

23 YEARS ON THE HIGH COURT

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1. The title of this talk is something of a misnomer. My experience of the High Court goes back a long way before the 23 years I served as a Justice and later Chief Justice of the Court.

2. At the outset, however, I should say something about the High Court's role. It was set up by the Australian Constitution as the "Federal Supreme Court", to be called the "High Court of Australia". High Court is the final court of appeal for Australia, though it was subject to restricted appeal to the Privy Council in London until 1975, and it is Australia's constitutional court in the sense that it determines the interpretation of the Australian Constitution.

3. As a law student I attended sittings of the Court in Darlinghurst where it sat before it moved to Canberra in 1980. In those days Sir John Latham was the Chief Justice. He had been a leading counsel in Victoria and was Attorney-General in the Bruce Government in the 1920s and later Leader of the Federal Opposition. To me he conveyed the impression of an austere schoolmaster, meticulously noting the propositions submitted by counsel in argument. He was described as "a coldly logical personality"[†]. He was a conservative and well-regarded lawyer, noted for his dedication to logic and

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[†] Oxford Companion to the High Court, Oxford, 2001, p.420.

legalism. In my earlier days I was more impressed by his clearly written judgments than by the dense and cryptic judgments of his successor, Sir Owen Dixon. Later I revised this opinion.

4. Latham was unfortunate in that some members of the Court in his time were difficult personalities and disharmony was the order of the day. Nonetheless he managed the business of the Court efficiently and was always courteous. It has been said that he frequently interrupted counsel's argument and often at great length. For my part I did not think that his interventions were too long. But my experience of him was very limited.

5. First and foremost among the difficult personalities was Sir Hayden Starke, a formidable and strong-minded lawyer from Victoria. Ayres' biography of Sir Owen Dixon paints a disconcerting picture of the personal antagonisms that divided the Court at that time[‡]. Starke's hostility was directed against his own colleagues, particularly Evatt J., rather than counsel. Starke described his colleagues as "worms" not "men". On other occasions he described some of them as "parrots". There was an occasion when Clive Evatt, Evatt J's brother was addressing the Court and Evatt J. was helping him over some difficulties in his argument. Starke then asked Clive Evatt another difficult question and said, "There, let's see brother Bert get you out of that one." On another occasion in 1948, when the Justices attended the burial of Sir Isaac Isaacs, a former Chief Justice and Governor-General, as they passed the open grave, Starke said to Sir George Rich, then aged 86, a long serving Justice of the Court, George, "Are you sure it's worth while your going home?".

[‡] Ayres, Owen Dixon, The Miegunyah Press, 2003, esp. Chapter 5.

6. Disharmony is no stranger to the Court. The antagonism that existed between Isaacs and the early members of the Court is well-known as was the later antagonism between Sir Garfield Barwick and Lionel Murphy.

7. I appeared before the Court when Dixon was Chief Justice on a number of occasions. Dixon was unquestionably the greatest and most influential judge Australia has produced. His reputation is acknowledged throughout the common law world. He presided over the Court with Olympian omniscience and detachment. During argument he confined himself to cryptic comments, maintaining a sardonic expression. His outward presence masked a troubled personality. He kept extensive diary notes in which he assiduously recorded the shortcomings of his colleagues. That made for lengthy diary notes. The revelation of the contents of the diaries may have impaired his reputation. This is unfortunate as it is unlikely that he kept the diary for publication.

8. Dixon subscribed, on paper at least, to a conservative judicial method which relied strongly on precedent. It is very likely that he made policy choices which were not openly declared. It is also likely that he believed that discussion of policy choices would run the risk of subjecting the Court to criticism. Better to concentrate on doctrinal discussion and precedent which is less vulnerable to challenge by critics who are not versed in the law.

9. He could be helpful to counsel as he was to me when, in my third year at the Bar, I argued a constitutional case, challenging the validity of s.24 of the Bankruptcy Act 1924 (Cth)[§]. In another case in which I appeared a little later, an agency case, through a slip of the tongue, I incorrectly referred to the English decision *Ogdens v Nelson* as *Ogden v Nash*. Dixon was quick to point out my mistake and in such a way as to imply that I had mis-spent my youth in reading Ogden Nash. He was probably right. Ogden Nash is not held in high esteem to-day.

10. The Court was highly regarded when Dixon was Chief Justice. He succeeded in generating a higher percentage of joint judgments than his predecessors except perhaps for the first Chief Justice, Sir Samuel Griffiths. On the Court in Dixon's time were some very able judges. They included Sir Wilfred Fullagar, Sir Frank Kitto, Sir Alan Taylor, Sir Victor Windeyer and Sir Douglas Menzies.

11. Sir Victor was a legal historian, a noted scholar who had a profound understanding of the structures of government and public affairs, something you would not expect of a military commander, unless you called to mind someone like Julius Caesar and perhaps the Duke of Wellington. Sir Victor did not intervene to any extent in oral argument. He was, I think, discomforted by his colleagues who were more interventionist and had more nimble minds. But there was no doubt about the quality of his judgments. Indeed, with the passage of time he has emerged as one of the great High Court Judges, eclipsing Sir Frank Kitto who would have been regarded as his superior when I was at the Bar and later when I was Solicitor-General. He was the first High

[§] (1954) 90 CLR 353 (the Court held the section invalid).

Court Justice to make extensive use of academic writings. He also made use of decisions from jurisdictions outside Australia.

12. Sir Douglas Menzies had been, in Dixon's words, a "dazzling advocate" – indeed he was the most polished and articulate counsel I ever heard and a man of infinite wit. I remember on one occasion when a Solicitor-General completed the first part of his argument with the words "That completes the first branch of my argument". Menzies commented, "Mr Solicitor, would not twig be a more appropriate word?" He was a cousin of Sir Robert Menzies and had been Secretary of the Chiefs of Staff Committee during World War 11. His reputation as a Judge was affected by his ill-health.

13. Dixon's successor, Sir Garfield Barwick, was an entirely different personality. Each maintained a barely-concealed dislike of the other. Dixon, who was extremely well-read, prided himself on his knowledge of Greek and Latin. Although Barwick was not a scholar, he had a quick and brilliant mind, and had won the University Medal in Law. He was the outstanding counsel of his day; courageous and tenacious, he possessed a remarkable capacity for turning hostile questions from the Bench to his advantage. And in his address in reply, he could be devastating. This is invariably the mark of an outstanding counsel. He was a very successful Attorney-General (probably the best Australia has had) and also a successful Foreign Minister.

14. As junior counsel I appeared with him in a number of cases when he was at the Bar and later when he was Attorney-General. He had remarkable stamina, both physical

and intellectual and equally remarkable powers of concentration. As a judge his approach to the law was more practical and less philosophical than Dixon's. He never achieved, as a judge, the status and reputation of Dixon. He had the misfortune of following Dixon as Chief Justice. This led to the making of an unfavourable comparison, particularly in Victoria, where Dixon was revered and Barwick was not regarded as his equal. And he joined a Court whose members had served with Dixon and greatly admired him.

15. Barwick never achieved a significant degree of influence with his colleagues, partly by reason of his personality. He was strong-minded with a penchant for talking rather than listening. Although he had constructive ability, he also possessed a destructive bent of mind and tended to take command of counsel's argument with the result that counsel's argument was sometimes shredded before it was fully articulated. Kitto, Taylor and Menzies were established lawyers in their own right and were not disposed to defer to Barwick. Indeed, they were almost as interventionist in argument as he was. Appearing before the Court at that time was a test of stamina and fortitude, to be compared perhaps with being examined by Torquemada and the Spanish Inquisition.

16. When older members of the Court were replaced by Sir Cyril Walsh, Sir Harry Gibbs, Sir Ninian Stephen and myself, Barwick's influence did not increase. Walsh and Gibbs were judges in the Dixon mould. Menzies, who was friendly with Barwick, acted as a bridge between Barwick and the younger members of the Court. When Menzies died and was replaced by Lionel Murphy, relations deteriorated and all the more so, as

Barwick, who was de facto architect of the new Court building, did not consult his colleagues about the building.

17. Barwick had a lasting impact on the way in which cases were argued in the High Court. He discouraged the reading of lengthy passages from the decided cases and focused attention on the discussion of propositions in the light of legal principle and, where appropriate, relevant policy factors. This was a welcome development. It reduced the time taken in hearing a case.

18. Barwick was also responsible for the Court moving to its permanent home in Canberra in 1980. Previously it had travelled around Australia, sitting in the State capital and using the facilities of the State Supreme Courts, except in Melbourne and Sydney where it occupied its own Court building. The Courthouse in Canberra has unrivalled facilities – courtrooms, library and recording facilities. The Court's library is the finest law library in Australia. Only a Chief Justice of Barwick's status and political connections – his clout – could have secured such a building for the Court.

19. Each Justice has the assistance of a secretary and two associates. The Judge's associates are generally recent University graduates, mostly graduates with first class honours in Law. They generally stay with the judge for a year, sometimes a little longer. Many of them subsequently enter the legal profession. Appointment as an associate to a High Court Justice is highly prized.

20. Before the Court moved to Canberra, Sir Edward McTiernan retired at the age of 84. He had been on the Court for a record 46 years. In earlier days he had been Attorney-General in the Lang Government, resigning from that position after falling out with Lang. He was very well read and an under-rated lawyer. He was courteous and considerate, though not perhaps renowned for hard work towards the end of his career.

21. The move to Canberra in 1980 coincided with other events. In combination they had a strong impact on the Court's work. The appeal from the High Court to the Privy Council was eliminated, thereby reducing the precedential effect of the decisions of English courts on the High Court's jurisprudence. The move to Canberra itself meant that most of the Court's cases were heard in Canberra, though the Court has continued to sit in Sydney and Melbourne to hear special leave applications and in the other State capitals for not more than one week a year, if there is sufficient work to justify a visit. The Justices also have Chambers and facilities in their home city as well as Canberra.

22. The fact that the Justices are centrally located in Canberra has facilitated conferences and discussions between Justices about cases, as has the technological advance in electronic communication. One such advance, which has a different advantage, is the hearing of special leave applications by video link with the Court sitting in Canberra and counsel presenting the case in another city. On one occasion the video link was interrupted. The image of the Justices on the screen was replaced by the characters in "Sesame Street". The Registrar reported that counsel did not think that

there was much difference between the Justices and Big Bird and his companions. My suspicion was that Big Bird was held in higher esteem than I was.

23. One unexpected consequence of the video link was that applications were heard and decided in a shorter time than they took in what the Americans called “an eyeball hearing”. Both counsel and judges found that focussing in the TV screen sharpened their concentration and eliminated any other distractions in the courtroom. Our system was based on a model pioneered by the Supreme Court of Canada. The Chief Justice of Canada subsequently told me that the Canadian experience of the video link was the same as ours.

24. Another important change was the 1984 legislation which abolished appeals as of right from other courts to the High Court and required the grant by the High Court of special leave to appeal as a condition of bringing an appeal. This allowed the Court to confine appeals to cases in which an issue of special or public importance has arisen, or there has been a significant irregularity, enabling the Court to concentrate its efforts on important work. This reform has resulted in a marked increase in the number of special leave applications over the last 20 years, particularly criminal leave applications of which a small percentage only succeed. This represents a growing problem for the Court and other national courts of final appeal. Various means have been adopted to address the problem.

25. Changes in the composition of the Court in the 1970s and the early 1980s also made a difference to the Court's approach. Sir Kenneth Jacobs, the President of the NSW Court of Appeal, a very good friend of mine, was appointed in 1974 but was forced to retire as a result of ill-health in 1979. Lionel Murphy was appointed on the death of Menzies in 1975. Sir Gerard Brennan, Sir William Deane and Sir Daryl Dawson were appointed in the early 1980s.

26. Murphy was certainly a radical reformist judge. A great admirer of the Supreme Court of the United States, he had little respect for precedent. His judgments often stated propositions to which he subscribed with relatively little discussion of the previous case law. His judicial methodology made it very difficult for other members of the Court to agree with his judgments, even if they were otherwise minded to do so. Although he may have thought that his judgments resembled those of the United States Supreme Court, to say that there was a strong resemblance would be incorrect. His admirers claimed that he influenced other members of the Court. I do not agree, though I did agree with some of his criticisms of the existing law, notably in relation to criminal trials. I had known him from the days when we were law students in the same year. We were not friends. But we established a working relationship.

27. From the historical perspective, Murphy is chiefly noted for the Murphy affair. There were Parliamentary inquiries into his alleged attempt to influence the proceedings against his "little mate", the solicitor Morgan Ryan, for conspiracy in relation to immigration matters. Ultimately Murphy was prosecuted for attempting to pervert the

course of justice. At the first trial he was convicted on one charge but the conviction was quashed on appeal. Although at a second trial he was acquitted, another fresh Parliamentary Commission of Inquiry was set up to deal with fresh allegations against Murphy. He unfortunately died from cancer during the currency of that Inquiry.

28. These events took place while Sir Harry Gibbs was Chief Justice and gave rise to a strong disagreement between Gibbs and Murphy. Gibbs considered that Murphy should not sit while the allegations against him were unresolved. Murphy maintained correctly that he had a constitutional right to sit. Gibbs and the rest of the Court considered that he should voluntarily agree not to sit until the allegations were resolved. This he refused to do. The question was not resolved and it has complications. Murphy believed that to stand down voluntarily would be seen by the public as a sign of guilt. You need to know that neither the Chief Justice nor the rest of the Court have power to suspend a Justice from performance of his judicial duties.

29. The events also gave rise to a serious misunderstanding between Gibbs and the Federal Attorney General, Lionel Bowen. Bowen thought that Gibbs told him that the Court would conduct its own inquiry into Murphy's alleged misdemeanours. There was no way the Court could do that and it is inconceivable that Gibbs would have said that to Bowen. It was also reported that the Court had threatened to "go on strike" if Murphy insisted on the right to sit. The Court made no such threat.

30. It was a difficult time for the Court. It had to go about its work while the Parliamentary Committees and Commission of Inquiry and the legal proceedings took place and the affair was the subject of political controversy and public debate. But the Court continued to function as an institution and to hear and decide cases, including a case brought by Justice Murphy to challenge the proceedings before the Parliamentary Commission of Inquiry which the Court rejected.

31. The Murphy affair unfairly cast a shadow over Gibbs's Chief Justiceship. He was a fine lawyer who presided over the Court efficiently, with patience and courtesy. His judgments exhibited both learning and common sense, the latter being a quality not always evident in High Court judgments. In constitutional matters he was not infrequently in dissent on questions relating to the extent of Commonwealth powers. His judgments in the field of private law were of high quality and he made a significant contribution to the development of the criminal law.

32. Sir Ninian Stephen retired in 1982 after 10 years on the Court to become Governor-General. He also was a fine lawyer and would have made an even more distinguished contribution to the Court had he not retired. An urbane and charming colleague he had an elegant writing style and a voice described as the most mellifluous legal voice in Australia. Of all the Judges I have known, he had the most open mind, free from pre-conceptions and prejudices.

33. Sir Ninian was a pipe-smoker. On one occasion when he was working at night in the old Supreme Court in Brisbane, his smoking set off the fire-alarm in the building. The Fire Brigade arrived to find Sir Ninian working on a judgment. Some years later, the old Supreme Court was burned down.

34. It would be invidious for me to speak about individual members who were with me when I was Chief Justice. Although we did not always agree on the outcome of the case under consideration, we maintained a collegial relationship – more so I think than in the earlier period when I was a Justice of the Court. We met regularly to discuss the judgments, something which had not occurred before in my experience, though there had been meetings to discuss particular cases. Moreover, we made a conscious effort to produce joint judgments rather than a series of individual judgments and, if possible, to bring about judgments which, if not unanimous, were supported by a clear majority, say 5 to 2, rather than by a bare majority of 4 to 3, particularly in important cases. Our efforts were not as successful as I had hoped but, given the extent of our underlying differences of opinion, the outcome was probably as much as could be expected.

35. The Court is a collective institution and it is the decision of the Court as a whole that is all-important, not the judgment of the individual judges. But each Justice is obliged to deliver a judgment which in his or her view represents the law, even if it is participating in a joint judgment or agreeing with the judgment of a colleague. There is therefore no place for bargaining as there is between politicians in coming to a political

decision. The way in which commentators have written about the Supreme Court of the United States has led Australian journalists to refer to justices “voting” on cases, as if to imply that judges make some pragmatic or political choice. That, of course, is not so. Each judge decides a case by reference to his understanding of the law as applied to the facts as found. There is in the judicial process no element of the expediency, compromise and bargaining that characterises the political process.

36. Judges, particularly appellate judges, and most notably High Court Justices, are constantly confronted with leeways of choice. The law reports are replete with cases which deal with questions of law to which there is no certain or accepted answer, there being respectable arguments to support different conclusions. So the courts, again most notably, the High Court, constantly make law by declaring what is the answer to a doubtful question of law. Hence the differences of opinion between judges, even judges on the same court, about the correct answer to any question of law.

37. Differences of opinion about the correct answer to a legal question are compounded by other disagreements which go to the very role of the courts. Should a court apply an old precedent which seems to be incorrect or out of date and leave change to the legislature? Here you need to bear in mind that the High Court is not bound by precedent; it is free to depart from its own previous decisions, although it is very reluctant to do so. That reluctance is stronger in relation to property and commercial decisions than other decisions.

38. When I first entered the legal profession, it was commonly thought that, if an existing decision was wrong, change should be left to the legislature. It was also thought then that Parliamentary supervision and redress was an adequate remedy for errors in administrative decision-making. Neither view now commands acceptance. A precedent may be clearly wrong because it is based on error, whether doctrinal or otherwise or because it is based on values which are outdated. Further, in modern times, it has become apparent that Parliaments are interested in the political game, not in law reform, especially reform of private law, or in reviewing the making of administrative decisions. The changing nature of Parliamentary priorities is therefore just one of many factors which serve to explain why final courts of appeal throughout the world are more inclined to review precedent than they were even fifty years ago. And that statement applies as much to the High Court of Australia as it was recently constituted as it does to any other court.

39. In recent times, the two most sensationalised decisions of the High Court, *Mabo (No.2)* and *Wik Peoples v Queensland*, both related to indigenous land rights. *Mabo* was delivered while I was on the Court, *Wik* after I left. The two decisions need to be understood in the light of what I have already said. *Mabo* departed from an old Privy Council decision in 1889 which stated that New South Wales was “without settled inhabitants and settled law”. Before *Mabo* that proposition had been refuted by the findings of fact made by Sir Richard Blackburn in a case relating to Gove Peninsula in the Northern Territory. The Court’s decision in *Mabo* was consistent with decisions in

the United States, Canada and New Zealand and with later decisions of the Privy Council dealing with indigenous rights in British colonies in Africa.

40. The decision in *Wik*, though a divided decision, was based on long-established principles of real property law which drew a distinction between a lease and a licence. Though called leases the relevant interests in *Wik* were no more than licences and as such did not terminate whatever indigenous title subsisted in the land. It is of some significance, that the two most sensationalised decisions of the High Court in the last half-century were not constitutional decisions but decisions on indigenous land rights.

41. This is rather surprising. In the past, the Court's decisions which had attracted the most publicity and the most controversy were its decisions on the Australian Constitution. And it is on constitutional issues that the members of the Court have been most divided. It is probably true to say that, at various times, it has been possible to divide the Justices into those who tend to favour Commonwealth power and those who tend to favour State power, questions of Commonwealth and State power being the staple diet of the Court's constitutional business over the years. Generally speaking, in the eyes of the commentators and perhaps in the opinion of a number of the Justices themselves, the constitutional work has been regarded as the most important.

42. In the early days of the Court's existence, its decisions on the Constitution were of vast importance. This was understandable in a context in which the six separate colonies had joined together in a Federation and the new Court, by its decisions, was

delineating the contours of the respective powers of the Commonwealth and State Parliaments. Nowadays the Court's constitutional decisions command nothing like the degree of public attention that decisions in the early years of federation attracted or even the *Bank Nationalization Case* in 1947 or the *Communist Party Case* in the early 1950s.

43. All Justices of the High Court are appointed as a result of a Cabinet decision of the Commonwealth Government pursuant to the Constitution. There is a statutory requirement that the Commonwealth Government will consult with the State Governments. This requirement has been understood by the Commonwealth as simply obliging it to ask the State Governments to nominate a candidate for consideration. Various suggestions for reform have been made, including proposals for participation in the appointment process of an independent Judicial Commission, a proposal which has had the support at various times of Sir Garfield Barwick, myself and, more recently, Sir Gerard Brennan.

44. A High Court Justice is required to retire at the age of 70. This requirement was introduced by an amendment to the Constitution approved at a referendum in the time of the Fraser Government. Although the Constitution contained no specific provision dealing with compulsory retirement the early High Court had interpreted it as contemplating appointment for life. Chief Justice Gleeson, before his retirement, questioned whether compulsory retirement at 70 is desirable.

45. Sir Owen Dixon has written of the unremitting and onerous burden of work imposed on the judges of the Court. The burden of work has been accompanied by the burden of travelling. Before the Court's move to Canberra, travelling was extensive as the Court was scheduled to sit for not less than 9 weeks a year in Melbourne, two weeks a year in Brisbane, Adelaide, Perth and Hobart and the rest in Sydney. For a Melbourne judge, the time spent away from home was considerable. Victoria did not generate nearly as much work for the Court as NSW did. In early times the Court travelled by rail and by ship to Perth. Even with the advent of airline travel, the High Court had established a convention that not all the judges would travel in the one aircraft. By the time I was appointed to the Court, that convention had been abandoned – no doubt it had its origins in concerns about aircraft safety.

46. The move to Canberra did not lessen the amount of time I spent away from home in Sydney. I found working in the Court in Canberra artificial and insular. The Court is a Canberra monument, virtually on the lakeside, surrounded by green parkland. It is a world away from shops or restaurants except for those in the National Gallery and the National Library. The entire working day was spent in the building. If you went out to lunch, which one did rarely, it was necessary to make a car trip. In Canberra, a High Court Justice is more removed from the community than is a judge on a court in one of the State capitals.

Conclusion

47. The High Court is a great national institution with an international reputation. Its role and importance are not fully appreciated. Efforts have been made in the last two decades, particularly by the Chief Justices, and, of course, Justice Kirby, by means of speeches, articles and interviews, to speak about the Court's work so as to promote a better understanding. But much of what the Court does is not newsworthy and would not make for a television spectacular.