Swearing in of his Honour Justice Stephen John Gageler AC

to the High Court of Australia

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The Honourable Stephen John Gageler AC (b. 1958) was sworn in as the 14th Chief Justice of the High Court of Australia on Monday 6 November 2023. Gageler practised at the NSW Bar from 1989 until 2008 and was a member of Eleven Wentworth Chambers from 1991. He took silk in 2000. He was Solicitor-General of Australia from 2008 until 2012, when he was appointed as a Justice of the High Court.

It was a warm morning in Canberra on 6 November 2023. An unusual number of dignitaries, even by the standards of the capital, made their way to Parkes Place. Few would have observed anything untoward in their approach. Certainly there was nothing to indicate a brewing constitutional crisis. Lake Burley Griffin was still. The atmosphere in the Parliamentary Triangle was as electric as it ever is during Budget Estimates. Despite the tranquillity, hardly anyone would have noticed the unusual silence of the National Carillon. And if there was any sign that something was amiss, it was that. The brutalist bell tower rising from the lake, although some 10 years older than Gar's Mahal, normally manifests a perfect sympathy with the larger concrete edifice on the far lake shore. But on this day, no fanfare was heard, nor even a solemn tolling, to mark Gageler's appointment. The National Capital Authority, pre-empting any appearance of a slight, explained the true reason on its website. The carillon, the Authority wrote, was 'undergoing instrumental improvements and repairs'; its 'internal instrumental components [were] being refreshed and upgraded'. No corresponding statement appeared on the High Court's website.

Ad hoc relaxation of relatively recent security measures saw many of the dignitaries admitted to the hallowed precincts of the court with their shoes on. Courtroom One gradually filled, and many guests had to be accommodated elsewhere (including Italy) to watch a livestream of the proceedings. Reflecting the universal acclaim with which Gageler's appointment was met, the Bar tables overflowed with counsel from across the nation. Western Australians argued with Tasmanians over the relative importance of the jarrah bench and the blackwood ceilings. Victorians and Queenslanders discussed AFL and rugby league before settling on the less controversial topic of human rights Acts. The South Australians squinted at Sir Samuel Griffith's portrait until he looked to their eyes like Sir Samuel Way. Members of the NSW Bar debated the proper application of the High Court's permissive robing protocol – '*may* wear what is customarily worn for a ceremonial sitting in the Supreme Court of the State' – in view of the demonstrably wigless leadership of Gageler's former pupil-master, Walker AO SC.

The genial chatter did not suggest any hint of awareness of the constitutional crisis simultaneously unfolding behind closed doors. A stand-off between the Executive and the High Court – just the first for the month, as things turned out – was delaying the commencement of proceedings. As recorded now only in the timestamp of 10.10am on the transcript, the Governor-General was late. As also recorded in the transcript, Gageler's commission was signed and sealed with the Great Seal of Australia on 22 August 2023. What the transcript does not record is whether the commission was also delivered on or about that date, or whether it was supposed to be conveyed from Yarralumla to Parkes Place on 6 November.

Donaghue KC, seen scribbling busily on his iPad Pro, was thought to be working out exactly what he was supposed to say the next day about the number of detained persons in the *NZYQ* cohort. In hindsight it seems more likely that he was urgently studying Gageler's advice of 26 August 2010 that, in 'extraordinary circumstances', the Governor-General 'may be impelled to assume the profound responsibility of considering the exercise of a function on the basis of [his] own deliberative judgment'.

With the Governor-General's whereabouts unknown, one can only imagine Gageler's rueful disposition in those long minutes. He would have learned from the ANU's Professor Leslie Zines all about James Madison's refusal to deliver William Marbury's commission. He would have become steeped in the detail of James Marshall's seminal constitutional law judgment on the matter when he completed postgraduate studies at Harvard, the second-best law school in the United States. He knows better than anyone how Australia's constitutional drafters improved upon the Article III precedent by adding s 75(v) to ensure that the High Court would not lack jurisdiction to compel the delivery of a commission to any Australian Marbury. He was the architect of many arguments that cemented the constitutional importance of s 75(v), including as Solicitor-General the successful argument in *Kirk v Industrial Court* (NSW), effectively extending the provision by implication to the states. He is the author of the leading contemporary authorities on the paragraph.

But Gageler surely cannot ever have imagined that he would be Australia's Marbury. Perhaps he took some comfort in one of Marbury's holdings, that delivery of a signed and sealed commission is but a formality and a compellable duty. Nonetheless, the prospect of being a plaintiff for mandamus in his own court likely troubled him. Not, we hasten to add, because he would doubt for a moment his colleagues' ability to decide correctly (provided they each thought about the question independently and then decided collectively). Not because of any feared impediment of the bias rule, which he would subordinate to a robust principle of necessity. Even the Barristers' Rules, precluding him from arguing his own or any case in the High or any court, would have caused him little pause; Gageler's observation of High Court advocacy over the preceding 11 years would have given him many thoughts, many thoughts indeed, about who to entrust with the brief. Perhaps the man who, as a mere amicus, invented Project Blue Sky and who fully articulated the law of materiality wondered momentarily if the Executive had too much latitude for error or whether he would be able to discharge the onus of proof. Weighing heaviest on Gageler's

mind, we expect, was the scarring realisation, borne of long experience at the Bar, particularly as Solicitor-General during the early French court, that canonical precedents like Marbury, 'commonly assumed' to be settled law, might yet yield to new dictates hitherto undiscerned in the terse language of s 61 of the *Constitution*.

At 10.10am, the hearing commenced. Although let us interpose here to say that, to those assembled, the delay seemed much longer. And we are not inclined to accept unquestioningly the veracity of the transcript on this point of no little importance. Take Gageler's first swearing-in on 9 October 2012, for example: the transcript of that proceeding no longer records the then Attorney-General's submission, literally true but substantively misleading, that Gageler had appeared as senior counsel in the High Court on 'over 30 occasions'. Nor does that transcript record Gageler's sotto voce aside, 'Do you mean this year?'

We digress. At not before 10.10am, the hearing commenced. To the relief of all present, Gageler announced that he had received his commission. Details of the Governor-General's lapse are not yet available, but Gageler had presciently construed the applicable statutes in the *Palace Papers Case* so that he will be able to find out what happened by request to the National Archives 30 years from now. Gageler will then be 95, and we look forward to his erudite article on the topic. He might consider co-authoring with Sir Anthony Mason, who has been Gageler's mentor since the *Tasmanian Dam Case*, when constitutional lawyers still debated the width of Commonwealth legislative powers, and who was present on the Bench on 6 November.

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Gageler once said of Sir Maurice Byers that he 'saw large issues largely'. One would say of Gageler that he 'sees systemic issues systemically'. The language of 'systems' is found recurrently throughout Gageler's writings. Perhaps more than most, Gageler sees room for judicial choice in the development of the law, but it is choice constrained by tradition and informed always by an understanding of the whole system affected by the choice to be made. Gageler is concerned for the system of law, not just the content of a rule or the outcome of a case. He has faith that robust answers to difficult problems can usually be developed by attaining a deep understanding of the system in question. This is why he was and is often seen, both as counsel and as a judge, with a collection of statutes, law reports and scholarly writings marshalled and arranged chronologically on his desk, systematically to be read in preparation for the case at hand.

Gageler has form when it comes to innovating institutions with a view to improving their systemic performance. As Solicitor-General he was known to say, with characteristic modesty, that the Commonwealth's High Court advocacy could more than adequately be sourced from the private Bar. The real significance of his statutory office, as Gageler saw it, was the provision of authoritative and binding advice across the Commonwealth. Gageler is the progenitor of Guidance Note 11, which centralises the Commonwealth's advice function and ensures that significant differences of view within the Commonwealth are resolved authoritatively. The internal conventions that have emerged from adherence to Guidance Note 11 should prevent agencies, perhaps blinkered by the encouragements of outsourced legal advisors, from taking immediately convenient positions that would undermine the Commonwealth's systemic long-term interests. In their logical if dramatic extension, the conventions should ensure in a constitutional crisis that a Prime Minister and a Governor-General act according to a shared understanding of what the law requires and permits.

Gageler foreshadowed in his remarks a continued focus on systemic issues. He explained the need for the judiciary to promote and project from within the essential qualities of competence, impartiality, and independence. He acknowledged the opportunities for collaboration between the Australian judiciary and the judiciaries of other countries. Fifteen years after *Farah Constructions v Say-Dee*, he articulated a vision of his ultimate appellate court, operating within a tradition depending less on legal theory than on accumulated experience, respecting and seeking to learn from the contemporary experience of the practical outworking of legal principle in Australia's lower courts. In a practical acknowledgement of the First Peoples of Australia, Gageler invited National Aboriginal and Torres Strait Islander Legal Services (NATSILS) to speak, and to speak first, at the swearing-in. This advanced the High Court's role in reflecting its history, projecting its institutional values, and maintaining public confidence in its constitutional function. As McAvoy SC, appearing for NATSILS, said, the High Court is a place for 'a fair hearing' giving 'hope for just outcomes' and will remain so under Gageler CJ. **BN**

The editors of *Bar News* asked us to record the occasion of the Chief Justice's appointment with remarks that were 'less biographical and more personal'. Institutional change is afoot in more than one place. Also, the biography was covered in the Summer 2012–2013 edition on page 78, and the only update to advise is that Gageler may be the first Chief Justice of the High Court with a black belt in taekwondo.

We have not dwelt on the constructional choices that the editors' instruction presented. We did not imagine for a moment that 'more personal' should mean 'ad hominem'. For such a universally liked and affable subject as ours, nothing could reasonably be said on that construction, so treating the words as 'insignificant, superfluous or void', must be rejected. 'More personal' perhaps means 'more human'. That might require departure from the traditional format of remarks, which Keane J once described as 'oddly dressed people say[ing] ridiculously kind things'. We are not too embarrassed to say that Gageler, like everyone, is not immune from the occasional lapse in judgement. He has, for example, been known to advise budding readers that there is significant learning to be acquired from listening to the one-sided and interminable war stories of participating in casual conversations with the very senior Bar. Yet his earnest, generous and normally sound advice to young lawyers is a fitting personal note on which to end. Gageler said at his swearing-in that 'no one is self-made'. He was speaking of himself, and so left unheralded his significant contribution, in a succession of roles, to the development of a rising generation of lawyers. His former students at the ANU, pupils and juniors at the Sydney Bar, counsel assisting, and a growing number of Associates are now to be found in chambers, law firms, community legal centres, universities and other enterprises across Australia and internationally.

To say that Gageler was destined to be the Chief Justice would be to downplay the hard work, over which he had complete control, and the political fortunes, over which he had no control, that led him to the office. But there has not been a better example of the system working exactly as it should.