LAW AT CENTURY'S END - A MILLENNIAL VIEW FROM THE HIGH COURT OF AUSTRALIA

THE HON JUSTICE MICHAEL KIRBY AC CMG*

IN THE BEGINNING

When I sit in the No 1 courtroom in Canberra, it is impossible to escape the presence of the three original Justices of the High Court - Chief Justice Griffith, Justice Barton and Justice O'Connor. Their large portraits are the only ones which hang in that room. Their presence is palpable. They remind the present Justices, and all who come into the room, of the continuity of the law and of the Court.

The portrait of Griffith, copied by Sir William Dargie from the original which hangs in the Supreme Court of Queensland (where he had also been Chief Justice), makes him appear somewhat lifeless, formal, remote. Barton with his cigar looks what he was - an urbane, comfortable, efficient lawyer who helped hammer the Australian federation together and became its first Prime Minister. O'Connor has a sensitive Irish face which belies the austere robes and tricorn in which he presents himself.

In moments of reverie, I ask myself what they would say to us if they could come back and witness the product of their handiwork a century later? What would they feel about the role of the Court which they helped to establish? Would a week in our chairs seem very different from the same interval in October 1903 when they first assumed office? As the world approaches a new millennium, the Federation its centenary and the Court the celebrations of its first hundred years, it is natural to look back in this way; and to look forward.

To attempt an answer to my questions, I opened the first volume of the authorised decisions of the Court - the *Commonwealth Law Reports*. It provides an interesting insight not only into the work of the Court in 1903-1904 but also into Australian society at that time and its legal and social problems.

The first reported decision, *Dalgarno v Hannah*[1] records a motion to rescind an order granting special leave to appeal which had been made before the passage of the *Judiciary Act* 1903 (Cth). The record of the facts tells of a jury verdict for £200 damages in an action brought by a telephone worker against a nominal defendant in the Supreme Court of New South Wales. The report comments that the decision of the Full Court of the Supreme Court of New South Wales refusing to intervene in the verdict was obscure: it not clearly appearing whether the judgment of the Court was based upon the maxim *res ipsa loquitur*, or whether there had been additional evidence of negligence.[2] A comment on the second page caught my eye. The Court had just heard an appeal which raised a question whether the doctrine of *res ipsa loquitur* should be banished from our law precisely because of the uncertainties to which it was said to give rise.[3] Some problems just keep coming back to revisit us.

Dalgarno and several other cases in the first volume explore the grounds upon which special leave to appeal would be granted by a court where the applicant cannot come as of right. In 1903 appeals as of right lay where the judgment under consideration concerned a matter in issue amounting to the value of £300 or where it affected the status of a person.[4]

The first volume contains a report of a Privy Council decision in an Australian appeal refusing special leave to appeal from early orders of the High Court of Australia. In *Daily Telegraph Newspaper Co*

---

* Justice of the High Court of Australia. The text of the article is based an address for the Monash University Law School Foundation, Melbourne, 22 November 1999.

1 (1903) 1 CLR 1.

2 Ibid 2.

3 *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 170 ALR 594. Cf *Fontaine v Loewen Estate* (1998) 156 DLR (4th) 577, 585.

4 *Judiciary Act* 1903 (Cth) s 35(1)(a).

McLaughlin[5] the record shows that their Lordships declined to intervene on the basis that the was 'unattended with sufficient doubt' to justify that course.[6] I always wondered where that came from. When, in the Court of Appeal, I would sometimes see my decisions upheld by the Court, by the use of that formula, I sometimes felt a little hurt. Did it mean that there was 'doubt' the correctness of my reasons; but not enough of it to warrant the grant of leave? Was it perhaps e way to say to an applicant, who had spent a great deal of money to seek special leave, that was actually an awful lot of doubt but that the High Court was too busy to resolve it? It was a adopted by the Privy Council and quickly accepted by the High Court itself.[7] It must be le to formulate reasons for the refusal of special leave which are less Delphic.

using leave in the *Daily Telegraph Case*, the Privy Council emphasised the importance of the Australian court:[8]

> The High Court occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it as of right to any tribunal in the empire. That can be no appeal at all unless His Majesty, by virtue of his Royal prerogative, thinks fit to grant special leave to appeal to himself in Council. In certain cases touching the constitution of the Commonwealth the Royal prerogative has been waived. In all other cases it seems to their Lordships that applications for special leave to appeal from the High Court ought to be treated in the same manner as applications for special leave to appeal from the Supreme Court of Canada, an equally august and independent tribunal.

irst volume of the reports also include, as might be expected, early cases concerning the new l Constitution. Two cases involved attempts by the States to impose burdens on federal loyees: *D'Emden v Pedder*[9] and *Deakin v Webb*.[10] Also in the first volume was the first case rning the meaning of that elliptical phrase 'duty of excise' appearing in s 90 of the ution.[11] That expression has since filled many a page of the reports. One cannot be sure that majority opinion in *Ha v New South Wales*[12] means that it will never return.

the start, cases involving federal legislation were important for the work of the High Court. e were many cases concerned with electoral returns, including no fewer than three in the *Chanter ckwood*[13] litigation which concerned the 1903 federal election for the House of Representatives of Riverina. At the beginning of the century, there was much controversy concerning the meaning ks and crosses on ballot papers. At the end of the century (in a vote on a referendum probably aginable in 1903) republicans and monarchists were fighting over ticks and crosses and their ing in the ballot of 6 November 1999 concerning the proposal to change the Commonwealth to a ublic.[14]

e were several cases on the customs power in 1904, that being at the time the major source of nue for the new Commonwealth. The conciliation and arbitration power was already beginning to r the attention that has preoccupied the Court to the present time. Other statutes were also part of staple diet of the Court from the beginning. There were two cases on State laws affecting lunatics; case involving a State law for the compulsory acquisition of land; and another concerning that lar visitor to the Court over a century: the indefeasibility of Torrens title.

ype of society which Australia was at the beginning of the century is illustrated by the cases erning licences for the removal of nightsoil; obligations as to rural vermin-proof fencing; the

---

(1904) 1 CLR 479.
Ibid 481 citing *La cité de Montréal v Les Ecclesiastiques du Seminaire de St Sulpice de Montréal* (1889) 14 App Cas 660, 662.
Backhouse v Moderana (1904) 1 CLR 675.
Daily Telegraph Newspaper Co Ltd v McLaughlin (1904) 1 CLR 479, 480.
(1903) 1 CLR 91.
(1904) 1 CLR 585.
Peterswald v Bailey (1904) 1 CLR 91.
(1997) 189 CLR 465.
(1903-4) 1 CLR 39, 121, 456.
Bennell v Gray, Electoral Commissioner [1999] FCA 1532.

ements of pasture protection; the incidence of gaming and wagering; and whether, in cattle ter laws, a 'pig' was within the definition of 'cattle'. The answer given was that it was not.[15]

ss law made its appearance in those days, as it has done ever since. There were cases about bills e in insolvency, the duties of bankers to customers[16] and the obligations of company directors to er share transfers.[17] Add to this collection cases on the right to ancient lights, on the powers ed by State police constables and on the construction of wills and you see the great variety of the of the High Court from its earliest beginnings. Unlike the Supreme Court of the United States, haracter of the High Court of Australia was stamped on it by its obligation, from the first, not to be the supreme constitutional court for Australia but also a general court of appeal supervising her courts of the new Commonwealth.

FAST FORWARD

e foundation Justices of the High Court of Australia were to pick up the latest volume of the *mmonwealth Law Reports*, they would see some changes. True, they would see the same diversity w and a number of similar problems. The construction of wills has, alas, all but disappeared. e are fewer cases on pasture protection[18] and none on nightsoil. But negligence, which was there e very beginning, is still a hardy perennial. Indeed, following *Donoghue v Stevenson*[19] the number ariety of cases on that theme has exploded. In one of the latest volumes there are two decisions, dealing with the liability of a public authority to a person said to have been harmed by that ority's failure to act to protect the plaintiff. In one the plaintiff succeeded;[20] in another she failed.[21]

ow common visitor, not found at all in the first volume, is the criminal law. Because of the ism that crime does not pay, that body of law has never been as fashionable in the senior ranks of egal profession as it deserves. Citizens probably consider that the most important areas of the law me, family law and (possibly) industrial relations law. Citizens are rarely wrong. At least since me of Chief Justice Barwick, the High Court of Australia has accepted a sizeable number of cases ving points of criminal law. In recent volumes there is an exploration of the crime of conspiracy defraud[22] and of the consequences for criminal trials of the conduct of undercover police ations.[23] The controversies about police constables at the beginning of the century were more ght-forward.

titutional law and the law relating to conciliation and arbitration of interstate industrial disputes emained on the agenda throughout the century. The old faithful, logs of claim, are there in the t reports,[24] illustrating vividly the adaptability of the Constitution to the changing economic and ustrial needs of a continental country with a common economic market. Business law now ably occupies a greater proportion of the Court's time. Cases on bankruptcy,[25] insurance[26] and rance brokers[27] cover many pages in the contemporary reports.

ral and State law continues to require attention. Customs and excise legislation engaged the nt Court as did the State law on stamp duty and the perennial favourite, indefeasibility of

---

Mackay v Davies (1904) 1 CLR 483.
Marshall v Colonial Bank of Australasia (1904) 1 CLR 632.
New Lambton Land and Coal Co v London Bank of Australia (1904) 1 CLR 524.
But cf *Puntoriero v Water Administration Ministerial Corporation* (1999) 165 ALR 337.
[1932] AC 580.
Pyrenees Shire Council v Day (1998) 192 CLR 330.
Romeo v Conservation Commission (NT) (1998) 192 CLR 431.
Peters v The Queen (1998) 192 CLR 493.
Swaffield v The Queen (1998) 192 CLR 159.
Attorney-General (Qld) v Riordan (1998) 192 CLR 1.
Cannane v J Cannane Pty Ltd (In Liq) (1998) 192 CLR 557.
Johnson v American Home Assurance Co (1998) 192 CLR 266.
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603.

stered title.[28] The impact of new technology can be seen in cases now coming before the Court. in the recent volume include the use of the technology of listening devices,[29] a facility that the ice constables of the turn of the last century could only dream of.

e considers the differences and the similarities, the latter clearly predominate. Griffith, Barton and onnor would not, I think, take long to master the detail of contemporary Australian law. The niques are substantially unchanged. Save for occasional visitors from Western Australia and mania, the dress of counsel would appear entirely familiar to them, with the wigs firmly in place. reas a medical practitioner of 1903, walking into a modern hospital, would feel lost in the world computer technology and modern pharmaceuticals, the judge or lawyer of the days when the High urt of Australia was founded would not feel lost at all. In law there is merit in stability and inuity. But have we over-valued these features of our discipline? Ought we to have been more stioning about fundamentals? Is it necessarily a matter of self-congratulation that the fundamentals e not changed much since 1903?

THE CHANGES

Court system

is is not to say that change has been a stranger to the High Court of Australia. On the contrary, ny changes have occurred in the century which is about to close.

e abolition of appeals to the Judicial Committee of the Privy Council is one of the most significant the changes.[30] I refer not only to the abolition of appeals to the Privy Council from the High Court d other federal courts, but also the termination of appeals from State Supreme Courts[31] and the clear dication that the High Court would never again grant a certificate to appeal under s 74 of the nstitution.[32] The insistence that most of the important constitutional cases should be finally ermined by the High Court of Australia was a means of avoiding unwanted imperial interference in, decisions about, federal issues with which English judges were generally unfamiliar.[33]

e removal of the possibility of appeals from the High Court itself to the Privy Council changed the image of the Court. No longer was it a penultimate final court of appeal. It was freed from the perintendence of foreign judges, in a way that New Zealand courts, even to this day, have not been ed. The possibility until 1986 that appeals could still be taken to the Privy Council directly from the ate Supreme Courts meant that most Australian State courts had to reach many of their decisions h the possibility in mind that a tribunal external to Australia, and other than the High Court, might e a say in a matter of legal principle affecting Australia's law. As it happens, I participated in the urt of Appeal of New South Wales in the last decision of an Australian court which went on appeal the Privy Council in London.[34] Now that era has passed. It was not wholly unsuitable to Australian ditions in earlier times. It had the merit of linking our law to one of the great centres of law in the rld.[35] But the removal of that link has had a considerable influence upon the development of stralia's law in the past two decades. It has affected the sources used by Australian courts and the ions which now prevail about the ultimate foundation of Australian law.[36]

Bank of South Australia Ltd v Ferguson (1998) 192 CLR 248.

For example, *Ousley v The Queen* (1998) 192 CLR 69.

Privy Council (Limitation of Appeals) Act 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth).

Australia Act 1986 (Cth), s 11.

Kirmani v Captain Cook Cruises Pty Ltd [No 2] (1985) 159 CLR 461, 464-465.

O'Sullivan v Norhunga Meat Ltd [No 2] (1956) 94 CLR 367, 375. See generally W M C Gummow, *Change and Continuity - Statute, Equity and Federalism* (1999) 71ff.

Austin v Keele (1987) 61 ALJR 605; 10 NSWLR 283 (PC).

F C Hutley, 'The Legal Traditions of Australia as Contrasted with Those of the United States' (1991) 55 *ALJ* 63, 64.

On cases concerning the sovereignty of the Australian people see *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 441-442; *Breavington v Godleman* (1988) 169 CLR 41, 123; *McGinty v Western Australia* (1996) 186 CLR 140, 237; *Leeth v The Commonwealth* (1992) 174 CLR 455, 484, 486.

features of the courts in the past two decades which have affected the development of Australian have included the growth of the federal courts following the establishment of the Family Court of alia and the Federal Court of Australia. Another is the creation of a number of separate State and tory Courts of Appeal[37] which have altered significantly the sources from which the High Court es most of its business.

Judicial numbers

her change in the century past concerns the number of Justices of the High Court. In 1903 the t comprised the minimum constitutional number, namely a Chief Justice and two Justices.[38] In , with the appointments of Justice Isaacs and Justice Higgins, the number rose to five. In 1913, the appointment of Justice Gavan Duffy and Justice Powers, it rose to seven. This is the number has remained ever since, although for a short interval during the Depression and until Justice b was appointed in 1946, one vacancy was left unfilled.

th the No 1 and No 2 courtrooms in Canberra, the design of the Bench appears to contemplate the tual appointment of two further Justices. That would bring the complement of the Court to nine - ame as the Supreme Court of the United States and the Supreme Court of Canada. If areas were ed on level 9 of the Court building in Canberra, where the Justices' chambers are found, it would erfectly feasible to establish chambers for two additional Justices. There is no constitutional er to the enlargement of the Court. Occasionally the idea has been talked of. The smaller the ber the greater the possibility of collegial dialogue. Any increase in the size of the Court would ably have to be accompanied by changes in the Court's methodology and perhaps in the nisation of the way in which it hears and disposes of appeals as the Constitution contemplates.

Court business

903, most of the work of the High Court of Australia comprised appeals coming to the Court as of in pursuant to the provisions of the *Judiciary Act* 1903 (Cth) s 35. Appeals then lay as of right from udgment of a Supreme Court of a State exercising federal jurisdiction in a matter pending in the h Court or, as earlier stated, in cases having at stake a sum declared sufficient for such appeal. erwise special leave to appeal was required.

provision for appeals as of right was abolished in 1976. Section 35 of the *Judiciary Act* 1903 h) was amended to establish a universal rule confining the right to appeal to one where the High rt itself has granted special leave for that purpose. This has also significantly altered the work of Court which is now, substantially, in the hands of the Justices themselves. They can select and fix priorities which, in the past, were largely out of their control and substantially determined by nts. This explains the falling away of cases involving the construction of wills or of most State tory provisions. In the past, it was enough that the amount at issue reached the threshold ssary for a right to appeal. Now, different considerations engage the attention of a special leave ch. Unless those considerations are present, the High Court will not usually intervene.

same is true of the original jurisdiction of the Court. Few trials in the ordinary sense are now ducted by the High Court. Much of the work of taxation, intellectual property and the like, which merly occupied single Justices, has been assigned by statute to other courts. Alternatively, cases ch must come directly to the Court in its original jurisdiction under s 75 of the Constitution may be removed or remitted to other courts.[39] This is commonly done, particularly if there are uted facts. This means that any case which remains in the High Court is likely to be an important It will typically be one involving difficulty, a significant legal principle, diversity of opinion in

---

In New South Wales, Queensland, Victoria, Northern Territory. A proposal is under consideration in Western Australia. See M D Kirby, 'Permanent Appellate Courts' (1987) 61 *ALJ* 391; (1988) 18 *Qld Law Soc J* 5; (1988) 4 *Aust Bar Rev* 51.

Australian Constitution, s 71.

Judiciary Act 1903 (Cth) ss 40, 42. Cf Gummow, *Continuity and Change*, above n 33, 76-77.

below or an apparently serious injustice which calls for the intervention of the highest court.

the right of the Parliament to confine the appellate jurisdiction of the Court to cases where leave was granted proved controversial and was even challenged,[40] it is difficult to conceive Court, at least in its present numbers and with its present organisation, could have coped if a proportion of its business arose as of right. Those who knew the Court in the years up to the of the 20th century describe its operation in ways that seem familiar to the experience I had in a court of Appeal. When there is a large amount of work which cannot be diverted or divested, imperatives of throughput and brevity, efficiency and sharing, which are reduced somewhat e court's docket is controlled by the judges themselves.

Sittings and circuits

eatures of the sittings of the High Court of Australia have remained the same. In June, as in ustice Griffith's days, we return to his beloved Brisbane. In August, the Court travels to de for a week. In October, it is Perth. Chief Justice Barwick, a keen yachtsman, always ed to visit Hobart for the Regatta Week in March. Now, the Court only travels to Hobart if ss permits; and this is comparatively rare. It does not yet travel to Darwin, although business as been comparatively brisk. On the establishment of the seat of the Court in Canberra, Chief Barwick attempted to terminate the circuits to the outlying cities. This was resisted by the then s. Although views differ, most consider (as I do) that it is important for the Court to maintain cuits. They provide an essential link between the serving Justices and the legal profession and es in the outlying States.

eation of the Court's permanent building in Canberra undoubtedly had an effect which went d the more efficient operations that it permits. Placing the Court in the constitutional triangle in erra imprints on the mind of all who work in it the significance which the Constitution assigns to igh Court in both its national and general appellate functions.[41] It may be no accident that the following the establishment of the seat of the Court in Canberra witnessed significant opments in the creativity of new legal doctrine affecting both the Constitution and the general

wing the example of the Supreme Court of Canada, the High Court of Australia has established links for the conduct of special leave hearings from courtrooms in Brisbane, Hobart, Adelaide, and Darwin. These were not imagined in 1903. They are very efficient. Analysis of outcomes ates that there is no difference between rates of success for counsel appearing in person, where dges are sitting in Canberra, and counsel making their submissions at long distance by videolink. nly differences are that average hearings seem to be shorter when conducted by videolink, costs uch lower and litigants can readily attend in outlying centres and see their cases argued. Physical iquity seems to encourage a greater measure of long-windedness in advocates. This may be a n for expanding the videolink hearings.

se of electronic systems has also been helpful in the provision of the decisions of the High Court e profession and to the general public. The reasons of the Justices are posted on the Internet on the ing they are delivered. Records indicate that there are approximately 660 hits a week indicating s to the Home Page. These numbers are increasing all the time. They extend to overseas users as as those throughout Australia. The transcript of oral argument in the Court is on sale usually n two hours of the completion of the hearing. It is also available on the Internet within 24 hours, f charge. It seems likely that the next step will be video transmission of the hearings before the , although upon the wisdom of this innovation opinions differ.

Carson v John Fairfax and Sons Ltd (Receivers and Managers Appointed) (1991) 173 CLR 194.
MD Kirby, 'A F Mason - From *Trigwell* to *Teoh*' (1997) 20 *Melbourne Uni L Rev* 1087, 1092.

Dress and gender

ne matter in respect of which the original Justices would certainly note a change concerns the Court ss of the Justices. In 1986, they decided to abandon the traditional robe and wigs. A simple stralian woollen garment is now worn with no head coverage. In Canada, and in most parts of the mer British Empire where wigs have been dispensed with, the robes of judges and advocates have terwise followed the English tradition which at least has the merit of contrasting black and white ments. Now the High Court is decked in black alone. Some observers find this forbidding - a aracteristic which may well have attracted its designers. The change has certainly accelerated moves r the abandonment of wigs both in federal and State courts.[42]

ne noticeable change since 1903 is the presence in the Court of Justice Mary Gaudron, the first man Justice. She was appointed in February 1987. She remains the sole woman to have held the ice. One in a century can scarcely be described as a flood. The recent appointments of Dame Sian as as Chief Justice of New Zealand and Madame Justice Beverly McLachlin as Chief Justice of nada indicate the change in the composition of the Bench that is coming throughout the common w world. But its advent in Australia will be slow. Perhaps the original Justices would be scandalised the public revelation of my own sexuality. Griffith, after all, included homosexual offences in the minal Code which he drew up for Queensland.[43] I am sure that I am not the first Australian judge to ve been homosexual; nor will I be the last. But I am certainly the first to have been open about it; ff perhaps a sign of changing times.

ighthoods (and the equivalent Damehoods) which were once the automatic entitlement of a Justice ve disappeared forever. Chief Justice Gleeson is the first Chief Justice of Australia without the nour of a knighthood, although he is a Companion of the Order of Australia, now the nation's ghest civil honour. Even appointment to that rank, which was formerly automatically offered to a tice, is, it seems, now no longer prompt or assured.

Time limits

r most of the century the High Court has managed without the imposition of formal time limits on duration of the arguments of advocates. The extended argumentation of the *Banking Case*[44] before High Court and the Privy Council, was internationally notorious. But it did not propel the Court any limitations of the kind long accepted in the United States Supreme Court. With the oduction of universal special leave requirements, time limitations were, at last, imposed. Now, unsel must compress their submissions to 20 minutes. The limitation certainly concentrates the mind all involved in such hearings, including the participating Justices.

strict limitations of this kind have been imposed in the presentation of argument in an appeal, once cial leave is granted. To a large extent the Court has left it to the parties and their representatives to ree on the time required and on the division of that time. Whether it would be preferable to impose ndard time limits for oral argument and to list more cases for hearing, is a matter for the future.

Dissent

ne of the most distinctive features of the common law judicial system is the right of appellate judges press dissenting opinions. Even the Privy Council, which tenders its decisions for the most part in form of advice to the Queen, has now introduced the right of dissent. In giving his reasons in the

---

Wigs are no longer worn by judges or counsel in proceedings in the Federal Court of Australia, or in the Supreme Court of Tasmania or the Supreme Court of Western Australia in civil matters.

Criminal Code Act 1899 (Qld) ss 208, 209.

Bank of New South Wales v The Commonwealth (1948) 71 CLR 1 (HC); (1949) 79 CLR 497. In the High Court the hearing lasted eight weeks. In the Privy Council, to the astonishment of their Lordships, it also consumed eight weeks.

y Council in *Fisher v Minister of Public Safety and Immigration*,[45] Lord Steyn observed recently:

> A dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow. In that way a dissenting judgment sometimes contributes to the continuing development of the law. But the innate capacity of different areas of law to develop varies. Thus the law of conveyancing is singularly impervious to change. But constitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced to die by hanging is at the other extreme. The law governing such cases is in transition.

he first volume of the *Commonwealth Law Reports* in *Chanter v Blackwood*[46] Justice O'Connor etted his inability to agree with his colleagues. The series was only 65 pages into its record of the ngs of the High Court when the first dissent appeared. Justice O'Connor said:

> It would have been well if in this decision which will be a guide to the administration of the Act throughout the Commonwealth, the judgment of the Court had been unanimous. I have given the utmost possible consideration to the opinion of my learned brothers, with a view to seeing whether I could not agree with them. Notwithstanding ... I hold a very clear opinion [to the contrary].

e judge went on to express it.

om the start, the High Court of Australia was a court of robust differences. In my dissent in the ss-vesting case of *Re Wakim*[47] I concluded by borrowing the final remarks of Justice Barton in *ncan v Queensland*:[48]

> To say that one regrets to differ from one's learned brethren is a formula that often begins a judgment. I end mine by expressing heavy sorrow that their decision is as it is.

ith the arrival of Justice Isaacs and Justice Higgins in 1906, the comparative unanimity of the iginal three Justices of the High Court of Australia was completely shattered. The former, in rticular, was a noted dissenter. His command of language, intellectual vigour and consistent vision the Constitution put him in a special class. One gets the impression that he may not have been the ost congenial of colleagues. Yet the power of his intellect has proved resilient. He is often read to his ccessors.

the 1970s, Justice Murphy assumed the mantle of the principal dissenter. Of the approximately 600 inions which he wrote whilst a Justice of the Court, 137 were in dissent. This constitutes 23% of the al. Some of his dissents have proved prescient,[49] although usually the ideas he advocated have been opted without much acknowledgment. The law is hard on outsiders.

cently, the Court administration provided statistics on the rate of dissent of the current Justices. cording to those statistics, I have overtaken Justice Murphy. Approximately 32% of my opinions e in dissent. The next in proportion is Justice McHugh with 15%. The rates of dissent of the other stices are much lower. These figures can, of course, be misleading. In some cases, a Justice may ree in the Court's orders (and thus not be in formal dissent) but express completely different reasons r coming to his or her conclusion. In my own case, this occurred in, for example, *Garcia v National stralia Bank Ltd.*[50] Some commentators have described my opinion there as a dissent; and certainly id not agree with the views of the majority that the reasons of Justice Dixon in *Yerkey v Jones*[51] ided an applicable rule of the Court. But it was not a dissent because I concurred in the Court's der, although for different reasons.

[1998] AC 673, 686. See also *Neumegen v Neumegen and Co* [1998] 3 NZLR 310, 321 per Thomas J.
(1904) 1 CLR 65.
Re Wakim; Ex parte McNally (1999) 198 CLR 511.
(1916) 22 CLR 556, 605. See also at 627, per Isaacs J.
For example his dissent in *McInnis v The Queen* (1979) 143 CLR 575, 586-591 read now with *Dietrich v The Queen* (1992) 177 CLR 292; *Buck v Bavone* (1976) 135 CLR 100, 135 read now with *Cole v Whitfield* (1988) 165 CLR 360.
(1998) 194 CLR 395.
(1939) 63 CLR 649, 684.

most countries of the civil law tradition, judicial dissent is completely forbidden. The foundation for s view is a conception of the law as having but one possible exposition. Dissent, it was feared, ld undermine the authority of the law which rests upon its certainty. It was upon the insistence of Allies that the post-War Constitution of the Federal Republic of Germany included, in the case of German Constitutional Court, the right to dissent. Old habits die hard. Dissent is still mparatively rare. It is not uncommon in the European Court of Human Rights. The candid nowledgment of the choices which judges must make, and of their preferences for differing swers, seems a more honest response to the dilemmas of the law than the pretence that every blem yields but one correct answer.

THE FUTURE

Other courts

oking into the future, one is bound to make even more mistakes than when looking into the past. e Australian courts hierarchy has changed significantly in the first hundred years of federation. hat will be the changes in the century to come?

e attempt to relate the Federal and State court systems in the cross-vesting legislation survived the st challenge.[52] However, following new appointments to the High Court and re-argument, it failed e second scrutiny.[53] It may be quite difficult to repair the problems disclosed by that decision. In my sons in *Gould v Brown*,[54] I suggested that it might have been possible for the scheme of cross-sting to be sustained by a reference of powers to the Federal Parliament pursuant to the Constitution (xxxvii) or the request for, or concurrence of, the Parliaments of the States to the exercise by the deral Parliament of a power which, at federation, could be exercised by the Parliament of the United ngdom, as the Constitution s 51(xxxviii) contemplates. This was in error. The fundamental fficulty which the majority discerned in *Re Wakim*, in the path of establishing a scheme for cross-ting of jurisdiction, arises from a conception of the requirements of Chapter III of the Constitution. l powers conferred by s 51, including those mentioned, are expressed to be 'subject to this nstitution'. That means (as would in any case apply, given the structure of the Constitution) subject the requirements of Ch III. Therefore, within the current constitutional text, it is difficult to see how e *status quo ante* on cross-vesting could be restored in terms of the Constitution as it stands. No ubt this is why the Federal Attorney-General has announced that consideration is being given to a nstitutional amendment.

cent history is somewhat discouraging for proponents of constitutional referenda. Yet the last nstitutional amendments to be approved by the electors occurred on 21 May 1977. They included approval for the amendment of provisions in Ch III requiring that High Court judges must retire at age of 70 and other federal judges at that age or at a lower retirement age fixed by the Parliament. at change, effected by the *Constitution Alteration (Retirement of Judges)* 1977, was carried with a l affirmative vote of 78.63% nationally and with affirmative votes in all six States.[55] Only one er amendment of the Constitution has achieved such an affirmative national vote in favour of ange. The amendments made by the *Constitutional Alteration (Aboriginals)* 1967 to ss 51(xxvi) and of the Constitution reached 89.34% and carried all States.[56]

hilst the Commonwealth and the States are considering alterations to Ch III of the Constitution, ought might be given to proposals for a national appellate court under the High Court to which peals from federal, State and Territory courts could lie as of right or under broad conditions. hough this idea might attract some opposition on the basis of States' rights, the need to reconsider tional judicial arrangements in the light of developments since 1901 seems indisputable. Should the

---

Gould v Brown (1998) 193 CLR 346.
Re Wakim; Ex parte McNally (1999) 198 CLR 511.
(1998) 193 CLR 346, 483-483.
A Blackshield and G Williams, *Australian Constitutional Law and Theory* (2nd ed 1993) 1188.
Ibid 1186. See *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 368, 406-408.

nstitution remain resistant to formal change in this regard, it could be feasible to explore the lternative possibility of granting personal commissions to judges of Australian courts to participate in he appellate courts of jurisdictions other than their own. Already, Justice Priestley of the New South Vales Court of Appeal, holds a personal commission as a judge of the Court of Appeal of the Northern Territory. His service in that Court is compensated by the provision of a judge of the upreme Court of the Northern Territory who receives a commission to sit in the Supreme Court of ew South Wales. In 2000, Chief Justice Doyle of South Australia and Justice Brooking of the ictorian Court of Appeal were given similar commissions so that they could sit in Darwin with ustice Priestley in a sensitive case. In the smaller States, it has always seemed to me that a separate ourt of Appeal could be constituted by appointments of this kind which would involve a practical easure of cooperative federalism. In the industrial relations field, cooperation of this kind has xisted for many years. Judges and other members of State industrial courts and tribunals have been iven personal commissions as Presidential Members of the Australian Industrial Relations ommission.[57] Sometimes the rigid inflexibilities of the Constitution can be softened by sensible stitutional arrangements of this character which are entirely consistent with the cooperative resuppositions inherent in the type of federation which the Constitution establishes.

Neighbouring countries

y service as President of the Court of Appeal of Solomon Islands, which I resigned on my ppointment to the High Court of Australia, alerted me to the growing influence which the High Court, d other Australian courts, have on the jurisprudence of the courts of neighbouring countries. I refer r only to the Island States of the Pacific and Papua New Guinea but also to countries further away sh as Hong Kong and Mauritius.

eems likely to me that the cooperation which already exists in the provision of the decisions of the gh Court, and of online access to current and past decisions, will expand by the participation in the urts of neighbouring countries of former Justices of the High Court and judges of other Australian urts. Chief Justice Gibbs has served on the Court of Appeal of Kirabati since 1988. Chief Justice ason served as a judge of the Supreme Court of Fiji and is a judge of the final Court of Appeal of ong Kong. He was also my successor as President of the Court of Appeal of Solomon Islands. ustice Dawson also serves on the Hong Kong Court as does former Chief Justice Brennan. The latter as appointed a Judge of the Supreme Court of Fiji, as was Justice Toohey. It seems likely that the stices of the High Court of Australia will continue to play a role, after retirement, in the courts of ighbouring countries. Obviously, this is a desirable development so long as it is desired by the untries and judges concerned.

th the continued expansion and special treatment of New Zealand in Australian legal arrangements, possibility of some form of trans-Tasman court cannot be excluded.[58] The constitutional ficulties for Australia are significant. It is a misfortune that, in the days following the Second World r, the British authorities did not have the imagination, or interest, to create a regional Privy Council the Pacific upon which Australian and New Zealand and other judges could sit together. The perience of participating in the Court of Appeal of Solomon Islands with senior judges from Papua ew Guinea, New Zealand and Australia is one which I will always cherish and to which I hope one y I may return.

Methodologies

veral ideas for the methodology of the High Court spring from current techniques. The success of deolinks for special leave hearings makes it likely that this mode of communication (specially pted to a country of continental size) will expand to appeal hearings. Case management is already a

---

Workplace Relations Act 1996 (Cth), s 13.. The position is reciprocal.

M D Kirby, 'CER, Trans-Tasman Courts and Australasia' [1983] *NZLJ* 304; M D Kirby and P A Joseph, 'Trans-Tasman Relations - Towards 2000 and Beyond' in P A Joseph (ed) *Essays on the Constitution* (1995) 129.

ure of the organisation of all Australian courts, including the High Court. This virtue must proceed th due regard to the obligations of the Court to observe the law and to respect the requirements of dividualised justice.[59] It seems likely that judges in Australia will continue to increase their role in management of litigation. The High Court will not be exempt from this trend. Representative ions present certain difficulties.[60] However, with due safeguards, they can also be a means by ich, in a time of mass production of goods and services, litigation can be organised to bring the ilar or identical legal claims of many people to justice with lawfulness and efficiency.[61]

would not be surprising if, in the future, formal time limits were imposed upon oral argument in ppellate courts, including the High Court. If this meant an increase in the number of cases which uld be heard by those courts, it could prove beneficial. Few now complain about the time limits in gument of special leave applications. The logic of such a requirement, to concentrate the mind and ngue, should take the High Court (and other Australian courts) into a revision of the present conduct ordinary appeals and other hearings.

e writing of judicial opinions remains the heaviest burden which appellate judges carry. Some anges in the techniques of advocacy have already been introduced. They include the duty to provide ended written submissions. It may be desirable that more radical changes now be contemplated.

enty years ago, at a legal convention, I suggested an idea which was denounced at the time as olerable heresy. It was an idea derived from my experience in the Law Reform Commission in the tribution of discussion papers which helped focus submissions and constructive debate. Why not tend this methodology to the courts? It could be done in one of two ways. Either the court itself uld prepare a draft opinion based on the papers. The advocates of the parties could then attack, or pport, this document. Alternatively, the parties could be required to draft an opinion for adoption th adaptations) by the court. This would impose upon them the obligation to relieve judges at least om the often tedious role of recording the facts, the issues, the applicable law and the primary guments.

he first model is not unlike that observed in some European court systems where a preliminary stage the appellate process involves the circulation of a draft by the Advocate-General. Would this not ssist in focussing debate in an efficient manner and utilising the skills of appellate judges in a way at is more efficient than the often tedious and mechanical burdens which are imposed upon them der current arrangements? Critics might perceive serious and even constitutional problems. Would it ean, if the drafts were prepared by an officer rather than a judge, that part of the judicial power of the mmonwealth had been delegated impermissibly from the courts to the ever-expanding power of the ecutive? I am far from convinced that it would not be possible to develop means by which decision-king could be maximised and tedium or routine reduced. I recognise that the solution to many ses lies in the facts. Sifting the detail is often critical to the process of reaching conclusions. The anny of the first draft should never lock the open-minded judge into a preconception about the ues in a case or its outcome.

et if we compare the methodology of the Australian judiciary and legal profession with that of, say, e medical profession, it is clear that the latter have been much more willing to think with complete shness, often stimulated by technology. The law is resistant to truly original thinking. This is pecially so when it affects the methodology of its operations which has lasted for centuries. There is rofessional fear to change long established ways of doing things. Whilst this is psychologically derstandable and sometimes justified, it is the obligation of every court, but particularly the final urt, to look with new eyes at the ways in which it performs its functions. The problems of cost and lay in getting to courts affect every court in the Australian Judicature and extend to the High Court Australia. If new methodologies could be adopted which tackled these problems and brought more

---

Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146.
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334.
Wong v Silkfield Pty Ltd (1999) 73 ALJR 1427; 165 ALR 373.

ple to justice within the human capacity of the courts (including that of the seven members of the court) the totality of justice in our society could be increased. We should not put such ssibilities out of mind.

ut of such 'radical' solutions, there may be other ways by which more cases could be disposed of the High Court of Australia than the current number which approximates 60 civil and criminal peals in any given year.[62] One possible way of increasing the number of such appeals would be the option of the disposal of the appeal with short form reasons as is now possible, by statute, in the se of the Court of Appeal of New South Wales.[63] Innovation in techniques and procedures should be e constant companion of the contemporary Australian judge. They should be motivated by the jective of reducing the twin enemies of true justice for all - cost and delay.

Interveners and Amici Curiae

e area in which, I believe, innovation is required concerns the acceptance of assistance from erveners and *amicus curiae*. I expressed my opinion on this issue in *Levy v Victoria*.[64] There, an dustrial organisation was denied leave to intervene but permitted to make a submission as *amicus riae*. In *Attorney-General v Breckler*[65] a difference arose as to whether a national organisation with sponsibility for administering superannuation funds should be heard in a test case concerning the eaning of complex superannuation legislation. The right to intervene was denied. So it was in the se of a compensation authority in tax litigation, although it was demonstrated that the outcome of proceedings before the High Court could affect the interests of that authority in concurrent ceedings before a Victorian court.[66] The authority was allowed to leave its written submissions but s not heard orally to support them.

oe it became clear that courts, particularly the High Court of Australia, are not engaged in a chanical function of applying unquestioned law to unambiguous facts, the choices which judges st make necessitates, at least sometimes, receiving assistance from persons other than the parties. e practice of other final courts, particularly the Supreme Court of the United States and Supreme urt of Canada, has adapted to this new reality. It seems inevitable that the High Court of Australia ll, in due course, do the same.

International law

ny of the cases which come before the High Court already directly involve issues of international . These can include questions of the meaning of international treaties incorporated in Australian mestic law,[67] elucidation of the law of extradition[68] and of the Closer Economic Relations Treaty th New Zealand.[69] The indirect impact of international law may be seen in a series of cases where judges have had regard to international human rights law in elucidating a principle of the common w in Australia.[70] It seems likely, for the reasons which Justice Brennan explained in *Mabo v eensland [No 2]*,[71] that international human rights law, expressed in treaties to which Australia is a y, will come to play an increasing part in the development of Australia's common law.

High Court of Australia, *Annual Report* 1998-99, 65-66. In the year under review 41 civil appeals were decided (compared with 48 in the year 1997-98) and 17 criminal appeals (the same as in 1997-98).
Supreme Court Act 1970 (NSW) s 45(4).
(1997) 189 CLR 571, 650-653.
(1999) 197 CLR 83, 134-137. Cf G Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Corporate Analysis' (2000) 28 *Federal Law Review* 365.
Commissioner of Taxation v Scully (2000) 169 ALR 459. Application refused on 7 September 1999.
Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 (concerning the Convention Relating to the Status of Refugees (1951) as applied by the *Migration Act* 1958 (Cth) s 4(1)).
AB v The Queen (1999) 198 CLR 111, 128-129, 141-145.
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273; *Dietrich v The Queen* (1992) 177 CLR 292.
(1992) 175 CLR 1 at 42.

ngland, this process will probably increase substantially following the coming into force of the *...n Rights Act 1998* (UK).[72] Already, the fact that the United Kingdom is answerable before the ...pean Court of Human Rights for the compliance of its laws with the European Convention on ...an Rights, has had an impact on substantive law. It reaches into unexpected fields. One of these ...ecently called to notice by Chief Justice Spigelman of the Supreme Court of New South Wales.[73] ...rew attention to the decision of the European Court of Human Rights in *Osman v The United ...dom*.[74] In that case, the European Court was highly critical of a decision of the House of Lords[75] ...hich their Lordships had applied their earlier decision in *Hill v Chief Constable of West ...shire*.[76] In the *Hill* case, it had been held that no action would lie against police for negligence in ...nvestigation and suppression of crime. Courts, it was held, should not supervise the difficult work ...olice. The European Court concluded that such an approach involved the conferral of a blanket ...unity on police which constituted an unjustifiable restriction on a victim's rights to have ...mination by a court of law of the merits of his or her claim against the police. It was decided that ...onstituted a violation of the obligation of the United Kingdom to afford access to the courts in ...cases.

...decision has not passed without criticism in England.[77] However, it seems inevitable that rulings ...is kind will come to play an important part in the future development of Australian, as well as ...ish, law. Although Australian court decisions are not subject to review in a human rights court, ...may be subjected to scrutiny in the Human Rights Committee of the United Nations.[78] It was a ...sion of that Committee concerning a law in Australia which eventually occasioned the enactment ...federal statute,[79] proceedings in the High Court[80] and, ultimately, the repeal of Tasmania's laws ...minalising consenting private adult homosexual acts.[81]

...he field of business law the impact of international markets, and the international treaties and ...ciples to which they have given rise[82], seem likely to expand with a consequential growth of ...onal and international regulation. Australia's legal system will not be immune from these ...elopments. In small and large cases, it is important for judges, dealing with issues of legal ...ciple, to keep themselves alert to analogous developments of the law that are occurring elsewhere ...to the economic implications of a decision in one case for the efficient operation of the legal ...em and the economy more generally.

Artificial intelligence

...of the foregoing constitute rather modest ideas about the years ahead. But the chief lesson of recent ...des has been the explosion of scientific knowledge and of its technological applications. Within ...years the great technological developments of the century have been expanded beyond the wildest ...ginings even of clever people of the mid-century. They include nuclear fission, informatics and ...genetics. The law has sometimes to sort out the consequences of these developments, as when ...es arise concerning the patentability of inventions said to involve living genetic material.[83]

M Hunt, 'The "Horizontal Effect" of the *Human Rights Act*' [1998] *Public Law* 423; A Hooper, 'The Impact of the *Human Rights Act* on Judicial Decision-Making' [1998] EHRLR 672, 684; A Lester and D Pannick (eds) *Human Rights Law and Practice* (1999) 31-33; W M C Gummow, *Change and Continuity* (1999) 107.

J J Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141.

(1998) 7 *Reports of Judgments and Decisions*.

Osman v Ferguson [1993] 4 All ER 344.

[1989] AC 53. Cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 278-279.

Lord Hoffman 'Human Rights and the House of Lords' (1999) 62 *Modern L Rev* 159, 164.

Established by the First Optional Protocol to the *International Covenant on Civil and Political Rights* to which Australia is a party.

Human Rights (Sexual Conduct) Act 1994 (Cth).

Croome v Tasmania (1997) 191 CLR 119.

Criminal Code (Tas), ss 122(a), (c), 123.

See e.g. P Read, 'Uniform Law for International Loans: A New Solution?' in W Weerasooria (ed) *Perspectives on Banking, Finance and Credit Law* (1999) 241.

Diamond v Chakravarty 447 US 303 (1980) (biogentically engineered organisms); *Diamond v Diehr* 450 US 175 (1981) (inventions in the field of information technology).

technological inventions come to the aid of the law. Information technology has radically ged the organisation of the lawyer's office and the judges' and advocates' chambers.[84] I do not ot that Griffith, Barton and O'Connor would regard as miracles the way in which word processors, linked between cities, can perform the functions of reducing ideas to text in ways that were nceivable in 1903. In such an environment, as we look into the future, it is necessary to challenge emporary imagination. Can it seriously be expected that the law and its institutions in the coming ury will successfully resist fundamental change in their ways of doing things as they have in the ? Or will the law office and courtroom in a hundred years time be as unrecognisable to us as the ital wards of today would be to medical practitioners of a century ago?

ld changes are already happening with voice recognition that will enable judges and lawyers in the e to summon, by oral commands, the accurate analysis of relevant case decisions and citation of gation. But will the advances be even more fundamental? Will it be possible to reduce legal ysis to computer programs so that artificial intelligence will take over at least some of the tions currently performed by judges and lawyers?[85] Before we scoff at such ideas, we should e to think of the dramatic alteration of the external world in which the law operates today. In the e of a century amazing changes have occurred. In but two decades computers, the Internet and erspace have taken hold. There is at present no possibility of programming machines which will e the *will* to do justice and to respond in a human way to human problems. But many routine sions may be susceptible to automated analysis. In several jurisdictions, migration and taxation slation is being written in a way apt for the early forms of artificial intelligence.[86]

main lesson of the past quarter century is that change occurs more quickly than humans expect. capacity to cope with change is constantly being tested. As a profession, law is generally resistant dical change. Indeed conservation, predicability and stability are part of law's essential mission. challenge of the years ahead will be to maintain the rule of law in a time of unprecedented social technological movement.

A GOLDEN FUTURE

ase this reverie. Griffith, Barton and O'Connor are safely on the walls of the great courtroom, ing down on me. The daily work of the High Court continues in ways that would not have seemed ery different to them. Most of what was good has been preserved. The High Court of Australia is of the enduring and continuously serving constitutional courts of the world. Constitutionalism and ule of law have been safeguarded by the people of Australia and by the Justices of the High Court the other judges, magistrates and public office-holders of the country.

future beckons. It is the duty of those who temporarily hold judicial and legal authority to guard the precious legacy from the century that is closing; to be vigilant and alert to the injustices inefficiencies of the legal system which remain to be corrected; and to be aware that science and nology will call the law to account in the coming century. We should cease our reveries about the den past, which was not always so golden for all. We should ready ourselves to respond to the llenges of the future to provide equal justice under law for all people in our Commonwealth and beyond.

M D Kirby, 'The Future of Courts - Do they Have One?' (1999) 8 *Journal Judl Admin* 185, 188-190.
P Gray, *Artificial Legal Intelligence* (1997).
Ibid 27, 52. See also L T McCarthy, 'Reflections on TAXMAN: An Experiment in Artificial Intelligence and Legal Reasoning' (1977) 90 *Harvard Law Rev* 837; R Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49 *Modern L Rev* 168, 170; R Susskind, *The Future of Law* (1998).