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SOME LEGAL SCENERY

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It used to be said of some elderly judges that they owed much of their legal knowledge to the fact that anyone who regularly makes the same journey for a sufficient time will become acquainted with some of the scenery along the way. Having been a Chief Justice for 19 years, I have become acquainted with some of the features on the legal landscape. I will take advantage of this opportunity to record, with the directness that is a prerogative of age, how they appear to me, before I forget what they are. Two of the most prominent are cost and delay. I will begin with delay.

The law's delay

Almost always and almost everywhere, the administration of justice has been associated with complaints of delay. Delay can be both a form and a cause of injustice. It may involve a denial of rights, or remedies, when they are most needed. It may make it more difficult, at the time of judgment, for a court to make a fair decision, especially if

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establishing a legal entitlement, or imposing a legal sanction, depends upon an accurate assessment of disputed facts. Delay often increases the difficulty of making such an assessment.

No one expects instantaneous justice, and there are few circumstances in which peremptory decision-making is valued. Lapse of time is not the same thing as delay. Depending upon the nature of the jurisdiction, the orderly progress of pre-trial procedures will involve some time, and should contribute to a fair outcome. What I mean by delay is the difference between the time required for such procedures and the time that is actually taken.

Standards of tolerable delay change. Everyone agrees that criminal justice should be administered with reasonable speed. Yet modern criminal justice moves at a pace very different from that of earlier, or even fairly recent, times. One of the best known 20th century criminal cases is *Woolmington v Director of Public Prosecutions*, concerning the onus of proof in homicide. The law reports show that the appellant shot and killed his wife on 10 December 1934. He was indicted for murder, and tried before a jury on 23 January 1935. He was convicted, and applied unsuccessfully to the Court of Criminal Appeal for leave to appeal. The case then went to the House of Lords, where it was argued on 4 April 1935. On 23 May 1935, the House of Lords allowed the appeal and quashed the conviction. The period from the alleged homicide to the decision of the court of final resort was six months. In Australia, a leading case on murder and the law of insanity is

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Stapleton v The Queen. The appellant killed a police officer on 9 June 1952. He was tried in the Supreme Court of the Northern Territory, and convicted of murder. He applied direct to the High Court for special leave to appeal. The Court granted special leave, allowed the appeal, and quashed the conviction on 19 September 1952. It delivered its reasons on 29 October 1952, less than five months after the killing. The pace of criminal justice altered radically during the last quarter of the 20th century; time standards now accepted as reasonable would have been regarded as intolerable as recently as 30 years ago.

As to the length of criminal and civil trials, no one in this audience needs reminding of the changes that have taken place during our professional lives. Forty years ago, a long trial was one that lasted more than two days. Now, at the end of a second day, counsel are just getting warmed up. Why has this happened? To what extent is it within the capacity of judges to reverse these changes? Is it their responsibility to try? An entire Conference could be devoted to those questions; and perhaps it should. Delay is like inflation; it feeds on itself. Just as in financial markets, inflationary expectations, when factored into planning, themselves contribute to further inflation, so courts and lawyers build upon expectations of delay. Delay, like inflation, is sometimes convenient for those who are part of the system; altering expectations and reversing trends may cause pain. Yet there comes a time when that is necessary. It is easy to become de-sensitised to this issue. Comparison of our current standards with those of earlier times is a useful corrective.

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Some delays in the system, although acute, may be temporary. When I was appointed Chief Justice of New South Wales - more accurately, soon after I accepted the position - I was told that, unless urgent remedies were adopted, the already serious delays in the Common Law Division of the Supreme Court could blow out to something of the order of ten years. This information was given to me to solicit my support for a Common Law Delay Reduction Programme. The solicitation was effective. The features of the vigorous delay reduction exercise that was undertaken are well known to some of you. I would make three comments based on that experience. First, almost all of the cases involved in the common law backlog were actions for damages for personal injury resulting from motor vehicle or work-related accidents. Generations of lawyers and judges regarded such cases as the staple diet of the common law system. Yet now, as a result of various legislative measures, there is little of that kind of litigation in New South Wales. The second point is related to the first. Governments have a responsibility to provide courts with adequate resources, including a sufficient number of permanent judges to dispose of the workload of the courts within a reasonable time. However, not all increases in judicial workload are permanent, and there are ways of reducing a backlog apart from increasing the number of judges. Thirdly, the problem of shifting a backlog gives a useful insight into the concept of judicial productivity.

In the example I mentioned, it was impossible that more than a small fraction of the cases in the backlog could have been resolved by

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judicial decision. Almost all of them were dealt with by settlement, although the availability of sufficient judges to pose a credible threat of judicial decision in the absence of compromise was often necessary, in addition to techniques of case management and alternative dispute resolution. In such a situation, a productive judge was one who ran his or her list so as to facilitate settlement, not one who forced litigants to run their cases to finality. Managerial experts will tell you that if something cannot be measured, it cannot be improved. I will not stay to debate that, but it is important to measure the right thing. A judge who allows lawyers to negotiate for settlement, even if he or she sits in chambers while that is going on, may be more productive than a judge who forces them on, and ends up producing, after an extended trial, a decision and an appeal. Even in normal times, this was most apparent when judges of the Supreme Court went on circuit. I used to go on circuit myself, to see how the system worked in different places and to experience sitting at first instance. The results of circuit sittings were, of course, influenced by the approaches of particular lawyers, and the attitudes of the insurers. What was clear, however, was that the judges who reported the largest turnover of cases were those whose methods promoted settlements, not those who spent the greatest number of hours in court. Time spent in court is easily measured, but for a system seeking to cope with delays, it may be a poor indicator of productivity. The object is to resolve disputes, not to keep judges active. Busy judges are useful, but, to be productive, their energies need to be well directed. In a programme of delay reduction, an obsession with keeping judges in court is counter-productive. The same is often true even in normal

times. Chief Justices and heads of jurisdiction know who are their most productive judges, and they do not base their conclusions solely, or even mainly, on sitting hours.

The cost of justice

Cost and delay are connected. The modern practice of time-charging by lawyers reinforces that connection. Cost bears two aspects: the public cost of the justice system, and the cost of court proceedings to litigants. Legal aid, although a cost to governments, may be put into the second category.

Compared to the amounts that governments spend on other activities, the cost of maintaining the justice system appears to me to be modest. There are, it is said, no votes in courts. That is certainly true when the system is working smoothly. Unacceptable inefficiency and delay, or patent inadequacy of facilities, however, might have political consequences. In Australia, as in the United States, there is a contrast between the court facilities funded by the federal government and those funded by State governments. In most Australian States (other than New South Wales, where some facilities are shared) the buildings housing federal courts are generally superior to those housing State courts. No doubt, the explanation for this is availability of funds. It also may be that the federal judiciary is relatively new. Until the 1970's, apart from the High Court and a small number of specialist judges, there were relatively few federal judges. The creation of the Federal Court and the

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Family Court, and more recently, the Federal Magistrates Court, and their rapid expansion, created a need for new court buildings and other facilities. The construction of the High Court in Canberra, completed in 1980, also represented a substantial commitment of federal funds. To one who travels regularly to most parts of the Commonwealth, the difference between the facilities provided to the federal and State courts is hard to overlook. In some States there are plans for new or renovated courts; in some there are not. Court buildings are primarily designed to provide facilities for the public, including litigants and witnesses, not accommodation for judges. Improving the standard of court buildings should not be trivialised as expenditure on the personal comfort of judges.

The cost of litigation is commonly described as an issue of access to justice. The expense of civil litigation is the greatest blot on the common law system. In my estimation, the common law system of criminal justice compares more than favourably with the civilian law system. Indeed, there are moves in a number of civilian jurisdictions to adopt features of the common law system, including an institutional separation of the judiciary from the prosecution, and a more adversarial procedure. Yet civilian jurisdictions have shown little inclination to copy the common law model of civil justice, primarily because of its expense. Legal aid is widely available in criminal cases, and this is an important contribution to the fairness of criminal justice. The availability of legal aid for civil cases is limited. Pro bono work by lawyers ameliorates the problem, and is encouraged actively by the judiciary. In certain types of

litigation, plaintiffs' lawyers commonly work on a no-win no-fee basis. This means that the accessibility of civil justice varies with the kind of dispute involved.

It is often said that only the very rich or the (legally assisted) very poor can afford to go to court. That is true of some kinds of litigation and untrue of others. I have already mentioned the flood of common law litigation that threatened to submerge the New South Wales courts in the 1980s and early 1990s. At the time, I wondered why, if only the very rich or the very poor could bring legal action, the common law courts were unable to cope with their workload. Most plaintiffs in such actions were required to give particulars which indicated their means. I asked for a survey to be done. It showed that the average income of plaintiffs in the Common Law Division of the Supreme Court was roughly the same as the community average. The explanation of their capacity to sue was that plaintiffs' lawyers historically acted on a speculative basis. This was good business, because the great majority of the cases were settled on terms that included payment by the defendant (usually insured) of the plaintiff's legal costs. However, as I mentioned, much of this work has largely disappeared. Litigation funding is now with us. Entrepreneurial activity in this respect raises issues that have come before the courts. It is not in all respects attractive, but subject to certain controls it may be a necessity. There is a need for some pragmatism about this, because the cost of access to justice is essentially a practical matter. Yet, a basic problem of access to civil justice is the remorseless mercantilisation of legal practice. This reflects the dominance of the culture of the market,

with its tendency to reduce society to the single dimension of producers and consumers.

Case management by judges is now an accepted feature of litigation. Because of the basis upon which most lawyers charge for their services, repeated interlocutory hearings add substantially to the cost of litigation. Interlocutory procedures, such as discovery and interrogatories, sometimes involve astonishing expense. Such is their cost, they may even be used as instruments of oppression. Summary procedures, where reasonably available, are often the only means of providing realistic access to civil justice. Modern judges and magistrates ought to be more, not less, favourably disposed to summary justice. Courts of primary and intermediate jurisdiction should not aspire to imitate the procedures of higher courts; on the contrary, they should recognise their own, less expensive, process as a strength which often provides the only prospect of reasonable availability of civil litigation to ordinary people.

The mega-trial is not a complete novelty. When I came to the Bar in 1963, the case of *American Flange v Rheem* was just getting started. As I recall, it was as at least as long as the *C7* case, although there were only two parties. What is new and more alarming is the length of the ordinary case. For well-resourced litigants, the time of judges is cheap. The government pays for judges; and it pays them much less than many litigants pay their lawyers. It is understandable that some parties and their lawyers adopt a habit of thought which discounts the economic

value of judicial services and court time. Judges should be conscious of this, and should be ready to assert their authority where that is necessary to secure reasonable expedition.

The administration of civil justice is not merely one of a number of alternative forms of dispute resolution. It is part of government. There are, therefore, major issues involved in requiring litigants to pay for court services. The courts are not merely service providers, and governments have a responsibility to make justice available to the public. Attempts to introduce user-pays justice suffer from both practical and theoretical difficulties. Yet litigants are using valuable and scarce resources, and modern judicial control of litigation should aim to reflect that fact.

Efficiency

Much attention has been given in recent years to streamlining and rationalising court process, within the general constraints of what is sometimes called the adversarial system. The essence of that system is that, in both criminal and civil cases, the parties, through their lawyers, define the issues to be tried, present the evidence upon which they intend to rely, and argue their respective positions as they choose. The judge undertakes the role, not of an investigator or a participant in the forensic contest, but of an independent adjudicator. A criminal trial normally takes the form of a contest between the government and a citizen. The theory that a just outcome is most likely to be achieved in this manner is not universally accepted, and even in common law

systems the full adversarial rigour of the process has been modified in significant respects. The system reflects a societal respect for individual autonomy. One of its strengths is the institutional protection it gives to the independence and impartiality of the judge, who plays no part in a decision to prosecute or commence proceedings, or in formulating the issues for trial, or in preparing the evidence, or in selecting the witnesses, or in framing the arguments. One of its weaknesses is that it assumes a reasonable balance of power (sometimes called equality of arms) between the opposing parties. A gross imbalance can defeat the system, and there are circumstances (of which the most obvious is a criminal trial of an unrepresented accused) where the judge is obliged to play an active role in order to redress the imbalance. Comparisons between the adversarial and inquisitorial systems are often oversimplified. In adversarial systems, modern judges are becoming more interventionist, and inquisitorial systems are beginning to adopt some of the features of the adversarial process, especially in the administration of criminal justice.

Case management, involving a level of judicial involvement in matters previously left to the parties and their lawyers, is now practised widely. The orality of the common law court process is diminishing. At both trial and appellate levels there is much greater emphasis on written material; developments in information technology have contributed to this. Electronic filing of originating process and supplementary material is used in some courts. International developments in court technology are well known in Australia, which has been one of the leaders in

implementing these changes. There is no occasion for me to elaborate on this. It is worth noting, however, that in some ways these changes, beneficial as they may be, have the capacity to be counter-productive. No judge or magistrate needs to be reminded of the problem of information overload. The facility with which lawyers can produce documentary material, including evidence and arguments in written or electronic form, increases the cost of litigation, and places an additional burden on judges. Judges often find themselves, at the end of a case and with little oral argument, presented with a volume of documentary material on the assumption that they will use it in the preparation of a reserved judgment. Conducting a completely oral procedure is now a luxury that most courts cannot afford, but there is a need to make allowance for the pressure on judges that can come from increasing reliance on written material. There is also, on occasion, a question whether such material has been properly tested and evaluated.

The imposition of time limits on evidence and argument, consistently with the basic requirements of fair process, is now more common. It is easier to do in appeal courts than at trial, where there is maybe an element of unpredictability that needs to be accommodated. In appeals in the High Court, we rarely impose formal time limits for oral argument, but counsel are told how long we are prepared to allot to a case (rarely more than a day) and they are expected to agree between themselves on a division of time. I have never found it necessary to be heavy-handed. Counsel understand what is required of them, and there is a high level of compliance. On the other hand, in special leave

applications when the Court decides to hear oral argument, time limits (20 minutes for each side) are strictly applied. Litigation is a prime example of work that expands to fill the available time. Some advocates, if given 20 minutes, will take 20 minutes; and if given a day, will take a day.

An issue that affects both the economy and fairness in the trial process is the use of expert witnesses. Of course, there is some litigation where technical issues require expert information. There seems, however, to have been a marked increase in the use of experts in cases where the true technical or specialist expertise involved is limited, and the experts are used mainly for the purposes of advocacy. When experts are used, their relevant expertise should be in something other than giving evidence. Confining opinion evidence within proper legal limits may require more attention to the rules of evidence than is often given by lawyers, especially in the preparation of written statements of evidence. Laxity in this matter complicates the task of trial judges and appeal courts.

I do not mean to suggest that judges should be encouraged to become their own experts. The extremes are to be avoided. The judge who requires proof of matters of common knowledge may be annoying. A greater, although I hope rare, menace, is the judge who is anxious to bring to his or her task information and wisdom extraneous to both evidence and arguments. When I was a barrister, a very experienced

American trial lawyer said to me: "It isn't what judges don't know that you have to worry about; it is what they think they know that is wrong."

Legal argument

Two major changes have affected the presentation of legal argument in trial and appeal courts. One is beyond the control or influence of the judiciary; the other is not.

The first change concerns the greatly increased level of legislative activity on topics that previously were left largely to the common law. Modern Parliaments enact legislation, which is to be interpreted and applied by judges, on a scale that would have astonished our predecessors. Partly as a consequence of the work of law reform agencies, partly as a consequence of expanding public and political interest in legal rights and obligations of many kinds, and partly as a consequence of an increased disposition to question and challenge all forms of authority, citizens now look to legislators to intervene in many areas that in former times were the exclusive province of judges and lawyers. Many examples could be given. Two will suffice. Legislation affecting sentencing now regulates extensively decisions that were formerly left largely to judicial discretion. Fortunately, although there are notable aberrations, Parliaments in Australia continue to accept, as a general principle, the value of discretionary and individualised sentencing. This acceptance, I believe, reflects public opinion. We have been spared the excesses of legislative intrusiveness that have affected

the work of some of our American counterparts. I have heard it said that American legislation to remove or severely curtail judicial discretion in sentencing was originally motivated by a politically liberal desire to overcome what was seen as discrimination against minorities in certain places. In Australia, moves to restrict judicial discretion are usually associated with the opposite political tendency. Another example of the same trend is legislation to effect what is sometimes described as tort law reform, or, at least, tort law change. In most Australian jurisdictions, the assessment of damages in negligence actions is heavily constrained by statute. Such examples could be multiplied.

Curiously, this development has not, or has not yet, been fully reflected in legal education. Few Australian law schools provide courses in statutory interpretation, although I am aware of some recent moves in that direction. The routine business of modern courts is largely taken up with interpreting and applying Acts of Parliament. Legal interpretation, including statutory interpretation, proceeds according to established principles, and imparting those principles ought to be regarded as an essential element in legal instruction. Those who arrange Bar practice courses also should keep this in view.

The second major change I have in mind concerns the approach to common law authority. Judicial precedent underpins the common law system. The doctrine of *stare decisis* is fundamental. Although I speak of relatively recent developments, and habits, the seeds of the problem have always existed in the common law.

According to Boswell's *Life of Johnson* (Vol 1, 443-444), on Saturday 27 March 1772, the great man and Sir Alexander Macdonald discussed judges, barristers and the law. Sir Alexander said: "Barristers, I believe, are not so abusive now as they were formerly. I fancy they had less law long ago, and so were obliged to take up abuse, to fill up the time. Now they have such a number of precedents, they have no occasion for abuse." Dr Johnson replied: "Nay, Sir, they had more law long ago than they have now. As to precedents, to be sure they will increase in course of time; but the more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigating principles."

What Dr Johnson asserted more than 200 years ago has a resonance for modern judges. The growth of precedents, he said, diminishes the law because it gives advocates, and in consequence judges, less occasion for investigating principles. Modern courts are affected, not only by the proliferation of judicial decisions that are reported or otherwise accessible, either in hard copy or electronically, but also in the use, or abuse, that is made of those decisions.

I referred earlier to information overload. This takes an especially acute form when, instead of authorised law reports edited with the conscious object of selectivity, advocates have available to them, and are therefore practically compelled to refer to, records of decided cases compiled with the object of universality. A barrister who specialises in

revenue law, for example, now has access to every decision on every revenue case made by every judge in the Commonwealth. Consulting those decisions to guard against error or surprise is one thing. Feeling obliged to cite them in argument, perhaps in written submissions which a judge is expected to make the subject of private reading, is another.

There is, however, a deeper issue. Excess of information may be burdensome, or annoying, but it is not fatal, and comprehensiveness has benefits. I would hesitate to make a judgment about whether practitioners these days, with ready access to the wisdom of the entire judiciary, are better or worse off than we were. Circumstances are different, and provided a barrister does not expect me to do the same, why should I complain if he or she consults everything that all judges have said on some topic? It is the way in which precedent is used that has the capacity to subvert principle.

The doctrine of *stare decisis* depends upon identifying the binding rule for which a decision stands. It is the *ratio decidendi* of a case that gives it authority, and that will involve a re-assertion, or clarification, or development of the law. The legally binding precedential effect of judicial decisions is a distinguishing feature of the common law. It would be an over-simplification to say that decisions of appellate courts in civil law jurisdictions have no precedential quality, but the defining characteristic of the common law is that it is judge-made, and is made by the systematic creation and adoption of judicial precedent.

The legal rule established by a decision of an appellate court, to be applied by courts bound by that decision and for most practical purposes by the appellate court itself in the future, is identified by relating the orders of the court, and the reasons for those orders, to the issues in the case. I stress "the reasons for those orders". In a collegiate court, the orders will be unanimous, or by majority. What is said by members of the court, or of the majority, may go beyond (sometimes well beyond) the reasons for the orders. What is said by a minority is not part of the reasons for the orders. Where the members of a majority write multiple reasons for judgment, it may be difficult to identify the essential reasons for the orders. However that may be, the search is for the binding rule. Yet there is a strong tendency, which in some cases amounts to a compulsion, to treat judicial reasons as a smorgasbord of *obiter dicta* from which the reader is invited to select according to taste. This may be a useful method of exposing law students to different ideas and approaches. It may be a source of ideas for legal change. It may provide a basis for informed commentary on the law judges are making. But it has little to do with the task that confronts practitioners, and judges, in the discernment and application of binding legal principle. Practitioners need to advise their clients as to the law; an advocate needs to persuade a judge that legal principle supports the advocate's case, and a trial judge or intermediate appellate court needs to know the binding rule to be applied. The law is neither completely certain, nor static. Sometimes it is distinctly unstable, or in need of refinement or modernisation. Even so, the primary reason for consulting judicial precedent is to establish the principle for which a case stands as

authority. For practitioners and judges, reasons for judgment are not like speeches made in the course of a parliamentary debate. What is sometimes said to be the increasing complexity of the law may be a modern manifestation of the tendency referred to by Dr Johnson: the displacement of legal principle by misused precedent.

The place of judges in government

What I have just said leads me to the topic of the role of the modern judiciary. Who do judges think they are? What do people in the other branches of government think judges are supposed to be? Is there such a thing as public opinion of judges and, if so, what is it? Of those questions, that of immediate importance is the first. There is probably no clear or simple answer to the second or the third. People in government, and members of the public, probably have a range of opinions about judges, to the extent to which they think about them at all.

As an institution in the public life of the nation, a feature of the judicial branch of government is that it is so small. There are only about 1000 judicial officers in Australia. For the leaders of the judiciary, this is a good thing. There are, I understand, more than 200,000 judges in the People's Republic of China. What is called "judicial reform" is an important topic in that country. When I meet China's judicial leaders, I marvel at what must be involved in achieving discipline in a judiciary of that size. Plainly, a relatively small judiciary, such as that in Australia,

can more easily achieve a sense of cohesion and common purpose, and an institutional acceptance of standards of professional behaviour. In some Australian States, the Chief Justice of the State knows every judge and magistrate personally. The members of our final court of appeal do not operate exclusively in the seat of government, but regularly visit major capital cities. We have, for practical purposes, a national legal profession. We have an integrated system of justice, with movement of personnel between State and Territory, and federal, judiciaries. We have a National Judicial College and, of course, this Judicial Conference. All this supports our professional unity and discipline. For that, I am very thankful. Inevitably, the size of the judiciary will increase. That will make it all the more important to foster unifying forces of the kind I have mentioned. That is why the Judicial Conference of Australia is so important to the future of the judiciary.

There is, I believe, an encouraging level of understanding, by people in public life, by the media, and by the community, of the importance of the rule of law, and of the inseparability of that from judicial independence. Independence always causes friction and resentment. Judicial independence is sometimes seen as interfering with a government's capacity to govern; and so in a sense it does. The error lies in failing to recognise that the judiciary itself is part of government; that judicial authority is governmental authority; and that justice and executive power are both attributes of sovereignty. Our constitutional arrangements reflect a political philosophy which values a separation of legislative, executive and judicial power as a safeguard of

freedom. The separation is not absolute, and the political philosophy is not incontestable. It is the legislative branch of government that is elected. This encourages an assumption that judicial power in some sense lacks legitimacy. The phrase "unelected judges" is often deployed, not to make the point that judges are free from the pressures of political contest, but to suggest that their authority is in some way illegitimate. The freedom of judges from political constraints, which ought to be welcomed because it sustains their impartiality, is sometimes a source of frustration. Impartiality is not a matter of degree. Words like "accountability" come trippingly off the tongue, but the conditions which must exist for judges to be, and to appear to be, free to administer justice according to law are inconsistent with certain forms of external control appropriate to other forms of authority.

People who speak of "unelected judges" rarely intend to suggest that Australian judges should be popularly elected. A good test of such a proposal would be to compose a policy speech for a candidate for judicial office. People who put themselves forward as candidates for election to an office usually need to do at least two things: first, they need to make representations as to what they will do if elected, and they are rarely able to confine themselves to anodyne generalities; secondly, they need to show why they should be preferred to the alternative candidates. Both of those courses are inconsistent with the comportment Australians expect of potential judges, and have the capacity to compromise their impartiality. I sense no serious community support for replacing our unelected judges with elected judges.

The fact that judges do not subject themselves to popular elections is related to what, in our society, is seen as the proper and legitimate function of judges. In particular, they do not engage in the political process in their decision-making. Judicial decisions sometimes have large political consequences, but, unlike political decisions, we expect them to be made impartially. We expect judicial authority to be exercised for judicial purposes, and people in general, and politicians in particular, are quick to sense when the bounds of judicial legitimacy are exceeded.

Pascal said: "Justice without power is ineffective; power without justice is tyranny." (*Pensées* (1670) at ch iii, 298). A nation's justice civilises its power. The separation of judicial authority from executive authority creates a tension that serves a positive and constructive purpose.

In the nature of things, from time to time those who have executive responsibilities will call for an increase in their power in order to enable them to discharge their responsibilities. From time to time, justice requires that those with judicial responsibilities exercise judicial power in a way that diminishes or restrains executive power. All forms of governmental power are exercised by fallible humans. One of the reasons why the law constrains executive power is that, even with the best of intentions, the people who carry out executive acts sometimes make mistakes. Matching the power given to officials with the calibre of

the people who are called upon in practice to exercise such power is important and often difficult. At least in theory, where a mismatch results in error and harm then political responsibility follows. But when excess or abuse, or human error, in the exercise of executive power results in injustice, then citizens will look to the judicial arm of government for redress. It is through an independent judiciary that the nation protects its justice from its power.

This, I have come to realise, is a message that needs constant reinforcement. I have no taste for repetition, but this is an unending story. The work of the Judicial Conference of Australia in explaining the role of an independent judiciary in the scheme of the Australian constitutional system will never be completed. I am sure that whoever takes my place will support that work, and I am sure that you will never give up on it.