# A Coram is not a Judge

It is a common belief among OPCA adherents that since case transcripts often have the name of the judge as "CORAM" it means that the person is not a true judge but someone without any authority or jurisdiction to decide the matter. *"The judges of the Supreme Court are only coram, not judges!"* is literally unintelligible and ridiculous.

One cannot BE a "coram", it is not a proper noun, as in the names of people, places, objects and events (eg. Sam, London, Adidas, Christmas) it is a VERB, an action/doing word (eg. ate, swim, bake and sing).

**Coram non judice**

This conclusion appears to have arisen solely from a misconception in the Latin legal term "***coram non judice****",* as the basic meaning of this phrase is "not before a judge". The misconception is that they overlook the fact that ***CORAM*** is only a portion of this phrase, as it is widely used in other similar legal terms, a pertinent example would be "***coram judice****",* which means "before a judge". There are also other phrases, such as *"coram paribus"* which means "before one's peers", *"coram populo"* which means "before the public", *"coram nobis"* which means "before us" and *"coram vobis"* which means "before you".

The main point one can take from all these terms, is that the basic meaning of CORAM on its own is "before" or "in the presence of". So when it is used in judgments and transcripts, as in "CORAM: O'BRIAN J." it means "before" or "in the presence of" Judge O'Brian.

In ***Keshari and Ludhani [2019] FamCAFC 79*** ground 5 contended:

> *"Coram merely means before or in the presence of another individual Coram non judice, is said of those acts of a court which has no jurisdiction, either over the person, the, cause, or the process. Such acts have no validity."*

The court responded:

> *"As to Ground 5, that is also incompetent, and frankly is a nonsense. The words "CORAM : O'BRIEN J" appearing on page 1 of the reasons for judgment merely signify that his Honour was the judge who heard and determined the application."*

In ***Jakaj v Kinnane [2020] ACTCA 19*** the applicant filed a Notice of Appeal seeking 23 "*coram judice* orders", including certain declarations, undertakings and orders to produce evidence, preliminary to an ongoing appeal. The submissions included the premise that the magistrates and judges were "*coram non judice*". to which the court responded:

> *"At a preliminary level, I make two comments. According to the Butterworth's Australian Legal Dictionary, 1997 edition, the Latin phrase "coram judice" means "before a judge"; unsurprisingly, "coram non judice" means "not before a judge". It is tolerably clear that in those orders where the applicant seeks a "coram judice order", he is seeking an order compelling the court or judicial officer to which the order is directed to produce evidence that they had jurisdiction to hear or otherwise deal with the charges against him."*

**A question of jurisdiction**

Of course, there are other reason which OPCA adherents raise as to why the judge has no jurisdiction to hear the case, two examples would be that the judge hasn't sworn the correct ***oath of office***, being an oath to the Queen, which has been raised in many cases, contending that due to the removal of references to the monarch in judicial oaths, and instead performing those oaths to the people of the particular State, the validity of the judge is in question, and another would be that the case must be ***heard by a jury***, and hence there is no jurisdiction to proceed without one. These premises are covered in the articles linked to in this paragraph, and many cases can be found on this website under the Tags ***The Removal of the Crown*** and ***Trial by Jury***. Both contentions have been consistently rejected.

Under the ***De facto Officers Doctrine***, the acts of a de facto public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office. It matters not that his appointment to the office was defective or has expired or in some cases even that he is a usurper. (See *G J Coles v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503* per McHugh JA (at 515) see also ***Nibbs v Devonport City Council [2015] TASSC 34***).

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A contention regarding trial by jury was raised in ***Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales [2008] NSWCA 292*** to which the court responded (at 51):

> "In coming to this conclusion the Full Bench distinguished the judgment in ***R v Perry (1990) 29 NSWLR 589*** upon which the applicant had relied. It did so on the basis that, in that case, an essential precondition under s 332(4) of the *Criminal Procedure Act* 1986 had not been met before a judge could validly hear a trial without a jury. That was not so in the present case. The Court concluded (at 24): *"It could not be, therefore, held, as was held in Perry, that the trial of the appellant was 'no trial at all', or that it was heard by a judge not authorised to do so, or that it was a proceeding coram non judice."*

And this raises the question, when is a proceeding actually without jurisdiction or "*coram non judice*"?

The question was explored in one of the main authorities on this subject, ***Parisienne Basket Shoes Proprietary Limited & Ors v Whyte (1938) HCA 7*** in which it was said (at 389):

> *"Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter is coram non judice. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable."*

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**There are several key points that can be gleamed from a study of the case law surrounding this subject.**

(1) A superior court has authority conclusively to determine the existence of its own jurisdiction.

(2) A judicial order of a superior court, even if made in excess of jurisdiction, is at most voidable and has effect unless and until it is set aside.

(3) There is a clear distinction between want of jurisdiction and the manner of the exercise of jurisdiction in the inferior courts. In the former case, the matter is *coram non judice* or "void". In the latter case, the judgment or order is merely "voidable", meaning it may only be set aside through the appeals process.

(4) In many circumstances, a decision made by a body which is "without jurisdiction" may be devoid of any legal consequence.

***Swansson v R [2007] NSWCCA 67; 69 NSWLR 406*** (from 88):

*"A superior court has authority conclusively to determine the existence of its own jurisdiction: **Parisienne Basket Shoes Proprietary Limited & Ors v Whyte (1938) 59 CLR 369**. Although not a superior court, but a court of record, the District Court has jurisdiction to determine its own jurisdiction **DPP (NSW) v PM (2006) 164 A Crim R 151, [2006] NSWCCA 297** (at 62).*

*The District Court has been provided by statute with jurisdiction to try the offences with which the appellants were charged. The proper exercise of that jurisdiction required that there be only one indictment. The failure to proceed on a single indictment leads to the consequence that this Court exercising its appellate jurisdiction must quash the conviction. However, by so doing this Court is not exercising a prerogative power and is not intervening because the District Court did not have jurisdiction to try the relevant offences. This Court determines an appeal from a conviction in which the essential question is whether the appellants were tried according to law.*

*In **Parisienne Basket Shoes** the High Court held that, although an information had been laid out of time, the proceedings could be heard and disposed of in the Magistrate's Court. The court rejected the submission that the Magistrate lacked jurisdiction. Dixon J said:*

> *"In courts possessing the power, by judicial writ, to restrain inferior tribunals from an excess of jurisdiction, there has ever been a tendency to draw within the scope of the remedy provided by the writ complaints that the inferior court has proceeded with some gross disregard of the forms of law or the principles of justice. But this tendency has been checked again and again, and the clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter is coram non judice . It is as if there were no judge and the proceedings are as nothing. They are void, not voidable (Cp **The Case of the Marshalsea (1612) 10 Co Rep 68 b**, at pp 76 a, 76 b; **77 ER 1027** at pp 1038-1041 )" (at 389).*

*The jurisdiction in the District Court to try the appellants for the relevant offences could only be exercised according to law if a single indictment was presented. Although the identified error occurred, with the consequence that the proceedings must be determined to be a nullity, the matter was not coram non judice.*

*Because, in many circumstances, a decision made by a body which is "without jurisdiction" may be devoid of any legal consequence, I was initially unsure as to whether the present matters could be resolved in this manner. However, the reasoning of the majority in Crane was authoritatively adopted by the High Court in* ***Russell v Bates (1927) 40 CLR 209*** *at 213, where in a joint judgment of Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ said:*

> *"We do not think it necessary to decide whether the Magistrate had, or had no jurisdiction to hear these cases together, for we are unable to agree with the conclusion that if there was no jurisdiction there was no adjudication from which an appeal lay to the Court of Quarter Sessions (at 213)."*

*Adopting the approach in Crane at 323, the joint judgment continued:*

> *"The Magistrate had jurisdiction over the charges laid against the respondents and, even if what took place was no trial at all or a mistrial, nevertheless, to adapt the words of Lord Sumner in Crane , the respondents were convicted and to all appearances convicted on the charges laid against them. … Those words, to use Lord Atkinson's language in Crane v Public Prosecutor 'cannot mean validly convicted, otherwise the statute would be futile and unworkable.' 'The very purpose' for which the appeal is given is 'to consider whether the convictions of persons who had, in fact, been convicted were valid or the contrary, and to deal with them accordingly'" (at 213-214).*

*It follows that the appellants in the present case have "in fact" been convicted and accordingly an appeal lies to this Court. That appeal cannot be confined to the ground which raises the problem of multiple indictments."*

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***Ho v Loneragan [2013] WASCA 20*** (from 23):

*"It is convenient to start with the second ground of appeal. The appellants' contention on the appeal to the District Court was that the judgment was void and of no effect because the magistrate had not set a time or place to pronounce it orally. It is implicit in the manner in which the primary judge dealt with the appeal that his Honour found that there was a valid, extant judgment.*

*On the appeal to this court, the appellants put the point a little differently, contending first, that the judgment was voidable and secondly, that it had been avoided by the appellants with the result that it had no effect. In our view, the first part of that proposition is correct, but the second is not. The failure to deliver the judgment in open court rendered the judgment liable to be set aside, but unless and until it is set aside the judgment has effect according to its terms. There has been no application by the appellants to set it aside.*

*The starting point is s 45(1) of the MCCP Act, which provides:*

> *All proceedings in the Court's civil jurisdiction are to be conducted in open court unless this Act, the rules of court or another written law provides otherwise.*

*'Proceedings' is not defined. It is clear, however, that giving judgment is part of judicial proceedings. As Griffith CJ said in **Melville v Phillips (1899) 9 QLJ 114**, 'pronouncing judgment upon a trial is a judicial proceeding – perhaps the most important part of the judicial proceeding' (116).*

*Section 45 of the MCCP Act reflects the long-standing position at common law that, apart from the exceptional case where the proper administration of justice requires otherwise, judicial proceedings must be conducted in open court. It is the ordinary rule of all courts that their proceedings shall be conducted 'publicly and in open view': **Scott v Scott [1913] AC 417**, 441, cited with approval in **Russell v Russell [1976] HCA 23**; (1976) 134 CLR 495, 520, 532; **Dickason v Dickason [1913] HCA 77**; (1913) 17 CLR 50, 51; **Hogan v Hinch [2011] HCA 4**; (2011) 243 CLR 506 [20]. In an oft-cited passage, Bayley J, speaking for the Court of Kings Bench in **Daubney v Cooper (1829) 10 B & C 237**; (1829) 109 ER 438, 440, described it as 'one of the essential qualities of a Court of Justice that its proceedings should be in public'. In **R v Denbigh Justices; Ex parte Williams [1974] QB 759**, 764, Lord Widgery said that it is an 'absolutely fundamental principle of the administration of justice.'*

*It follows from s 45 that unless permitted by the MCCP Act or some other written law, the magistrate was bound to deliver judgment in open court. There is nothing in the MCCP Act, the rules of the Magistrates Court or any other written law which empowered the Magistrates Court in this case to conduct the proceedings, including delivering judgment, other than in open court. (We note in passing that the requirement that proceedings be conducted in open court does not apply to a minor case (as defined in s 26): see s 29 of the MCCP Act; but this case was not a minor case.)*

*The respondent's submission that s 13, s 15 and s 16(t) of the MCCP Act permitted the course that was taken, cannot be accepted. Section 13 is a general provision which requires the Magistrates Court to ensure that cases are dealt with justly by ensuring, among other things, they are dealt with efficiently, economically and expeditiously. The requirements of efficiency, economy and expedition are not inconsistent with the need to conduct proceedings in open court, and the general requirement to ensure that cases are dealt with justly would ordinarily make it necessary that that be done. Section 15 allows the court in certain circumstances to make an order on its own initiative without hearing the parties. That clearly has no application to final orders made after the trial of an action. Section 16(t) enables the court to make any order for the purpose of complying with s 13. That also can have no application.*

*It was not, therefore, open to the magistrate to give judgment by posting the orders and her reasons to the parties. Her Honour was required to give judgment in open court. We should say that it was accepted by both parties that what was sent to them constituted a judgment of the court. While the requirement to conduct proceedings in open court is expressly provided for by s 45 of the MCCP Act, the legislature has not, however, prescribed the consequences of a failure to do so. It is to that question it is necessary then to turn.*

*It has long been held that a judicial order of a superior court, even if made in excess of jurisdiction, is at most voidable and has effect unless and until it is set aside: **Scott v Bennett (1871) LR 5 HL 234**, 245; **Revell v Blake (1873) LR 8 CP 533**, 544; **Cameron v Cole [1944] HCA 5**; (1944) 68 CLR 571, 590 – 591; 9 **Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11**; (2002) 209 CLR 597 [151].*

*The position in relation to inferior courts or tribunals, however, is different. In **Parisienne Basket Shoes Pty Ltd v Whyte [1938] HCA 7**; (1938) 59 CLR 369, Dixon J, referring to proceedings in a Court of Petty Sessions, emphasised:*

> *"The clear distinction [which] must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend to the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, certiorari, or appeal. But, if there be want of jurisdiction, then the matter is coram non judice. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable (389).*

*In **Attorney-General for New South Wales v Mayas Pty Ltd (1988) 14 NSWLR 342**, a question arose as to the effect of the contravention of an order of a magistrates court prohibiting the publication of anything identifying the alleged victim of a sexual assault. It was held that the court had no power to make such an order. McHugh JA (with whom Hope JA agreed) held that the order was of no effect and could not found a prosecution for contempt. He said:*

> *"If an inferior tribunal exercising judicial power has no authority to make an order of the kind in question, the failure to obey it cannot be a contempt. Such an order is a nullity. Any person may disregard it. Different considerations arise, however, if an order is of a kind within the tribunal's power but which was improperly made. In that class of case, the order is good until it is set aside by a superior tribunal. While it exists it must be obeyed (357D).*

*His Honour's statement was applied in **United Telecasters Sydney Ltd v Hardy (1991) 23 NSWLR 323**, 335C, in respect of an order of the District Court of New South Wales prohibiting the broadcasting of certain material in relation to a pending criminal trial, it being held that the District Court had no power to make an order of that sort and that the order was therefore a complete nullity, binding no-one. It was subsequently quoted with approval and applied by the High Court in **Pelechowski v Registrar, Court of Appeal (NSW) [1999] HCA 19**; (1999) 198 CLR 435 [27], [55] (Gaudron, Gummow and Callinan JJ).*

*While those cases concerned the effect of non-publication orders, the principle is applicable in the present case. In that connection, it is not in doubt that the Magistrates Court had power to make orders of the sort made and that the court's jurisdiction had properly been invoked. What occurred was an irregularity in the manner in which the orders were made; that is, in the exercise of the jurisdiction. The consequence is that the orders made by the magistrate are effective unless and until set aside.*

*That is consistent, too, with the decision of the Privy Council in **McPherson v McPherson [1936] AC 177**. That case concerned the effect at common law of a failure to conduct proceedings in open court. There a divorce action had been heard in the judges' law library in the court building. On the outer door of the law library was a brass plate on which was endorsed the word 'Private'. At the conclusion of the hearing, the judge made a decree nisi which was subsequently made absolute. The Privy Council found that by hearing the action in the library the court had unintentionally but effectively (and wrongly) excluded the public from the hearing. The appellant submitted that the effect of the irregularity was to render null and void the decrees nisi and absolute. That submission was rejected. Lord Blanesburgh, delivering the judgment of the Privy Council, observed that it was not a case where the decree nisi had been pronounced after a travesty of a judicial proceeding. His Lordship said:*

> *"Here their Lordships are dealing with a decree pronounced after a serious trial free from every other defect in procedure, and one entered and remaining on the court files as regular in every respect. To say that such a decree is void would seem to be out of the question. If the law were so to treat it, the remedy would be far worse than the disease it was designed to cure. To say that it is voidable states a result which, their Lordships think, entirely meets the case." (203 – 204).*

*The decision in **McPherson** has been applied in a case where the court was required, by a provision in similar terms to s 45 of the MCCP Act, to conduct proceedings in open court. In **Lednar v The Magistrates' Court [2000] VSC 549**, orders that each of the three applicants provide a DNA sample were obtained in the Magistrates Court without notice to the applicants and in chambers which were not open to the public. Section 125 of the Magistrates Court Act 1989 (Vic) was in all material respects in the same terms as s 45 of the MCCP Act. Gillard J found that while the Magistrates Court undoubtedly had power to make an order of the kind in question, the orders had been made in breach of the requirement in s 125 that all proceedings be conducted in open court. His Honour expressly applied the reasoning in **McPherson** to conclude that the orders were voidable, rather than void. Gillard J went on to find that each of the applicants was entitled to have the order against him quashed, even though two of the applicants had already provided samples. His Honour held that by doing so they had not lost their right to have the orders quashed as the court had power to order that the samples be delivered up to be destroyed.*

*A different approach appears to have been taken in the earlier case of **R v Casey; Ex parte Lodge (1887) 13 VLR 37**, where the Full Court of Victoria concluded that the failure in that case to give judgment in open court had the result that it was 'not a judgment at all' and everything done under it was void. However, the reasons are extremely brief and there is no explanation of the reasoning which led the court to that view.*

*In **Melville v Phillips**, the court described a judgment not given in open court as ultra vires, but said (at 116) that if it was accepted by the parties probably no objection could be taken to it afterwards.*

*It is also necessary to refer to two decisions at first instance which were touched upon in the course of argument on the appeal. In **Seapack Melbourne Pty Ltd v Clerk of Courts, Magistrates' Court, Yarram** (Unreported, VSC, 12 June 1990), the magistrate had delivered judgment by sending it to the clerk of courts who posted a copy to the parties and entered the judgment on the court register. Fullagar J held that as the delivery of judgment was otherwise than in open court it was ultra vires. His Honour referred in that context to, among other cases, **Melville v Phillips**. He ordered that the judgment be deleted from the register and that the magistrate deliver it in open court. We do not, however, understand his Honour to have concluded that the judgment was a nullity, as opposed to voidable.*

*On the other hand, in **Wandin Springs v Wagner [1991] 2 VR 496**, in similar circumstances McDonald J appears to have concluded that a judgment which the magistrate had sent to the parties by post was a nullity. Having described the posting of the judgment as ultra vires, his Honour went on to say that it 'constituted no determination of or judgment in the action' (499). He ordered that the judgment be removed from the register and, as the magistrate had since retired, that the action be reheard. There was, however, no reference by his Honour to **McPherson** or **Mayas**. In our respectful view, the finding that a judgment delivered otherwise than in open court has no effect is contrary to authority and we would not follow it. Similarly, to the extent Ex parte Lodge is authority for such a proposition we do not think it is correct and we would not follow it.*

*In our view, it could not have been intended that any failure to comply with s 45 of the MCCP Act has the effect that the proceedings are of no effect. As the Privy Council aptly put it in **McPherson**, if that were the case the remedy would be far worse than the disease. In the present case, the failure of the magistrate to give judgment in open court does not mean that the judgment has no effect. In our opinion, her Honour's judgment has effect unless and until it is set aside.*

*Whether it is still open to the appellants to seek to have it set aside was a matter of some tentative debate on the appeal. Counsel for the respondent contended that it was now too late for the appellants to do so. Counsel for the appellants contended it was still open. That, however, is not a matter for this court. It is a matter which can only fall for consideration upon a properly constituted application for such relief brought by the appellants in the appropriate forum. But until it is set aside the judgment has effect, as the primary judge implicitly found."*

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An early case regarding the validity of a proceeding was in ***R. v. Dargan and Wildred [1824] NSWSupC 27***, in which it was contended that the quorum of judges had not been complied with, and therefore the proceeding was *coram non judice*.

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There have been several cases in which matters were determined on appeal to be void for want of jurisdiction. A prime example would be ***Police v Ryan [2012] SASC 225*** (from 5):

*"The first ground of appeal is: The Court was not properly constituted under section 7A(2)(c) of the Magistrates Court Act 1991 (SA) to hear and determine the minor indictable offence alleged against the respondent. There is no dispute that the offence charged is a minor indictable offence. It follows that, in order for the Court to be properly constituted, then a magistrate is required to sit unless a magistrate is not available.*

*Section 7A of the Magistrates Court Act 1991 (SA) provides:*

> *7A – Constitution of Court*
> *(1) Subject to this section, the Court, when sitting to adjudicate on any matter, must be constituted of a Magistrate.*
> *(2) The Court may be constituted of a special justice –*
>
> - *(a) in its Petty Sessions Division; or*
> - *(b) to hear and determine uncontested applications of a class prescribed by the regulations; or*
> - *(c) in any other case – if there is no Magistrate available,*
>
> *but, when constituted of a special justice, the Court may not impose a sentence of imprisonment.*

*Counsel for the appellant submits that the Special Justice failed to consider and determine that a magistrate was not available. That being a prerequisite to a Special Justice having jurisdiction, the Court, as constituted, did not have jurisdiction to hear and determine the matter.*

*In **Pollard v Police [2010] SASC 23** Gray J considered the operation of s 7A. He said (at 59):*

> *"Whether or not a Magistrate is available to constitute a court is a precondition to a special justice sitting in a jurisdiction other than the Petty Sessions Division. The concept of there being no Magistrate "available" is a jurisdictional fact as the jurisdiction of a special justice relies on the satisfaction of this condition."*

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In ***Hannon v Norman [2006] VSC 228*** the appellant claimed his conviction for drink driving was *coram non judice* as he was convicted ex parte because he had failed to appear. His conviction was overturned, but because of a procedural and not a jurisdictional error, as the procedure in Schedule 2 of the *Magistrates' Court Act 1989* was not followed, and it was held that the oral evidence was deficient, and hence he was convicted on inadequate proof. The charges were dismissed.

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