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## Address on the retirement of the Honourable Justice Sheller

### ADDRESS ON THE RETIREMENT OF THE HONOURABLE JUSTICE SHELLER BANCO COURT, SUPREME COURT OF NEW SOUTH WALES SYDNEY, 29 APRIL 2005

In the 180 year history of this Court there have been numerous judges who have displayed many of the judicial virtues: learning, wisdom, compassion, eloquence, robust independence, impartiality, attentiveness, diligence, common sense, clarity of thought and of expression, administrative skills and strength of character. Few have had all of these qualities and to the high level, that has been manifest by the Honourable Justice Simon Sheller for the entire period of over thirteen years that you have served as a Judge and Judge of Appeal of this Court.

Regrettably the time has come to pass on the responsibilities of office to others. In the words of Lucretius - *et quasi cursores vitae lampada tradunt*: "like runners they pass on the torch of life". This State is losing a great judge. It is fitting that so many of us have gathered here today to mark your retirement.

From your Honour's first day in this Court to your last day, not one of the many hundreds of litigants, whose affairs it fell to you to determine, had any doubt that they were treated with the utmost courtesy; that the assessment of the case for and against their interests was conducted with care and rigour; by a person of great dignity who also had an enormous store of legal knowledge and a compassionate understanding of their difficulties and wishes. No one left your Honour's Court, whether during the course of a hearing or after judgment was delivered, with any doubt that they had received substantial justice according to law.

Your Honour's contribution was not limited to sitting as a judge. It extended to the detailed administration of the Court and more broadly to the service of the Australian judiciary. Your Honour made a contribution that is unlikely to be surpassed and which has justifiably been recognised at the highest levels by the award of an Order of Australia.

Between 2000 and 2004 your Honour served as the president of the Judicial Conference of Australia where you represented the whole of the Australia judiciary at a time of considerable challenge, particularly in the context of the imposition of a taxation surcharge on judicial pension entitlements.

In this Court your Honour served as the chairman of the Building Committee from its establishment in 1993 ensuring that the practical accommodation needs of the Court were met and, perhaps most notably, supervising the transformation of the original Francis Greenway designed Supreme Court building in an award winning heritage project which, unusually for a heritage building, recycled an old building for its original use, whilst providing contemporary accommodation standards.

Your Honour also chaired the Alternative Dispute Resolutions Committee of the Court since 1997. Your enthusiasm for mediation has led directly to changes in the Court's Rules and in its practice with respect to mediation, which changes have considerably enhanced the dispute resolution process in this State.

Your Honour has served on the Law Court's Library Management Committee since 1995 and as chair from 2002 to 2004, maintaining the high level of quality of the service provided by the library, which is much appreciated by all judges. This service has been considerably enhanced by the resolution under your guidelines of longstanding budgetary difficulties with those who fund the courts and the reconstruction of the library itself.

Your Honour also chaired the 175th Anniversary committee in 1999, organising a series of events including a ceremonial sitting, lectures, an exhibition and a dinner, by which the legal profession and, to some degree, the broader community came to better recognise the contribution that is made to this nation by the longevity of our institutions of the rule of law.

In all of these respects your Honour's past activities will continue to have effect to the great advantage of the administration of justice for many years to come.

Like any judge, your major contribution is the judgments you have delivered. Over 200 are published in the New South Wales Law Reports which, of course, represent only a fraction of your Honour's entire throughput in what was once called, when there was such a thing, unreported judgments.

I have, over recent years, on these occasions of the retirement of a Judge of Appeal noted a number of that judge's judgments which will clearly stand the test of time. On this occasion I stand defeated. There are simply too many. It would be invidious to select some rather than others. There is no area of this Court's jurisdiction that your Honour did not touch. There is no area that you touched that you do not adorn.

You have delivered leading judgments on the duties of company directors, on the law of options, on takeovers and winding ups, on the lifting of the corporate veil, on equitable setoffs and constructive trusts, on fatal accident claims, on the duty of care of local authorities and hospitals, on the effect of fraudulent conduct on insurance policies, on the requirements of procedural fairness in various statutory bodies, on the duties of executors, on the disbarment of legal practitioners, on the law of declarations, on the standing to obtain injunctions, on the rights of beneficiaries to have access to trust documents, on sentencing for sexual offences, on identification evidence based on photographs, on the withdrawal of a guilty plea, on the 'perils of the sea' exception to carriers liability and on the valuation of a dredge. There is no point in singling out any one of these judgments, nor in extending the list further.

Each of these judgments manifest your Honour's judicial style of comprehensive attention to all of the relevant facts, to the issues arising in the proceedings and to the arguments submitted by the parties. Notwithstanding the complexity or the size of the task, every one of your Honour's judgments deals with each of the requirements of the case at hand in a manner that is uncluttered by anecdote, literary reference or any other form of self indulgence, to which so many of us, including myself, sometimes succumb. Your command of the language allows all of this to be expressed with force and clarity and in a tone of high sobriety.

However, there is a side of you that is not manifest in your judgments and which is only available to those with the privilege of direct personal contact. Your Honour is a man of great wit, frequently of a kind that borders on the impish. Interacting with you, as your fellow judges have had the privilege to do on a regular basis, has always been a delight. That delight has been considerably enhanced by the contribution that your wife, Jan, to whom you are devoted, has made to the collegial life of the Court. I wish to acknowledge that contribution here this morning. I know how much you value her support. We are particularly grateful that she permitted you to stay until you were required to retire by statute.

Your Honour leaves us with many memories and with many contributions and insights, on which we will draw for some considerable time. There is one, however, that will abide for all of my time as a judge and I am sure, in this respect, I speak for all of those who have been your colleagues. Thank you for many things, but thank you most of all for providing all of us a role model as to how a judge should behave.

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## Judicial Independence

### ANNUAL CONFERENCE OF THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

AT

SUTTON FORREST

3 MAY 2002

### "JUDICIAL INDEPENDENCE"

C S C SHELLER

#### **1. Introduction**

Three inter-related ideas underpin a democratic and consensual society such as ours. They are judicial impartiality, judicial independence and public confidence in the judiciary. If the public loses confidence in the independence or impartiality of the judiciary the democratic structure is weakened and the rights and freedoms of our citizens put at risk.

#### **2. A matter of concern**

Judges are entitled to be and should be concerned about the growing process and practice of denigration of their office by politicians, by members of the media, by public commentators and sometimes by academics and members of the legal profession. There is no debate. Such attacks bypass reasoned criticism of particular decisions and choose the lazy but effective road of generalised vilification. Much that is said abandons any attempt at rational argument and descends into mindless abuse, often from senior politicians who should know better. Thus Federal government ministers are prepared publicly to bad-mouth High Court judges [1]. This process insidiously subverts public confidence in the judiciary and has opened the way to questions being raised about aspects of judicial independence. The most striking example of public vilification was the assault made on Justice Michael Kirby in the Senate on 12 March 2002. I shall come back to this.

This concern is not new. On 2 February 1990 Justice R M Hope, speaking on his retirement after nearly twenty years of judicial service, eighteen in the New South Wales Court of Appeal, expressed his concern about the erosion of community understanding of judicial independence. The judge said:

"Challenges to, indeed attacks upon, the integrity, and at times the independence, of judges have increased significantly in the last ten years. Judges and the judicial system are, and indeed must be, sufficiently robust to be subjected to informed criticism. But the attrition of continual uninformed and unjustified criticism is not merely an irritant; it could, if not kept in check, cause great, even irreparable harm to the system itself. By tradition it is not answered. Perhaps a system should be devised by which, in some cases at least, the public could be informed of the facts." [2]

Justice Michael Kirby has pointed out that after the High Court's decision in the **Wik Peoples v Queensland** [3], a decision by a majority of four to three:

"[P]oliticians in both Federal and State Parliaments appeared to compete with each other to attack the Court and especially the majority judges. Few indeed demonstrated any familiarity with what the judges had written..... A State Premier described [Justice Kirby's reasons] **as** nothing more than 'rantings and ravings'. The attacks, the like of which we have never seen

before in Australia, continued for months, unrepaired by an effective defence of the Court by the traditional political guardian of judicial independence, the Attorney-General." [4]

The Federal Attorney-General stated that he did not agree with the convention that the Attorney-General should defend the courts from criticism. The judiciary is able "to defend itself in most situations and should do so".[5] I draw attention to a different approach.

In the *Sydney Morning Herald* on 11 June 2001 appeared an article by Evan Whitton containing the following paragraph:

"Unlike judges at adversary trials, commissioners and coroners at least do not conceal relevant evidence, but they are so habituated to suppressing evidence that they find it hard to recognise the truth when they see it."

This sort of nonsense published in a daily newspaper which is widely read, if it gains credence, tends to harm the institution. A senior judge wrote to me:

"This commentator has previously (and frequently) accused the common law judiciary of a total lack of interest in 'the truth'. However, I am not previously aware of this claim, that is, that our judges deliberately exclude relevant evidence. He has elevated the charge from a passive (disinterested) one (serious enough) to an active (especially nasty) one."

I referred the matter to the New South Wales Attorney-General, Mr Bob Debus, who had not seen the article but agreed that judges rightly took exception to it. Mr Debus said that he saw it as the role of the Attorney-General to correct such misinformation though he pointed out the difficulty of doing so, because recent experience when he had sought to set the record straight about intemperate criticism of the judiciary by writing to the *Sydney Morning Herald*, was quite simply that his remarks were not printed. However, at least one Australian Attorney-General still sees it as the role of that office to protect the judicial arm of government from intemperate criticism.

Another example of such criticisms appeared from the correspondence in January 1997 between the Chief Justice Sir Gerard Brennan and the then Deputy Prime Minister Tim Fischer [6]. On 3 January 1997 the Chief Justice referred to a headline and article in *The Australian* of 28 November 1996 "Fischer Lashes High Court for Delay in Wik Decision".

The Chief Justice remarked that this was the second attack that Mr Fischer had made upon the Court suggesting an unwarranted delay and acquainted him with the facts of the case. The appeals were removed into the High Court on 15 April 1996 and came on for hearing on 11 June. The hearing was completed on 13 June. The appeal books consisted of seventeen volumes, containing 263 documents covering 3,036 pages. There were seven volumes of legislation contained in 338 documents covering 1,971 pages. The written submissions covered 714 pages with 915 pages of attachments. 98 Australian and 155 overseas cases were cited. The transcript of oral argument covered 266 pages. While dealing with this mass of material and difficult questions of law, time had to be found for the Court to continue to sit and deal with cases listed for hearing during the balance of the year. As the Chief Justice said the claim that there was any unwarranted delay in the delivery of the judgment was quite unjustified. It was delivered on 23 December 1996 as soon as convenient after all Justices had written their judgments.

Importantly, the Chief Justice wrote that attacks of this kind emanating from a Deputy Prime Minister are damaging to the High Court. "You will appreciate that public confidence in the constitutional institutions of government is critical to the stability of our society."

In his letter in reply of 13 January 1997 there was no sign that Mr Fischer comprehended the damage that attacks such as his could have upon the integrity of the system of the administration of law we espouse. His said merely that his comments were made against the background of "incorrect advice" he had received. He concurred "strongly" with the view that public confidence in the constitutional institutions of government was critical to the stability of government. He left it at that.

### 3. Why does it matter?

Judicial independence is a catch phrase familiar to judges and others concerned with the body politic. Its importance is freely acknowledged. But the practical application of the concept has proved difficult. What does it entail and how should it be preserved?

Ringed words and powerful truths have been spoken and written during the last 400 years. It is worth repeating some of them.

On 13 November 1608 Coke CJ, in the presence of the judges assembled in Whitehall Palace and on their behalf, responded to King James I's claim that the judges were his shadows and ministers.

"[T]he King in his own person cannot adjudge any case ..... [which] ought to be determined and adjudged in some court of justice, according to the Law and Custom of England.... Causes which concern the Life, or Inheritance, or Goods or Fortunes of his Subjects" were to be decided by "Judgment of Law..... The Law was the golden Met-wand [touchstone] and Measure to try the Causes of the Subjects." [7]

Pitt the Elder (Lord Chatham), speaking in the House of Lords in the case of **Wilkes** on 9 January 1770, said: "Where law ends tyranny begins". [8]

Thirty years later in **Marbury v Madison** [9], the Chief Justice of the Supreme Court of the United States, Marshall CJ said that it is emphatically the province and duty of the judicial department to say what the law is.

These are dramatic but defining assertions of the supremacy of the law and the importance of that supremacy. Yet to this day, in Australia too many people think judges are but public servants, people appointed to do the will of the legislature or the executive. That they are not is demonstrated by **Tait v The Queen** [10] which exemplifies the protection that a court gives the individual. Upon granting an adjournment before considering the merits of an appeal, the High Court ordered that the execution of the prisoner applicant fixed for the next morning be not carried out but stayed pending the disposal of the applications. In 1920 in **R v Macfarlane; ex parte O'Flanagan and O'Kelly** [11], Isaacs J said that every person is entitled to his personal liberty except so far as that is abridged by the due administration of the law.

In **Chambers v Florida** [12] Justice Hugo L Black, once a member of the Ku Klux Klan but, within a short time after his appointment, a leader of the liberal wing of the United States Supreme Court, remarked that ".... courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement".

In **Liversidge v Anderson** [13] Lord Atkin reminded us that it is the judges who "stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

Our Constitution is an instrument framed on the assumption of the rule of law; **Australian Communist Party v The Commonwealth** [14]. One of its principal objects is to provide for the maintenance of the rule of law by an independent judiciary. [15]

In 1961 Justice Felix Frankfurter remarked [16]:

"The Court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction."

These quotations emphasise that the rule of law is an essential element of democracy and that judges play a vital and irreplaceable part in maintaining it. If judges are not independent, that is to say free from interference or threat from government, there is the risk of a public perception that they will not be impartial and stand between the subject and executive encroachments on the subject's liberty. Our freedom depends on public confidence in the independence and impartiality of our judges.

Article 10 of the 1948 Universal Declaration of Human Rights states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him. That statement succinctly and compellingly both sets out the core of the proposition and explains its importance: "a fair and public hearing by an independent and impartial tribunal." I know of no better expression of a fundamental right sustaining our individual personal freedom.

Judicial independence is not an end in itself, some self-serving judicial privilege. It is a privilege of the

people and protects the people in a society which operates consensually and not by the exertions of an overwhelming police presence. Impartiality goes hand in hand with independence. [17] The public must have confidence in the impartiality of the judiciary. But public confidence in turn depends upon the judges' adhering to their oath of office to do right by all manner of people without favour or ill will. The judges sap public confidence if they are seen to favour one party, be it Crown or citizen, or show ill will to either.

Despite the importance of judicial independence and the often repeated statements by community leaders world wide that this independence must be preserved, many do not appreciate what the expression implies. Few understand that judicial independence is an essential condition for maintaining the rule of law; that the rule of law binds not only the citizen but the legislature and the executive, the government and its officials. The governed and the governors stand equally before the law. The rule of law protects not only those who are powerful, influential, popular and righteous. It protects also the rights of the unpopular, the weak, members of minority groups and in particular the rights of those charged with criminal offences. If Premiers, and popular radio commentators and celebrities publicly pronounce individuals guilty of offences regarded by the community as heinous, then how important it is that those individuals be judged according to the law by judges who are not populists, but independent and, in particular, impartial.

What becomes of the haven of the helpless, weak, outnumbered, victims of prejudice and of public excitement if public confidence in the courts is undermined by unsubstantiated abuse?

Public confidence in the judges and hence the authority of the courts can be diminished without the public realising it. In 1940 Lord Atkin wrote to Dr Evatt:

"How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air: they know and care nothing about it until it is withdrawn." [18]

#### **4. The attack on Justice Kirby**

On 12 March 2002, in speaking to the address in reply to the Governor-General's speech in the Senate beginning at about 8.43pm, Senator Heffernan, the Parliamentary Secretary to the Cabinet, made a savage assault on a member of the High Court, Justice Michael Kirby. In an edition of *The Australian* newspaper published before 4am on 13 March 2002 the headline was "Heffernan claims High Court judge trawled for sex". By 18 March 2002 the evidence for these allegations, such as it was, was demonstrated to be false.

Senator Heffernan, referring to an application for special leave to appeal to the High Court on which Justice Kirby had sat with another judge and observing that the application was granted, said that the Justice Kirby had "displayed a highly skilled and articulate capacity to manage close public scrutiny and, most importantly ....[had] confirmed through [his words and actions] that indeed judicial legitimacy is a myth without a federal judicial commission" [19].

Rule 193 in Chapter 31 of the Senate Standing Orders, which deals with the rules of debate, provides:

"(3) A Senator shall not use offensive words .....against a judicial officer, and all imputations of improper motives and all personal reflections on .....officers shall be considered highly disorderly."

Resolution 9 of the 25 February 1998 Senate Resolutions under the heading "Exercise of Freedom of Speech" states (1) that the Senate considers that in speaking in the Senate, Senators should take the following matters into account:

"(e) The desirability of ensuring that statements reflecting adversely on persons are soundly based."

In *Australian Senate Practice*, [20] reference is made to resolution 9 enjoining Senators to exercise their freedom of speech responsibly. The author wrote:

"These resolutions were adopted after a great deal of attention had been given to the possibility that

members of the parliament may abuse the absolute immunity which attaches to their parliamentary speeches by grossly and unfairly defaming individuals who have no legal redress and who, if they are not themselves members, have no forum for making a widely publicised rebuttal."

On 13 March 2002 in the House of Representatives at 2pm, the Leader of the Opposition asked the Prime Minister whether he agreed with a statement by the Foreign Minister that when people use the parliament and parliamentary privilege they should also remember that privileges bring with them responsibility and if you are going to attack people who are out of the political sphere it is very important to have evidence to back that up. The Leader of the Opposition continued:

"Given that there is no credible evidence to support Heffernan's allegations, when will you sack him?" [21]

In the course of a long reply the Prime Minister tabled a letter he had received from the Senator, the substance of which was that no prosecution had been undertaken against the judge because in the assessment of the police it would not meet the technical prosecution guidelines of the NSW DPP. The Prime Minister recorded that Senator Heffernan did not resile from what he had said, that the allegations against Justice Kirby needed to be further assessed and that there was some need for a protocol to deal with allegations against Federal judges.[22] I shall return to deal with the reply to a question made by the Attorney General.

The late night assault protected by privilege had its inevitable consequence. Justice Kirby was not only accused, he was condemned in the minds of many newspaper readers. One would be naïve indeed to think that this was not the intended result. Many commentators remarked that his career was finished and that he would be bound to resign. Suggestions were made that he should.

Such a consequence flows from attempts to undermine the rule of law and the due processes of law. Senator Heffernan attacked the High Court, the highest court in this land by suggesting that one of its judges was unfit to sit and guilty of bias in dealing with a case and that his words and actions made judicial legitimacy a myth.

This was a direct attack on the independence of judges. Senator Heffernan no doubt disagreed with the granting of special leave to appeal in the case he referred to, a grant made by Justice Kirby with another judge of the Court. In short, if a member of Parliament does not like the work of a particular judge, the method to remove him is such as was adopted here. It is not possible to over-emphasise the seriousness of what happened. The reaction of the Prime Minister - to suggest in some way that what Senator Heffernan had done was justified because he holds his view very deeply and very conscientiously or because Senator Heffernan holds his affection and friendship - ignored the seriousness of what was done.

The Prime Minister should have sufficient confidence in his Attorney-General to seek his advice and act on it. The Attorney-General must not only be competent but strong. No doubt it is often difficult to insist that the rule of law prevails and that the independence of the judiciary be maintained. In particular, judges must remain free from threats by government or members of it.

On 14 March 2002 in the *Australian* [23], under the heading "Cowards way leaves victim defenceless - Heffernan's attack on Justice Kirby is an act of constitutional bastardry", Greg Craven, Dean of Law at Notre Dame University, Western Australia, wrote:

"Judicial independence is not a god-given right, even in the society such as Australia. It rests upon a popular consensus that our judges are honest people, honestly applying the law.

Heffernan has assaulted that consensus under parliamentary privilege in a swirl of venom and spleen. Quite apart from the ethical and personal considerations that apply, and however passionately Heffernan believes he has material to justify the attack, this was an act of constitutional bastardry.



Of course, the Cabinet Secretary has a ready response to such allegations. He protests that he is deeply concerned that judges such as Kirby might be subject to blackmail over their past behaviour. Such judges are unsuitable holders of judicial office, says Heffernan.

There are a number of responses to this, none of them remotely polite. Perhaps the simplest is to observe that even blackmailers might shrink from the company of assassins, especially assassins of character who lack the courage to make their allegations in a public arena."

The Attorney-General's response to a question put to him by Mr McClelland as to whether he had "complete confidence" in Justice Kirby was to refer to a news release he had issued that morning which carried the heading "High Court's Integrity Not in Question".[24] That news release began:

"Some commentators have criticised my views regarding the role of the Attorney-General as a defender of the judiciary. The comments I have seen are superficial or misguided."

The heading was no doubt intended to absolve him, according to his own rules, from defending Justice Kirby. The Attorney-General said:

"[T]here can be no credible suggestion that the High Court, as an institution, is under challenge."

The Attorney-General saw the attack as mere personal criticisms.

At best and at its saddest, the events which began late at night on 12 March 2002 demonstrated a failure at the highest level of government to understand how important it is to our democratic system that the rule of law be upheld and the independence of the judges preserved. If Justice Kirby is to be accused of criminal conduct or found unfit for office, he is entitled, like all of us, to the benefit of due process. If he is denied due process, so are we all.

On 21 March 2002 the Judicial Conference of Australia published a statement, the last paragraph of which was in the following terms:

"A responsibility of the Attorney-General and one of the first importance is to uphold the rule of law. The rule of law depends upon an independent judiciary. In addition to the personal trauma it inflicted on Justice Kirby and his family, Senator Heffernan's speech damaged the reputation of the High Court and of the Parliament. The extent of the damage and the lasting effect of what Senator Heffernan did remains to be seen. If the Attorney-General had been strong in his advice to the Prime Minister and defence of the High Court, both the High Court and the Parliament might have been spared. Australia and the democracy it cherishes cannot afford such assaults on its most important institutions. The Attorney-General must reconsider his role in upholding the rule of law and the independence of the judges."

*"The Council of Chief Justices, at its meeting on 3 April 2002, resolved that the Council deplored the use of parliamentary privilege in a manner damaging to the standing of the High Court and the judiciary by the making of an unjustified attack on the fitness of one of the members of the High Court to sit as a judge, and the use of parliamentary privilege to attack, on unsubstantiated grounds, the reputation of an individual and a judge. The Council shared the concerns expressed by the Executive Committee of the Judicial Conference of Australia on 21 March 2002."*

## 5. Tribunals

In the atmosphere of social legislation which developed in the 20th Century tribunals are said to offer speedier, cheaper and more accessible justice essential to the administration of much government activity both in the provision of social services and in other fields such as taxation. These bodies represent a compromise between, on the one hand, the process of courts, which tends to be at least costly and may be slow and is designed to produce the highest standard of justice, and, on the other, the unchallengeable administration of such matters by public servants without recourse to hearing. The aim is not to provide the highest standard of justice but the best article that is consistent with efficient administration. [25]

Wade and Forsyth [26] point out that the responsibilities of tribunals can and frequently are no less important than those of courts of law. The designation "Administrative Tribunals" is misleading in some ways. For example, the decisions of most tribunals are in truth judicial rather than administrative in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policies. It is important that tribunals remain independent and are not subject to administrative interference in how they decide any particular case. They must make their own decisions independently and free from political influence. The public may have some concern about their impartiality, for example if the tribunal sits in the department's premises.

In England after the Second World War it could be said that intensive social legislative put great trust in tribunals because of an attitude of positive hostility to the courts of law. One Minister spoke of "judicial sabotage of socialist legislation". Importantly, the Franks Committee [27] set up to investigate the system of tribunals did not accept the argument that tribunals in the social service field should be regarded as adjuncts to the administration of the services themselves but considered that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. In the United Kingdom was preserved a right of appeal to the High Court on a point of law and judicial control by means of remedies such as certiorari and mandamus. The proceedings are adversarial rather than inquisitorial.

In an article on the appointment and removal of judges [28], Sir Anthony Mason said that the emergence of a modern system of administrative justice with its myriad of tribunals standing outside the orthodox court system had naturally led to the view that the requirement for independence with its essential protection should apply to at least some of the tribunals in the system. He acknowledged that the vast range of administrative tribunals, the wide variation and the functions they discharged and the issues they were called upon to decide made it impossible to apply to all tribunals the regime which ought to govern the appointment and removal of judges. He said:

"Unless we put in place provisions which preserve the independence of magistrates and members of tribunals, we run the risk that interference with the independence of magistrates and tribunal members will eventually contribute to the erosion of the concept of judicial independence as it applies to judges. The central element of judicial independence is the freedom of a judge to hear and decide cases without interference and uninfluenced by an outsider - be it government, pressure groups or anyone else. The purpose of that independence, it should be emphasised, is to serve as a protection and a privilege of the people, not of the judges." [29]

In 2000 the Federal Government introduced legislation to substitute a new tribunal, the Administrative Review Tribunal, for various tribunals including the Administrative Appeals Tribunal. In 1975 when the AAT legislation, together with the Ombudsman legislation, became law, the then Attorney-General said that "Australia can stand proud in the nations of the world as having perhaps the most enlightened, advanced and progressive form of administrative law in the world." [30] Australia's administrative law package has since come to be recognised internationally as setting a standard for administrative review.

The Administrative Review Tribunal proposed in 2000 was seen by many as undermining that administrative law record and in some areas, such as taxation and compensation, making people worse off in terms of their rights to external review than they were before the Administrative Appeals Tribunal was established. The proposed legislation was defeated in the Senate and it is not my intention to debate its merits beyond pointing to various features which appeared to be directed to undermining the independence of members of the tribunal. These serve as a reminder of government attitudes to judicial independence and government attempts to assert executive control over the outcomes of review.

The proposed Administrative Review Tribunal Bill contained no provision that its President should be a Judge or even a lawyer. It required members to enter into performance agreements and, in addition, comply with a code of conduct. A member who refused or failed to enter into a performance agreement or after entering into one committed a serious or continuing breach of it or committed a serious or continuing breach of his or her obligations to comply with a code of conduct, would inevitably be removed from office by the Governor-General. The performance agreement was to deal with the performance by the member of the duties of his or her office though not to deal with the

substance of particular decisions. Appointment was for a period of years with an entitlement to apply for re-appointment. The appointment had to be approved by the Minister responsible for the particular field of government with which the tribunal would be concerned, such as taxation or migration.

How would a member of the public feel if the tribunal consisted of or included a person shortly to come up for renewal of office by the Minister whose department was a party to the matter before the tribunal? An apprehension of bias would be inevitable. In addition, the responsible Minister or portfolio Minister could issue directions that had to be followed by the tribunal in reviewing decisions made under the legislation for which the particular Minister was responsible. While there was some restriction on this, a wide range of matters might be dealt with by practice and procedural directions with the result that the potential for Ministerial control was significant.

What was troubling was not the re-vamping of the structure of federal tribunals so as to combine them all into one - the matter which the government emphasised. It was the failure not to ensure, not to guarantee, that whoever sat on the tribunals was and appeared to be wholly independent and impartial, and in particular, independent of any governmental control, of any favour such as the possibility of re-appointment or any fear such as the possibility of dismissal.

## 6. Courts must have the facilities and power to do justice

The power and facilities to resolve disputes and enforce the law are necessary ingredients of judicial independence. In a paper presented to the Third Annual Seminar of the Australian Institute of Judicial Administration at Brisbane on 25 August 1984 [31], the then Chief Justice of Tasmania, Sir Guy Green, said that discussions about judicial independence often emphasised the need to ensure that the judiciary is able to carry out its work free from improper influence or interference. That, of course, is a very important part of judicial independence, but it is an empty concept unless the judiciary is also provided with the powers and facilities which are necessary to enable it to do its work. "As a commentator writing about Franco's Spain cynically put it:

'How are we to reconcile the existence of an independent judiciary with that of an authoritarian regime? Is not such a co-existence a flagrant paradox? The answer may be that the paradox is just apparent: for judges in contemporary Spain are independent but they are powerless. Or, as a Magistrado I interviewed put it to me, they are independent *because* they are powerless.'

" [32]

Section 476(1) of the Migration Act 1958 (Cth) empowered the Federal Court to review decisions of the Refugee Review Tribunal. **Abebe v The Commonwealth** [33] concerned a challenge to Federal Government amendments to the Migration Act on the basis that they were beyond legislative power. The amendments stripped the Federal Court's power to review on the grounds, inter alia,

- that a breach of natural justice had occurred in connection with the making of the Tribunal's decision, ie on the ground of apprehended bias, compare s476(2)(a) and see 197 CLR at 552.9; and
- on the ground that the decision involved an exercise of power that was so unreasonable that no reasonable person could have so exercised the power.

Further, s476(1) provided that while a decision could be challenged on the basis that it was an improper exercise of power, the reference to an improper exercise of power was not to be taken as including a reference to:

- taking an irrelevant consideration into account in the exercise of a power;
- failing to take a relevant consideration into account in the exercise of a power;
- an exercise of discretionary power in bad faith; or
- even, in some cases, the exercise of a power in such a way that it represented an abuse of power.

[34]

According to Campbell and Lee [35], these amendments flowed from the Government's "exasperation" with the Federal Court. The effect was to leave the power to review on broader grounds with the High Court under s75(v) of the Constitution. The effect of the legislation was to truncate the power of a superior court, albeit a statutory court established by the Parliament, to supervise the conduct of a Federal tribunal in cases where ex hypothesi the tribunal had acted contrary to the law, for example, by arriving at a decision that no reasonable person could reach or alternatively by ignoring relevant material or giving weight to irrelevant material.

The powers of the Federal Court to review decisions by a Refugee Review Tribunal have been further attenuated by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). Thus there is removed in respect to refugees an innate power of a superior court to review administrative action so as to ensure that the principles of natural justice have been observed and give relief where they have not. Wade and Forsyth [36] describe this as the minimum of fairness in administration and adjudication. Fortunately, s75(v) provides a constitutional barrier against the government doing what one might hope it would never conceive of doing namely, removing the power of the courts to review administrative action however gross. In this respect, the Federal Court remains like Franco's courts, independent but powerless.

The August 2001 Tampa incident led to the Federal Parliament passing the *Border Protection (Validation and Enforcement) Powers Act 2001* (Cth) which provided that "all action .....taken by the Commonwealth.....in relation to the MV Tampa .....is taken for all purposes to have been lawful when it occurred". In an article in the *Sydney Morning Herald* [37], David Marr said that legislation of this kind was highly unusual in countries that respect the rule of law; see **Vadarlis v MIMA & Ors** [38]. What is pertinent and, if right, deplorable about this sort of legislation is that it puts Australia's approach to the rescue of the victims of shipwrecks at odds with international convention [39]. Ironically, this is to be compared with the expressed attitude of the Government of China to conform with internationally accepted convention about the rule of law, and the independence of the judiciary. In a recent forum in Beijing [40] both Li Peng, the Chairman of the Standing Committee of the People's Congress and Chief Justice Xio Yang, President of the Supreme People's Court, publicly dedicated China to the rule of law, the independence of the judiciary and the impartiality of judges. By contrast, in Australia we witness at a Federal level retrospective exoneration of the government and its officers from the operation of the rule of law.

## 7. Conclusion

Unfortunately, the failure of those in government to protect the independence of the judiciary and the tendency to legislate in ways which sap the power of the courts to uphold the rule of law brings the courts and the judges more and more into areas of public controversy. Since many people tend to align themselves in such controversies with the political party they support, so more and more do judges become involved in political debate. Yet if judges do not remain vigilant to protect their independence and maintain the rule of law as bastions of democratic freedom, who else will?

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1 Justice Michael Kirby, 'Attacks on Judges - A Universal Phenomenon' (1998) 72 ALJ 599 at 601 and Campbell and Lee, *The Australian Judiciary* (2001) at 58.

2 As extracted from Justice Michael Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth' (1990) 13 (2) UNSWLJ 187 at 188.

3 (1996) 187 CLR 1

4 Justice Michael Kirby, above n1 at 600.

5 House of Representatives, 20 March 2002, Hansard, p1684.

6 Campbell and Lee, above n1 at 56-58.

7 *Coke's Reports*, as extracted from Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (1957) at 261-263.

8 Extracted from Justice McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1 JJA 1 at 8.

9 (1803) 5 US 368 at 389; (1803) 1 C 137 at 177

10 (1962) 108 CLR 620

11 (1923) 32 CLR 518 at 541-542

12 309 US 227 (1940) at 241

13 [1942] AC 206 at 244

14 (1951) 83 CLR 1 at 191 per Dixon J

15 (1996) 82 Canberra Bulletin of Public Administration 1 at 2

16 *Baker v Carr* 369 US 186 (1961) at 267

17 See Justice Nicholson, 'Judicial Independence and Accountability: Can they Co-Exist?' (1993) 67 ALJ 404.

18 Lewis, *Lord Atkin* (1983) at 176.

19 Senate, 12 March 2002, Hansard, p402.

20 Odgers, *Australian Senate Practice*, 10th ed at p71.

21 Senate, 13 March 2002, Hansard, p1056.

22 Ibid at pp1056-1057

23 Greg Craven, 14 March 2002, p11

24 Senate, 14 March 2002, Hansard, p1192.

25 Wade and Forsyth, *Administrative Law*, 8th ed (2000) at 884 and following.

26 Ibid

27 The Committee on Administrative Tribunals and Enquiries (Franks Committee) was established in 1955 and was presided over by Sir Oliver Franks. The Committee's Report was published in 1957: Cmnd 218 (1957). See further, *ibid* at 900-901.

28 Sir Anthony Mason, 'The Appointment and Removal of Judges' in Judicial Commission of New South Wales, *Fragile Bastion* (1997) at 1.

29 *Ibid* at 32-35

30 House of Representatives, 21 May 1975, Hansard, p 2629.

31 Reproduced in Sir Guy Green, 'The Rationale and Some Aspects of Judicial Independence' (1985) 59 ALJ 135.

32 *Ibid*

33 (1999) 197 CLR 510

34 See s476(3)

35 Campbell and Lee, above n1 at 63.

36 Above n25.

37 David Marr, 'Still Making Waves', January 12-13 2002 at pp20-21.

38 Application for Special Leave per Gaudron, Hayne and Gummow JJ, 27 November 2001.

39 *The Safety of Lives at Sea Convention* 1914.

40 'Forum on Judicial Impartiality and Efficiency', Beijing, 11-13 December 2001.

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## Aspects of Judicial Independence

### COMPENSATION COURT CONFERENCE 2001 ANCHORAGE, PORT STEPHENS

30 MARCH 2001

### ASPECTS OF JUDICIAL INDEPENDENCE THE HONOURABLE JUSTICE CSC SELLER

#### Introduction

1 Since May 2000 as Chairman of the Judicial Conference of Australia I have become conscious of an increasing tendency in Australia to erode judicial independence and particularly to erode the essential and related value that decision makers should not only be, but be perceived to be, impartial when called upon to resolve disputes. In re-assessing the importance of judicial independence the history of this Court and its predecessor illustrates both the trend away from and back towards independent judges as decision makers and how judicial independence can extend to financial independence. This afternoon I propose to talk about these matters.

#### Misconceptions

2 Judicial independence, like responsible government and the rule of law, expresses what is generally accepted to be a desirable and necessary quality of the Australian democratic system. What part it plays is little understood. Historically it emerged as a fortress against executive, particularly kingly, power, and as a protector of liberty. But as well it stands at the heart of acceptable and hence, effective, dispute resolution in a consensual society not ruled by police presence. Good government is inevitably linked to judicial independence. Yet the independence of the judiciary is always vulnerable and under constant siege from both government and citizen.

3 Sir Alfred Stephen, the third Chief Justice of New South Wales, retired on 6 November 1873 after serving thirty-four years as a judge of the Supreme Court, twenty-nine of those years as Chief Justice. His eminent personal and professional qualifications were said to have adorned the seat he occupied and to have had a lasting influence in strengthening the community's confidence in the administration of Justice. His long and almost uninterrupted service to the law was such as to earn a well merited rest which he enjoyed for another twenty years before his death in 1894.

4 At his farewell ceremony, Chief Justice Stephen said;

“But I would beg those who may be disposed to think lightly of the judicial office, or its work, to be assured of this one thing - that nothing but evil to the country can result from depreciating either. No object is or ought to be of higher moment, of greater interest to any community, than the integrity, the independence and the learning of the judges of the land and therefore the preservation of their station from reproaches and their character from unthinking comment or undeserved obloquy.”

5 This statement by a great Australian judge, which has been echoed by many judges, remains true today. Yet the voices of reproach, unthinking comments and obloquy have become more strident. Often they are heard from members of the other arms of government, the legislature, and the executive. More worrying, as I will mention in due course, there seems to be in government a failure to understand the reasons and recognise the need for judicial independence. Amongst some, even some judges, the idea persists that judicial independence is a self serving tenet used by judges to preserve privileges. It is important that in this continuing and lively debate, judicial officers should understand

what their independence means and its importance so that they can be, as they must now be, the protectors not only of their own independence and strength, but of the independence and strength of the Australian judiciary as a whole.

6 In *Liversidge v Anderson* [1942] AC 206 at 244, Lord Atkin, a Queenslander by birth, viewed with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject showed themselves more executive minded than the executive. He reminded us that it is the judges who “stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law”. He described the arguments for the Crown, upholding executive power to detain a citizen for an unlimited period without access to the courts, as ones “which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I”. This may have been a reference to a case in 1627. In Darnel’s case *Howell’s State Trials (1816) vol 3, p1* in that year the King’s Bench accepted the Crown’s argument that a court of law was an unsuitable forum in which to debate matters peculiarly within the discretion of the executive. Lord Atkin was in sole and courageous dissent in *Liversidge*. Nearly forty years after it was decided the House of Lords said that the majority was wrong and Lord Atkin right. *R v IRC; Ex parte Rossminster Ltd* [1980] AC 952

7 Judicial independence is not a privilege of judges. It is not for their personal benefit but rather for the protection of the people, whose rights only an independent judge can preserve. *American Bar Association, 1997, An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence* Sir Ninian Stephen has said that judicial independence:

“..... can never mean .....some privileged position for judges, some special advantage given them for their benefit. What its precise meaning must always include is a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the State and also made as immune as humanly possible from all other influences that may affect their impartiality.” 1989 *Judicial Independence*, Australian Institute of Judicial Administration, Melbourne.

8 According to Sir Gerard Brennan the reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law - “the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought.” (1996) *Judicial Independence, Opening Address to the Annual Symposium of the Australian Judicial Conference, Canberra* An American commentator, the first Watergate Special Prosecutor, agreed that “an independent judiciary is perhaps the most essential characteristic of a free society”. It makes a system of impartial justice possible by enabling judges to protect and enforce the rights of the people, and by allowing them without fear of reprisal to strike down actions of the legislative and executive branches of government which run foul of the Constitution.

9 The reasons which have led people to fight for the ideal through the centuries and which are equally important today, are threefold (1) protection against executive oppression; (2) protection against violations of fundamental human rights; and (3) the assurance that judges are upright and impartial. Cox (1996) *The Independence of the Judiciary: History and Purposes*, 21 *Dayton Law Review* 566 The threat to individual liberty increases as regulation by elected governments intrudes on the life of its citizens. The judiciary depends upon government for funding and for the effectiveness of its judgments. The independence of judges is ever more vulnerable and yet remains essential. Judicial officers must never be seen as mere servants of government.

### **The Guardians of Independence**

10 In April 1998 the Commonwealth Attorney General said that the argument that an Attorney General has an obligation to defend the judiciary is an outmoded notion which derives from a different British tradition. This “outmoded notion” has been abandoned by most law officers in Australia.

11 Who then is to protect and maintain this essential characteristic of a free society? Sir Harry Gibbs wrote that except in so far as the

Constitution places Federal judges and particularly the High Court (and now, perhaps, the Supreme Court, see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51) in a special position, “the independence and authority of the judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves and the support and confidence of the public.” Introduction to *The Supreme Court of Queensland 1859-1960* by Justice B H McPherson

12 The principal object of the Judicial Conference of Australia, an association of judicial officers, judges, masters and magistrates, is “*in the public interest* to ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia”. (emphasis added) The second object is to promote, foster and develop within the executive and legislative arms of government, and *within the general community*, an understanding and appreciation that a strong and independent judiciary is indispensable to the rule of law and to the continuation of a democratic society in Australia (emphasis added). In 1940 in a letter to Herbert Vere Evatt, Lord Atkin wrote:

“How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air: they know and care nothing about it until it is withdrawn.” Lewis, Lord Atkin (1983) p 176

## Origins

13 The Act of Settlement 1701, which vested the succession of the Crown after William III and Anne, was the product of the previous turbulent century in English history and particularly the product of the struggle for power between the King and the parliament. In 1178, when Henry II ruled, those appointed to hear the complaints of the realm and to do right carried out their work as part of the King’s Court. Their activities were supervised by the King and the wiser men of the realm. Consistently with this they held office at the King’s pleasure.

14 Nearly 500 years later in 1642, Charles I agreed to the appointment of judges during good behaviour but by 1668 the system of appointments during pleasure had been re-introduced. In the last years of his reign, Charles II sacked eleven judges. In the three following years James II sacked twelve. On 3 March 1701, just over 300 years ago, the House of Commons passed a resolution making provisions for the security of the rights and liberties of the people. Judge’s Commissions were to be made *quamdiu se bene gesserint*, and their salaries ascertained and established. But upon the address of both Houses of Parliament it would be lawful to remove them.

15 Provisions for adequate and irreducible salaries were subsequently developed in a context of tolerated corruption. Lord Macclesfield, who was Lord Chancellor between 1718-1725, increased the honorarium charged by his predecessors for the sale of the office of Chancery Master to such an extent that newly appointed masters felt obliged to recoup the premium, they had to pay the Lord Chancellor, from the litigants who appeared before them. Sometimes they would delay cases and then pocket a fee for expediting them again. Sometimes they would help themselves from the funds that were held in court under their tutelage. This went beyond the bounds of what could be tolerated. Lord Macclesfield was impeached, convicted and fined £30,000. But not for another hundred years were puisne judges’ salaries doubled in 1825, to compensate them for the removal of their income from litigants’ fees and other perks previously available. Thereafter they remained unchanged in England until 1931.

16 In 1992 the *New South Wales Constitution (Amendment) Act* added Pt 9 to the *Constitution Act* 1902 to provide that no holder of a judicial office, including a magistrate, could be removed from office except by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity. Part 9 was entrenched by the amendment of s7B of the Act following a referendum held on 25 March 1995 which carried the Constitution (Entrenchment) Amendment Bill 1992. Compare s72 of the Federal Constitution which provides also for security of remuneration.

## Effective dispute resolution

17 Today the significance of the independence of judges has moved beyond the prevention of actual executive control of decision making to the avoidance of the perception that judges may have reason to decide cases in a way that the government of the day would approve. Bound up with this is the maintenance of public acceptance and hence the effectiveness of the judgments of the court and



accordingly the maintenance of the rule of law.

18 In a recent publication, the Australian Federal Judicial System edited by Opeskin and Wheeler, Professor Stephen Parker writes at 68:

“Social groups need procedures and institutions to resolve conflicts and disputes if they are to maintain a reasonable degree of internal order and protect themselves from external threats. Dispute resolution is most effective when the loser in any dispute has no reason to suppose afterwards that the procedure amounted to two against one. This not only helps truly to resolve the particular dispute, it also channels other disputes in the direction of the procedure. Acceptance of the outcome by the loser is highly dependent upon a belief in the impartiality of the decision-maker.”

19 Professor Parker speaks of the impartiality of the decision maker. The core value is the perception of that impartiality. Not only must the judge be impartial. The judge must appear to be and be recognised by the reasonable bystander to be, impartial. The need for this perception of judicial impartiality underlies the need for judicial independence. Together they ensure public confidence in the judiciary. No more is this so than when the State is a party to the litigation which it frequently is in civil cases and always in criminal cases. Judicial independence is a concept which derives from and describes the conditions designed to preserve impartial adjudication. The fabric of Australian society depends upon the consent of its members and in that sense is consensual. Obedience to decisions of the Court is voluntary. In the words of Justice Felix Frankfurter, “the Court’s authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction.”

20 The question becomes not only whether the decision maker was partial, a question often difficult to resolve, but whether a normal litigant, with no reason to know much about the law or judges, might have a reasonable fear about the decision maker’s partiality.

21 A necessary bulwark of a perception of judicial impartiality is independence at least to the extent envisaged by the Act of Settlement, that is to say, security of tenure and security of remuneration not to be diminished during office. For like reason, independence is important to maintain the perception of impartiality of not only judges but all persons whose duty it is to decide disputes between citizen and citizen or citizen and government. In his foreword to *Fragile Bastion*, published by the Judicial Commission of New South Wales, Gleeson CJ remarked that a judicial officer who has the duty to resolve disputes between citizens and the government, who holds office at the will of the government, and who could be dismissed for making a decision of which the government disapproved, would be unlikely to command the confidence of the public.

### Perceived impartiality at risk

22 If it is fundamental to our system of government that the rights and liabilities of members of the community are determined by the impartial application of the law, a litigant before a tribunal is as much entitled to have the dispute determined by an independent body as is a litigant before a court. Yet there is an idea in government that the need for perceived impartiality and its offshoot judicial independence can be sidestepped by setting up tribunals or other decision making bodies rather than courts to resolve disputes.

23 Recent Australian history suggests that government sees no impropriety in establishing “tribunals” and appointing members to divisions of a tribunal on the recommendation of the Minister, whose department’s decisions will be reviewed by that division, for fixed periods which may be extended or renewed and which may be terminated by the executive for breaches of codes of conduct and performance agreements which themselves equate performance with productivity and provide for performance related pay scales; see the proposed Administrative Review Tribunal Bill and the recently published minority report of the Senate Legal and Constitutional Legislation Committee’s Inquiry into the provisions of that Bill.

24 Sir Anthony Mason In his article on the appointment and removal of judges in *Fragile Bastion* at 32 has commented:

“Internationally, emphasis on the essentiality of judicial independence, particularly in developing and emerging countries, extends to tribunals as well as courts.”

He referred to Article 10 Affirms that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the

determination of his rights, and obligations of any criminal charge against him.” of the Universal Declaration of Human Rights and Article 14.1 Provides that “[a]ll 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.” of the International Covenant of Civil and Political Rights, ratified by Australia. Accepting the impossibility of applying to all the tribunals standing outside the orthodox court system the regime which ought to govern the appointment and removal of judges, he said:

“Unless we put in place provisions which preserve the independence of magistrates and members of tribunals, we run the risk that interference with the independence of magistrates and tribunal members will eventually contribute to the erosion of the concept of judicial independence as it applies to judges. A central element of judicial independence is the freedom of the judge to hear and decide cases without interference and uninfluenced by an outsider - be it government, pressure group or anyone else. The purpose of that independence, it should be emphasised, is to serve as a protection and privilege of the people, not of the judges.” *Fragile Bastion*, Judicial Commission of New South Wales, 32-35.

25 Another aspect of this is the compulsory diversion without court input of cases to arbitration or other forms of alternative dispute resolution. This may be the politically expedient way to avoid proper funding of the courts. But by doing this the government abdicates its function to maintain courts and hence to uphold the rule of law.

### **Superannuation surcharge on judges' salaries**

26 As Professor Parker has pointed out, in general terms the superannuation surcharge legislation was designed to impose a 15 per cent surcharge on the contributions that employers of high income earners made to superannuation funds. (Deliberately it was not called a tax because of an election promise not to increase taxation). The legislation was apparently aimed to catch arrangements whereby employees agreed to “salary sacrifices” in return for superannuation contributions by their employers.

27 Judges, however, are not, as such, members of superannuation schemes and make no contributions as such. Their pensions are funded at the point of payment out of consolidated revenue. Separate legislation was therefore enacted by the Commonwealth government so that what it believed was an equivalent tax would be applied to the pensions of those judges appointed after the commencement date. It seems, however, that the legislation has a disproportionate effect on judges caught by the tax and, in any event, it unsettles an assumption on which judicial salaries are fixed by the remuneration tribunal.

28 The extension of the superannuation surcharge in a way which taxed serving judges significantly reduced their pension rights. Ultimately in 1997 the Commonwealth government conceded that judges' remuneration included post-retirement pensions and exempted serving judges from the superannuation surcharge. The legislation now applies to newly appointed judges and serving masters in a way which effectively and significantly reduces their take home pay or pension. The surcharge operates as a direct tax on the after tax earnings of judicial officers and in that respect is almost unique. Such taxes imposed on the after-tax earnings of the community at large would have been political suicide.

29 This legislation and the extent to which its unfairness and its effect on judicial independence can be resisted, has to be looked at in the context of public attacks on the decisions of judges, their approach to adjudication and even upon them personally. An example was the reaction of political leaders to the Mabo decision (1992) 175 CLR 1 and Wik (1996) 187 CLR 1; see Justice Michael Kirby *Attacks on Judges - A Universal Phenomenon* 72 ALJ 599 at 600-601.. One is reminded of attacks on the Federal Court for its decisions in migration cases and for the law and order debates which suggest judges are soft on crime, a claim said to justify mandatory sentencing.

### **Funding and other aspects of independence**

30 Of course in one sense the court is never independent of those arms of government which fund its operation. This points up the importance of the judicial officer's security of remuneration. "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." Hamilton A, Jay, J and Madison, J (1787) *The Federalist*, Reprint E M Earle (edition) Modern Library New York, 1937.

31 On 6 December 1993, Frank McGrath, the retiring Chief Judge of this Court, referred to the many platitudes mouthed about the importance of judicial independence and said: "At the same time there are forces which are completely inimical to a continuation of such independence." (68 ALJ 323)

32 Judge McGrath spoke of the widespread ignorance of the basic principles of the separation of powers. In his view, while no one doubted their importance, there was more to judicial independence than security of tenure and of salary. The courts must have control of and responsibility for the administration of their own registries and their day to day budgets subject only to the overall supervision of the Auditor General. He regretted that the wishes of the Compensation Court had been overridden when the court was transferred from Macquarie Street to the Maddison Tower Building.

33 In particular Judge McGrath pointed out that until its abolition in 1984 the judges of the Workers Compensation Commission had direct control over the whole budget of the court. The judges had the responsibility to levy insurers and self-insured employers and by this means built up reserves which enabled the courts in both Wollongong and Newcastle to be located and internally designed to meet the specific requirements of the court, to be developed without the necessity to borrow money or to place unacceptable burdens upon the insurers and employers by precipitate increase of levies. In Judge McGrath's opinion the 58 years of operation of the Commission proved clearly that judges were fully capable of administering the budgets of the courts over which they presided in a responsible manner. This 58 years of budgetary control was unusual if not unique in Australia.

### **The administration of Compensation Law**

34 The administration of workers' compensation law as it has developed in New South Wales illustrates the tension between on the one hand the resolution of disputes by a court comprising judges appointed to a retiring age and on the other by commissioners or tribunal members appointed for a term of years but eligible to have that term extended. As Judge McGrath pointed out, it exemplified how a court can fund and administer its own finances by levying those groups of people whose disputes come before it to meet the needs of the court or commission in the way its members regarded as appropriate.

35 When established in 1926 the New South Wales Workers Compensation Commission was the first such tribunal in Australia. Despite attempts to introduce legislation in New South Wales as early as 1899, New South Wales had not been the first State to establish a system, separate from the common law, for compensating injured employees. Wade's Act (the *Workmens Compensation Act* 1910) followed similar legislation in other States and was based on the English Workmens Compensation Act 1897, not then the latest legislative provision in that country. In broad terms, the entitlements of those workers affected by the legislation (those employed in certain categories of work, railway, tramway, factory, workshop, mine, quarry, wharf, vessel, engineering or building work where four or more persons were employed, not being casual workers) became *sui generis*.

36 The rights of the worker to be compensated for work related injury were no longer searched for in contract or tort law but were now derived from the worker's status as an employee, though initially the common law remained intact notably the doctrine of common employment. The doctrine has been given as an example of adventurous though conservative judicial law making designed to blunt the edge of reform and turn back progressive ideas,. At the close of the 19th century it had been said in the House of Commons that "Lord Abinger planted [the doctrine], Baron Alderson watered it, and the devil gave it increase." A remark of the Secretary for Ireland in 1897 quoted in Friedman and Ladinsky "Social Change and the Law of Industrial Accidents" (1967) 67 *Columbia Law Review* 53N 13.

37 In September 1919 George Stephenson Beeby, then New South Wales Minister for Labour and Industry, after visiting Britain and the United States of America, published his report on industrial conditions in those countries. This report laid the ground for the 1926 *Workers Compensation Act* passed under the Lang government of 1925-27.

38 In particular, Beeby reported that the most important divergence between the American and the Australian systems was in administration. In the USA there was a strong sentiment against allowing claims for compensation to be subjects of ordinary litigation and in a number of American States the carrying out of the law was left entirely in the hands of industrial accident commissions. The commissions generally consisted of a special board of three or five members, with quasi judicial functions, appointed to enforce the law. The boards received all accident reports, investigated claims,

settled disputes, heard cases, granted awards, issued decrees and in some States administered insurance funds. The boards acted as general advisers to all parties and, in Beeby's opinion, had undoubtedly proved an immense value in facilitating quicker and more satisfactory administration. Formalities were dispensed with. Cases which generally depended on medical evidence and in the ordinary course would have occupied a court for a day or two and involved the parties in considerable expense settled in two or three hours to the satisfaction of the workman, the employer, and the insurance company.

39 Beeby recommended that the administration of the *Workmen's Compensation Act* be vested in the Board of Trade or a special industrial commission and that all claims for compensation be settled by the board without right of appeal except on matters of pure law. The 1916 Act had attempted to remove workers compensation from the court system by introducing the position of the arbitrator. The 1926 Act did remove workers compensation from the court system by establishing the commission to hear all disputes and to regulate and license insurers. At the same time the Act abrogated the defence of common employment.

40 The parliamentary opposition did not share the government's enthusiasm for non-legal proceedings and one of the few amendments which J M Baddeley, by now the Minister for Labour and Industry, accepted was Bavin's request that the chairman of the commission have legal qualifications. Section 31 provided that the commission would be chaired by a barrister of at least five years standing with the rank and precedence of a District Court judge. The other two members of the commission were appointed for a fixed term of seven years but eligible for re-appointment. They were to be representative of "each side".

41 Routley was the first employers' representative, Halliday the first employees' representative. In *Waterside Workers of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 469 Isaacs and Rich JJ seemed unconcerned that there were courts "officered by Judges whose tenure is of little importance". The Commission was constituted as a body corporate (s32). Section 36(1) provided that the commission had exclusive jurisdiction to determine all matters arising under the Act and the power to re-consider any matter and rescind or amend a decision. Section 41 constituted a fund to which insurers and self insured employers contributed, in accordance with estimates made by the Commission, and from which salaries and other moneys required for carrying out the provisions of the Act were to be paid.

42 The Act greatly increased the benefits and the range of workers entitled to benefit. However, by 1939 the tide had turned and the Act was amended to provide that disputed cases should be decided by persons of District Court status.

43 By contrast with the Commission's first year of operation from 1 July 1926 when 688 applications were received, by 1982, thirteen judges were hearing 10,000 matters a year in Sydney and on circuit. Between filing and first hearing there was said to be a delay of 52 weeks. Sometimes a final decision was not made for 18 months. The legislation which was specially designed to give the workman a simple cheap and easy remedy for his injuries had become encumbered with an ornate seductive writhing mass of case law which was suffocating the whole scheme by loading it with expense, delay and difficulty. This result could not fairly be attributed to the judges of the Commission, chaired by Perdriau, from 1926-1950, Conybeare, from 1951-1972, Langsworth, from 1972-1982 and McGrath from 1982 to 1984.

44 It is interesting to note that Lord Atkin's biographer Lewis, Lord Atkin at 123 states that during the period of Lord Atkin's career on the bench the Workmen's Compensation Acts represented the single largest field for statutory interpretation. Its complexity often defied logical analysis. In *Richards v Goskar* [1937] AC 304, faced with an Act which said in terms that industrial disease was to be treated as an injury caused by an accident, and the question was how disablement (caused by the disease) could be the accident which caused the injury Lord Atkin resorted, at 312 to Lewis Carroll's Alice. "The only comparable sequence that occurs to me arose when Alice learned from the White Queen's accident the art of living backwards; first the bandage then the bleeding, then the pinprick."

45 Sir Leslie Herron in the Alfred Rainbow oration of 28 September 1964 mentioned doubts entertained by Judge Rainbow about the New South Wales Workers Compensation legislation. These doubts included the system of adjudication of claims by courts which was said to be expensive and inefficient. Administrative tribunals as used in the United States would be preferable. But even so Judge Rainbow thought that, if the determination of claims by courts had produced a system of case law conspicuous for its clearness, certainty and justice, all of the disadvantages which had accrued might be regarded as irrelevant in comparison.

46 The *Compensation Court Act* 1984 constituted this Court. Section 16 provided that a judge might before or at any stage of the proceedings refer any matter to a commissioner. Section 26 contemplated a two-tiered adjudicative structure, the court, consisting of judges, and appointed commissioners who might exercise functions of the court conferred under the Act. Section 27 indicated a legislative intention to reduce formality and technicality and do away with the rules of evidence. Commissioners were to hold office until the age of 60 with a provision for extension not beyond the age of 65 (Schedule 2). At that time a judge of the Compensation Court remained in office during ability and good behaviour and might only be removed in the same manner as a judge of the District Court. The Governor might

remove a District Court judge for inability or misbehaviour with an opportunity to make representations and be heard before the Governor in Council. With the 1984 Act control of the fund and hence of the Court's budget was lost. Such control was said to have produced a conflict of interest; see for example *Registrar Compensation Commission v FAI*. (1980) 1 NSWLR 276. This function was taken over by what was then known as the State Compensation Board.

47 The 1985 amendments to the Act provided that a commissioner need not be legally qualified. They were removed from the court and became empowered to hear applications when the matter to which the application related was not likely to exceed \$40,000. The board allocated matters to judges and commissioners accordingly. Emphasis was placed on conciliatory pre-hearing conferences.

48 Under the *Workers Compensation Act* 1987 Pt 4 Div 4 the commissioners obtained exclusive jurisdiction to examine, hear and determine all matters arising under the 1987 Act; s107. Effectively the Compensation Court's jurisdiction was confined to hearing appeals from commissioners.

Commissioners were not subject to the control of the court.

49 Early in 1988 there was a change of government. The *Workers Compensation (Compensation Court) Amendment Act* 1989 omitted and replaced s107 thereby giving the Compensation Court exclusive jurisdiction to hear and determine all matters arising under the Act. For more than 10 years the Court operating this new legislative structure has dealt with about 19,000 new cases a year. There is something between 32 and 35 weeks between a matter coming into the pending list and the matter being heard. There has been established an automative computerised court and case management system (currently Phoenix III) described in the 1999 AIJA Technology for Justice Report as a good benchmark for other courts and by the Victorian Law Reform Committee, *Technology and the Law*, as a best practice example for a case management system for a court with a high volume of cases.

50 It might be said, looking back, that twice, once between 1926 and 1939, and, again, for a short period, between 1985 and 1988, the theory that compensation disputes were better resolved by an informal procedure before lay commissioners was tried. No doubt many here will have opinions about those systems and how they worked. However, this approach seems scarcely to have been justified by the way in which the Compensation Court currently administers a huge list with a relatively small number of judges.

51 What is to be learnt from this in terms of judicial independence? In the first place, arguably delays and technicality and expense are not the fault or consequence of a judge administered court structure for resolving disputes but follow rather from the nature of the substantive legislation. This in itself is not surprising. In the first half of the 20th century the development of the rights of employees to protection from the consequences of work-related injury was novel and developed against a fear that the cost would be such that neither employers nor the community at large could meet it without disastrous economic consequences.

## Comment

52 In 1926 when the Commission was established it was accepted that two of its three members should represent a class of the litigants whose disputes would be resolved by it. Sir Anthony Mason has remarked *Fragile Bastion* at 4: "Independent and impartial adjudication denies the notion that the judge will bring to bear a view which represents that of a particular section of the community." The very method of appointment raises a perception of bias.

53 Members of the public expect impartial and independent adjudication from any public official appointed to resolve a dispute between them or any of them and the government or its representative. The perception of impartiality is greatly increased if the decision maker is independent of any possible favour from government including the chance of re-appointment or extension of term or the chance of removal for any reason other than proved misbehaviour or incapacity. Yet in 1926 commissioners were appointed as representatives, whatever that might have involved. The members of the commission other than the chairman were appointed for a term of seven years and were eligible for re-appointment. The normal litigant might have thought that a member who failed fully and properly to represent either the employees or the employers, as the case might be, was not likely to be re-appointed. Under the 1984 *Compensation Court Act* judges appointed to the court were removable in the same manner only as a judge of the District Court. Under Schedule 2, a commissioner held office until attaining the age of 60 years. This term might have been extended up to the age of 65 years. The Governor might remove a commissioner from office for misbehaviour or incompetence.

54 From the beginnings of her independence, Venice had been theoretically a democracy. Not only was the Dogeship itself an electoral office, but the Doge was attended by two tribunes whose explicit purpose was to prevent him from abusing his office. Furthermore, there had always been provision for the Arengo, a meeting of all the citizens in general assembly to vote on major decisions affecting the security of the State. "But democracies are unstable institutions; they need constant maintenance if they are to work." John Julius Norwich, *The History of Venice*, p34.

55 Judicial independence remains as ever a “fragile bastion”. We are its strength and its protectors, the defenders of an essential part of democracy’s bedrock.

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## Australian Insurance Law Association Annual Conference 5-7 April 2000

1. At a conference whose theme is "Challenges of Change", the topic I have come to address is change in the method of presenting expert opinion evidence to the Court and, in particular, the Court appointed expert. Expert opinion evidence is directed to matters of a technical nature beyond the knowledge and unaided understanding of the Court. The witness is a person with specialised knowledge coming from training, study or experience. In his opening address, the Chief Justice has already given some detail of these changes.
2. The appointment by the Court of an expert, while not new, is radical. It involves taking the presentation of expert evidence out of the hands of the parties and putting it under the control of the Court which appoints an expert to advise upon and perhaps effectively decide technical issues. This is a considerable departure from adversarial litigation as we know it.
3. In the written paper, which I do not propose to rehearse, I have had something to say about the reasons behind this proposed change - the perceived partisanship, unreliability and cost of the traditional method of presenting expert opinion evidence and about matters in favour of and against various solutions to what is recognised as a problem.
4. Many judges, if they ever had great faith in the reliability of expert witnesses, have lost that faith. One judge has said that expert witnesses are so partisan that their evidence is useless. Over 120 years ago, Sir George Jessel in *Thorn v Worthing Skating Rink Company* (1877) 6 ChD 415N at 416 said:

"A man may go, and does sometimes, to half a dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, 'Will you be kind enough to give evidence?' and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one."
5. I am sure no sensible insurer committed to paying valid claims, but anxious to uncover dishonest claims, would approach the matter in that way. You want sound advice you can act on with confidence. But other people are not necessarily so minded.
6. You would appreciate that in personal injury cases if each side retains a battery of experts it becomes very expensive. Lord Woolf (Access to Justice, Final Report, 1996) has identified the actual cost of pursuing litigation as one social ill. Another social ill is that parties with a just cause do not start litigation because of the advice they have received about the cost of it.
7. How then to eliminate bias and reduce cost?
8. The use of the single expert, perhaps with a particular responsibility of being appointed by the Court, is one solution.
9. The most encouraging feature of what is taking place at the moment is that the problems of partisanship and cost are being addressed by the Courts. The Courts are being given greater control over how the expert case is run and a wider variety of options for dealing with the particular case. The new Part 39 of the Supreme Court Rules which took effect at the beginning of last month is an example.
10. With experience, a lot will be learnt about which of the many solutions on offer are the most successful. It is not necessarily helpful to try and guess at this.
11. Court based litigation requires expert assistance to decide disputes involving matters of a technical or special nature which need to be explained by specialists. Examples are personal injury cases, arson cases, machinery breakdown cases, and medical negligence cases.

12. To introduce my comments I want to tell three stories, one about ship-wreck, one about gelatine, and one about forgery.

13. At the Bar I did very little personal injury work. I did do admiralty work. After the *Mikhail Lermontov* foundered off Cape Jackson in the South Island of New Zealand, I was offered, and took, the brief for the ship owners on the basis that the case raised some interesting matters about admiralty law. In fact, it involved about a hundred personal injury claims brought by passengers. Some of those were very complex involving the physical and emotional stress suffered by elderly people on finding themselves waiting for the life boats to be lowered in the bowels of a huge, dimly lit passenger liner, listing 15 degrees. Like all personal injury cases, there was a lot of medical evidence.

14. Experts are not witnesses of fact. Strictly experts express opinions based on assumed facts which, if the opinion is to be of any value, have to be proved. I objected to the medical reports because commonly they were based on what the doctors had been told by the patient and that was often quite different from what the patient told the Court. That objection was received by the Judge with a good deal less than favour. Indeed nowadays in personal injury cases, which are heard in great numbers by very busy Judges, most if not all the expert evidence is in the form of written reports. Few, sometimes none, of the medical experts give oral evidence. That is the only practical way of getting through the personal injury claim lists. It is not unheard of for there to be twenty to thirty medical reports in the one case. But if the evidence as given is unsatisfactory, as it usually is, it is not necessarily the fault of the doctors who often do not have the opportunity to explain, expand or take account of new material.

15. The second story is about a consignment of gelatine shipped to Sydney from a port north of the equator. The consignment arrived mouldy. I acted for the owner of the cargo in a claim against the shipowner for bad stowage. The shipowner claimed the gelatine was damaged as a result of its own inherent quality or vice. The shipowner relied upon the evidence of a professor of food technology from one of the universities, a person of very high standing in the field. The cargo owners relied upon the work done by a researcher, who armed us with a standard and internationally accepted text dealing particularly with the development of mould as a consequence of the exposure of food to the atmosphere. The Queen's Counsel who led me as his first question asked the professor whether he had read this internationally acclaimed standard text on the subject in issue. Not only had the professor not read it, he had never heard of it. From that start, the professor never recovered and his evidence was rejected. The evidence of our more lowly expert was accepted.

16. The third story is about forgery. In a recent case in the District Court, the plaintiff claimed about \$120,000 from the estate of a deceased grazier. The plaintiff relied on the terms of a letter he said the grazier had written to him before he died. The defendant had retained one of Australia's best known and most reputable hand-writing experts. The plaintiff had a hand-writing expert who was not particularly well-known. The expert evidence, given orally, took five days of the hearing. The Judge accepted the less well-known witness's evidence and found that the letter was not a forgery. The reasons for judgment showed quite convincingly that the well-known expert was wrong.

17. In both of these cases, had the Court appointed a single expert, the better known expert would have appeared a better candidate, in terms of reputation and experience than the other expert. It is true that the Court expert could be cross-examined. But, in deciding whether or not to accept the expert's evidence, the Judge would not have had the benefit of the evidence given by the other expert with a contrary view. I do not regard this as at all satisfactory. The time taken and therefore the cost may have been less, but the chance of injustice greater.

18. I make the following general comments:

- We operate by the rule of law. The Courts are there to uphold the law and see justice done between disputants.
- People look to the Courts to resolve their disputes.
- It is natural enough for a person injured at work or on the roads to sue the person responsible and expect to receive compensation by that process.
- Such claimants will at an early stage have seen doctors, GPs and specialists. Their care and recovery is in the hands of those people.
- Are the doctors who treated the claimant to be denied the opportunity to tell the Judge what is wrong with the claimant?
- But what value is that evidence if the doctor embellishes the gravity of the injury or understates the prospects of recovery to try and get the claimant a bigger verdict? If the doctor is not prepared to embellish the claimant's case, perhaps the claimant will find another doctor who will.
- What value if the other side is encouraged or forced to find experts who are prepared to embellish



the defendant's case in order to answer the plaintiff's embellished case.

- Most experts are professional people bound by professional codes of behaviour.
- Most recognise what is meant by an objective opinion.
- I think the idea of an expert witness code of conduct is good for at least it ensures that every witness called to give expert evidence will recognise what is required.
- Evidence given by expert witnesses will not be received unless the expert has read the code and agreed to be bound by it.

- a. The expert's overriding duty is to assist the Court impartially.
- b. The witness's paramount duty is to the Court not to the person retaining the expert.
- c. The expert witness is not an advocate for the party.

· I have suggested that the expert swear, affirm or declare that "any opinion I give in evidence will be my true opinion and the reasons I give for such an opinion will be my true reasons".

19. I think, also, that the process of peer review is helpful. The rules provide, and the Courts may order, that:

- a. Experts confer with other experts and endeavour to reach agreement;
- b. Experts provide a joint report specifying what is agreed and what is not agreed and the reasons for non-agreement.

20. This brings me to the hot tub. Interestingly, the hot tub has not been formally adopted in the Supreme Court Rules. It is provided for in the Federal Court Rules and has also been tried in the Commercial Division. The Court may direct:

- that each expert witness be sworn immediately after another;
- that each give an oral exposition of his or her evidence on the question;
- that each give his or her opinion about the opinion of the other experts;
- that each expert be cross-examined.

21. In one case, a Federal Court Judge was advised that the expert evidence in a loss of profits case would take two weeks. A direction was given that the experts confer and report. In the result, an agreed statement about the losses took 10 minutes evidence time. The Judge considered that, while the favourable result was the consequence of ordering the experts to confer, the fact that the experts knew they would have to justify their views to their peers in the hot tub led to agreement.

22. If these techniques are effected, why appoint a Court expert bearing in mind that parties will need their own expert to prepare the case and may seriously undermine the usefulness of the Court expert when the expert is cross-examined?

23. The excitement of the moment is that problems with expert evidence which have been recognised for at least 150 years are now being addressed and solutions put forward and tried. Part of the process consists of discussions such as those we are having this morning.

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