LAWYERLY

Wrong side of the law: What raised judges' ire in 2023

Jan 17, 2024 Sam Matthews Melbourne

Judges were not afraid to vent their spleen in 2023, but lawyers were not the only object of judicial scorn last year, as judges waded into public discourse and sounded off over issues including complex legislation, media reports, famous social media commentators, and the involvement of government departments in legal proceedings.

Lawyers routinely cop a spray from the bench for poor conduct, and the past year was replete with examples of judges taking aim at practitioners for delays, poor pleadings, and for making large claims on the settlement pot in class actions.

But 2023 also saw some more unusual examples of judges airing their frustrations - with one South Australian judge taking aim at inflammatory comments about the court by the author of Harry Potter, while the Chief Justice of the NSW Supreme Court went on the record to correct an MP's statements about the court and the Federal Court took aim at "ill-informed" media coverage.

The Office of the Australian Information Commissioner and the ATO earned adverse comments from judges, and one judge even targeted a departing colleague, after being saddled with her stagnating case.

Correcting the record

On at least three occasions last year, judges took the unusual step of going on the record to correct public commentary about judges and the courts.

In June, Federal Court Chief Justice Debra Mortimer came out in defence of Justice Mordy Bromberg's appointment to the Australian Law Reform Commission, in a rare response to news reports, characterizing media coverage of the move as "ill-informed".

In her statement, Chief Justice Mortimer rejected suggestions of judicial impropriety made in some reports of the appointment, which referred to research by a conservative think tank on Justice Bromberg's decisions in favor of unions and portrayed him as a judicial activist whose rulings were commonly overturned on appeal.

"The court rejects out of hand any idea that Justice Bromberg has not at all times discharged his office in accordance with his judicial oath and likewise emphatically deprecates the insinuation to the contrary," she said.

"That his Honour has been reversed on appeal is something which happens to every trial judge in the course of their career. The suggestion that mere reversal signifies anything about the competence of the trial judge subject to the appeal, is as misconceived as it is unfair."

In November, the Chief Justice of South Australia responded to commentary on a new practice note relating to the use of preferred gender pronouns in the state's courts, after Harry Potter author JK Rowling took to Twitter to opine that "[a]sking a woman to refer to her male rapist or violent assaulter as 'she' in court is a form of state-sanctioned abuse".

Chief Justice Chris Kourakis corrected Rowling's "completely unfounded" fears, and said he would prefer that "social media commentators took the time to properly inform themselves before pressing the send button".

"Unfortunately, Ms Rowling has misunderstood the protocol," he said.

"It does no more than allow lawyers and others to inform the court of the correct pronunciation of their name and their preferred gender pronoun so that proceedings are conducted respectfully.

"However, the presiding judicial officer retains control over all forms of address used in court.

"For many decades, the courts of this state have taken every care to protect victims of crime and other vulnerable witnesses from the distress and trauma which might arise from their participation in a hearing.

"A victim of crime would never be asked to address an accused person in a way which caused the victim distress."

In yet another public statement from the courts, the NSW Supreme Court in December lashed out at comments made by the state industrial relations minister, who contrasted the court unfavourably with a proposed new court dedicated to workplace disputes.

The court spoke up after minister Sophie Cotsis said the Supreme Court was an impractical jurisdiction for claims by workers and unions, and described it as "legalistic, slow and costly".

"I have all due respect for the Supreme Court, but it is not a practical forum for dealing with industrial issues between workers and their employers," Cotsis told the Legislative Assembly on

November 23, as she promoted the state Labor government's Industrial Relations Amendment Bill, which would reestablish the former Industrial Court of NSW.

But the state's highest court said it was not accurate that generally speaking proceedings take years and require the briefing of senior barristers, saying the choice of which counsel were briefed was "a matter for the parties". It pointed to a handful of employment cases, most of which, it said "have not involved senior counsel at all".

The statement noted that many industrial matters were appeals or involved administrative law issues that "typically take less than a day to be argued and are dealt with in a matter of weeks or less".

"Many other industrial related matters have been dealt with by a judgment delivered on the same day of hearing or within a matter of days," it said, providing 12 examples.

As to the suggestion that Supreme Court judges "often do not have an industrial law background", the court pointed to three of the 52 judges on its bench with strong backgrounds in industrial relations, including Justice Michael Walton, who served as president and a judge of the former Industrial Court.

Judges take aim at OAIC, ATO

Government departments did not escape the court's wrath in 2023.

In April, Federal Court Justice Bernard Murphy expressed his reluctance to involve the Australian Taxation Office in distributing a settlement in the class action against two Westpac units, expressing his view that the department was not likely to reunite group members with their money efficiently.

Justice Murphy recounted his experience overseeing a similar superannuation class action against Colonial First State Investments, saying he was "horrified" when payments were being made to the ATO.

"I must say in [Coatman v Colonial First State Investments] when money was being handed over to the tax department…I was horrified," said Justice Murphy.

"My impression is they're useless…the idea the tax department might diligently try to reunite superannuants with money…was against my initial view."

The judge said he did not know whether the distribution scheme "was working or not" in Coatman, which involved the superannuation trustee making voluntary payments to the ATO from the settlement proceeds.

Several months later, while overseeing a class action over the Optus data breach, Federal Court Justice Jonathan Beach said he would order the Information Commissioner to appear in court to give "direct answers" and explain the "delay and uncertainty" surrounding a number of representative complaints before the OAIC, which he said were hampering the court proceedings.

Justice Beach decided to order the OAIC to court after counsel for Optus told him that the OAIC had declined to provide a copy of a representative complaint, despite her client's "extensive attempts" to obtain the documents in order to work out whether the teleco was facing duplicative proceedings.

The judge did not take kindly to a July letter from the OAIC to Optus, which he said "seems to be saying, 'we're going to take however long to do what we need to do bureaucratically under the Privacy Act, and the court proceeding is something we don't need to trouble ourselves about'."

Overseeing a similar class action against Medibank over its own data breach, which is also accompanied by parallel proceedings before the OAIC, Justice Beach railed against the "plague" of competing class actions.

At a case management hearing for the class actions, Justice Beach said in May he was taking a "robust" approach to the problem of duplicative class actions when he temporarily stayed Slater & Gordon's latecomer case until the court could determine which class action would go ahead, and directed Medibank to ask the privacy commissioner to drop the investigation of a third case.

"The court is vexed if not plagued by competing class actions…the court's processes over the last few years have attempted to deal with it, but perhaps the court has to take a more robust approach to these things, this may be the vehicle to do so," Justice Beach said.

The judge said Slater & Gordon would have to "justify to me why I should even allow [its] proceeding to go ahead". The firm later ceded the class action to Baker McKenzie.

The judge pushed Medibank to apply to the Commissioner to exercise her power to not continue with her investigation of the complaint, and to do so before it makes any stay applications in court.

"You could solve the problem by asking her to at least not proceed with the representative complaint," the judge said.

"Don't apply for a stay before me if you haven't even taken that step… you can take the self-help remedy of making your own application to her."

Judge takes 'unnecessary' swipe at departing colleague

In a rebuke in July, Federal Court Justice Ian Jackman did not hold back after being assigned the task of issuing a ruling in a three-year old case, overseen by a judge who had resigned before delivering judgment.

The evidence, he said, did not indicate any acceptable reason why Justice Kathleen Farrell could not have given judgment by the time her resignation took effect. It appeared the judge's problem was not an "inability" to discharge the judicial function but an "unwillingness", he said.

Justice Jackman was charged with issuing a dispositive decision in the case based on his reading of 20 affidavits, 10 volumes of documents and almost 600 pages of trial transcript. He did so in just three weeks.

"I have sought to prepare this judgment as expeditiously as possible, given the delays which the parties have patiently borne to date. It is a task which I have undertaken in the time available to me after dealing with what was already a full load of matters for hearing and judgment," he said.

"While Farrell J is not one to rush to judgment, the evidence does not indicate any acceptable reason why her Honour could not have given judgment by 1 August 2023, even if her Honour did not begin the task until 30 June, 2023."

He noted a reference in the transcript by Justice Farrell to a doctor's appointment on the morning of October 19, 2020, but said there was no indication the appointment had impeded the hearing of the trial later that day or on any subsequent day.

"The problem does not appear from the evidence to be one of inability, to which subs 10(2) [of the Federal Proceedings (Costs) Act] is directed, except perhaps in a euphemistic sense of 'inability'," Justice Jackman said.

"Rather, the problem seems to be one of unwillingness to discharge the judicial function of giving judgment in the proceedings."

The remarks, which were keenly picked up and covered by media, including Lawyerly, came as a surprise to Chief Justice Debra Mortimer, who sent around an email stressing the need for collegiality, according to a report in the AFR.

South Australia professor Dr Joe McIntyre told Lawyerly that Justice Jackman's comments were "juridically problematic tending towards inappropriate."

"Justice Jackman's comments are unnecessary," he said.

"They are contrary to principles of comity and collegiality.

"They appear to be an attempt at imposing an informal sanction upon Farrell J, in a misguided attempt to hold her to account. This is not the role of trial judge."

Outgoing judge slams complex Corporations Act; steep court fees

In November, an outgoing judge was the one airing his frustrations, slamming court fees "that no ordinary person can afford" and overly complex legislation, including the Corporations Act, which he called a "blight on our community."

In his farewell address, Federal Court Justice Steven Rares took the opportunity to share his "pipe dreams" for judicial reform, including more affordable fees to conduct litigation in the Federal Court.

"There cannot be one law for the rich and another for the poor," Justice Rares said.

The judge also denounced the "whittling away" of legal aid by all governments, saying it has caused an increase in the number of self-represented litigants who struggle to articulate their cases, and condemned legislative complexity, including in the areas of corporations, taxation, competition and consumer protection law.

The retiring judge specifically criticised the complexity of the Corporations Act, which numbers 4,500 pages, as being a "blight on our community".

"It seeks to cover everything that can happen with a corporation from the everyday to the unimaginable. It offers a smorgasbord of prescriptions that, like Swiss cheese, is full of holes," said Justice Rares.

"How can an ordinary shopkeeper, tradesperson or other small business person or, dare I say, a judge navigate and understand such a behemoth?"

Practitioners cop flak for delays, correspondence, pleadings, poor settlements

As always, many practitioners last year copped flak from judges for a laundry list of frustrating conduct - from delays to "informal and presumptuous correspondence" with the court; as well as "outrageous" claims on class action winnings and deficient pleadings.

Judge rejects 'outrageous' deductions from class action settlement

In May, Justice Rares approved a $5 million class action settlement against payment processor Tyro over a service outage but eviscerated the proposed funder payout and legal fees that would have comprised 60 per cent of the sum, calling the costs "outrageous".

Approving the headline sum, the judge refused to grant $1.875 million in legal costs, a $1.2 million payout for funder Court House Capital that also included $150,000 in after the event insurance costs and a class closure order that would have excluded approximately 12,500 group members from receiving a payout.

Justice Rares reserved special scorn for the large amount of legal costs, saying it was “really quite worrying” that class action law firm Bannister Law had charged $560,000, including $140,000 in disbursements for counsel fees, to prepare the statement of claim.

“I’m just really quite shocked by this…something here doesn’t look right,” the judge said.

“It may all be fine but there is $560,000 in lawyers’ costs incurred before the statement of claim is filed…I find that just bizarre.”

Justice Rares said the large amount of costs was not warranted as it was not a particularly complicated case and there were deficiencies in Bannister Law’s work, including not properly addressing Tyro’s defence and not providing evidence of the lead applicant’s losses.

“I just think this is outrageous…the work was not done and that was the problem,” Justice Rares said.

“This didn’t look like a very difficult case and certainly did not look like a case that had been prepared to within an inch of its life when it went to mediation.

“I am just not happy to throw those charges on people who lost real money.”

‘Informal and presumptuous’ correspondence rankles judge

In November, a judge took aim at the increasing informality of correspondence addressed to her chambers, taking a legal team to task for an 'informal and presumptuous' email.

The email, written by a law clerk, referred to an attachment of short minutes of order by which the parties had consented, directing the matter be relisted for hearing "in accordance with the orders" and signing off with "Kind regards” - content that did not please the Federal Circuit and Family Court Judge Sophie Given.

"There is arguably nothing so informal, or possibly arrogant, as to approach a court with orders which have been agreed amongst the parties and simply presume, or in the instant case direct, that they will be made (or to use the parlance of days’ past 'rubber-stamped'),” she said.

"The concluding use of 'Kind regards' or similar expressions, in correspondence with a court, is also not appropriate, and falls foul of the obligation to avoid informality."

Delay, delay, delay

Delays are bound to draw ire from the bench, with two judges grappling last year with cases first filed in mid-2019. In October, Justice Murphy fixed a class action against four AMP subsidiaries over alleged excessive superannuation fees for trial over the wealth manager’s protest - saying he’d

“had enough” of delays in the case, while Justice Melissa Perry said a suite of cases filed against P&O Cruises by holidaymakers who were seriously injured in a bus collision in Vanuatu in 2016 was “running extremely badly".

“I’m very, very concerned about that,” she said.

“So much delay, and so much miscommunication or lack of communication, especially from the clients to the lawyers - now that’s just not satisfactory.”

Justice Rares sounded off over delays in emphatic terms in April, as group members in a class action against the government over its total ban on live cattle exports to Indonesia continued to go unpaid almost three years after a ruling awarding $2.9 million to the lead applicant.

The judge slammed the parties for seeking to extend a timetable set down in February to resolve issues flowing from his 2020 finding that the ban was unlawful - saying the lawyers have “got to have a crunch point".

“This is a court case, not some sort of rolling entertainment section. Why do we keep coming back here, and nothing gets resolved," he said.

“If you keep thinking I am going to adjourn, and adjourn, and adjourn, and vacate and change orders because you keep negotiating, and after years we’ve not got to the point where we’ve worked out what we’re even arguing about - I’m sorry, but these things have to come to an end."

Months later, the judge told the applicants in the same case that they were in "cloud cuckoo land" in seeking to prove an extra 800,000 head of cattle would have been exported if not for the ban.

“I mean it’s just absolutely ridiculous,” he said.

Justice Rares said he was not disposed to order “an amazingly expensive and ridiculous exercise” to determine the maximum export numbers, unless the applicant could demonstrate a “substantive issue” with his methodology.

Judge displeased by use of ‘such as’ in pleadings

As always, pleadings also came under fire last year, with a judge rejecting an amended copyright case against US-based analytics company CoreLogic in June, expressing his displeasure at the use of imprecise phrases like "including" and "such as" in the revised pleading.

Federal Court Justice David Yates found building information provider BCI’s pleading was “generally deficient”, noting the use of expressions like "including", which he found “tend to promote imprecision, uncertainty and confusion”.

“Unfortunately, the draft statement of claim continues to deploy this device, including use of the expression 'such as'. These expressions should be removed,” the judge said.

“Alternatively, BCI must plead its allegations comprehensively, not simply by using exemplifications.”