SPEAKERS' FORUM

UNIVERSITY OF NEW SOUTH WALES

17 AUGUST 1999

COURTS: FIRST AND FINAL

BY

THE HON JUSTICE IDF CALLINAN

OF THE HIGH COURT OF AUSTRALIA

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THE HON JUSTICE IDF CALLINAN, HIGH COURT OF AUSTRALIA

I was asked to select a topic for this talk to you today and I chose "First and Final Courts". By "first" I did not mean pre-eminent but the sort of Court that served the common law system for so long and is to some extent, unhappily in my view, declining in use today; that is a court constituted by judge and jury. It is fashionable in some circles to criticise juries and the role they play in deciding cases. I am not one of those critics. Let me put aside for present purposes criminal jury trials and talk about civil jury trials.

In this State, the role of a civil jury in what was one of the few remaining preserves of the civil jury, defamation cases, has recently been very much reduced. Juries no longer decide the quantum of damages in such cases. I suspect that the extravagance of juries in assessing damages has been greatly exaggerated. It seems to me that the role of a jury in assessing damages in such a case can be an appropriate one, for who can better understand the impact of a gross libel upon a person and the utter helplessness of a victim in seeking redress, than a jury vindicating, by a substantial award of damages, a shattered reputation?

However, defamation trials by jury on most issues are still available in most jurisdictions in this country and personally I would hope will continue.

It is said of barristers and former barristers that they generally tend to remember only the cases they have won. Let me at once tell you that in the defamation cases in which I appeared and sometimes won and sometimes lost, I formed a very healthy respect for juries in all of their fact-finding exercises, including damages. Anecdotally it is my impression that jury assessments of damages tended to be reversed with no greater frequency by appeal courts than assessments of damages by judges sitting alone in other cases.

So far as criminal trials are concerned the same holds true. Of course juries sometimes fall into error but that is what appeal courts are for and in the nature of things fewer verdicts by juries, properly instructed, are likely to be reversed than judgments by trial judges sitting alone. Judges are of course, unlike juries, bound to give reasons for their decisions and this in part tends to account for the high survival rate of jury verdicts.

Attitudes to juries tend to be polarised. At one extreme is the diatribe against them delivered by the distinguished English scholar Glanville Williams in the seventh series of the Hamlyn lectures when he said[1] :

> "If one proceeds by the light of reason, there seems to be a formidable weight of argument against the jury system. To begin with, the twelve men and women are chosen haphazard. There is [was at that time] a slight property qualification - too slight to be used as an index of ability, if indeed the mere possession of property can ever be so used; on the other hand, exemption is given to some professional people who would seem to be among the best qualified to serve - clergymen, ministers of religion, lawyers, doctors, dentists, chemists, justices of the peace (as well as all ranks of the armed forces). The subtraction of relatively

> intelligent classes means that it is an understatement to describe a jury, with Herbert Spencer, as a group of twelve people of average ignorance. There is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental. The danger of this happening is not one that can be removed by some minor procedural adjustment; it is inherent in the English notion of a jury as a body chosen from the general population at random".

Now is neither the time nor the place to dissect and criticise that somewhat elitist criticism probably uninformed by direct experience of juries, but suffice to say that I would take block with Lord Justice Devlin who, in the next year, in 1956, in the eighth Hamlyn lecture series, said[2] :

> "Each jury is a little Parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows freedom lives".

It is a matter of regret that most of you who go into practice on the civil, rather than the criminal, side are very unlikely to see a civil jury in action. On the other hand jury trials continue to thrive in the criminal jurisdiction and those who go to the criminal bar will have to learn to find a way to make yourself intelligible and persuasive to a varied group of people, sometimes in occupations and from backgrounds far removed from this campus. I wish you every success in that regard. Practices before juries are demanding and stimulating.

There is another advantage in jury trials, particularly ones in which there are both difficult factual and legal issues. A judge presiding over a jury trial, and counsel in it are put to the very rigorous test of separating discrete factual questions so that there may be a pure application of law to them.

Now let me say something about final courts of which the High Court is of course one.

Unlike in the United States neither in Australia nor the United Kingdom has very much been written about the processes by which the High Court and the House of Lords make their decisions and write their judgments. Not surprisingly, in that great melting pot of democracy and opinion, the United States, masses of material, some of it well-informed, and some of it speculative, are published annually.

Last year, a former law clerk to a justice of the Supreme Court of the United States published an insider account of the operations of the Court. It again brought into the public spotlight some of the power plays and alleged intrigues of the institution. I use the word "alleged" advisedly, because, after reading the book, *Closed Chambers* , I was left with the unmistakable impression that the author had *not* understated his role as a clerk to one of the Justices, and had also seen the publication of the book as an opportunity to give the world the benefit of *his* opinions on the various errors that *he* was satisfied some of the Justices regularly made.

But it is not the first of such disclosures. The book, *The Brethren* , published in 1979, revealed similar stories. The latter, although again no doubt to be taken with a grain of salt, I found considerably more readable and less self-righteous than *Closed Chambers* . However the books did have in common a generally consistent theme of deal-making between Judges at times anxious to have a particular point of view prevail.

Today I will make a few observations about the differences and similarities between the two final appellate courts: the United States Supreme Court and the High Court of Australia. I should stress, however, that in doing so, I use as my sources largely only the published material, such as the two books already mentioned. Sadly, I am unable to offer you a personal tour of the High Court in the

style of *Closed Chambers* or *The Brethren* . There will be no inappropriate revelations.

Let me say a little first about the High Court. As you would all know when it was established there were only three justices and now there are seven, three of whom were Judges in New South Wales at the time of their appointment to the High Court, one of whom was a Solicitor-General in that State, another who was a member of the Court of Appeal of Victoria, and myself, on appointment in practice at the Bar in Queensland. In all there have been 43 appointments to the High Court since it first sat in Melbourne in 1903. That relatively small number is attributable to two matters, that until 1977 Justices of the High Court had a constitutionally entrenched life tenure, and some had remarkable longevity, which is *not* to suggest that the work has ever been easy or undemanding. Sir Edward McTiernan served for 46 years and was 84 years old when he retired. Sir Garfield Barwick served as Chief Justice from 1964 until 1981 and was 78 years of age when failing eyesight caused him to take what he would have regarded as premature retirement as all of his other faculties remained acute.

The circumstances of Justice McTiernan's retirement were unusual. He had fractured his hip trying to squash a bug on the floor of his bedroom and was confined to a wheelchair. Because wheelchair access to the bench was not then available, unlike today, McTiernan J was forced into retirement.

The work of the High Court of Australia is today almost exclusively appellate and many of the current generation of lawyers are unaware of a time when single Justices of the Court regularly exercised original jurisdiction, in the diversity jurisdiction, and in other fields such as tax and compensation on acquisitions by the Commonwealth.

I am, as you will appreciate, a new boy on the block in the Court and can only speak of my own short experience. I do not think that I would be improperly divulging secrets by telling you that nowadays the Justices of the Court meet informally after a case is heard, in the Chambers of the Chief Justice, or the most senior of the Justices if the Chief Justice has not sat, to discuss the case. Tentative opinions are expressed with a view to finding, if possible, some consensus. The Chief Justice has also instituted a regular judgments meeting which is still an informal, but slightly more structured conference to take place over a day following each sittings of the Court. The meetings are very useful because of the opportunity they provide for the exchange of views, the reaching of consensual opinions and judgments, when possible, and the identification, and usually, in consequence, the narrowing of differences between the Justices. No Justice seeks to exert any pressure on the others and overall, I have found the process very helpful.

After a case has been heard and there have been discussions about it sometimes a first judgment, or a subsequent one, will be taken to be a draft, or substantially the judgment of all of those Judges who agree with it. Sometimes such a judgment will be the subject of agreement subject to qualifications. Judges circulate all judgments to one another and exchange suggestions by memoranda and discussion. This is really a summary of what takes place in the Court these days after the hearing.

I will now say something about the proceedings in the Court themselves. Increasingly the Courts, including the High Court are being asked to depend upon written materials. Those written materials are important and very helpful. But there are two cautions which need to be sounded about them from my own point of view. There is a perception that the cost of litigation can be measured by the amount of hearing time that a case takes. That can be an unreliable guide. Generally speaking, the shorter the hearing time on a complex case the greater and the more prolonged the work may have been out of Court, not only I might say by the parties and their lawyers, but also the Court itself in preparing for the case and the writing of the judgment.

The presentation of so much of a case in writing seems very much to be at the heart of what all courts are being urged to do, that is, actively to manage a case through all of its phases. Some, including members of the judiciary, advocate very active involvement in the process in lieu of the former passive, detached determination of issues as they are presented by the parties. Case management means exercising power to control or direct not only the way in which the case is to be presented in court but also the preparatory processes for the hearing.

Not all commentators and judges share unqualified enthusiasm for case management as it seems to be developing. No one could possibly be in favour of needlessly prolonged and expensive litigation but on the other hand it is important to keep sight of the end, that is, the determination of a case in a

way that is not only impartial but also is seen to be impartial. If a judge has descended to the level of the parties by, as sometimes happens, telling one or other of them that a certain interlocutory step is a luxury that cannot be afforded, or that a party ought to be careful about relying upon some technical, strict, legal right, then the judge may risk losing the appearance, and perhaps even the reality of judicial impartiality. Moreover there is, so far as I am aware, little hard evidence that all judges are necessarily good administrators or managers.

The Australian Law Reform Commission has commented that judges may not have the appropriate skills or experience to be able to direct the course of a complex trial[3] . It is a new thing for the courts to be so closely involved. Often judges are not as well qualified to manage the case as the parties[4]. After all, Zander notes, the parties "live with the case"[5].

Perhaps a time may come when judges will simply sit to hear cases which until that point have been managed by other judges or lawyers who have shown a particular aptitude for management.

A third risk is that a judge, despite his or her best endeavours may have his or her open mind about a case unconsciously contaminated by the very large volume of information concerning it gleaned in managing it.

The manager receives extensive details of the case before the hearing; about the parties involved, the process of discovery, claims for privilege and the conduct of the various parties in preparing for hearing. It is true to say that there is extensive exposure of the manager to the parties and vice versa. It is information unfiltered by the rules of evidence. Some of it may be received ex parte, with no opportunity for the other side to respond to the submissions or to contradict them. It may provide, as one commentator thought "a fertile field for growth of personal bias"[6] .

Another caution that I offer against paper, or largely paper trials and appeals, is that they can deny the Court the opportunity of probing a submission and exploring the ramifications of it. Speaking for myself, again, what I have found particularly helpful are the testing and questions asked by the other Justices of the High Court. One justice will sometimes ask a question which counsel are unable to answer but another justice, anxious to look at the case from all angles will answer it for that counsel. Thus there can take place a stimulating debate as the case develops, of a kind which would simply not occur if the Court were left to consider written materials only, either alone in their chambers, or even in conference.

One matter which I know is of particular interest to students is the role of the Law clerks or Associates in the various institutions. Law clerks, or "Associates" as we call them here in Australia, exist in almost all ultimate courts in the Western World. New Zealand, Canada, and even England now have them. In fact it was only last year that the English Court of Appeal appointed its first "Judicial Assistants" to the Lords of Appeal[7].

The relationship of clerks to the Justices they serve has been described in the United States as:

> "The most intense and mutually dependent one outside of a marriage, parenthood or a love affair."[8]

And as:

> "Professional only in part, it is a close human relationship, one that endures long after the clerkship ends."[9]

A Judge has to rely upon his or her staff in many ways. Trustworthiness and an ability to maintain confidentiality are critically important qualities in an Associate. The High Court insists that Associates comply with a detailed protocol which precludes them from making disclosures of

confidential matters of which they inevitably become aware, and also forbids them to publish any material during the terms of their Associateships.

It is inappropriate to discuss judgments outside chambers, or to rely on people for research who are outside the Court. Mostly when they are first appointed, Judges come to the Bench from the Bar, where they are used to interacting with a broad range of people in their working day. On the Bench, one is more reliant on the Associate not only for research but also for companionship and some social interaction in the work place.

I will make some more general observations about some important differences between the Supreme Court and the High Court, at a high level of abstraction.

One thing that may surprise an Australian lawyer on reading *The Brethren* was just how much information the authors had managed to obtain or claimed to obtain. Interviews with over 200 people, mostly, wait for it former law clerks. Also, there was unpublished material made available to the authors, including, quite surprisingly, internal memoranda between the Justices[10]. That is really very significant. It is unlikely to happen here.

The contrast is in the availability of published material on the High Court. In fact, it has been noted that in both Australia and Canada, there has been practically no informed consideration of the institutions.

The US Constitution, unlike the Australian equivalent, contains a Bill of Rights, and rights to freedom of speech, religion and assembly. Its existence involves the Court in the most political and controversial issues of the day. The Supreme Court rules on rights issues, such as obscenity, abortion, and the death penalty. It is not just the Justices' toes that are dipped in the cauldron: each Justice is inevitably drawn deeply into its boiling brew of politics, the attributed or perceived social values of innumerable groups in a population of 240 million or more people, federal state relations and such other matters as the parties can persuade the Court are constitutional rights issues.

In both *Closed Chambers* and *The Brethren* , the authors refer to the immense volume of mail sent by the general public to Justices in relation to matters before the Court, or matters on which the Court had recently ruled. In *Closed Chambers* , Lazurus talks about some thousands of letters sent to (the recently deceased) Justice Blackmun in connection with the abortion decisions of that time. Happily I certainly have not received, and I doubt whether my colleagues have ever received such a volume of fan mail.

Owing perhaps to the absence of a Bill of Rights, cases before the High Court do not involve the same level of politics, or discretion. Indeed the Australian model does not provide the same opportunity for personal or idiosyncratic views to influence the outcome of a case, even subconsciously. Anyway, the figures speak for themselves. High Court cases are by no means as sensationalist or intriguing. There are currently 22 per cent criminal, 56 per cent civil and just 22 per cent Constitutional appeals annually[11]. Although work on the High Court may lack some of the excitement (overrated in practice I suspect) of involvement in the affairs of the day, it does offer a degree of variety and contact with a vast range of legal issues which in general the United States Supreme Court does not have an opportunity to explore.

Americans seem to be much more closely concerned with the activities of their Court. Indeed one might very well infer that Americans generally take a closer interest in political issues of the day, in which, because of the Bill of Rights, the Supreme Court is a player. I am sure a higher percentage of the American public could name at least a few members of the Supreme Court bench. Many more could name seminal cases and the area of law that the Court has been called upon to consider. I doubt whether that is so in this country.

The Supreme Court is scrutinised by a body of people known as "Supreme Court watchers". In a recent article in the *Washington Post* , the writer notes[12]:

> "Supreme Court watchers are second only to the old Cold War Kremlinologists in their obsessiveness: They parse communications, wire up sources and sleuth for any sign of movement at the top."

In the same article, the author Joan Biskupic wrote " advocacy groups constantly watch the nine leather chairs, the administration keeps an ear cocked for any sign of movement and the media cannot help obsessing on a potentially big story."

There is also a large and informed Supreme Court press corps. Almost all journalists attached to the Court have legal qualifications and the most senior has been reporting for 39 years.

It is as a result of the North American culture and Americans' interest in public institutions that the Justices there do not enjoy the same degree of anonymity as we do as Justices in Australia. I must say that so far as I am concerned I wouldn't mind being a lot more anonymous still.

Take Chief Justice Burger, Chief Justice of the Supreme Court from 1969 to 1986. Travelling under a pseudonym; disguising himself by dressing to avoid recognition and going everywhere with an armed chauffeur and guards to protect him from publicity still did not prevent him from being recognised and criticized[13] .

I think that privacy of public officials, and the society which respects it, are both positive forces. Anonymity allows Justices to pursue their work and private lives without unnecessary interference. There is a balance to be maintained. How can judges be expected to keep in touch with "real life" if they are forced to retreat from it? How can they be expected to be well-balanced people if they cannot be normal participants in mainstream society? On the other hand, a Judge has to be careful neither to become a participant in nor to appear to be a participant in, political affairs or controversies which could come before the Court, or in respect of which it is not appropriate that Judges play a role.

Another striking feature of the United States Supreme Court is the lack of any mandatory retiring age. Justices are appointed to the Supreme Court for life. The lack of a statutory age of senility, as it has been described, allowed Justice Black to retire at 85, Justice Brennan at 84 and Justice Marshall, the Court's first African American Justice, to retire at 85. Justice Stevens in currently the oldest on the Bench, and is aged 78.

Although not all justices stay well into old age, many spend a long time on the Bench. The present Chief Justice, Rehnquist is entering his 26th year on the Bench. Douglas J recorded a massive 36 years. Since 1965, the primary reason for retiring from the Court has been age in more than half of departures from the Court[14] . Justice Douglas' record is said to be rivalled only by that of Australia's Justice McTiernan, who spent a record 46 years as a Justice of the High Court.

In Australia, as most of you know, a High Court Justice must now retire at 70. The referendum in 1967 concerning the power of the Commonwealth to make laws for Aboriginal people is often cited as the occasion on which the population most overwhelmingly embraced constitutional change. What is less well publicised is the fact that the 1977 referendum was the second most overwhelming embrace of change by substitution for life tenure of federal judges, including High Court Justices, of a compulsory retirement age of 70. What does this tell us about the Australian people? They were very concerned to recognise Aboriginal rights and entitlements and to ensure that judges not overstay their welcome.

In *The Brethren* , the authors recount an incident that occurred when Justice Harlan was ill and in hospital. He insisted on working, even though virtually blind. The story goes like this[15].

> "One day a clerk brought in an emergency petition. Harlan J remained in bed as he discussed the case with the clerk. They agreed that the petition should be denied. Justice Harlan bent down, his eyes virtually to the paper, wrote his name, and handed the paper to his clerk. The clerk saw no signature. He looked over at Harlan J.
> Justice Harlan, you just denied your sheet', the clerk said gently, pointing to a scrawl on the linen."

One problem about the absence of a compulsory retirement age is that sometimes those least able to assess their capacity to do the work are most likely to continue to try to do it. Unfortunately there will always be vigorous, highly alert septuagenarians with much to contribute who will be civilian casualties of the Constitutional amendment but that may be an acceptable price to pay for the avoidance of occasional real, as opposed to statutory senility.

Many Judges, though, lead quite active lives, even later in life. President Nixon sniggered about Justice Douglas' marrying for the fourth time - to a 25 years old law student, when the Judge was 70[16] . Justice McTiernan married for the first and only time at the age of 56, to his faithful secretary of many years, Ms Kathleen Elliott. She was apparently a formidable lady.

In the US, oral argument is not obligatory. Where there is oral argument, strict time limits are imposed. Alternatively, a case may be given "summary consideration"; that is, without oral argument, and in relation to which only a brief, unanimous, opinion is issued by the Court as a whole. Further, cases can be stood over for re-argument. Cert. petitions, which are applications to persuade the Court that the case should be heard in full, are determined on the papers only; there is no oral argument. Each Justice has oversight of one or more of the 11 appeals circuits, which involves dealing with special and emergency petitions, such as those often brought in death penalty cases.

In Australia, while Special Leave applications are strictly timed, they too almost always involve oral argument.

A further illustration of the US court's different technique is the convention of the assignment by the Chief Justice of the writing of opinions. That has been described as an important source of real power[17]. Justice Blackmun said that a Justice who was "in the doghouse" with Chief Justice Burger might be assigned one of the "crud" opinions "that nobody wants to write".[18]

There has been some controversy here and in the United States about the Courts' selection of cases for hearing. David Stewart wrote of the US system[19]:

> "As each term of the Supreme Court begins, many lawyers look over the Court's schedule or arguments and ask, Why did they grant cert. to so many dogs?" That sometimes prompts a follow-up question. Why did the justices refuse to hear other cases of at least equal importance?"

This brings me to law clerks. According to Lazurus, the involvement of the law clerk in chambers business in the United States is all-pervasive. He claims, I emphasize, "claims", that they participate in inter-chambers negotiations, and that they also virtually decide cert. applications and even draft opinions. If this account is accepted, then the law clerk wields an influence in the Supreme Court which simply would not be tolerated in Australia.

But I think any account such as this must be balanced with the other side of the story. It has been observed that "law clerks, in describing themselves, often inflate their own importance and power"[20].

It would not be surprising when you consider that the number of cases filed in the Court had increased from about 1,372 in 1951-55 to 4,786 in 1986-90 and I am told more than 7,000 last year[21]. Recently, the *Washington Post* reported a demonstration of 1000 people on the steps of the Supreme Court[22]. The demonstration decried the lack of diversity among the Justices' staff. Only one of the current clerks is Hispanic. Since 1972, fewer than 20 per cent of the 428 clerks have been African American, the article pointed out. What the protest shows is that it is widely assumed that the clerks are occupants of positions of influence.

The article alleged:

> "Supreme Court clerks play a crucial role in shaping American law. They recommend which appeals should be heard, develop questions for justices to use at oral arguments and often write first drafts of opinions supporting their justices' positions on cases."

Clerks go on to hold positions of influence in the legal profession; and elsewhere. The article further claimed:

> "Beyond their ability to influence the high court's work, clerks frequently continue on to command high salaries at private law firms or hold influential positions in government or as law professors."

There have been occasions recently where the involvement of the law clerk has been noted - by the Court itself. Justice Scalia said in *Conroy v Aniskoff*[23]:

> "I confess that I have not personally investigated the entire legislative history - or even that portion of it which relates to the four statutes listed above. The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task."

There is also the Alabama case in which the Court gave one very lucky clerk a pretty good wrap as they would say[24]:

> "This Memorandum of Opinion was prepared by William G Somerville III Law Clerk, in which the Court fully concurs."

There are many indications in the published material of "subterfuges" of the clerks on the Court. When Chief Justice Burger came to the Court in 1969, he was convinced something had to be done about the clerks' network. He began by attacking the underground inter-chambers communications system by issuing a memorandum on confidentiality. Some clerks, the Chief wrote[25]:

> "at times have a tendency to develop a collective Law Clerks' decision to resolve cases on the merits before the Justices themselves have worked out the answers. Of special importance in this regard is the conversation which takes place in the Law Clerk Dining Room. Law Clerks generally view the lunch period as a unique period to exchange insights and stories about their justices. It has been customary for Law Clerks to discuss with one another the most intimate of matters relating to their Justices with the understanding that none of what is said shall go beyond the four walls of the Dining Room. While such conversation can be both educational and entertaining for the Law Clerks, the extent to which such information is not carried beyond the Dining Room is questionable."

The Chief concluded by saying that no information was to be revealed about him which would tend to place him in an unfavourable light.

I need hardly repeat that none of this is the Australian experience or practice.

Courts the target

I turn to another topic now, media criticism of the Courts in Australia.

One preoccupation of some judges in Australia at the present time is with the barage of criticism, not always fully informed with which they are being bombarded. Such criticism can of course be very hurtful. But public life is in some respects a little like the theatre with which I have had some acquaintance. Neither actors nor authors can afford the luxury of sensitivity. I've never read any description of a judge of the kind used in respect of an actor, Dennis Quilley, in a musical version of " *Blithe Spirit* " by Noel Coward. Bernard Levin said this:

> "Denis Quilley played the role with all the charm and animation of the leg of a billiard table."

When Michael Redgrave played the lead in " *Hobson's Choice* " the poison pen critic, Kenneth Tynan said that although some critics had seen overtones of Lear in his portrayal, he thought a somewhat bad tempered Father Christmas would have been nearer the mark.

When Terrence Stamp played Dracula, The Times' dramatic critic said that he had nothing to offer except a noble profile, his entrances were insignificant, his voice without menace or mystery and his physical tricks consisted largely of flapping his cloak like a bat failing to take off.

One of the most damming criticisms was of a play by JB Priestley called " *When We Are Married* ". One critic said:

> "It would make an ideal treat as a night out for your despicable inlaws. Send them a couple of tickets and then meet them later at the Theatre restaurant for a blazing row."

Criticisms therefore that have been made of the courts seem by comparison to be rather mild stuff.

However enough of the media. There are more serious matters to be considered.

It has been said of the United States Supreme Court that cases that reach the Court usually represent conflicts between highly commendable principles none of which can fully prevail in life on earth; each is apt to have impressive legal backing. In such conflicts the law is far from clear, yet the judges must somehow decide cases.

The High Court does not with the same frequency have to decide cases of such volatility as fall to be decided under the US Bill of Rights. But in recent times the High Court has had to deal with issues about which many people are emotional and hold strong views: race and land, (*Mabo* , *Wik* , *Kartinyeri* , *Fejo* , *North Ganalanja Aboriginal Corporation v Queensland*), religion (*Plimer v Roberts* special leave application 1998), children (*NT v GPAO* , *AMS v AIF*), the spoils of property in marriage (*Mallett v Mallett*), politics (*Sykes v Cleary* , *Sue v Hill*), and, all the time, money and property. In issues such as these there will always be unhappy losers.

Jefferson once said that a court of able, independent judges would not buckle before the frenzy of citizens commanding wrong. I hope that is true of the Court on which I have the honour to serve.

Well that brings me to the end of what I have to say to you today. I see I have over-run my allocated time. I thank the executive of the University of New South Wales Law Society and Julian Leeser for inviting me to speak today. I thank those present for listening.

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1 Endnotes

The Proof of Guilt , 3rd ed (1963) at 271-272.

2 *Trial By Jury* at 164.

3 *Review of the Adversarial System of Litigation* , IP 20, April 1997 at 41-42.

4 See for example Zander, "The Woolf Report: Forwards or Backwards for the New Chancellor?" (1997) 16 *Civil Justice Quarterly* at 216.

5 Zander, "The Woolf Report: Forwards or Backwards for the New Chancellor?" (1997) 16 *Civil Justice Quarterly* at 217.

6 Resnik, "Managerial Judges" (1982) 96 *Harvard Law Review* at 427.

7 See Vine, "Judicial Assistants: Junior Tenants in the Court of Appeal?", June (1998) *Counsel* 22.

8 Wald, "Selecting Law Clerks", (1990) 89 *Michigan Law Review* 152-163 at 153.

9 Kozinski, "Confessions of a Bad Apple", (1991) 100 *Yale Law Journal* 1707-1730 at 1708.

10 See *The Brethren* at 4.

11 Source: *High Court of Australia Annual Report 1997-98* at 59.

12 "Court Followers Tensely Await Justice Stevens's Verdict: to Stay or Go?", *Washington Post* Sunday June 14 1998 p A2.

13 See *The Brethren* at 135-136.

14 Baum, *The Supreme Court* , 4th ed (1992) at 67.

15 See *The Brethren* at 157.

16 See *The Brethren* at 18.

17 Baum, *The Supreme Court* , 4th ed (1992) at 163.

18 Baum, *The Supreme Court* , 4th ed (1992) at 164.

19 "An Inside Peek at How the Court Picks its Cases", (February 1985) 71 *American Bar Association Journal* at 110.

20 Bloch and Krattenmaker, *Supreme Court Politics: The Institution and its Procedures* , (1994) at 502.

21 Baum, *The Supreme Court* , 4th ed (1992) at 111.

22 "As Term Opens, Lack of Diversity is Decried", *Washington Post* , Tuesday 6 October 1996 p A3.

23 123 Ed 2d 229 at 243 (1993).

24 *Acceptance and Insurance Company v Schafner* 651 F Supp 776 at 778 (ND Ala 1986).

25 See *The Brethren* at 34-35.