



HIGH COURT OF AUSTRALIA

CEREMONIAL SITTING

1319

ON THE OCCASION

OF

THE SWEARING-IN

OF

THE HONOURABLE MICHAEL DONALD KIRBY AC CMG

AS

A JUSTICE OF THE HIGH COURT OF AUSTRALIA

AT

CANBERRA

ON

TUESDAY, 6 FEBRUARY, 1996, AT 10.17 AM

Coram:

BRENNAN CJ
DAWSON J
TOOHEY J
GAUDRON J
McHUGH J
GUMMOW J

In addition to the members of the Court the following dignitaries were present on the Bench:

The Honourable Sir William Deane, AC, KBE, former Justice of the Court

The Honourable Sir Anthony Mason, AC, KBE, immediate past Chief Justice of the Court

The Rt Honourable Sir Harry Gibbs, GCMG, AC, KBE, former Chief Justice of the Court

Seated behind the Bench were the following dignitaries:

The Rt Honourable Sir Robin Cooke, KBE

The Honourable Sir John Muria, Chief Justice of the Solomon Islands

The Honourable M.E.J. Black, Chief Justice of the Federal Court of Australia

The Honourable A. Nicholson, AO, RFD, Chief Justice of the Family Court of Australia

The Honourable M. Wilcox, Chief Justice of the Industrial Relations Court of Australia

The Honourable D.K. Malcolm, AC, Chief Justice of the Supreme Court of Western Australia

The Honourable A.M. Gleeson, AC, Chief Justice of the Supreme Court of New South Wales

The Honourable J.H. Phillips, Chief Justice of the Supreme Court of Victoria

The Honourable J.J. Doyle, Chief Justice of the Supreme Court of South Australia

The Honourable J.A. Miles, AO, Chief Justice of the Supreme Court of the Australian Capital Territory

At the Bar Table the following persons were present:

Mr M. Phelps, President of the Law Council of Australia

Mr D.J.M. Bennett, QC, President of the Australian Bar Association and of the New South Wales Bar Association

The Honourable J.W. Shaw, QC, Attorney-General for New South Wales

Mr G. Humphries MLA, Attorney-General for the Australian Capital Territory

Mr M.L. Abbott, President of the South Australian Bar Association
Mr W. Sofronoff, QC, President of the Queensland Bar Association
Mr C. Pullin, QC, President of the Western Australia Bar Association
Mr N. Young, QC, representing the Victorian Bar Association
Mr G. Richardson, SC, President of the Australian Capital Territory
Bar Association
The Honourable M. Lavarch, MP, Attorney-General for the
Commonwealth of Australia
Dr G. Griffith, AO, QC, Solicitor-General for the Commonwealth
Mr K. Mason, QC, Solicitor-General for New South Wales
Mr T. Pauling, QC, Solicitor-General for the Northern Territory
Mr P.A. Keane, QC, Solicitor-General for Queensland
Mr D. Graham, QC, Solicitor-General for Victoria
Mr R. Meadows, Solicitor-General for Western Australia
Mr B. Selway, QC, Solicitor-General for South Australia
Mr H. Berkeley, QC
Mr A.R. Castan, QC
Mr J.W. Greenwood, QC
Mr J. Glissan, QC
Mr D. Kirby, QC

Judiciary seated within the Court:

The Honourable Justice M. Einfeld

The Honourable Mr Justice P. Finn

The Honourable Justice R. Madgwick

The Honourable Mr Justice G.E. Fitzgerald, AC, President, Court of Appeal, Queensland

The Honourable Justice D.L. Mahoney, AO,

The Honourable Justice M.J. R. Clarke

The Honourable R.P. Meagher

The Honourable C.S.C. Sheller

The Honourable T.R.H. Cole, RFD

The Honourable Justice P. Cummins

The Honourable Mr Justice J.F. Gallop

The Honourable Mr Justice T. Higgins

The Honourable Justice W.K. Fisher, AO, Chief Judge, Industrial Court of New South Wales

The Honourable Justice R.O. Blanch, Chief Judge, District Court of New South Wales

The Honourable Judge P. Bell

The Honourable Judge J. Moore

The Honourable Justice M. Campbell, Chief Judge of the Compensation Court of New South Wales

His Honour Judge R. Burke

The Honourable Justice D. O'Connor, President of the Australian Industrial Relations Commission

The Honourable Justice J. Mathews, President of the Administrative Appeals Tribunal

The Honourable Mr Justice J.R. Dowd, AO, Chairman of the International Commission of Jurists

The following Queen's Counsel and Senior Counsel were present in the body of the Court:

Mr D. Jackson, QC

Mr M. Rozenes, QC, Commonwealth Director of Public Prosecutions

Mr J.A. McCarthy, QC

Mr D. Cowdroy, OAM, QC,

Mr G.J. Gibson, QC

Mr H.B. Fraser, QC

Mr S. Rares, SC

Mr D.J. McGill, SC

Mrs A. Bennett, SC

Ms C.A. Wheeler, QC

Mr F.J. Purnell, SC

Mr J. Agius, SC

Mr P. Byrne, SC

Mr N. Lyall, Law Society of New South Wales

Mr T. Abbott, Law Society of South Australia

Ms A. Trimmer, ACT Law Society

Mr L. Katz, SC

Mr S. Rothman AO, SC

Mr A. Meagher, SC
Mr A. Robertson, SC
Mr R. Keleman, SC
Mr S. Doyle, SC
Mr J. Bingeman, QC
Mr A. Adams, QC
Mr P. Coghlan, QC
Mr A. Molesworth, SC
Mr P. Vickery, QC

Speakers:

The Honourable M. Lavarch, MP, Attorney-General for the
Commonwealth

Mr M. Phelps, President of the Law Council of Australia

Mr D.J.M. Bennett, QC, President of the Australian Bar Association
and of the New South Wales Bar Association

TRANSCRIPT OF PROCEEDINGS

KIRBY J: Chief Justice, I have the honour to announce that I have received a commission from His Excellency, the Governor-General of Australia, appointing me a Justice of the High Court of Australia. I present my commission.

BRENNAN CJ: Mr Principal Registrar, I ask you to read the commission.

PRINCIPAL REGISTRAR:

Commission of Appointment of a Justice of the High Court of Australia

I, WILLIAM GEORGE HAYDEN, Companion of the Order of Australia and Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council and under section 72 of the Constitution, hereby appoint the Honourable MICHAEL DONALD KIRBY, a Companion of the Order of Australia, Companion of the Order of St Michael and St George, President of the Court of Appeal of New South Wales, to be a Justice of the High Court of Australia for the term commencing on 6 February 1996 and expiring on his attaining the age of 70 years.

Signed and sealed with the Great Seal of Australia on 20 December 1995. Bill Hayden, Governor-General, by His Excellency's command, Michael Lavarch, Attorney-General.

BRENNAN CJ: Your Honour Justice Kirby, I invite you to take the Oath of Allegiance and of Office.

KIRBY J: I, Michael Donald Kirby, do swear that I will bear true allegiance to Her Majesty, Queen Elizabeth the Second, Her Heirs and Successors, accordingly to law, that I will well and truly serve Her in the Office of Justice of the High Court of Australia and that I will do right to all manner of people, according to law, without fear or favour, affection or ill-will. So Help Me God.

BRENNAN CJ: Thank you. I ask you to subscribe that oath. Mr Principal Registrar, please record that in the records of the Court.

PRINCIPAL REGISTRAR: Yes, your Honour.

BRENNAN CJ: Your Honour Justice Kirby, having taken the oath of allegiance and of office, I congratulate you on your appointment as a Justice of the High Court of Australia and I invite you now to proceed to the discharge of your office.

KIRBY J: Thank you, Chief Justice.

BRENNAN CJ: Mr Attorney-General for the Commonwealth.

MR LAVARCH: May it please the Court. It is my very pleasant duty and great privilege to welcome your Honour to the Bench of the High Court of Australia. I suppose it is a pleasant duty on two accounts. Firstly, and most importantly, it enables me to extend to your Honour the congratulations of not only the Government of the Commonwealth but also the people of this country. Secondly, it allows me a very brief respite from the cut and thrust of the election campaign.

This ceremonial sitting, I suppose it should be noted, occurs at a time of renewal in the Australian community. The appointment of a Judge to the High Court, of course, is an important process of renewal of one of the great institutions of this country; of course, also, the decision of the Australian people in electing a new Parliament and from that a new Executive. There is also, as our Constitution prescribes, part of the renewal of the broader government of this country.

The decision of both the people in an election period and of a Justice of this Court puts great demands. It asks both the Justice and the people to make serious decisions about ciphering the differences between the profound and the transitory, between merely a fashion and more enduring values. I suppose if we look back over our history now as a nation I think far more often than not both the Court and the people have got those decisions right.

I do not know if it is particularly appreciated by the general community what a great demand we place on Justices of the High Court. The sheer physical and mental effort of hearing and determining each year some 60 or 70 cases, cases of the utmost complexity, is of itself a very large ask of the Justices of this Court.

In determining these cases, Justices of the Court are often required not merely to identify and apply the law; of course they evolve the law. In doing so, we expect them to reject the arbitrary and

the fanciful and to proceed instead from what Sir Owen Dixon termed the "deeper, more ordered and ... more enduring conceptions of justice".

This is, I think, probably the most daunting of all the Court's responsibility. Key amongst the relationships which the Court must determine is that between the government and the citizen. In this respect, the Court has recently shown a preparedness to identify individual rights and guarantees from the political conceptions that underlie the Constitution.

One only has to look at the matters currently before the Court to see how many additional avenues for constitutional litigation have been opened as a consequence. This new emphasis on the relationship between government and the individual reflects certain basic legal and political changes which have occurred in Australia, and internationally, in the post-war period. In particular, the severing of our legal ties with Britain led inevitably to the conclusion that sovereignty in our nation rests with the Australian people. This recognition of popular sovereignty leads to a reconsideration of the fundamental rights of people in relation to their government. The Court's identification of individual rights and guarantees has raised the Court's public profile and increased debate of its constitutional role. It has presented the Court with the new challenge of applying and adapting the judicial method to the recognition and enforcement of individual rights.

All of this was to be expected, for as Sir Owen Dixon once noted:

"The very purpose as well as the nature of constitutional checks and guarantees makes it inevitable that they will not be capable of the objective treatment characteristic of the administration by courts of private law."

I know I have said nothing that will in any way dampen your Honour's enthusiasm for his appointment. Indeed, I suspect talk of hard work and intellectual challenge has merely reinforced that enthusiasm. In any event, after many years as President of the New South Wales Court of Appeal, your Honour is well aware of the demands of judicial office.

Extensive experience as an appellate judge is only one of the many attributes which your Honour brings to the Bench. You will

forgive me if I do not list in great detail all your Honour's experience and background because if I attempted to, and to do it justice, it probably would be one of the longer addresses that your Honour would hear on this Court.

But it is, I think, suffice to say that your Honour, through not only your direct work as a Judge in New South Wales, through your work as a law reformer, as one of the great legal writers of this country, and as an Australian who has rightly earned an international reputation for your stand on human rights, that in many ways I think even a quick overview of your career shows that appointment to this Court was quite inevitable.

There is also your Honour's almost legendary ability to speak on a prodigious range of subjects. The capacity to hold forth on any matter is, of course, common enough. I have heard a number of my colleagues in the House of Representatives who believe that they have that same ability. But being able to discuss a range of topics with insight and clarity, to illuminate each of them in a way which fosters understanding and informed debate - that is a rare talent and is a talent which your Honour enjoys.

One particular area of interest which has occupied your Honour is that of international law. In view of the increased attention which this Court is paying to international developments, including the international community's protection of human rights, your Honour's appointment to the Bench is particular timely.

Your interest in international law is not merely an intellectual or an academic one. Your Honour has displayed a deep concern for fundamental rights and values. Prominent among these has been your Honour's staunch and consistent defence of judicial independence.

Your concern for human rights, which received public recognition in 1991 with the conferral of the Australian Human Rights Medal, has seen your Honour take up a number of important appointments including the Special Representative of the Secretary-General of the United Nations on Human Rights for Cambodia and President of the International Commission of Jurists. These appointments give some indication of the richness and the variety of your Honour's public life. The many appointments you have held, the many pursuits you have followed, have given you a deep appreciation of the law as an involving and shaping force of society and this

appreciation has complemented your profound knowledge of the judicial function.

It is for all of these reasons we welcome your appointment to the Court and look forward to the significant role that you will doubtless play in further developing Australia's law.

Before I finish, it would be remiss of me not to note the attendance of Sir William Deane at today's sitting. I have not had the opportunity to publicly thank Sir William on behalf of the Government and the people of Australia for his contribution to the work of this Court over the past 13 years. I do so now and I extend to Sir William my very best wishes for his new appointment. May it please the Court.

BRENNAN CJ: Thank you, Mr Attorney. Mr Phelps, President of the Law Council of Australia.

MR PHELPS: May it please the Court. Your Honours, it is a great pleasure for me, on behalf of the Law Council and the lawyers of Australia, to welcome your Honour to this Court.

The Attorney has spoken this morning of your Honour's outstanding career in the law which led to your appointment, the announcement of which was enthusiastically welcomed and embraced by the whole of the legal profession. That is not to say that the announcement in December last was not preceded by considerable speculation about the most likely candidate to be appointed to the vacancy on the Court. That interest was compounded by the appointment of your brother Judge, Justice Gummow earlier in the same year. Might I say that the speculation which existed within the profession was more than matched by that which appeared in the media and in the broader community. I must say that, the sporting pages aside, I can think of no other issue apart perhaps from the outcome of federal elections every three years or so, which attracts and excites such media interest.

However, you would have to acknowledge that at present the public's interest in the former is somewhat greater as I am sure the Attorney hardly needs to be reminded.

Nonetheless, leading up to the announcement in December of your Honour's appointment to the Court, odds were being offered by our friends in the media on their self-styled short listed candidates in

line for appointment. Your Honour featured prominently. It is not surprising given what may be described in colloquial and popular terms as a distinguished track record over a number of years, combined with excellent current form.

Your Honour's great legal intellect, your legendary capacity for hard work and your generosity of spirit are compelling attributes giving rise to an unquestionable qualification for appointment to this Court. Those outstanding characteristics have always been evident in a career which has spanned all facets of the profession - a solicitor, a barrister, law reformer, judge and international jurist.

The highlights of that career are well known to most within the legal profession and perhaps, more importantly, to a broad cross section of the Australian community. Indeed, such has been your Honour's public profile over many years, there is I suggest not a great deal about you to share with the Court on an occasion such as this, which is not already known to the people of Australia.

Nevertheless, and notwithstanding such a high profile, the scrutiny by the media following the announcement of your appointment reached a new level of intensity. I was bemused, although not surprised, to notice that in virtually every article written about your Honour a simplistic label or a catchy phrase was sought to conveniently condense your career and upon which was based an opinion as to the vision or influence you might bring to the Court. If the media are to be believed you are, at once, "a well-known centralist", "generally strong liberal", "a parliamentary supremacist", "a conservative", "adventurous" and "God's stirrer". Such gratuitous labelling is not particularly accurate, informative, helpful or indeed relevant. In fact, we have come to learn that it is as equally idle to speculate on those matters as it is on the identity of any prospective appointment to the Court.

Certainly, any analysis and tribute to your Honour's career to date would have to acknowledge the role you have played in the field of law reform. We are indebted to you for your untiring work with the Australian Law Reform Commission and for your ongoing interest in seeing that laws remain a tool and resource of the people. Your commitment to ensuring that those who reform the laws communicate with those who live by them, was the hallmark of your term with the Commission.

I am reminded of a recent article in which your Honour is quoted as saying,

"The law is not a mystery to be enjoyed by lawyers behind closed doors. The law belongs to the people and, if we are to reform the law and consult the people about it, we must communicate with them. If that involves appearing on television between the soap powder ads, so be it."

Granted that the Court in recent years has become far more proactive in the media role, with respect, your Honour, that particular proposal would represent a quantum leap for the Court.

Nevertheless, the sentiment is one which, I suggest, we could all take to heart and typifies the approach to the relevance of the law and the legal system in our society. We would hope and expect that, whilst you may not be at liberty to be quite so expressive in your new role, you will continue to pursue the issues which you confront with a like attitude and commitment.

It is the case that your Honour's personal opinions on all manner of subjects are well known, largely as a result of your enthusiastic willingness to speak about and discuss topical issues publicly and with frankness. Your capacity to express your views with candour, reason and, on many occasions, a great deal of passion, has measurably raised the standard of public debate in this country on a wide variety of matters.

Your Honour's willingness to air opinions and viewpoints should not, however, be seen as something that will in any way diminish your renowned capacity to reach judgments by exclusive reference to the principles of law. The community can have the greatest confidence in the detachment and wisdom of your judgments.

Might I say that the Law Council itself has been a fortunate beneficiary of your Honour's generosity on many occasions for which we are grateful. You have been an enthusiastic and strong supporter of our organisation and the Bar Associations and Law Societies which it represents.

The Australian Advocacy Institute, which was established by the Law Council, has also had your strong support, and for that support and encouragement and other endeavours, the Law Council expresses its gratitude and we would hope that the relationship with

the Law Council will be enhanced rather than diminished in your new position.

Just as the Australian legal profession welcomes you to this high office, your appointment has been acclaimed by the international legal community, to which you have given so generously your time, your skills and your commitment. As we have heard, your recent election to the position of President of the International Commission of Jurists, one of the world's oldest and proudest human rights institutions, is but one example of your commitment to the promotion of the rule of law and due recognition for your ongoing efforts in the defence of human rights throughout the world.

As an indication of the recognition of your achievements by the international legal community, I received yesterday a request from our good friend Dato' Param Kumaraswamy, the immediate Past President of Lawasia and currently a Special Rapporteur on the Independence of Judges and Lawyers with the United Nations, and Param asked me to convey to your Honour his good wishes. If I may, with the leave of the Court, read from the text of his message:

Your Honour's international appointments all stand testimony to your commitment to the rule of law as the basis for good government. Your untiring and effective contributions to these institutions enriched them considerably.

The High Court of Australia has today emerged as one of the most independent courts in the World. It has all the trappings to lead and influence the development of the law in the Asia and Pacific region not only politically but in the economic, social and cultural areas too.

In congratulating you today I am sure all the Special Rapporteurs, Special Representatives and Experts of the U.N. Centre for Human Rights will join me in wishing you well in this new appointment.

We look forward to your continued support, guidance and assistance to the work of the Centre in the promotion, protection and defence of human rights and the independence of judges and lawyers.

Such comments confirm your Honour's standing as one of the legal profession's finest ambassadors and we have no doubt that you

will continue your service to the community through your new office with your trademark dedication to principle, with courtesy and with considerable compassion.

Your Honour, I am particularly pleased to be able to convey to you the very warm wishes of the Law Council for a long, personally satisfying and an ongoing distinguished professional life as it takes on a new, heightened and exciting dimension. If the Court pleases.

BRENNAN CJ: Thank you, Mr Phelps. Mr Bennett, President of the Australian Bar Association and of the New South Wales Bar Association.

MR BENNETT: May it please the Court. As in the case of all appointments to this Court, your Honour's appointment was preceded by the considerable speculation referred to by Mr Phelps. The speculation followed the usual lines - what characteristics of a High Court Judge would most satisfy the largest number of perceived pressure groups? Whose previously expressed views would most accord with those of Government? What is significant is that the Government had the strength to ignore these irrelevant factors and appoint the best person for the position.

It cannot be said too loudly or too often that it would be a sad day for this Court if persons were appointed to it because of their state of origin or any other perceived balancing characteristic. Perhaps more importantly, it would be a sadder day if we were ever to follow the United States practice of holding public legislative hearings to explore the candidate's views on abortion, law and order and states rights. An Australian government made that mistake in 1913 when it sounded out the judicial politics of Mr Justice Piddington with the result that his Honour resigned before being sworn-in. That mistake must never be repeated.

The fact is that if one looks at the seven members of this Court it would require considerable imagination to isolate any common perceived predilection to any particular judicial policy. Joint judgments of the Full Court are rare. Nothing could indicate more clearly that successive governments have rejected the erroneous approach. They have applied no criterion other than the one criterion which should be and is the sole criterion for appointment to this court - individual excellence.

The Australian Bars are not slow to criticise government when it is appropriate to do so. The corollary of that is that they must also be quick to praise where praise is due. In relation to the policy which has thus far been applied in relation to appointments to this Court, and in particular in relation to the government's appointment of your Honour today, that praise is readily given.

I have described your Honour's appointment as one of excellence. Let me, although it is probably unnecessary to do so, make good that proposition.

When your Honour was appointed as President of the Court of Appeal, your Honour was relatively unknown to much of the profession. With Justice Gaudron, you had been a Deputy President of the Australian Conciliation and Arbitration Commission, a body few of us were privileged to appear before. You had subsequently been a Law Reform Commissioner. You had also been a student politician. On that occasion the court room was comparatively empty. Last week, your Honour retired after nearly 12 years as President of the Court of Appeal. Rarely before has the Banco Court been so crowded - that huge auditorium had standing room only. Never before have all 44 judges of that court attended a swearing in or swearing out of a judge. Never before has there been a ceremony at which so many craved the opportunity to farewell and honour the achievements of a great judge.

Your Honour's entry in Who's Who is one of the longer entries in that volume. Although I speak today with two hats - the Australian Bar Association and your home Bar, the Bar Association of New South Wales, and am therefore entitled to twice the time of the other speakers before the orange light casts its dread warning - even that time would be insufficient to catalogue your Honour's achievements. I will mention but a few. Your Honour is President of the most significant human rights body in the world, the International Commission of Jurists, perhaps one small step for your Honour but a giant leap for all Australians. Your Honour has been deeply involved in combating prejudice and discrimination of all kinds. Your Honour has been in the forefront of modern thinking on bio-ethics and morality. Indeed there are few areas about which your Honour has not publicly expressed oral and written views which are always thoughtful, balanced and presented with elegant simplicity. Since your Honour's time on the Law Reform Commission, you have successfully brought law and legal policy problems to the people and you have continued to follow this course as a judge. At international

conferences your Honour's skill as a rapporteur is unrivalled. People who attend such conferences and listen to your Honour's summations often wonder if your Honour is summarising the same debate they have just listened to, but they know that every point of view is represented and that your Honour has summarised the problem with your usual skill. This is something which the Chief Justice may well find useful when the Court reserves its decisions.

Your Honour travels many times a year but, unlike many of us for whom travel is an attractive perquisite, your Honour travels in sections of aeroplanes other than the front to places most Australians would fear to visit. Your Honour has been in the forefront of the movement to protect the rights of AIDS sufferers and for that purpose has attended conferences in some of the less pleasant cities of Central Africa. Your Honour has been in the forefront of the education of judges and legal practitioners and for that purpose has visited Cambodia as a special representative of the Secretary-General of the United Nations on a number of occasions, that being a place where your Honour requires the protection of tanks and armoured personnel carriers for transportation but risk to your Honour's life is no deterrent to the pursuit of a worthy cause. Apart from Justice Einfeld, no other judge in Australia has chosen to work under such conditions for so long for causes devoutly believed in.

On the Bench, your Honour has educated us and caused us all to revise our approach to legal research in three principal ways. First, we look to different judicial sources. To some of us, it comes as a shock on the first occasion to be asked why one is citing foreign authority when one reads from a speech in the House of Lords. That shock develops into incredulity when your Honour gently reminds the advocate of directly relevant authority in Upper Pradesh, Cyprus or the Turks and Caicos Islands. It is interesting to note that a high proportion of the few Australian cases reported in the Law Reports of the Commonwealth (which the cognoscenti no longer confuse with the Commonwealth Law Reports) are decisions of your Honour. The universality and breadth of your Honour's approach to law will be of great benefit to this Court.

Secondly, your Honour has taught us to look beyond black letter law to considerations of policy. This is not to say that your Honour seeks in any way to administer some sort of palm tree justice in specific cases rather than to decide them according to law. What it does mean is that, where law is being developed and where, for one of the reasons adumbrated by Professor Stone in his categories

of indeterminate reference, there is a genuine and proper judicial choice about the direction of that development, your Honour wishes to appreciate the policy considerations before making a decision, and counsel is expected to identify and discuss those factors. Your Honour's pioneering efforts in this area will be of even greater significance in this Court.

Thirdly, your Honour has encouraged advocates to cite academic writings without the quaint and incomprehensible limitation we were taught at law schools that only a dead writer could be cited. The days of the Dead Lawyers Society have passed largely because of your efforts.

Your Honour's concern for the Bar and its traditions have endeared you to us. It is customary when new silks take their bows for the presiding judge to address some helpful and congratulatory remarks to them. This is not enough for your Honour. When new silks take their bows before your Honour in New South Wales, your Honour prepares a few well chosen words about each, personal to that silk, and you confer on each an individual photo opportunity. You thus make the occasion more moving and significant for the new silks and their families. I know of no other judge who has this practice. It is an example of your Honour's concern for others and a willingness to take great trouble to make others happier and more fulfilled.

In your Honour's 11 years on the Court of Appeal, you have proved to be one of Australia's greatest and most humane judges. We eagerly look forward to the development of your Honour's career on a court where you will have far greater scope for continued manifestations of excellence. The Bars of Australia and New South Wales congratulate you on your appointment, congratulate the Government for appointing you and congratulate the Court on its newest acquisition. May it please the Court.

BRENNAN CJ: Thank you, Mr Bennett.

KIRBY J: Your Honour the Chief Justice of Australia, your Honours, your Excellencies, your Lordships, Mr Attorney, Mr Phelps, Mr Bennett, dear friends, ladies and gentlemen.

Thank you very much for all the flattering remarks which have been uttered on this occasion. They would probably be sufficient to persuade a judicial novice that a saintly life in the law had been

rewarded, justly, with an ascent into the judicial heaven. Alas, I am no novice. In fact, as you have heard, I have served in judicial positions of various kinds for more than twenty-one years. In this courtroom today, only Sir Robin Cooke and Justice Dennis Mahoney have longer continuous service.

Today, in fact, is the tenth time that I have taken the Judicial Oath. I have attended many, many ceremonies such as this. These are the jubilees of the legal profession, marking its continuity and change. I have heard many speeches of praise, welcome and farewell of varying degrees of enthusiasm. By that I mean, in the case of farewells, enthusiasm for the Judge, not for his going. Out of delicacy, the latter would, at least normally, be subtly disguised.

It is a sobering thought that virtually none of these utterances can be remembered once the ceremony is over. Portentous words of the newly sworn judge, or a departing judicial tyro, hang in the air and then evaporate and are gone. So it will be with my words today.

Very occasionally, wise counsel is given. Chief Justice Gleeson, who does me the honour of being here today, at his welcome took as his theme the last words of the great philosopher Voltaire. A priest, approaching Voltaire with a candle heard him exclaim "Not the flames already". And when the priest enjoined the dying man to repent his sins and renounce the devil, Voltaire declared: "This is no time to be making enemies". That is a good injunction for a newly appointed judge. But I fear it comes too late for me. It would be of interest to know if it has always been observed by the sweet-natured Justices of this Court. Certainly, once appointed, they have always disguised any flaws of impatience in their character.

I am the fortieth Justice in the history of the High Court of Australia. Forty in almost a century of the Court's existence is not very many. Fortunate is the Court, and lucky is Australia, that those who have served earned for this Court a global reputation for integrity, independence and erudition. I know from my journeys to the corners of the world how high this Court stands in reputation and honour. To the qualities for which it has long been famous have lately been added an accolade of great wisdom and a willingness in the words of Oogeroo of the Nunuccal to fashion "a juster justice...grown wise and stronger". I will not be able to say these words of praise after today. I only say them now because you will understand the trepidation and anxiety which any Australian lawyer would feel on being inducted to walk in the footsteps of Griffith, Isaacs, Evatt, Dixon, Kitto, the great

and recent company who provide the intellectual and reputational capital of this Court.

I am specially grateful that their Excellencies the Governor-General and Mrs Hayden, as one of their last acts of faithful service to our country, have attended this ceremony today. And that Sir Harry Gibbs, Sir Anthony Mason and Sir William Deane (shortly to take up his new responsibilities) have come to the Court with us. What a privilege it is for me to sit, even momentarily, on the same Bench with them. I have also received the warmest messages from other past Justices and from all my present colleagues and from court officers. I thank them from the bottom of my heart. They have stilled some of my apprehensions.

I am particularly appreciative of the presence of so many Chief Justices and Judges of Federal Courts and of courts of the Australian States and Territories. Sir Robin Cooke, soon to receive from the Queen the rare honour of Barony, does me and this Court a great compliment by joining us on the Bench to represent the Chief Justice and judiciary of New Zealand. Sir John Muria, Chief Justice of Solomon Islands, also honours us by his presence. These most distinguished jurists signal vividly, by their presence today, the belated but growing recognition of the need to fashion the common law of Australia in a way that is attentive to the legal systems of our common law neighbours in the Pacific, the India Ocean and near Asia. No longer an historical anachronism or settler, or purely European society, Australia and its legal system are now coming to terms with the challenges and opportunities of our geography and of our regional destiny.

Two weeks ago I sat in Honiara, Solomon Islands, with Sir John Muria and with Sir Mari Kapi, Deputy Chief Justice of Papua New Guinea, in the Court of Appeal of Solomon Islands. Attending a service in the Cathedral of Saint Barnabas, I saw the way in which the people of Solomon Islands have fervently embraced the religion of the missionaries and made it their own. So they, and we, must do with the common law. By chance, the service included the anointing of two deacons. It followed a form not very dissimilar to a judicial welcome such as this. The only difference was that the deacons, before their confirmation, were presented to the people for the people's acceptance. It is, perhaps, as well that we do not trouble you with such a question in ceremonies of this kind. The results could occasionally be awkward.

As we assemble today and as you, Mr Attorney, have said, Australia is in the midst of a federal election to choose the next national Parliament. Peacefully and resolutely, as our Constitution envisages, millions of our fellow citizens will go in a month's time, to schools and local church halls across this continent to cast their ballot and thereby to render the federal Parliament and government accountable to the people of this nation. We should cherish most dearly this feature of our national life. It is far from universal, as my work for the United Nations has often shown me. It is natural that in an election, political candidates should make policy speeches and vie for popular support. Judges too need the support of the people and their understanding. But a quest for personal popularity or a set of specific promises by a new judge would be completely inconsistent with our notion of an independent judiciary deciding cases on their legal merits as argued in open court. Our only promise is the promise of the judicial oath.

Perhaps the sole speech of this kind which is known to every Australian lawyer is that of Sir Owen Dixon at his swearing-in as Chief Justice. It was then, in that little courtroom in Darlinghurst, in Sydney, where, 20 years ago I saw Lionel Murphy sworn, that Chief Justice Dixon uttered his well-known words:

There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

Since that April day in 1952 much has changed. The world, our country and its law have changed. Technology has put our species into Space. Scientists have unravelled the double helix of DNA. Information technology has revolutionised our planet and now reaches even towards simple artificial intelligence. But the abiding judicial duties of neutrality, integrity and the provision of persuasive reasoning remain as strong today as they were in Sir Owen Dixon's time. The termination of Privy Council appeals has finally released Australian law from accountability to the judicial values of England which lasted so long. The slow realisation of this fact, and of its implications, in a profession which is often resistant to change, presents to this, as to other Australian courts and courts of the region, challenges which are both exciting and sometimes very difficult.

There will be no returning to the social values of 1952, still less those of 1903 when this Court was established. It falls to each generation of Australian lawyers, led by this Court, to fashion new principles of the Constitution, of common law, and of equity, which

will contribute wisely to the good governance of the Australian people. There is now a greater public understanding of the limited, but still very real, scope for judicial creativity and legal development. Judges are now more candid about this aspect of their function. Without a measure of creativity how else would the common law have survived seven centuries, from feudalism to the space-age? How else would it have endured in so many different lands after the sun set on the British Empire?

In any case, the "good old days" were not always so good in the law in Australia, including in the common law. They were not so good if you happened to be an Australian Aboriginal. Or indeed, a woman. Or an Asian confronted by the White Australia policy. Or a homosexual Australian. A conscientious objector. A person with heterodox political views. A homeless person. A publisher of the mildly erotic. A complainant against official oppression. A person struggling in litigation with an imperfect understanding of the English language. For these Australians, judicial words on occasions such as this seemed boastful and empty.

But we in Australia have now taken a confident turn in our legal journey towards enlightenment and justice for all under the law. Yet the lesson of the present enlightenment must be that there are other injustices to which we are still impervious, or indifferent or which we do not yet see clearly. We need to defend our legal institutions and to adhere to time-honoured legal principles. Not blindly. And not mechanically. But with eyes, minds and hearts always open to the call of justice. Only the quest for justice gives the profession of the law its claim to nobility.

I pay my tribute publicly to my parents, now in their 80th year. By God's grace, they are with me to witness this occasion. To my family and loved ones who sustain me and criticise me every day. Everyone, without exception, needs such human support and loving correction. To the political leaders, of different parties, some present today, who have given me opportunities to serve the people who are the ultimate source of authority in our Commonwealth. To my teachers, including those in the Law Reform Commission and universities and long ago when I started as an articled clerk who instructed me to conceptualise the law and to see the unity of its great mosaic. To my judicial colleagues of the past, particularly in the New South Wales Court of Appeal. There, for more than a decade, I have enjoyed intellectual stimulus, professional comradeship and personal friendship. It has been a rare preparation for the office I now enter

upon. To my staff and associates and bodies that I have served on. To the members of the legal profession who sustain and support the judges. To the many community and legal groups with which I have been associated. And to the many personal friends, to all, I say my thanks.

It has been a long journey to this moment. Sometimes, in late years, as I visited Canberra, I would steal a look across the lake at this building. So close, so far away. I confess that I would then sometimes think of what might have been. Now, what might have been, is. May I prove worthy of the great spirits of the law who have gone before. Of you present who offer me support, love and friendship. And of the people of Australia and our country's challenging future which beckons us all into the new millennium - a millennium of justice for all Australians, without discrimination, under the rule of law.

BRENNAN CJ: The Court will now adjourn until 3 pm.

AT 11.03 AM THE COURT ADJOURNED