice H V Evatt. The latter retired on grounds of illness on 24 October 1962 to be replaced by Mr Justice L J Herron CMG, then the senior puisne judge of the court. Chief Justice Herron was a bluff but practical and experienced judge who had helped Evatt to survive in an office which mental and physical deterioration had rendered Evatt largely incapable of discharging.

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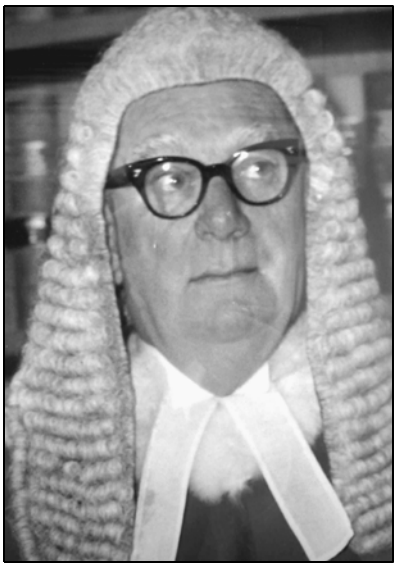
42 Minute of Solicitor-General H A Snelling to the Under-Secretary of the Department of Attorney-General and of Justice, 9 July 1958.

43 Minute of the Under-Secretary of the Department of Attorney-General and of Justice to Attorney-General Robert Downing, 26 August 1958.

44 Ibid.



The Hon Sir Leslie Herron KBE, CMG (d. 1973) Judge, Supreme Court of New South Wales, 1941 to 1972 Chief Justice of New South Wales, 1962 to 1972

A file note of 18 March 1960 recorded recommendations for the urgent appointment of three persons as judges of the Supreme Court, namely Mr Gordon Wallace QC, Mr Kenneth Jacobs QC and Mr J F Nagle QC. All were later appointed. However, Cabinet decided to substitute Mr A R Moffitt QC with priority over Jacobs and Nagle. A file note of 14 March 1960 then discloses that Mr Moffitt, who had been an acting Judge of the Supreme Court, was unable to accept appointment at that time for 'a very personal reason'. The note signalled a willingness on his part to do so in the future.

In July 1962, the New South Wales Bar Association breathed new life into the proposal for a permanent appellate court for the State. A report of its Law Reform Committee III, to whom the earlier proposal had been referred, announced that it recommended in favour of 'a permanent statutory appellate division of the Supreme Court'. It attached a draft Bill to give effect to that proposal. It also favoured an American style innovation, namely the provision of written contentions of the parties on appeal, something which judicial traditionalists (such as Sir Raymond Evershed) were not much disposed to favour.[45] High in the priorities of the Bar Association was the view that 'judgments should not be reserved for undue lengths of time'. Presumably, it was thought that the permanent appointment of appellate judges might reduce the very considerable delays that were then being experienced. The Bar report was signed by Mr M H (later Sir Maurice) Byers.

Mr Acting Justice Moffitt was appointed to a permanent seat in the Supreme Court of New South Wales with effect from 9 November 1962. Suitable minutes record the warrant for the 'manufacture of a new Gold Pass' for the judge to permit free transport in the State, a golden benefit of office lost in the 1980s when undistinguished electronic cards replaced the medallions, then recalled from service.

The year 1963 began with Chief Justice Herron established in office and the painful interlude of the chief justiceship of H V Evatt out of the government's way. Clearly enough, the Attorney-General still entertained the idea of a separate court of appeal. Newspaper accounts on file from April and May of 1963 reported that the Attorney-General, in company with Chief Justice Herron, had travelled to New Zealand at the end of April 1963 to study the permanent appellate court operating there.[46] The newspaper items record that the visitors had discussions about the

45 Evershed, above n22 at 389.

idea with the 'chairman' of the New Zealand 'Appeals Court', by that stage Sir Alfred North, as well as with Lord Chief Justice Parker of England who was present in New Zealand for a legal convention.

Attorney-General Downing was quoted in the news reports as stating that the New Zealand system was modelled on that operating in Britain. Clearly, the issue of seniority of the judges of the Supreme Court was on his mind for he added:

> As in all things there are a number of conflicting views … But a permanent Court would be comprised of the same appellant [*sic*] judges who would take their status in accordance with their seniority in relationship to all the other Justices of the Supreme Court.[47]

Chief Justice Herron was not so tentative. He told the media that he 'thought there was a need for a permanent Appeal Court in NSW. Five or six permanent appeal judges should be appointed, he said'.[48]

Whatever doubts were in Attorney-General Downing's mind when he set out for New Zealand, they appear to have been resolved by the conclusion of his visit. On 13 June 1963, the departmental file contains a letter to Chief Justice Herron forwarding a draft Cabinet minute, which Mr Downing intended to submit 'at an early date with the view to the establishment of a Permanent appellate court along the lines discussed between us from time to time'.[49] The Attorney-General sought the Chief Justice's advice and opinion. He noted submissions from the New South Wales Bar Association raising the assignment of prerogative writs and indicated his view that the new Court of Appeal should have that jurisdiction 'where they are in substance a form of appeal in civil proceedings', but not *habeas corpus*.

Things then moved swiftly. On 28 June 1963, the new Labor Premier, the Hon J B Renshaw, wrote to the Attorney-General confirming that the State Cabinet, at its meeting on 25 June 1963, had approved the preparation of legislation to implement the proposal for a permanent appellate court for New South Wales.[50] There followed a detailed submission to the Attorney-General by the Under-Secretary of his Department, dated 7 August 1963. This contained the intelligence:

> The Honourable the Chief Justice has now indicated that he is, generally speaking, in agreement with the Attorney-General's minutes as conveyed to him, and comments that whilst he believes that this is a progressive and desirable proposal, it is possible that some of the judges may not feel well disposed towards it, especially in the case of those who would be unlikely to be appointed. However, the Chief Justice believes that this should not be a sufficient reason for refraining from putting the proposal into effect.[51]

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46 'Examination of NSW Appeal Court Question', *Sydney Morning Herald* (16 April 1963) at 7; 'State Plans New Court: Downing Reports on NZ System', *Sun* (1 May 1963) at 17.

47 'State Plans New Court', above n46 at 17.

48 'Examination of NSW Appeal Court Question', above n46 at 7.

49 Letter from Attorney-General Robert Downing to Chief Justice L J Herron enclosing draft Cabinet minute, 13 June 1963.

50 Minute from Premier J B Renshaw to Attorney-General Robert Downing, 28 June 1963, noted Department of Attorney-General and of Justice, 2 July 1963.

Many of the Chief Justice's recorded comments at this time were designed to preserve the prerogatives of his own office. He urged that the Court of Criminal Appeal, as constituted by him, should be preserved and not amalgamated with the proposed Court of Appeal. As to the note of the designation of Judges of Appeal — in the Canadian fashion, as 'JA' — and the indication that they should 'have rank, status and precedence next after the Chief Justice and President (if any) and ahead of the Puisne judges', the Chief Justice is recorded as commenting:

> This is a delicate matter and might merit some discussion later on when new appointments are being made, and the Attorney might feel disposed to deal with the problem in that way.[52]

Attorney-General Downing's handwritten note on this letter records: 'I agree'.

In response to the Chief Justice's apparent lack of enthusiasm for the designation of a 'President' to lead the new appellate court, the Under-Secretary suggested that, if one were appointed, the Chief Justice 'might be relieved of the administrative work of the Division, but this could involve an added salary or allowance to the appointee'.[53] The Attorney-General agreed to this suggestion, but noted that, where the next senior judge was sitting, he should be designated 'Deputy President',[54] a suggestion that did not come to pass in the legislative drafts.

There was consequential discussion about the nomenclature to be given to the General Division of the Supreme Court. The first of the Chief Justice's recommendations ('Queen's Bench Division') was not favoured by the Under-Secretary as this 'could involve some confusion with the English court of that name'. The Attorney-General agreed.

One point which particularly exercised the departmental advisers was a concern, later to be invoked by Attorney-General Downing's successor, that nothing should be done to cast doubt on the role of the new permanent appellate court as a manifestation of the Supreme Court of the State. In a note on the constitution of the proposed court, this was the first item dealt with by the Under-Secretary, by reference to the decision of the High Court in *Stewart v The King*.[55] In that case, a formal objection had been taken to an appeal to the High Court from orders of the Court of Criminal Appeal of New South Wales, established under the 1912 Act. It was submitted that the 1912 court was not one of those courts from which an appeal lay to the High Court under the federal Constitution.[56] The High Court rejected the argument, declaring that the 1912 Act:

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51 Submission from the Under-Secretary of the Department of Attorney-General and of Justice to Attorney-General Robert Downing, 7 August 1963.

52 Ibid.

53 Ibid.

54 Minute from Attorney-General Robert Downing to the Under-Secretary of the Department of Attorney-General and of Justice, 7 August 1963.

55 *Stewart v The King* (1921) 29 CLR 234 ('*Stewart*').

56 *Australian Constitution* s 73(ii).

> does not create or constitute a new Court distinct from the Supreme Court, but merely directs that the Supreme Court shall act as the Court of Criminal Appeal …. If there can be no appeal to this Court unless the Supreme Court and the Court of Criminal Appeal are one, the Legislature evidently thought they were one, because sec. 24(2) assumes that an appeal lies to this Court.[57]

Although, in the upshot, the Court of Appeal was not eventually created as a 'Division' of the Supreme Court, but as part of that court, the reason for that course was to steer the new institution into the safe waters chartered by the decision in *Stewart*. By doing so, the status quo, so far as appeals from the appellate disposition of proceedings in the highest court of the State, both to the Privy Council and to the High Court, was preserved intact.

The result of this coalescence of the views of the Chief Justice, the Department and Attorney-General Downing (together with the earlier expressed views of Solicitor-General Snelling) was the minute to Cabinet and approval for the drafting of legislation to create 'an Appellate Division of the Supreme Court of New South Wales'. It is clear from the memoranda on the file that the Department treated as the starting point for the proposed legislation the New South Wales Bar Association's draft Bill attached to the Law Reform Committee report signed by the acting president of the Association, Mr M H Byers QC.[58]

Having brought the proposal to such an advanced stage, something undisclosed in the archive file appears to have intervened to bring the fast-gathering momentum, and the draft Bill in its advanced stage, to an unexpected halt. What could this have been? The Labor government had won re-election to office in March 1962 with 48.6 per cent of the popular vote. However, it had been in office for more than 20 years and was running out of steam. On 28 April 1964, Premier Heffron, who had held office since October 1959, retired to be replaced by a government led by Mr Renshaw. Quite soon, the government was embroiled in a scandal involving the Speaker, the Hon R S Maher. It was in the aftermath of that scandal that, on 1 May 1965, a general election was called in the State. It was at that election that the Renshaw government was defeated and the Askin government elected.[59]

Attorney-General Downing had not brought to fruition his proposed permanent appellate court for the State. However, with noticeable vigour, the Attorney-General in the new government, the Hon Kenneth McCaw, reignited the process that had fallen dormant for nearly two years under his predecessor. A new government, with a strong focus on law reform, committed itself to introducing the new court of appeal without further delay.

5. The Coalition Government Initiates Reform 1965

Within three weeks of coming to office, Mr McCaw, as Attorney-General, signed a minute for Cabinet proposing the 'constitution of a permanent appellate court'.[60]

57 *Stewart v The King* (1921) 29 CLR 234 at 240.

58 New South Wales Bar Association, Submission to Attorney-General Robert Downing, 30 May 1963.

59 Bryce Fraser, *Macquarie Encyclopaedia of Australian Events* (rev ed, 1997) at 76–77.

This minute was obviously drafted by departmental officials against the background of the somewhat languid exercise of the previous seven years that had petered out before coming to fruition. The new Attorney-General's minute stated:

> I am firmly of the view that provision should be made in this State for a statutory Appellate Court, a view dictated by the following considerations: –
>
> (a) Commonsense would seem to require that those members of the Bench most suited to the discharge of appellate duties should be entrusted with them, and if so qualified, should continuously discharge such duties;
>
> (b) The real purpose of an Appellate Court is only achieved by having a 'combined judicial operation';[61]
>
> (c) The fact that members of the Appellate Court are constant, tends to obviate different determinations of questions of principle and conflicting application of settled principles.[62]

Notwithstanding these considerations, Attorney-General McCaw favoured retaining a separate Court of Criminal Appeal 'at this juncture'. He called in aid the opinion of Chief Justice Herron that establishment of the new appellate court would 'in its initial stages … cause some internal difficulties'. He noted the reassurance of the Chief Justice that 'these were successfully negotiated in New Zealand where the reform now works well'.[63]

On 4 June 1965, Premier Askin wrote to the Attorney-General confirming that, at its meeting on the same day, the State Cabinet had approved the preparation of a Bill for the specified purpose.

No doubt anxious lest the same torpor should settle on the new government that had come to grip its predecessor, on 17 June 1965 Chief Justice Herron wrote to the new Attorney-General sharing with him his acute concern about the serious backlog of cases in the Supreme Court and the need for immediate relief. In the result, four senior counsel (Messrs Meares, Woodward, St John and Lee) were appointed Acting Judges during the Law Vacation to afford a temporary emergency respite for the immediate problem. Attorney-General McCaw was not one to let time pass on his appellate proposal.

On 7 September 1965 Mr McCaw wrote to Chief Justice Herron forwarding him a draft of the Bill to establish a Court of Appeal, indicating that it was the government's wish that the new court should be established 'as from the commencement of Lent Term in 1966'.[64] The dilatory approach of the past was over.

Recognising this, on 8 September 1965, the Chief Justice responded with some comments on the draft Bill. Again, these were designed to preserve the Chief Justice's prerogatives in respect of the assignment of judges within the Court of Appeal. He stated that '[a]ccording to the traditional practice and procedure of the

60 Minute from Attorney-General Kenneth McCaw to Cabinet, 30 May 1965.

61 A reference to the remark of Sir Raymond Evershed MR: see Evershed, above n22 at 389.

62 McCaw, above n60.

63 Ibid.

64 Letter from Attorney-General Kenneth McCaw to Chief Justice L J Herron, 7 September 1965.

Court' these were 'left to me as Chief Justice'. In the upshot, a formula was fixed as a compromise which has worked well under which, in practice, assignments are left to the President of the Court of Appeal but with proper involvement of the Chief Justice in the business of the court.[65] Chief Justice Herron did not entirely get his own way with Attorney-General McCaw.

It was at about this time that news of the contents of the draft Bill began to circulate amongst the judges of the Supreme Court of New South Wales. The result was anger and a flurry of correspondence which is recorded in the file.

One letter of 29 September 1965 to Chief Justice Herron, signed by Mr Justice Russell Brereton, contested the assignment of all of the traditional business of the Full Court to the proposed Court of Appeal. He supported instead a proposal, attributed to Mr Justice Sugerman, that only the appellate functions of the Full Court should be so transferred. This would leave other tasks — contempt proceedings, professional and sundry work — previously performed by the Full Court, to the non-appellate judges of the Supreme Court sitting in banc. Although Mr Justice Brereton was, like others, to be superseded, and was profoundly disappointed by the disturbance of his seniority and loss of participation in civil appeals, his letter suggests a realistic assessment on his part that, with Attorney-General McCaw and the new State government flush with enthusiasm, energy and governmental power, the most that could be hoped for was a compromise. This would secure some of the traditional work for the senior judges of the State about to be bypassed, of whom he appears to have suspected (correctly) he would be one.

On 7 October 1965 Mr Justice Sugerman, who was even more alarmed because of his higher rank (being the third judge in seniority after Chief Justice Herron and Mr Justice Clancy) wrote directly to Attorney-General McCaw. He protested that he had not been given a copy of the Bill affecting the 'constitution of the Supreme Court'. Incorrectly, he ventured to presume: 'Nor as far as I know have you sent a copy to the Chief Justice or any other judge of the Court'.

He went on:

> If I have been rightly informed, this Bill, if it became an Act, does not set up a new Court but within the Supreme Court itself provides that the Executive may change the seniority of the various judges from that on the faith of which they accept their appointments. I do hope that I have been misinformed about this matter because I find it hard to believe that the present Government would contemplate a change in the status of the present judges that was contrary to their desires and particularly that such a course would be undertaken without ascertaining their views or informing them beforehand.[66]

Mr Justice Sugerman informed the Attorney-General that he would find it 'very difficult … to accept, if it were made, the offer of any advancement in my seniority or by any conduct or action to encourage recognition in public places of the fact that I had been superseded by one who is now my junior'. Nevertheless, his letter to McCaw concluded: 'With kindest regards'.

65 *Supreme Court Act* 1970 (NSW) s 39(1).

66 Letter from Justice Bernard Sugerman to Attorney-General Kenneth McCaw, 7 October 1965.

Five days later, on 12 October 1965, Mr M H Byers QC, wrote to Attorney-General McCaw concerning the Bill, a copy of which the Bar Association clearly had.[67] This letter made a number of proposals designed to ensure that there was no doubt about the continuance of appeals from the proposed new court to the High Court and to the Privy Council. Specific reference was made, for example, to federal appellate jurisdiction and to the fact that the new *Matrimonial Causes Act* 1959 (Cth), in terms, afforded appellate jurisdiction to the 'Supreme Court of that State sitting as a Full Court'. The possible need for amendment of the federal Act to include the denigration of the new appellate court in New South Wales was drawn to notice.

Nevertheless, the letter from the Bar finished on a positive note, the Acting President of the Bar Association concluding: 'May I express my congratulations to you in relation to the proposed Bill'.[68]

There was no difficulty for the government in securing passage of the Bill through the Legislative Assembly of New South Wales. However, in 1965, the Askin government did not command a majority in the Legislative Council. Accordingly, a heavy responsibility passed to the leader of the government in the Legislative Council, the Hon A D Bridges MLC, when the Bill reached that chamber.[69] He was at pains to emphasise the long history of the new government's proposal:

> Both the present Chief Justice and his predecessor in office, the present Lieutenant Governor, Sir Kenneth Street have, over the years, urged that provision to be made for two appeal courts, sitting regularly, and that the organization of the court should be remodelled to provide for a special appellate, as distinct from court of first instance, jurisdiction.[70]

Mr Downing, now in Opposition, sought to attract some of the kudos for the new measure to himself and his party. In his contribution to the debate in the Council, he referred to the visit he had made with Chief Justice Herron to New Zealand and to the fact that the only criticism directed by New Zealand practitioners against the New Zealand Court of Appeal was 'the fact that it ha[d] been given jurisdiction in criminal appeals',[71] a facility which the government's proposal had excluded, just as Mr Downing's unimplemented proposal had done.

Nevertheless, Mr Downing was obviously concerned about the question of the 'rank and precedence of the judges of Appeal'. By implication, this might have been the matter that had held up the prosecution of the Bill for a Court of Appeal during the last two years of the Labor government. He suggested that the problem could be overcome by arrangements within the Supreme Court that obviated disturbance of the order of precedence of the judges of that court. However, this

67 Letter from Mr M H Byers QC to Attorney-General Kenneth McCaw, 12 October 1965.

68 Ibid.

69 New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965 (Arthur D Bridges) at 1341.

70 Id at 1342.

71 New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965 (Robert Downing) at 1346.

was unacceptable to Mr Bridges. He reminded Mr Downing that constitutional requirements of the federation argued against setting up a completely separate Court of Appeal for the State. This might endanger the availability of appeals to the High Court and the Privy Council. Moreover, if all that was done was shuffling of appointments within the Supreme Court, by designating some Supreme Court judges as appellate judges otherwise left in their current status, this would 'merely transfer responsibility from the Chief Justice to the executive government for the appointment of the judges to deal with appellate work'. Mr Bridges concluded:

> The Government sincerely regrets that the seniority of existing judges has come into the realm of controversy as a by-product of the Bill.… No one would wish to disturb the order of seniority of judges if some other useful and practical alternative were available. … [I]f the honourable gentleman insists on pressing the proposed amendment, the bill will become a dead letter, at least for the time being, and those bringing about that result must take full responsibility for their decision.[72]

Meantime, other judges of the Supreme Court of New South Wales were writing directly to the Attorney-General expressing their concern about the disturbance of their seniority and the supersession of judges. Mr Justice Jacobs on 12 October 1965 even wrote to the Premier stating:

> It is distressful for me to feel obliged to write to you on a subject of pending legislation but a matter of such constitutional importance is involved that I feel I am justified in so doing.[73]

By this stage, the draft Supreme Court and Circuit Courts (Amendment) Bill 1965 (NSW) had obviously reached all of the Supreme Court judges. All eyes fell on clause 2, which would introduce s 21C(6) into the principal Act to affect the seniority, rank and precedence of the judges of the Supreme Court.

Mr Justice Jacobs urged that any amendment should not affect the current judges of the Supreme Court but only those hereafter appointed. He said that:

> Whether or not in the future judicial promotion within the one court should be in the gift of the Executive is a matter of broad constitutional principle but is a principle of a kind that may properly be left to the Legislature.
>
> However, the proposed legislation affects not only constitutional principle in respect of future judges, but also would seem to affect the rights and privileges … of existing judges.[74]

He urged upon the Askin government the course that, he pointed out, had been adopted in Victoria when enacting a retiring age for Supreme Court judges for the first time, namely to take 'care to exempt from the operation of the legislation, judges already appointed'.[75]

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72 New South Wales, *Parliamentary Debates*, Legislative Council, 26 October 1965 (Arthur D Bridges) at 1382–1383.

73 Letter from the Hon K S Jacobs to Premier Robert Askin, 12 October 1965.

74 Ibid.

75 Letter from the Hon K S Jacobs to Premier Robert Askin, 13 October 1965.

In a separate letter of the following day to Attorney-General McCaw, Mr Justice Jacobs drew attention to the course that had been adopted in England when the Court of Appeal was first established in that country.[76] By that provision, the first appointed 'ex officio judges of the Court of Appeal … shall rank in the Supreme Court in the order of their present respective official precedence'. This envisaged appointment of the new Judges of Appeal; alteration of the appellate sitting arrangements; but retention, unaltered, of the formal personal seniority of already appointed judges whose work was altered but whose rank was not.

This letter obviously disturbed Premier Askin. On the day of its receipt he asked the Attorney-General to 'confer … on the points … raised' and to get in touch with him at his earliest convenience. Never one to waste time, Attorney-General McCaw responded to Mr Justice Jacobs on 22 October 1965 in unyielding terms:

> Whilst I fully appreciate your comments to the effect of the measure upon the seniority, rank and precedence of the judges, I am confronted with the position that there are but two alternatives to the proposal contained in the Bill.[77]

The Attorney-General explained that the first of these alternatives was to leave the Supreme Court unchanged and to create another different and separate court. However, were this to be done, the right of appeal to the High Court or the Privy Council would be imperilled by reason of the language of the federal Constitution ss 73 and 74. The second course would be effectively to leave the Full Court system as 'presently existing', but to limit appointment of appellate judges to those appointed by the executive in particular cases. This, the Minister declared, involved 'transferring from the Chief Justice to the executive the power to constitute a Full Court' and was constitutionally unacceptable.[78]

Apparently, Mr McCaw found the Jacobs proposal unacceptable. Certainly, it would have disadvantages. Effectively it would result in competing orders of precedence within the Supreme Court: one for *work* and the other for *status*. It would mean that the intended President of the new Court of Appeal might rank lower in precedence than many other judges of the Court of Appeal and also judges of the Supreme Court not appointed to the appellate court.

In the result, the Attorney-General pressed on with his measure in its original form. The judges of the Supreme Court did not stand still.

According to the Hon Rae Else-Mitchell, Mr Justice Hugh Maguire, the judge at the time ranked seventh in seniority amongst the puisne judges of the Supreme Court, under Chief Justice Herron, then took an initiative.[79] Maguire sat mainly in common law causes. But he was resourceful and experienced and he displayed a proper pride in the seniority that his years of service had earned on the Supreme Court bench. He had good reason to fear displacement by the new appellate judges. Effectively, he could see the writing on the wall. The occasional relief he had from

76 *Supreme Court of Judicature Act* 1873, 36 & 37 Vict, c 66, ss 10, 11.

77 Letter from Attorney-General Kenneth McCaw to the Hon K S Jacobs, 22 October 1965.

78 Ibid.

criminal, motor car and work accident trials, by assignment to the Full Court befitting his seniority, would become a thing of the past. He would suffer permanent confinement to trial work, only relieved by occasional invitations to participate in the Court of Criminal Appeal, whose work would now have to be shared with a greater number of judges.

As Else-Mitchell recounted it, together with a number of his colleagues who felt themselves in a like position, Mr Justice Maguire drafted a 'Memorial' for discussion by the judges of the Supreme Court at a general meeting. Much of the work that went into the preparation of the 'Memorial' was contributed by Justices Sugerman, McClemens and Brereton. A meeting of the judges to discuss the 'Memorial' was convened. The meeting took place and, according to Else-Mitchell, a great deal of acrimony was evident. Mr Justice Wallace (at this time 16th in the order of seniority out of 26 Supreme Court judges, after the Chief Justice) was already rumoured to be the Attorney-General's choice for President of the new court.[80] He added to these rumours by absenting himself from the judges' meeting. Other newly appointed judges, thought to be in favour of the proposal and likely to benefit from it, including Mr Justice Kenneth Asprey, attended the meeting but declined to sign the 'Memorial'. A number of the judges who did sign the 'Memorial' (including Justices Sugerman, Walsh and Jacobs) did so as a matter of principle. However, they later accepted appointment to the Court of Appeal, presumably on the basis that nothing they could say would change the legislation, once enacted by the State Parliament and after that they had let their views be known in advance on the matter of principle.

According to Else-Mitchell, the 'Memorial' was duly presented by the judges to the President of the Legislative Council of the Parliament of New South Wales, the chamber that had been the original legislature of the colony. The 'Memorial' was also provided to the Premier and the Attorney-General. However, the government had made its mind up. It was not now prepared to compromise. The 'Memorial' was not recorded, or referred to, in the record of Parliamentary Debates. A search amongst parliamentary papers of the time did not bear fruit.

For the reasons that Attorney-General McCaw repeatedly expressed to any who complained, the decision to create a Court of Appeal was a matter of high government policy. In the government's view, it could only be effected appropriately by giving superior rank to the new appellate judges. It was undesirable to do it in any other way as this could have unfortunate consequences,

79 Before his death in 2006, Else-Mitchell, a judge of the Supreme Court of New South Wales between 1958 and 1974, in conversations with and by letters to the author, recounted his version of his own supersession. He was one of the leading objectors to what occurred. Although reportedly 'difficult', he was generally regarded as very able and was sometimes spoken of for (and allegedly offered) appointment to the High Court. See Michael Kirby, 'Obituary: Hon Rae Else-Mitchell CMG' (2006) 80 *Australian Law Journal* 625; Gordon Samuels, 'Else-Mitchell's Contribution to the Law' (1989) 48 *Australian Journal of Public Administration* 223; Troy Simpson, 'Appointments That Might Have Been' in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 26.

80 See 'Obituary: Sir Gordon Wallace' (1988) 62 *Australian Law Journal* 186.

effectively preserving a Full Court and limiting the judges whom the Chief Justice could assign to it. Attorney-General McCaw appears to have experienced particular delight in correcting the judges, if they were suggesting the establishment of a separate Court of Appeal, for having failed to realise that doing so might present grave constitutional difficulties of the kind considered in *Stewart*.

When the Supreme Court and Circuit Courts (Amendment) Bill 1965 (NSW) passed both houses of the New South Wales Parliament, Attorney-General McCaw reported this fact on 27 October 1965 to Chief Justice Herron. The latter responded that he was 'glad to know that this valid [*scil* valuable] measure has now passed both Houses … and that it will soon become law'.

Back-pedalling somewhat from the enthusiasm of his earlier letters to the Minister, Chief Justice Herron, by now doubtless made fully aware of the strength of feeling amongst the judges of the Supreme Court, remarked:

> I thank you for your communications and offer my assistance, although I have adopted the view throughout that this Bill is a matter of policy of your government and that the appointment [of the new Judges of Appeal is likewise].[81]

Promptly, a minute paper was prepared for the Executive Council of New South Wales recommending to the Council that the Amending Act should commence on 1 January 1966. At a meeting held on 3 November 1965, there was much business before the Council. The commencement date for the new measure was approved. So was the appointment of Mr Justice Gordon Wallace as the first President of the new Court of Appeal, as and from its creation. Also appointed were six other Judges of Appeal. In order of precedence, they were Mr Justice Bernard Sugerman, Mr Justice Charles McLelland, Mr Justice Cyril Walsh (later a Justice of the High Court of Australia), Mr Justice Kenneth Jacobs (also later a Justice of the High Court), Mr Justice Kenneth Asprey and Mr Justice J D Holmes. The last-mentioned was at the time the President of the Bar Association of the State. He had stood aside from any dealings in the matter, leaving them to be handled by his deputy, Mr Byers. Holmes was appointed at once to the Supreme Court, and as a Judge of Appeal. Mr McCaw wrote immediately to inform Mr Byers, accepting at the same time the suggestion of the Bar that the Commonwealth be informed of the need to amend the federal *Matrimonial Causes Act*.

On 5 November 1965, the Sydney newspapers were full of reports of the establishment of the new Court of Appeal for the State.[82] The reports appeared under headings suggesting that the judges were being 'diverted for appeals' to secure 'reduction of delay' in securing a hearing which, Mr McCaw was quoted as promising, would fall from twelve months to 'three months'. One news item picked up the 'upset' to judicial precedence. It reproduced the following table:

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81 Letter from Chief Justice L J Herron to Attorney-General Kenneth McCaw, 28 October 1965.

82 'Seven Judges to be Diverted for Appeals' *Sydney Morning Herald* (5 November 1965) at 1. See also 'New Appeals Court Will Speed Law' *The Australian* (5 November 1965) at 4.

SEESAW	Before	After
Wallace	15	2
Sugerman	2	3
McLelland	3	4
Walsh	9	5
Jacobs	16	6
Asprey	21	7
Holmes	–	8

How the judges' positions of precedence were affected by yesterday's appointments.[83]

The newspaper report went on:

> It was taken for granted by his fellow-judges that Mr Justice Wallace would sit on the new Court, but not all of them expected — or wanted — him to be President …
>
> He is a long-standing friend of the Attorney-General, Ken McCaw. In 1955 he ran as a Liberal Party candidate for a seat in the Legislative Council.
>
> So did Ken Jacobs, QC who will now sit with him on the Court of Appeal. They were beaten by a fellow-barrister, Colin Begg, now Mr Justice Begg.

As if to soften the political blow, it was reported that Mr Justice Holmes 'was a protégé of the late Dr Evatt' and that his first wife was 'the daughter of the author-historian, Dr George Mackaness, who was a close friend of Dr Evatt'.

From such news items, building upon the gossip and rumours circulating within the legal profession at the time, the suggestion was planted that the new State government had conceived of the new Court of Appeal as a means of advancing those whom it believed might be more friendly to its policies. In the matter of judicial appointments, politicians are, of course, forever hopeful. However, when the full background is known and the contemporaneous documents are accessed, this was a case where the story of the creation of Australia's first permanent appellate court, under the High Court, takes on a different complexion.

In fact, the creation of the court was all but concluded under the previous Labor government but then somehow ran out of steam or political support. It was certainly consistent with the Askin government's broader emphasis on legal

83 'Verdict on the Judges', *Sydney Morning Herald* (5 November 1965) at 6 (Data Column). The same point is noted in 'New Appeals Court Will Speed Law' *The Australian* (5 November 1965) at 4.

reform. Most importantly, it could be accomplished, with legislation virtually ready, and without undue delay. The accomplishment could be presented as an attack on backlogs in the court whilst at the same time achieving the objectives of principle which Attorney-General McCaw had identified in his original minute on the subject within days of being appointed the first law officer of New South Wales.

Not long after the list of Judges of Appeal was approved by the State Executive Council, Mr Justice Moffitt, as from 10 February 1966, was appointed an Acting Judge of Appeal for six months. In 1972, Mr Justice Martin Hardie was appointed an Acting Judge of Appeal. The next full-time appointee to the Court of Appeal was Mr Justice Anthony Mason CBE, appointed to that office on 1 May 1969, having served to that time as Solicitor-General of the Commonwealth. He was to serve as a Judge of Appeal until 6 August 1972 when he was appointed to the High Court, later serving as Chief Justice of Australia for eight years from February 1987. Mr Justice Moffitt was appointed a permanent Judge of Appeal in January 1970 and elevated to the office of President in February 1974[84] when Mr Justice Jacobs took his seat on the High Court.[85]

6. Reflections on the Creation

In conversation with the author, Rae Else-Mitchell described the severance in relationships between the judges of the Supreme Court of New South Wales that followed the supersession that happened after the creation of the Court of Appeal on 1 January 1966. From that day amongst the Judges of Appeal, he said, he retained a close personal link only with Sugerman. The puisne judges of the Supreme Court who were bypassed in the appointments responded in different ways. According to Else-Mitchell, it caused deep resentment on the part of Macfarlan; it hastened Russell Brereton's death; and it ushered in a bitter and unhappy time in personal relations within the Supreme Court of New South Wales.

Unlike the course followed in other States and Territories when they established their own courts of appeal, in New South Wales the Court of Appeal did not displace the Court of Criminal Appeal, constituted from the judges of the Supreme Court. To this day, that court remains in existence. The senior serving judges of the Supreme Court continued to receive summonses to sit in criminal appeals. However, for some of them, their expertise and their interest lay in matters of civil law, particularly constitutional, public, and land and valuation law. There, the summonses to sit in the highest court of the State evaporated. On the contrary, the decisions of a judge such as Else-Mitchell were subject to appeal to the Court of Appeal and thus to review by judges whose appointments to the Supreme Court had happened after, even significantly after, his own.

84 For the obituary of the Hon A R Moffitt CMG OAM who died in 2007 see Michael Kirby, 'Obituary: Hon Athol Randolph Moffitt, CMG, OAM, QC' (2007) 81 *Australian Law Journal* 839.

85 Sir Kenneth Jacobs is the sole judicial survivor of this saga. He lives in London.

Else-Mitchell acknowledged that there was one partial precedent in New South Wales for the supersession effected by the establishment of the Court of Appeal. This had arisen on the appointment of Mr Justice David Roper to the Supreme Court of the State. Roper had initially been appointed to the Land and Valuation Court of New South Wales, a court with a status similar to that of the Supreme Court, but not part of it. Subsequently, legislation was enacted which, in effect, deemed Roper's earlier appointment to the Land and Valuation Court to have been an appointment to the Supreme Court. A possible difficulty arose because, in the interim, Mr Justice William Owen had been appointed to the Supreme Court. He too was later to be appointed a Justice of the High Court. However, Chief Justice Jordan made it clear that, even if by statute Roper was entitled to a higher precedence than Owen, so far as the Supreme Court was concerned, Owen's precedence would not be disturbed. Effectively, this was the Jacobs compromise; but it was much more difficult to implement in respect of a new court with seven specially designated members, including one newly appointed from the Bar (Holmes).

Else-Mitchell himself served in the Land and Valuation Court. He would have been privy to Roper's views, and he indicated that it was his belief that Roper disagreed with Chief Justice Jordan's ruling. However, Roper loyally accepted it. So it appeared in the list of the judges of the Supreme Court of New South Wales at the time of Else-Mitchell's own appointment to the Supreme Court. Else-Mitchell contrasted what he saw as the principled conduct of Jordan on that occasion, where there were arguably more substantial reasons for disturbing the order of precedence, with the course taken by Chief Justice Herron and later by Chief Justice John Kerr, following the creation of the new Court of Appeal for the State. On the other hand, those Chief Justices may possibly have felt that they were simply being obedient to the terms of a valid law of the State.

Although particular friendships were maintained, and newly appointed judges did not suffer the intense dislike of some of those who were the beneficiaries of the events of 1965-6, it really required the elapse of two decades before the wounds would be healed or the wounded would depart. In fact, only when the last of the superseded judges retired was this finally achieved. The barrister who had defeated Mr Gordon Wallace for election to the Legislative Council, later Mr Justice Colin Begg, did not retire from his office as a judge of the Supreme Court until 9 September 1984. The writer's appointment as President of the New South Wales Court of Appeal, in succession to Mr Justice Moffitt, took effect on 24 September 1984. The institutional memories remained. But for the most part, the wounds by then were not so personal or so raw.

Since 1984, the model of a permanent intermediate appellate court has continued to gather support in all jurisdictions of Australia.[86]

86 See Michael Kirby, 'Permanent Appellate Courts — The Debate Continues' (1988) 4 *Australian Bar Review* 51; (1988) 18 *Queensland Law Society Journal* 5.

In due course, the Court of Appeal of Queensland,[87] the Court of Appeal of Victoria[88] and the Court of Appeal of Western Australia[89] have been established. Doubtless in each case their creation produced some of the same appointment difficulties as arose in New South Wales. Yet, somehow, the worst of the personal animosity that occurred in that case seems to have been avoided. In 1979, in the Northern Territory of Australia, the *Supreme Court Act* 1979 (NT), which replaced the *Northern Territory Supreme Court Act* 1961 (Cth), provided in Part III for a 'Court of Appeal'. It was constituted to include judges who held, or have held, commissions on the Federal Court or Supreme Courts of the State. In 1983, the *Family Law Act* 1975 (Cth) was amended by the insertion of s 21A and the amendment of s 22 of that Act. By these provisions, an Appeal Division of the Family Court was created. Particular Family Court judges were assigned to that Division.[90]

So far, the Federal Court of Australia has resisted the establishment of a similar appellate division.[91] And as Sir Raymond Evershed recognised more than fifty years ago, the particular difficulty of creating a separate Court of Appeal, in jurisdictions with a small number of judges, remains an obstacle to establishing permanent intermediate courts in those places. Thus, no such court has been created in South Australia or Tasmania. However, a Court of Appeal has been established for the Australian Capital Territory.[92]

It cannot be gainsaid that the disturbance of established seniority, rank and precedence in a superior court is a serious and potentially destabilising step. Being accomplished by the executive government with the authority of Parliament, it is capable of being viewed as an interference in the independence of the judges involved, perhaps for naked political purposes.

The United Nations *Basic Principles on the Independence of the Judiciary*, in arts 5, 11 and 13, lay down limits on changes to judicial arrangements and on displacing the jurisdiction of established courts.[93] Likewise, the International Commission of Jurists' *Statement on the Judiciary and the Rule of Law* (1959), para 6, is relevant, as is the International Bar Association's *Minimum Standards of Judicial Independence* (1982), including art 20(a) which states:

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87 *Supreme Court of Queensland Act* 1991 (Qld).

88 *Constitution (Court of Appeal) Act* 1994 (Vic).

89 *Acts Amendment (Court of Appeal) Act* 2004 (WA).

90 *Family Law Amendment Act* 1983 (Cth).

91 See Michael Kirby, 'Hubris Contained: Why a Separate Australian Tax Court Should be Rejected' (2007) 42 *Taxation in Australia* 161.

92 See *Supreme Court Act* 1933 (ACT) Part 2A, inserted by *Supreme Court Amendment Act (No 2)* 2001 (ACT).

93 Art 5: 'Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.' Art 11: 'The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.' Art 13: 'Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.' See above n5.

> Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.

Article 20(b) of those minimum standards provides:

> In cases of legislation reorganising courts, judges serving in those courts shall not be affected, except for their transfer to another court of the same status.

Similar principles are reflected in the United Nations *Draft Principles on the Independence of the Judiciary* ('Siracusa Principles') (1981), art 9 ('Transfer').

The introduction of the changes could certainly have been achieved in New South Wales with greater sensitivity, more actual consultation and involvement of the affected judges of the State Supreme Court, and attempts, in other ways, to respect and protect the legitimate expectations of those judges whose seniority would be altered by the creation of the new permanent appellate court. It is noteworthy that, in the current moves to create the new Supreme Court of the United Kingdom, the legislation envisages that the serving Law Lords will move seamlessly into place as the first judges of the proposed new Supreme Court,[94] with the exception of the presiding Justice who will receive a separate commission.[95]

In Queensland, Victoria and Western Australia, when the new State Courts of Appeal were established, legislation contemplated the occasional appointment of superseded judges (and others) as Acting Judges of Appeal. In practice, many of the superseded judges were called upon in this way from time to time. In any case, the controversy that accompanied the creation of the Court of Appeal in New South Wales (and its institutional success) appears to have increased the determination of all the judges involved to avoid needless friction, to the full extent that this was possible.

The merit of returning to the original documents and chronicling the history of the proposal to create the permanent appellate court in New South Wales is that it helps to demonstrate that what was accomplished was done, overwhelmingly, for reasons of principle and not simply for political or present advantage or the appointment of judges thought to be congenial to the appointing government. Mr McCaw may have wished to have Mr Justice Gordon Wallace as his appointee to the presidency of the New South Wales court. But the documentation shows that the proposal to create that court had a much longer history. It originated in an idea planted in the minds of Australian lawmakers by models from overseas, especially England and New Zealand. It promised improvement in the quality and performance of appellate work. Ultimately, the innovation has been sustained by the results. The change has been imitated throughout Australia.

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94 *Constitutional Reform Act 2005* (UK) c 4, s 24.

95 It has been announced that Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, will become the first President of the new Supreme Court of the United Kingdom.

Whether some transitional arrangement could have been devised that would have respected the seniority, status, rank and precedence of the already appointed judges of the Supreme Court of New South Wales, without inviting other serious difficulties, is a matter for conjecture. On the whole, it seems unlikely that a new appellate court of the highest quality could have been created immediately without some supersession.

The disappointment for the individual judges affected was real and, in some cases, probably justified. As I have endeavoured to show, the issues raised were not solely narcissistic. They presented institutional questions that went beyond the disgruntlement of a few elderly judges. Theirs was certainly more than a storm in a teacup. However, in the end, the prediction of Chief Justice Herron proved accurate. The legal profession came to accept and welcome the change. The change in New South Wales came to be copied in other jurisdictions of Australia. The judges remained loyal to the judicial institution. A long planned institutional reform was accomplished. The efficiency and quality of appellate dispositions was generally improved. The general public, whilst noting the disturbance in judicial rank called to attention by the media, did not seem to appreciate what the fuss was about or to realise, as Mr Justice Jacobs said at the time, that an important constitutional principle was at stake amidst all of the individual judicial heart-burning.