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**THE CENTENARY OF THE HIGH COURT: LESSONS FROM
HISTORY
AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION**

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On 14 September 1900, Alfred Deakin, recording that Australian Federation appeared to him "to have been secured by a series of miracles", said that "[a]ll History takes on the appearance of inevitableness after the event"¹.

The Parliament of the newly created Commonwealth was required by s 71 of the Constitution to establish "a Federal Supreme Court, to be called the High Court of Australia". That requirement was fulfilled by the enactment of the *Judiciary Act* (Cth) 1903. On 6 October 1903, in this courtroom, the first three members of the Court were sworn in. One hundred years later, the creation and constitution of the Court, and some of its subsequent history, may have taken on the appearance of inevitability. Yet the story of the High Court is part of the story of our nation; and it has much to teach us.

Some of what we know about the Court's establishment and later activity is of mainly historical interest. For example, although s 71 of the Constitution did not merely empower the Parliament to set up the High Court, but mandated its establishment, the drafting took some surprising turns. Andrew Inglis Clark was the founder most familiar with the United States Constitution. His draft Bill, which was influential at the 1891 Convention, in the Part headed "Federal Judicatory", provided that "[t]he Judicial power of the Federal Dominion of Australasia shall be vested in one Supreme Court, and in such Inferior Courts as the Federal Parliament may from time to time create and establish". Clark saw the Supreme Court as an integral part of the Constitution. To his annoyance, the drafting Committee on the *Lucinda*, led by Griffith, altered the clauses relating to the judicature. He said they "messed it"². They proposed to make the creation of the Court permissive rather than mandatory. The matter was rectified at the 1897-1898 Convention, but it is curious that Griffith and Barton approved the earlier change³.

Section 74 of the Constitution, concerning appeals to the Privy Council, is now a dead letter. Its subject matter was the last obstacle in the path to Federation. Its presence reminds us that the Constitution enacted by the Imperial Parliament was not in all respects the same as that drafted in the colonies, and approved by their parliaments, and their people. For most of its first century, the High Court was not the ultimate court of appeal in the Australian judicature, and the common law of Australia was declared, from time to time, by British judges. That has

changed. The Court decided recently that the United Kingdom has become a foreign power⁴.

The political contest over s 74 caused personal bitterness. On the occasion of his swearing in as the first Chief Justice, Sir Samuel Griffith remarked on criticisms that had been made of his appointment. He was strongly attacked in the Federal Parliament by Mr Kingston, a former Premier of South Australia. Kingston had been one of the delegates in London who felt that negotiations with the Imperial authorities were compromised by the activities of colonial Chief Justices, including the Chief Justice of Queensland. Griffith was also attacked by Senator Keating, a protege of Clark. That he felt obliged to mention those attacks on 6 October 1903, and to respond briefly to them, reminds us that there never was a golden age when the members of the Court basked in universal admiration. Anyone who thinks that later there might have been such an age, should read the facts of *R v Dunbabin; Ex parte Williams*⁵, decided in 1935.

On 7 October 1903, the Court granted special leave to appeal in *D'Emden v Pedder*⁶. The dispute between the High Court and the Privy Council over the application in Australia of *McCulloch v Maryland*⁷, exemplified in cases such as *D'Emden v Pedder*, *Webb v Outtrim*⁸ and *Baxter v Commissioner of Taxation (NSW)*⁹, and the application of s 74 to that dispute, became intense. Lord Halsbury's opinion in *Webb v Outtrim* was reasoned in a manner that evidently infuriated Chief Justice Griffith, with its casual rejection of the relevance of United States

experience. Griffith's response in *Baxter* is the most vitriolic judgment in the Commonwealth Law Reports. He set out to give the Privy Council a lecture on the (very recent) history of Federation. He pointed out that the founders had deliberately followed the United States, rather than the Canadian, model of federalism. He asserted that the 19th century decisions of the Privy Council about the Canadian Constitution had caused widespread dissatisfaction. He implied, with no attempt at subtlety, that the Law Lords knew nothing about the Constitution of the United States. On the issue as to *McCulloch v Maryland*, history was on the side of the Lords. *The Engineers' Case*¹⁰ in 1920 decided that Lord Halsbury was right, and Sir Samuel Griffith was wrong. That decision was one of the most influential ever given by the Court, not because of the quality of the reasoning, but because of the importance of the principle laid down in the joint majority judgment. The case shows that a clear majority in favour of a binding rule may be much more significant than a multiplicity of finely reasoned, but disparate, individual opinions.

The early debates about the size and structure of the Court are fascinating, but no longer matter. They are reflected in Deakin's great speech in 1902 in support of the Judiciary Bill¹¹. There was a serious proposal that the Court should be a scratch court, composed of State Chief Justices sitting on a part-time basis. There were doubts that the Court would be fully occupied. Thrift was an important influence on the original design of the Federal judiciary. Our famous autochthonous expedient, conferring federal jurisdiction on State courts, was devised to save money¹². The first three members of the Court, and then the next

two, after its size was increased to five, had all been prominent politicians. There was a fear that this would set the pattern for the future. It did not. A career in politics has not been treated as a disqualifying factor, but most of the Justices of the Court have never been parliamentarians. Part of the explanation of the predominance of ex-politicians in the early years is that, in those days, it was common for leading barristers to enter Parliament. Members were not expected to devote the whole, or even most, of their time to parliamentary and electoral duties. They were entitled to earn a living elsewhere. Now, it is difficult to combine a busy legal practice and a political career.

Beyond matters of purely or mainly historical interest, there are aspects of the foundation and growth of the Court, its work, and its influence, that are of enduring importance. It is these that ought to be the focus of our attention.

At the time, the creation of the Court was seen as a completion, or fulfilment, of the Constitution. Deakin, in his speech on the Judiciary Bill, described the Court as "a structural creation which is the necessary and essential complement of a federal Constitution"¹³. On 6 October 1903, Senator Drake, the Attorney-General, said "the Constitution in its grand outline is now complete"¹⁴. Much of Deakin's advocacy of the Judiciary Bill was aimed at making the point that a federal union necessarily required a constitutional court, and that the people of the colonies had been promised "a new court, strictly Australian and national, created for Australian and national purposes"¹⁵. He said that the people were given

the guarantee of an "impartial independent tribunal to interpret the Constitution"¹⁶.

In 1903, *Marbury v Madison*¹⁷ was 100 years old. The first High Court was as distant in time from Marshall CJ as the present High Court is from Griffith CJ. Of those involved in the early drafting of the Constitution, it may be that only Clark had studied *Marbury v Madison*. He found it necessary to remind Barton of the decision in a letter he wrote during the 1898 Convention debate¹⁸. Chief Justice Rehnquist has described the idea of an independent judiciary with the final authority to interpret a written constitution as one of the crown jewels of the American system of government¹⁹. He pointed out that the idea has spread to other places, especially since the Second World War. It was made a basic aspect of the Australian system at the beginning of the 20th century. An acceptance of the principle that the judicial power of the Commonwealth, as a matter of necessity, extends to deciding the limits of legislative and executive power, is embedded in the Constitution itself. Deakin in 1902, spoke of the "authority reposed in a judiciary to interpret [the] supreme Constitution and to decide as to the precise distribution of powers" as one of the "fundamental conditions to any federation"²⁰. Thomas Jefferson would not have agreed, but in Australia, by the time of Federation, it was Marshall's opinion that had prevailed, and was treated as self-evident.

In some modern federations, there is a separate constitutional court. There appear to be three main reasons why it never occurred to

the founders that we might have such an arrangement. First, they were greatly influenced by the United States precedent, and treated the Supreme Court of the United States as the exemplar. Secondly, as Deakin explained, British colonies were familiar with local legislatures of limited powers, and with the need for the ordinary courts of law to resolve disputes about those limits. Thirdly, enforcing the Constitution was seen as an incident of the exercise of judicial power. In 1903, Clark wrote a paper for the Harvard Law Review entitled "The Supremacy of the Judiciary Under the Constitution of the United States, and Under the Constitution of Australia"²¹. His reasoning gives an insight into the assumptions behind Ch III of the Constitution, of which Clark was a principal architect. Accepting that there needs to be a supreme judicial authority with the ultimate capacity to determine the validity of legislative and executive action, it is consistent with our history, tradition, and legal culture that such capacity be vested in a body composed of what might be described as regular judges, who, in the ordinary course of their duties, exercise judicial authority. It is the judiciary's collective reputation for independence and impartiality that sustains the acceptability of judicial review. Anyone who doubts the existence of that reputation might consider the propensity of politicians and the media to demand a "judicial inquiry" into controversial issues requiring public investigation. As Sir Owen Dixon observed²², judicial review of legislative and executive action is tolerable only upon the faith of an understanding that such review will be guided by a spirit of legalism. Legislators, administrators, and the public, assume the existence of such a spirit in the regular judiciary, and are quick to express alarm if it appears to

recede. Whether the benefit of the same assumption would be extended to a special tribunal, perhaps composed only partly of judges, is another matter.

Judicial review of legislative and executive action is part of the High Court's reason for being. It involves the Court in the resolution of disputes that have political significance; sometimes major political significance. Decisions on matters of that kind naturally arouse partisan feeling. That feeling is sometimes directed towards the Court. Checks and balances are applauded universally in theory; but people with power do not always enjoy being checked or balanced. The enthusiasm of politicians for judicial review may depend upon whether they are in Government or Opposition. The High Court never has been, and never will be, free of the certainty that some of its decisions will arouse popular resentment, and even partisan fury. That is a clear lesson of its history.

In 1911, Mr H G Turner, a Victorian banker, wrote a book on "The First Decade of the Australian Commonwealth". It is interesting to see how the early High Court's record of judicial review appeared to him. He recorded the hostile response to the decision in *R v Barger*²³, declaring invalid the legislation that give effect to the "New Protection". His comments show an astute lay person's appreciation of the constitutional role of the judiciary, and the value of its independence. He said²⁴:

"In the heyday of their success, and backed by much journalistic support, many of the newly-elected Members [of Parliament] indulged in foolish predictions of improved social conditions as a result of their advent to power. Some even inveighed in most reprehensible terms against the Courts which had dared to decide adversely to former claims of

their party. With a lamentable ignorance of the question which the High Court had to decide, a Mr Beard, newly-elected for a suburban constituency in Victoria, was reported in the daily papers to have said at a public meeting that 'the Federal Government intended to bring forward industrial measures, and, if the High Court refused to pass them, the Government would apply to the people to give it power over the Court. Mr Justice Higgins and Mr Justice Isaacs were with the workers, and should the other Judges refuse to pass the measures, others would be elected to carry out the mandate of the people'. It is almost incredible that a man aspiring to political life could be so ignorant of the very basis of judicial functions; and yet to show that his was not an exceptional expression of hostility to the independence of the Bench, it is to be noted that on the same day, 21st May [1910], at a congress of the Labor Convention in Queensland, resolutions were passed ... demanding 'an amendment to the Constitution to deprive the High Court of power to declare unconstitutional Bills passed by both the Houses of Federal Parliament'. It was politically wise for the more moderate Labor men to repudiate these silly vaporings, and even to attribute them to the Socialists, towards whom many of them maintained a respectful aloofness."

From the very beginning, decisions of the Court that have frustrated political objectives, have resulted in noisy criticism, resentment of the Court's power and independence, and threats to limit that independence. When that occurs, it is not a cause for alarm, or for hand-wringing about a loss of public confidence. It is what one expects in a robust democracy. The important thing is to recognise threats to judicial independence when they are made, and to take proper steps to make the public aware of what is at stake.

In the *Wheat Case*²⁵, in 1915, the Court, with Griffith CJ and Isaacs J in the majority, and Barton J in the minority, dealt a fatal blow to the Inter-State Commission which was mandated by s 101 of the Constitution, and was to have such powers of adjudication as the

Parliament deemed necessary for the execution and maintenance of the provisions of the Constitution relating to trade and commerce. Isaacs J, not given to understatement, began his judgment by identifying the question as one of "vast importance". The decision was a strong assertion of the principle that judicial power belonged to the judiciary.

The decision in the *Engineers Case*²⁶ was understood by lawyers, politicians and lay observers to mark a major shift in the federal balance. Sir Robert Garran said, in 1924, that it "caused consternation in the State camp"²⁷. Professor Galligan, in *The Politics of the High Court*²⁸ quotes a newspaper report in *The Argus* of 1 September 1920:

"The judgment of *D'Emden v Pedder* is overthrown, and all the decisions based on it. People must wonder how long this new interpretation will last. The question is: Are there any such things as State rights? The people have lived for a number of years under the impression the State instrumentalities are immune from Commonwealth interference, and they have refused in referendums to extend Commonwealth powers. Now the High Court has done what the people would not do."

Consternation in the State camp is something with which the Court has learned to live. Its decisions on uniform taxation, external affairs, and the corporations power substantially altered the federal balance. When I first began to appear in the High Court, Sir Garfield Barwick was Chief Justice. It was a brave advocate who used the words "sovereign" and "State" in the same sentence. A cardinal sin was to put any submission that reflected pre-Engineers' orthodoxy. That had been exploded, and counsel were not allowed to forget it. I was junior counsel for the Commonwealth in the *Payroll Tax Case*²⁹ and the *Concrete Pipes*

Case³⁰. There was a Coalition Government in 1971, and the Attorney-General of the day, Mr T E F Hughes QC, announced a policy of exploring the outer limits of Commonwealth power. His timing was good.

Discontent with the consequences of decisions of the Court, given in the exercise of its constitutional function of judicial review, has often been accompanied by suggestions that the Court should give advisory opinions. The founders had considered, and rejected, that possibility. One of the features of the writings of Clark and Deakin is the emphasis they placed upon the decision to follow the United States, rather than the Canadian, model of federalism. Clark regarded Canada as more of an amalgamation than a federation³¹. In his speech on the Judiciary Bill,³² Deakin referred to the federal veto on provincial legislation in Canada, and observed that, in Australia, unlike Canada, the undefined powers all remained vested in the States. Thus, he felt, the interpretation of the Australian Constitution was "beset with much greater federal perils". The High Court should compare more closely with the Supreme Court of the United States than with the Supreme Court of Canada. In particular, he said, the High Court, like the United States Court, and unlike the Canadian Court, should not give advisory opinions. Such a role was seen as likely to compromise the separation of powers which was essential to the Court's independence as an arbiter of federal disputes.

Turner, in 1911, writing of the work of the Third Labor Ministry, referred to the introduction of legislation which "proposed to throw upon

the Judges of the High Court the duty of determining any question of law as to the validity of any Act of Parliament which might be referred to them by the Commonwealth Government"³³. The reaction of the leading lawyers in Parliament was negative. Sir John Quick considered the proposed legislation of doubtful validity. He could find no section in the Constitution which would authorise the Federal Parliament to pass such a measure³⁴. Nevertheless, later, the legislation was enacted, and as predicted, it was held to be invalid³⁵. It is interesting to compare the history and fate of the cross-vesting legislation at the end of the century³⁶. *Re Judiciary and Navigation Acts* is one of the most frequently cited of the Court's judgments. The inconvenience it was said to cause, and the supposed folly of a strict adherence to the Constitution, still rankled with the newspaper editor who was convicted of contempt of court in *Dunbabin*³⁷. He reported that the Assistant Treasurer, Mr Casey, was complaining of the way in which the High Court "knocked holes in the Federal laws". He said:

"Some of these days a commonsense Government may tell the High Court that, as it has very little useful work to do, it will be required to examine the Acts which will be sent to it straight from the Legislature, to stamp O.K. upon them, or to suggest amendments which will make them thoroughly legal, as the case may be, and then return them by swift messengers for the Vice-Regal signature".³⁸

The Court has the capacity, in interpreting the Constitution, to depart from received wisdom and to respond to altered circumstances where appropriate. Writing in 1972, shortly after the decision in the *Concrete Pipes Case*, Professor La Nauze³⁹ pointed out that, in the light of the difficulty that had been experienced in securing constitutional

amendment under s 128, it was as well that judicial interpretation allowed a limited measure of flexibility. This had been understood, and intended, from the beginning. In 1902, Deakin said:

"The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary of the High Court of Australia or Supreme Court in the United States. It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to form the future, without undue collision and strife in the present."⁴⁰

Facilitating transition from the past to the future, without undue collision or strife in the present, is a difficult, and occasionally delicate, task. Deakin's description of the judicial method would be described, in modern terms, as incrementalism. Why is it that judicial interpretation of the Constitution does not achieve "direct and sweeping changes" but involves "gradual ... cautious ... steps"? That is not as exciting or entertaining as the alternative, but it is part of our society's concept of judicial legitimacy. Ideas as to how judges ought to behave are bound up with what is called public confidence. Even in relation to the *Engineers' Case*, Sir Robert Garran said, in 1924, that "time will show that the change is not so great, and the discontinuity not so marked, as might at first sight appear"⁴¹. *Melbourne Corporation v The Commonwealth*⁴², in 1947, represented another swing of the pendulum, as did the *Incorporation Case*⁴³ in relation to *Concrete Pipes*. The nature of the judicial power to interpret the Constitution, and to review legislative and executive action by the application of such interpretation,

involves a responsibility that is, in the broadest sense of the word, political. In the *Boilermakers Case*⁴⁴, the joint judgment said, of the institution of federalism, that upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised, and upon that the whole system was constructed. That is a political as well as a legal principle, which has implications for the way in which judges exercise their authority. This is what Sir Owen Dixon was talking about when he said that "close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts"⁴⁵. Maintaining the confidence of the public, of the parties to litigation, and of those concerned in contests about the limits of governmental power, is a challenge. It requires acceptance, by judges, that they are appointed, and entrusted with judicial power, on the understanding that they are committed to exercise their powers by the application of the techniques of legal reasoning. Governments, and the public, understand that litigation always produces winners and losers; and that the losers often complain. Criticism of particular decisions does not shake confidence in the Court. Criticism of the legitimacy of the Court's approach to the exercise of judicial power is another matter. Although there are contestable issues at the margin, there is a high level of agreement on what constitutes judicial legitimacy. The best evidence of what judges regard as legitimacy is to be found in the methods by which they justify their decisions. The decisions of almost all judges are subject to appellate review by other judges; and that is a powerful force for conformity to generally accepted judicial standards. Even judges whose

decisions are not subject to the possibility of appeal (and there are few of them) reason in a manner that is, by comparison with other decision-makers, heavily constrained. Justice Ruth Bader Ginsburg recently wrote on the application of the rule of law in the context of the United States federal judiciary. She referred to the "decision-making mores to which legions of federal judges adhere: restraint, economy, prudence, respect for other agencies of decision ..., reasoned judgment and, above all, fidelity to law"⁴⁶. That list of primary judicial qualities would be accepted by a large majority of Australian judges.

Because so many of the High Court's decisions have political consequences, and because the Justices of the Court are appointed by the government of the day, it is natural that the Court is watched for signs of political influence. Any appearance of such influence would be the subject of comment and criticism. What would surely be taken as such a sign would be a pattern of decision-making by members of the Court along the lines of the political colour of the government that appointed them. That does not happen. In my first five years on the Court, four of the Justices had been appointed by Labor governments, and three by a Coalition government. The only case that I can think of in which the Court divided along those lines was a tort case of no party political significance. It is interesting that this has gone unremarked. The fact that Australians take it for granted that the Court does not divide along such lines is, it seems to me, itself an achievement worth noting.

There is no easy measure of the High Court's success as a constitutional court. Inevitably, opinions differ upon the wisdom of particular decisions, or lines of authority. The Court has made many decisions that others might have made differently, but reasonably. Issues ordinarily would not get to the Court unless there were grounds for reasonable differences of opinion. What can be said, however, is that the Court has adhered to the principle of legality; that it has maintained a reputation for independence and integrity; that there is no serious challenge to the necessity of its constitutional role; and that Australia has enjoyed a century of stable federalism.

The other principal function of the Court is to act as what was referred to in some early drafts of the Constitution as a "High Court of Appeal"⁴⁷. That may be the origin of the Court's name. For much of its first 100 years, the Court shared this role with the Judicial Committee of the Privy Council. As a court of last resort in general civil and criminal cases, the High Court has more in common with the Supreme Court of Canada than with the Supreme Court of the United States. Appeals from Australian courts to the Privy Council diminished with legislation in the 1970's and 1980's, and came to an end with the *Australia Acts* 1986 (Cth and UK).

The founders regarded themselves as British, and saw the High Court as interposed between the State courts and the Privy Council, just as they saw the Federal Parliament as interposed between the States and the Imperial Parliament⁴⁸. That perspective has now changed. The

change was gradual, but inexorable. There is now a common law of Australia⁴⁹. That law is part of a "single system of jurisprudence" which also includes the Constitution, and Federal, State and Territory laws⁵⁰. The role of the High Court as a final court of appeal from State and Territory, as well as Federal, courts secures the integrity of a national system of jurisprudence.

At Federation, and for most of the 20th century, the position was more complex. Although the expense of appealing to the Privy Council placed a practical limitation upon the number of appeals from Australia to London, the pressure was to maintain consistency with the common law of England. This pressure was gradually relaxed in exceptional cases⁵¹ but, so long as there was the possibility of appeal from the High Court to the Privy Council, our common law jurisprudence generally marched mainly in step with England. The embarrassingly long transitional period, during which appeals from the High Court were impossible, but appeals from State Supreme Courts to London remained available, produced some messy consequences⁵². These are now behind us.

In 1981, Mr Justice Hutley of the Court of Appeal of New South Wales wrote⁵³:

"The evaluation of the effect of the Privy Council upon Australian law has yet to be done. The existence of a superior court has a constricting effect upon a lower court, and this type of constriction by a foreign court offends nationalistic sentiments. On the other hand, the forcible hitching of the legal systems of a small State to one of the great legal systems of the world has provided stimulus to us. The development of the law of torts and contracts in so far

as it had been effected by the judiciary has been largely guided by English leadership. That leadership would have operated anyway without the existence of the Privy Council, but its existence guaranteed its success. The casuistical methods employed by the courts to adjust and modify the law work most effectively if there are competing doctrines confronting them. In a relatively provincial country (though very litigious) such as Australia, the tendency to lapse into self-satisfaction has been restrained by the continual presence of a major legal system, not as a distant exemplar, but as a continual force for change."

That was a just tribute to the contribution of the Privy Council to Australian jurisprudence, and it is worth repeating on this occasion. Justice Hutley did not live to see the Internet, or the proliferation in Australian courts of references by counsel and judges to decisions from all common law jurisdictions. Provincialism in the development of the common law is no longer an option. One interesting development, however, is the effect upon English law of European influences. The decisions of English courts are still the most frequently cited of foreign decisions, and the extent to which European influences will percolate, through English decisions, into Australian law is not yet clear. One form of influence will certainly be significant. The human rights jurisprudence which is developing in Europe, including England, will undoubtedly affect Australian law. In the area of judicial review of administrative action, for example, historically the focus of attention has been the duties of administrators; now it is the rights of citizens. Australian law will not be isolated from such a change. The decision making of the High Court over the 20th century contains many examples of the upholding of human rights and the insistence upon the recognition of such rights of governments and their agencies.

The common law judicial method, as adopted by the High Court, was expounded by Sir Owen Dixon in a lecture at Yale University in 1955⁵⁴. He may have had as a target a particular English judge who was, at the time, much admired, though not by Dixon. He was also setting out to diminish the influence of the school of legal realism. Of the complaint that the law we inherited was obsessed with certainty, he said that "at least it gave some coherence to the inheritance"⁵⁵. On the role of precedent, he said⁵⁶:

"It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from ... settled legal principles to new conclusions ... It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience."

He criticised "the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up"⁵⁷.

That these opinions remain orthodox is, once again, evidenced by the techniques of reasoning by which judges justify their decisions. It is interesting to compare what Dixon said in 1955 with what Professor Troper, from a civil law system, said recently in connection with Supreme Courts.⁵⁸

"Courts are collegiate bodies and their members tend to disagree on most issues. In the course of their internal discussions, some types of arguments will never be used ... because they could never persuade others. It would be impossible for instance to justify one's position by saying that it corresponds to one's personal values. In order to persuade it is necessary to show that the proposed decision is consistent with some ideas that have been previously agreed upon and that can be considered 'objective' ... A supreme court can only influence the lower courts and

beyond the courts influence the behaviour of individuals if these individuals make decisions, by taking into consideration the consequences of their actions, that is, if they are able to predict that the courts will react to their actions in a particular way. This will only happen if the jurisprudence of the court is not subject to frequent changes. The court therefore faces the following paradox - its power is greater (in the sense that it exerts a greater influence on actual behaviours) if it is more constrained by past decisions".

The less predictable the decision-making of a final court of appeal, the less influential its decisions will be, because it is the predictability of its conduct that constrains the decision-making of lower courts. The High Court hears only about 70 appeals a year. It has no capacity to seek out and correct judicial error in the great mass of cases heard by other courts. It is only to the extent to which it states, and itself adheres to, general principle, and settles the common law, that it controls the decisions of other courts. It is only to the extent to which other courts believe they know how the High Court would resolve an issue that those courts can subject themselves to its authority. Of course, a court of last resort is not a slave to precedent. Of course, the High Court develops the common law from time to time according to contemporary circumstances and needs. Yet the Court would undermine, and ultimately destroy, its own authority if it were to abandon respect for principle and precedent.

One change in the work of the Court should be noted. It concerns the extent to which parliaments, State and Federal, engage in statutory law reform. There are now few appeals that can be decided without the application of legislation. Legislative concern with issues of tort,

contract, and equity has transformed litigation. An increasing part of the ordinary work of judges of all courts, including the High Court, turns on the interpretation and application of statutes; some of extraordinary complexity. The relationship between common law and statute is symbiotic⁵⁹. The interaction of common law and statute adds a new dimension to the task of the High Court at the apex of the Australian legal system.

Throughout the Court's history, its position as a final court of appeal has strongly influenced appointments to the Court. The Court needs the confidence of the public. Above all, it needs the confidence of the legal profession, and of the judges of the courts from whom it hears appeals. If the judges, and the profession, were to lack confidence in the technical ability of the High Court to discharge its responsibilities as a court of final appeal in the full range of civil and criminal cases that come before it, then public confidence could never be maintained. In large measure, members of the public, when they think about the High Court, take their lead from the profession. Members of the profession are keen and skilled observers of the competence of judges. In consequence, governments have generally taken care that persons appointed to the High Court are regarded by lawyers, and by other judges, as qualified by ability and experience to sit on a court of final appeal. There may have been occasions when appointments fell short of that standard but, in the main, they have measured up well. The day to day work of the Court has always involved, and still involves, dealing with civil and criminal appeals. The capacity to perform that work to a

satisfactory technical standard has always been essential to the Court's credibility. This imposes a salutary practical constraint on governments. Until a constitutional amendment by referendum in 1977, Justices of the Court were appointed for life. A consequence of the change, naturally, has been a greater turnover in the composition of the Court, and more frequent appointments.

As a result of amendments to the *Judiciary Act* in 1984, no one now has a right of appeal to the Court. All appellants require special leave to appeal. Before 1984, civil appellants could come to the Court as of right if the appeal involved a relatively modest amount. This meant that most civil appeals could be decided by the application of settled principles to the facts. Nowadays it is rare for the Court to hear appeals which do not involve issues of novelty or on which there has been disagreement in other courts; and in a high proportion of cases the Court is being invited to develop the law. This change in the character of the Court's everyday business is to be kept in mind when making comparisons with earlier times.

From the beginning, the Court has travelled. Since 1980, it has had a permanent building of its own in Canberra, but it still hears appeals in Adelaide, Brisbane and Perth each year, and in Hobart approximately every three years. When Sir Samuel Griffith gave up the position of Chief Justice of Queensland to become Chief Justice of the High Court in 1903, it may be doubted that he was regarded by the profession as a more important figure than the Chief Justice of New

South Wales or the Chief Justice of Victoria. It may also be doubted that the Chief Justice of either of those two States would have had an interest in taking on his job. Justices of the first High Court had no pension entitlements. Their total remuneration was less than that of judges of the Supreme Court of Victoria⁶⁰. Their travel was extensive and arduous. Their accommodation was borrowed. There was uncertainty about whether they would be fully occupied. The new Federal Government, with which their future was linked, was widely regarded as an agent of the States. Expenditure on its activities was resented. Even in the middle of the century, there was resistance to the idea that the Court should have a permanent establishment in Canberra. The achievement of Sir Garfield Barwick in persuading the Commonwealth to provide such an establishment in 1980 has not been acknowledged fully. Imagine having to persuade a government now to provide such facilities for the Court. The fact that it was not until 1980 that the High Court was given a home in the seat of government, and proper facilities for its members, shows that the political will to provide the justice system with adequate resources cannot be taken for granted.

It is worth mentioning a matter of judicial style. One of the earliest criticisms made of the High Court, and in particular of its first Chief Justice, concerned the vigour with which the Bench engaged counsel in debate. In a letter from Professor Harrison Moore to Andrew Inglis Clark⁶¹, written in 1906, the author admired the Chief Justice's ability and mental agility, but criticised his impatience with any difference from his own views. On the occasion of his swearing in as Chief Justice⁶², Sir

Owen Dixon, referring to his own experience as an advocate in the early Court, spoke of "the process by which arguments were torn to shreds before they were fully admitted to the mind". He consciously set out to depart from that example, but admitted he might have gone to the other extreme. Sir Garfield Barwick, who followed Dixon, was much more in the Griffith mould in this respect. I felt sure the present Court had struck a balance, until I read the Moore letter. It complained that, during three and a half days of his address, counsel "never got a clear five minutes speaking". No counsel would be given three and a half days now, and a clear five minutes speaking would only happen if all the Justices walked off the Bench. However, allowance should be made for the fact that, although there are no formal limits on times for address, in appeals, counsel are now required to provide the Court with written submissions in advance of oral argument, and the Justices are familiar with the facts and the issues before the hearing commences. The pressure of time under which the modern Court conducts its business is much greater than in earlier years. Counsel are expected to come directly to the point, and are given encouragement (though not, I hope, at the expense of courtesy) to be succinct. As for style in judgment writing, this is a subject worthy of a paper of its own. By saying nothing about it on this occasion, I hope to set an example of judicial restraint.

In conclusion, I should raise a question to which there is no ready answer. Where does the High Court stand in the estimation of the Australian public? The question, I think, is unanswerable, partly because its meaning is uncertain, and partly because it is too broad. I

doubt that there is, or ever has been, a single and coherent public perception of the Court. Judges refer to public confidence in the judiciary, but I sometimes wonder how that is measured, or what exactly it means. In extreme circumstances, a failure of public confidence in an institution may take a discernible form. And trends may emerge, from time to time, that give cause for concern. I think the important question is rather more precise: does the community believe that, in a contest between citizen and government, the High Court holds the scales of justice evenly between the parties? My belief, which may owe more to faith than to science, is that the answer is yes. If I am right, then the answer tells me a large part of what I want to know about the standing of the Court at the beginning of its second century.

* Chief Justice of Australia.

¹ 'And Be One People': Alfred Deakin's Federal Story, (Melbourne University Press), at 172-173.

² F M Neasey and L J Neasey, *Andrew Inglis Clark*, (University of Tasmania Law Press, 2001) at 171.

³ The drafting history is traced in La Nauze, *The Making of the Australian Constitution*, (Melbourne University Press, 1972) at 25, 35, 36, 67, 114, 137, 189.

⁴ *Sue v Hill* (1999) 199 CLR 462.

⁵ (1935) 53 CLR 435.

⁶ (1904) 1 CLR 91.

⁷ 4 Wheat 316 (1819).

⁸ (1906) 4 CLR 356.

⁹ (1907) 4 CLR 1087.

¹⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

¹¹ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902.

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- ¹² La Nauze, *op cit* at 130, 131.
- ¹³ Australia, House of Representatives, *Parliamentary Debates* (Hansard) 18 March 1902, at 10963.
- ¹⁴ Quoted by J M Bennett, *Keystone of the Federal Arch* (AGPS 1980) at 23.
- ¹⁵ Australia, House of Representatives, *Parliamentary Debates* (Hansard) 18 March 1902 at 10965.
- ¹⁶ *Ibid* at 10974.
- ¹⁷ 1 Cranch 137 (1803).
- ¹⁸ Neasey and Neasey, *op cit* at viii-ix.
- ¹⁹ William H Rehnquist (1996) 46 *American University Law Review* 263 at 273-4, cited by Ruth Bader Ginsburg, "Remarks on Judicial Independence: The Situation of the US Federal Judiciary", Saunders and Le Roy, *The Rule of Law* (The Fédération Press, 2003).
- ²⁰ Australia, House of Representatives, *Parliamentary Debates* (Hansard) 18 March 1902 at 10966.
- ²¹ (1903) 17 *Harvard Law Review* 1.
- ²² (1952) 85 CLR at xiv.
- ²³ (1908) 6 CLR 41.
- ²⁴ Turner, *The First Decade of the Australian Commonwealth*, (Mason, Firth and McCutcheon 1911) at 264.
- ²⁵ *The State of New South Wales v The Commonwealth* (1915) 20 CLR 54.
- ²⁶ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
- ²⁷ "The Development of the Australian Constitution" (1924) 40 LQR 202 at 216.
- ²⁸ (University of Queensland Press, 1987) at 98.
- ²⁹ *Victoria v The Commonwealth* (1971) 122 CLR 353.
- ³⁰ *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
- ³¹ Neasey and Neasey, *op cit* at 227.
- ³² Australia, House of Representatives, *Parliamentary Debates* (Hansard) 18 March 1902 at 10980.
- ³³ Turner, *op cit* at 295.
- ³⁴ *Ibid* at 296.

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- ³⁵ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.
- ³⁶ *Re Wakim; ex parte McNally* (1999) 198 CLR 511.
- ³⁷ (1935) 53 CLR 434.
- ³⁸ (1935) 53 CLR 434 at 436.
- ³⁹ La Nauze, *op cit* at 288.
- ⁴⁰ Australia, House of Representatives, *Parliamentary Debates* (Hansard) 18 March 1902 at 10967-10968.
- ⁴¹ (1924) 40 LQR 202 at 216.
- ⁴² (1947) 74 CLR 31.
- ⁴³ *New South Wales v The Commonwealth* (1990) 169 CLR 482.
- ⁴⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276.
- ⁴⁵ (1952) 85 CLR xiv.
- ⁴⁶ Ginsburg, "Remarks on Judicial Independence: The Situation of the US Federal Judiciary", Saunders and Le Roy (eds), *The Rule of Law* (The Federation Press (2003) at 63.
- ⁴⁷ La Nauze, *op cit* at 35, 36.
- ⁴⁸ See, for example, Deakin's speech on the Judiciary Bill, Australia, House of Representatives, *Parliamentary Debates* (Hansard) 18 March 1902 at 10964.
- ⁴⁹ See eg *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 515 [3].
- ⁵⁰ (2000) 203 CLR 503 at 534 [66].
- ⁵¹ eg *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.
- ⁵² eg *Candlewood Navigation Corporation Ltd v Mitsui O.S.K. Lines Ltd* [1986] AC 1.
- ⁵³ "The Legal Traditions of Australia Contrasted with Those of the United States", (1981) 55 ALJ 63 at 69.
- ⁵⁴ "Concerning Judicial Method", republished in Dixon, *Jesting Pilate*, 2nd ed. (William J Hein & Co Inc 1997) at 152.
- ⁵⁵ *Ibid* at 155.
- ⁵⁶ *Ibid* at 158.
- ⁵⁷ *Ibid* at 159.

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- ⁵⁸ Troper, "The Limits of the Rule of Law", in Saunders and Le Roy (eds) *op cit* at 94-95.
- ⁵⁹ *Brodie Singleton Shire Council* (2001) 206 CLR 512 at 532-533 [31], [32].
- ⁶⁰ Turner, *op cit* at 60.
- ⁶¹ A copy of the letter was kindly shown to me by Dr John Williams of the University of Adelaide.
- ⁶² (1952) 85 CLR at xiv, xv.