W.D. SCOTT AND CO. PTY. LIMITED MANAGEMENT CONSULTANTS

SEMINAR ON DIRECTIONS IN PUBLIC POLICY

WENTWORTH HOTEL, SYDNEY, FRIDAY, 25 JUNE 1982

THE JUDICIAL ROLE, ADMINISTRATIVE REFORM, THE COURTS AND GOING TOO FAR?

The Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission

June 1982

W.D. SCOTT AND CO., PTY LIMITED MANAGEMENT CONSULTANTS

SEMINAR ON DIRECTIONS IN PUBLIC POLICY

WENTWORTH HOTEL, SYDNEY, FRIDAY, 25 JUNE 1982

THE JUDICIAL ROLE, ADMINISTRATIVE REFORM, THE COURTS AND GOING TOO FAR?

The Hon Mr Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

CHRISTIAN VIRTUES, THE JUDICIARY AND RETIREMENT

This is a time of change in the judiciary. Sir Ninian Stephen, a High Court Judge, has become Governor-General Designate. Sir Keith Aickin, a Judge of the High Court of Australia for only six years died last week. Two vacancies remain to be filled on our highest court. Judges are retiring early. A New Zealand judge, Mr Justice Speight retired last month after 15 years on the bench of the Supreme Court, now called the High Court of New Zealand. He is aged 60 years but he had a potential of 12 further years ahead on him in the judicial harness. In New Zealand judges retire at 72. In Australia (save for Victoria) they retire, generally, at 70. Mr Justice Speight explained 'I just feel I have had enough'.

Those of you who read the papers earlier in the week will have seen that judges emerged once again as number one in the Australian social status of occupations, according to an opinion poll. They were followed by Cabinet Ministers and barristers. Also making the upper class were managers of large enterprises. I am afraid that managers of lesser organisations have to make do with the middle class, in the public's esteem.

Mr Justice Speight, however, had other ideas about the judicial role. he said on his retirement:

> 'Nowadays, going on the bench does not change your life greatly. Like everyone else a judge these days spends his weekends watching footy or painting the house'.

In Australia too we have seen a few early judicial retirements apart from Sir Ninian Stephen. Mr Justice Connor recently retired from the Federal Court of Australia and the Supreme Court of the A.C.T. He retired at 60 — although in his case he enjoyed an appointment for life. However, on his return to Melbourne he was called back to service by the new Cain Government to head up an inquiry into casinos and the reform of the law of gambling in Victoria. That project should keep him busy.

The retirement of antipodean judges looks startlingly premature when measured against the announcement of late May 1982 that Lord Denning, Master of the Rolls in England was quitting judicial office at the age of 83. Lord Denning had boasted that he knew every Christian virtue save retirement. The circumstances of his announced retirement were typically controversial. A further book, his third since his 80th birthday, titled 'What Next in the Law' was withdrawn by the publishers after two black jurors in a Bristol riot trial threatened to sue the judge for libel. In the book, Lord Denning had suggested that juries should no longer be selected at random because some racial minorities in Britain had 'different morals' that could lead them to defying the law and being more likely to acquit the accused. Such was the outcry, he announced he was going. The Society of Black Lawyers in London acknowledged that Lord Denning had acted honourably in withdrawing and that his was the retirement 'of a legal giant'. According to Crispin Hull, legal correspondent in the Canberra Times (1 June 1982), 'Christian morals and seeing red at the sight of unions were Denning's weak points as a judge'. His views on these topics were so strong, according to Hull, that 'his judgments sometimes verged on evangelism, a trait in the judiciary neither expected nor welcomed by the community'. Yet Hull acknowledges that Lord Denning was magnificent in his use of the English language, frank in his identification of public policy reasons for developing the law and determined to press on with law reform from the bench because of inadequate attention to reform by succeeding governments. Hull again:

> Lord Denning's power will live on in the law reports. The cases he has decided will affect not only future litigants, but, because many actions of people and companies are influenced by the state of the law, they will affect all the travellers on the Clapham bus, whether they know it or not.

Before the announcement of Lord Denning's retirement, the Governor General of Australia Sir Zelman Cowen delivered an elegant tribute to him at the Lord Denning Society in the University of Queensland on 1 April 1982.

> No name in the contemporary common law would be better known than that of Lord Denning. Distinguished English lawyer and fellow judge, Lord Scarman, wrote in January 1977, that the past 25 years were not to be forgotten ... They

were (he said) the age of legal aid, law reform and Lord Denning. So far as Denning is concerned, there would be general agreement, even on the part of those who disagree with much or some part of what he sees as the role of the Judge. On his 80th birthday in January 1979, the Lord Chancellor, Lord Hailsham, who certainly does not accept all of Lord Denning's views, wrote that he had a fearless, original mind revolving around new ways of accelerating the development of the law, pondering its faults, seeking to remedy its injustices and anomalies and devising fresh and novel solutions to age old problems.

GOING TOO FAR?

Lord Denning is, of course, a judicial activist. He has said time and again that he sees no great problem in judges entering frankly into the field of public policy in their judgments. He sees no reason for waiting for law reform commissions to report or for Parliament to act on reports or other suggestions for change. As far as he is concerned, the creative function of the common law judge is as alive today as ever it was. He never flinched from stretching old precedents and developing new legal concepts and remedies. Other judges might baulk at the notion of judge overtly and frankly making new laws (and not merely applying laws long established). But not Lord Denning. He was untroubled by the democratic theory that Parliament makes laws and that judges merely faithfully implement them. Nowadays, few people believe this fairy tale. But Lord Denning stretched to the limit the extent to which the judge should be creative and inventive. As a stimulus to more cautious souls and as a burr under the saddle of the common law of England, he fulfilled a unique and important catalytic function — with implications in our own country. I suspect that he will be sorely missed.

In another recent speech, the Governor-General, Sir Zeman Cowen raised an important and different different question about the judicial role — and one peculiarly relevant to judges in Australia. This time it was in the context of the novel changes in administrative law introduced in the Federal sphere in Australia by succeeding governments over the past decade. Some of you may not know of these changes. They deserve wider publicity than they have received, including amongst leaders of commerce. A mosaic of new administrative reforms is being put together in order to provide new and more effective means of redress for the citizen against the growing, anonymous bureaucracy. The chief pieces of this mosaic so far put in place by Federal legislation include:

. The creation of the Commonwealth Ombudsman (Professor Jack Richardson) with power to investigate bad administration, negotiate changes and to report to the Prime Minister and Parliament where administrative wrongdoing affecting a citizen is not righted.

. The creation of an Administrative Review Council in Canberra, of which I am a member, to develop review of administrative action in the Federal public sector, to suggest rationalisation and improvement of Federal review mechanisms and tribunals and to push forward the processes of reform.

. The passage of an important reforming Act the Administrative Decisions (Judicial Review) Act 1977 which came into force in October 1980. This statute, which is increasingly being used to call public officials of the Commonwealth to account, confers on persons affected by discretionary decisions of Commonwealth administrators a right to reason for their decisions. It also simplifies, expedites and centralises the system of judicial review by which administrative discretions can be tested against the letter of the law and principles of fairness and natural justice.

. The passage of the Freedom of Information Act 1981 represents an important advance towards greater openness of Federal administration. It reverses the prima facie position that has obtained until now, namely that documents in the possession of government are not available to members of the public. Now documents will be prima facie available. To be withheld, they must fall within certain classes of exemption and may be subjected to independent review scrutiny.

. Finally, there is the creation of an important new Federal tribunal — the Administrative Appeals Tribunal. This Tribunal was established by an Act passed by the Whitlam Government. It has received enhanced jurisdiction under the Fraser Administration. It is headed by Federal Court judges. Its unique and remarkable jurisdiction extends to substituting 'on the merits' for the decision of the administrator appealed against, what it — the Tribunal — considers to be the 'right and preferable' decision in the case. Courts traditionally have limited themselves to examining whether administrators have complied with the law and performed their functions in a fair way. This new Commonwealth tribunal looks not just at the letter of the law and at the procedures but also at the actual substance of the decision under review. Its unique characteristic is its capacity to substitute its judgment for the judgment of the administrator. It may do this even in cases where the administrative decision has been made by a Minister of the Crown. It has been held not to be bound by government policy, where that policy does not lead to the right or preferable decision. But it must give careful attention to government policy. It was in the context of this novel extension of new powers to a tribunal which includes judges, that led the Governor-General to ask whether we had not now gone too far.

Addressing the opening ceremony of the Fifth South Pacific Judicial Conference at the High Court of Australia in Canberra on 24 May 1982 — a day traditionalists would remember was Empire Day -- Sir Zelman referred first to the varied tasks of institutional law reform in Australia.

> One interesting contemporary investigation by the Australian Law Reform Commission involves examination of the co-existence of Customary Aboriginal Law with the general system or systems of law operating in Australia. That such questions should be asked and examined at a time when there is greater awareness and a greater sensitivity to the needs and aspirations of Aboriginal Australia, is not surprising. ... Thus, in Australia, with a quite highly developed science and technology, it is well said that there must be mechanisms for law reform to adapt the law to fast developing technology ... So it is that the Australian Law Reform Commission has given its attention to matters as diverse as human tissue transplantation and its legal-ethical implications, and the threats to privacy posed by the impact of a range of technological developments in computers and electronic detection devices.

But it was then that the Governor General adverted to the new administrative law. After referring to the 'great debate on the judicial role' and about Bills of Rights he said this:

> For my part, let me say — even if I am to be torn apart for saying it — that I have serious doubts, especially in what I conceive as a democratic framework of society — whether this is a role for judges, or one to which judges ought to aspire. I think that what has been done in Australia in the way of administrative law reform is exciting, remarkable and impressive, but in some respects I wonder whether it has not gone too far.

That phrase, 'going too far', had first appeared in an editorial in the Canberra Times where the respective balance between the elected legislators, the permanent bureacracy and unelected review bodies had been discussed. The editorialist had opined:

> Going too far is, of course, a problem especially in situations once within the exclusive province of the Executive (and thus ultimately the Minister) and now within the province of a non-elected and not necessarily representative judicial system.

A further editorial in the Canberra Times (26 May 1982) titled 'Defining the Limits' quoted Sir Zelman Cowen's speech at length

> 'We have been involved in a massive reshaping of the law arising out of the way in which public administration has developed in a complex and federal society' he said. 'What we have done is to give sweeping authority in such matters to the judge to substitute his own view of what is good policy or a more just outcome for that of elected or administrative officers' ... The concern Sir Zelman expresses [in asking whether it has not gone too far] must always be at the fore. Whenever one arm of the constitutional balance takes powers from one or both of the other arms, it is wise to ask how more reasonable and accountable that process might be — particularly when the transfer concerned substitutes the view of unelected judges for that of an elected and accountable executive. But the fear Sir Zelman expresses should not be allowed to stymie two rather different processes which are part and parcel of the changes taking place: the improved room for official, non-judicial review of administrative decisions; and the scope provided for permitting examination of the process, if not the result, of executive decision-making.

Apparently fearful of impeding the Commonwealth's administrative reforms by its own editorials, the Canberra Times urged this conclusion:

> So far ... the court seems conscious of the difference between intervening when administrators go too far and going too far itself. ... Sir Zelman is right to point to the dangers; those dangers are not, however, proving themselves to be such that a desirable and worthwhile reform should stop, or should be turned back. If anything, as the Canberra Times pointed out in the editorial quoted, there is room for more reform yet.

What the overseas participants in the South Pacific Judicial Conference made of the Australian debate is not recorded. In many quarters the radical federal administrative reforms — especially the establishment of the Administrative Appeals Tribunal with power to substitute decisions 'on the merits' and the enactment of the powerful new Administrative Decisions (Judicial Review) Act, would be regarded as remarkable. Yet the growing docket of the AAT and of the Federal Court under the Judicial Review Act demonstrate that a major community need is being met by these reforms.

CAN WE COPE?

In an address to the Victorian branch of the Second Division Officers Association of the Federal Public Service in Melbourne in April 1982, I traced the reaction of federal public servants to these new administrative law reforms. I said that these reactions varied from those who belonged to the 'too bad' school or

the 'I told you so' school to those who regarded the new reforms as the 'last straw' or a time when the public service was caught between a 'pincer movement' of new obligations to the public but with reduced staff and resources. In answering the question whether the public service could cope with the new administrative law reforms, it was important not to exaggerate the costs of the new system. People's complaints have to be dealt with in some fashion. United States statistics show that following the introduction of the Freedom of Information Act, relatively little increase had been generated in the costs of agencies because most of the enquiries made would have been answered even before the Act was passed. It is of course easier to see the costs of administrative reform and less easier to evaluate the intangible benefits. One of these is often under-estimated. I refer to the value of the symbiosis between a dedicated, professional public servant, a member of an 'administrative culture' on the one hand, and the external civilising generalist body on the other. Though this inter-action may itself be weakened if the faults of the 'legal culture' come to dominate the review bodies, the inter-play between external and sometimes novel ways of looking at a problem and routine administration is usually healthy and stimulating.

I urged in my talk in Melbourne the development by the Federal Public Service Board of an information pamphlet about decisions involving the new administrative law. On the initiative of Dr Geoffrey Flick, Director of Research in the Administrative Review, steps had been taken by the Law Council of Australia in Law News to publicise decisions. Little has been done in the Australian Public Service to call general decisions and rulings of the Federal Court, AAT, tribunals and the Ombudsmen to notice throughout beaucracy. It is hard to be wise even after the event if you are completely ignorant that the event ever took place.

My address then was placed in the context of a few words addressed to the new Victorian Government, whose Premier, Mr. John Cain is a past member of the Australian Law Reform Commission. Mr. Cain has already announced his intention to move in administrative law reform matters in Victoria, including by the introduction of Freedom of Information legislation. In the other States things also appear to be happening. In New South Wales the long awaited final report of the enquiry by Professor Peter Wilenski has been handed to the NSW Premier, Mr. Wran. Developments are also occurring in other States of Australia. Much more will be heard by all of us concerning administrative law reform. In the age of big government, it is a problem of our time.

MORE ON JUDGES

The increasing community attention to the proper role and function of judges has probably been encouraged by the move of the High Court of Australia to its permanent home in Canberra. This has permitted the appointment of

permanent legal correspondents in both the print and electronic media. They now bring to a general public audience much more information about the doings of our highest court. Inevitably, this will attract more attention to the functions of the judges and personalities and values systems that are reflected — directly or indirectly — in the judicial role, whether in the High Court or in other Australian courts.

Judges themselves are beginning to write more openly and freely about the judicial function and how it is changing, rapidly. The changes are coming about partly as a response to changing social attitudes. But also the changing function assigned to the judiciary by the growing statute book of parliaments inevitably makes more and more judicial work the analysis of an Act of Parliament and the attempt to apply the parliamentary will to the established facts of a given case.

One of the members of the English House of Lords, Lord Keith of Kinkel, in an address recently published in the new Civil Justice Quarterly addresses the problem of judicial discretion. See (1981) 1 CJQ 222. According to Lord Keith, the demand for greater flexibility and less rigidity in the law has dramatically increased the opportunities for and necessities of judicial discretion. Examples are cited in a number of fields of law and lessons are drawn by the author from Scots law, including in the area of the admission of evidence in criminal trials where the evidence was unfairly or unlawfully obtained.

> It must be faced that in modern times judges can very often find no guidance from any body of rules and indeed may be mislead and drawn into error by relying on reports of cases in specialised fields — which seem nowdays to proliferate — and which represent no more than decisions of fact. The judge is better to rely upon his own judgment and sense of justice, doing his best to understand comprehensively the whole circumstances of the case, attributing to each of them the significance which its merits deserve. If he does this, he has good prospects of arriving at a just result, and his decision will not be open to successful challenge in any appellate court. (p. 32)

Another essay by an English judge which has just come to hand and which deserves noting is the presidential address of Sir Roger Ormrod, a Lord Justice of Appeal, to the Holdsworth Club 1980. Titled 'Judges and the Processes of Judging', the address analyses the changes that have occurred in the last fifty years or so in the role of the judge and in the processes of judging. Both, according to the author, have 'radically changed: a change which has attracted astonishing little attention'. Sir Roger suggests that a chief contributor to the change is the elimination of the civil jury. Another

is the extension of the judge's discretionary powers, just noted, 'which has been particularly marked in the last decade' and which is now involving the judge 'in a ever wider range of value judgments and in pushing him further and and further into unmapped territory which, on his predecessors' maps, was marked: 'here lie dangers'. The freer the judge's discretion, says the author, 'the closer it comes to resemble an administrative discretion'. However, he acknowledges that in some branches of the law uncertain justice is preferable to certain injustice. And he then makes a bold claim for the judiciary that 'our combined experience is much wider than that of any other group in the country. We are of course, also husbands, wives, mothers or fathers, drivers, gardeners, farmers and so on'. I wonder if every one would agree with this assertion.

ARE JUDGES POPULAR MEDIA TARGETS?

In his maiden speech to the House of Lords, the Lord Chief Justice of England, Lord Lane also criticised the public stereotype of the judiciary as a 'monoculture'. Judges, he says are a 'popular target for all sorts of people'.

> They are a ... target because they make good copy and seldom have an opportunity to answer back. Within the past few days, judges have been heavily and almost hysterically criticised for passing too lenient sentences and also for passing too severe sentences. It is impossible for judges to be right. ... There is a limit to what judges could do.

Defining that limit and clarifying the proper respective roles of Judges, Parliament and the bureacracy was the subject of a recent address by the former head of the Federal Attorney-General's Department in Canberra, Sir Clarrie Harders. Speaking to a seminar that the Australian National University on 'Doing business with Canberra' (23 April 1982) Sir Clarrie offered his observations on the growth of the new administrative law with its tribunals and other officers who, unlike the public service are 'not subject to ministerial control or direction'. The fact that the Administrative Appeals Tribunal can apply its own view of policy has produced, according to Sir Clarrie, 'troublesome questions'. It was, he said, 'detracting from the authority and responsibility of Ministers and also of Senators and Members as the whole'. One little vignette in his address was a reference to a warning delivered by the former Federal Solicitor General, Sir Kenneth Bailey before the growth of the modern review of administrative action. Sir Kenneth suggested that the call for new procedures to check the bureaucracy:

> 'reflects a declining belief in the process of Parliamentary Government as a whole ... removing from the elected representatives of the people the direct responsibility for the administrative process'.

These reservations must not be read out of context. Even in the Administrative Appeals Tribunal, the area of policy determination is usually small. In answer to the Governor-General's direct question 'Have we gone too far?', it is important to keep in mind the limitations upon as well as the adventures of the Australian judiciary. For most member of the judiciary, particularly in the lower courts, the scope for creativity is circumscribed equally by tradition, law and opportunity. Even in the higher courts, there are few Dennings. Even Lord Denning (and his antipodean acolytes) can find that inventiveness and novelty is often sat upon and reversed on appeal — leaving it to the legislature or a later generation to pick the idea, if it has merit. A great and growing part of the role of judges today is statutory interpretation: poring over the text of one of the thousand Acts of Parliament which are passed by the busy parliaments of Australia each year. Often there is no plainly right and wrong answer to a problem of statutory interpretation. Clearly, there are opportunities for personal values to creep in. But for the most part the fastidious analysis of statutory language is unconducive to both judicial adventurism. Parliament, at least in our country, usually says in great detail what it means. Though sometimes the intent remains obscure and sometimes is frustrated, generally the parliamentary intent is plain and must be upheld by the judge whatever his private views about the justice of the case.

Sir Zelman Cowen's question was, however, specifically addressed to the area of administrative law reform and especially the enhanced function of the Administrative Appeals Tribunal to review policy, including policy the elected Minister or his answerable officials. I have previously acknowledged myself that this new function raises particular difficulties that need exquisitely careful handling if the respective roles of the elected and non-elected arms of government are to be preserved, basically intact. Although many citizens would probably be happy to leave decisions to be made by unelected judges, our tradition of democratic government requires that, ultimately, important public policy decisions should be made by elected officials who are responsive and answerable to the people. The Administrative Appeals Tribunal experiment must be seen in context. When we do this, there is, I feel, no reason for alarm, though their remains good reason for moving cautiously in the unchartered territory upon which the Tribunal has been launched. These features of the administrative experiment must be kept clearly in our minds:

. First, the very reason for the creation of the experiment is the recognition that the old theory of responsiveness of the Minister is breaking down, if it has not already collapsed. Such is the growth of government today that Ministers cannot realistically be held accountable for everything done in their name in their department. Ministers do not now automatically resign when mistakes are

made by subordinates or even by themselves. Lord Carrington's recent resignation in Britain was the more remarkable because such conduct is now so rare. Many decisions must be made in the name of the Minister which, it would not be humanly possible, for him to consider personally. Thus many bureaucratic decisions are in fact made by permanent officials who are as equally unelected as the judges. At least the judges and other members of the Administrative Appeals Tribunal must conduct their functions in public and give their reasons in an orderly, public and reviewable fashion. In this sense, the AAT experiment is not a diminution of democracy but can be an enhancement of democracy: opening up administration in a way that permits the disaffected to seek further reforms from the elected officers, including Ministers.

- Secondly, the AAT itself is a creature of Parliament. It has been created by Parliament on the initiative of the Executive Government. Its powers are, in this sense, powers which Parliament has seen fit to confer upon it. If these powers are more ample than those of the courts and if they include a franker assessment of policy than has traditionally been conferred on the courts, that is because Parliament has decided to do it this way. What Parliament does, Parliament can undo. Because these enhanced powers are themselves the gift of the elected arm of government, there is no ultimate offence to democratic theory. Furthermore, if a policy decision of the AAT offends the elected Parliament or the Executive Government, it is in their hands to change the law. The AAT must comply with the law of the land, including government policy that has been translated by Parliament into that law.

- Thirdly, the areas of policy making in the AAT ought not to be exaggerated. Most cases involve, as in the courts, a simple clarification of the facts and an application of the law to the facts. It is not often that government policy is called into question. Where it is, the Full Court of the Federal Court of Australia has made it clear that the AAT must have regard to that policy, without being legally bound by it. In fact, proper respect (though not abject deference) is shown by the AAT to government policy. If the government wants deference, it is in its power to seek a change in the law and by clarifying the law to impose its will, with the concurrence of Parliament, on the Tribunal.

- Fourthly, in the one area where important national policy questions have been raised — the area of drugs policy and the deportation of convicted drug offenders — the work of the AAT has been beneficial in clarifying that policy and in ensuring that its application is fairer in individual cases. Furthermore, in such cases

> the AAT's decision is made in the form of a recommendation to the Minister. In all save very few cases, those recommendations have been complied with. The ultimate decision remains with the Minister and he can (as he has rarely decided to do) reject the Tribunal's decision. Though not all of my colleagues agree with me, it seems to me quite clear that the price of expansion of the Administrative Appeals Tribunal into areas of high policy is that some of its jurisdiction in such areas will have to be conferred on the basis that the decision is in the form of a recommendation. In such a form, the ultimate decision remains with the politically elected officer. But because the Tribunal may be constituted by a judge, it can be expected that in such a case the conventions of our Constitution will require that the decision to reverse the Tribunal will be actually made by a Minister personally and not by an anonymous, unelected official.

There are many other policy issues for law reform, including administrative law reform that will have to be faced in the decade ahead. However, the issue raised by the Governor-General to which I have referred is at the heart of the future relationship between the various arms of government in Australia. Despite the constitutional separation of powers, which has tended to isolate the judiciary from the other arms of government, no political arrangement is utterly immutable. In the end our Constitution and its organs serve the peace, order and good government of Australia and its people. Adjusting the instruments of government and their relationship to each other and to the citizenry is an important issue of law reform. It is one in which we are likely to see changes in the decades ahead as we continue to refine and define the respective functions of Parliament, the Executive Government, the public service and judges in the government of our country.

THE COURT STRUCTURE

Finally, I want to say something on an important subject concerning judges and the courts in Australia that was brought to public notice most recently by comments this week of the Chief Justice of New South Wales, Sir Laurence Street. Addressing a luncheon meeting of the Law Society of New South Wales on 23 June 1982, the Chief Justice was reported as proposing the creation of a new national court system in which the State Supreme Courts and the new Federal Courts would have equal powers as 'Divisions' of a new 'Supreme Court of Australia'. Sir Laurence Street, and some other judges, have lately expressed increasing concern about the overlap of jurisdiction or uncertainty about jurisdiction that can sometimes exist between Federal and State courts. The problems have arisen most especially in the area of family law, following the creation of the new [Federal] Family Court of Australia. But they have

also arisen in some matters involving trade practices, where the Federal Court of Australia has jurisdiction. Fear has been expressed that the enhancement of the jurisdiction of the Federal Court of Australia by the present and future Federal Governments will exacerbate the problems of overlap between the courts, early symptoms of which have already begun to appear.

There is no doubt that Sir Laurence Street's suggestion deserves the most careful consideration, not least because he proposes it. The spectre of additional cost, frustration and delay arising because litigants or their lawyers choose the wrong court or seek to affect the decision by 'forum shopping' is one we must take seriously. The constitutional provision by which Federal jurisdiction could be conferred upon State courts in Australia was one of the few original ideas of the founding fathers of the Australian constitution. Otherwise, their originality was largely muted by their fascination with the American constitution. It was a good idea. We should not lightly throw it away.

On the other hand, a number of things should be kept in mind in considering objections to the present relationship between the Federal and State courts in Australia.

- Priorities. First, although there has been a great deal of talk about the problems of overlap, between States and Federal courts the actual number of cases where litigants have gone to the wrong court or where the court could not provide a remedy, are few. In terms of the priorities for the reform of the administration of justice in Australia, this should not, at least in terms of the numbers of cases presenting, be ranked high. There are many more urgent problems to be addressed. They include the problems of lengthy trials, the reform of legal aid, changes in the procedures of our courts to lessen the costs of litigation, introduction of more conciliation procedures and reforms in the legal profession itself. Although the problem of overlap between Federal and State courts is one that rightly concerns those involved in the administration of justice, more attention has been paid to the problem than to most of the others I have mentioned. Why should this be so? Possibly it is because the issue concerns perceptions of judicial status. I do not discount the debate. I simply say that it is only one of many that should have our attention.

- Federal Court History. Secondly, it must be remembered that Federal courts have been with us in Australia for a very long time without causing heartburn. There has been a Federal industrial court, in one form or other, since 1904. There has a Federal Bankruptcy Court for many years. The forerunner of the Federal Court of Australia was established in 1956. And it must be remembered that

the Family Court of Australia was only established by the Federal Parliament because of the unwillingness of some of the Supreme Courts of the States to agree with reform proposals that were desired by the Commonwealth in the new Family Court. Most of us can still remember the publicity which attached to reports of family matters in the State Supreme Courts. Yet some of those courts resisted the notion of privacy of proceedings in family court matters, resisted the abolition of wigs and robes, the introduction of greater informality, child minding facilities and so on. Innovation in courtroom design, court counselling services, court procedures and court personnel (including judges) was much more readily possible with the creation of a new court than would have been possible if the Family Court had simply remained a division of the old State Supreme Courts. I note that there is no special Family Division proposed in the structure suggested by Sir Laurence Street. Presumably it would simply be part of the general Federal Division of the Supreme Court of Australia.

- Specialisation. A further consideration that led to the creation of special Federal Courts was the degree of specialisation that was considered necessary to promote the efficient discharge of business under particular Federal laws. The involvement of national concerns and the specialisation of the lawyers and litigants appearing before it, led to the creation of the old Court of Conciliation and Arbitration, a Federal Court. So it was with the Bankruptcy Court. So too, there were reasons of specialisation in the creation of the Family Court, including the feeling that those who did not have the training, experience or inclination were not always sufficiently sensitive to the predicament of the divorce litigant. Nowadays, business increasingly tells the Australian Law Reform Commission that it prefers a national court to deal with business concerns. The reasons are not difficult to see. Industries, such as the insurance industry, the banking industry, the maritime industry and so on are increasingly nationally organised and run in Australia. They look to the court system to provide uniform interpretations, nation-wide orders (enforceable in any part of the country) and efficient, modern procedures. Perhaps under Sir Laurence Street's model this business would flow increasing into the Federal Division of the Supreme Court of Australia. But in the meantime, it seems likely to me that the demands of business efficiency will increase the calls for enhanced commercial jurisdiction in the Federal Court of Australia.

- Appeals. Sir Laurence Street's model contemplates an Appeal Division of the Supreme Court of Australia, separate from the Federal Division. But at the moment the Federal Court of Australia and the Family Court of Australia have

appeal functions, including from State courts. In a limited number of cases appeals lie in Federal matters from a single justice of a State Supreme Court to a Full Court of the Federal Court of Australia. Unless one were to modify the role (and possibly the commissions) of judges of the Federal Court so that they became purely trial judges of a Federal Division, the notion of an Appeal Division would seem to contemplate changes in the current appeal functions of present Federal and State judges. The problems which attended the creation of the New South Wales Court of Appeal, including from some only of the members of the New South Wales Supreme Court, stand as a warning to any government of the enormous potential for hurt feelings and professional bitterness that can arise out of such changes in established judicial functions.

. The Border Land. The notion of a Federal Division and of State Divisions of a national Supreme Court may not tackle the basic problem for the administration of justice of avoiding matters arising in the incorrect Division. Unless members of each Division could take over matters that had been brought in another Division, the problems that have already arisen in different Courts would simply be replicated in the different Divisions. Is the Division of one State to be equally able to deal with the business of the Federal Division? If so, this would frustrate the acknowledged right of a Commonwealth government to retain authority in respect of the appointment of judges who will interpret and administer, including on appeal, the laws passed by the Commonwealth Parliament. Sir Laurence Street is reported to have said that appointment of judges is a much prized head of power of executive governments 'and rightly so'. If it is so prized, one can call it a Division or one can call it a Court; but the desire of the respective governments (Commonwealth or State) in some matters at least to appoint the judges who will administer its laws, is likely to frustrate the desire to allow business to flow indifferently and without limitation between judges of the State or Federal Divisions. Yet if the Federal Division is to remain watertight for the kind of reasons I have been mentioning, we will not have made a great advancement (except perhaps cosmetic) upon the presently separate court systems.

. Status. There are various other matters that could be raised in this debate. In the eye of the general public, the most important work which the judiciary does is probably presiding at the important criminal trials — murder, rape and large corporate offences. Overwhelmingly these remain the business of the State Supreme Courts. They may not be seen as so important in the mandarin atmosphere of barristers and judges. But this is not to say that the public has its priorities wrong. I have always felt that the criminal law has been seriously undervalued and underestimated in the Australian legal profession. In terms of intellectual complexity, emotional challenge and public importance, it

is undoubtedly near the top of my list. Accordingly, concern in some quarters about the supposed decline of State judicial status would seem to me to be premature or misguided, and not reflected in public perceptions.

. Practical Impediments. As well, there are numerous practical problems which stand in the way of the reform urged by the Chief Justice. Not the least of these was that mentioned by the Solicitor-General of Australia, Sir Maurice Byers QC who pointed out that constitutional amendments would be necessary to effect the change. True it is, the people recently agreed to one constitutional amendment affecting the judiciary, namely the retirement age for Federal judges. But whether they would agree to such a signficant amendment as a whole new court system is much more doubtful, in the light of the notorious conservatism of the Australian people at constitutional referenda. This raises once again the questions of priorities: with all the problems of constitutional reform which have been identified by many authors, is this a priority problem? One might suspect that more important may be the proliferation of tribunals (Federal and State), the uncertainty of jurisdiction created by this proliferation and the need, perhaps, to design a more coherent system of tribunals. The need for constitutional power to delegate Federal jurisdiction to State tribunals might be a much more urgent task than the resolution of the occasional border difficulties between Federal and State superior courts.

The solutions to these problems, ventured by Sir Laurence, are challenging, bold and undoubtedly deserving of respect and attention. I have mentioned some of the difficulties, not to discourage that attention. A reformer must always remain optimistic. However, it will be gathered that I have my doubts about some aspects at least of the bold scheme offered. Furthermore, some minor degree of competition between courts (including between State and Federal courts) may not be such a bad thing. It may help to promote a greater willingness in all courts to accept innovation and reform in the administration of justice. Moreover, simpler expedients can be adopted to avoid undue inconvenience to litigants arusing out of the existence of State and Federal courts side by side. These include:

. Legislative provisions permitting (or requiring) a Federal Court to transfer a matter to a State Supreme Court if the interests of justice demand that course or if other statutory criteria are met.

. A Federal Court could be authorised or encouraged to show restraint in the exercise of its jurisdiction where remedies could better be offered in a State Court. To some extent, this self-denying ordinance already appears to be in operation in the approach of many judges of the Federal Court of Australia.

. Thirdly, the course could be taken of issuing a Federal judicial commission to State Supreme Court judges or some of them so that, where need be, they could be authorised to have two judicial hats and perform Federal and State work, within any limits imposed by the Constitution. There is a precedent for this in the recent action of the Federal Government in issuing a Federal commission to Mr Justice Alan Barblett, the Chief Judge of the State Family Court of Western Australia. He has been given a judicial commission in the [Federal] Family Court of Australia and so he can sit in both courts with full powers as a Federal and State judge. There are, of course, difficulties in this arrangement. They include salary, pension, retirement and other differences that can exist in judicial appointments. However, it would seem to me that this is territory more likely of success — certainly early success — than the rearrangement of our superior court system.

. Fourthly, some of the problems of overlapping jurisdiction may be solved by more ample use of the pendent jurisdiction of Federal courts or by reference of constitutional power by the States to the Commonwealth Parliament as has been proposed - but not yet accomplished - in the area of family law

I have talked to you about this problem briefly and without detailed analysis because it is in the news. That there is a need for debate, including public debate about the courts, the judiciary, the administration of justice and the tribunals of our country is beyond question. I hope I will have said enough to encourage you to take part in that public debate.