"WORKING AS A HIGH COURT JUSTICE"

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WORKING AS A HIGH COURT JUSTICE

It is a great pleasure to be invited to give this Lecture in Newcastle at the request of the Newcastle Law Society and the Women Lawyers Association of New South Wales. Not only was I born in this city, but, apart from living for a few years in North Queensland as a boy and a few months in Sydney, I lived in Newcastle until I was 28 years of age. So it can be fairly said that Newcastle is my natural home. For better or worse then, Newcastle played a major part in my formative years.

I spent my first nine months at the Bar in Sydney, reading with John Williams, a former Newcastle barrister who had gone to Sydney to practise. However, my legal career really began in Newcastle where I was in practice at the Bar from April 1962 until June 1964. Those two years at the Newcastle Bar were an invaluable training ground. The very nature of practice at a regional Bar means that a barrister has to acquire a sound knowledge of many areas of law. Certainly, in those days, specialisation was not an option at the Newcastle Bar, at least if you wanted to make a living as a barrister. At no moment during those two years in Newcastle did it ever occur to me, however, that I would later spend almost 17 years of my life working as a Justice of the High Court which is the title of this Lecture and to which topic I must now turn.

Throughout my time on the High Court, people have often asked me whether I enjoy being a High Court Justice. I tend to think that "enjoy" is not the appropriate term. The work of the Court is too important, too voluminous, too demanding and too intense to make talk of enjoying the work appropriate. I think that it is more appropriate to ask whether the work is satisfying or continues to interest you. If asked, I would answer each of those questions, "yes".

One reason why working as a High Court Justice never loses its interest is the infinite variety of the legal issues and factual scenarios that come before the Court for decision. Yesterday, I had a quick look at the subject matter of the appeals that the Court decided in 2004. The appeals concerned:

- professional misconduct,
- real property,
- defamation,
- evidence,
- criminal law,
- extradition,
- contract,
- negligence,
- copyright,
- local government,
- insurance,

- income-tax,
- employer-employee,
- statutory interpretation,
- immigration,
- town planning,
- estoppel,
- constitutional law,
- trade practices,
- patents,
- private international law,
- contributions and indemnities between tortfeasors, and
- inducing breach of contract.

No other area of legal practice or endeavour exposes a legally trained person to such a variety of interesting work. And the cases that raise these issues are not confined to any particular State or part of the Commonwealth. They include questions arising under federal law and the laws of each of the States and Territories.

Given the breadth of legal and factual issues that come before the Court, I am always amused to hear or read statements that the Justices of the High Court live in an ivory tower deciding abstract questions of law and have no understanding of the real world. There is almost no aspect of human behaviour that does not come before the Court either in appeals or special leave applications. The Court does not of course see witnesses but it reads the evidence they

give. And over the range of cases that come before the Court that evidence reveals just about the whole spectrum of human behaviour. You would not have to be on the High Court for very long before you concluded that the only limit to human evil, depravity and dishonesty is physical impossibility. Nor would you have to be there very long before you concluded that there is no limit to human gullibility.

If anything, the special leave applications that we hear give rise to an even wider variety of legal problems in a wider range of factual scenarios. That is because more than 75% of special leave applications deal with issues that are not sufficiently important to warrant the grant of special leave but nevertheless touch on facts and subjects that have their own intrinsic interest. Questions of the construction of contracts or of statutes peculiar to a particular State or Territory, for example, frequently raise factual and legal issues that generally do not warrant special leave to appeal. If the Court is to do its work properly, it can only hear about 60 appeals each year and, of necessity, must preserve the grant of leave for cases that lay down general principles that have wide application throughout the Australian community.

Another example of the type of case that does not warrant the grant of special leave is a case turning on purely factual issues. Ordinarily the Court will not grant leave to determine questions of fact. Wily counsel appearing for respondents in special leave applications know that one of the best grounds for defeating the

application is to persuade the Court that, despite the important legal issues in the case, the Court will not be able to determine those issues without first determining complex factual questions. The standard formula for dismissing an application in those circumstances is to say that it is not a suitable vehicle for the grant of leave, a statement that once prompted an irate applicant to say to his counsel, "Next time, I'll bring a Cadillac."

However, the *Judiciary Act* requires the Court, in determining whether to grant leave, to take into consideration whether there has been a miscarriage of justice in the particular case. That can include miscarriages arising from factual as well as legal error. From time to time, special leave applications come before the Court where the decision appears to have been affected by an indisputable error of fact on the part of the Court below. Where that appears to be the case, the Court generally grants leave to appeal unless, for some other reason, an appeal is bound to fail.

No discussion of the work of the High Court would be complete without mentioning the volume of special leave applications. In the 2003-2004 year, 729 special leave applications were filed. In the 2004-2005 year, 876 applications were filed in the Court. That was an increase of 20% on the previous year. This year almost one in four sitting days has been devoted to hearing special leave applications. Previously, it was about one sitting day in eight. This change has necessarily reduced the number of days

available to hearing appeals. In addition to the time devoted to reading special leave applications that are the subject of a hearing, a considerable amount of time is also spent in reading and determining applications for special leave to appeal that are dealt with on the papers.

As a result of changes in the High Court Rules that commenced last January, the Court is now able to deal with many applications for special leave without having a hearing and indeed without requiring the application to be served on the proposed respondents to the application. At least up to the present, this procedure has increased the work burden of the Justices. Last Friday week, for example, Justice Heydon and I delivered reasons for dismissing 53 such applications. There were, of course, many, many hours of work involved in determining those applications.

Immigration cases are one of the causes of the blow out in special leave applications. For the year ended 30 June 2005, 457 applications, representing 60% of all civil applications for special leave, related to immigration. Unrepresented litigants filed 402 or 88% of those immigration applications. Indeed the number of unrepresented litigants filing matters in the High Court now constitute 64% of all civil applications filed compared to only 19% 10 years ago. The almost exponential growth of special leave applications over the last decade has meant that the time between filing applications and the hearing of them has increased each year

until quite recently. By a major effort, the Court has been able to reduce the delay slightly.

Many applications by unrepresented litigants – probably the majority of them – are understandably poorly prepared. Under the old Rules, the submissions of respondents frequently enabled the Justices of the Court to quickly get to grips with the real issues in the case. But where the case appears to be one that may be able to be dealt with on the papers, the respondent is not served with the application unless the Court determines it should go for an oral hearing. As a result, where the case appears to be one that can be dealt with on the papers, the Court is deprived of the assistance that used to come from the respondent's submissions. Consequently, additional time of the Justices is now taken up in seeking to understand the points and issues that the unrepresented litigants seek to raise. It need hardly be said that the time taken to study an application by an unrepresented litigant is almost always greater than the time taken to study an application prepared by a competent legal practitioner. But no matter how poorly prepared an application may be, it is always possible that lurking behind the disorganised material is a point worthy to be considered by the Court. Although the occasions when this occurs are very rare – probably less than five times in a thousand – the Justices do what they can to ensure that the unrepresented litigant – and indeed every litigant – does not suffer injustice by reason of lack of legal knowledge or a good point overlooked.

To those cynical enough to believe that the Court processes special leave applications rather mechanically, words spoken by Justice Kirby in an interview with Monica Attard on Sunday Profile in November 2003 are worth repeating. His Honour said:

> "When I came to the High Court one thing really struck me that I hadn't known as an outsider: as a judge who had been subject to the High Court. This was how seriously everyone takes the final appeal. We hear special leave applications and I'd been the subject to that for 13 years while I was President of the Court of Appeal of New South Wales. I didn't know how the High Court did it internally. But it really isn't a secret. The cases are assigned and shared between us. We meet with very careful discussion beforehand, before we go to court. No final decision is made, of course. But it's been very thoroughly examined and I was rather pleased, I must admit, to come into the Court and see how seriously everybody took the responsibility of considering the cases."

What his Honour said regarding special leave applications that are the subject of a hearing applies equally to special leave applications that are dealt with on the papers. A recent demonstration of how conscientiously the Justices of the Court study special leave applications concerns the case of the former Queensland Chief Magistrate, Ms Diane Fingleton. After studying the papers in that application for special leave to appeal against a criminal conviction, the Court directed its Registrar to write to the parties and inform them that the Court wished to hear argument on the applicability of a statutory provision giving immunity to Magistrates in respect of certain matters. That provision had not

been relied on or raised either at the trial, on appeal to the Queensland Court of Appeal or in the special leave application. The Court eventually granted special leave on that point. On appeal, the Court unanimously quashed Ms Fingleton's conviction because of the immunity provision. If it had not been for the Court's careful study of the special leave application, one can feel almost certain that her conviction would not have been quashed on that point.

By any standard, the workload of the High Court Justices borders on oppressive. Forty years ago in his retirement speech, Sir Owen Dixon said that the Bench was "hard and unrewarding work". It has not got any easier. On the contrary, with the increased complexity of law and the ever increasing volume of work in the Court, it has got even harder. The Court still has only seven Justices; the same number of Justices that constituted the Court during the tenure of Sir Owen Dixon between 1952 and 1964. So the same number of Justices do the work of the Court despite the increase in litigation that has seen almost all other courts double, triple or quadruple their numbers. It is probably no coincidence that, since the Constitution was amended in 1977 to require Justices to retire on turning 70, no Justice other than the three Chief Justices – Sir Harry Gibbs, Sir Anthony Mason and Sir Gerard Brennan – has stayed on the Court to the compulsory retiring age. If everything goes according to plan, I will be the first puisne Justice since 1977 to have reached the retiring age.

Inevitably, the workload requires the justices of the Court to work very long hours. I suspect that no Justice works less than 60 hours each week and one or two Justices work in excess of 80 hours each week. Moreover, quite apart from physically dealing with cases, Justices inevitably think about the issues in cases even when they are not sitting in Court or Chamber or at home in their studies.

The workload has also had a very significant impact on the leave entitlements of Justices. In the last 20 years, most Justices have taken only part of their leave entitlements. When I retire from the Court in November, I will forfeit about 18 months of accumulated leave entitlements. Justices Mason, Brennan, Gaudron, Deane, Toohey and Dawson would have forfeited similar, if not greater, entitlements.

So how do the Justices of the Court cope with this very large workload? Obviously, the research and arguments of counsel is of great assistance to the Court. So is the assistance that the Court gets from its Law Library, which has a fine Research Section. The High Court Library is probably the best in the Southern Hemisphere, spending around $1million on subscriptions and books each year. At the request of a Justice or a Justice's Associate, the Research Section will provide a detailed survey of any area of law that is relevant to the case at hand together with copies of the relevant research material. In addition, each Justice has two Associates as

well as a Personal Assistant. Part of an Associate's duty is to proof read his or her Justice's judgment checking for accuracy every quotation, assertion of fact and citation in the judgment. In addition, the Court has two highly skilled proofreaders who again check the judgments for accuracy in these matters.

The Court also arranges its sittings so as to maximise its efficiency having regard to the need to hear cases and have time for research, reflection and the writing of judgments. The Court usually sits in Canberra and hears cases for the first two weeks of each month except for January and July. It then sets aside the second two weeks of each month for research, reflection and the preparation of the reasons for judgment. In most years, most Justices for much of January or July or both also research and prepare judgments. Four times a year, the Court travels interstate to hear cases during one week of that second two-week period. If there is a sufficient volume of work, the Court goes to Hobart during March, to Brisbane during June, to Adelaide during August and to Perth during October. The Court also travels to Sydney and Melbourne on one or more days during the first two weeks of the month to hear special leave applications. It sits in Canberra to hear special leave applications from the ACT and to hear such applications by video link from Darwin, Brisbane, Adelaide, Hobart and Perth.

Some weeks before the beginning of each month, the Chief Justice circulates a proposed list that identifies the cases and special leave applications to be heard during that month and the Justices who are to sit on those cases and applications. The list is headed "Proposal" because that is all that it is. Each Justice is entitled to sit on every case whether or not the Justice is named on the Proposal. From time to time, a Justice will ask to sit on a particular case even though his or her name does not appear on the Proposal. In the 1930s, that formidable individualist, Sir Hayden Starke, would even turn up without notice to the presiding Justice and sit on a case although not listed to sit. Ordinarily, the Proposal lists five Justices to sit on appeals and three Justices on special leave applications. If an appeal is perceived to be of particular importance or difficulty, the practice is to list all available Justices to sit on the appeal. In constitutional cases, seven Justices sit unless, for some reason, a Justice is unavailable or perceives a conflict of interest

About 10 to 14 days before the commencement of a sittings, the Appeal Books and Special Leave Application Books for that sitting are delivered to the Chambers of the Justices who are to sit on the appeals and applications. Some days before the hearing of appeals or constitutional and other cases in the original jurisdiction of the Court, the Justices receive copies of the written submissions of the parties and any interveners. The manner in which Justices prepare for the hearing of appeals and constitutional or other cases appears to vary from Justice to Justice. Some Justices carry out

intense preparation before the hearing of a case. They not only read the appeal or application books thoroughly but they carry out research of at least a preliminary nature. These Justices often write a draft judgment almost immediately after the hearing of a case. But, of course, they will make changes in their judgments at a later stage after further thinking or upon reading the reasons of or receiving comments from other Justices. When I was a Judge of the New South Wales Court of Appeal, I usually followed the approach of these Justices. However the issues were generally simpler in cases in the Court of Appeal and the volume of work in that Court and the demands of efficiency made it imperative that a Judge of that Court circulate judgments as quickly as possible.

My working method when sitting as a member of the Full Bench of the High Court is quite different from the method that I used when I was in the Court of Appeal. I still use that method when sitting on my own in the original jurisdiction of the High Court. Only on about four or five occasions have I reserved judgment when sitting on my own. If you are not going to reserve your decision, you need to be confident that you have not overlooked any point when you give your ex tempore judgment. And that inevitably requires extensive pre-hearing work.

When I am a member of the Full Bench of the High Court, however, I seldom do more than read the judgments of the judges in the lower courts who heard the case and the summing-up in criminal

or civil cases when relevant and the written submissions of the parties. Of necessity, reading these submissions of the parties will require me to read parts of the evidence. But until I have listened to the oral argument of counsel and the Socratic dialogue that takes place during the hearing, I rarely read the whole of the evidence or all the cases cited in the written submissions. Like Sir Owen Dixon, I see the arguments of the parties as but the first step in the process of preparing a judgment. I like to work my way to a conclusion after having made an in-depth study of all the relevant materials. That way is seldom smooth. Frequently, I change my views about issues and the ultimate decision, as I research, read and think more. Frequently, I find a view that I had formed before I began to write will not "write" – that it cannot be reconciled with the existing law and the facts of the case. Necessarily, I have to backtrack and re-think the issue.

After the completion of the oral argument, it is the usual practice of the Court to have a Conference in the Chambers of the presiding Justice to ascertain the views of the Justices concerning the determination of the case. Sometimes, the Justices or a majority of them will have a reasonably strong view as to how the case should be determined. When that is so and the reasoning process of the Justices or a majority of them is similar, the presiding Justice will usually ask one of the Justices who holds that view to write a draft judgement. The draft judgment, like all judgments of members of the Court, is circulated to the other members of the

Court who sat on that case. The fact that a Justice is asked to prepare a draft judgment for the Court or a majority is not decisive of the outcome of the case. After the Justices have studied the case in more detail and done further research, the potential majority may disappear. I remember on one occasion the draft judgment becoming a dissent with most members of the assumed majority changing their minds and deciding the case in the opposite way and for different reasons.

If there is a sharp division of opinion at the Conference, the presiding Justice may also ask a member of the minority to write a first draft and that too will be circulated. In difficult cases, however, there may be no clear consensus as to how the case should be decided or how the decision should be reasoned. When such a case occurs, it will often be set down for discussion at a special monthly meeting where the Justices discuss the progress made in completing judgments in all outstanding cases. Sometimes the result of discussion at the meeting is that a majority of Justices agree on the way the case should be decided and the reasons for so deciding it. If that occurs, one of the majority may be asked or will volunteer to do a first draft. In cases where no consensus is achieved, the unspoken understanding is that each Justice will prepare a judgment, although, of course, Justices with a similar view may get together and prepare a joint judgment.

Unless the case seems very clear at the end of oral argument, I prefer not to form a view as to the way it should be decided. I prefer to wait until I have read as much material and given the case as much thought as I can. At the start of each month, my two Associates are expected to agree between themselves as to which cases to be heard that month an Associate wishes to work on. In cases, where I have not come to any definite conclusion, I will often discuss the case with the Associate after the hearing telling him or her about any tentative views I have and asking the Associate to prepare a memorandum on the case with those views in mind. I find these memoranda of great assistance. In a single document they gather together and objectively analyse the arguments of the parties and discuss the relevant cases and statutes to which the parties have referred together with any independent research and ideas the Associate has. Quite frequently, they reflect, at least in a general way, the view I finally take of the case. Often enough, however, I do not agree with their analysis or their reasoning process as set out in the memorandum. But even in those cases I find the memorandum to be a useful document.

It is not surprising that the memoranda are useful and of a very high standard. All my associates have held first class honours degrees in law. Over 50% of them have won one or more University Medals in law or other subjects. One of the advantages of getting the Associate to write a memorandum is that it focuses the Associate's thinking. As a result of the Associate's thinking and

research, he or she is then in a better position to criticise my drafts. I have always encouraged my Associates to point out any weaknesses or omissions that they see in my drafts. I tell them that I would rather hear their criticisms than have them pointed out some months later in a law review article. Needless to say, my Associates do not hesitate to express their views about my drafts. If I think the point made by an Associate is correct, I change the judgment to give effect to that view. However on many occasions, the Associate and I have to agree to disagree. Sometimes I have to tell the Associate that it was I who was appointed to the High Court.

After examining and thinking about the arguments of the parties, re-reading the judgments in the courts below and reading any judgments of my colleagues that have been circulated, I frequently do a Preliminary Outline of a proposed judgment. I then use that Outline to give direction to my own reading and research. After I have read as widely as I can in the relevant area of law and again studied the arguments of the parties and read any judgments of my colleagues that have been circulated, I prepare a draft judgment. When that I was at the Bar, I always dictated Opinions and when I was on the Court of Appeal I always dictated the first draft of a judgment. In the High Court, however, I have always used a computer to write my judgments. For many years, I have used Word software. In recent years, however, I have also used Dragon Naturally Speaking to dictate parts of the judgment into the computer. I find that particular voice recognition system to have

about 85% accuracy in recording what I have said. Most of my judgments go through several drafts before they are finally proofed and published.

It will be apparent to the members of this audience that there is nothing in the work of a High Court Justice that cannot be done by a first class woman lawyer who has the energy to cope with the workload. Mary Gaudron proved that beyond a doubt. And there are many women practising law today who are capable of doing the work of a Justice of the Court in accordance with the standards that the community expects of its judges including High Court Justices. Leaving aside those in practice or teaching, in my view – by any reckoning – there are at least 10 women judges serving in the Supreme Courts of the State and the Federal Court who would make first class High Court Justices.

For the reasons that I gave in a speech that I made to the Law Society of Western Australia in Perth last year, I think that there is an overpowering case for appointing a woman as my successor and to at least some of the other three vacancies in the High Court that will occur in the next three and a half years. As I said in Perth, the need to maintain public confidence in the legitimacy and impartiality of the justice system is to me an unanswerable argument for having a Judiciary in which men and women are equally represented. No doubt what constitutes equal representation is open to debate. But that is a matter of detail, not principle.

In many cases, women lawyers bring a different approach to solving legal problems. And in the Law – as I sought to demonstrate in the Inaugural Sir Anthony Mason Lecture on Constitutional Law – attitudes and approaches in Law are all important. Law is not an exact science. At the margins of legal doctrine, the approach of individuals is frequently decisive. Look at the dissent rates in the High Court. Justice Kirby dissents in 33% of cases. Justice Callinan in 18%. I dissent in 14% of cases. So at least three Justices of the Court have different views about how the law should be interpreted and applied in many cases.

Madam President of the Law Society of Newcastle and Madam Vice President of the Women Lawyers Association of New South Wales, I thank you and your Associations for the opportunity to give this Lecture. I hope that it has given those attending here tonight some insight into the work of the Court or at least the work of this particular Justice.