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the Hon. J J Spigelman, AC, Chief Justice of NSW in 1999**

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Becket and Henry II: Select Ruminations

**ADDRESS BY THE HONOURABLE J J SPIGELMAN
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE ST THOMAS MORE SOCIETY
27 OCTOBER 1999**

The relationship between Henry II of England - warrior, Count, Duke and King - and Thomas Becket - clerk, Chancellor, Archbishop, martyr and saint - is a tale with heroic, indeed Homeric, qualities which has acquired the status of myth, a mother lode of parables for subsequent ages, each with their different pre-occupations. Century after century theologians, medievalists, constitutional lawyers, historians, poets and playwrights have returned to rework the original sources - which include no less than eight contemporary biographies and hundreds of letters.

Myth has bred myth: from the astounding fertility of Becket's shrine at Canterbury as a producer of miracles, to the apocryphal tale of Henry VIII disinterring Becket's remains and putting them on trial for treason, before spreading them to the winds and waters of reliquary oblivion. Even two years ago a new book appeared reinvestigating long lost legends as to the continued existence, somewhere in Canterbury Cathedral, of the bones of Thomas Becket.

For advocates of the English monarchy and effective centralised administration of justice, the stiff necked resistance of the Archbishop was treachery. For the religious, the same resistance represents the triumph of the spiritual over the temporal and martyrdom for the church. For the anxieties of a world after the pointless sacrifices of the Great War, T.S. Eliott found an ideal statement of the strength of spiritual belief in his play "*Murder in the Cathedral*" expressed in poetic form, save for the speeches of the assassins which are in prose. For Jean Anouilh, writing his play "*Becket*" in Nazi occupied France, there was the theme of resistance to foreign invasion based on the historically inaccurate description of Thomas, in a French biography, as a Saxon resisting the Norman King. In fact Becket was a Norman.

My own attraction to the close study of this period is based on a personal belief that if you try to read everything, you will learn nothing. Accordingly, it is preferable to organise ones ignorance by investigating a particular subject matter in depth. Like others who have returned to the sources of this Homeric struggle between Archbishop and King, I too have been attracted by the thought that in history one can learn lessons for our own time.

One returns to the first centuries of the second millennium of the Christian era, a millennium which commenced on the 1st January, 1001. Those who propose to celebrate the end of the century and millennium on the 31st December of this year are, of course, proclaiming the twentieth to be the first century that consisted of only ninety-nine years. At the time of the creation of the *anno domini* system, by the sixth century monk, Dionysius Exiguus - a rough translation of his name is "Dennis the Short" - the Arab mathematician who invented the zero had not been born, indeed would not be for several centuries. Accordingly 1 BC was immediately succeeded by 1AD and each century ended on the 31st December of the year ending with double zero.

So it was that when Australia became a federation on 1 January 1901 the slogan of the time was 'A New Nation for a New Century'. What has happened in this century is that people have got used to the odometer turning over in motor vehicles where one notices 999 becoming 1,000. We have come to attribute a new kind of populist significance to the double zero.

I expect that on 31 December 2000 there will be a more muted celebration of the true new millennium, by a significant number of religious fanatics and a few pedants like me.

In the first centuries of this second millennium, the basic fault line of political life in western Christendom was constituted by the conflicting institutional imperatives of the Church on the one hand and secular rulers on the other. This has some similarities to the fault line of politics over approximately the last two centuries, which has been the conflicting institutional imperatives of the centralised state on the one hand and private organisations of various kinds, particularly commercial corporations on the other. In both of these periods, the pursuit of institutional self-interest was a

mainspring of social action. Institutional loyalty was a primary social bond. It was so during medieval times and has become so again.

Institutions like individuals have a craving for self esteem. The personal imperative for prestige, recognition and freedom amongst individuals is reflected in institutional demands for autonomy. A preoccupation with institutional loyalties is present in all ages, but in some periods of history it proves to be more central to the issues of the time than in others. The salience of institutional loyalty is something which our own times share with the twelfth century.

Loyalty was the centrepiece of the medieval moral framework. Loyalty which overrides all standards of ethical conduct. Loyalty which drove four knights to murder an Archbishop in his cathedral. This was just the kind of behaviour that aristocrats demanded and admired - indeed still demand and admire - from their underlings. They call in honour. On the other hand there was a loyalty of similar force based on the power of ideas and faith. Specifically, in the context with which I am dealing, the sense of loyalty demanded by an organised Church and by the institutionalised component parts of that Church.

My approach to these issues is that of a secular historian. For those who regard this as inappropriate when dealing with the life of a martyr and Saint, I apologise in advance.. It is the only perspective which I am capable of bringing to the events.

Any student of medieval society knows the significance attached to the institutional independence of the corporate groups in which that society was divided. A keyword of the contemporary rhetoric was "libertas" identifying the special rights and privileges of particular institutions. In a sense the Church and the various manifestations of secular authority were each claiming autonomy on their own part. The claim of institutional autonomy by the monarchy and by the Church, is the central theme of the conflict between Becket and Henry.

Over a period of two decades in the middle of the twelfth century a civil war had convulsed England, primarily because of the refusal by a group of barons to accept a woman as monarch. Matilda the daughter of Henry I and grand-daughter of William the Conqueror - so referred to by English historians but still, universally, referred to by French historians with affection as 'William the Bastard' - had been deprived of her inheritance by the House of Blois, which put King Stephen on the throne. Matilda abdicated her claim in favour of her son, Henry, product of her union with Geoffrey, Count of Anjou. Count Geoffrey had ruthlessly subjugated Normandy, on behalf of his wife's claim to succeed her father.

After the death of his own son and heir, Stephen signed a formal treaty adopting Henry on terms that he would succeed as King of England on Stephen's death, which occurred within a year. This marked a most extraordinary transition for Henry. The 17 year old Henry became Duke of Normandy on his father's nomination in 1150, Count of Anjou on his father's death in 1151, Duke of Aquitaine in 1152, by marriage within two months of the day on which Eleanor of Aquitaine had, for failure to produce a male heir, been divorced by the King of France, and finally, King of England on Stephen's death in 1154: Henry was 21 years of age.

As part of the peace settlement between Stephen and Henry it had been agreed that all castles which had been erected since the death of Henry I should be destroyed. The reference to the state of affairs at the time of Henry I appears in the young Henry's actions for the first time. This was to be a central feature of his political rhetoric and programme for his reign. The basis of his legitimacy, and his political strength against the power which the usurper Stephen had obtained from incumbency, was Henry's assertion of a direct and immediate succession to Henry I. Throughout his reign he continued to assert that the period of usurpation did not create rights enforceable by the barons against him. Nor, though he did not yet articulate it, would he accept the substantial expansion of what the Church perceived to be the rights it had acquired during those years. His rhetoric of restoration was repeated in countless charters, writs and letters as a hallmark, almost, of political obsession.

In the case of the castles described as "adulterine", because they had not been legitimately licensed by Henry I, Henry was concerned with the practicalities of his future authority. Castles were the basic building blocks of secular authority. Such structures, of varying sophistication, enabled barons to assert independence from the King. A castle enable the castellan to control the surrounding countryside.

Henry's first task as King was to ensure the full implementation of the treaty by which the barons had

bound themselves to destroy or hand over castles. He did so much earlier than any of them could have expected. Even then, there would be 225 legitimate baronial castles against 49 of his own. A ratio of 5:1. Methodically, by continual expansion and improvement of Royal castles and by taking advantage of each domestic accident to remove or reduce the fortifications of the Barons, he and his sons were to reduce that ratio to about 2:1.

This perhaps more than anything else was the foundation of the expansion of Royal justice in England. It is in many ways the definitive measure of Henry's contribution to the development of the legal system. His first act as King was to identify precise time limits for the destruction of the remaining strongholds. He marched north to invest and attack castellans, some of whom had earlier been his allies. He obtained formal recognition that all fortifications were either his property or required his permission, in return for definite feudal services.

Henry II was a passionate man with boundless aggressive energy. He had one overriding passion and that was to control everything around him. His energy was single mindedly channelled into the exercise of power.

A King could do and say what he wanted, when he wanted. That was the ultimate freedom. He alone had it and he wanted everyone to know that he alone had it. Henry never tried to hide his incessant infidelities. He frequently abandoned both in public and private, any semblance of self-control, as his volatile temper flashed from an affable gentleness into an ungovernable blind rage terrifying all around him with blasphemous epithets. Whatever the context, whether trivial or profound, Henry wanted - needed - to be in complete control. This frequently led to carpet chewing rages of infantile self-indulgence.

As the generally admiring courtier Walter Map noted, when listing what he thought were Henry's few defects, Henry was "Impatient of repose, he did not scruple to disturb half of Christendom." As one hostile, but grudgingly admiring eye-witness, known to historians as Gerald of Wales, recalled:

"He allowed himself neither tranquillity nor repose. He was addicted to the chase beyond measure; at crack of dawn he was off on horseback, traversing waste lands, penetrating forests and climbing the mountain tops and so he passed restless days. At evening on his return home he was rarely seen to sit down either before or after supper. After such great wearisome exertions he would wear out the whole court by continually standing."

This stocky, barrel chested, bandy legged King continually paraded his considerable physical energy by making everyone keep up with his horsemanship and exploiting the etiquette which prevented anyone sitting unless he sat.

The social framework of the Middle Ages was constituted by a hierarchy of interconnected loyalties created by mutual oaths. Henry sought to create an identity between legitimate authority as stipulated in this framework and the realities of power exercised by physical coercion. Future historians would seek to portray his conduct as representing the interests of the people and of stable government. That was not his intention. He identified his person with the institution of the monarchy and the ultimate virtue was his own independence and authority. His autonomy was an end in itself, not some instrument for achieving the peace and welfare of others.

Henry II was one of the great legal innovators of all time. To understand how Henry's drive for power led to a transformation of the legal system, it is necessary to understand how medieval society was pervaded by a system of rules, not market exchanges. Indeed, its detailed regulation is replicated in the worst bureaucratic nightmares of our own century.

This was a rule bound society down to the very lowest level. In the manors which were the basic farming units, the manorial courts created rules of considerable detail: for example, specifying the size of the loaves of bread which working villeins would receive for lunch or of the sheaves of corn which they would receive at the end of a working day; the amount of the fee payable if a villein's daughter wanted to marry and of the fine if she were found to be unchaste; the right of a free meal for servants on the day of the lord's marriage; the gifts that had to be paid to the lord on stipulated religious feast days; the number of days a tenant was obliged to work on the lord's land; how many days he had to mow and carry hay; the area of land he had to plough, sow and harrow and whether or not he had to supply a plough and oxen; the precise amount of corn he must pay for the privilege of using the lord's monopoly over grinding and baking at his nominated mill and bakery; how many times he may have to move the sheep a year and how many days he must spend in washing and shearing sheep. One is

reminded of the detailed manuals specifying entitlements in the contemporary welfare state.

Henry's power and authority as Count, Duke and King - and the wealth which brought him military strength - depended on an intricate web of overlapping powers, rights, and privileges and prerogatives. In England, the basic theoretical assumption was that the King owned all the land. He in fact kept direct control of a considerable proportion of England particularly in the area known as "forests", in which a separate, almost totalitarian, legal regime was in force, protecting his extensive property interests in farms and herds of animals as a royal larder, as well as the favourite royal sport of hunting.

In addition to the services, and fees in lieu of services which the king was entitled to receive from his tenants in chief for the land he permitted them to occupy, the king had a range of rights which entitled him to the profits of land during vacancies - such as before the confirmation of a successor or during the wardship of a minor. This extended to the properties held by the senior ecclesiastics, including the Archbishop of Canterbury. This gave him, of course, a vested interest to delay as long as possible the appointment of any successor to an office particularly, as under the reform papacy, Archbishops and bishops unlike secular barons, were not themselves entitled to pay key money to hasten an appointment.

In addition the King had a right to consent to certain acts - for which a fee, generally called a "relief" could be charged. This included the confirmation of heirs to a deceased estate; the marriage of a widow or single heiress or of a ward. Furthermore there were the profits of justice - yes they were profits in those days - including fines, forfeiture of the estates of convicted criminals, fees of elastic size for providing a forum at all, and for "amercements" - i.e. payment for the King's mercy - perhaps for failing to perform some public duty like apprehending a criminal, at other times for a breach of a private duty, like taking a wife without permission but often, for merely displeasing the king. Every year a flow of payments were recorded in the Treasury for matters such as this: "for having the King's benevolence" or his "love" or his "peace" or his "favour" or that "the King's anger may be allayed" or "abate" or be "put aside". Henry's fits of temper were a major royal profit centre.

At every point in the feudal system, there was a detailed list of services and obligations - many of which were commuted for cash payments. These were not only at the level of the monarchy. They were reflected right down through the feudal hierarchy. A bewildering variety of services in addition to or in lieu of a stipulated annual rent were attached to particular grants of land or leases; to feed the animals near the King's hunting lodge at Woodstock; to keep a certain number of falcons during the mewing and moulting season and deliver them to the King when ready to fly; to provide the King with a meal of roast pork when he hunted in a nearby forest; to supply a new tablecloth worth three shillings at Michaelmas; to supply a pair of scissors at Christmas; to rear one puppy a year for the King; to carry the King's banner when he visited the area. Nothing was too detailed for specification. Upon the solemn royal crown wearing of Christmas day, Rolland, the tenant of Hemingstone in Suffolk, was required to attend at court and perform - as the rhythmical Latin of his formal deed of title recorded - "Unum saltum et siffletum et unum bumbulum" namely he was obliged to make 'a leap, a whistle and a fart'.

The complexity and detail of these arrangements - most of which have implications for the King's revenue - makes even the *Income Tax Assessment Act* look simple. To maximise the value of all of these various rights and prerogatives required an acute legal mind. This was Henry's greatest strength. As one of his contemporaries said, Henry was a "subtle deviser of legal processes". This is an under-statement. The writs that he issued are the foundations of a centralised system of royal justice of which we are the beneficiaries to this day.

In such a rule bound society Henry's preoccupation with legal detail was the essential foundation of his success. His acute sense of his own position transformed his sense of personal honour into an almost oriental concern with "face". Perhaps more appropriately - given the Norman heritage of Sicily and southern Italy - a mafia like preoccupation with "respect".

Henry was never more generous than when others gave him complete face or respect or honour in acknowledgment that he was not beholden to any other person. He reserved his greatest wrath for anyone who seemed to question his authority in any way. This was the case during the conflict with Becket.

Becket's advancement in the world came about under the personal patronage of Theobald, his predecessor as Archbishop of Canterbury. Theobald was born in the Norman town of Thiereville, where Thomas Becket's father was also born. Theobald had spent the entirety of his adult life in the

piety of the Abbey of Bec, four miles from Thiereville. That Abbey, deliberately located in difficult terrain in the Risle valley of Normandy, had attracted as its first prior one of the most cultivated ecclesiastical lawyers of the time, the Italian Lanfranc. The school he established at the Abbey rapidly acquired a reputation throughout Europe attracting patronage as well as numerous monks.

The Abbey prospered with its Norman sponsors. Lanfranc became Archbishop of Canterbury after 1066. The most powerful figure in England after William the Conqueror himself. The second Abbot of Bec, St Anselm, the dominant theologian of the age, indeed one of the greatest of all time, became Lanfranc's successor as Archbishop.

Becket joined the personal staff of Theobald as a strapping young man in his early twenties with some education and with experience - unusual for a cleric - in the world of commerce. His particular skills, and quite probably his attractiveness to Theobald, lay in his administrative and financial experience. Becket had been employed as a clerk by a London merchant who relished in the name, Osbert Huit-Deniers or "Eightpence", in what is recognisable as a rudimentary kind of bank.

Becket's background in practical affairs is referred to by all his biographers, but not even the most devoted of his biographers attempt to portray him as having an interest in matters of theology or any other form of intellectual activity. Plainly he was intelligent, quick witted and had an extraordinary memory, this is the unanimous opinion of his biographers. However, he was never interested in ideas.

His basic education was at Merton Priory, south of London near contemporary Wimbledon. This was followed by study in Paris at its nascent university and, later, Theobald sent him to the law school at Bologna. He was in Paris at the time of Abelard - an outstanding mind and an early example of the Parisian tendency to treat intellectuals as stars. He went to Bologna at the time of Gratian - one of the greatest legal scholars of all time. There is no record that Becket sought out either Abelard or Gratian or was interested in anything they had to offer. Becket's time in Paris, according to his biographers, was spent in boisterous undergraduate dissipation, including participation in the aristocratic blood sports of hawking and hunting.

Within the Archbishop's household, Becket attracted the particular patronage of Theobald's brother, Walter, probably because he worked directly with him in administering the Archbishop's estates. No biographer suggests that Becket made any contribution to the Archbishop's spiritual, educational or charitable functions.

Walter held the office of Archdeacon of Canterbury, the superintendent of the hierarchy of rural deans and parish clergy throughout the diocese. For purposes of administration, the archdeacon was the Archbishop's deputy and alter ego, administering the estates and collecting the fees. The archdeaconry, as a formal office, had its own synod and court for resolving disputes. There were rules of custom as to the proportion of synodal dues or chrisms fees or profits of the ordeal which an archdeacon could keep and the proportion he had to pass on to his bishop or archbishop. The income of the Archdeacon of Canterbury was estimated to be 100 pounds a year, which made him a very rich man indeed.

Becket's intelligence and organisational skills marked him for promotion. Theobald took him to witness the workings of the Church at its highest level at the Council of Rheims in 1148. This was an important experience which requires a separate paper. In 1151 Theobald entrusted to Becket the sensitive task of a mission to Rome to forestall the anticipatory coronation by Stephen of his son Eustace as King of England.

Notwithstanding what appears to be defects of his early education including imperfections in his Latin, unfamiliarity with the intellectual intricacies of theology and his need for catch-up schooling in law, Becket proved a skilled negotiator. His intelligence, wit, eloquence - notwithstanding an engaging slight stammer - personal vivacity and ingratiating manner is attested by all his contemporary biographers. His bearing - handsome, unusually tall, with even features and a slightly aquiline nose - combined with these personal characteristics to make him a pleasant companion, so desirable a quality in a diplomat or a courtier.

Eventually Becket was himself appointed Archdeacon of Canterbury. The position of archdeacon was no role for a sensitive theologian or of a monk preoccupied with salvation. Archdeacons were generally regarded as worldly and mercenary. Theologians of the era debated the ironic question "Is it possible for an Archdeacon to be saved?" One anxious cleric refused appointment as Archdeacon because he feared the temptation of accepting an office with a vested financial interest in the

multiplication of sin. Henry II would later voice the common opinion when he complained to Theobald that the archdeacons of England extorted more from the people than he himself could collect in taxes.

Later when an avaricious cleric used Becket as an example to justify taking money from sinners for the computation of penance, the exasperated Bishop declared, "Believe me, it was not that which made him a Saint!" It is no accident that his contemporary biographers do not dwell on Becket's role as archdeacon.

Combining administrative and judicial functions, the archdeacon represented the Bishop in numerous delegated functions: holding courts and synods, going on visitations, searching out married clergy, collecting fines, fees and tithes. Sometimes this was done like tax farming in the manner of the rural office of sheriff - namely paying a fixed annual amount to the bishop or archbishop and keeping anything that could be collected over and above that. Today, this old tradition of tax farming would be called "privatisation".

Theobald had formally consecrated Becket as a deacon prior to his appointment to the archdeaconry. He was then prohibited - as he had not been as a mere tonsured clerk - from pursuing activities inconsistent with that status, such as marrying or bearing arms. However he had still not heard a call for a vocation as a priest. That call, with its additional restraints, would not come until the time of his appointment as archbishop.

Becket was a practical man of the world with real knowledge of administrative requirements. Immediately upon the coronation of Henry II, Theobald urged the new king to appoint Becket as his Chancellor. That occurred. Becket did not however surrender the other appointments he held at Canterbury including the archdeaconry and a number of other specific appointments together with the profits they brought him.

There can be no doubt that Becket's appointment was in part due to the new king's need for the Church's goodwill, particularly that of Theobald, at a time when his authority in his new kingdom had yet to be established on a firm footing. He was about to launch his attack on the adulterine castles.

The appointment was a triumph.

A close personal bond was quickly created between Henry and his Chancellor. In his play, *Becket*, Jean Anouilh captured the easy, almost fraternal, amity between them, to which all the contemporary biographers testify, as follows:

"Becket: I received two forks ---

King: Forks? -

Becket: Yes it's a new instrument a devilish little thing to look at - and to use too. It's for roning meat and carrying it to your mouth. It saves you dirtying your fingers -

King: But then you dirty the fork? So are your fingers. I don't see the point.

Becket: It hasn't any practically speaking. But it's refined, it's subtle it very un-Norman.

King: You must order me a dozen! I want to see my great fat barons' faces at the first court banquet when I present them with that. We won't tell them what they are for. They won't make head nor tail of them! I bet they'll think they are a new kind of dagger."

Becket emerges as the King's closest confidante and friend at court, not merely an adviser but a daily companion. They shared a mutual passion for hunting and hawking. Henry was fluent in a number of languages including Latin and, even more unusually for an aristocrat of that time, was even known to read books. The King and his Chancellor even enjoyed what was then regarded as the somewhat raffish game of chess, when the moves of bishops, knights and castles had layers of meaning long since lost and in the words of a contemporary chronicler:

"Where front to front the mimic warriors close,
to check the progress of their mimic foes."

The relationship was not such as to prevent Henry, on numerous occasions making sure that everyone knew who was boss, including his closest associate Becket.

Later, after the breakdown of their relationship at the moment of a formal reconciliation, Henry's spontaneous outburst revealed his greatest hurt. According to the chroniclers he said: "Oh, if you would only do what I wish." It was almost a cry of pain.

As long as he was Chancellor, Becket did precisely what Henry wished. Becket understood from the closeness of their relationship and by witnessing a myriad of examples of Henry's preoccupation with his own authority, that it would be suicidal to challenge Henry in any way which questioned his ability to freely exercise his will or pursue his own interests as he saw them. When he did so as archbishop, he knew what to expect.

In the time available to me this evening, it is only possible to give one example. One of the first tasks Becket had to perform as Chancellor involved a conflict of interests between the King and the Church, including Archbishop Theobald. This concerned a jurisdictional conflict over Battle Abbey.

For his victory at the Battle of Hastings in 1066 and in penance for the slaughter, William the Conqueror established an abbey and ordered that the altar stone be laid at the very spot that Harold fell. Battle Abbey was a sacred site in both a secular and theological sense. It was the Norman cenotaph.

By reason of its unique status as a Royal chapel - like Westminster Abbey - it laid claim to unique privileges, particularly in the form of exemption from control of the local bishop, the Bishop of Chichester. Its claim was based on the circumstances of its creation. It asserted that William as its founder had expressly preserved its independence from episcopal control.

Whether or not a secular ruler could, even by means of a foundation grant for the creation of a religious institution, alter hierarchical relationships within the Church, engaged one of the most important political issues of the time. This is sometimes described as a conflict between Church and State: somewhat anachronistically because the word State does not accurately describe the network of interconnecting mutual rights and obligations upon which secular authority was based. Nevertheless the terminology is convenient.

The claim that such exemption could be given by a lay ruler was entirely inconsistent with the agenda of the reform papacy of the eleventh and twelfth centuries.

There were practical matters involved as well as the principle of autonomy. If the abbey were subject to supervision by the archbishop then it had to attend his court and synod, paying the synodal fees. It also had to provide hospitality to the archbishop and his entourage wherever he paid a visit.

In the context of the hiatus in secular authority during the reign of Stephen, Hilary, the Bishop of Chichester asserted his authority over Battle Abbey. He excommunicated the Abbot for failure to obey his orders.

The Abbot of that time was a Norman of impeccable heritage. Walter de Luci was the brother of Richard de Luci, a knight who had acquired significant estates in the service of Stephen. Under the truce between Stephen and Henry, Richard was the custodian of the key castles at Windsor and the Tower of London, to ensure the succession of Henry. At the time of the truce Archbishop Theobald, had to direct Hilary to lift the sentence of excommunication so that Walter, together with all the other Normans who owed an oath of fealty directly to the king for the lands which they held of the king, could renew their oaths in person before Henry and ensure the succession that had been agreed.

The detailed house history kept by the monks of the Abbey, known as the "Battle Chronicle", described Walter as "standing manfully firm to preserve unharmed the treasures of the Church, its lands, liberties and royal customs". Walter relied on a formal charter which purported to be issued by William, together with confirmatory charters in the names of his successors, William Rufus and Henry I. Notwithstanding the assertion of their veracity in the Battle Chronicle, it is quite likely that the charters were forgeries. They had first emerged at a conference in the Royal Chapel of the White Tower in London attended by King Stephen and a group of loyal Barons and ecclesiastics. No-one had apparently heard of them until then. Not even the Battle Chronicle suggests that they had. Their existence is probably inconsistent with the profession of obedience which Walter de Luci himself had made to the Bishop of Chichester upon his appointment to Battle Abbey.

These charters were probably concocted in an active copying centre at Westminster Abbey which,

having made its own matrices of the seals of Edward the Confessor and William I had provided a stream of writs and charters for abbeys at Coventry, Gloucester, Ramsay, Bury, St Peters of Ghent as well, of course, for itself.

Forgery was a well established tradition of the era. Monasteries were notorious throughout Europe for practising forgery when it suited them. No doubt it was believed that these documents merely provided documentation for an actual event which had, or should have, occurred but for some reason was negligently conveyed only in oral form or, even worse, had been left to implication.

When arranging a forgery to establish what was no doubt a genuinely held oral tradition of their exceptional status, the monks of Battle Abbey stood in a well established tradition. Their in-house history, the Battle Chronicle, proclaimed:

“Christ did not suffer His Church to be bereft of its ancient and just privileges, but at an appropriate time, by His watchfulness he renewed them stronger than ever before.”

To say the least this is an odd way to describe a jurisdictional conflict between a group of monks on the one hand and an archbishop and bishop on the other.

Shortly after the coronation of Henry II, Abbot Walter forwarded the charters to the new King and sought their confirmation by a fresh charter. Henry was not then in a position to act. His authority was not entirely secure after so many years of civil war. He was not prepared to offend the Church.

The Norman nobility undoubtedly supported the Abbey not least in the persona of Richard de Luci, Stephens former right hand man, appropriately called “The Loyal One”, whom Henry had just appointed co-justiciar of England, the Crown’s most senior administrative post. The critical task for Henry was to confirm his actual authority over the group of regional war lords who had consolidated contiguous areas of territory over which they ruled. The adulterine castles had yet to be suppressed.

The claims of the Bishop of Chichester were supported by the official hierarchy of the Church and, in particular, by Archbishop Theobald of Canterbury. The ideology of the reform papacy rejected such lay interference in the internal affairs of the Church. Furthermore, the Archbishop of Canterbury had a direct interest in ensuring the claims of his own Bishop, who reported to him. Finally, Theobald himself was engaged in a longstanding conflict of a similar character with the monks of St Augustine’s Abbey in Canterbury itself. When the issue of Battle Abbey arose, that conflict had not been resolved.

England was unusual in that some English cathedrals were manned by monks, clergy called “regular” because they lived by a “rule”. Christ Church in Canterbury, which was attached to the Cathedral made it one of those cathedrals. A longstanding conflict existed with the neighbouring monastery of St Augustine’s, located just outside the Canterbury city walls. It was of course St Augustine who, as a monk leading a band of monks, had executed the mission to convert the heathens of what became known as England.

The celebrity of St Augustine’s was based on its relics. St Augustine’s body, entombed within the Abbey, was, at that stage, of infinitely greater significance to pilgrims and others than anything which Christ Church or the Cathedral could offer.

Other Abbeys had local patron Saints, such as the Santo in Padua, St Zeno in Verona and St Appolinaire in Ravenna - this was St Appolinaire in Classe not St Appolinaire Nuova, the former being determined, in a bitter arbitration, by Pope Alexander III to be the true resting place of St Appolinarus. These abbeys were regarded as more sacred edifices than the cathedrals in their city, and many still are. St Augustine’s would remain such, until completely overshadowed by the shrine of St Thomas at Christ Church.

The early Archbishops of Canterbury, many of whom became saints, were buried in St Augustine’s rather than the Cathedral - until the ninth Archbishop, Cuthbert, having negotiated the secret permission of the Pope and the King of Kent, directed his remains to be interred in his own Cathedral and that his death be kept a secret until after his burial. Foiled by what they regarded as a conspiracy, on the death of the next Archbishop, the Abbot of St Augustines tried to storm the Cathedral at the head of an armed mob but was repulsed.

Throughout Europe there were abbeys which had acquired institutional freedom from the supervision of the Bishop, by asserting a direct, unintermediated subjection to the Pope himself. This was a

privilege which successive Popes were not reluctant to grant.

St Augustines sought to acquire such independence for itself. After all, its Abbot ranked second only to the Abbot of Monte Casino in the Benedictine order.

Theobald became involved in a long legal battle when he attempted to enforce the annual dues which, according to Canterbury tradition, were owing by the Abbey to the Archbishop.: two pounds ten shillings and seven pence in cash; two rams; 30 small loaves; two and four units of mead and one of beer. This aspect of the conflict was settled when the monks assigned substantial property to the Archbishop to remove this annual reminder of their bondage.

During Stephen's rule, various aspects of St Augustine,s had been conducted in defiance of Archbishop Theobald's instructions. He excommunicated the second and third ranking officers in the hierarchy, the prior Sylvester and the sacristan. Theobald won this case in Rome. Sylvester and the other defaulting officers had to publicly confess their sins and endure a period of humiliation and penance. However, when Sylvester became Abbot, he refused to swear, as all of his predecessors had done, "Canonical obedience in all things" to Theobald and his successors. It took Theobald six years and numerous appeals to the Pope, before he obtained an order that Sylvester make the traditional promise. This issue had not been resolved when the jurisdictional conflict over Battle Abbey erupted. Theobald shared the belief of the Bishop of Chichester of the importance of maintaining the hierarchy of the Church.

When Walter de Luci first raised the alleged charters with Henry II, Archbishop Theobald appealed to the King not to confirm the charters by reissuing them. He said, according to the Battle Chronicle:

"The King ought not to allow the Church of Canterbury, the mother of all England and the authority by which the King himself had been crowned and the church of Chichester, its suffragan, to be despoiled of liberties and privileges held from ancient times, merely for Battle, a church of no such authority or rank."

This was a direct challenge to the great significance the Norman nobility attached to the Abbey. There can be little doubt that Henry made it clear to the de Luci brothers that as soon as he felt able to stand up to the Church, the Abbey would have its charter.

Within days of the formal submission by the last recalcitrant northern baron on 7 July 1155, at a full assembly of Bishops and Barons at the site of the siege, Henry gave Walter de Luci his charter.

Henry of Chichester had not given up. He approached the Pope who summonsed Walter de Luci to come to the episcopal centre at Chichester to receive orders from the Pope himself. Walter replied with a series of qualifications unknown to the canon law:

"He would obey in all respects, saving the honour of the Lord Pope, his fealty and honour of his own Lord King, his own person and his order and saving the rights of his Church."

The phrase "saving his order" was a phrase which Becket would himself use to Henry and which would trigger the crisis between himself as Archbishop and the King. Walter de Luci's qualifications were particularly fulsome. They were those of a man who was confident of his supporters.

Henry decided to put an end to the dispute once and for all. He called a full council of archbishops, bishops, earls and barons for May 1157. A few days before the formal council was due to commence in Colchester Abbey, Henry summoned a group of Battle Abbey supporters to a secret preparatory meeting: the Abbot, his brother Richard de Luci, Becket and a few close confidants. At this meeting, Becket took the King through the various charters, including a new version of William's original charter which had just been "discovered". It bore the "signature" of the Bishop of Chichester of the day. At an earlier time Hilary had pointed out the absence of any such acknowledgment by any of his own predecessors in the copies of the charters shown to him. That problem had been overcome.

One of the issues to be discussed was the fact that upon his succession as Abbot, Walter de Luci had made a formal profession of obedience to the Bishop of Chichester. According to the Battle Chronicle, a biased but, as far as one can tell, not inaccurate source, Henry responded:

‘Profession is not against the privileges of Churches. For those who make profession do not promise anything beyond what they ought.’

A flexible doctrine indeed designed, as so many of Henry’s positions were designed, to maximise his own flexibility in all circumstances. He of course had to make such professions to the King of France as a Count and a Duke. During the course of this preliminary meeting, Richard de Luci forcefully put the Norman case:

“This Church should be elevated to the highest rank by you and by all us Normans. For there the most noble King William by God’s grace and with the aid of our kin, won that by which you hold the Crown of England at this very moment in hereditary right and by which we have all been enriched with great wealth. We therefore pray your clemency to protect this Church and its privileges and exemptions with the hand of your authority and to command that it, with all its possessions, be free.”

Henry made it quite clear that he had made up his mind to do just that.

When the formal trial convened at Colchester Abbey a few days later, Hilary and his key supporters, like Archbishop Theobald, were taken by surprise by the determination of the King.

Hilary chose to give the King a lecture on the ideology of the reform papacy. According to the Battle Chronicle, he said:

“Jesus Christ our Lord has established two abodes and two powers for the governments of this world: One is the spiritual the other the material. The spiritual is that to which our Lord Jesus Christ referred when He said to our first shepherd the Apostle Peter and through him, to all his disciples and successors, ‘You are Peter and upon this rock shall I build my Church’. As a result the Church of Rome, marked out by the apostolate of the Prince of the Apostles has achieved so great and so marvellous a pre-eminence world wide that no Bishop, no ecclesiastical person at all may be deposed from his ecclesiastical seat without its judgment and permission.”

Hilary invoked the doctrine by which each Bishop could trace his authority by a direct line of succession back to the sacred powers conferred by Christ on each of his twelve Apostles. This is the most successful direct lineage of institutional legitimacy that the world has ever known, with the possible exception of the Chinese imperial tradition.

Henry reacted with his usual undisciplined anger to the suggestion that his authority was in any way limited. In response to Hilary’s assertion that no ecclesiastical person may be deposed from his ecclesiastical seat, Henry said, “Very true a Bishop may not be deposed”. However, gesturing with his hands he added, “But see, with a good push he could be ejected”.

Ignoring what the Battle Chronicle describes as “universal laughter” Hilary pressed on:

“It is impossible for any layman, indeed even a King to give ecclesiastical privileges and exemptions to Churches and ecclesiastical authority shows that it is impossible for those arrogated to them by laymen to be valid except by the permission and confirmation of the Holy Father by the laws of Rome.”

Henry responded in fury:

“You are plotting to attack the royal prerogative given to me by god with your crafty arguments. I command that you undergo just legal judgment for presumptuous words against my crown and royal prerogative.”

Becket assumed something of the role of a counsel assisting the Court. He reminded Hilary of the

oath of fealty he had taken to the King and said, "You should therefore be prudent", by way of warning.

Then Walter de Luci played his trump card. He presented the new copy of William's charter which purported to be sealed by Hilary's predecessor as Bishop of Chichester. Hilary pointed out that he had never seen or even heard of the charter in the years of disputation.

Becket was called upon to reply to Hilary. He described Battle Abbey as "The King's own chapel" and proceeded on the assumption that the charters were genuine.

At this point a crucial moment in the trial occurred. As I have mentioned the Pope himself had issued a direction to the Abbot to present himself at Chichester and accept the authority of the Bishop. Appeals from any part of the English Church to the Pope, which occurred without the King's consent, were plainly regarded as a fundamental challenge to the monarch's authority. Indeed in the previous year in the context of the claim for exemption by St Augustines, Pope Adrian, the only English Pope, had accused Archbishop Theobald of conspiring with Henry to "bury appeals to Rome".

Becket directly challenged Hilary on this question of the appeal to Rome and the way in which the papal order had been implemented by officers of the Archbishop when they refused the request for a delay by the Abbot of Battle. Becket is recorded as saying:

"Your clerks kept demanding from him things that were against the royal prerogative. The Abbot prayed that they give him a delay so that he might go to our lord King and hear his advice and his wishes in the matter. They refused and he was unable to get his delay."

At this point, Henry, menacingly demanded to know whether Hilary had procured the papal letter. Perhaps realising the debate was over, Hilary denied it, on oath - to everyone's astonishment. Theobald, according to a malicious aside by the chronicler of Battle, crossed himself.

The king's determination was plain. Theobald made one last effort to obtain a face saving formula which acknowledged the independence of the Church. He asked the king:

"May Your Excellency command us to reconsider what should be done about this and settle it by the judicial method of Church custom."

Henry replied emphatically:

"No. I shall not command it to be settled that way by you. I shall put a proper finish to it in your company and having taken counsel about it."

After lengthy discussions, Hilary capitulated. He renounced his claim which meant there could be no appeal to Rome from this decision. Archbishop Theobald ratified the agreement both as archbishop and papal legate.

Henry made it quite clear that he was prepared to exercise his authority over the English Church and would not tolerate claims to independence based on the superior status of the papacy. He was determined to restrict the Pope's claim to exercise a legal jurisdiction within his kingdom.

The principles of the independence of the Church enshrined in the canon law were regarded by Henry as an affront to his own status. When, in the years to come, Becket sought to draw on those principles, he knew that this was not a matter on which Henry was likely to compromise.

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Access to Justice and Human Rights Treaties

KEYNOTE ADDRESS BY THE HONOURABLE J J SPIGELMAN CHIEF JUSTICE OF NEW SOUTH WALES
TO THE NATIONAL CONFERENCE OF
THE AUSTRALIAN PLAINTIFF LAWYERS ASSOCIATION
22 OCTOBER 1999

Access to Justice and Human Rights Treaties

Paget-Lewis, a school teacher at Ahmed Osman's school in England developed a sexual infatuation with his student. Over a period of months he subjected Ahmed and his family to a process of stalking and harassment all of which was reported to the police. When interviewed by the police, Paget-Lewis admitted that he was in danger of doing something criminally insane. To a school inspector, who reported the matter to police, he made clear threats to murder Ahmed's family. Police officers were instructed to arrest him, but nothing occurred for three months. On 7 March 1988 he followed the Osman family home where he shot and injured Ahmed Osman and killed his father.

Ahmed and his mother instituted proceedings for negligence against the police for failing to prevent the attempted murder of Ahmed and the murder of his father. The statement of claim was struck out. An appeal to the Court of Appeal was unsuccessful. The Court applied the House of Lords decision in the Yorkshire Ripper case, *Hill v Chief Constable of West Yorkshire Police*¹, in which the House of Lords had decided that, for public policy reasons, no action would lie against the police for negligence in the investigation and suppression of crime.

In *Osman*² the court rejected the submission that the House of Lords' decision in *Hill* was concerned with police policy decisions, which were immune, but did not extend to police operational decisions. A number of other arguments designed to distinguish *Hill* were rejected. There were important issues of public policy involved in this line of authority and the British courts had determined where that policy lay. As Lord Templeman said in *Hill*:

"... If this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties." ³ .

Ahmed Osman and his mother lodged an application with the European Commission of Human Rights asserting that English law, as revealed in this decision, was in breach of their rights under the European Convention on Human Rights. The case was referred by the Commission to the European Court of Human Rights. The Court unanimously upheld the claim under Article 6 of the Convention which, relevantly, provides:

"In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

Note the generality of the provision. Nothing is said about any particular civil obligation, let alone the law of private wrongs which encompass matters such as negligence in the common law system. The Article speaks only of what may be described as a right of access to justice.

The European Court of Justice analysed the English case law, specifically *Hill v Chief Constable of*

West Yorkshire. The case for the Applicants was that the dismissal by the Court of Appeal of their negligence action on the ground of public policy constituted a restriction of their right of access to a court. The European Court referred to the exclusionary rule laid down in the *Hill* case and concluded:

“... In the instant case the Court of Appeal proceeded on the basis that the rule provided a water-tight defence to the police and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime.

The Court would observe that the application of the rule in this manner without further inquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant’s right to have a determination on the merits of his or her claim against the police in deserving cases.

In its view, it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule.”⁴.

The Court outlined a list of factors including the significant degree of negligence involved and the nature of the harm sustained and concluded:

“For the court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police.”

And

“The court concludes that the application of the exclusionary rule in the instant case constituted a disproportionate restriction on the applicant’s right of access to a court. There has accordingly been a violation of Article 6(1) of the Convention.”⁵.

The result of these proceedings was that the Applicant’s had lost the chance of success in the proceedings. The Court would not speculate as to the outcome of the proceedings if the statement of claim had not been struck out. Nevertheless, the loss of the chance was valued in the amount of £10,000 together with £30,000 costs.

The decision in *Osman* has not passed without criticism. Lord Hoffman said:

“... this decision fills me with apprehension. Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. In so doing, it is challenging the autonomy of the Courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration.”⁶.

As his Lordship concluded:

“It is often said that the tendency of every court is to increase its jurisdiction and the Strasbourg Court is no exception.”⁷.

I have taken you to this case in order to indicate the way in which treaty obligations may impinge on a private action for damages. Human Rights treaties are not simply concerned with matters of public law and criminal law. Much of the discussion of human rights, whether in the context of international treaties or the in the context of a domestic Bill of Rights, focuses exclusively on public law and criminal law issues, to the virtual exclusion of consideration of civil actions.

Osman was a negligence case for damages. The action in the European Court, however, had to be directed to the United Kingdom as a Nation-State for its failure to ensure that the British legal system complied with the treaty obligation on access to justice. The United Kingdom paid compensation on a loss of chance basis for its failure to ensure that its law conformed with its international obligations. This private dimension of human rights treaties is the focus of my remarks today.

Article 6 of the European Convention has its equivalent in a Human Rights treaty to which Australia is a party. This is Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) which relevantly provides:

“1 All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

By Australia's accession to the First Optional Protocol of the ICCPR, Australian citizens are entitled to approach the United Nations Human Rights Committee in Geneva, for a decision as to the compatibility of Australian law with Australia's obligations as a State Party to the Covenant. Although this is not a formal judicial process, and results only in international embarrassment, it can be effective. The best known example is, of course, the case of *Toonen v Australia* decided by the Human Rights Committee on 4 April 1994 to the effect that the Tasmanian Criminal Code which criminalised male homosexual conduct violated the right of privacy guaranteed by Article 17 of the ICCPR. The publicity, generated in part by this decision, led to the Commonwealth overriding the offending State law and the *Human Rights (Sexual Conduct) Act* 1994, the efficacy of which was subsequently affirmed by the High Court.

The United Kingdom as part of its engagement with Europe had, in 1966, accepted the two optional clauses of the European Convention being the right of individual petition under Article 25 and the compulsory jurisdiction of the European Court under Article 46. The papers have recently been released under the 30 year rule. It is reasonably clear that no-one had any idea as to the scope of the jurisdiction which the European Court could assume⁸.

The exercise of rights to approach the European Court is both costly and lengthy. First, all domestic remedies have to be exhausted. Secondly, until recently, the application had to be made to the European Commission of Human Rights which would in turn refer the matters to the Court. In 1998, the procedures were streamlined so that the Commission no longer intervened and the judicial character of the system was strengthened by the creation of a single full time court.

More significantly, however, for purposes of Australian public debate is the decision by the British Parliament to incorporate the European Convention in its domestic law by the *Human Rights Act* 1998. This legislation is of fundamental significance for the practice of private law in the United Kingdom. It will radically change the process of reasoning in, and the results of, cases in English courts.

The significance of the *Human Rights Act* was manifest in its Parliamentary treatment. During the debate in the House of Lords, Lord Campbell of Alloway expressed his bewilderment with what he described as “these esoteric lectures in law”. He proclaimed that in his entire eighteen years in the Lords he had “never heard anything like this after dinner”⁹.

In his Keynote Address at the Annual Conference at the Bar on the ninth of this month, the Lord Chancellor Lord Irvine of Lairg addressed the implication of the *Human Rights Act* as follows:

“The lawyers role in every country goes to the heart of delivering justice. Like the independent judge, the independent lawyer is vital. Lawyers must use their skills fearlessly to express truth; to serve the legal needs of their clients; and to ensure that the court can see the case from their client's perspective. They must be independent of the State and committed to the highest ethical standards. I agree with Sir Sydney Kentridge that,

‘It is the independent bar inseparably from the independent bench which is

the protection of the citizen against the State.”

The Lord Chancellor went on to say:

“The role of lawyers will become even more marked on 2 October next year, with the implementation of the *Human Rights Act*. From the perspective of the bar, the incorporation of the European Convention on Human Rights into domestic law is perhaps the most significant element in the government’s programme of constitutional reform. It will give birth to a major new jurisprudence, born out of challenges brought by lawyers; and over time, a culture of respect for human rights will permeate the whole of our society.

The *Human Rights Act* 1998 offers a modern reconciliation of the tension between the democratic right of the majority to exercise political power, and the democratic need of individuals and minorities to have their human rights secured, whilst at the same time respecting parliamentary sovereignty.”

There are four features of the *Human Rights Act* which will impinge significantly on English case law and the utility of that case law for Australian purposes.

First, by s3 of the Act the courts are obliged to interpret both statutes and delegated legislation “so far as it is possible to do so ... in a way which is compatible with the Convention rights”. In determining a question which has arisen in relation to a Convention right, English courts must “take into account” judgments and decisions of the European Court of Human Rights.

The second feature of the Act is that it constitutes an innovative model for the incorporation of a Bill of Rights in domestic law. Different levels of entrenchment are possible. The highest is a Constitutional Bill of Rights, as in the United States. A level of entrenchment somewhat below that is the Canadian Charter of Rights and Freedoms, which permits the legislature to exempt a particular enactment from the Charter. The least entrenched is ordinary legislation capable of amendment by the Parliament without special requirements.

The British approach is in between. The *Human Rights Act* authorises a court, at the instance of a private litigant, to make a declaration of incompatibility between a Convention right and a statute. Where such a declaration of incompatibility has been made, a Minister of the Crown may take steps to make amendments to an act of Parliament, which the Minister “considers necessary to remove incompatibility”. Such orders require approval by resolution by each House of Parliament. It is by this means that the judicial acknowledgment of the Convention right is reconciled with the doctrine of parliamentary sovereignty. A declaration of incompatibility by the court will have an effect by way of embarrassment. However, the final determination as to whether or not a statute should no longer have effect is not a decision of a court, it is a decision of the Parliament.

Whether or not an individual litigant receives the benefit of a declaration of incompatibility will depend on the relevant Minister exercising his power to make a remedial order which has effect retrospectively. This has not been considered in the literature to which I have made reference, although some articles assume the litigant will receive no advantage. The power to amend legislation retrospectively, seems to me to create the possibility that the litigant may avoid the effect of the originally incompatible statute. A court which makes a declaration of incompatibility can stand the case over to await the outcome of the process of amendment, if any, before finally disposing of the case.

The third matter to which I wish to refer is s6 of the Act which states:

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”

Where a public authority is found to have breached this provision, a court is able to make such orders or grant such relief or remedies as it considers just and appropriate. This will extend to damages.

By force of s6, public bodies will be open to challenge, other than pursuant to an effective incompatible statute, for breaching such Convention rights as the right to personal liberty and security (Article 5); the right to a fair trial (Article 6); the right to respect for private and family life, home and

correspondence (Article 8); the right to freedom of expression and assembly (Articles 10 and 11); the right to peaceful enjoyment of property (Article 1 of the First Protocol); the right to education (Article 2 of the First Protocol); and the right to enjoy the Convention rights and freedoms without discrimination on the grounds of, inter alia, sex, race, religion, political or other opinion (Article 14).

The range of new causes of action against public bodies is, potentially, very wide.

Furthermore, "public authority" is defined to include "any person certain of whose functions are functions of a public nature". The public conduct of private organisations will be encompassed within s6 of the *Human Rights Act*. There is considerable English jurisprudence on the distinction between 'private' and 'public' in administrative law. In that context 'public' bodies have included the Law Society, the Bar Council, the Advertising Standards Authority, the Panel on Takeovers and Mergers, a product accreditation committee in the pharmaceutical industry, and a service provider regulatory committee of telecommunication companies. All of these have been found to be public for administrative law purposes and are likely to be held liable for acting in a manner incompatible with Convention rights.

The rights under the Convention that I have referred to will now likely impinge to a significant extent on what has hitherto been regarded as private arrangements. For all of these public authorities, including public authorities in the narrower more traditional sense, new flexible remedies are available. These are likely to sweep aside the remaining technical grounds for judicial review in administrative law. They will also impact on a wide range of activities not hitherto subject to such review.

The fourth matter to which I wish to refer is, prospectively, the most significant from the point of view of private rights of action. The legislature has not made clear the extent it intends the courts to change the law with respect to cases not involving a public authority, as broadly defined. If the legislation is brought into effect in its present terms, this will be one of the most significant early decisions the courts will make on the construction of the *Human Rights Act*.

The words "public authority" is specifically defined to include a "court or tribunal". Accordingly, a court is prohibited by s6 from 'acting in a way which is incompatible with a Convention right'. What does this mean?

It is one thing for a court to decide that an act alters the rights and obligations between a public body and an individual - referred to in the English literature as the "vertical effect" of the Act. However, what is it that the court is obliged to do to obey the statutory injunction imposed on *itself* as a "public authority" when deciding a case between two private litigants? This is referred to in the English literature as the "horizontal effect" of the Act.

There is now a considerable literature on the horizontal effect of the Act.¹⁰

An expansive view of the "horizontal effect" has been drawn from some general observations by the Lord Chancellor in the course of debate on the Bill about how the Convention will affect the courts development of the common law. Reference is also made to observations by the Home Secretary that the object was to give a remedy "at home" to someone who could get a remedy in Strasbourg.

The consensus view amongst human rights lawyers appears to be that the Act will have significant horizontal effects but will not go so far as to create new causes of action. It is by no means clear to me that these predictions are supportable. Numerous difficult decisions will have to be made by the courts.

Issues of access to justice, such as that considered in *Osman's* case, may now be determined as matters of domestic law enforceable in the civil courts of England.

In many ways the *Human Rights Act* is a logical development in view of the fact that citizens of the United Kingdom are entitled to seek redress in the European Court, against the nation, for the failure of statutes or the common law to protect their Convention rights. Whilst *Osman* involved a public authority, this would not always be the case.

The European Court has developed a jurisprudence which obliges State parties to change their law so as to be compatible to Convention rights. A good example of this is the case of *X and Y v The*

*Netherlands*¹¹.

. In that case the prosecutor decided not to proceed with a case against a person who sexually assaulted a mentally defective girl. The European Court held that the failure of the Netherlands Criminal Code to protect the victim was a violation of her right to privacy under Article 8. In its decision, the Court said:

“The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of individuals between themselves.”¹².

English lawyers are well aware of the dramatic impact this new approach will have on their common law inheritance. It is confidently expected that many areas of criminal justice will be radically transformed and certain other areas, such as family law, will also result in significant new litigation activity. Indeed, there are few areas of the law which will not be impacted upon in some way or another.

The construction of Article 6 as part of the domestic law of England will impinge on access to justice issues as they arise between litigants, as well as between litigant and a government agency. For example, one issue that will arise is whether or not the right to a hearing “within a reasonable time” is breached by the listing practices of the court and delays in a case being heard. At present, a litigant who was prepared to face the further delays of proceedings in the European Court, could be entitled to compensation from the United Kingdom. The *Human Rights Act* may create such a right of compensation as a matter of domestic law.

Similarly, issues will arise as to whether or not a denial of a right of access to legal assistance by reason of Legal Aid rules is in accordance with Convention rights; whether the rules of standing applicable in a particular area of the law are compatible with those rights; whether a statute of limitations is compatible; whether rules requiring leave for the admission of evidence are compatible; whether leave requirements for instituting proceedings are compatible; time limits imposed by court rules or directions may be subject to challenge; declarations that someone is a vexatious litigant may be challengeable; contractual agreements for compulsory arbitration may be subject to review in circumstances where they do not constitute a true exercise of free choice and where the procedures do not guarantee against abuse.

Access to Legal Aid and the burden of excessive legal costs may also give rise to issues of access to justice. Indeed, when the High Court established the principle in *Dietrich* that a stay of criminal proceedings could be ordered when an accused was unable to obtain legal representation, the Court drew on international treaties, including the European Convention and its jurisprudence.¹³.

There are numerous access to justice issues which, in England, may now be determined in accordance with these human rights obligations.¹⁴

These are technical points, but often with dramatic consequences.

Australian law is developing slowly in the same general direction as the *Human Rights Act* will now take English law.

Section 3 of the British Act which requires the court to construe legislation in a manner which is compatible with Convention rights - the New Zealand *Bill of Rights Act* 1990 contains a similar provision - may already be reflected in the Australian law of statutory interpretation. The English material asserts that the new section goes further than the common law, which is confined to construing an ambiguous provision on the basis that Parliament was presumed to intend to legislate in accordance with its international obligations.¹⁵

However, not without an element of irony, the word “ambiguity” is itself not without its own difficulties.

Generally “ambiguity” is understood in the sense that a word or phrase may have more than one meaning. However, the word “ambiguity” is also sometimes used in a more general sense: that it applies to any situation in which the intention of Parliament with respect to the scope of a particular statutory provision is, for whatever reason, doubtful. ¹⁶.

It is this broader approach to the concept of ambiguity which has found favour in Australia with respect to application of international human rights instruments. As three members of the High Court put it:

“We accept the proposition that the court should in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australian under an international treaty.” ¹⁷

However the word “ambiguity” in this context bears the broader meaning, namely it applies to any case of doubt as to the proper construction of a word or phrase. As Mason CJ and Deane J, with whom Gaudron J agreed on this subject, said in *Teoh*:

“In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations to which it imposes on Australia, then that construction should prevail. So expressed the principle is no more than a canon of construction and does not import the terms of the treaty or Convention into our municipal law as a source of individual rights or obligations.” ¹⁸

There is no reason why this principle of statutory construction would not now be reflected in Interpretation Acts, whether at Commonwealth or State level. In the light of the broader concept of “ambiguity” developed in Australia, it is likely that the jurisprudence in England and New Zealand, under their statutory provisions, will also guide the application of the common law of statutory interpretation in Australia.

The position with respect to the development of the common law will not, however, coincide. As Sir Gerard Brennan said in *Mabo (No 2)*:

“The opening up of international remedies to individuals pursuant to Australia’s accession to the [First] Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.” ¹⁹

The incorporation by the *Human Rights Act* 1998 of the European Convention into English law gives rise to a radically different approach to the influence of international human rights instruments on the development of the common law. It is in this respect, more than any other, that Australian common law and that of England will progressively diverge.

This will be seen in a substantial way in the new rights of action against public authorities, including private organisations exercising public functions. To the extent that the courts accept a “horizontal effect”, this will be even more dramatic.

Last year, in an address to a conference organised by the Human Rights and Equal Opportunity Commission, I stressed the significance for Australian lawyers of these developments in England. ²⁰

I noted that one of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now both Canada and England, and to a lesser extent New Zealand, will progressively be removed as sources of influence and inspiration.

This is a transition of great significance for Australian lawyers. At the present time, for the vast majority of us, American Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australian common law tradition is threatened with a

degree of intellectual isolation that many would find disturbing.

1. [1989] AC 53.
2. *Osman v Ferguson* [1993] 4 AllER 344; Tregiljas-Davey "Osman v Metropolitan Police Commissioner: The Cost of Police Protectionism" (1993) 56 *MLR* 732 at 733-734.
3. *Ibid* at 64-65
4. *Osman v The United Kingdom* European Court of Human Rights, 28 October 1998, pars 150-151.
5. *Ibid* pars 152 and 154
6. Lord Hoffman "Human Rights and the House of Lords" (1999) 62 *MLR* 159 at 164
- 7 *Ibid* p166
8. See Lord Lester "UK Acceptance of the Strasbourg Jurisdiction: What Really Went On in Whitehall in 1965" (1998) *Public Law* 237
9. House of Lords Deb vol 583 col 827-828 24 November 1997
10. See eg Sir William Wade "*Human Rights and the Judiciary*" Judicial Studies Board Annual Lecture pp4-6; Murray Hunt "The 'Horizontal Effect' of the Human Rights Act" (1998) *Public Law* 423; Feldman "Remedies for Violation of Conventions Rights, under the Human Rights Act" (1998) *EHRLR* 691 at 702-703; Sir Anthony Hooper, "The Impact of the Human Rights Act on Judicial Decision Making" (1998) *EHRLR* 676 at 684-685; Greer "A Guide to the Human Rights Act" (1998-99) 24 *EL Rev* 3 at 7-8; Klug "The Human Rights Act 1998" (1999) *Public Law* 246 at 257-259; Ewing "The Human Rights Act and Parliamentary Democracy" (1999) 62 *MLR* 79 at 89-90; Lord Lester and D Pannick (eds) *Human Rights Law and Practice* Butterworths, London (1999) at 31-33.
11. (1985) 8 *EHRR* 235
12. *Ibid* para 23.
13. *Dietrich v The Queen* (1992) 177 CLR 292 at 300, 306, 334 and 351.
14. See McBride "Access to Justice and Human Rights Treaties" (1998) 17 *CJQ* 235
15. *R v Home Secretary, Ex parte Brind* [1991] 1 AC 696 at 747-748; *Bringing Rights Home* Cmd 3782 (1997) par 2.7.
16. See *Cross on Statutory Interpretation* (3rd ed 1995) pp83-84; *Bowtell v Goldsborough Mort & Co Limited* (1996) 3 CLR 444 at 456-457; and my Sir Ninian Stephen Lecture "Statutory Interpretation: Identifying the Linguistic Register" to be published in the *Newcastle University Law Review*, accessible at www.lawlink.nsw.gov.au/sc.
17. *Chu Kheng Lim v The Minister for Immigration and Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38.
18. *Minister for Immigration & Ethnic Affairs v Teoh* (1994-95) 183 CLR 273 at 287-288.
19. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.
20. Spigelman "Rule of Law - Human Rights Protection" (1999) 18 *Aust Bar Rev* 29.

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Dedication of a Memorial to Israeli Athletes and Officials

DEDICATION OF A MEMORIAL FOR THE ISRAELI ATHLETES AND OFFICIALS WHO LOST THEIR LIVES AT THE 1972 MUNICH OLYMPIC GAMES

HOMEBUSH BAY, SYDNEY 15 OCTOBER 1999

BY THE HONOURABLE J. J. SPIGELMAN
CHIEF JUSTICE OF NEW SOUTH WALES

In the early hours of 5 September 1972, eight members of a Black September terrorist unit broke into the quarters of the Israeli team in the Olympic Village at Munich. Two Israelis were killed, nine others were taken hostage. The terrorists demanded the release of two hundred Arab prisoners held in Israeli, in exchange for their own safe passage out of Germany with the hostages who, they said, would later be freed.

It was well known then and now, that no Israeli Government would ever negotiate in such circumstances. To do so would be an open invitation for the repetition of such terrorist acts in the future.

It was the international significance of the Olympic Games and its universally acclaimed role as a manifestation of international inclusiveness and good will, that led these terrorists to believe that on this occasion the Israeli Government could be forced to change its usual practice. In the event, the hostages and the terrorists were killed during a failed attempt by the West German authorities to free the hostages. It is that tragedy which we commemorate today. It was of abiding significance for the Olympic movement that the German government decided to enforce the principle of not negotiating with terrorists. If the status of the Olympic Games had been acknowledged as justifying surrender to the terrorists' demands, then generations of terrorists over the period of almost three decades since Munich, may have exploited subsequent Olympics in the same way.

In a very real sense, the eleven Israelis who sacrificed their lives at Munich did so, not just for Israel, but for the integrity of future Olympic Games. We Australians, as custodians of the Olympic tradition next year, are beneficiaries of their sacrifice. It is fit and proper that we commemorate it.

The tragedy of Munich was a direct onslaught on the Olympic values of internationalism, inclusiveness and respect for diversity - as reflected in the Fundamental Principles which form a preamble to the Olympic Charter, specifically:

“(3) The goal of Olympism is to place everywhere sport at the service of the harmonious development of man with a view to encouraging the establishment of a peaceful society concerned with the preservation of human dignity. To this effect, the Olympic movement engages, alone or in co-operation with other organisations and within the limits of its means, in actions to promote peace.

(6) The goal of the Olympic movement is to contribute to building a peaceful and better world by educating youth through sport practised without discrimination of any kind and in the Olympic spirit which requires mutual understanding within the spirit of friendship, solidarity and fair play.”

Nothing could have been more inconsistent with these Principles than the terrible crimes committed in Munich in September 1972. The action of those terrorists was the antithesis of the Olympic spirit as identified by the founder and driving force of the Olympic movement, Pierre Coubertin, speaking in Athens in 1894 when he said:

“Every four years the restored Olympic Games must give the youth of the world the opportunity for a happy and fraternal reunion which little by little will dissipate this ignorance in which people live with respect to others, an ignorance which breeds hate, compounds misunderstandings and hastens events down the barbarous path towards merciless conflict.”

Such ignorance led down precisely such a path to the merciless events of Munich.

The spirit of competition amongst athletes and between nations reflected in the Olympic Games allows participants and their respective publics an opportunity to express a patriotism which is positive and not destructive of the patriotism of others. It was such patriotism which the Israeli athletes represented and which we can all respect. We do so in the expectation that our own patriotism will be respected.

The transformation by terrorism of an Olympic village into a theatre for violence was an affront to all participants in the Olympic movement. As the President of what was then West Germany, Gustav Heinemann, told the grieving crowd in the Munich Olympic Stadium on 6 September 1972:

“The Olympic idea is not refuted. In the name of the Federal Republic of Germany, I call on all nations in this world to help us conquer hatred! Help us prepare the way of reconciliation!”

The memorial we unveil today is a monument to such reconciliation and an answer to this call. There is, regrettably, no shortage of such tragedies to commemorate. However, some events which result in the senseless loss of life have a salience and significance greater than other such events. The loss of the lives we commemorate in this memorial is of this character. It was precisely because of the global significance of the Olympic games that these murders ignited the sympathy of people throughout the world.

In Munich in 1995, a monument to the Israeli athletes and officials was inaugurated by Walther Troeger, the President of the German National Committee who had been the Mayor of the Olympic village in Munich in 1972. He recalled the spirit of these dead athletes:

“Despite the understandable fear of the threat of death which faced them during their captivity they were obviously conscious of the duty which they had for their country and their people. I was the last to speak to them except for their torturers who then became their murders. I will never forget them or their bearing.”

The memorial which we unveil today is a testament to the human spirit displayed by those Israeli athletes and officials.

This memorial will stand as dedicated, not only to the lives of the individuals who died, but also to the values of universality, inclusiveness and mutual respect which the Olympic ideals embody. Palestinians will participate in the Sydney 2000 Olympics as they did, for the first time, in Atlanta. Their participation manifests the triumph of those Olympic values over the values of intolerance and violence manifested at Munich.

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Seen to be Done: The Principle of Open Justice

KEYNOTE ADDRESS TO THE 31ST AUSTRALIAN LEGAL CONVENTION CANBERRA 9 OCTOBER 1999

BY THE HONOURABLE J J SPIGELMAN
CHIEF JUSTICE OF NEW SOUTH WALES

All lawyers will recognise the oft cited aphorism of Lord Hewart from *Rex v Sussex Justices; Ex parte McCarthy*:

"... it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done." ¹

Lord Hewart was encapsulating a principle that had been long known and often expressed ². Another pithy articulation of part of the scope of the principle is that of Lord Bowen:

"... Judges, like Caesar's wife, should be above suspicion ...". ³

And Lord Atkin said:

"Justice is not a cloistered virtue." ⁴

The High Court has expressly applied Lord Hewart's aphorism a number of times, ⁵ as have other Australian courts. It appears in the Oxford Dictionary of Quotations.

Must we attribute the aphorism to Lord Hewart? If we do, the proposition that "justice must be seen to be done", could hardly have a less auspicious provenance.

Even the English Dictionary of National Biography, which usually confines its entries to the bland list of facts customarily found in a *Who's Who*, could not contain itself in the case of Lord Hewart. It described him as:

"Brilliant advocate; less successful as judge through tendency to forget he was no longer an advocate". ⁶

Can this be the author of the aphorism "justice must be seen to be done"?

Lord Hewart was the Solicitor General in Lloyd George's government and, when F. E. Smith became Lord Chancellor, was promoted to Attorney General. The British practice was that an Attorney General had a right to be appointed Lord Chief Justice of England, if the office fell vacant during his term of office. When that occurred in 1921, Lloyd George refused to dispense with Hewart's services, or at least refused to risk a by-election, but promised to appoint him as soon as he could. Accordingly, a High Court Judge aged 78 was appointed in his stead. The very next year that new Lord Chief Justice was astonished to read of his own resignation in *The Times*. Hewart was Lord Chief Justice from 1922 to 1940.

Professor R M Jackson in his book on *The Machinery of Justice in England*, referred to the system by which an Attorney General had a right of appointment as Lord Chief Justice in the following way:

"In 1922 this system landed the country with Lord Hewart as Lord Chief Justice, who proved to be a judge so biased and incompetent that he seems to have caused a reaction against it." ⁷

In the seventh edition of his book published in 1977, Professor Jackson had referred to Hewart as "the worst English judge in living memory". ⁸ This reference was deleted from the eighth edition of 1989. Perhaps in the intervening decade, other contenders had emerged for the title.

Lord Devlin, however, displayed no doubt when he wrote in 1985:

“Hewart ... has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever.”⁹

Again I ask, must we continue to attribute this important aphorism to such a judge?

Lord Hewart may very well have presided over the worst conducted defamation trial in legal history:¹⁰ one Hobbs suing the Nottingham Journal. Of the litany of misconduct found by the Court of Appeal to have been committed by Lord Hewart during the course of this trial, it is sufficient to note the following:

- Rulings were made against the Plaintiff without calling for submissions from Counsel for the Plaintiff.
- His Lordship accused the Plaintiff, in front of the jury, of fraudulently concealing documents and failed to withdraw the accusation when informed that the document had in fact been disclosed.
- He permitted two days of cross-examination on matters of bad reputation, including allegations of criminal conduct, of a character which had never been particularised.
- His Lordship received communications from the jury which were not disclosed to counsel.
- When the jury indicated a tentative view in favour of the Defendant, his Lordship orchestrated an early end to the trial.
- He failed to give the jury any summing up or any directions as to the limited use they could make of the cross-examination and he failed to leave issues to the jury.
- He refused to permit an adjournment of a second defamation trial against the same Defendant - suggesting the same jury should hear the second case immediately - and entered judgment for the Defendant in the absence of counsel for the Plaintiff.

The apparent author of the aphorism “justice must be seen to be done”, never indicated to the jury that they were entitled to ignore his Lordship’s numerous expressions of opinion on the facts or his adverse comments about the veracity of the Plaintiff, upon which the Court of Appeal found it unnecessary to rule, being content with the observation of Lord Justice Scrutton, in accordance with the demure standards of the time, that:

“I regret that, with much better grounds available, it was thought right to insist on them.”¹¹

Many would wish that appellate courts were still so reticent.

The last word from this case belongs to Lord Sankey. In his judgment, his Lordship said, with reference to the false accusation of non disclosure, that it was “unfortunate that the Lord Chief Justice did not appreciate” the correctness of certain submissions made to him and, Lord Sankey concluded:

“The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire - namely, that justice should not only be done, but should appear to have been done.”¹²

His Lordship cited no authority for this proposition. Perhaps he was indulging in a little whimsy. Alternatively, perhaps Lord Sankey, who six years earlier had merely concurred with Lord Hewart’s judgment in *Rex v Sussex Justices*, was giving us a hint as to the true origins of the aphorism. For myself, I am content for the future, to quote Lord Sankey.

The Principle of Open Justice

The principle that justice must be seen to be done - to which I will refer as the principle of open justice - is one of the most pervasive axioms of the administration of justice in our legal system. It informs and energises the most fundamental aspects of our procedure and is the origin, in whole or in part, of numerous substantive rules. It operates subject only to the overriding obligation of a court to deliver

justice according to law.

Australian public debate has a tendency to ignore such fundamental principles, in the same way as we fail to appreciate the skill embedded in the engineering infrastructure which ensures that if you flick a switch, the lights go on or, if you turn a tap, water pours out. No-one thinks about it. We take it for granted.

In this address I wish to emphasise the vital role that the principle of open justice plays in our institutional arrangements. I will then make some observations about how the principle should inform contemporary debate about judicial accountability.

I use the word "justice" to mean fair outcomes arrived at by fair procedures. To whom must justice, in this sense, appear to be done? The observer is not a party, not even the accused in a criminal trial.¹³ The relevant observer is always the "fair minded observer", acting "reasonably".¹⁴

Acceptance by such an observer, should also demand acceptance by a fair minded party.

The principle of open justice is reinforced by Australia's ratification of the *International Covenant on Civil and Political Rights* 1966 (ICCPR), Article 14 of which relevantly provides as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interests of private lives of parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
[Emphasis added]

Australia is a party to the Covenant. It is also scheduled and annexed to *the Human Rights and Equal Opportunity Commission Act* 1986 (Cth). As such, the Covenant is not made a part of Australian law. However, this method of 'quasi-incorporation' of international human rights instruments - with their national reporting requirements and forums, established for the discussion of those reports - renders the Covenant a powerful influence on courts in developing the common law.

As Sir Gerard Brennan said in *Mabo*:

"The opening up of international remedies to individuals pursuant to Australia's accession to the [First] Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."¹⁵

As a principle of customary international law, the right to a fair and public hearing, enshrined in Article 14 of the *ICCPR*, bears on the interpretation of statutory rights and obligations. Statutes will be interpreted and applied, if possible, in conformity with established rules of international law.¹⁶

We have not, however, incorporated this, or many other international human rights covenants, in our own law. I have on an earlier occasion referred to the long term significance of the *British Human Rights Act* of 1998 which incorporates the European Convention on Human Rights. The law of Britain will increasingly develop in the light of international jurisprudence on human rights. So will the law of Canada under the Canadian Charter of Rights and Freedoms and, to a lesser extent, the law of New

Zealand under the *Bill of Rights Act* of 1990.¹⁷

I repeat my comments of last year:

“We have ahead of us a transition of great significance for Australian lawyers. At the present time, for the vast majority of Australian lawyers, American Constitutional Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British cases will be equally incomprehensible to Australian lawyers. Indeed, it is already the case that the common law in England is developing, on a pre-emptive basis, in the shadow of the jurisprudence of the European Court to an extent that limits the use of British cases as precedents for the development of Australian common law.

This is an important turning point for Australian lawyers. One of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now, both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.”¹⁸

The English Courts will have frequent occasion to change their procedures and substantive rules to bring them into alignment with the requirement in Article 6 of the European Covenant that:

“... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The principle of open justice, should be understood as so fundamental an axiom of Australian law, as to be of constitutional significance. Indeed in the basic House of Lords decision on open courts, *Scott v Scott* decided in 1913, Lord Shaw described the principle as “a sound and very sacred part of the constitution of the country and the administration of justice”.¹⁹ His Lordship went on to say:

“To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.”²⁰

In 1913 a unanimous High Court followed the House of Lords and declared:

“... there is no inherent power in a Court of justice to exclude the public in as much as one of the normal attributes of a Court is publicity, that is the admission to the public to attend proceedings.”²¹

The subject of constitutional law should not be identified solely with exegesis of the terminology of the written document called “the Constitution”.²²

Our Constitution, like the British Constitution, includes a number of statutes which, theoretically, can be amended by Parliament. Similarly, it includes principles of the common law, which can also be amended by Parliament. Nevertheless, the fundamental nature of some of these laws and principles, and the improbability of modifying legislation, is such as to justify treating such laws as part of constitutional law.²³

The protection of the integrity of the judicial process for federal courts under Chapter III of the Constitution, which has a derivative application to State Courts,²⁴ does not, according to the recent decision in *Nicholas v The Queen*, prevent legislation which may have an adverse effect on the reputation of courts.²⁵

In *Nicholas*, by majority, the High Court refused to strike down a statute which modified the common law principle that a court could, in its discretion, exclude evidence of a crime in which police had participated.²⁶

In words reminiscent of the principles expressed by Lord Shaw in *Scott v Scott* with respect to the

alleged discretion to close a court, Sir Gerard Brennan said:

“To suggest that the statutory will of the Parliament ... is to be held invalid because its application would impair the integrity of the court’s processes or bring the administration of criminal justice into disrepute is, in my respectful opinion, to misconceive both the duty of a court and the factors which contribute to public confidence in the administration of criminal justice by the courts. It is for the Parliament to prescribe the law to be applied by a court and, if the law is otherwise valid, the court’s opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests. To hold that a court’s opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court’s opinion about its own repute to the level of a constitutional imperative. It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts’ repute as the administrator of criminal justice.”

27

As has frequently been asserted, public confidence in the courts is a critical aspect of the open justice principle. Some aspects of judicial procedure and practice which ensure open justice are likely to be held to be so essential an aspect of the character of a court, that any infringement will be struck down as invalid. The High Court has held that legislation may not permissibly:

“... extend to the making of a law which requires and authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial powers.”²⁸

The “appearance of impartiality” has been identified by Justice Gaudron as an essential characteristic.²⁹ The fundamental rule that judicial proceedings must be conducted in open court has often been referred to in such terms.³⁰

In *Russell v Russell*, the High Court, by majority, struck down a provision in the *Family Law Act 1975*, which required State Courts exercising that jurisdiction to sit in camera. It was found that this impinged on an essential characteristic of the Court and was, accordingly, beyond the power to invest State Courts with federal jurisdiction under s77(iii) of the Constitution. It may be difficult to resist the conclusion that a statute which required a federal court to sit in camera would infringe Chapter III.

Whilst it appears that some aspects of open justice will be found to be constitutionally protected, there is as yet no agreement on what they might be. One hopes that the occasion for doing so will not arise. However, no-one who has witnessed what a Schumpeterian would call the “gales of creative destruction” wreaked, over recent decades, on our universities, should have any confidence that the contemporary belief in the universal applicability of market solutions, will not pose fundamental challenges to our legal institutions.

Accordingly, it is timely to recognise the principle of open justice as one of the most fundamental rules of our legal system. It is reflected in a wide range of characteristics of the judicial process and in specific rules:

(i) The fundamental rule is that judicial proceedings must be conducted in an open court, to which the public and the press have access.³¹ The exceptions to this fundamental rule are few and are “strictly defined”.³²

As the Privy Council put it:

“Publicity is the authentic hallmark of judicial as distinct from administrative procedure.”³³

As Jeremy Bentham said:

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial.”³⁴

This rule requires that a court should do nothing to discourage the making of fair and accurate reports of what occurs in a courtroom.³⁵ This has important implications for the law of contempt. The courts are not as fearful of publicity as they once may have been. So in the case of pre-trial publicity, juries are trusted more often than previously to be true to their oath to determine the case on the basis of the evidence in the court and in accordance with the judge’s directions.³⁶

(ii) The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties.³⁷ This has its “foundation” as Justice McHugh said, in “the principle that justice must not only be done but it must be seen to be done”.³⁸

Judges can no longer rely on the advice which Lord Mansfield gave to a general who, as governor of an island in the West Indies, had also to sit as a judge:

“Lord Mansfield said to him, ‘Be of good cheer - take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently - then consider what you think justice requires, and decide accordingly. But never give your reasons; - for your judgment will probably be right, but your reasons will certainly be wrong.’”³⁹

(iii) The principle informs the determination of whether a function conferred on a judicial officer is incompatible with the office, under the separation of powers in the Constitution.⁴⁰

(iv) The guarantee of judicial impartiality by the disqualification for bias of a judicial officer, is determined by a test of what fair minded people - not just the parties, but the public - might reasonably apprehend or suspect.⁴¹ The High Court has expressly rejected the less strict “real likelihood of bias” test. It has also applied the reasonable apprehension test to the conduct of a juror.⁴²

(v) The rule of natural justice - the obligation to accord procedural fairness by way of a hearing - is in part based on the importance of appearances.⁴³

English juries would appear, however, to be made of stern stuff. The English Court of Appeal once held that a trial did not miscarry despite the fact that during the accused’s counsel’s address to the jury, the chairman of Quarter Sessions kept sighing and groaning and was heard to say “Oh God” a number of times.⁴⁴

On another occasion, the Court of Appeal rejected an allegation that a murder trial miscarried when the judge appeared to be asleep for 15 minutes. The Court was satisfied by a perusal of his summing up that he must have been awake and that the mere appearance of being asleep was not enough.

The Court referred to the principle that “justice must be seen to be done” as a “hallowed phrase” and described the appearance of the judge as inattentive or asleep as a “facile” application of the principle. Their Lordships concluded:

“It was not wholly without relevance that none of the experienced counsel present found it necessary to take steps to awaken the judge or to acquaint him with the fact that his appearance seemed to be less alert than it should have been.”⁴⁵

English counsel are made of the same stern stuff as English juries.

Perhaps this is an application of a principle of waiver, which the High Court has accepted to be applicable to the right to object on the grounds of bias.⁴⁶

(vi) The power of a court to prevent abuse of process is also based in part on the need to maintain public confidence in the administration of justice.⁴⁷

(vii) The operation of various principles designed to ensure the fairness of a trial is based on appearances: for example, the prohibition of undue interference by a judge and of improper conduct by a court officer; or the obligation of a judge when sitting without a jury to enunciate any warning that he or she would have to give to a jury.⁴⁸

(viii) Open justice also serves the important function that victims of crime, and the community generally, may understand the reasons for criminal sentences.⁴⁹ The significance of this function was well expressed by Warren Burger, the Chief Justice of the United States:

“Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in a corner [or] in any covert manner.” It is not enough to say that results alone will satiate the natural community desire for “satisfaction.” A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice.” *Offutt v United States*, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it.

.....
 People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.”⁵⁰

(ix) Open justice affects the weight to be given to the public interest in the determination of claims of privilege.⁵¹

(x) The public interest in the appearance of justice in part explains the reluctance to order a stay of criminal proceedings.⁵²

(xi) The role of legal practitioners as officers of the Court creates a public interest to restrain a legal practitioner from acting against a former client, which is also reflected in scepticism about the efficacy of ‘Chinese walls’.⁵³

As Justice Bryson put it, in a frequently cited case:

“Cautious conduct by the court is appropriate because the spectacle or the appearance that a lawyer can readily change sides is very subversive of the appearance that justice is being done. The appearance which matters is the appearance presented to a reasonable observer who knows and is prepared to understand the facts.”⁵⁴

Judicial Accountability

The central significance of public confidence in the administration of justice is mentioned in virtually every case which refers to the principle of open justice. Public confidence is primarily maintained by the practical operation on a daily basis of the principles of open justice. As Justice Gummow has said, the maintenance of public confidence in the administration of justice “in present times, is the meaning of the ancient phrase ‘the majesty of the law’.”⁵⁵

The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perceived bias and to ensure the fairness of a trial, is the way the judiciary is held accountable to the public.

The “public” which, in a democracy, the judiciary serves, must not be understood in any immediate

populist sense. The judiciary serves the “public” understood as a historical continuum: acknowledging debts to previous generations and obligations to future generations.

The relationship between the principle of open justice and judicial accountability has been emphasised by Chief Justice Gleeson, who said:

“The corollary of the obligation of judges to conduct their business in public, and to give reasons for their decisions, is that they are exposed and are regularly subjected, to public comment and criticism. The practical importance of this should not be underestimated, especially in an age when attitudes towards authority are no longer deferential, and are frequently the opposite. Being a judge is not a suitable occupation for the thin skinned.”⁵⁶

His Honour said with respect to the obligation to give reasons:

“This form of accountability is not to be taken lightly. The requirement of giving a fully reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from judges, how many other decision makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Most decisions, other than those made by judges, are made by people who may choose whether or not to give their reasons.”⁵⁷

The principle of open justice is an important aspect of the quality of judicial decision-making. The openness of the process and the necessity for reasons ensures that judicial conduct is subject to the spur of close scrutiny, particularly by the legal community, but also by the general community.

As Sir Harry Gibbs put it:

“It is the ordinary rule of the Supreme Court ... that their proceedings shall be conducted ‘publicly and in full view’ (*Scott v Scott* at 200). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected.”⁵⁸

Lord Diplock expressed similar sentiments when he said:

“If the way courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy”⁵⁹

Impartiality, it has truly been said, is the supreme judicial virtue.⁶⁰ By the judicial oath, judges undertake to act “without fear or favour, affection or ill will”. However, impartiality must not only exist, it must be palpable. The High Court has made it quite clear that in Australia the test for determining that a judge has been or might be actuated by bias is whether or not fair-minded people might reasonably apprehend or suspect that the judge has pre-judged or might pre-judge the case.⁶¹

The test of bias based on appearance is a crucial manifestation of the principle of open justice. The maintenance of impartiality, not only the actuality but the appearance thereof, is the point at which judicial independence and judicial accountability intersect. There is no incompatibility between accountability by open justice and judicial independence. Indeed they are closely intertwined principles.

Open justice is also one of the most significant guarantees of personal liberty. The principle of the separation of powers must be seen to be in operation as a practical reality. For example, a relationship between the bench and the prosecution in the criminal process which can be described as “too close”, is by no means unknown in our history. However, as Viscount Dilhorne put it:

“A judge should stay out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution.”⁶²

Similar principles apply in a civil trial.

There is a clear movement towards managerial judging - the direct involvement of judges in the preparation for and the conduct of proceedings. This is in part motivated by new pressures for accountability as to how courts spend public resources. Nevertheless, there are very real limits on the extent to which such involvement can be taken, consistently with the principles of open justice.

There is an inevitable tension between the contemporary pressures on courts to maximise throughput and the principle that justice must be seen to be done. In 1936 the Privy Council held that a divorce trial was voidable because the judge had sat in a room which had a sign saying "Private" on the door. The Judicial Committee said:

"Publicity goes far to prevent the trial of these actions, where one is superficially so much like another, from becoming stereotyped and standardised, so that the ability to dispose of them is even now, apparently, regarded in some quarters as the convincing test of judicial efficiency."⁶³

Such attitudes have returned with greater virulence. I do not mean to suggest that improvements in judicial efficiency have not been required, nor that further improvements cannot occur. My proposition is that many advocates of such measures have an inadequate understanding of the way that such steps may adversely affect other values and of the incompatibility of some such measures with fundamental principle, including the principle of open justice.

I am, of course, conscious of the fact that there are limits to the proportion of the gross national product that we can afford to expend on the legal system. That system is not immune to the effects of the substantial shift in attitude to the public sector which has had significant, and often adverse, impacts on many other areas of government. However, the process of adapting to this most recent swing of the pendulum about the proper role of government, must proceed with caution in the case of institutional arrangements which have taken centuries to develop and which can be destroyed in years.

We should not underestimate the significance - not least to our economy - of the broadly based acceptance of the institutional legitimacy of the administration of justice.

It is institutional legitimacy that explains one great marvel of our social system: why do the overwhelming majority of Australians obey the law, and refrain from taking the law into their own hands, even when the risk of detecting a breach is low and the application of a deterrent sanction even lower? The operation of open justice is an important determinant of this institutional legitimacy. This phenomenon could not be replicated by market forces.

I do not wish in any way to be understood to doubt the importance of courts accepting accountability for the use to which they put public funds of which they are the custodian. Nevertheless, there is a tendency to equate courts with bureaucracies in both the approach taken and the terminology employed with respect to these matters. This is a fundamentally pernicious development which ought to be resisted.

The development of performance measurements by means of benchmarking operates under the auspices of the Council of Australian Governments (COAG). The present system continues an initiative of the Premier's Conference of July 1993 in, what was called, the Review of Government Service Provision. This Review is supervised by a Steering Committee chaired by the chair of the Productivity Commission. Each area of government activity is supported by a working group which, in the case of the legal system, is the Court Administration Working Group.

All aspects of this process are being pursued with a single ideology and a single methodology. A system of performance benchmarking is established, pursuant to which performance indicators are developed and published. In the case of the judicial system, the terminology is misleading, perhaps dangerously so. The courts do not deliver a "service". The courts administer justice in accordance with law. They no more deliver a "service" in the form of judgments, than the Parliaments deliver a "service" in the form of statutes.

This recent development of contemporary public administration draws heavily on an analogy with the private sector and seeks to replicate the incentives and sanctions of a market system in areas of activity in which a market does not directly operate. I do not doubt for a moment that this approach can supply valuable insights and lead to important reforms. There is, however, a tendency amongst the practitioners of this new approach to public administration to regard the focus of their own activities as in some respects more important than the activities which they supervise.

More significantly, there is a marked tendency to devalue aspects of these activities of others which are incapable of measurement. With respect to the legal system these deficiencies are capable of causing significant distortions. The tendency to regard the courts as providing some kind of "service" has crept into the terminology of all aspects of government decision-making with respect to the courts and, most particularly, with respect to decision-making about the allocation of resources. It is important that these tendencies should be counter-balanced by a broader appreciation of the functions performed by the legal system as a manifestation of government.

In particular, the tendency to give quantitative measurements a quite disproportionate influence in the making of decisions, particularly on the allocation of resources, which arises from the very concreteness of statistics against the more amorphous quality of principle, is a tendency that must be resisted.

Not all areas of government are capable of being moulded by analogy with the operation of a free market. There are important areas of government activity in which market forces have been introduced with substantial benefits to the community as a whole. However, the administration of justice is not an area in which such an analogy has much that is useful to contribute. Few advocate that commercial corporations should conduct their affairs in public, nor that they should publish reasons for their decisions, or observe any of the other principles of open justice. Nor should the dynamics of commercial corporations be seen as having any particular relevance for the administration of justice.

One characteristic of open justice is its inefficiency when compared with private or secret justice. There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, and not have to publish reasons for their decisions. Even greater "efficiency" would be quickly apparent if judges had made up their minds before the case began. There are places where such a mode of decision-making has been, and indeed is being, followed. We do not regard them as role models. Open justice does not provide the most efficient mode of dispute resolution. Nor, indeed, does democracy provide the most efficient mode of government.

Yet the major pressure on the courts, like other parts of the public sector, is to increase throughput without increased resources.

I am reminded of the micro economic reformer who noted that a Mozart String Quartet takes as long to perform in 1999 as it did in 1799. In short, in two hundred years there had been no productivity improvement whatsoever. Plainly, this could only be the result of a collusive arrangement amongst professional musicians. The matter needs to be investigated by the ACCC.

Some things take time. Justice, and in particular the appearance of justice, is one of them. No doubt there is an economist somewhere who would classify this as some form of trade off between quality and quantity, but this very perspective fails to give weight to the public interest involved and, specifically, fails to understand the significance of institutional legitimacy.

I repeat, the courts do not provide a public funded dispute resolution service to litigants as consumers. The courts perform a core function of government: the administration of justice according to law.

A dispute resolution "service" can be delivered more economically in private. Indeed, privacy is frequently cited as a motive for participating in alternative dispute resolution. Although mediation and arbitration have important roles to play, we should not, however, forget the public interest that is served by open justice.

It is the qualitative dimension of open justice which requires one to treat with reserve the role of "performance indicators", which appear to treat courts as accountable for their performance only in quantitative terms.

In the former Soviet Union, one of the few things of which they had no shortage was performance indicators. They called it a five year plan. There are a number of classic examples as to how such performance indicators distort decision-making. My favourite comes from Nikita Krushchev in one of his speeches critical of the controllers of heavy industry, whom he dismissed as "steel eaters". He pointed out that the five year plan had for many years contained a performance indicator for nail manufacturers expressed in the form of tonnes of nails. This proved to be inadequate as every factory made a huge number of big nails and virtually no small nails. In order to overcome the shortage of small nails, a new five year plan expressed the performance indicator in terms of numbers of nails, rather than tonnes.

The obvious occurred: within a few years there was a shortage of big nails.

When deploying such performance indicators in terms of accountability, we must never lose sight of the qualitative dimension. Open justice cannot be measured. Open justice, not statistics, must continue to be regarded as the basic mechanism of judicial accountability.

I do not wish to suggest that accountability for financial expenditure is not important. However, if it provides the primary input to decisions about allocation of resources, then the fundamental function performed by the legal system may be compromised. Indeed, taken too far, it will threaten the very market system in the name of which the process has been instituted.

There is a tendency amongst economists to regard "the market" as a product of nature, as unorganised as a medieval bazaar. It is not. The "market" is a sophisticated human creation and, more than anything else, it is a creation of good government and of the law. Without the protection of property and the enforcement of contracts, no market system can operate.

In the Town Hall of Sienna there are two wonderful frescoes by Lorenzetti: Allegories of Good Government and of Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, would convince anyone that without law, there can be no market system.

Conclusion

The principle of open justice did not emerge in our legal history by a process of deduction from an abstract ideal. Like all other important aspects of our legal system, the principle was derived from observation of the actual practice of dispute resolution over long periods of time which, once recognised as a principle, influenced further development of the practice.

The word "court", in the sense of the judicial institution, shares a common origin with a royal or aristocratic "court" which, of its nature, involved a broader range of persons than the immediate disputants. The early use of juries as representatives of the community, also implied public access. Such are the pragmatic origins of fundamental principle in the common law.⁶⁴

During a period of this nation's history when the pressures of global events are imposing radical change on all of our institutions, we must learn to stop taking important things for granted. We must, at least occasionally, rearticulate the rationale for our fundamental principles, so that we do not lose their benefit, without intending to do so.

I have in mind, particularly, the way in which the standards of commercialism have swept aside other values, and dominate public debate to an unprecedented degree. It is noticeable that although once our cities were dominated by public buildings - parliament, court, town hall, cathedral - now all are dwarfed by commercial office blocks, and public buildings or are now often constructed in indistinguishable form. There are dangers in such uniformity.

Diversity in the values served by social institutions is as significant for the health of our society, as bio-diversity is for our ecology. The values of truth, justice and fairness, which are served by the legal system, are not necessarily compatible with the unbridled operation of market forces.

At times the belief in the universal applicability of market forces, borders on monomania. The common law has seen off a number of monomanias. In the past they have tended to come in the form of religion. It once came in the form of the divine right of kings. It now comes in the form of the divine right of markets. No claim to universality is compatible with the pursuit of truth, open justice and fairness.

Even in economics there is proof of the significance which ordinary people attach to the perception of fairness.

Economists have created an experiment called "the ultimatum game".⁶⁵ In the ultimatum game one person is given a sum of money which he is instructed to offer to the second player. If the second player accepts the amount he can keep what is offered and the first player gets to keep the rest. If the second player rejects the offer neither player gets anything. No bargaining is allowed. On the basis of the usual assumptions of rational behaviour and pursuit of self interest, an economist would predict that the first player will offer a minimal amount and the second player will accept it. This is not what happens. Offers usually average between 30 and 40 percent. Offers less than 20 percent are usually

rejected.

An offeree feels mistreated in a contemptuous way by a minimal offer. It is not fair. He would rather get nothing. Offerors expect and understand that his will happen. They make offers likely to be perceived to be fair.

There is a great deal of wisdom deeply embedded in institutions which have grown and adapted to changing circumstances over long periods of time. It is a regrettable characteristic of much Australian public debate, that it proceeds on the basis that history is of little significance. That is reflected in some discussion of judicial accountability.

We do not often assert, indeed it seems we are sometimes reluctant to admit, that we draw on an institutional tradition of at least 800 years. More significantly we should recognise and reject the underlying assumption that 'history' is something that happened somewhere else.

This year, the Supreme Courts of Tasmania and of New South Wales, celebrated the 175th Anniversary of their foundation.⁶⁶ By any standards, those are old institutions. The nations that have judicial institution of such vintage, can be numbered on the fingers of one hand.

We Australians like to think of ourselves as a young country. However, when it comes to the basic mechanisms of governance - parliamentary democracy and the rule of law - this is not a young country, this is an old country. Our courts have a continuous institutional existence of 175 years. Representative and responsible government is almost 150 years old. We will soon celebrate the centenary of Federation. These are old traditions.

Fundamental values - like the principle of open justice - on which these successful institutions are based, have served us well. The expression of these values in actual institutional arrangements and practices will continue to adapt - as they have been adapting for centuries - to changing demands and social conditions. The preservation of those values requires continued vigilance.

Endnotes:

1. *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.
2. A comprehensive historical treatment is given by Chief Justice Burger in *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) at 564-575; See also Nettheim "The Principle of Open Justice" (1984-1986) 8 *University of Tasmania Law Rev* 28; Baylis "Justice Done and Justice Seen to be Done" (1991) 21 *Victoria University Law Rev* 177; Kelly "Reviewing the Observer of Bias" (1993) 67 *ALJ* 340 at 346.
3. *Leeson v The General Medical Council* (1889) 59 LJChNS 233 at 241.
4. *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335.
5. See eg *Stollery v Greyhound Racing Control Board* (1973) 128 CLR 509 at 518-519; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351-352; *Webb & Hay v R* (1993-94) 181 CLR 41 at 47.
6. *The Concise Dictionary of National Biography*, Vol II, Oxford University Press (1992) p1413; see also Simpson *Biographical Dictionary of the Common Law* London, Butterworths (1984) pp237-238.
7. *Jackson's Machinery of Justice*, Cambridge University Press, Cambridge (8th ed, 1989) p375.
8. *Ibid* (7th ed, 1977) p475.
9. Lord Devlin *Easing the Passing: the Trial of Dr John Bodkin Adams*, Bodly London (1985).
10. *Hobbs v Tinling and Company Limited* [1929] 2 KB 1.
11. *Hobbs v Tinling* at 33.
12. At 48.
13. *R v Racz* [1961] NZLR 227 at 232.
14. See the list of synonymous expressions in *Webb & Hay* at 51.
15. *Mabo v Queensland (No2)*(1992) 175 CLR 1 at 42.
16. See *Chu Kheng Lim v The Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1994-95) 183 CLR 273 at

- 287-288; *Jumbunna Coal Mines NL v Victorian Coal Mines Association* (1908) 6 CLR 309 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181; *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 at 303-305; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1423-1425; *Kartinyeri v Commonwealth of Australia* (1998) 72 ALJR 722 at [97]; Sir Anthony Mason "International Law as a Source of Domestic Law" in Opeskin & Rothwell (eds) *International Law and Australian Federalism* (1997) pp220-222.
17. The significant impact of the Charter on the principle of open justice is considered in Leopfsky *Open Justice: The Constitutional Right to Abort Criminal Proceedings* Butterworths, Toronto (1985).
 18. "Rule of Law Human Rights Protection" (1999) 18 *Australian Bar Rev* 29 at 32-33.
 19. *Scott v Scott* [1913] AC 417 at 473.
 20. *Ibid* at 477.
 21. *Dickason v Dickason* (1913) 17 CLR 50 at 51.
 22. See my address "Foundations of Administrative Law" (1999) 58 *Australian Journal of Public Administration* 3; (1999) 4 *The Judicial Review* 69; *Egan v Chadwick* [1999] NSWCA 176 at [7].
 23. Even in the absence of a written Constitution as in the United Kingdom, a principle such as the right of access to the courts has been described as a "constitutional right". *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Limited* [1981] AC 909 at 977 per Lord Diplock; *R v Secretary of State for the Home Department; Ex parte Leech* (No2) [1994] QB 198 at 210 per Steyn LJ; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 585 per Laws J.
 24. *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 15
 25. *Nicholas v R* (1998) 193 CLR 173.
 26. *Ridgeway v R* (1995) 184 CLR 19.
 27. *Nicholas* at 197, and esp at 275-276 per Hayne J.
 28. *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* at 27, also at 53.
 29. *Ibid* at 208-209 per Gaudron J.
 30. See eg *Daubney v Cooper* (1829) 109 ER 438 at 440; *Dickason v Dickason* at 51; *Russell v Russell* (1976) 134 CLR 495 at 520; *Richmond Newspaper v Virginia* at 573.
 31. *Scott v Scott*, *Dickason v Dickason* at 51; *Russell v Russell* at 520; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 41 at 50-53. A court may not even agree to hear a case in camera by consent (*Scott v Scott* at 436, 481).
 32. See eg Wright "The Open Court: The Hallmark of Judicial Proceedings" (1947) 25 *Canadian Bar Rev* 721 at 74-75; *McPherson v McPherson* [1936] AC 177 at 200; *R v Tait* (1979) 46 FLR 386 at 402.
 33. *McPherson v McPherson*.
 34. Quoted in Nettheim *ibid* at 28.
 35. *Attorney-General v Leveller Magazine* [1979] AC 440 at 449-450; *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-479; *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 esp at 1068-1073; *Ambard v Attorney-General* at 335.
 36. *Hinch v Attorney General (Vic) (No 2)* (1987-88) 164 CLR 15 at 74; *Murphy v R* (1988-89) 167 CLR 94 at 99; *R v Yuill* (1993) 69 A Crim R 450 at 453-454; *R v VPH*, unreported, NSW Court of Criminal Appeal, 4 March 1994; *R v Bell*, unreported, NSW Court of Criminal Appeal, 8 October 1998.
 37. Kitto "Why Write Judgments?" (1992) 66 ALJ 787; *Pettit v Dunkley* (1971) 1 NSWLR 377 at 382; *Housing Commission of NSW v Tatmar Pastoral Co. Pty Ltd* (1983) 3 NSWLR 378 at 385-386; *Public Service Board v Osmond* (1986) 159 CLR 656 at 666-657; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273, 277-281.
 38. *Soulemezis* at 278E, and see 279B-C.
 39. Quoted in Jackson *Natural Justice* (2nd ed, 1979) p97.
 40. *Grollo v Palmer* (1995) 184 CLR 348 at 365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17, 23; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 107, 116-117, 134-135.
 41. See *Webb & Hay* at 47 and especially the list of cases set out at footnote 36.
 42. *Webb & Hay*, refusing to follow the House of Lords in *R v Gough* [1993] AC 646.
 43. *Murray v Legal Services Commission* [1999] NSWCA 70; 46 NSWLR 224 at [68]. See Jackson *ibid* Chp 4.

44. *R v Hircock* [1970] 1 QB 67.
45. *R v Langham* (1972) CrimLR 459.
46. *Vakauta v Kelly* (1989) 167 CLR 568 at 587; cf *Goktas v Government Insurance Office of NSW* (1993) 31 NSWLR 184 at 687.
47. *Moevao v Department of Labour* [1980] NZLR 464 at 481; *Jago v District Court of New South Wales* at 300; *Williams v Spautz* (1992) 174 CLR 509 at 520; *Walton v Gardiner* (1992-93) 177 CLR 328 at 393-394. As to the effects of illegal conduct by police see *R v Ireland* (1970) 126 CLR 321 at 334-335; *Bunning v Cross* (1977-1978) 141 CLR 54 at 74-75 and "the courts should not be seen to be acquiescent" at 78; *Cleland v R* (1982) 151 CLR 1 at 20; *Pollard v R* (1992) 176 CLR 177 at 201-203; *Ridgeway v R* (1994-95) 184 CLR 19 at 74-75, 77; cf *Nicholas v R* (1998) 193 CLR 173 at 196-197 and 208-209, 210, 272, 274-276.
48. (Undue interruption by judge) *Clever* (1953) 37 Cr App R 37 at 39-40; *R v Racz* at 232; *Yuill v Yuill* (1945) 1 All ER 183 at 185; *GIO (NSW) v Glasscock* (1991) 13 MVR 521 at 529-530, 532, 538-539; Ipp "Judicial Intervention Trial Process" (1995) 69 ALJ 365 esp at 371-373. (Conduct by court officer) *R v Barney* [1989] 1 NZLR 732; *Re JRL; Ex parte CJL* at 349-350, 352. (Judicial officer warning him or herself) *Fleming v R* [1999] HCA 68; 73 ALJR 1 at [37].
49. *Jago v District Court of New South Wales* at 49-50; *Pearce v R* (1998) 194 CLR 610 at [39]; *R v Jurisic* (1998) 45 NSWLR 209 at 221.
50. *Richmond Newspapers Inc v Virginia* at 571-572.
51. *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 593-594; *Alister v R* (1983-84) 154 CLR 404 at 415; *Ellis v Home Office* [1953] 2 QB 135 at 147.
52. *Jago v District Court of New South Wales* at 50.
53. *D & J Construction Pty Ltd v Head* (1987) 9 NSWLR 118 at 122-123; *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 362-363, 374; *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning* [1991] 1 Qd R 558 at 565-566; *Ocean Lite Ltd v HIH Casualty and General Insurance Ltd* [1999] NSWSC 292 at [48]; *Lincoln v Holmesglen Institute of TAFE* [1999] FCA 601. See also *R v Winston Smith* (1975) 61 Cr App R 128; *MacDonald Estate v Martin* (1991) 77 DLR (4th) 249 at 255-256; *Re Everingham et al v Ontario* (1992) 88 DLR (4th) 755 at 761-763. The public interest in avoiding conflict situations of lawyers was also accepted in New Zealand until recently. See *Black v Taylor* [1993] 3 NZLR 403 at 408. This seems to have been reversed in the most recent case. See *Russell McVeagh McKenzie Bartleet & Co v Tower Corp*, unreported, New Zealand Court of Appeal, 25 August 1998. See Coull "Conflicts of Interest and Chinese Walls" (1998) NZLJ 347 at 349. The English law also omits reference to a public interest dimension (*Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831; *Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 2 WLR 215).
54. *D & J Constructions Pty Ltd v Head* at 123
55. *Mann v O'Neill* (1996-97) 191 CLR 204 at 245.
56. The Honourable Murray Gleeson "Judicial Accountability" (1995) 2 *The Judicial Review* 117 at 123-124.
57. *Ibid* at 122.
58. *Russell v Russell* at 520.
59. *A-G v Levens Magazine* at 450.
60. Lord Devlin *The Judge* Oxford University Press (1979) p4; Sir Gerard Brennan "Why be a Judge?" (1996) 14 *Australian Bar Review* 89 at 91.
61. See *Webb & Hay* and authorities cited at 47 fn 36.
62. *Director of Public Prosecutions v Humphrys* [1977] AC 1 at 26.
63. *McPherson v McPherson* at 202.
64. *Nettheim* *ibid* at 26-27; *Raybos Australia v Jones* at 50-51; *Richmond Newspapers Inc v Virginia* at 565-566.
65. See Cass R. Sunstein *Free Markets and Social Justice* Oxford University Press (1997) p32.
66. See (1999) 73 ALJ 561.

Address to celebrate the 150th Anniversary of the University of Sydney, 6 September 1999

ADDRESS BY THE HONOURABLE J J SPIGELMAN

CHIEF JUSTICE OF NEW SOUTH WALES

UNIVERSITY OF SYDNEY

PARLIAMENT HOUSE DINNER 6 SEPTEMBER 1999

We assemble here today only a few yards from the chamber of the Legislative Council, now occupied by the Legislative Assembly of the New South Wales Parliament, in which on 6 September 1849 William Charles Wentworth moved the resolution for the establishment of a committee to inquire into the creation of a University. That committee, chaired by Wentworth, reported within 15 days and, within a similar period, on 4 October 1849, Wentworth moved the Second Reading of the University Bill in the Legislative Council.

Accordingly, this day represents the 150th Anniversary of a critical stepping stone for the creation of the University of Sydney: a prelude, our invitation for tonight's dinner states - perhaps even an overture - to the sesquicentenary celebrations which the University will commence to celebrate next year.

The legislative chamber in which Wentworth delivered the two speeches to which I have referred, is one of the oldest parliamentary chambers in continuous use anywhere in the world. It is well, on occasions like this, for us to pause and reflect on just how old many of our most important institutions are.

Australians like to think of this as a young country. However, in many respects, and particularly in the basic mechanisms of governance, this is not a young country. This is an old country.

On 17 May of this year the Supreme Court of New South Wales celebrated the 175th Anniversary of its foundation. The number of nations which have judicial institutions of such vintage can be counted on the fingers of one hand.

The Supreme Court and the first Legislative Council were both created under the New South Wales Act, a statute of the British Parliament of 1823. That was the first written constitution in Australian history. The beginnings of representative government occurred over 150 years ago. In a few years we will celebrate 150 years of representative and responsible government - the pursuit of which was, perhaps, the single most important theme of Wentworth's political life.

The twin great institutional traditions of our civilisation - the rule of law and the need for consent of the governed - form part of the core content of Australian national identity. Their force today, reflected in the universal acceptance of the legitimacy of the institutions which perform these functions, is derived in large measure from the longevity of the traditions by which they are performed. There is an embedded wisdom in institutions which have grown and developed over long periods of time. It is fitting that we commemorate anniversaries of the character we gather here today to mark.

The speech which Wentworth gave on 6 September 1849 reveals some of the strengths of our society, strengths which have enabled us to enjoy a history of economic prosperity and social stability, which is reflected in the longevity of our institutions, and which most nations in the world have reason to envy.

The William Charles Wentworth of 1849, was no longer the firebrand of the 1820s when he returned from Britain with his legal qualifications and university experience. Shortly after his return he was admitted as one of the first two barristers of the Supreme Court of New South Wales. Immediately upon his admission, he moved a motion in the Court that henceforth, as was the custom in England, solicitors should no longer be permitted rights of audience in the court.

It is pertinent to note that in 1846, one of Wentworth's political rivals, Robert Lowe, supported legislation which would have led to the amalgamation of the two branches of the legal profession. At that stage Australians who wished to be admitted to the Bar had to go to England and take up residence at one of the Inns of Court merely, as Lowe put it, "to eat 36 dinners there". Lowe argued, in terminology which is reminiscent of recent debates, for "Free Trade in Law". He maintained that the "barrister monopoly" was "a tax on the administration of justice". Wentworth protested that the Bill would destroy the dignity of the legal profession by making barristers stoop to collect their own fees. Some things change very little.

Although this measure was defeated, a highlight of the debate was the necessity, if separation of the two branches of the legal profession were to continue, to establish a means of training Australians for the independent Bar, without the cost and inconvenience of travel to England. Lowe and Wentworth both agitated for the creation of a University, inter alia, by reason of this need. Similar demands came from the medical profession.

Both Lowe and Wentworth were members of the committee established by the resolution of the 6 September 1849 and which reported with such commendable speed.

I wish to highlight two aspects of the speech that Wentworth delivered 150 years ago today. The first, the personal origins of an individual in either convict status or freedom, was the dominant social divide of the first century of Australian life. The second subject, conflict amongst the major Christian denominations, lays claim to be the dominant social divide of the second century of Australian life.

Wentworth, as is well known, was the son of a convict mother. Notwithstanding his education, his contribution to society and his obvious personal capacity - not always consistently displayed - his entire public life was marred by a battle for social acceptance. His speech of 6 September 1849 refers on a number of occasions to the "tainted population" of the colony of New South Wales. He propounded the greater responsibility of the Government of a convict colony to provide for education than in other British colonies, without such "moral taint". He said:

"If it was the duty of the State to instruct the free and virtuous population of those colonies, how much greater the necessity to enlighten the tainted population of this. The governments of those colonies had to deal only with the ignorance of untaught multitudes - here it was the duty of the government to do all in its power to subdue their vices."

The Hansard report of this speech indicates that at this point members of the Council burst into cries of "Here here".

This debate reflected the passions that convict origins could still incite at this time, and their significance to the social, economic and political life of the colony. However, within a few decades, other than in the most narrow of conservative circles of ever reducing size, this, the most important social issue of the early decades of colonial life, had passed into irrelevancy.

This was the first manifestation of an extraordinary capacity for adaptation which our social institutions have displayed on a number of occasions, including the second theme of Wentworth's address - the importance of religious differences - but also more recently in the absorption into our society of waves of non-Anglo Celtic migration.

As I have said a second theme - perhaps the main theme - of Wentworth's two addresses on the 6 September and 4 October was the importance of creating a secular institution. All proposals for public involvement in education had been bedevilled by the claims of the various denominations to control the education of their adherents. Indeed early in his political career, Wentworth had conducted a campaign opposing plans by the Anglican establishment to create what would have been, effectively, a monopoly of educational provision in the colony.

The proposal which Wentworth put forward in his speech of 6 September 1849, which the committee endorsed and, indeed, which was established, was for a tertiary institution free from religious teaching, so that no sectarian influences would impinge themselves upon the educational process and, accordingly, that members of all denominations could allow their adherents to attend. A compromise, somewhat characteristic of our society, was put forward in the form of affiliating denominational colleges to the University so that the religious instruction, which most then thought to be essential,

could occur within the context of those colleges, but not in the University itself.

At that time, of course, Cambridge and Oxford were Anglican institutions with a strict religious test for entry. The non-denominational University of London had only recently been established. However, as Wentworth pointed out during the course of debate, the Universities of Scotland and of Ireland had no religious test. The then controversial nature of this proposal was manifest in the refusal of the Anglican Bishop of Sydney to nominate a member to the first Senate.

The social division between Catholics and Protestants, overlapping as it did very substantially with class divisions, remained of central significance in our society until comparatively recently. When I was pursuing my legal studies at this University in the late 60s, only 30 years ago, the significance of this division was quite apparent in the law. There were law firms in this city which had never had a Catholic employee, let alone partner. There were others, which had never had a Protestant. The position of Commissioner of Police was filled alternatively by a Catholic and a Mason and that remained the case for many years. However, over the last three decades this basic social divide has dissipated. A sense of harmony has replaced longstanding tensions. The speed and frictionless nature of this transition is another manifestation of the extraordinary strength of our social institutions and their capacity for adaptation.

The report of the 1849 Committee contrasted the failure to create a university after sixty two years of British settlement with the position in the United States. The Report said:

“The University of Harvard, to our shame be it mentioned, was established by the Pilgrim Fathers of New England in less than twenty years after its settlement.”

In his speech of 6 September 1849, Hansard reported Wentworth to have said:

“He should not weary the House by enumerating the endowments of the educational establishments of the United States. It would be sufficient to say that the endowment generally did not proceed from the revenue of the State.”

Even at that early stage, the contrast between Australian and American traditions of philanthropy was clear. It has remained so since. Nevertheless, over the century and a half of its existence, this University has been able to attract substantial private support by Australian standards. I am sure everyone present is acutely aware that contemporary developments in government funding make such support more necessary than ever.

It would be appropriate to conclude this address with a quotation from one of Wentworth's two speeches. However, the modern ear is not well attuned to the bombast of Victorian rhetoric. Suffice it to say that Wentworth's comments were particularly focussed on a patriotic assertion of the potential contribution of Australians to education and to civilisation. After 150 years they remain worthy and noble sentiments, appropriate for commemoration.

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Women Lawyers Association of NSW

ADDRESS BY THE HONOURABLE J J SPIGELMAN

CHIEF JUSTICE OF NEW SOUTH WALES

SHERATON ON THE PARK 25 AUGUST 1999

The constraints of a luncheon address are such as to require concentration on no more than one or two subject matters. More would run the risk of being exceedingly glib. I have chosen to concentrate on the potential impact of technology on the prospects of greater workplace flexibility, in the interests of ensuring that women can fully participate in this legal profession to which we all belong.

It is now widely recognised that women in all forms of employment have imposed upon them difficulties which men simply do not have. Difficulties arise from the requirements of raising a family and the maintenance of domestic arrangements generally. This goes well beyond the obvious biological necessities to the fact that as a matter of choice, to some extent constrained by social expectations which are not likely to dissipate in the foreseeable future, women assume a disproportionate burden of meeting the demands of children and domestic tasks.

Workplace expectations in all of the spheres in which legal professionals are employed, but perhaps particularly in the context of private firms, also limit opportunities for men to participate in family life. But there is no doubt, as a matter of practical reality, the impact is much greater on women than it is on men.

The dramatic expansion in women's participation in the work force, including at all levels of the legal system, happens to have coincided with a considerable intensification of pressures on employees, particularly in white collar, or as they are sometimes now referred to lace collar, occupations. The pressures of globalisation and the increase of concern with economic efficiency and productivity reflect what is, in this country, described as economic rationalism. In England it is described in more gender specific terms as "Thatcherite".

Many of the more leisurely practices of professional conduct and judicial conduct of past years have disappeared. At the time that such practices were common they would have been, and indeed were, described, not inaccurately, as "gentlemanly". No aspect of legal practice, including the conduct of proceedings in court, could be so described today. The pressure of billable hours targets, early and late working hours, touting for business after hours, administrative and, even, judicial performance targets is unremitting and, indeed, ubiquitous. It appears, everything must have productivity improvements on a regular basis.

Indeed, one recalls the example of the ardent economic reformer who noticed that a Mozart string quartet was played in exactly the same time in 1999 as it had taken in 1799. In other words in 200 years there had been no productivity improvement. This obviously manifested a collusive arrangement amongst professional musicians and must be investigated by the ACCC.

Contemporary work place pressures on women, which arise from the disproportionate burden that women assume in caring for children and maintaining domestic arrangements, operate as a significant impediment on advance in any profession, and particularly in the legal profession. I do not ignore the fact that some women do have domestic arrangements of a different character, including many who do not have children. Nevertheless, the majority do, or wish to do so. Their employability and their promotion is significantly affected by demands of the workplace which are inconsistent with these greater burdens.

There are the biological necessities of pregnancy, birth and breastfeeding, all of which involve restrictions on the ability to devote long continuous periods of time to work, indeed in some respects require interruptions of significant lengths. Furthermore, personal choice or social expectations even after breastfeeding has stopped, operative through to the end of schooling, are such as to continue to

cause interruptions and restrict the amount of continuous time that can be devoted to work to an extent quite disproportionate to that to which men are subject. Over and above that effect are practices with respect to domestic arrangements unrelated to children.

There is no doubt there have many changes in various areas of legal employment which have introduced more flexible working practices. It appears true that such accommodation is more widely spread in the public sector than the private sector. That is, no doubt, part of the explanation of the comparatively high proportion of women lawyers employed in the public sector. Amongst these changes are maternity leave, job sharing, short hours, flexitime, working from home, part time work, outsourcing and preparedness on the part of employers to focus work tasks such as redirection away from long trials or work involving extensive travel.

However these flexible arrangements may result in a perception of marginalisation of the employees who receive the benefit of them. On occasions, 'out of sight' means 'out of mind', when it comes to promotions, assignments and secondments. There is a pervading work culture in which it is regarded as a mark of 'seriousness' and of 'success', that a legal professional is seen to be 'putting in the hours'. This is understood as a manifestation of commitment and performance and, not least, billable hours. There are also understandable concerns by clients about limits on accessibility. They increasingly demand instant access at a time of their own choosing. The protection of professional aloofness has long since dissipated.

Flexible working arrangements do impose restrictions on the ability to develop a professional career, including limitations on opportunities to tout for business and to engage in networking with clients, superiors and colleagues. Interruptions to continuity of work are capable of adverse consequences on a career. Not being able to travel extensively for work purposes, not being able to be involved in long trials or matters which require undivided attention for significant periods of time, will necessarily limit opportunities for displaying talent and the development of professional skills.

These adverse affects arise because there is a paradigm of conduct which is regarded as 'normal'. That paradigm requires immediate and continuous availability in the form of physical propinquity. It is this aspect upon which contemporary technology impinges. Modern technology makes physical presence or propinquity optional in many circumstances.

Over recent decades there have been numerous predictions of the imminent arrival of the paperless office or of telecommuting by modems, faxes and telephones. Whilst all of these phenomena have progressed to some extent - more limited than many predictions - the idea of what is 'normal' has not changed. However, it may.

The principal idea I wish to propound this afternoon is that women have an interest in changing the paradigm of 'normal' conduct of workplace relations in a direction which creates an alternative paradigm that does not require physical propinquity. All of the technologies that I have mentioned will assist in that regard. One technology, if fully deployed, has particular promise of overcoming the effect of flexible working practices as leading to the marginalisation of the beneficiaries of such practices. I refer to video links and video conferencing.

Set top video conferencing systems are now available for a few thousand dollars. Real time, interactive, audio visual communications using an existing television set are now available for a cost which is feasible for many professionals. Higher levels of quality and sophistication can be acquired at a price. The crucial issue is not capital cost but user charges. All existing delivery systems are capable of being employed - the standard copper telephone line, as well as the optical fibre networks and satellite delivery.

Video conferencing opens the possibility of a degree of direct contact and sense of presence, which other forms of telecommunications do not offer. It is for this reason that the utilisation of video conferencing, once it becomes sufficiently common, may counteract the marginalisation attendant on working from home. Similar benefits may result from other technologies, such as the use of real time transcript, which is made immediately available via the Internet to members of the legal team who are out of court, perhaps interstate, perhaps at home.

The dynamics of technological innovation are such that predicting the speed of introduction and integration of different technologies, increasingly using the nearly universal Internet protocol, is very

difficult. For example, the origins of the fax machine lay in the fact that the Japanese believed they suffered a competitive disadvantage by reason of the complexity of their character based written language in the previous generation of business communication hardware, namely the telex. A means of transmitting visual characters needed to be invented. It was.

Real time transcript had its origins in the needs of hearing impaired people, whether as parties or as witnesses, who found it impossible to follow court proceedings in which they were involved. The early use of video conferencing was with respect to vulnerable witnesses, particularly children, giving evidence from a nearby room on a closed circuit system, in order to avoid being in the physical presence of an accused who had abused or threatened them.

To date, the steps that have been taken by the court system in the deployment of these various technologies have been experimental and somewhat tentative. Nevertheless the success is such that courts are now ready, subject to availability of funds, to adopt a more integrated and determined approach. Within the month the Supreme Court will have available a fully equipped technology court which will enable integrated electronic communications including video conferencing, real time transcript and electronic document management. This will offer a permanent facility instead of the ad hoc arrangements that have been made from time to time.

The most common use of video conferencing in courts throughout Australia has been to take evidence from specific witnesses, often overseas witnesses, whose travel to the court would be either impossible, grossly inconvenient, or disproportionately expensive. However, the uses have multiplied. In the Supreme Court we have for many years had direct video links to Long Bay and Silverwater gaols for purposes of bail applications. This has enabled the Department of Corrective Services to avoid both the costs and the security risks associated with transporting prisoners. The High Court has for many years conducted Special Leave Applications from some cities, such as Brisbane, via a video link. Courts have had legal representatives conduct appeals via video link for a client who is unable to afford the added expense of interstate travel, with the appellate bench and the other legal representatives being in a different city. Recently, in the Federal Court, objection was taken to a judge sitting on the morning of an appeal, a new judge was brought in and "sat" on the court, via video connection.

Not all of these uses are necessarily cost effective. The cost of travel may very well be less than the user charges for the connection. However, many are cost effective when the opportunity cost of the time of participants in the legal system is to be taken into account. It is this, more than anything else which will drive the use of video conferencing and other technologies in the future.

For example, much routine police evidence can be given from a police station, which will save the considerable amount of police time used in travelling to and from court and waiting to be called. Similarly, much medical evidence can be given from a video conferencing facility in a hospital or medical centre with considerably less disruption to normal medical practice. Other specialists may also find the investment in a video conferencing link appropriate. The Victorian Court system has developed a network for the use of video conferencing including a link to the Police Forensic Science Laboratories. Evidence is given all over the State by forensic experts, with the assistance of equipment which allows them to display objects and fingerprints in magnified form in the relevant courtroom. Cost efficiencies and improvement of services, particularly in rural and regional areas, will constitute a significant spur to the deployment of this and other technologies.

I do not wish to suggest that these technologies are appropriate in every circumstance. In the case of witnesses whose credit is critical, a virtual courtroom is unlikely to be an acceptable alternative, at least for the foreseeable future. Nor do I wish to minimise the significance of the direct personal contact in a courtroom. Nevertheless, a great deal of cost saving and improvement in efficiency is possible from the deployment of such technology.

Let me give you an example of the conduct of directions hearings. Attendances at court for such hearings frequently involve an amount of time travelling to and from court and waiting at court which is quite significantly disproportionate to the amount of time actually spent in conducting the business. The overwhelming majority of these hearings could be conducted with equivalent efficacy if participants never left their office or their home. Links can now be achieved by means of a telephone directions hearing. These have advantages of preserving a degree of interactivity, without the use of special technology, other than in the central location. The substantial expansion of Internet use makes available other forms including a chat room facility which enables several users to correspond with

each other in real time via their keyboards, or discussion groups or bulletin boards which operate like chat rooms but the participants are not involved at the same time, instead they post comments which others can later read and respond to, including the officer of the court who has to make the final decision. Where more direct contact is required, video conferencing would be able to replicate in a virtual way the advantages of such contact.

One of the difficulties with the widespread use of these technologies is that many will have the effect of internalising to the Court, costs which are now borne by the parties. After just over one year as Chief Justice, I do not underestimate the inertia that can be caused by such a phenomenon.

Although much heralded and not yet imminent, all of these technologies to which I have referred do open prospects of greater flexibility in both the workplace and in the conduct of the courts. This has been called the "dematerialisation" of the workplace. There is a real possibility of the "dematerialisation" of some court processes into their electronic equivalents.

I believe that women lawyers have a particular interest in these developments.

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Victory in the Pacific

Official guests, men and women who served, ladies and gentlemen.

We are gathered this morning at this solemn monument to commemorate the end of war in the Pacific 54 years ago. Of all the anniversaries we commemorate each year, including those marking the conclusion of past conflicts, this occasion has particular significance. The Pacific war was the first and only time in our history when the territorial integrity of Australia was subject to direct immediate threat and when acts of war were carried out on Australian soil.

This day, 54 years ago, marked the end of the Second World War, a conflict without precedent in recorded history.

During that war, from a population of seven million people, almost one million men and women enlisted for service and a great many more supported the war effort directly in a civilian capacity. Almost forty thousand Australians gave their lives and countless thousands suffered physical or emotional wounds, during that terrible conflict.

We assemble here to mark this anniversary, first and foremost to remember and to honour those who served and those who suffered both in Australia and overseas. Above all, we gather here to pay tribute to , and to express our continuing gratitude to, those who died.

By this remembrance, repeated annually, we reinforce our awareness as a community, that our democratic and free way of life is a precious inheritance which has been hard won through the commitment and sacrifice of those who served.

As we reflect on the rigours and the horror of war and its impact on individuals and on families - of lives cut off, of hopes and aspirations destroyed - we engage in a process which must be undertaken so that our nation will do what it can to ensure that such an occurrence will never happen again.

As it was once put: *"Those who cannot remember the past are condemned to repeat it"*.

We must never allow it to be said that those who defended our fundamental freedoms in the Second World War died in vain.

What we commemorate today is the performance by millions of Australians of duties they owed to Australia as a nation and a society. I do not speak only of military duties, I speak of duties owed as citizens. The duty to defend the nation is the most fundamental of civic obligations.

The example of those who served emphasises for all of us that the rights we enjoy must be earned.

I belong to a fortunate generation which has not had to earn our rights in the same way as those whose service and sacrifice we commemorate today, had to do. But it is their example which should make each and every one of us ponder: Are we doing what we should in the performance of our civic obligations, so as to be able to say that we have earned the rights we enjoy?

We have a duty to the dead whom we honour today, and who performed their obligations beyond measure, to be able to answer that question "Yes".

Red Cross Gala Dinner - 50th Anniversary of the Geneva Conventions

ADDRESS BY THE HONOURABLE J J SPIGELMAN

CHIEF JUSTICE OF NEW SOUTH WALES

IN THE GREAT HALL OF THE UNIVERSITY OF SYDNEY

12 AUGUST 1999

In the maelstrom of conflict over nationalism, religion and political ideology, there are very few creations of the human imagination which are universally regarded as unequivocally good. The Geneva Conventions, the 50th Anniversary of which we commemorate today, fall in that tiny category.

There can be no doubt that these Conventions have played a significant role in the alleviation of human suffering in the course of armed conflict. That is not to say, as those who have served the International Committee of the Red Cross are all too well aware, that the provisions of the Conventions are always observed. Nevertheless their very existence and the mechanisms for enforcement, not least through the activities of the Red Cross, have had universally positive effects by introducing some standards of civilised behaviour to warfare. It is fitting that we commemorate such an achievement.

As we look back over a period of 50 years, it is appropriate to note that those who gathered in Geneva on 12 August 1949 to sign the Final Act of the Conference, and open for signature the four Conventions which were the product of the conference, were looking back at developments over a period of 85 years.

As members of this audience are well aware, it was the experience of the young Swiss, Henry Dunant of the aftermath of the Battle of Solferino that commenced this entire process. In June 1859 two armies of Austrian and Franco-Italian forces clashed. By nightfall there were 6,000 dead and 36,000 wounded on the battlefield. No effort was made to gather them until the following day and some of the wounded received no help for several days. Finally, 22,000 Austrian and 17,000 French soldiers lost their lives at Solferino. During the campaign 60% of the wounded died. In the military campaigns of that era the number who were immediately killed usually amounted to a mere quarter of the total number who died.

It was in the wake of this experience that Dunant wrote his book "A Memory of Solferino". He made a twofold proposal. First, that a volunteer relief society be constituted and prepare itself in peacetime to assist army medical services in the event of war. Secondly, that the Nations meet and adopt a Convention to provide a legal basis for the protection of military hospitals and medical personnel. The first proposal led to the creation of the Red Cross. The second led to the first Geneva Convention concerned with the Relief of the Wounded and Sick of Armies in the Field.

The Convention of 22 August 1864 was the foundation of contemporary international humanitarian law. From that time to this the further development of that law has proceeded in symbiotic relationship with the development of the functions and activities of the Red Cross. It is 135 years since the International Conference met in Geneva on 8 August 1864 which led to that first Geneva Convention of 22 August 1864.

This first Convention contained only 10 Articles. The four Conventions of 1949 contained a total of 486 Articles, including appendices. Over that period, similar explosion has occurred for the statutes with which I deal on a daily basis as a Judge. It is by no means clear that this constitutes progress.

The original instrument of August 1864 was revised in 1906 and 1929, by Conventions respectively concluded at Geneva. However even the 1929 Convention proved deficient to deal with the practice of warfare during the Second World War. Accordingly the Geneva Conference of 1949 adopted a new

Convention on the subject of military wounded.

The second Convention of 1949 provided protection to wounded and sick and shipwrecked members of armed forces at sea. After an unsuccessful attempt in 1868, the principles of the 1864 Convention with respect to armies in the field were adapted to maritime warfare in the Convention signed at the first Hague Conference of 1899. That was revised in 1907. Notwithstanding attempts to further amend these provisions in the light of the 1929 revisions to the original Convention, only drafts of the amendments existed prior to the Second World War. A new more elaborate Convention was adopted in 1949.

The third Convention of 1949 was concerned with protection of prisoners of war. The humanitarian impulse had led to the Hague Regulations following the Hague Convention of 1907. The experience of World War I led to the adoption of a detailed code of provisions in a Convention adopted by the conference in Geneva in 1929. Changes in the structure and process of modern warfare reflected in the Second World War led to the revision in the third Convention of 1949.

The nature of progress in the area can be readily seen from this history. The process extended humanitarian principles, from time to time, to new categories of victims of war. The development of modern warfare and the particular horrors of the Second World War had established beyond question the need for humanitarian protection of civilians. The fourth Geneva Convention on the Protection of Civilian Persons in Time of War is the most novel of the four Conventions, the Anniversary of which we commemorate today.

Preparatory work had gone on for some time particularly in the form of a draft Convention at the 15th International Red Cross Conference held in Tokyo in 1934. This, together with drafts of amendments to the other Conventions had been placed on the agenda of a Diplomatic Conference called by the Swiss Government for the beginning of 1940. The outbreak of war led to the abandonment of this event. Its progress had to await the Conference held in Geneva between 21 April and 12 August 1949.

Proposals that the 1949 Conventions would lead to a composite Convention for the Protection of the Victims of War did not eventuate. However the commonality of the four Conventions that were adopted at that time is reflected in the fact that they have certain common Articles. One of the common Articles extends Convention rules not only to declared wars but to "any other armed conflict". Another establishes the applicability of a minimum of humane treatment for "armed conflict not of an international character". However, in 1949 States were not prepared to allow international law to intrude upon their own sovereignty.

Accordingly breaches of the moral principles in the case of domestic armed conflict were not subject to international enforcement. The regime focused on "grave breaches" from which these internal State conflicts were exempt. Nevertheless, common Article 3 represented a significant declaration of humanitarian principle applicable even to civil wars.

It is in the area of enforcement of international humanitarian law that hopeful signs have recently emerged. The occasions for international co-operation have expanded since the conclusion of the Cold War.

For the first time since the Nuremberg Trials and the Tokyo Trials in the immediate wake of the Second World War, the international community has created an international enforcement process.

First, in 1993, by resolution of the Security Council there was established the International Criminal Tribunal for the Former Yugoslavia. Then, in 1994, also by resolution of the Security Council there was created the International Criminal Tribunal for Rwanda following the mass murders of that Nation's civil war.

The test case for this new tribunal system involved Dusko Tadic, a Serb nationalist from Bosnia-Herzegovina who was eventually sentenced to 20 years imprisonment for his involvement in the brutalities of ethnic cleansing amongst his Muslim neighbours.

One of the judges in the initial hearings was our own Sir Ninian Stephen.

The Tribunal was limited in its application of the 1949 Geneva Conventions which, in their terms apply sanctions only for the particular list of allegations described as "grave breaches" which, relevantly, are confined to "armed conflicts" which are "international". Accordingly, a number of alleged breaches of these conventions were dismissed on the basis that Tadic's conduct occurred during a civil war. The Tribunal was convinced that the Bosnian Serb forces were allies not agents of an international power, namely Milosevic's Serbia. On that basis there was no "international conflict". The prosecution appealed. A month ago, on 15 July this year, the Appeals Chamber allowed the appeal and found Tadic guilty of "grave breaches" of the Geneva Conventions for his treatment of civilians.

On 17 July 1998 there occurred in Rome, an event of great international potential. 120 Nations voted to adopt a statute creating an International Criminal Court. This is not the occasion to delve into the detail of difficulties of interpretation and the compromises involved in developing an international regime of this character. Nor to speculate on the outcome of a process which has just commenced. It is sufficient to acclaim the result of a project that has been on the minds of jurists for over a century and actively pursued on the UN agenda for the last 10 years.

It is likely that there will now be a permanent International Criminal Court. Criticism of the Nuremberg trials by reason of the element of retrospectivity will no longer be valid. The process of resolving the conflicting claims of the rule of law and the sovereign independence of Nations will be a continuing one. Many issues of jurisdiction and procedure remain to be resolved. Nevertheless, there is reason to welcome the real progress made in the application of legal principles to control crimes against humanity and war crimes.

A particularly dramatic example of the change in the international environment in this regard occurred on 24 March 1999. On that day the House of Lords ruled that the Torture Convention, to which the United Kingdom was a party, had taken away from General Pinochet the sovereign immunity from prosecution which he had enjoyed as a Head of State. Accordingly he faces the prospect of extradition to Spain. On that same day NATO commenced its bombing campaign against the sovereign state of Yugoslavia in response to the Serbian atrocities in the province of Kosovo. A primary motivation for that intervention was humanitarian. Kosovo has no oil. Although the decision of the House of Lords was a legal remedy, the intervention in Kosovo indicates the limitation on legal remedies.

Marcus Tullius Cicero said 2,000 years ago: "In the midst of arms, law stands mute." The Geneva Conventions of 1949, the 50th Anniversary of which we commemorate today, constitute one of the most significant landmarks on the road that has been taken to render this dictum wrong.

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The Medico-Legal Society of New South Wales Annual General Meeting

**The Honourable JJ Spigelman
Chief Justice of New South Wales**

6 August 1999

The theme I wish to develop with you this evening is the common bond that medicine and law have as professions, in the light of contemporary challenges to the role of, perhaps the very concept of, a profession. Some of you may have attended the Legal and Medical Conference earlier this year at which Chief Justice Gleeson spoke on the subject "Are the Professions worth Keeping?". His Honour concluded:

"The idea of professionalism is as important now as it ever was ... The status of a profession should not be a badge of exclusivity. Rather, it should be seen as an acceptance of responsibility, and encouraged. Provided they understand the reason for their existence, and accept that the public interest is the ultimate test of the legitimacy of their practices, the professions are more necessary than ever, and well worth keeping."

I commend his Honour's speech to those of you who may wish to pursue the matter further. This evening I wish merely to highlight one or two aspects of the themes developed more fully in that paper.

His Honour began with the pressures, common to both the legal and medical professions, which seem to drive practitioners in the direction of treating their activities as merely a business. The use of commercial criteria as an exclusive measure of value is perhaps the most distinctive feature of this, aptly called, American century. Commercialism is the most prominent phenomenon of that nation's culture - I use the term in its widest sense.

The application of commercial values to everything - the concept that everything is for sale - is most dramatically manifest in the physical structure of our cities. In the immediately preceding centuries the dominant buildings in any urban area were public buildings: a parliament house, a town hall, a cathedral. Today all these buildings are dwarfed by commercial office blocks. Increasingly public functions are performed in such towers distinguishable, if at all, only by their banality.

It is inevitable that forces of such strength will impinge on all traditional modes of behaviour, including that of the professions. They do so in many different ways. The pressure of judging everything by economic values is one that ought be resisted. Economic criteria are of course relevant. They do not however constitute the only values which we profess as a society.

In the case of the medical profession, the healing of the individual body or mind has value irrespective of its economic consequences. So for the legal profession, truth, justice and fairness are matters which demand primary consideration.

I am reminded in this respect of the ardent micro-economic reformer who noticed that a string quartet performs a work by Mozart in exactly the same time in 1999 as it was performed in 1799. In short there had been no increase in productivity for 200 years. This reformer, sure that a great scandal had been discovered, in the form of a collusive arrangement amongst professional musicians, referred the matter to the competition regulator. Some commentary on the legal system discloses a similar approach to life. So does some commentary on medical practice. Some things take time. Justice is one of them. Healing is another.

The pressure of commercialisation has substantial impetus in both professions - not least the impetus of greed. However, that sin is now validated in a regulatory culture which assumes that "greed is good".

Both the medical and legal professions are being driven in a direction which emphasises the significance of economic factors, particularly by their joint subjection to the co-operative scheme of the Commonwealth and State Governments reflected in the Competition Principles Agreement. The regulation of each profession is now subject to a primary criterion of competition policy. What was hitherto regarded as the primary aspect of the relationship between the professional and his client or patient - namely a personal bond, created in a context of a high degree of personal responsibility - is apparently to be replaced by a primary bond of impersonal market forces.

There can be no doubt that competition operates in the public interest and that many past aspects of professional practice could not be justified as being in the public interest. Too much of professional self-regulation was exposed to be purely protectionist. Nevertheless, there is an element of monomania about the application of competition policy to the professions, which renders it suspect.

I acknowledge, as Chief Justice Gleeson acknowledged in the speech to which I have referred, that increased competition amongst professionals is a good thing, that it can serve the public interest and that many of the changes that have been introduced under the spur of competition policy have been positive. There are however limits to the efficacy of this approach which are not always recognised.

One of the primary difficulties in the provision of legal services concerns the frequency with which there appears to be no rational or reasonable proportionality between the costs of legal services and the value of what is involved. A similar issue arises with respect to the problem of overservicing in the context of medical practice. There are limits to the ability of a market based approach to control such matters.

As Chief Justice Gleeson noted in his speech:

“Consumers of professional services are often not well placed to decide for themselves the extent of their need for services. Consider, for example, in the area of medical practice, the matter of diagnostic services. How is competition likely to prevent over servicing? How can patients, as consumers, make a judgment as to their need for diagnostic services? In the area of legal practice ... even the most sophisticated client is likely to be at a disadvantage in making a judgment about the reasonableness of the time spent by the solicitor on various aspects of the case.”

Economists would call this “market failure”. Let me pursue this perspective of micro-economics. In a market for medical or legal services in which knowledge were perfect, clients or patients would ensure that the costs of litigation or medical service would be minimised and that the costs would be reasonably proportionate to the value to them of the legal service or the medical procedure. How is a litigant to know whether the time and effort expended on discovery was necessary? Or whether the often substantial photocopying bill had to be incurred? All of this is exacerbated by the in-built conflict associated with the ubiquity of time based charging and the tyranny of billable hours. The inadequacy of information available to clients and patients about the relevant legal or medical knowledge and about the skills of their lawyers or doctors, prevent them exercising control over the market for these services in this way.

Although many steps can be, and are being, taken to improve consumer information, there are limits to what can be done. For this reasons professional standards have a role to play which cannot be performed by market place competition. As Chief Justice Gleeson said:

“The constraint upon the pursuit of self-interest which is an essential aspect of professionalism also provides a necessary form of protection for consumers of services.”

The proposition was well put by Justice Sandra Day O'Connor in the Supreme Court in the United States when her Honour said:

“One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of

*restraining lawyers in the exercise of the unique power that they inevitable wield in a political system like ours ... Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arms length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subject to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialised knowledge that these professionals possess.” (See *Shapero v Kentucky Bar Association* (1988) 486 US 466.)*

One of the important restraints on professional conduct to which her Honour went on to make reference was the restriction on advertising and solicitation which she described:

“... as a concrete, day-to-day reminder to the practising attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other.”

Her Honour went on to qualify these remarks by indicating that some degree of advertising was appropriate and would provide the advantages of competition. Nevertheless there are indications in the United States legal profession, though not yet in the Australian legal profession, that the removal of restraints on advertising fails to serve the public interest.

There is some suggestion that the medical profession, even in Australia, has already suffered from the removal of restrictions on advertising particularly in such areas as treatment for bladder problems, impotence, anxiety, penile enlargement, cosmetic surgery, tattoo removal and laser treatment. The pressures from national competition policies have required medical regulatory authorities to lift restrictions on advertising services, which medical entrepreneurs who are profit driven and dependant on high turnover, may have been taken too far.

There is no evidence that the regulation of truth in advertising is conducted more effectively by the general law, through bodies such as the Australian Competition and Consumer Commission, than it would have been through restraint by professional regulation. We have yet to see whether sufficient resources will be available to prevent the occurrence of the kinds of abuses that sometimes attend promotional conduct, abuses which did not occur when advertising was regulated by professional standards.

The common law has seen off earlier waves of monomania. In the past it came in the guise of religion - once as the divine right of kings. The secular religion of commercialism has had many victories in recent years. Nevertheless, it is incumbent on those of us who represent other values to emphasise the significance of what may be lost through such monomania.

In the context of the legal profession it is important that we emphasise the duties which legal practitioners have to the Court such as the duty not to mislead the court; the duty not to commence or pursue proceedings which do not have reasonable prospects of success; the duty not to assist any form of improper conduct; the duty to conduct cases efficiently and expeditiously; the duty to refrain from making allegations of impropriety against any person, without due cause. These duties apply irrespective of the wishes or interests of a client or, indeed, his or her enthusiasms and, accordingly, they apply irrespective of the indirect financial interest of the practitioner, based on the interests of wishes of the client.

By emphasising the ethic of service, professions indicate that their basic organising principle is not merely one of commercialism. A diversity of organising principles is as important to the health of our society as bio-diversity is to our ecology. In maintaining such diversity, the medical and legal professions can and should play a leadership role. They can do so only by reaffirming the traditional values of professionalism, particularly the ethic of service - honesty, fidelity and diligence - above self interest, specifically commercial advantage.

As Proust once said about professions:

“Just as those who practise the same profession recognise each other instinctively, so do those who practise the same vice.”

That comment does not only contain an analogy. It also contains a distinction, which it is important to maintain. We can do so by recognising the force of the commercial imperative and, whilst abjuring nostalgia, rearticulating the value of the traditions we jointly and severally inherit.

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Sentencing Guidelines Judgments

Address to the National Conference of District and County Court Judges

The Honourable JJ Spigelman
Chief Justice of New South Wales

24 June 1999

The New South Wales Court of Criminal Appeal has established a formal system of guideline judgments ([Jurisic \(1998\) 45 NSWLR 209](#); [Henry \(1999\) NSWCCA 111](#)). This represents a significant development in this State with respect to the exercise of discretion by sentencing judges, a context which is, perhaps, the most controversial single area of judicial decision-making.

The new system of guideline judgments has been well received by the public. It has also been well received in legal commentary[1]. It is not a universal rule of human behaviour that persons who have a discretion invariably welcome what may be regarded as confining their exercise of it. However, insofar as I have received commentary from trial judges that has also been supportive. It may be that this is on the Mandy Rice Davies principle - "They would say that, wouldn't they".

The guideline judgments system has emerged in a context in which there has been a significant public debate about the introduction of various forms of legislative prescription which would significantly confine the exercise of sentencing discretion. This includes the introduction of minimum sentences or of a detailed matrix or grid for sentencing.

The introduction of legislation of this character in Western Australia last year, led to the preparation of a condemnatory report by the Chief Justice of Western Australia, with what was described as "the express and unanimous support and concurrence of the judges of the Supreme Court and of the District Court", although in one particular respect, on behalf of the judges of the Supreme Court only. This report was tabled in Parliament pursuant to the provisions of s144(1) of the [Sentencing Act 1995 \(WA\)](#) [2]. The report condemned the proposals as imposing an unreasonable fetter on the sentencing discretion.

We have been here before. I am indebted to his Honour Judge Greg Woods QC, of the District Court of NSW, who has drawn my attention to the Criminal Law Amendment Act (NSW) of 1883. That Act of the New South Wales Parliament created a sentencing structure with five distinct steps or categories, with both minimum and maximum sentences. That scheme led to palpable injustices so that, with respect to one case, the Sydney Morning Herald editorialised on 27 September 1883:

"We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion."

After such inequities were clearly established, the scheme was abandoned by statute a year after its introduction. Today's Northern Territorians are made of sterner stuff.

Consideration has been given to an argument that there exist constitutional limitations on the ability of a State Parliament to imposing minimum penalties or a sentencing grid system [3]. This argument is based on an application of the reasoning of the High Court in [Kable v Director of Public Prosecutions](#) [4] which recognised restrictions on the ability of the State Parliaments to require the State Courts to operate in a way which would be incompatible with their role under the Constitution of the Commonwealth, as repositories of federal judicial power.

However, it is clear that a State Parliament may impose on its Courts any regime which the Commonwealth could impose on Commonwealth courts, consistently with the requirements of Chapter III of the [Constitution](#)[5]. There is clear authority in the High Court that the Commonwealth

can prescribe a minimum penalty for a Commonwealth offence[6]. The argument has not been successful in a challenge to the minimum sentencing legislation of the Northern Territory[7]. Similar constitutional arguments have proven unsuccessful in other jurisdictions[8].

Discretion

As I emphasised in my judgments in [Jurisic](#) and [Henry](#), guideline judgments are a mechanism for structuring discretion, not for restricting discretion. The continued existence of sentencing discretion is an essential component of the fairness of our criminal justice system.

Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice. Guideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing.

The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice - do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.

Centuries of practical experience establish that the multiplicity of factors involved in the sentencing task require the exercise of a broad discretion, which is best conferred on trial judges. That is why the promulgation of guidelines must not be inconsistent with the existence of a sentencing discretion. We must strive for both consistency and individualised justice.

Sentencing guidelines as promulgated by the NSW Court of Criminal Appeal are not binding in a formal sense. They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure[9].

The appropriateness of an appellate court establishing guidelines has been authoritatively established in [Norbis v Norbis](#) [10], in which the High Court held that the promulgation by the Full Court of the Family Court of guidelines with respect to the exercise of statutory discretions by trial judges was justified. I have summarised this line of authority in my judgment in [Henry](#) [11].

Justices Mason and Deane, in a joint judgment in [Norbis](#), gave compelling reasons for the appropriateness of guidelines:

"... it does not follow that, because a discretion is expressed in general terms, Parliament intended that the court should refrain from developing rules or guidelines affecting its exercise. One very significant strand in the development of the law has been the judicial transformation of discretionary remedies into remedies which are granted or refused according to well settled principle. It has been a development which has promoted consistency in decision-making and diminished the risks of arbitrary and capricious adjudication.

.....

The point of preserving the width of the discretion which parliament has created is that it maximises the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines ... To avoid the risk of inconsistency and arbitrariness which is inherent in the system of relief involving a complex of discretionary assessments and judgments, the Full Court, as a specialist appellate court with the unique experience in family law in this country, should give guidance as to the manner in which these assessments and judgments are to be made. Yet guidance must be given in a way that preserves, so far as it is possible to do so, the capacity of the Family Court to do justice according to the needs of the individual case, whatever its complications may be." [12]

This reasoning is equally applicable to the exercise of the sentencing discretion.

There was a suggestion in the judgment of Justices Mason and Deane in [Norbis](#) that there may be circumstances in which it was appropriate for an appellate court to lay down a guideline, even with respect to a statutory discretion, which was in the nature of a binding rule of law. On that basis, failure to apply the guideline could itself constitute a legal error, which would justify an appellate court interfering with the exercise of the discretion. For the reasons I gave in my judgment in [Henry](#), I am of the view that the balance of authority strongly indicates that this is not so[13].

The decision in [Henry](#) establishes for New South Wales, that failure to sentence in accordance with a guideline is not itself a ground of appeal. Nevertheless, where a guideline is not to be applied by a trial judge, the appellate court expects that the reasons for that decision be articulated[14].

Consistency

Just as the sentencing task involves the weighing of incommensurable and sometimes contradictory objectives, so the appellate task involves balancing the objectives of individualisation of a sentence against the requirement of consistency. Perhaps more than any other factor, it is the need for consistency in judicial decision-making which justifies appellate courts laying down guidelines for the exercise of discretion by trial judges. The cases in the various areas of the law which approve guidelines, referred to in [Henry](#) [15], refer to this factor.

Allegations of inconsistency are not always well informed[16]. Nevertheless inconsistency in sentencing can and does occur. By inconsistency I do not mean only that individual judges have different penal philosophies. This is not a bad thing in a field in which, as Sir Frederick Jordan once put it: "The only golden rule is that there is no golden rule"[17]. In this regard, judges reflect the wide range of differing views on this very matter that exists in the general community. However, there are limits to the permissible range of variation.

There is one significant impediment to the ability of our traditional system of appeals achieving the objective of consistency. Our system of appeals operates in a distinctly different way with respect to appeals against severity, from the way it operates with respect to Crown appeals against leniency.

Wherever a trial judge sentences in a manner that can be described as inconsistent with that of other trial judges by being too harsh, the appellate court will correct the error without any restraint on its doing so. In the case of Crown appeals however, there are significant restraints which do not operate in the case of severity appeals[18].

Crown appeals are said to be comparatively infrequent, though perhaps less so now than hitherto. There remain significant, and entirely appropriate, inhibitions on Crown law officers initiating appeals at all. If they are lodged, appellate courts approach such appeals with the application of the principle of double jeopardy. There are hurdles which the Crown has to overcome, before the court will interfere with an exercise of discretion that is said to be too lenient, which do not need to be overcome in the case of interference with the exercise of discretion said to be too harsh. In this context, it becomes even more important than usual, that we do what we can to minimise the need for appeals. Guideline judgments may assist in this regard.

No-one doubts the significance of consistency in decision-making in this very difficult and sensitive area. That significance was well expressed by Sir Anthony Mason, when his Honour said:

"Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice."[19]

Consistency in sentencing does not simply impinge on the criminal justice system. By reason of the public prominence of the issues that arise, consistency in sentencing serves a high constitutional purpose: the maintenance of the rule of law.

Leniency

Issues of inconsistency in sentencing must be distinguished from allegations of systematic excessive leniency. Plainly where such is established, it may call for a sentencing guideline of the character I

have identified. The Court of Criminal Appeal did detect a pattern of leniency in both *Jurisc*[20], with respect to the offence of dangerous driving causing grievous bodily harm or death and in *Henry* [21], with respect to the offence of armed robbery.

In *Jurisc* the Court referred to a long list of invariably successful Crown appeals for the relevant offence. It appeared to the Court that the Parliamentary intention reflected in significantly increased maximum penalties, which the Court of Criminal Appeal had said a number of times should lead to a "sharp upward" movement in sentences, had simply not been implemented.

In *Henry*, the statistics indicated that non-custodial sentences for armed robbery were common. This contrasted with a long line of appellate authority which stated that such sentences should be rare. Nevertheless, on other aspects of sentencing for armed robbery trial judges would have found it difficult to reconcile decisions of the Court of Criminal Appeal. One of the functions of a guideline judgment, as shown in *Henry*, is to prevent inconsistency at an appellate level also.

Justice Wood, Chief Judge at Common Law, said in an address to the Annual Conference of the District Court of NSW in April, that one reason for promulgating a guideline judgment is:

"it becoming apparent that sentencing judges are merely paying lip-service to pronouncements by the Court of Criminal Appeal as to sentencing policy in a particular area of criminality, and are possibly relying on: the reluctance of the Crown to appeal against sentence; or upon the discretion traditionally exercised by the Court of Criminal Appeal in declining to interfere in such matters; or upon the double jeopardy principle, in those cases where it does intervene; to produce a less severe sentence than that properly called for." [22]

Where it becomes apparent to a Court of Criminal Appeal that a particular judge is behaving in this way, it is open to the appellate Court to approach that judge's sentences without the usual inhibitions on intervening with the exercise of discretion and to suspend the double jeopardy principle in such a case. A guideline judgment system appears to me to be preferable to such a course.

The sine qua non of the ability of the Court of Criminal Appeal in New South Wales to assess sentencing practice for the purpose of determining the need for a guideline judgment is the systematic collection of sentencing statistics by the Judicial Commission of New South Wales of a comprehensiveness that is not readily available in all Australian states. In 1989, the Australian Bureau of Statistics ceased publishing detailed sentencing statistics for higher courts in Australia. Since that time, sources of information have not been adequate in some States. I am aware that the judiciary in those States has been urging the collection of such statistics. I confirm that the absence of such comprehensive information makes it extremely difficult to ensure consistency in sentencing practice. A system of guideline judgments would be virtually impossible.

I do not need to tell this audience that allegations of systematic leniency in sentencing decisions, which so frequently appear in the media, is often not well informed criticism. That is not to say that there are not occasions when public criticism of specific sentences for leniency is justified. There are such examples and, for the reasons I have mentioned, they are not always able to be cured by appellate courts.

Part of the role of sentencing guidelines is to reinforce public confidence in the administration of justice. Indeed the experience in New South Wales is that the very announcement of a system of sentencing guidelines by the Court of Criminal Appeal has, of itself, had an announcement affect on public perception on questions of both leniency and inconsistency, in such a way as to enhance public confidence in the criminal justice system.

One of the tasks that courts, and others responsible for the administration of the criminal justice system, must undertake is public education of what sentencing practices actually are. There is no doubt that the occasional inadequate sentence receives much more significant public exposure through the media than the continuing, day in and day out, imposition of sentences that are generally regarded as correct and, therefore, pass without comment.

Research throughout the western world has indicated that there is a widely held belief that sentences actually imposed are not commensurate with the seriousness of the crimes for which they are imposed [23]. However, there are now numerous studies which show that the public opinion expressed

in polls, through the media and talk back radio and various other expressions of public opinion, are often ill informed. The belief that there exists a significant disparity of a systematic character between actual sentencing practice and what the public see as appropriate sentences, is wrong. More detailed and sophisticated methods of gauging popular opinion suggest that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentences actually imposed or, at least, to express the opinion that they are lenient to a significantly lesser extent than answers to general, undirected questions would suggest.

This is true of research in the United States[24], in the United Kingdom[25] and in Canada[26]. These studies have been replicated in Australia with generally similar results[27].

A good example of such research was conducted by the Royal Commission on Criminal Justice in the United Kingdom, which asked 2,300 jurors what they thought about the sentence passed in the case in which they served. About a third said they had no expectation. Almost a third said that the sentence was as they had expected. The remaining one third was divided between those who thought it was more severe than they expected (14%) and those who regarded it as less severe (23%)[28].

This discrepancy between public perception and the reality of sentencing practice exists. The public interest would be served by minimising that discrepancy. The public response to the system of guideline judgments in New South Wales, suggests that such judgments may help to bring public perception into line with actual practice.

Deterrence

Another function performed by the promulgation of guidelines is that of deterrence. The public at large and potential offenders in particular, should know in advance that offences of a particular kind are likely to lead to a particular level of sentence. This is often said to be an advantage of a minimum sentence regime or of grid sentencing. It is apparent that the publication of maximum sentences does not perform a substantial deterrent function, as the relationship between maximum sentences and actual sentences is not sufficiently clear.

There is a considerable debate about the deterrent effect of sentences and, particularly, of marginal increases in sentences. That penalties operate as a deterrent is a structural phenomenon of our criminal justice system. For reasons I analysed in [Henry](#) [29], the courts must continue to act on the basis that punishment deters and that, within limits of tolerance, increased punishment has a corresponding effect by way of deterrence. This is a structural feature of the common law, in its application to criminal justice. Legislation would be required to change the traditional approach to this matter.

However, deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice. Guideline judgments are a mechanism of increasing the efficiency of the transmission of such knowledge.

Guideline Judgments

Guideline cases are judgments that go beyond the point raised in the particular case to suggest a sentencing scale, or appropriate starting point, in one or more commonly encountered factual situations.

As I emphasised in my judgment in *Jurisc*, the statement of guidelines in a quantitative form is a development of what appellate courts have long done by way of statement of sentencing principles. I set out in *Jurisc* the range of cases in which the New South Wales Court of Criminal Appeal had previously indicated circumstances in which a custodial sentence would usually be appropriate and cases in which the court had stressed that the length of imprisonment should be substantial[30]. However, the laying down of guidelines and sentencing principles in the traditional manner, does run the risk that the guidelines will be overlooked.

As the Honourable Justice Wood, Chief Judge at Common Law said in [Jurisc](#):

"The court has...over the years endeavoured to lay down sentencing principles for particular classes of cases where sentences reflecting a significant element of general deterrence are required, or where non-custodial options are inappropriate. It appears that sometimes these principles are lost or that their significance is overlooked, in the volume of appellate decisions handed down and in the pressures imposed on trial courts to dispose of the increasingly busy criminal lists." [31]

Formally labelling particular judgments as "guideline judgments" will reduce the possibility of oversight.

Two kinds of systems of guideline judgments have emerged in different jurisdictions. The first is a system in which the appellate court establishes a guideline of a prescriptive character. The second, is a system in which the appellate court purports to derive a range or "tariff" from the actual sentences of trial judges. The former, I have called 'top-down' sentencing guidelines, and the latter, 'bottom-up' sentencing guidelines.

The most well developed system of guideline judgments is in England, where the system was initiated in the 1970's by the English Court of Appeal (Criminal Division) under Lord Justice Lawton and further developed by Lord Chief Justice Lane. The usual English guideline judgment does two things: First, it sets a tariff or sentencing range for a particular offence and, secondly, it differentiates between, and analyses, aggravating and mitigating factors in relation to a particular type of offence. Guidelines have been for particular offences[32], or for type of penalty[33], or for the type of offender[34]. Sometimes, a quantitative measure is not appropriate because of wide variations in the circumstances of an offence e.g. burglary or manslaughter[35]. In such cases the guidance is in the form of consideration of aggravating and mitigating factors.

In Canada, the courts have developed, in certain specific cases, a prescriptive approach to guidelines. The Supreme Court of Canada has affirmed the appropriateness for a criminal appellate court to lay down guidelines in the nature of a starting point for sentencing of a particular offence[36]. The majority judgment was delivered by McLachlin J. Her Ladyship said:

"The traditional notion that sentencing is primarily a matter of impression for the sentencing judge and only secondarily a matter of principle, began to be questioned by the Courts in the mid 60's. Behind the challenge lay increasing recognition that some measure of uniformity was essential in a sentencing process that was not only just, but was seen to be just."[37]

In New Zealand, sentencing guidelines are of the bottom-up variety i.e. a synthesis of pre-existing first instance sentences, rather than a guideline as to what is appropriate[38].

In Australia, the Supreme Court of South Australia has promulgated sentencing standards, in particular cases, which are recognisably prescriptive i.e. of a top-down character[39].

In Western Australia, the Court of Criminal Appeal has provided sentencing guidelines in a 'bottom-up' fashion derived from sentences actually imposed by trial judges[40].

Henry summarised the guidelines that had been developed in all these jurisdictions, and some other jurisdictions, for the offence of armed robbery. Although differences in remissions sometimes make comparisons difficult, it proved a most instructive review for the formulation of a guideline for New South Wales with respect to that offence.

A Legislative Scheme

By way of reaction to [Jurisic](#), the New South Wales Parliament inserted a new Part 8 into the [Criminal Procedure Act 1986](#). This part provides for the Attorney General to apply to the court to give a guideline judgment. Subsection s26(2) specifies that:

"An application may be made with respect to sentencing of persons found guilty of a particular specified indictable offence or category of indictable offences and may include submissions with respect to the framing of the guideline."

Such applications would not extend to requesting guidelines for types of offender or types of penalty, as the English Court of Appeal has done on occasion.

The legislation expressly envisages the continuation by the Court of the formulation of guideline judgments without any form of application by the Attorney General (ss26(4), 28(a)). The Court is not obliged to issue any guideline, even after application, unless it believes it appropriate to do so ([s28](#)

(b).

During the course of the campaign for the recent State election, the Government, as part of its platform, undertook to apply to the Court of Criminal Appeal for guideline judgments in the following cases: "Break enter and steal, home invasion, drug importation, child sexual assault, sexual assault and high range drink driving offences".

With respect to all but one of these matters, cases involving either severity or Crown appeals against sentence are regularly before the Court of Criminal Appeal. It is my intention, if feasible, to list any application made under [s26](#) of the [Criminal Procedure Act 1986](#), together with actual cases involving real factual situations.

One of the matters with respect to which the government has indicated it will apply to the Court of Criminal Appeal is "high range drink driving" offences. These are not appeals that come to the Court of Criminal Appeal. They are heard in the District Court. Special arrangements for informing the Court will need to be made with respect to this application, if it is received.

In the normal course, the Commonwealth Director of Public Prosecutions would apply for a guideline with respect to Commonwealth offences. One of the matters which the New South Wales Government indicated it would refer to the Court of Criminal Appeal under s26 of the Criminal Procedure Act, is the offence of drug importation. That is a Commonwealth matter. It may be that this application, if and when received, will raise a Constitutional question.

In any event special consideration will arise in deciding on the feasibility of a guideline judgments system for Commonwealth offences. Section 16A of the [Crimes Act 1914 \(Cth\)](#), formulates a principle of general application and a list of factors required to be taken into account on the sentencing task. The application of the reasoning in *Norbis* may arise directly.

In the future it may very well prove to be the case that applications for guideline judgments come from the defence side of the record. In New South Wales this is feasible because of the existence of a Public Defender, although it is a function that can be performed also by the Legal Aid Commission. The capacity of the Public Defender is acknowledged in [s26](#) of the [Criminal Procedure Act](#).

English guideline judgments have encompassed the identification of situations in which custodial sentences should not be regarded as appropriate. Guideline judgments do not operate in one direction only. The pressures of an ever increasing prison population may well justify a systematic consideration of the need for custodial sentences for a range of offences, as has happened in England.

The experience of the Court in *Henry*, involving the consideration of seven separate cases for the offence of armed robbery, being six Crown appeals and one severity appeal, was particularly gratifying. The interaction between the Court and the range of counsel, for the Crown and those representing offenders in a significant number of different factual situations, proved to be particularly successful in the conduct of the policy inquiry required for formulation of guidelines. The system of guideline judgments enabled all relevant parties to approach preparation with a degree of comprehensiveness that would usually be difficult to justify. The quality of the materials presented to the Court, and of the oral argument, was very high.

It is reasonably clear that in the near future, the Court of Criminal Appeal of New South Wales will devote considerable effort and energy to determining whether or not guideline judgments are appropriate in a number of different spheres of sentencing. As I said in [Jurisic](#) [41], such guidelines should be recognised as having a useful role to play in maintaining an appropriate balance between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the need for consistency in sentencing and the promotion of public confidence in the administration of justice, on the other hand.

Endnotes

1 "Sentencing: guideline judgments" (1998) 10 Judicial Officers' Bulletin 67; E. McWilliams "Sentencing guidelines: who should be the arbiter, the judiciary or parliament?" (1998) 38 Law Society Journal 48; H. Donnelly, " Guideline judgments: from tariffs to starting points" (1998) 5 Criminal Law News 93; P. Young "Guideline judgments in criminal appeals" (1999) 73 ALJ 13; D. Spears "Structuring Discretion: Sentencing in the Jurisic Age" (1995) 5 UNSW Law Journal 18; N. Morgan & B. Murray "What's in a Name? Guideline Judgments in Australia" (1999) 23 Criminal Law Journal 90.

2 Report to Parliament by the Honourable David K Malcolm AC, Chief Justice of Western Australia: Sentencing Legislation Amendment and Repeal Bill 1999 and Sentence Administration Bill 1999 (25 November 1998).

3 Flynn "Fixing the Sentence: Are there any constitutional limits" (1999) 22 UNSWLJ 280.

4 [\(1997\) 189 CLR 51](#).

5 See [H A Bachrach Pty Limited v Queensland \(1998\) 72 ALJR](#) 1339 at par 14

6 Frazer Henleines Pty Limited v Cody (1945) 70 CLR 100 at 121-122; [Palling v Corfield \(1970\) 123 CLR 52](#) at 58, 64 and 68.

7 Wynbyne v Marshall (1997) 117 NTR 11; special leave refused 21 May 1998; see also Johnston & Hardcastle "State Courts: The limits of Kable" (1998) 20 SydLR 216 esp at 234-235.

8 See Hinds v R (1977) AC 195; Gereau v Director of Public Prosecutions (1986) LRC (Crim) 3 esp at 10-11. See also Moffat (1998) 2 VR 229 esp at 237, 251 and 258; Ali v R (1992) 2 AC 93 at 101-102.

9 See eg [Jurisic](#) at 220-221; [Henry](#) [29-31]; R v De Havilland (1983) 5 CrAppR(S) 109 at 114.

10 [\(1986\) 161 CLR 513](#).

11 supra [13-31].

12 (519-520).

13 See [Norbis](#) supra 536, 538; Shreeve v Martin (1969) 72 SR(NSW) 279 at 290; FAI Insurances Limited v Goldleaf Interior Decorators Pty Limited (No 2 (1988) 24 NSWLR 644 at 661; [Latoudis v Casey \(1991\) 70 CLR 534](#) at 558-559; Leighton Contractors Pty Limited v Kilpatrick Green Pty Limited (1992) 2 VR 505 at 516-517; Maysell v Transport Industries Insurance Co Limited (1995) 2 VR 328 at 334-335; [Oshlack v Richmond River Council \(1998\) HCA 11](#); 72 ALJR 578; 152 ALR 83 [35 and 134]; Bini (1994) 68 ALJR 859; McDonnell (1997) 114 CCC (3rd) 436 at pars 32-34; 100; 109.

14 See [Jurisic](#) pp15-16; [Henry](#) [29-31].

15 At [8].

16 See eg Sir Guy Green "The Concept of Uniformity in Sentencing" (1996) 70 ALJ 112.

17 Geddes (1936) 36 SR(NSW) 554 at 555.

18 See e.g. [Griffiths v The Queen \(1976\) 77 137 CLR 293](#) at 310; Tait & Barkley (1979) 46 FLR 386 esp at 388; Allpass (1994) 73 ACrimR 561 at 562-563.

19 [Lowe \(1994\) 154 CLR 606](#) at 610-611.

20 supra at 229-230.

21 supra at [100-110].

22 Wood "Sentencing Review" 1999 11 Judicial Officers' Bulletin 33 (June 1999)

23 See eg Roberts & Stalans "Public Opinion Crime and Criminal Justice" (1997).

24 See Roberts & Stalans supra p210; Thomson & Ragona "Popular Moderation v Governmental Authoritarianism: An Interactionist view of public sentiments towards criminal sanctions" (1987) 33 Crime & Delinquency 337 esp at 338-339.

25 Ashworth & Hough "Sentencing and the Climate of Opinion" (1996) CrimLR 776.

26 Walker and Hough (ed) Public Attitudes to Sentencing (1988) Chapter 6

27 See Walker & Hough *ibid* Chapter 8; Indermaur "Public Perception of Sentencing in Perth Western Australia" (1987) *Aust & NZ Journal of Criminology* 163; Indermaur "Perceptions of Crime Seriousness and Sentencing" (November 1990).

28 See Zander & Henderson Crown Court Study Royal Commission on Criminal Justice Research Study No 19 (1993) par 8.8.3.

29 [204-211].

30 [Jurisic](#) at 217-219.

31 [Jurisic](#) at 233.

32 e.g. Billam (1986) CrAppR 347 (rape).

33 e.g. Bibi (1987) CrAppR 360 (imprisonment).

34 e.g. Upton (1980) 71 CrAppR 102 (non-violent petty offenders).

35 See Brewster (1998) 1 CrAppR 220 esp at 225-227.

36 See McDonnell (1977) 114 CCC 3(3rd 436; Bloos and Renk "Case Comment: Stopping Starting Points R v McDonnell" (1977) 35 Alberta LR 794; Ruby Sentencing (4th ed) 1994 pp481-482. See also the Canadian armed robbery cases collected in Henry at [140-144].

37 McDonnell *supra* par 65.

38 See e.g. Puru (1984) 1 NZLR 248; Te Pou (1985) 2 NZLR 580; Hall "Reducing disparity by judicial regulation: Sentencing factors and guideline judgments" (1991) 14 NZULR 208 at 223-224.

39 See *Police v Cadd* (1997) 94 ACrimR 466, esp at 479-480, 487, 490-491, 511 and 520. See also my discussion of the South Australian guidelines on armed robbery in [Henry](#) *supra* [250-158].

40 See e.g. Miles (1997) 17 WAR 518 and other armed robbery cases discussed in Henry *supra* [145-149]. The Western Australian Court of Criminal Appeal has express statutory authority to issue guidelines under s143 of the Sentencing Act 1995. It has not yet done so. See [Jurisic](#) 217.

41 at 220C.

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Magistrates' Institute of NSW Annual Dinner

THURSDAY, 3 JUNE 1999

ADDRESS BY THE HONOURABLE J.J. SPIGELMAN

It is an honour to be invited to attend this important gathering of the magistracy. I wish to take this opportunity of continuing the theme of emphasis on our traditions from my last public address. On 17 May this year, the Supreme Court of New South Wales celebrated the 175th anniversary of its foundation. At the ceremonial sitting of the Court to mark the occasion, I sought to emphasise just how old our basic mechanisms of governance are.

The Supreme Court of New South Wales is one of the oldest courts with a continuous institutional existence anywhere in the world. Australians like to think of ours as a young country, however, when it comes to the basic mechanisms of governance, this is not a young country, this is an old country. In a few years, we will celebrate 150 years of representative and responsible government. In 2001, we will celebrate the centenary of federation. Too many Australians seem to think that history is something which happened somewhere else.

One of the reasons why our basic institutions receive such universal acceptance and legitimacy is the fact that the traditions by which they perform their function are of such long standing.

The same is true of the magistracy. The first recorded meeting of magistrates in New South Wales occurred on 19 February 1788 in the case of *Mary Jackson*. Of course, in those days the magistracy exercised the functions of Justices of the Peace under the law of England. Initially, these were unpaid positions by which members of the upper classes maintained social order. As is well known, to a significant extent, Justices of the Peace continue to operate in this way in England. Amongst the original Justices of the Peace appointed in the First Fleet were the Governor, the Lieutenant Governor and the Judge-Advocate, by virtue of the Letters Patent of 2 April 1787. The magistracy in Australia developed in a different way from England. Our primary tradition here is derived from the stipendiary magistrates.

The creation of the Supreme Court 175 years ago made a significant difference to the magistracy. The *New South Wales Act* of 1823, an Act of the British Parliament, was the first written constitution in Australian history. It created the first Legislative Council, then a body of nominated members. It also created the Supreme Court. It invested the Supreme Court, for the first time, with the supervisory jurisdiction of the Court of the Kings Bench. That created a formal hierarchy for review of decisions of the Justices of the Peace operating in New South Wales.

From the very outset of the creation of the Supreme Court, the first Chief Justice, Francis Forbes, emphasised the importance of the independence of the judicial institution. That was dramatically exemplified in his early years as Chief Justice when he struck down as invalid attempts by Governor Darling to regulate the press, first by the creation of a licensing scheme and then by the imposition of punitive stamp duty.

As Francis Forbes wrote in February 1827:

"A judge cannot be too careful of his reputation for independence. If he loses that he loses his necessary influence over public opinion ... his charges bear no weight, the juries do not respect him and his decisions carrying no conviction over the mind of the public."

The reputation of the judiciary of this State for independence and impartiality has not been doubted during the subsequent 175 years.

The creation of local courts as recognisably independent judicial institutions is of more recent origin. Its significance has been emphasised by my predecessor, Chief Justice Gleeson, in words which I am

happy to adopt. In July 1997, Chief Justice Gleeson addressed the Local Courts Conference in Sydney and said:

"The point of having an independent judiciary and magistracy is that it is not the duty of a judge, or a magistrate, to implement the policy of the Attorney General, or of any other representative of the executive government ... A judiciary which saw it as its duty to carry out the policy of the executive government could not protect the rights of citizens who came into conflict with the government, either through the criminal justice system or in civil disputes.

It was the great achievement of the former Chief Magistrate, Mr Briese, that he was instrumental in persuading the Governor of the day to enact the Local Courts Act 1982, which gave the magistracy formal legal independence from the State Public Service."

Chief Justice Gleeson's address to the Conference was entitled "Maintaining Independence in an Age of Accountability". I note that Mr Justice McPherson has chosen a similar title in his address to your conference yesterday. I am reminded that the Lord Chief Justice of England, Lord Bingham of Cornhill recently gave an address on "The Future of the Common Law". He expressed the hope that his address would be acknowledged as being in the top 100 of addresses so entitled.

The reference to accountability in the context of judicial independence is of considerable significance for all levels of the judiciary. In my introduction to the recently published Annual Review, 1998 of the Supreme Court I said: "Perhaps the foremost challenge for judicial administration at the present time is to ensure that the requirements of accountability and efficiency remain consistent with the imperative of judicial independence."

There can be no doubt that on some occasions, demands for accountability are inconsistent with judicial independence when that happens, judicial officers should not be shy to say so. As Chief Justice Gleeson said in his address two years ago:

"Many people resent judicial independence and are frustrated by their inability to impose or invoke sanctions by way of retribution for decisions they do not like. It is an important part of the duty of the judiciary to explain to the public the importance of judicial independence and to ensure that it is seen, not as a personal privilege of judges and magistrates, or a some kind of perquisite of judicial office, but as a vital safeguard of the rule of law."

However, as Chief Justice Gleeson went on to say:

"The community rightly expects appropriate accountability from all areas of government. The administration of justice is labour intensive and time consuming. It involves the expenditure of large amounts of public monies, and it involves litigants in substantial costs. ... Court delays bear heavily upon governments and citizens alike. It is beyond question that governments, litigants, and the general public, have a legitimate interest in the efficiency with which the courts conduct their business."

The task of finding an appropriate balance between the requirements of efficiency and accountability on the one hand, and the traditional values of our system of justice in terms of the fairness of procedures and the quality of the decision making process, on the other hand, is a continuing one. There is no simple catalogue of answers. I am conscious that I am engaged in a process off change, together with all judicial officers in the State, and that this process is a continuing process.

Indeed, if one looks at history of the judiciary and the magistracy in this State, at any point of time an assessment of the contemporary position would identify the concurrent existence of continuity and change. In this regard we, like generations of our predecessors, must observe the twin requirements of respect for our traditions and recognition of the need for change.

A traditional symbol of justice is a woman with a blindfold, a sword and a pair of scales. The origin of this symbol is probably Themis the Greek goddess personifying justice, wisdom and good counsel, often portrayed carrying a pair of scales. The blindfold, it appears, was introduced with the Roman goddess, Justitia. This image may need to be modified in order to reflect contemporary judicial practice. When Gulliver went to Lilliput, he discovered that the representation of the image of "Justice" in Lilliput was quite different. In Lilliput the statue of "Justice" had both eyes firmly open. Indeed, the statue also had eyes in the back of the head. This is what we call case management.

The administration of justice has not been, and is not, immune to the shift in attitude to the provision of public services which has had substantial, and often adverse, impacts on many other areas of government. Major public services have endured significant diminution in their ability to deliver the quantity and quality of services that they once delivered. The pressures appear unremitting and operate virtually across the board.

It is in this context that all judicial officers have to conduct the heavy caseloads of their respective courts. These pressures are such as to require all of us to attend to ways to speed the disposition of cases and to be sensitive to the efficient management of the caseload of the court. We must do so, however, in a context where our primary task is to conduct the cases with appropriate patience, deliberation and by procedures which are widely respected as fair procedures.

Without detracting from the proposition that there is always room for improvement, we must recognise that there are restraints on the ability to increase productivity of the courts in the sense of maximising the throughput of cases in the shortest period of time. I have in mind the response of that ardent micro-economic reformer who noticed that a string quartet performed a work by Mozart in exactly the same time in 1999 as it had been performed in 1799. In short, for 200 years there had been no improvement in productivity. That reformer was sure that he had discovered a great scandal in the form of a collusive arrangement amongst professional musicians. No doubt, the matter will be investigated by the ACCC. Some comments on the judicial system disclose a similar approach to life.

Some things take time. Justice is one of them. It is not appropriate to assess the judicial system as if it was merely a publicly funded provider of dispute resolution services. The judicial system is the exercise of a governmental function, not the provision of a service to litigants as consumers. The enforcement of legal rights and obligations is a core function of government.

However, contemporary expectations for all areas of government, including the administration of justice, require a continued articulation and re-articulation of precisely what is done with the resources made available. As I have said, there is an increased concern with accountability and efficiency. However, we must recognise - as is true of many areas of government - that there is sometimes an inverse relationship between quantitative requirements and qualitative requirements. In the context of the administration of justice, qualitative requirements include both the fairness of the processes and the fairness of the outcomes. Not everything can be measured by quantitative "performance indicators".

In the former Soviet Union, one of the few things of which they had no shortage, was performance indicators. They called it a five year plan. There are a number of classical examples from the experience of the Soviet Union as to the distortions which such performance indicators can have on decision making. My favourite comes from Nikita Krushchev in one of his speeches critical of the controllers of heavy industry, whom he dismissed as "steel eaters". He pointed out that the five year plan had for many years contained a performance indicator for nail manufacturers, expressed in the form of tons of nails. This proved to be inadequate, as every factory made big nails and virtually no small nails. In order to overcome the shortage of small nails, the new five year plan expressed the performance indicator in terms of numbers of nails, rather than in tons. The obvious occurred. In a few years there was a substantial shortage of big nails.

This targeting of performance indicators is something which can occur with any system of measurement of performance. It is a manifestation of one of the major blights of any system of organisations, namely the tendency to give prominence in decision making to institutional self interest. This is something which both administrators of courts and judges must take care to avoid.

I regret to say that the pressures on local courts are unlikely to attenuate. Perhaps the greatest challenge facing the legal system is to ensure that there is rational relationship between the costs of deciding a dispute and the value or significance of the subject matter of the dispute. By costs I mean both the legal costs borne by the parties and the cost of the administration of justice borne by the taxpayers. We are all aware of situations in which the cost, as so broadly defined, significantly outweighs any possible value associated with the subject matter of the dispute.

We have in New South Wales a tripartite hierarchy of courts by which practices and procedures are able to be moulded to reflect the significance of the subject matter of the dispute at, broadly, three different levels. This enables us to adapt to this need for proportionality. However, the objective must also be reflected within each of the three courts.

The cost of litigation and the cost of legal decision making remains an almost intractable problem in the administration of justice. It lies at the heart of the access to justice debate. Anatole France once commented on "The majestic equality of the law which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread". An English judge once expressed the same thought when he said "In England, justice is open to all, like the Ritz".

By reason of difficulties of access to justice, the pressure to ensure that decisions are made in the most expeditious and efficient manner, will remain with us. Solutions will be multi-faceted. It may take the form of alternative dispute resolution mechanisms such as Ombudsman created by industry or government. It may take the form of administrative tribunals. In the judicial system it will take the form of continuing expansion of the jurisdiction of local courts.

As Chief Justice Gleeson said in November last year, in a speech to the Judicial Conference of Australia on "The Future State of the Judicature" - one of the top 100 with that title - after commenting on the "unsustainable cost of litigation" and the "pressure for alternative, cheaper and more efficient methods of dispute resolution", said in a passage with which I agree:

"There are already clear signs that governments are turning to the expansion of summary justice as a means of responding to some of the pressures to which I have referred. Although it has not attracted a great deal of public attention, in recent years there has been, in State jurisdictions, a clear trend towards increasing the number of criminal offences which may be dealt with summarily, rather than at a trial before a judge and jury. There is little doubt that this has been driven mainly by cost considerations. Similarly, in the area of civil justice, the jurisdiction of the local courts has expanded greatly. Once again, I have no doubt that this has been influenced by the desire, in the interest of costs and access to justice, to extend the range of civil disputes which may be dealt with summary procedures. The practical importance of the role of magistrates in the administration of civil and criminal justice is constantly increasing ..."

I wish to associate myself with the recognition by Chief Justice Gleeson on this and other occasions of the significant, and growing, role of the local courts. To you will fall the task of the efficient and expeditious provision of justice for the overwhelming majority of our fellow citizens.

In the years ahead of me as Chief Justice, I do not expect any diminution in the intensity of public scrutiny of the efficiency with which the administration of justice is conducted. One of my principal tasks, not just for the Supreme Court, but for all jurisdictions in this State, is to ensure that such scrutiny remains consistent with requirements of the independence of the judiciary, including the independence of the magistracy. I know, as all of you know, that the independence of a judiciary frequently irritates those of whom they are independent. No-one, however, will dare to attack judicial independence directly. Rather, it is through pressure for increased accountability and efficiency that encroachments on independence will come. In the years of vigilance ahead of me with respect to such matters, I look forward to the co-operation of the magistracy.

* * *

175th Anniversary of the Supreme Court of New South Wales

The anniversary we commemorate is the inauguration of a free community governed by the rule of law. The effect of the Charter of Justice, promulgated on this day, 175 years ago, was to ensure that the Government and all persons in New South Wales were subject to the law.

This Court, and the first Legislative Council, were both created under the New South Wales Act, a statute of the British Parliament of 1823. This was the first written constitution in Australian history. There are few nations which have judicial institutions as old as the Supreme Court of New South Wales. We do not often recognise just how old our basic mechanisms of governance are.

The beginnings of representative government occurred over 150 years ago. In a few years we will celebrate 150 years of representative and responsible government. In 2001 we will celebrate the centenary of Federation. These are old traditions, by any standards.

The twin great institutional traditions of our civilisation - the rule of law and the need for consent of the governed - form part of the core content of Australian national identity. Their force today, reflected in the universal acceptance of the legitimacy of the institutions which perform these functions, is derived in large measure from the longevity of the traditions by which they are performed. It is appropriate that we commemorate these institutions.

From its very inception under the first Chief Justice, Sir Francis Forbes, this Court established a reputation for independence and impartiality that remains unquestioned to this day. Under Chief Justice Forbes the Court asserted its high constitutional function of protecting individual rights and freedoms. The early decisions of this Court - now, insofar as they have survived, available in accessible form for the first time on the Macquarie University website - speak in terms that we still readily appreciate.

The first constitutional case in Australian history concerned the right to trial by jury in a criminal trial at Quarter Sessions. This issue reflected the major political divide of the time: between emancipated convicts and the "exclusives". The latter, predominant amongst the Justices of the Peace who conducted the trials, objected to a jury system in a society with so many emancipated convicts. Chief Justice Forbes held that trial by jury was a birthright of all free men and women. He referred to the Magna Carta and the development of English constitutional law. He ordered the justices to sit with juries.

The authority of the Court was also invoked to ensure the creation of free institutions, specifically freedom of the press. Within a month of their admission in September 1824 as the first barristers of this Court, William Charles Wentworth and Robert Wardell, established *The Australian*, the first newspaper in our history to be critical of the Government. Its reportage, and that of its followers, soon incensed Governor Darling.

The Governor proposed legislation to require all newspapers to obtain licenses. Under the 1823 constitution, the Legislative Council could not pass legislation if the Chief Justice proclaimed it to be "repugnant to the laws of England". Chief Justice Forbes struck down the newspaper licensing bill as such. He said:

"By the laws of England every free man has the right of using the common trade of printing and publishing newspapers; by the proposed Bill this right is confined to such persons only as the Governor may deem proper. By the laws of England, the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraints; by the proposed Bill, a preliminary licence is required which is to destroy the freedom of the press and to place it at the discretion of the government ..."

Governor Darling then proposed to impose a stamp duty on all newspapers in an amount which would have crippled a number of newspapers, including the *Australian*. Chief Justice Forbes declared the stamp duty bill invalid.

The licensing scheme was overturned by the refusal of a certificate by the Chief Justice. Although, in substance, this was a kind of judicial review, it did not survive in those terms. The stamp duty bill, however, was struck down in a different way.

The New South Wales Act of 1823 permitted the imposition of taxes for stated purposes. Forbes boldly asserted that the true purpose of the stamp duty on newspapers was not for the public works stated in the Act. Rather, the true purpose was to destroy certain newspapers.

This is a form of judicial review of the validity of legislation with which we are very familiar, particularly in the context of the Commonwealth Constitution. It is of abiding significance that the first time in Australian history that a Court exercised this form of judicial review was to protect the right of free speech.

The assertion of judicial independence, so dramatically manifest in this confrontation, has never been the subject of serious challenge. Over 175 years, it has been, and remains, a fortification of freedom in this nation.

The capacity for such independence is now, and has always been, nurtured by the strength and autonomy of the legal profession, from which the judiciary is drawn. That strength and autonomy, in turn, is a product of the adversary system.

Throughout the history of this Court, in any proceedings, including those in which the State is a party, the litigants determine, in large measure, what issues are raised and how they are fought. This system reflects the significance our society attaches to the autonomy of individuals and to the maintenance of personal freedoms. Individuals are entitled to exercise control over their own lives. They are entitled to participate in decisions which affect their lives to the maximum degree possible. No arm of the State controls how they conduct their legal affairs

Even in a criminal case, the State, appearing in the guise of a prosecution authority, is required to conduct the entirety of the proceedings as if it were an ordinary litigant in the Court. It receives no privileges. It receives no special access to the magistracy or the judiciary. Its right to call or interrogate witnesses, or to make submissions, is no different from that of any other litigant in the Court.

Personal autonomy and participation have very deep roots in this country. One of the reasons why these values are so secure, is because for 175 years they have been, and continue to be, reflected many times every day in the procedures within our Courts, indeed in the very structure of our courtrooms.

History suggests that the inquisitorial system with which our own is sometimes compared, is compatible with a society of either dictatorship or freedom. The adversary system is only compatible with a society of freedom. In an adversary system the administration of justice and the autonomous legal profession are protective devices of freedom. That is not a function necessarily performed by the administration of justice or by the lawyers in an inquisitorial system.

It is true that the adversary system is not the cheapest form of legal decision making. However, nor is parliamentary democracy the cheapest form of government.

There is a tendency today to treat the Courts as some form of public funded dispute resolution service. Such an approach would deny the whole of the heritage we have gathered here to commemorate. This Court does not provide a service to litigants as consumers. The Court administers justice in accordance with law. This is a core function of government.

In conclusion, I wish to acknowledge the speakers here today. Mr Carr as the Premier of New South Wales, represents the great institutional tradition of Parliamentary democracy. Our other speakers represent both that tradition and the intertwined tradition of the rule of law.

The Presidents of the Bar Association and the Law Society, Mr Barker and Ms Hole, were good enough to step aside on this occasion and to have their respective memberships represented by two of their most distinguished former practitioners, one of whom, Mr Whitlam has served, and the other, Mr Howard now serves, as the Prime Minister of this country. Their histories personify the interconnection of the two great traditions of our mechanisms of governance - parliamentary democracy and the rule of law - and the respect each has always shown for the other.

The tradition of the rule of law is reflected in the presence on the bench of my two immediate predecessors, Sir Laurence Street and Chief Justice Gleeson. Between them they served as Chief Justice of this Court for 24 years. Their presence here today personifies an abiding characteristic of our legal tradition: the concurrent existence of continuity and change.

There is an embedded wisdom in institutions which have grown and developed over long periods of time. Experience indicates that contemporary custodians of such institutions, and those whose conduct can impinge on their activities, should approach their tasks with an element of humility. After 175 years of tradition, it is appropriate that we should conclude in that spirit.

The Court will now adjourn.

As acknowledged in his judgments by the first Chief Justice of this Court, Sir Francis Forbes, for thousands of years before the arrival of British justice, the aborigines made and enforced laws in this land.

It is appropriate that we recognise that prior tradition on this occasion.

AUNTI ALI GOLDING

A Biripi Elder, Taree, New South Wales, who has been adopted by the Eora People and has lived in the Redfern Aboriginal Community for the past 21 years.

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Compensation Court Annual Conference

FRIDAY 7 MAY 1999

THE HONOURABLE J.J. SPIGELMAN

My second judgment as a judge was an appeal from the Dust Diseases Tribunal, *James Hardie Industries Pty. Limited v Grigor* (1998) 45 NSWLR 20. It proved to be a dissenting judgment. In the course of that judgment, I had occasion to refer to the need for the courts to adapt to the limited resources available for the administration of justice in New South Wales.

The case involved the institution in the Dust Diseases Tribunal of proceedings by a New Zealand resident arising from the purchase of materials in New Zealand. My comments concerned whether or not demands on the judicial resources in this State are such that this should be a permissible element to take into account when exercising the jurisdiction to stay proceedings on forum non conveniens grounds, as is the case in the United States. I concluded that this course could not be followed in Australia in view of the High Court's decision in *Voth v Manildra Flour Mills Pty. Limited* (1990) 171 CLR 538.

The pressure on judges in all jurisdictions to do more with less is the theme I wish to develop with you today.

Before coming to our own situation, however, let me share with you the observations of Judge Kent of the United States District Court of South Central Texas. Proceedings were taken by the Republic of Bolivia against a number of American tobacco companies for the health care costs which the government of that country had incurred in treating illnesses suffered as a result of tobacco use. It was, apparently, one of six different suits brought by the governments of Guatemala, Panama, Nicaragua, Thailand, Venezuela and Bolivia in various locations in the United States and in both State and Federal Courts. The Bolivian proceedings had been commenced in the District Court of Brazoria County, Texas - a state Court - and then, by some form of cross-vesting, were sent to the United States District Court in Galveston, Texas - a federal Court. Judge Kent's judgment is a model of its kind for a cross-vesting decision:

"... this humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparalleled fairness and alacrity, apparently in common discussion even on the mountain peaks of Bolivia. Still, the Court would be remiss in accepting an obligation for which it truly does not have the necessary resources. Only one judge presides in the Galveston Division - which currently has before it over seven hundred cases and annual civil filings exceeding such number - and that judge is presently burdened with a significant personal situation which diminishes its ability to always give the attention it would like to all of its daunting docket obligations, despite genuinely heroic efforts to do so.

And, while Galveston is indeed an international seaport, the capacity of this Court to address the complex and sophisticated issues of international law and foreign relations presented by this case is dwarfed by that of its esteemed colleagues in the District of Columbia who deftly address such awesome tasks as a matter of course. Indeed, this Court, while doing its very best to address the more prosaic matters routinely before it, cannot think of a Bench better versed and more capable of handling precisely this type of case, which requires a high level of expertise in international matters. In fact, proceedings brought by the Republic of Guatemala are currently well underway in that Court in a related action, and there is a request now before the Judicial Panel on Multidistrict Litigation to transfer to the United States District Court for the District of Columbia all six tobacco actions brought by foreign governments, ostensibly for consolidated treatment. Such a Bench, well-populated with genuinely renowned intellects, can certainly better bear and share the burden of multidistrict litigation than this single judge division, where the judge moves his lips when he reads ...

Regardless of, and having nothing to do with, the outcome of Defendant's request for transfer and consolidation, it is the Court's opinion that the District of Columbia, located in this Nation's capital, is a much more logical venue for the parties and witnesses in this action because,

among other things, Plaintiff has an embassy in Washington, D.C., and thus a physical presence and governmental representatives there, whereas there isn't even a Bolivian restaurant anywhere near here. Although the jurisdiction of this Court boasts no similar foreign offices, a somewhat dated globe is within its possession. While the Court does not therefrom profess to understand all of the political subtleties of the geographical transmogrifications ongoing in Eastern Europe, the Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks.

Thus, it is readily apparent, even from an outdated globe such as that possessed by this Court, that Bolivia, a hemisphere away, ain't in south-central Texas, and that, at the very least, the District of Columbia is a more appropriate venue (though Bolivia isn't located there either). Furthermore, as this Judicial District bears no significant relationship to any of the matters at issue, and the judge of this Court simply loves cigars, the Plaintiff can be expected to suffer neither harm nor prejudice by a transfer to Washington, D.C., a Bench better able to rise to the smoky challenges presented by this case, despite the alleged and historic presence there of countless smoke-filled rooms. Consequently, pursuant to 28 U.S.C. 1404(a), for the convenience of parties and witnesses, and in the interest of justice, this case is hereby TRANSFERRED to the United States District Court for the District of Columbia. IT IS SO ORDERED. S.D. Tex., 1999."

When assessing the resources available for the administration of justice, we must remain conscious of the fact that there are limits to the proportion of the gross national product that this, or any other country, can afford to expend on its legal system.

The administration of justice is not immune to the substantial shift in attitude to the provision of public services which has had substantial and adverse impacts on many other areas of government. Major public services have endured significant diminution in their ability to deliver the quantity and quality of services that they once delivered. The pressures appear unremitting, virtually across the board.

I have in the past had positions in government which involved participation in central resource allocation decisions. I have personal experience of how difficult it is to make decisions between allocating resources to, say, tertiary education or hospitals and allocating resources to courts or legal aid.

Contemporary expectations for all areas of government, including the administration of justice, require a continued articulation and rearticulation of precisely what is done with the resources made available. There is an increased concern with accountability and efficiency. Indeed, perhaps the foremost challenge for judicial administration at the present time is to ensure that contemporary expectations of accountability and efficiency remain consistent with the imperative of judicial independence. I do not need to explain to this audience why the latter is of importance.

The first and most basic proposition which representatives of the judiciary must articulate at every opportunity is that the most important criteria by which the performance of courts must be judged are qualitative, namely the fairness of the processes and the fairness of the outcomes. Statistics, based on criteria like the number of cases disposed of within particular time periods, acquire an inappropriate significance by reason of their concreteness. In the law, as in other areas of public activity, the most important matters are not susceptible to precise measurement by way of what is sometimes called "performance indicators".

In the former Soviet Union one of the few things of which they had no shortage was performance indicators. They called it a five year plan. There are a number of classic examples from the experience of the Soviet Union as to the distorting effects which performance indicators can have on decision-making. My favourite comes from Nikita Krushchev in one of his speeches critical of the controllers of heavy industry, whom he dismissed as "steel eaters". He pointed out that the five year plan had for many years contained a performance indicator for nail manufacturers expressed in the form of tons of nails. This proved to be inadequate as every factory made a huge number of big nails and virtually no small nails. In order to overcome the shortage of small nails, a new five year plan expressed the performance indicator in terms of numbers of nails, rather than tons. The obvious reaction was that in a few years there was a large shortage of big nails.

The first danger of which we must all be particularly wary is to not target the performance indicators. If one attempts to change the temperature by manipulating the thermometer, eventually you will be caught out.

A second danger, not dissimilar to what I have just described, that arises from the combination of financial stringency and "performance indicators" is the tendency of institutional self-interest to be given excessive prominence in decision-making. One manifestation of this is the pre-occupation with targeting the measures of performance, as in the nail example, rather than servicing the need. Another manifestation is the imperative to organise one's affairs in such a way as to externalise costs. This can be done in numerous ways and administrators of Courts and Judges must be on guard against this temptation.

The most obvious way that this happens is for Courts to over list cases. This minimises the amount of downtime within Courts and so enables the Court to get through a larger volume of work, as measured. However, it has adverse effects on parties whose cases are not reached. Their costs are increased, generally quite disproportionately to what the Court "saves". There is a very real balancing exercise involved in this process and it is not an easy one. We must all be sensitive to the extent to which a Court by its own practices imposes costs on parties or other persons, like witnesses.

None of this is to suggest that productivity improvements are not feasible. I am hopeful, for example, that the application of new technology like video conferencing will enable productivity improvements within the Courts and also significantly reduce the costs imposed on the legal system as a whole.

There are, however, very significant restraints on the ability to increase productivity of the Courts in the sense of maximising the throughput of cases in the shortest period of time. I have particularly in mind the response of an ardent micro-economic reformer who noticed that a string quartet performs a work by Mozart in exactly the same time in 1999 as it was performed in 1799. In short there has been no increase in productivity for 200 years. This reformer, sure that a great scandal had been discovered in the form of a collusive arrangement amongst professional musicians, referred the matter to the ACCC. Some comments on the judicial system disclose a similar approach to life.

Some things take time. Justice is one of them. We must never lose sight of the fact that it is not appropriate to assess the judicial system as if it was merely a publicly funded provider of dispute resolution services. The judicial system is the exercise of a governmental function, not the provision of a service to litigants as consumers. The enforcement of legal rights and obligations is a core function of government.

This is of course most clear in the case of criminal trials. If all we were concerned about was the most efficient mechanism for determining guilt or innocence, then our system would operate quite differently to the way it does. We would not have open trials in public; we would dispense with many requirements of procedure and standards of proof; we would dispense with the presumption of innocence; Judges, insofar as they make relevant determinations, would simply make them without giving reasons. The whole process would work much more effectively and economically behind closed doors without the interference of lawyers. As Chief Justice Gleeson has pointed out, that is the way criminal justice is administered in some places, but we do not now believe, and have never believed, that that is how it should be done.

In the area of civil justice there are similar considerations both with respect to the substantive law and to the procedures by which cases are decided. The law and its procedures both reflect and affect our society's values. Even in the context of resolving a private dispute there is a broader public purpose. It is what economists would call an externality.

Even a civil trial involves, on many occasions, a public affirmation that one party is right and the other party is wrong. Denunciation of conduct has a role to play in the outcome of civil disputes and in the reasons for judgment by trial judges. Perhaps this does not operate to the same degree as in criminal cases, but nevertheless there is such a role for civil trials.

Similarly, the concepts of general and specific deterrence, which play such a significant role in the criminal justice system, also have a role in the civil justice system. The area of

compensation for injuries at work is a good example. The determination of civil cases through the mechanism of resolving individual disputes may have an impact by deterring employers from engaging in unsafe practices and providing an incentive for them to improve their practices, either directly or through their insurance premiums.

These are public purposes served by the process of private dispute resolution. Of course they are consistent with the settlement of those disputes. But the courts accessibility serves a public purpose which constitutes an "externality" - i.e. a public benefit over and above the private benefit - that economists would accept as relevant to the process of making decisions about the allocation of resources.

There is also the "externality" in the form of written judgments. The clear articulation of the reasons for a decision in a particular case serves the purpose of avoiding other disputes. That is, an "externality" unrelated to the resolution of a dispute in the particular case. Published decisions enable lawyers to advise their clients of the likely outcome if they pursue a dispute.

I wish to direct attention to the constitutional role of the Courts which serve public purposes beyond the interests of the parties to a dispute. This most clearly arises where the Courts are determining matters such as the powers of government and Parliament, the enforcement of the rights of citizens and in other ways maintaining the institutional structure of our polity and of our other important social institutions. The judicial system provides a forum parallel to our parliamentary system for the public discourse by which our society and polity affirms its core values, applies them and adapts them to changing circumstances.

There is another role properly described as "constitutional". The Courts maintain the rule of law and develop the common law: public functions of great and abiding significance. The ability of our system of law to continually replenish itself and to adapt itself to new circumstances, is one of the essential elements of the success of our society and the social stability with which we are blessed. These are achievements of which to be proud. The role of the judicial system in performing this function goes well beyond the provision of services to litigants as consumers. However, because these benefits are intangible and not susceptible to measurement, they are all too frequently ignored.

I do not mean, by my emphasis on the public purposes served by the resolution of individual disputes, to detract from the significance to the individuals of proper and measured determination of their own cases. Some years ago Judge Tate of the United States put the matter well when he said:

"In the gigantic industrial societies of the twentieth century, the courts are one of the last institutions where individuals receive individualized treatment. No matter how hopeless an appeal may be, it is not frivolous to the appellant, because it represents his hopes for individualized justice against the alleged prejudicial decisions of an institution in an impersonal society. The price of individualized consideration, essential in a democratic society founded upon the individual's importance, is necessarily high. The courts must consider many worthless appeals for fear of missing the one with merit.

In its efforts to assure prompt consideration of all claims, the court system must not become just another bureaucracy, cramming litigation papers into suitable slots or at least the closest-fitting cubbyhole. While we may adopt more efficient procedures to find and decide quickly the easily-decided cases, these appeals must receive the same deliberative consideration in their disposition as do the more difficult matters."

The overriding requirement of the judicial process is to do justice in the circumstances of the individual case. This requirement potentially conflicts with any attempt to impose managerial concepts of efficiency on Judges. The judicial oath which we all take requires us to : "Do right to all manner of people after the laws and usages of this State without fear or favour or ill will". It is difficult to get managerial considerations into that oath.

That is not to say that some aspects of efficient conduct are not required for the purpose of

serving the object of individualised justice. Excessive delay is itself a form of injustice. As it is often put "Justice delayed is justice denied". However, it must also be recognised that "Justice rushed is justice denied".

The formulation of judgment takes time for proper reflection. There has been considerable focus on delay in the delivery of judgments. This needs to be balanced with the recognition that the quality of the decision-making process, and its value for purposes of preventing future disputes, is enhanced by reflection, i.e. delay in the articulation of reasons. This must occur, of course, within reasonable limits.

I do not claim that there is any easy resolution of the dilemma that arises from the inverse relationship between efficiency and quality in the judicial process. Each of you will have been confronted with issues of this character. The heavy caseloads of the Courts are such as to require all of us to attend to ways to speed the disposition of cases and to the efficient management of the caseload of the Court. On the other hand, trials must be conducted with appropriate patience, deliberation and by procedures which are manifestly fair procedures.

We are now well advanced into a new era of managerial judging which has changed the perception amongst Judges of their own functions. There has been a shift in the responsibility for management of civil litigation away from litigants and their legal advisers towards the Court. This is a process which has been carried further in some jurisdictions than in others. It is a process that all Courts have been engaged in for over a decade. It is not yet complete.

The task of finding an appropriate balance between the requirements of efficiency and throughput, on the one hand, and the traditional values of our system of justice, on the other, is a continuing one. I do not claim that there is a simple catalogue of answers. I am conscious that I am engaged in a process of change, together with all judicial officers in the State, and which is a continuing process.

We must always recognise in our deliberations as judicial officers that our primary task is to administer justice in accordance with law. It is not our task to please the parties who appear before us. When David Hunt was presiding over the trial of Ivan Milat he was not providing a service to a customer whom he should have sought to please. Whilst that is obvious in the administration of the criminal justice system, it is a proposition that is equally applicable in relation to civil justice. Employees who seek compensation for injuries they have suffered at work, just like individuals who sue for defamation or breach of contract or for any tort, do not want their case to be heard by a Judge who believes that one of his purposes in life is to send both parties away happy. Any such litigant wants the Judge to make an objective and impartial decision and to do so irrespective of how much that might offend the other party.

It is in this context that we must assess the frequently expressed preference for encouraging settlements or alternative dispute resolutions mechanisms. Parties who settle because they do not believe they can afford to litigate or because they suspect that their cause will not receive just and impartial treatment, or to receive such treatment but on a time scale which is unacceptable to them, do not necessarily go away satisfied with the fairness of the process. Settlement in and of itself does not necessarily mean satisfaction.

We do not live in a Confucian society in which overriding value is given to the harmonious resolution of disputes for the sake of retaining harmony. Obviously where continuing relations are required there is a value in settlement for its own sake. However, one of the strengths of Western civilisation is that it is a society in which rights are recognised. The administration of justice is the means of enforcing rights.

I have mentioned that courts must be sensitive to the extent to which their procedures impose cost on parties. The cost of litigation remains the single most significant, and apparently intractable, problem in the administration of justice. It lies at the heart of the access to justice debate. We are all aware of the frequency with which there appears to be no rational or reasonable proportion between the costs of particular litigation and the amount in dispute. For many cases, our way of resolving matters of litigation, is simply not sustainable in the long term.

In a sense this involves what an economist would call "market failure". Let me return, for a moment, to the perspective of micro-economics. In a market for legal services in which

knowledge were perfect, clients would ensure that the costs of litigation would be minimised and reasonably proportionate to the value to them of success in the litigation. However, the inadequacies of information available to clients about the legal process and about the skills of their own lawyers, prevent them exercising control over the market for legal services in this way.

Courts have been called upon to involve themselves in the conduct of litigation to a degree which was once thought incompatible with the adversary system. Managerial judging may be regarded as a form of state regulation by judicial officers to offset the market failure caused by the inadequacy of information about legal services available to individual clients.

This comparatively new imperative coincides with the objective of minimising the cost to the judicial process itself by reason of the frequency with which persons do not pursue their causes of action with reasonable expedition in such a manner as to impose costs on the court system eg adjournments which result in downtime.

The two imperatives for managerial judging are different and do not always coincide. It may be that early intervention by Judges to manage cases will add to the costs of litigation for parties. This plainly occurs where significant expenditure of resources is required at an early stage after the institution of proceedings with respect to cases which were likely to settle in any event. In such cases active case management by Judges imposes costs which would not otherwise be incurred.

There have been a large number of changes both by statute and by Court practice, motivated in part by excessive costs: rights of action have been abolished or quantum limits on recovery have been imposed; rights of appeal have been abolished or leave requirements introduced; the right to jury trial has been significantly attenuated; numerous procedural changes have been made eg interrogatories are almost extinct and discovery has been restricted; the pressure on judges to hear more cases more quickly and to deliver judgments more quickly has been unremitting.

The combined effect of restrictions on public funding of the administration of justice, together with continuing concerns about the cost of litigation, will require us all to continue to make or endure changes of this character. They have, however, very real effects on the quality of justice which are not always acknowledged.

One of the many ways in which quantity and quality are inversely related arises in the context of specialisation by judges. It is possible that maximum efficiency would occur by treating all judges as a single pool and throwing them at lists. This would maximise the throughput of cases.

Quality of decision-making and public confidence in the courts is usually enhanced by specialisation either in separate courts eg the Compensation Court or the Land and Environment Court, and specialist divisions within courts such as the Dust Diseases Tribunal or the divisions in the Supreme Court - Equity, Common Law and Court of Appeal.

When I accepted appointment to the office I now hold, I did not really appreciate that so much of my time would be taken up with issues of this kind. I have the comfort to know that I am not alone.

There is not likely to be any diminution in the intensity of public scrutiny of the efficiency with which the administration of justice is conducted. One of my principal tasks, not just for the Supreme Court but for all jurisdictions, is to do what I can to ensure that such scrutiny has a qualitative and not merely a quantitative dimension.

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The Tradition of Ethical Service by Members of the Legal Profession

Comments of the Chief Justice, The Honourable JJ Spigelman, on the Admission of Legal Practitioners to the Supreme Court of New South Wales, 9 April 1999

Spigelman, CJ
Studdert, J
Dunford, J

THE SUPREME COURT OF NEW SOUTH WALES
BANCO COURT
9 April 1999

The formal part of these proceedings is now complete but before the Court adjourns I should like to offer a few words of congratulations and of welcome to the newly admitted legal practitioners of this Court.

This is an important occasion for you. It is also an important occasion for the Court. Present with me on the Bench this morning is Justice Studdert to my right and Justice Dunford to my left. Together we constitute the Court that has, in the due exercise of its jurisdiction, admitted you to practice.

The first thing I want to say to you is that you are all individually welcome. You have arrived here after a long and successful course of study and in many cases, a lengthy period of practical training. You are entitled to be proud of your achievement and your family and friends are entitled to be proud of your achievement.

On this occasion, I wish to draw your attention to two matters, which distinguish the legal profession from other occupations; I refer in the context of a Court with a long tradition and a profession with a long tradition.

On 17 May this year, this Court will celebrate the 175th Anniversary of its formation. We Australians like to think of ourselves as a young country. When it comes to the basic institutions of governance and of the rule of law, this is not a young country. This is an old country.

The number of nations that can say that they have judicial institutions of this antiquity, are to be numbered on the fingers of one hand. This year is a significant year in terms of reinforcing the length and the depth of the traditions that this Court represents and of its relationship with the profession.

As legal practitioners you have professional obligations, including ethical obligations to your clients and obligations to this Court. These obligations are what distinguish a profession from a business or from a job. There is no doubt that many aspects of the law constitute a business. But it is not only a business or a job and that is an important distinction.

One of the most important aspects of the legal system is that it depends on the performance of professional obligations by professional people. In a period of this Nation's history, when more and more things are judged merely by economic standards, it is important that some spheres of conduct affirm that there are other values in life. The values of justice, truth and fairness, are central to the activities of the legal system. That is why that system cannot be assessed only by economic criteria.

The obligations you have as professional practitioners to this Court, include a duty of full disclosure of the relevant law; a duty of candour not to mislead the Court, or to knowingly permit your client to do so; a duty to refuse to permit the commencement, or continuance of any baseless proceedings; a duty to exercise care before making any allegations of misconduct against any person and to test any instructions you might receive from your client in that regard; a duty not to assist in any form of improper conduct; and a duty to conduct cases in this Court efficiently and expeditiously.

Performance of some of these duties may, on occasions, conflict with your client's interests, or indeed

his or her enthusiasms. Nevertheless, they are obligations of a professional character that you owe to the Court.

The second matter to which I wish to refer, is the criticism that is often made of the law, in its practical operation in our society, to the effect that it operates unevenly and perhaps unfairly in some sections of that society.

As a general rule people who are popular, or powerful, or wealthy, or who enjoy the support of a majority, either do not need, or do not have any difficulty in securing the protection of the law. The people who need the protection are the weak, the friendless people who are accused of crime or other disgraceful conduct, people who can appeal only to the law to protect and vindicate their rights.

There is, in certain sections of the community at the moment, a great deal of impatience with the law's insistence upon upholding the rights of unpopular people. History shows that you cannot be selective about granting or withholding rights which people have on a basis such as their current popularity. In many cases the assertion by an unpopular individual of a legal right will offend a majority in the community. It is basic to our society's values that, where necessary, the law will insist upon respect for that individual's right.

That is why justice is administered by independent, unelected judges who do not need to be constantly seeking popularity, or the approval of governments. Lawyers are a part of this system and must be prepared to stand up for individuals and minorities, even at the risk of incurring the resentment and anger of the majority.

The performance of professional obligations to the Court, the maintenance of ethical obligations and the protection of the rights of the unpopular, does not involve an easy path.

As each of you face the challenges and tribulations of dealing with clients and superiors, you should remember the support you can always receive from the broader professional community which you join today.

For many of you this is an important family occasion. Those of you who have recently completed a long course of study will be celebrating with family and friends your success. Many of you, no doubt, owe a great deal to the support that you have received over the period of your study and training from your relatives and friends. It is always a source of great pleasure to the judges of this Court to see so many relatives and friends participating in this important ceremony.

I hope that this is a happy and memorable occasion for you all.

On behalf of all the judges of this Court, I congratulate you on your admission and wish you a warm welcome to the legal profession of this State.

The Court will now adjourn.

Sir Ninian Stephen Lecture: Statutory Interpretation - Identifying the Linguistic

delivered at the
University of Newcastle - 23 March 1999
by The Honourable JJ Spigelman
Chief Justice of New South Wales

In the second Sir Ninian Stephen Lecture delivered on 10 March 1993, the Honourable Justice McHugh of the High Court of Australia said:

"Legislation is the cornerstone of the modern legal system."

His Honour's lecture was entitled "The Growth of Legislation and Litigation". His Honour emphasised the centrality of the law of statutory interpretation to the functions of the profession and the judiciary. The overwhelming majority of cases in the Courts require reference to statutory provisions. Something in the order of half of all cases require the Court to construe a statute. The constitutional significance of statutory interpretation should also be noted. A number of the rules of construction, to which I will refer, make it clear that the common law's protection of fundamental rights and liberties is secreted within the law of statutory interpretation.

I wish to deal with one aspect of statutory interpretation in this lecture: How do we select the meaning of words capable of application at different levels of generality? That is to say, when Parliament uses general words does it intend to encompass everything that is capable of falling within them?

The title that I have chosen for this lecture is "Identifying the Linguistic Register". This is a formulation that I have adopted from Lord Simon of Glaisdale. In a case concerned with the meaning of the word "premises" in the British Rent Act 1968, his Lordship said:

"Statutory language, like all language, is capable of an almost infinite gradation of 'register' - i.e. it will be used at the semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants, etc). It is the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give to it the primary meaning which is appropriate in that register (unless it is clear that some other meaning must be given in order to carry out the statutory purpose or to avoid injustice, anomaly, absurdity or contradiction). In other words statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances."¹

Lord Simon of Glaisdale returned to this issue in a subsequent case where his Lordship said: "If a court of construction places itself in the position of the draftsman, acquires his knowledge, recognises his statutory objectives, tunes into his linguistic register, and then ascertains the primary and natural meaning in their context of the words he has used, that will generally be an end of the task of construction. But occasionally something will go wrong. It may become apparent that the primary and natural meaning cannot be what Parliament intended: it produces injustice, absurdity, anomaly or contradiction, or it stultifies or runs counter to the statutory objective."²

Ambiguity

The identification of the appropriate "linguistic register" is not the same as resolving an "ambiguity": understood in the sense that a word or phrase may have more than one meaning. This is the sense in which the word "ambiguity" is generally used.

However, the word "ambiguity" itself, perhaps ironically enough, is not without its own difficulty. Frequently, in the context of statutory interpretation, the word "ambiguity" is used in a more general sense. It is applied, not only to situations in which a word has more than one meaning, but to any situation in which the intention of Parliament with respect to the scope of a particular statutory situation is, for whatever reason, doubtful.

As the authors of the third edition of Cross on Statutory Interpretation state:

"In the context of statutory interpretation the word most frequently used to indicate the doubt which a judge must entertain before he can search for, and if possible, apply a secondary meaning is 'ambiguity'. In ordinary language this term is often confined to situations in which the same word is capable of meaning two different things; but in relation to statutory interpretation, judicial usage sanctions the application of the word 'ambiguity' to describe any kind of doubtful meaning of words, phrases, or longer statutory provisions."³

A similar broad approach to the concept of "ambiguity" is reflected in a judgment of Justice O'Connor in 1906, when his Honour said:

"It has been contended in this case that an ambiguity must appear on the face of a statute before you can apply the rules of interpretation relating to ambiguities. In one sense that is correct, and in another sense it is not. You will frequently find an Act of Parliament perfectly clear on the face of it, and it is only when you apply it to the subject matter that the ambiguity appears. That ambiguity arises frequently from the use of general words. And wherever general words are used in a statute there is always a liability to find a difficulty in applying general words to the particular case. It is often doubtful whether the legislature used the words in the general unrestricted sense, or in a restricted sense with reference to some particular subject matter."⁴

The Contemporary Approach

Justice McHugh has identified the task of the contemporary interpreter, in a judgment which is frequently referred to with approval, in the following way:

"A rule of law enacted by statute consists of a proposition which gives rise to legal consequences when the act or omission of some person falls within the factual outline delineated by that proposition ... The difficulty is to determine whether Parliament intended a particular set of facts to fall within the factual outline of the proposition. That is, the difficulty is to determine the ambit of the factual outline which Parliament intended to enact."⁵

His Honour has explained the contemporary approach to this process:

"In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the 'ordinary meaning' to be applied. If however, the literal or grammatical meaning of a provision does not give effect to that purpose, that meaning cannot be regarded as the 'ordinary meaning' and cannot prevail. It must give way to the construction which will promote the underlying purpose or object of an Act ..."⁶

His Honour went on to quote from the frequently cited judgment of Mason and Wilson JJ, where their Honours said, *inter alia*:

"The propriety of departing from the literal interpretation ... extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions."⁷

The purposive approach to statutory construction is now enshrined in statute.⁸ It is not without its difficulties.⁹ It must not be forgotten that the task is to identify the meaning of what Parliament said, not to identify what Parliament meant to say.¹⁰

Context

The contemporary Australian approach to construction is the same as Justice Learned Hand once expressed:

"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."¹¹

A good short hand description of this approach is "literal in total context".¹² Wherever general words must be construed, it is essential for the interpreter to bear in mind that a statute has a context, it has

a background and it reflects assumptions as to the circumstances in which it will operate. The words of a statute do not exist in limbo.¹³

Let me give you one example of this principle at work.¹⁴ Parents leave their children in the care of a childminder. They suggest that to keep the children amused, the childminder should teach them a game of cards. After the parents leave, the childminder teaches the children to play strip poker. The natural and ordinary meaning of the words "game of cards" is, merely, a game played with cards. Strip poker falls within that natural and ordinary meaning. However, there seems little doubt that the meaning which the parents intended for the words they chose, did not encompass this particular example of such a game. The reason for that is the context. In accordance with what one would assume to be the generally accepted conception of the proper upbringing of children, parents do not intend the words "game of cards" to extend to a game of this character, at least in relation to their children.

Another example is found in a controversial civil liberties case from Australian history. I refer to the case of Egon Kisch, a radical political figure, to whom the Commonwealth government of the day, in 1934, wished to deny entry into Australia. The relevant legislation entitled a Commonwealth official to administer a dictation test to any prospective entrant. The legislative provision permitted such a test to be "in a European language". Kisch, a national of Czechoslovakia, was asked to submit to a test in Scottish Gaelic. The High Court refused to accept that this was permissible. Sir Owen Dixon said:

"It appears to me that the objects which the legislature had in view would not be furthered by attaching to that expression (i.e. 'a European language') a meaning which is arrived at by disintegrating the phrase into its component words and asking oneself, first - is it a language? and then is it European? ... The rules of interpretation require us to take expressions in their context and to construe them with proper regard to the subject matter with which the instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them. To ascertain this meaning the compound expression must be taken and not its disintegrated parts. I am disposed to think that it means here to convey that a test is provided for immigrants depending upon a proper familiarity with some form of speech which in some politically organised European community is regarded as the common means of communication..."¹⁵

The Court held that Scottish Gaelic was not such a "European language".

Over the long history of the common law there have been fluctuations in the degree of emphasis which the Courts have given to a literal interpretation of words on the one hand, and the context, subject matter and purpose of legislation on the other hand. We are now in an era where the latter is more frequently determinative than may have been the case until a decade or two ago. This is particularly the case with respect to the construction of general words. Those who would strictly apply a "plain meaning" rule have to recognise that general words do not necessarily have a "plain meaning".¹⁶

Whilst acknowledging changes in the emphasis over time, there is nothing new in the application of what is now regarded as the contemporary approach to construction.

As long ago as 1660 the Barons of the Court of the Exchequer said:

"And the judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the intent was particular."¹⁷

And added:

"... the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another and sometime by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."¹⁸

This extract from 1660 highlights the significance for any process of construction, of the whole text

and of the subject matter being dealt with, to provide the context within which a particular provision is intended to operate.

In the United States the classic application of this approach is to be found in a decision of the United States Supreme Court in 1892. The Church of the Holy Trinity in New York contracted with an Englishman to come to the Church as its rector and pastor. The issue was whether this violated a Federal statute which made it unlawful for a person to "assist or encourage the importation or migration of any alien ... under contract or agreement ... to perform labour or service of any kind in the United States". In finding that the contract was not within the statute the Court said:

"It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in the statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such a broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular Act".¹⁹

The Court identified the circumstances which led to the passage of the legislation as a concern with the importation of cheap unskilled labour. Hardly applicable to a man of the cloth.

The Court concluded:

"It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of a country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the Act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."²⁰

Justice Scalia of the United States Supreme Court, has attacked the line of authority which includes the Church of the Holy Trinity case on the following basis:

"Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former ... Church of the Holy Trinity is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life giving legislative intent. It is nothing but an invitation to judicial law making."²¹

Justice Scalia has conducted a long battle against laxity in the process of statutory construction, and in particular constitutional construction. His criticisms have been influential in the United States in a movement labelled "the new textualism".²² In many respects Justice Scalia's approach to statutory construction is bringing the United States approach back to that which applies in Australia and the United Kingdom. His criticism of the Church of Holy Trinity line of cases has not prevailed in the United States. Nor would it do so in Australia.

As Mahoney JA has put it:

"It is part of the ordinary process of legislative construction to qualify the generality of words."²³

In any such process, little assistance can be gained from previous cases on different statutes. This is because:

"Everything depends upon the subject matter and the context."²⁴

In 1906 Justice O'Connor in the High Court, immediately after his reference to the broader sense of the word "ambiguity" referred to above, quoted with approval the following passage from the third edition of Maxwell on the Interpretation of Statutes:

"General words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise also much that was not; or be so restricted in meaning as not to reach all

the cases which fall within the real intention. Even, therefore, where there is no indistinctness or conflict of thought, or carelessness of expression in a statute, there is enough in the vagueness or elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment, with a degree of accuracy necessary for determining whether a particular case falls within it."²⁵

Section 52 of the Trade Practices Act

One example of the courts grappling with the application of general words is the delineation of the precise scope of s52 of the Trade Practices Act 1974 (Cth), and its replication in s42 of the States' Fair Trading Acts. Giving each of the words their fullest literal meaning would open the prospect of s52 superseding vast tracks of the law of tort and of contract. Such could also supersede a large number of specific statutory provisions. It is not likely that Parliament intended any such results. Nevertheless, the delineation of the boundaries of the application of the section has proven a matter of some difficulty.

In the basic authority in the High Court on this matter, the Court divided four/three. The case involved an employee who had suffered physical injuries.

The Court was unanimous in its conclusion that s52 of the Trade Practices Act did not intend to regulate all conduct of a corporation engaged in for the purposes of its trade or commerce. The minority found the relevant restriction in the heading Part V of the Act with its reference to "Consumer Protection". This led to the conclusion, on a textual basis, that Parliament intended to restrict the protection of the Act to consumers in their capacity as such.

The majority took a different view. The reason expressed for not permitting the heading of Part V to determine the scope of the general words of s52 was because the Court identified such a construction to be discriminatory. The joint judgment said:

"So to constrict the provisions of s52 would be to convert a general prohibition of misleading or deceptive conduct by a corporation, the consumer or supplier, in trade or commerce, into a discriminatory requirement that a corporate supplier of goods or services should observe standards in its dealing with a corporate consumer which the consumer itself is left free to disregard. That being so, the general words of s52 must be construed as applying even handedly to corporations involved in a transaction or dealing with one another 'in trade or commerce'."²⁶

The question of discrimination has played a significant role in various aspects of the High Court's recent jurisprudence. What appears to be envisaged in this present context is that the idea of fair dealing lying behind s52 does, as a matter of the presumed intent of Parliament, require some element of mutuality.

The majority identified the source of restriction of the general words in s52 as arising from the use of the word "in", before the words "trade or commerce". Their Honours held:

"The phrase 'in trade or commerce' in s52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified type. As a matter of language, a prohibition against engaging in conduct 'in trade or commerce' can be construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business ... Alternatively the reference to conduct 'in trade or commerce' in s52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which of their nature bear a trading or commercial character."²⁷

The decision of the Court was that the words bore the latter meaning. Their Honours concluded:

"Section 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation may engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently the section was not intended to impose, by a side wind, an overlay of Commonwealth law upon every field of legislative control, in which a corporation may stray for the purposes of, or in connection with carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character."²⁸

The Court drew on the words of Sir Owen Dixon in a different context, to conclude that the words "in trade or commerce" referred to "the central conception" of trade or commerce²⁹ and not to the whole range of conduct engaged in in the course of, or for the purposes of, carrying on a business. This identifies a boundary, but where that boundary is to be drawn remains a matter of some difficulty.

In *Concrete Constructions* itself the High Court concluded that communications between employees as to the safety of the system of work were not "in trade or commerce" in the relevant sense. It also gave another example in which a driver carrying freight between Sydney and Melbourne who used the indicator lights to suggest the movement of a vehicle in a manner which proved false or misleading, was also not engaging "in trade or commerce" in the relevant sense. Clearly the boundary proposed in the majority judgment is more difficult to draw than that identified in the minority judgments and so it has proved.

The "side wind" metaphor has been applied subsequently.³⁰ Persons who believed themselves to be depositors in the building societies were not permitted to rely on s52. The form of the alleged "deposits" was non-withdrawable shares. Section 52 was not permitted to supersede the long established procedures for the conduct of a company liquidation. The Court concluded that "the Trade Practices Act is not concerned to regulate the position as between members of the company and its creditors". Nor was it intended to eliminate "the detailed provisions established for more than a hundred years to govern the winding up of a company"³¹.

The determination that s52 must be disregarded as a "side wind", with respect to a particular body of law, is as difficult as the identification of certain conduct as falling within the "central conception" of trade or commerce. The High Court will revisit these issues.

Fundamental Rights

The most important application of the process of statutory construction by which words of general application are read down so as not to apply to particular factual situations, occurs when a statute impinges on fundamental rights recognised by the common law. As I have said, the protection which the common law affords to the preservation of fundamental rights and liberties is secreted within the law of statutory interpretation.

This protection operates by way of rebuttable presumptions that Parliament did not intend:³²

- * to invade common law rights;
- * to restrict access to the courts;
- * to abrogate the protection of legal professional privilege;
- * to exclude the right to claims of self incrimination;
- * to interfere with vested property rights;
- * to alienate property without compensation;
- * to interfere with equality of religion;
- * to deny procedural fairness to persons affected by the exercise of public power.

A number of alternative, but equivalent formulations have been propounded to identify the level of strictness appropriate to construe provisions of this character: eg "express words of plain intendment"³³; or "clear and unambiguous words"³⁴; or "unmistakable and unambiguous"³⁵ or "irresistible clearness"³⁶ or "clearly emerges, whether by express words or by necessary implication"³⁷ or "with a clearness which admits of no doubt"³⁸.

The basic proposition was well put by Lord Reid:

"There are many cases where general words in a statute are given a limited meaning. That is, not only when there is something in the statute itself which requires it, but also where to give general words their apparent meaning would lead to conflict with some fundamental principles. Where there is ample scope for the words to operate without any such conflict it may very well be that the draftsman did not have in mind and Parliament did not realise that the words were so wide that in some few cases they could operate to subvert a fundamental principle. In general, of course, the intention of Parliament can only be inferred from the words of the statute, but it appears to me to be well established in certain cases that, without some specific indication of an intention to do so, the mere generality of words used will not be regarded as sufficient to show an intention to depart from fundamental principles."³⁹

The High Court has adopted a similar approach in the six person joint judgment in *Bropho*, a case concerned with the appropriate test for determining whether an Act is intended to bind the Crown.

Their Honours said:

"One can point to other 'rules of construction' which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result. Examples of such 'rules' are those relating to the construction of a statute which would abolish or modify fundamental common law principles or rights, which would operate retrospectively, which would deprive a superior court of power to prevent an unauthorised assumption of jurisdiction or which would take away property without compensation. The rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear. Thus, the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is 'in the least degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used'."40

The last quotation in this passage refers to an earlier case in which Justice O'Connor had adopted a passage from the fourth edition of Maxwell on Statutes.⁴¹ His Honour also quoted, with approval, the first sentence of the following passage from Maxwell on Statutes:

"There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the legislature. It is regarded as more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended."⁴²

The joint judgment of the High Court in *Bropho*⁴³ referred with approval to the reasoning of Isaacs J in *Ex parte Walsh & Johnson*; *In re Yates*, where his Honour said:

"... the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognised principles that Parliament would be prima facie expected to respect. Something unequivocal must be found; either in the context or the circumstances to overcome the presumption."⁴⁴

His Honour had also said in that judgment:

"But once concede the tractability of a phrase, then the extent of tractability depends entirely on its surroundings, including extraneous circumstances."⁴⁵

One of the presumptions I have listed is the presumption that Parliament does not intend to restrict access to the Courts. Accordingly where a statute expressly includes such a restriction in an "ouster" or "privative" clause, this presumption operates to require a strict reading of the clause.⁴⁶ So a statute which prevented judicial review of decisions "under this Act" would not protect jurisdictional error. The words were not "under or purporting to be under this Act".⁴⁷

The right of individuals to approach the Courts to enforce the law, not least to ensure that the executive arm of government exercises its power in accordance with law, is a fundamental right of constitutional significance. Statutes which purport to oust that right will not only be strictly construed, there is a core content to which the strict construction will be applied with stringency.

Australian law has developed the Hickman principle.⁴⁸ An ouster clause will not save the exercise of a power which is not a bona fide exercise, which does not relate to the subject matter of the legislation or which exceeds the scope of the power on its face. These represent a core content of jurisdictional error to which a stringent standard is appropriate. I have recently held that the obligation to accord procedural fairness is also such a core category.⁴⁹

There are two general points to make about the circumstances in which a Court will read down general words in order to protect a fundamental principle.

First, the particular principles so protected are well known and are so well established, that

parliamentary draftsmen cannot be in any doubt that they will be applied. Questions are sometimes raised as to whether such a construction by the courts is consistent with the proper functions of the courts or represents in some way a failure by the courts to reflect the true intention of the legislature. No such criticism is warranted with respect to the application of such long established principles of statutory construction. Parliamentary draftsmen know that this is the approach that will be taken. If they wish to ensure a particular result, they can do so by the use of appropriate language. Indeed the contrary is true. As Sir Gerard Brennan has said:

"The authority of the courts to change the common law rules of statutory construction must therefore be extremely limited, for the courts are duty bound to the legislature to give effect to the words of the legislature according to the rules which the courts themselves have prescribed for the communication of the legislature's intentions."⁵⁰

The second point to identify is that the categories, to which this approach to statutory construction apply, are not closed. In this, as in every other respect, the common law is a developing body of principle. The case of *Bropho* itself concerned the modification of a strict construction with respect to a category to which it had hitherto been applied, namely, whether or not a statute bound the Crown. Immediately after the passage I have quoted above, in which the High Court identified the principle as an "assumption" that in certain contexts the legislature would make its intention "unambiguously clear", the High Court added:

"If such an assumption be shown to be or to have become ill founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear."⁵¹

The High Court went on to say, that there had been such a change with regard to the issue of whether statutes bound the Crown, by reason of the historical development of the position of the Crown. However, in acknowledgment of the prior position on which parliamentary draftsmen may very well have relied, the Court distinguished between statutes passed before and after the publication of the decision in *Bropho* itself. The Court said:

"It must be acknowledged that, in the period since the *Province of Bombay* case the test of 'manifest from the very terms of the statute' and 'purposes of the statute being otherwise wholly frustrated' came to be established as decisive of the question whether, in the absence of express reference the general words of a statute bind the Crown. That being so, it may be necessary, in construing a legislative provision enacted before the publication of the decision in the present case, to take account of the fact that those tests were seen as a general application at the time when the particular provision was enacted. If, however, a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail. In the case of legislative provisions enacted subsequent to this decision, the strength of the presumption that the Crown is not bound by the general words of statutory provisions will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises."⁵²

The considerations identified in *Bropho* suggest that if a new category of fundamental principle is to be developed, by the usual processes of the common law, then cases involving statutes enacted before the new principle was established may have to be approached differently from those enacted thereafter.

In addition to the traditional common law examples of what constitutes "fundamental principles", there is a new source of authoritative exposition of such principles to be found in the human rights treaties and conventions to which Australia is a party. They may, in the future, prove to be a fertile source of authoritative exposition of principles which are used to read down general words.

Such an approach has long been adopted in the case of private international law. Sir Owen Dixon once said:

"The rule is that an enactment describing Acts, matters or things in general words, so that, if restrained by no consideration lying outside its express meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law, administered or recognised in our courts, it is within the province of our law to effect or control. The rule is one of

construction only, and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending the cases which, according to the rules of private international law administered in our courts, are governed by foreign law."⁵³

A similar presumption applies with respect to established doctrines of public international law. As O'Connor J said in 1908:

"Every statute is to be interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law."⁵⁴

The basic rule is that Parliament is to be presumed to intend to legislate in conformity, and not in conflict, with international law.⁵⁵ The scope of the matters within this field may change with time. This has been the case with subject matter of the kind found in international human rights instruments. In a case concerning the possible application of human rights conventions, referred to with approval in subsequent cases, three judges of the High Court said:

"We accept the proposition that the Court should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty."⁵⁶

The word ambiguity in this context bears the broader meaning to which I have referred above, i.e. any case of doubt as to the proper construction of a word or phrase. As Mason CJ and Deane J said in *Teoh*:

"In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations."⁵⁷

An express statutory provision has recently been adopted in this regard in the British Human Rights Act 1998 which incorporated the European Convention on Human Rights into the law of the United Kingdom. Section 3(1) of that Act states:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

This provision bears some resemblance to the provision in the New Zealand Bill of Rights Act 1990 which requires the Courts to construe other legislation consistently with the protected rights "wherever an enactment can be given such a meaning".

No such provision has been introduced into the Interpretation Acts of the Commonwealth or the States. There is no reason why, even though human rights treaties have been ratified by the executive of the Commonwealth government, that a State legislature could not establish such a presumption for purposes of its own legislation.⁵⁸ The reasoning in *Teoh* suggests that a common law principle to this effect may be emerging.

Footnotes

1 *Maunsell v Olins* [1975] AC 373 at 291.

2 *Farrell v Alexander* [1977] AC 59 at 84. See also *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 645 per Lord Simon of Glaisdale.

3 Cross *Statutory Interpretation* (3rd ed, 1995) at 83-84.

4 *Bowtell v Goldsborough Mort & Co Limited* (1996) 3 CLR 444 at 456-457.

5 *Kingston v Keprose Pty Limited* (1987) 11 NSWLR 404 at 421. His Honour's analysis in this judgment was referred to with approval by a six person joint judgment of the High Court: *Bropho v Western Australia* (1991) 171 CLR 1 at 20.

6 *Sarasvati v The Queen* (1990-91) 172 CLR 1 at 21.

7 *Cooper Brookes (Wollongong) Pty Limited v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321.

8 E.g. Interpretation Act 1901 (Cth) s15AA; Interpretation Act 1987 (NSW) s33 and similar provisions in other States and Territories.

9 *Brennan v Comcare* (1994) 54 FCR 555 at 572-575 per Gummow J.

10 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* supra at 613 per Lord Reid, 645 per Lord Simon of Glaisdale; *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459.

11 *Cabell v Markham* (1945) 148 F2d 737 at 739.

12 E. Driedger *Construction of Statutes* (2nd ed, 1983) at 2; Barnes "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law-Part One" (1994) 22 FedLR 116 at 134.

13 *Morris v Beardmore* [1981] AC 446 at 449 per Lord Edmund-Davies.

14 See Zander *The Law Making Process* (1980) at 57.

15 *R v Wilson*; *Ex parte Kisch* (1934) 52 CLR 234 at 244.

16 *Maunsell v Olins* supra at 385-386 per Lord Wilberforce.

17 *Stradling v Morgan* (1660) 75 ER 305 at 312.

18 *Ibid* at 315; See also *Bowtell v Goldsborough Mort & Co Limited* supra at 457-458; *Commercial Union Insurance Co Ltd v Colonial Carrying Co of New Zealand Ltd* [1937] NZLR 1041 at 1047-1049.

19 *Church of the Holy Trinity v United States* (1892) 143 US 457 at 459.

20 *Ibid* at 472.

21 Scalia *A Matter of Interpretation: Federal Courts and the Law* Princeton University Press (1997) at 20-21.

22 Zeppos "Justice Scalia's Textualism: The 'New' Legal Process" (1991) 12 *Cardozo Law Review* 1597; Karkkainen " 'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction" (1994) 17 *Harvard Journal of Law and Public Policy* 401; Schacter "The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation" (1998) 51 *Stanford Law Review* 1.

23 *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 279.

24 *Hall v Jones* (1942) 42 SR(NSW) 203 at 208 per Jordan CJ.

25 *Bowtell v Goldsborough Mort & Co Limited* supra at 457.

26 *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) 169 CLR 594 at 602.

27 *Ibid* at 602-603.

28 *Ibid* at 603-604.

29 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 381.

30 The origins of the metaphor are to be found in the judgment of Brennan J in *Parkdale Custom Build Furniture v Puxu* (1982) 149 CLR 191 at 224. See Gillooly "Limiting Section 52 of the Trade Practices

Act: The Side Wind Argument" (1994) 24 UWALR 278; Marshall "Section 52 of the Trade Practices Act an External Legal Order: Lessons from the NRMA Case" (1996) 3 TPLJ 126 at 140-143.

31 Webb Distributors (Aust) Pty Ltd v Victoria supra at 36-37.

32 See Pearce and Geddes Statutory Interpretation in Australia (4th ed, 1996) Chapter 5.

33 Commissioner of Police v Tanos (1957-58) 98 CLR 383 at 396; R v Lieschke (1986-87) 162 CLR 446 at 463; Annetts v McCann (1990) 170 CLR 506 at 559; Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 at 576.

34 Bropho supra at 17.

35 Coco v R (1994) 179 CLR 427 at 436-488; Kartinyeri v Commonwealth (1998) 72 ALJR 722 at [89].

36 Potter v Minahan (1908) 7 CLR 277 at 304.

37 See eg Pyneboard Pty Ltd v Trade Practices Commission (1982-83) 152 CLR 328 at 341; Public Service Association (SA) v Federated Clerks Union (1991) 173 CLR 132 at 160.

38 McGrath v Goldsborough Mort & Co Ltd (1931-32) 47 CLR 121 at 128.

39 Smith v East Elloe Rural District Council [1956] AC 736 at 764-765.

40 Bropho supra at 17-18, references omitted.

41 Potter v Minahan supra at 304.

42 Maxwell on the Interpretation of Statutes (12th ed, 1969) at 105.

43 At 18.

44 (1925) 37 CLR 36 at 93.

45 Ibid at 91.

46 See e.g. McGrath v Goldsborough Mort supra at 128, 134.

47 Darling Casino Ltd v New South Wales Casino Authority (1997) 71 ALJR 540 at 556; See also Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 at 170; De Smith, Woolf and Jowell Judicial Review of Administrative Action (5th ed, 1995) at 253.

48 R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598.

49 Vanmeld Pty Ltd v Fairfield City Council (1999) NSWCA 6 at [132]-[165].

50 Corporate Affairs Commission v Yuill (1991) 172 CLR 319 at 322.

51 Bropho supra at 18.

52 Bropho supra at 23.

53 Wanganui-Rangitikei Electric Power Board v Australian Mutual Providence Society (1934) 50 CLR 581 at 601.

54 Jumbunna Coal Mines NL v Victorian Coal Mines Association (1908) 6 CLR 309 at 363.

55 See Polites v The Commonwealth (1945) 70 CLR 60 at 68-69, 77, 80-81; Zachariassen v The Commonwealth (1917) 24 CLR 166 at 181; Mabo v Queensland (No 2) (1992) 175 CLR 1 at 42; Minister for Foreign Affairs v Magno (1992) 37 FCR 298 at 303-305 per Gummow J; Newcrest Mining (WA) Ltd v The Commonwealth (1997) 71 ALJR 1346 at 1423-1425; Kartinyeri supra at [97]; Sir Anthony Mason "International Law as a Course of Domestic Law" in Opeskin and Rothwell (eds)

International Law and Australian Federalism (1997) at 220-222.

56 *Chu Kheng Lim v The Minister for Immigration and Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ.

57 *Minister for Immigration and Ethnic Affairs v Teoh* (1994-95) 183 CLR 273 at 287-288.

58 See Spigelman "Rule of Law - Human Rights Protection" Address delivered at the 50th Anniversary of the Universal Declaration of Human Rights National Conference conducted by the Human Rights and Equal Opportunity Commission on 10 December 1998, to be published in the *Australian Bar Review* (forthcoming).

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Speech Night Sydney Boys High School

**Address by the Honourable JJ Spigelman
Chief Justice of New South Wales
16 February 1999**

I am the second graduate of Sydney Boys High School to become the Chief Justice of New South Wales. The first was Sir Frederick Jordan. He was the Chief Justice between 1934 and 1949.

Like myself, Sir Frederick Jordan was not born in Australia. He was born in London and came to Australia at the age of five. I came at the age of three. He was not the son of privilege. His family lived modestly in Balmain. He attended Balmain Public School and then Sydney Boys High School. After he graduated from Sydney High he could not afford to go to university. He worked in the Public Library for a number of years before he saved enough money to attend university. Thereafter, he completed his studies with the assistance of scholarships.

My own career and that of Sir Frederick Jordan, confirms that Australian society has been and remains a comparatively open one. Our careers are particular manifestations of the ability of this school, by reason of its tradition of selection on the grounds of academic excellence, to make available opportunities to persons from backgrounds which may otherwise restrict such opportunities. The ability to obtain an education which is pitched at a level appropriate to the capacities of particular students, is the basis for the equality of opportunity, to which I have referred.

From time to time you will find comments made which characterise the acceptance of excellence in education as in some way "elitist". I refute that. My personal experience and that of many other persons who have come from family backgrounds that do not offer any particular privilege, is that excellence in education is the way we have broken through the existing elites.

In my opinion, those who would undermine the achievement of, or the recognition of, academic excellence in our schools are the true elitists. For they place barriers in the path of those who can overwhelm an entrenched elite.

Whilst acknowledging the role this school played in my education, I do not wish to overstate the importance of old school ties. There are persons who never seem to graduate from school or from university, and carry throughout their life a special addiction to either the old university blazer or the old school tie. I do not wish to downgrade the contribution that is made by persons with such an affection for their alma mater, it is just that I do not share it.

I agree with Sir Frederick Jordan who once said:

"Schools and universities are valuable institutions for the training of children and youths in the elements of knowledge. It is good to have passed through them, provided that one has emerged on the other side. Too many regard them as ends, instead of helps towards starting points."

It is customary on occasions such as this to identify some of the challenges or difficulties which lie ahead of you as young men soon to embark on the great adventure of adult life. The first thing I wish to say to you is that you should regard your education at Sydney High as a starting point for the future.

The school makes available to you various opportunities. The extent to which you take advantage of those opportunities is a matter for each of you. I do not only refer to the process by which you are equipped to continue your education and to choose your job and career paths for the future. The opportunities which the school offers encompasses your involvement in society as whole and your capacity to make a contribution, as we should all in one way or another make a contribution, as citizens. Furthermore, it encompasses the various skills and interests of a cultural and sporting

character by which your future lives will be enriched. The school creates opportunities for all of you in each of these respects.

Perhaps I may be permitted a few moments of personal reflection in this regard. My own career has included a number of occasions on which I was involved in social activity, unrelated to any job or career path. That started at Sydney Boys High School.

Towards the end of my period at the school, I remember the arrival an American exchange student arrived for one year. The school went to quite significant lengths to establish a programme for him: establishing a committee to widen the scope of his activities and of his exposure to the whole of the school community.

I realised that there were at the school, a number of students from Asia who were here on what was then known as the Colombo Plan Scheme. Under this scheme the Commonwealth countries of Asia, then all regarded as underprivileged, sent students for education in Australian high schools and universities. It was an enlightened scheme from which Australia has gained immense advantage in its relationships with Asian nations over the decades.

I pointed out to the headmaster that no special arrangements of any character had ever been made by the school for these students, a dozen or so, and that this stood in marked contrast with the proposals for the solitary American exchange student. Accordingly, a group of students and teachers got together to form a committee which created a range of new opportunities for interaction between the students from Asian nations at the school and the Australian students and teachers.

I urge upon you the significance of activity which has a broader civic purpose, beyond the requirements of individual job or career paths. It may be that this was easier for my generation than it is for yours. Unemployment rates were unquestionably much lower. Graduate unemployment was virtually unknown. The circumstances have changed. However, what has not changed is the fact that we live in a society which depends for its health and stability on the active involvement of its citizens. Your own lives will, I assure you, be enriched by such involvement.

Perhaps I can give you one other example from my own career. In 1965, at the very commencement of my third year at university, I was one of the organisers of a group at the University of Sydney called Student Action for Aborigines which organised in February 1965 what was called a "freedom ride". This involved a group of students travelling through New South Wales' rural areas with the objective of exposing discrimination against Aborigines in various country towns.

The discrimination at the time included local government regulations which prohibited Aborigines from swimming in public swimming pools and the practices among various groups, like RSL clubs, which banned even aboriginal ex-servicemen from becoming members of those clubs. This sort of discrimination was widespread at the time.

The basic objective of the student group was to expose discrimination against Aborigines through publicity. This was particularly successful. It was the first time in Australian history that Aborigines were front page news for a period of two weeks.

I was nineteen at that time. I have done a number of things since then, most recently my appointment as Chief Justice. However, it may well be that the most important thing I have ever done, was what I did then at nineteen. Time will tell. All of you should be aware that you can make a difference, even at that age.

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Opening of the Law Term Dinner

Chief Justice JJ Spigelman
1 February 1999

(Introductory remarks)

From the time of my appointment as Chief Justice, I have on numerous occasions reiterated my belief that the operation of the legal profession, as a profession, performs a vital role in the administration of justice.

The law is not simply a job or a business focused solely on maximising the income of its members.

The profession of the law has a strong ethical dimension and seeks to attain the objectives of justice, truth and fairness, not simply the promotion of the self-interest of members of the profession or their clients.

As I said at my swearing-in ceremony, I do not intend to suggest that venality is unknown in the legal profession, but it is not its central organising principal. A plurality of organising principles for our social institutions is as important to the health of our society as bio-diversity is to our ecology.

It is appropriate that I reiterate this basic philosophical perspective on this, the occasion of my first attendance at an Opening of Law Term Dinner. I intend to continue to acknowledge the significant role that public service, rather than self-interest, plays in the activities of the legal profession. We must as a profession resist what appears to be the dominant perspective in our society that people who put duty and service to the public ahead of self-interest are eccentric or, at least, subject to significant suspicion. No sin is more effective in projecting itself on others than the sin of greed.

A few months ago I had occasion to sit on a five member bench of the Court of Appeal which considered the failure of a legal practitioner to comply with the rules of the Court for the timeous filing of submissions and chronologies in the Court of Appeal. The unanimous judgment of the Court affirmed the basic principle that legal practitioners owe duties to the Court, which include a duty to ensure that proceedings before the Court are conducted efficiently and expeditiously. It is the existence of such duties to the Court which distinguish the practice of a profession, from that of business, trade or a job.

The particular duty in question in that case does not, as may some other duties to the Court, involve any conflict between the duty to the Court and the duty to the client. The interests of clients is also to ensure the efficient and expeditious conduct of their proceedings.

I am pleased to be able to inform you that last year I initiated a process of consultation with both the Law Society and the New South Wales Bar Association on this matter. Each Association nominated two representatives to engage in a dialogue with me, directed to the clarification of the duty to conduct cases efficiently and expeditiously. As the dialogue proceeds I expect it will be reflected in changes in the Advocacy Rules and perhaps in other professional rules. It may also involve amendment to the Rules of the Court.

The objective of this dialogue is to ensure that the profession and the Courts act cooperatively to enhance the efficiency with which the Courts can use their limited resources and promote the accessibility of the system of justice by limiting the costs to parties. I look forward to continuing that dialogue.

Whilst I do not doubt the significance of steps to improve the efficiency with which the judicial system conducts cases before it, some contributions to the debate on this matter do not sufficiently acknowledge qualitative aspects of the judicial process, as distinct from merely quantitative aspects. The fairness of the legal decision making process is a matter of great social significance. The role of the judiciary cannot be measured by the extent to which it pushes through the maximum number of cases in the shortest period of time.

An ardent micro-economic reformer would have noticed that a string quartet performs a work by Mozart

in exactly the same time in 1999 as it was performed in 1799. There has been no increase in productivity for 200 years. Sure that a great scandal had been discovered, in the form of a collusive arrangement amongst professional musicians, the matter would obviously be referred to the ACCC.

Some comments on the judicial system disclose a similar approach to life.

I wish to associate myself with the analysis of the Chief Justice of Australia, Chief Justice Gleeson in a paper on *"The Future State of the Judicature"* delivered in November of last year. His Honour took as his central theme the proposition that it is not appropriate to assess the judicial system as if it was merely a publicly funded provider of dispute resolution services. I agree with his Honour. We must never lose sight of the fact that the legal system is the exercise of a governmental function, not the provision of a service to litigants as consumers. The enforcement of legal rights and obligations is a core function of government.

The first example given by Chief Justice Gleeson is criminal justice. He said:

"The process by which a criminal trial court conducts its affairs, including the openness of the proceedings to the public, the insistence upon proper procedure and methods and standards of proof, and the maintenance of a presumption of innocence, both reflects, and affects, the aspirations and values of the community ... If the only objective of the criminal justice system were the efficient determination of the guilt or innocence of accused persons, and the fixing of appropriate punishments, then the system would operate quite differently. An efficiency expert might conclude that the whole thing could be done much more effectively, and economically, behind closed doors, without the interference of lawyers and without the impediment of rules and procedures which frequently operate to protect undeserving people. That, in fact, is the way in which criminal justice is administered in some places. But our values prevent, and will continue to prevent, such standard prevailing here."

His Honour referred to the administration of civil justice and emphasised that in that case also, both the substance of the law, and the procedures adopted, reflect and affect society's values. He added:

"A great body of judge made law has been developed in the course of judicial dispute resolution, and the existence of that law is an important factor in dispute prevention."

I agree with Chief Justice Gleeson about the significance of published decisions of the superior courts. They enable lawyers to advise their clients of the likely outcome if they pursue a dispute. Even after proceedings are instituted, the vast bulk of civil cases are in fact settled, because the published body of judicial decision is able to be used by the advisers on both sides to effect a settlement. As Chief Justice Gleeson said:

"It can be seen that the social utility of the dispute resolution activities of Courts extends far beyond the interest to the parties to individual cases."

This is a public purpose that is served by the process of resolving a private dispute. The broader public purpose results in social benefits well beyond the resolution of the individual dispute. It is what we economists call an externality.

Finally, Chief Justice Gleeson emphasised the constitutional role of the Courts in determining such matters as the powers of governments and parliaments, the enforcement of the rights of citizens, and other ways to maintain the institutional structures of our polity. The judicial system provides a forum, parallel to our parliamentary system, for the public discourse by which our society and polity affirms its core values, applies them and adapts them to changing circumstances.

The resolution of disputes by the authoritative process of the Courts involves a public affirmation of rights and, often, the social denunciation of improper behaviour. This is a social role, well beyond the

resolution of a particular dispute.

We do not live in a Confucian society in which overriding value is given to the restoration of social harmony. Western civilisation recognises the rule of law in which people are entitled to assert their rights. In many disputes, some parties are plainly in the wrong and we should not shirk from saying so. There are virtues in resolving disputes for the sake of doing so - especially where an ongoing relationship is involved. But there are also virtues in proclaiming that someone is right and someone else is wrong.

Nothing I have said should be understood as detracting from the importance of alternative dispute resolution or the judicial contribution to efficiency and expedition. There is no doubt that the involvement of the judiciary in the legal process has changed over recent decades. I am reminded that when Gulliver went to Lilliput he discovered that the representation of the image of "Justice" in Lilliput, was not like our representation in the form of a woman with a blindfold. In Lilliput, the statue of "Justice" had both eyes firmly open; It also had eyes in the back of the head. This is what we call case management.

I have no doubt that the judiciary will, in the future, be even more actively involved in the conduct of litigation. I agree with Chief Justice Gleeson when he said in his November speech:

"The civil disputes function is most likely to undergo substantial modification because the cost of performing that function in the manner in which it is presently performed is not sustainable."

The modifications will be multifaceted. They are least likely to be made in a context of a grand scheme of reform across the board. A grand scheme is inherently susceptible to abandoning important changes in order to progress the overall agenda. The most important reforms are often compromised as has, I believe occurred with the Woolf reforms in England. A more patient long term approach is much more likely to lead to substantial change.

One of this nation's most abiding characteristics is its profound scepticism of grand theories. Our political, economic and social development has occurred by a process of slow, but deliberate, elaboration and evolution of an appropriate legal and institutional framework through a process of trial and error.

Throughout our history there has been a recognition of the value of what has been achieved up to that point of time. However this recognition has always been accompanied by a parallel recognition that the established order can and will change: the process of elaboration and evolution is continuing and will continue.

I myself am a firm believer in the application of such a process to reform of the legal system. I am sceptical of grand schemes for reform which look neat on a whiteboard. I believe in an ongoing process of change and adaptation.

I look forward to a continued association with the Law Society in the progressive development of the legal system of which we are all a part.