

MONASH UNIVERSITY LAW STUDENT'S SOCIETY

683

INAUGURAL PUBLIC LECTURE IN MEMORY OF THE LATE

THE HONOURABLE JUSTICE LIONEL MURPHY

LAW INSTITUTE OF VICTORIA

MELBOURNE FRIDAY 9 OCTOBER 1987

PERMANENT APPELLATE COURTS - THE DEBATE CONTINUES

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The Honourable Justice Michael Kirby, CMG*

LIONEL MURPHY - ONE YEAR ON

On 21 October 1987 a year will have passed since Lionel Murphy's death. In the bustling world of human activity, it is easy to overlook such anniversaries. To those who knew Lionel Murphy only as a public person, I imagine that this commemorative lecture may seem kindly and well meant, but unnecessary. To those of us who knew him as a warm hearted man, politician and judge, keen to seek and to achieve reform of the law, it is hard to accept that a year has gone by without him in our midst. He had such a strong personality and so engaging a temperament, that his spirit seems still to walk the land.

In a sense, it does. It is given to few public people (and fewer still lawyers and judges) to leave such a mark on the tapestry of the law. I do not need to review again his achievements. They have been collected and praised (perhaps a

little uncritically) in a book which Dr Jocelynn Scutt edited, published in June of this year¹. Other books have been published which collect some of his major judgments in the High Court of Australia². Apart from these, many important Acts of the Federal Parliament stand monuments to his reformist zeal. I suppose the most important of these include the Administrative Appeals Tribunal Act 1975, the Family Law Act 1975, the Law Reform Commission Act 1973 and the Trade Practices Act 1974. There are many others.

Judges of the superior courts of our country also have a rare opportunity by their writing, to influence the shape of justice and of society for generations to come. This is particularly so, where such judges sit in appeals, and especially in the ultimate appellate court of the nation. Lionel Murphy's thoughts over the last ten years of his professional life, are collected in the Commonwealth Law Reports. They are quite frequently read to appellate courts. This is not only because of their authority (being the authentic instruction of a Justice of the High Court) but also because of the brief and striking way in which he usually expressed himself. It is true that his style and manner of reasoning are atypical of the appellate judges of Australia. It is also true that many lawyers (and doubtless some judges) regard his assertive and sometimes idiosyncratic writing as unhelpful or unpersuasive. For all that, the impact of his personality on his brethren cannot be gainsaid. His perception of the necessities of justice was sometimes, arguably, more acute³. Most importantly, his influence on the coming generation of young lawyers is enormous because of the potency

of his ideas - expressed with brevity and assurance. Because of the influence of each succeeding generation of lawyers in shaping the future of legal institution, the legal profession and thereby the content of the law, the impact of Lionel Murphy on young lawyers cannot be ignored by anyone in the law in this country. Even those who do not themselves value his contribution as an advocate, legislator, minister and judge, are bound to face squarely the likely influence of his thinking on the future, through the young law students of today. That which now seems unorthodox - both as to content and presentation - may come, in time, to be the received wisdom. Such is the cycle of history upon which mortals clamber for a short ride. In our craft, there is no finally correct answer to the problems of justice. There are few absolutes. Because ours is a venerable, stable and conservatising profession, it naturally and understandably tends to react adversely to novel ideas and to new ways of going about the attainment of justice according to law. It takes more courage to do novel things in novel ways than to conform to the old values and the old ways. But the prize which is offered to those who exhibit that courage is the possibility that they may make a greater contribution to the development of the law and its adaptation to rapidly changing times.

Therefore, to those in the legal profession (probably the majority) who do not share Lionel Murphy's value system exhibited in his judgments, I would say, the future may see many converts line up behind his banner. To those who disparage the brevity of his judgments, the assertiveness of his conclusions and his occasional neglect of closely reasoned

logic, I would say that his may be the simple style of instruction most appropriate in the highest appellate court. In the barrage of words which daily bombard our profession, the gift of simplicity may be more important than distinguishing a hundred precedents. To those who are shocked by Lionel Murphy's frank appeal to policy in legal decision making, I would point out that, nowadays, few would deny the importance of policy in most ultimate decisions. In such circumstances, it may be more honest to disclose the policy than to pretend that nothing more is involved than the application of precedents laid down in cases long ago. To those who still decry Lionel Murphy as a dangerous radical, I would endorse Professor Blackshield's conclusion that here was no anarchist. On the contrary, Lionel Murphy had a "deep sense of institutional integrity".

"Towards the law's authoritarian trappings he is almost subversive; towards its fundamental principles and true institutional values, he is almost conservative."⁴

Almost a year after his death, I am sure that there are few gestures of remembrance which would have pleased him more than the initiative of some of the law students of Australia's largest law school at Monash University. The inauguration of any series of lectures is an important event. The inauguration of a series in honour of a Justice of the High Court of Australia - one of the enduring and most distinguished courts of the common law world - is necessarily an event of significance. But to commence such a series with a speech in honour of a dear friend is a particularly affecting privilege for me.

I had, for the last 15 years of his life, the friendship and cheer, the intellectual stimulation, the encouragement and enthusiasm of Lionel Murphy. His faults were the human faults of a warm spirited, generous and loving man, unashamed to show the qualities usually so heavily disguised as to be suppressed, in the circles in which he mixed. His strengths need no more words from me. I am proud, once again, to do honour to him.

EMS TELEGRAM AND THE QUALIFICATIONS OF THIS REVIEW

The students of history among you will recall that the Franco-Prussian War began as a result of a contrived mistake arising out of what became known as the Ems telegram⁵. Ever since that time, those who use telecommunications have had to do so with a degree of circumspection, for fear that terrible misfortune may attend mistaken communication. It will be remembered that the Franco-Prussian War, which followed the famous telegram, led on to the termination of a faded but elegant Empire, grown weary through lack of change and failure to remove its inner contradictions.

When I was invited by the organisers to deliver this lecture, I was asked, by telephone, to nominate a theme on which I would speak. As an avid reader of the professional journals of Victoria, I had noted the Bar Notes and the Law Society Journal had each contained essays arising out of the publication of the first Annual Review of the Court of Appeal of New South Wales, of which I am President. I therefore asked whether a topic of interest might be the suggested advantages and disadvantages of permanent appellate courts, in the light of the experience of the Court of Appeal of New South Wales. I thought that such a contribution might be instructive for the

consideration of lawyers and others in Victoria. So it was settled.

Imagine, then, my surprise when my notice was called to the invitation to this lecture with its bold unqualified assertion: "A Court of Appeal for Victoria". No question mark betrayed the circumspection which should accompany such a topic. No hint of the existence of an already hard working "appeal court" for Victoria was suggested by the title attributed to me. On the contrary, it is as if, out of ignorance, I was suggesting that Victorians were content with all first instance decisions and that the notion of an appellate court was a novelty to be pressed by me upon an unsuspecting Melbourne audience. I trust that enough knowledge of the distinguished work of the Full Court of the Supreme Court of Victoria will be ascribed to me (if only from a reference to the frequent citations in my judgments) to acquit me of such naivete.

Let me therefore make it plain that it is not my intention to speak specifically about Victoria's appellate judicial arrangements at all, except insofar as they may illustrate my general thesis. My thesis is undoubtedly one worthy of debate and reflection in a learned profession. It is that appellate judicial work is better performed in a separate court of permanent members than in a court of changing membership. This thesis is one which convention and decorum suggest that, speaking in a State other than my own, I should approach with delicacy. But that it is a legitimate topic for debate can be seen not only in the debates in the Victorian professional journals and elsewhere in Australia. Coinciding

with those debates has been discussion in many lands about the arrangements for the disposition of appeals. Appeal, as such, was unknown to the common law of England. The history of the introduction of various forms of review, and ultimately of appeal, has been sketched by me in an essay recently published in the Australian Law Journal. There is no point in repeating that history⁶. Suffice it to say that fast moving events in a number of jurisdictions in the common law world have revived the debate about appellate judicial arrangements. In some jurisdictions the impetus for the revived debate has been the removal or projected removal of appeal to the Judicial Committee of the Privy Council. There is, for example, the decision about to be made in New Zealand. The Minister of Justice (Dr Geoffrey Palmer) has revived the question posed by the 1978 Report of the Royal Commission on the Courts concerning the future appellate arrangements of that country. The Law Commission of New Zealand has been asked to advise. Its report is awaited.

The Court of Appeal of New Zealand is a most distinguished tribunal. But in the rush of dealing, as a general appellate court, with the civil and criminal appeals of that country, concern has been expressed (including by the members of the Court of Appeal themselves) that that body cannot at the same time perform the useful function of also developing the broad principles of the legal system. This has revived, once again, talk of some form of trans-Tasman ultimate appellate court⁷.

The remaining vestiges of the Privy Council's jurisdiction in Australia were terminated in 1986 when the last

appeals as of right from the State Supreme Courts were discontinued. The appellate courts of the State Supreme Courts and of the Federal and Family Court are now, contingently upon a grant of special leave by the High Court of Australia, final appellate courts for this country. Special leave may, of course, be given in any case. That possibility may dampen the enthusiasms of such courts. It may discourage in some the propensity to innovation and legal development. But as in New Zealand, so in Australia. The termination of Privy Council appeals and the universal requirement of special leave to go beyond the State and Federal appellate courts, necessarily adds a new dimension to the work of those courts and to their function. The published statistics show that the number of cases going on appeal, by special leave, to the High Court of Australia is very small, even miniscule. As the number of appeals to the Supreme Courts continues to rise, the proportion of all appeals which can be accepted by the final court will continue to diminish. As the federal and constitutional components of the work of the High Court of Australia increase, that Court's capacity to superintend the whole body of the law of this country must necessarily decline. That superintendence has always been a marvel to lawyers of other lands, particularly in the United States of America where the Supreme Court has had an entirely different role and function.

The concern about appellate arrangements is also the source of a lively controversy in the United States of America at this time. Suggestions continue to be made in that country for a further appellate tier in the federal system of courts⁸. The United States Court for the Federal Circuit was

recently created to have a nationwide jurisdiction in respect of certain federal causes. But the need for a further appellate tier continues to be pressed by those who acknowledge the limited workload which can be improved upon by the Supreme Court. The increasing obligation to provide a further venue for appellate review of important cases is urged, especially where differences have arisen in the precedents of different Circuits⁹.

In Canada too, the heavy workload accepted by the Supreme Court of Canada and the Provincial Courts of Appeal following the incorporation in the Canadian Constitution of the Canadian Charter of Rights and Freedoms has led some commentators to suggest the need for the reconsideration of appellate judicial arrangements. For example, proposals have been made for a further inter-Provincial tier of appeal, below the Supreme Court of Canada, to cope with the increased and changing workload of the appellate courts (particularly in respect of cases involving the Charter). It has also been urged to ensure suitable fora for the review of large commercial disputes which, in recent years, have increasingly been edged out of the Supreme Court by the pressures imposed by the Charter.

Further examples could be given from India, Malaysia and, indeed, from England¹⁰. Suffice it has been said to show that talking about the appellate arrangements of our courts is not to be taken as a slight upon the capable and hard working Australian Judges who perform their vital duties in the current arrangements established by law. It is not for the judges, ultimately, to determine court arrangements, although their voices should surely be heard before changes are made. Judges

are commissioned by the Crown and serve the people. Above all, they are the servants of the law. If for reasons of function and efficiency, changed appellate arrangements are lawfully introduced, it is the duty of judges to conform to such arrangements. Judges have no more right finally to dictate those arrangements than do others with commissions from the Crown. I doubt if any would claim such rights. As befits a profession such as ours, we should attend to the debates which are taking place in New Zealand, the United States, Canada and elsewhere. We should look at the suggested modifications of their appellate arrangements. We should learn from the experience of the different jurisdictions of Australia.

INHIBITIONS UPON CHANGING COURT ORGANISATION

It is as well to note a number of qualifications which should be kept in mind before any changes are contemplated in the present appellate arrangements of the superior courts of Australia.

The first is that change for its own sake can be mischievous, particularly in institutions as established and as essential to the operation of a healthy democracy, as the courts are. Reform is not change for its own sake, but change for the better. What is better, is necessarily a matter of controversy. The best means of evaluating differing opinions is by the exposure of the competing points of view for the consideration and decision of society and its representatives. Tinkering with the court system is not to be encouraged, unless the projected changes can be justified by clearly stated objects which are deemed worthy of attainment and are attainable.

Secondly, one of the precious features of our form of federal democracy is the privilege of developing laws and institutions in the several jurisdictions which differ from those operating elsewhere in the Commonwealth. The Supreme Courts of the States proudly trace their histories to colonial times. At least in the case of my own Court, the history is traced to its establishment by Royal Charter. The Supreme Court Act 1970 (NSW) "continued" the court so established¹¹. Since the Australian Constitution commenced in 1901, the Supreme Courts of the States have had a constitutional status, as a glance at s 73(ii) demonstrates¹². Federal courts, and any court of a State invested with federal jurisdiction under s 77(iii) of the Constitution, form part of the judicature of the nation. It is clear that the Constitution contemplates their harmonious inter-relationship. But concerning the internal arrangements of the Supreme Courts, including in the disposal of appellate business, the Constitution is silent. In this silence lies the opportunity for diversity and experimentation. These are valuable features of a federal system of government. What works in one jurisdiction may not work well in another. What is deemed attractive in one State may not be considered necessary in another. The needs of the population and economy of one jurisdiction may be quite different from others. There is no overriding attraction in uniformity for its own sake. The traditions of the judiciary in the different States of Australia differ in matters of detail. The differences go beyond the rosettes typically worn with the silken robe in Victoria. They go beyond the specially high professional reputation for courtesy enjoyed by the

Victorian judges. They even go beyond the differing traditions relating to service in Royal Commissions observed in different States. Each Supreme Court is different. We should remember the injunction of Dr John Bray, formerly Chief Justice of South Australia, that "diversity is the protectress of freedom".

Thirdly, there may be a practical inhibition against changing the appellate arrangements of the courts. It cannot be denied that the process of establishing the permanent Court of Appeal in New South Wales led to a great deal of ill feeling in the judiciary of the Supreme Court at the time. Some of the judges who, by reason of their seniority, had attained a regular seat in the Full Court, were passed over in the initial appointments. This caused animosities which it took more than ten years to exorcise. In some cases it damaged old friendships. In some cases there was probably a justifiable feeling of injustice. The disturbance of judicial precedence can be a painful thing. It required a new government with a electoral mandate and a determination to push the reform through, as it did in 1965, to achieve the Court of Appeal of New South Wales.

The problems which I have mentioned could, in certain circumstances, be avoided by the simple expedient of choosing, initially, the senior judges to be the Judges of Appeal. But if the end is worth attaining, the impediment of personal displacement, even of distinguished judges, should not prevent the attainment. Continued opportunities to serve in appellate work exist for Supreme Court judges. They exist in New South Wales in the Court of Criminal Appeal, which usually numbers two judges (and sometimes three) who are not Judges of Appeal.

It also exists in the growing work of appeals to single judges from magistrates and, on points of law, from other courts and tribunals . I foresee developments in the courts of our country, by which the Supreme Courts of the States will increasingly be performing fewer trials (as of motor vehicle and industrial accidents) and more appellate and review functions, especially in the review of administrative action.

FUNCTIONAL ARGUMENTS FOR PERMANENT APPELLATE COURTS

Different functions: What, then, are the arguments in favour of permanent appellate courts? Drawing on an influential graduation address at the University of Melbourne given in 1951 by Sir Raymond Evershed, as well as the debates in the New South Wales Parliament at the time our Court of Appeal was established, I collected some of the chief points in the article in the Australian Law Journal already mentioned¹³. It is convenient to analyse these points by reference to the arguments of function and efficiency which favour permanent appellate courts. Although the two criteria necessarily overlap, the one is addressed to identifying the nature of the judicial activity involved; the other is concerned with the efficient attainment of the objective so defined.

Take, therefore, first, the arguments relating to the functions of the appellate court. Although the tasks are necessarily related, the functions of an appellate and a trial judge are significantly different in kind. Each must apply the law to facts. But the qualities that make a capable appellate judge may not necessarily be the same as those that equip the judge to perform, with skill and assurance the taxing

obligations of presiding at a trial. Just as the skills of appellate advocacy are different, so are those of appellate judging. The appellate function involves a greater element of theory, principle and conceptualisation of the law. The trial function requires great skill in following the facts, and accuracy and deftness in rulings on evidence. That the two tasks are similar is undisputed. But so are some at least of the functions of a solicitor and a barrister. So too are the functions of a barrister and a judge. The points of difference are ones of degree but critical to the attainment of excellence and high efficiency. This is not to say that many of the finest judges of the appellate courts have not first fashioned their skills as trial judges. Indeed, that has been the dominant tradition of Australia and England. But it is not a universal truth. Many great appellate judges had little or no trial experience as judges¹⁴.

Law development: The need for conceptualising the law and developing coherent legal principle has become even more important in the State Supreme Courts of Australia, following the termination of Privy Council appeals and the introduction of provisions requiring special leave to appeal further to the High Court of Australia. This point was put most clearly by McHugh JA in a recent essay in the Sydney Law Review. Responding to the suggestion that the Court of Appeal should confine itself to drawing supposed deficiencies in the law to the attention of the ultimate Court of Appeal and Parliament, he pointed to the consequence that, should this model be adopted:

"a significant part of New South Wales law would be the subject of outdated rules and principles for lengthy periods. The workload of the High Court and its obligation to give preference to constitutional cases make it impossible for that Court to carry the burden of making necessary changes in the law of New South Wales. In 1985 the High Court granted special leave to appeal against decisions of the Court of Appeal in only eleven cases"¹⁵.

Therefore, to the functions of conceptualising the law, developing it in ways consistent with the techniques of the common law and seeing particular changes in the context of the whole mosaic of the law, a permanent appellate court provides a decided advantage for a coherent legal system. True, a court of changing membership may provide the stimulus of multiple perspectives. It may occasionally allow novel viewpoints to be voices at the appellate level. It certainly provides work variation for judges in an often burdensome and arduous professional existence. But for the important features of coherence and consistency, the provision of a court of permanent numbers (as the High Court of Australia itself demonstrates) allows a greater clarity of legal exposition and development than a court of constantly changing membership.

It is unpersuasive to say that law development is no province of appellate judges and should be left to Parliament. I am second to no one in supporting Parliamentary attention to law reform. Ten years of my life were dedicated to that end. But no informed observer nowadays believes the fairy story that judges do not "make" law but only "discover" it. Lord Reid finally despatched that mythology 15 years ago¹⁶. Most wide-ranging and important reform of the law is and should be done by Parliament. But interstitial and procedural reforms by judges are necessarily part of the common law system itself.

Therefore we should attend to the vital question of how best those marginal judicial reforms and extensions of the law may be achieved.

Manifest independence: There is also another point of principle which affects the composition of the appellate court. This is the point delicately phrased by Evershed which needs to be restated. It is one seen in a more realistic light outside the legal profession than from the perspective within. I refer to the risk of the appearance (and even more so the actuality) that rotation of judges from the trial to the appellate function may temper the critical review of colleagues' decisions, out of recognition of the fact that next week the same colleagues might be sitting in judgment upon one's self. Some might say that such limitations upon appellate interference is no bad thing. Certainly, such an attitude would be compatible with the historical English view that litigation is usually a misfortune and appellate litigation doubly so. Furthermore, peer review by colleagues is an established feature of many other professions. Why not of the judiciary?

On the other hand, the attainment of justice is so important and so frequently controversial, that we normally insist upon a tribunal of complete and manifest independence to perform the task. That objective may most faithfully be secured by an appellate court which is removed from the risk or appearance of collegiate interdependence than by one made up of a rotating number sitting in judgment on each other. To say this is not to cast doubt on the integrity and vigilant

independence of the judicial tradition followed until now. But the replacement of that tradition first in England, then in North America, elsewhere throughout the common law world and in 1965 in New South Wales, reflects the quest for a more perfect system. This is one that not only attains independence but manifestly does so by the separate constitution of the appellate court's membership. It is one which is likely to secure greater respect because of the legitimacy which may attach to a separate court, established with a superior place in the court hierarchy. Such authority may be more difficult to achieve where there is no obvious and necessary seniority in the judges performing appellate duties.

No doubt, occasionally, with wisdom after events, appellate courts may demonstrate an insensitivity to (or ignorance of) the practical problems facing trial judges which the rotating membership of a Full Court might help to avoid or overcome. But the sacrifice of that advantage was deemed acceptable and appropriate in England when the English Court of Appeal was established. It was vigourously defended by Evershed. It proved a major factor in justifying the establishment of the New South Wales Court of Appeal. Judges - including those who judge the decisions of other judges - should be, and be seen to, be completely independent, even from the collegiate pressure of their institution.

EFFICIENCY ARGUMENTS FOR PERMANENT APPELLATE COURTS

Appointments: I turn from those arguments which relate to the nature and function of appellate judicial work to a consideration of the arguments which relate to the efficiency

of the attainment of that function. The chief considerations here can be shortly stated. First, there is the greater attractiveness of appointment to an appellate court which can be offered to lawyers experienced in appellate work. For them, the prospect of years conducting trials may be so uncongenial to their skills and temperament as to dissuade them from accepting judicial appointment. It is well known that difficulties have been experienced, both by Federal and State Attorneys General, in securing the appointment as judges of leading Queen's Counsel, when the prospect before them may be years of trial work before they "graduate" to regular appellate judicial duties. If their talents lie in conceptualising the law and if their bend is towards a scholarly interest in the law, they may well be deflected from accepting judicial appointment. In this way, some of the best minds and talent of the Bar, may be lost to high judicial office. A permanent appellate seat, on the other hand, might be more congenial and suitable.

It should not be forgotten, as well, that a number of the leading judges in the common law world in recent years came from academic life. I realise that this is a heresy to propound in Australia. But I cite Lord Goff of Chieveley in England, Laskin CJ, Le Dain J and Tarnapolsky J in Canada and Richardson J in New Zealand as notable instances. If the Bench is to be occasionally stimulated, elsewhere then on the High Court of Australia, by the appointment of lawyers of great talent who may have no particular inclination towards, skill in or even talent for years of trial work, an alternative stream may be provided, to the great benefit of the law and of

society. This is not a condescending remark, designed to disparage the taxing work of the trial judge. On the contrary, it is simply a reflection of the obvious fact that skills in trial and appellate advocacy differ, as do skill in trial and appellate judicial work. Our judicial institutions should reflect that obvious fact.

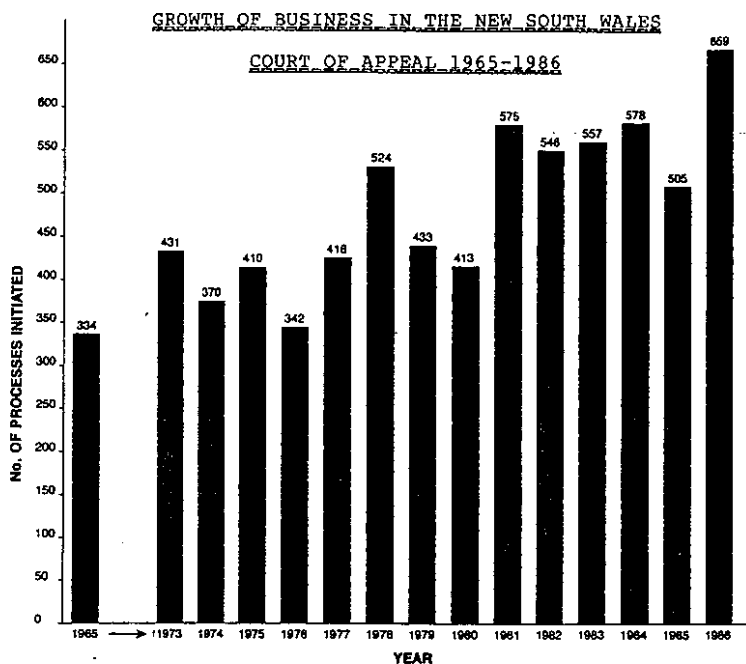
Innovative procedures: A further practical consideration is that a permanent appellate court can permit the introduction of innovative procedures which may be harder to attain in a court of constantly varying membership. In New South Wales many new procedures have been introduced. They include detailed provisions for written submissions, the provision of a chronology¹⁷, and provisions relating to foreign, unreported or obscure references, which facilitate the work flow of the Court. This in turn permits ready procedures for the expedition of appeals or of applications for judicial review, where urgency can be shown. It is not unusual, upon real urgency being demonstrated, for an appeal in New South Wales to be heard within a week even within a day, if need be. Days rostered off for the judges can be compensated in the following month in a way that would be much more difficult to achieve in a court of constantly changing membership. Similarly, constant membership permits more easy and frequent discussion by the judges of issues involved in appeals, the regular assignment of the obligation to produce a first draft, the provision of a single or Court judgment and the avoidance of the unnecessary proliferation of judgments and the unnecessary lapse of time awaiting judgments. A collegiate court also permits frequent

housekeeping and social contact at which the outstanding judgments can be reviewed. This provides appropriate peer pressure to efficiency and effort which is much more difficult to exert in a court of constantly changing membership. Knowledge of and discussion concerning recent decisions provides a ready means of monitoring important developments of legal principle which may have general significance. The practical problem of trial judges assigned to country circuits writing, with inadequate library and other resources, judgments which stand reserved from the Full Court, has only to be stated to be understood. The tasks of appellate decision making require time for reflection, as Frankfurter J once said of the Supreme Court of the United States¹⁷.

Effective throughput: A further consideration is the effective throughput of appellate work. The workload of the Judges of Appeal in New South Wales has doubled since the establishment of the Court. Yet there has been no increase in the number of the judges.

A graph demonstrates the growth of the Court's business¹⁸:

TABLE 1



Without efficient and flexible machinery for processing the appeals and performing this workload in an efficient way, the delays in appeals would be unacceptable. Many appeals which would otherwise have been brought would not be brought. I have seen it suggested that litigants unnecessarily appeal in New South Wales. It was even hinted that this might provide a reason for avoiding a permanent appellate court in other States¹⁹. On the contrary, our concern should be for litigants who would otherwise wish to appeal but do not do so because of the delays or other inefficiencies which will be involved in doing so. Delay is a great enemy of justice. The efficient organisation of appellate arrangements should seek to diminish

delay and to minimise it entirely where true urgency can be demonstrated.

There are different traditions of litigation in New South Wales and Victoria. I have not seen a sociological study of the reasons for these differences. I do not intend to offer my own theories. But even allowing for the well known variation, the differences in the numbers of appeals in New South Wales and the other States, including Victoria, are remarkable. The schedule of appeals to and from Federal and State appellate courts has already been published. It deserves repetition. It shows the appellate business in the various States²⁰:

TABLE 2

APPEALS TO AND FROM SUPERIOR COURTS IN AUSTRALIA 1986

<i>Appellate Jurisdiction</i>	<i>Number of Appeals^(a)</i>	<i>Number of Motions</i>	<i>Civil Special Leave Applications to High Court of Australia Granted</i>
Federal Court of Australia ^(b)	301	NA	11
Family Court of Australia	278	NA	0
N.S.W. Court of Appeal	266	459	11
Vic. Full Court	80	50	2
Qld Full Court	198	NA	4
S.A. Full Court	148	NA	6
W.A. Full Court	91	NA	1
Tas. Full Court	7	NA	0
N.T. Court of Appeal	26	NA	0

^(a) The NUMBER OF APPEALS represents the number of civil appeals actually heard and disposed of within the designated jurisdiction, except in the Federal Court of Appeal, where there is no differentiation between civil and criminal appeals.

^(b) APPELLATE JURISDICTION — FEDERAL COURT OF AUSTRALIA includes civil and criminal appeals for 1986.

A first explanation offered for the disparity in the number of Victorian non criminal appeals may be the commercial ascendancy of Sydney and the likelihood that numerous important commercial disputes will accordingly be brought to the Supreme Court of New South Wales and the Court of Appeal. This explanation is unconvincing, because of the greater number of appeals in Queensland, South Australia and Western Australia. It may be simply a matter of differing traditions. It may even be, as one writer has hinted, greater satisfaction with the judgments at first instance of the Supreme Court of Victoria. It may be more likely to be related to the listing arrangements for appeals in Victoria which recent innovations are reportedly designed to improve²¹. Whatever the explanation, the disparity is a source of concern to at least some members of the Victorian Bar²². Any community which seeks to attract and hold commercial business must provide an efficient court system, including an efficient appellate system, to solve the disputes of business. That much is self-evident. As traditional areas of legal practice fall away (particularly in the personal injuries field) the lesson of New Zealand suggests that an important and worthy area for the growth of alternative legal practice will be the provision of prerogative relief in administrative law cases. If appellate courts in the States are to maintain an effective superintendence of the administration of justice, and at the same time to provide worthwhile and relevant work for the legal profession, special attention must be paid to the efficient provision of the beneficial activities of appeal and judicial review.

Appellate Bar: Finally, may be mentioned the establishment of an appellate Bar. The creation of a permanent appellate court is more likely to stimulate such a Bar, simply because of the practical features of the organisation of the Divisions of the Court, the arrangements of its lists and the ready recognition by the profession of the varying skill of lawyers in appellate advocacy. One of the problems of a rotating Full Court, is that judges may not again sit in precisely the same combination, for some time. This makes it more difficult for a Court to enforce appropriate discipline upon the Bar. For example, if a case is estimated to last three days, the Court can less readily stand the continuance over for conclusion in the following month's list. After a month, the Court may be quite differently constituted. With a permanent appellate court, not only may the Court organise its list more effectively and deploy its judges more efficiently, but a specialist Bar will more readily develop around the Court. This is a familiar symbiotic relationship which can be seen in New South Wales. Given the particular talents needed for appellate advocates in a generalist court, the fashioning and refinement of those talents may more readily be achieved where the Court is permanent and its control of its list accordingly more assured.

A SEARCH FOR OBJECTIVE CRITERIA FOR CHOICE

In some ways it would have been an easier task to have devoted this inaugural lecture to the work of Lionel Murphy. He is certainly a subject sufficiently interesting and notable to deserve such treatment. However the organisers resolved that I should take a different theme. In the dutiful way of our judiciary, I have attended to the problem assigned to me.

It is timely to review the appellate judicial arrangements in Australia as numerous developments in this country and abroad suggest. In such arrangements, neither in my own State nor in any other part of the Commonwealth are our institutions immutable. We do not labour under the laws of the Medes and Persians. The goals for all of us must be the efficient service of the public and at the same time the coherent and principled application and development of the law.

I have suggested, for a number of reasons of principle and efficiency, that a permanent appellate court is to be preferred to a court of rotating numbers. I recognise that the proposal is a controversial one. Upon it, views of able people, worthy of respect, differ. I also recognise the political and personal problems of changing institutions and the fact that diversity is to be seen as a strength and not a weakness of our Federation. For all that, I believe that it can be said, after twenty years of experience, that the Court of Appeal of New South Wales has justified the hopes of those who established it as a separate, permanent appellate court.

There are no objective ways of demonstrating that assertion to universal acceptance. Members of the bench and of the Bar can be asked for their opinions. Members of the legal profession can form their own views from the cases reported in the law books. So far as objective evidence is concerned, the most that can be pointed to are the statistics collected in the Annual Review of the Court of Appeal, some of which I have set out in this and other essays.

One additional statistic may perhaps be added to those earlier and elsewhere cited. It is admittedly an imperfect one, derived from a small sample. It is provided without full analysis. Nevertheless it may contain some instruction. I refer to the outcome of non criminal appeals from the Court of Appeal of New South Wales and the Full Courts of the other States, taken to the High Court of Australia.

If the last 29 volumes of the Commonwealth Law Reports (Vols 131-159) are taken as the data base, and the results analysed by outcome in the High Court, the following tables show the results.

TABLE 3

REPORTED NON CRIMINAL APPEALS TO THE HIGH COURT OF AUSTRALIA
FROM THE NEW SOUTH WALES AND VICTORIAN SUPREME COURTS

	Total Non Criminal Appeals	Full Court Reversed	Full Court Reversed by High Court 5-0
NSW Court of Appeal	119	45	24
Victorian Full Court	23	14	8
All Full Courts in Australia (not NSW)	169	85	53
The same figures as a percentage			
NSW Court of Appeal	100	38	20
Victorian Full Court	100	61	35
All Full Courts in Australia	100	50	31

TABLE 4

REPORTED NON CRIMINAL APPEALS TO THE
HIGH COURT OF AUSTRALIA FROM ALL COURTS
SHOWING OUTCOME 1975-1986

FULL COURT OR COURT OF APPEAL	ALL NON CRIMINAL APPEALS	NO OF DECISIONS REVERSED	NO REVERSED 5 - 0
NSW	119	45	24
Vic	23	14	8
Qld	41	21	12
SA	20	6	5
WA	19	9	6
Tas	2	2	1
Federal	56	25	16
Family	8	8	5
ALL	169	85	53

I realise that this raw analysis neglects the detailed reasoning of the judges in the cases. It omits decisions which are not reported in the Commonwealth Law Reports, some of which may later be perceived to be extremely important. Clear reversals may or may not be more likely to include a principle appropriate to be recorded in the authorised reports. The approach may also appear to ascribe too much importance to immediate success in the appellate process. Our legal system is a living one. Minority and dissenting decisions may not,

objectively speaking, be wrong. As Mason CJ, Wilson, Dawson and Toohey JJ recently said in Federation Insurance Limited v. Wasson & Ors²⁴:-

"A dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom"

The fact that a court is reversed, in a particular case, may illustrate nothing more than where ultimate power lies in the judicial hierarchy.

That said, the above figures do appear to show a consistently much lower pattern of reversals of the Court of Appeal of New South Wales than of other State Full Courts. The differences appear to be statistically relevant. They may bear out reputational theories derived from professional impressions. They have relevance to the legal profession, their clients and to the discharge of the heavy burden of the High Court itself.

At the close of his life, Lionel Murphy told a meeting of law students at Macquarie University that, looking at his dissent rate (being 129 out of 632 decisions in the High Court), he was more concerned at the level of agreement than by the number of his dissents. It is unlikely that the rest of the legal profession or the community, would share his robust view of the value of dissent in our legal process. A further, almost unspoken, reason for permanent appellate arrangements is the prospect it may present of an occasionally unorthodox appointment, like Lionel Murphy, to stimulate, provoke and stir the judicial and legal systems into greater self analysis and self criticism - including by vigorous dissent.

This was the most precious contribution which Lionel Murphy made in our highest judicial tribunal. In an age of dynamic change and unprecedented demands upon the courts, we undoubtedly need appellate judges of his creativity, foresight and humanity.

FOOTNOTES

- * President of the Court of Appeal, Supreme Court of New South Wales. Formerly Judge of the Federal Court of Australia, Deputy President of the Australian Conciliation and Arbitration Commission and Chairman of the Law Reform Commission. The views stated are personal views only.
1. J Scutt (ed), "Lionel Murphy - A Radical Judge", 1987.
 2. J & R Ely, "Lionel Murphy - The Rule of Law", Akron, 1986; A R Blackshield & Ors, "The Judgments of Justice Lionel Murphy", Primavera, Sydney, 1986.
 3. See eg McInnes v The Queen (1979) 143 CLR 575, 583.
 4. See Blackshield & Ors, xvi.
 5. See M Howard, "The Franco-Prussian War", Fontana, 1967, 54ff.
 6. M D Kirby, "Permanent Appellate Courts - The New South Wales Court of Appeal Twenty Years On". (1987) 61 ALJ 391, 396 ff.
 7. M D Kirby, "Closer Economic and Legal Relations between Australia and New Zealand". (1984) 58 ALJ 393, 387 ff.
 8. See eg S M Hufstedler, "Bad Recipes For Good Cooks - Indigestible Reforms of the Judiciary". 27 Arizona L Rev 785 (1985); See also 19 Third Branch (7) 1 (1987) and R A Posner, "The Federal Courts: Crisis and Reform". Cambridge, Harvard University Press 1985.
 9. Cf discussion in Levinge v Director of Custodial Services; unreported CA (NSW), 23 July 1987; (1987) NSWJB 139.
 10. C T Emery, "No appeal without leave?". (1986) 136 New Law Journal 1211.
 11. Supreme Court Act 1970 (NSW), s 22.
 12. See discussion in Beecham (Australia) Pty Limited v Roque Pty Limited, unreported, CA (NSW) 31 July 1987; (1987) NSWJB 148.
 13. (1987) 61 ALJ 391, 399.
 14. See eg Isaacs CJ, Latham CJ, Barwick CJ and Mason CJ. Dixon CJ served as an Acting Justice of the Supreme Court of Victoria for less than a year in 1926.

15. M H McHugh, "Lawmaking in an Intermediate Appellate Court: The New South Wales Court of Appeal" (1987) 11 Syd. L. Rev 183, 188.
16. Lord Reid, "The Judge as Lawmaker". (1972) 12 J. Public Teachers Law 22.
17. Dick v New York Life Insurance Co, 359 US 437, 458-9 (1959).
18. (1987) 61 ALJ 391, 404.
19. L Mulhail "A Court of Appeal for Victoria?". (1987) 61 Law Inst Jc (Vic) 890.
20. (1987) 61 ALJ 391, 394.
21. "Improving the Court System" (1987) 61 Law Inst Jc (Vic) 768. See also *ibid* 765.
22. See The Age, 9 July 1987, 17. Cf S Charles, "A Court of Appeal for Victoria" Vic Bar Notes, Winter 1987, 16f.
23. H T Gibbs, "Appellate Advocacy" (1986) 60 ALJ 496. Cf J W Davis, "The Argument of an Appeal". 26 ABAJ 895 (1940); H W Nies "A Judicial Perspective on Appellate Argument: The John W Davis Decalogue Revisited". 55 Antitrust LJ (US) 2, 437, (1986); A F Mason, "The Role of Counsel and Appellate Advocacy". (1984) 58 ALJ 537.
24. Federation Insurance Limited v Wasson & Ors, unreported, HCA, 5 August 1987, 11.