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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2004**

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Occasional Address - Graduation Ceremony: Policing Studies - Charles Sturt University

**OCCASIONAL ADDRESS
GRADUATION CEREMONY: POLICING STUDIES
CHARLES STURT UNIVERSITY
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
29 OCTOBER 2004**

I grew up in a country in which the Prime Minister, Sir Robert Menzies, was able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching cricket and then return, taking another six weeks to do so. Such conduct is inconceivable today. Not even our present Prime Minister could restore the pace of that era in this regard.

I hold the belief, which many of you probably regard as illusory, that this was not that long ago. The technological changes over this period have been extraordinary and are continuing. For many years, all aspects of Australian life was dominated by what was aptly described as the tyranny of distance. In some respects we have substituted the tyranny of distance with the tyranny of immediacy. This tyranny, at least, we share with everyone else.

All aspects of life have speeded up. Olympic sports like luge, cycling and canoeing are now measured in milliseconds. Other sports have changed their rules or reinvented themselves to provide a "fast-food" alternative. One thinks of the introduction of tie breakers in tennis. Sir Robert Menzies would never have approved of one-day cricket.

Anyone using contemporary telecommunications or computer technology has experienced a curious phenomenon: a sense that a particular delay in some processing functions was quite intolerable, even though that length of delay was perfectly acceptable, indeed regarded as miraculous, only a year before.

Where we once spoke of words per minute, we now speak of characters per second. One can buy telephone answering machines with a quick replay button - in a digital format, so that the replay is accelerated without the high pitch of a Disneyfied chipmunk. In Tokyo there is a restaurant which charges by time. You clock in, you clock out and your bill is computed at a certain number of yen per minute.

Indeed it is necessary for us to create the illusion that we are saving time, even when we cannot do so. On most elevators, the "door close" button is in fact a placebo. It has no function other than to placate those who measure their life in seconds.

Sometimes our technology proves constraining. The original typewriters were mechanical. A fast typist would cause the metal typefaces to lock together. Accordingly, a keyboard was invented to slow down the pace of typing in the English language, by positioning the letters in a deliberately inconvenient manner. This is called the QWERTY keyboard, after the top left hand line of letters. It remains the standard upon which everyone has learned to type, even though it is deliberately inefficient.

I give another example concerning the booster rockets on the side of the United States space shuttle, which must be shipped by train from the factory to the launch site. Those booster rockets cannot be made any bigger because they have to fit through a single track railway tunnel in the Rocky Mountains.

The United States railway gauge, which is four feet eight and a half inches, or 1.435 metres, was adopted because that was the gauge in the pioneer industrial economy, England. The first railway lines in England had been built by the same engineers who built the pre-railway tramways and that was the gauge that they had used. The reason they adopted that gauge was because they used the

same jigs, tools and equipment that had long been used to build wagons and carriages, drawn by horses. The wagons and carriages were built with four feet eight and a half inches between the wheels because that was the space between the ruts in the road for many of the long distance roads in England. By continued use over the centuries, those ruts had become fixed by the passage of countless wagons and carriages and the most efficient way to traverse the road was to stay in the ruts.

Many of the long distance roads in England had been laid down by the Romans and the ruts had commenced to be formed during the period of Roman occupation of England by the wheels of Roman chariots. All chariots throughout the Roman empire were built, in the interests of standardisation, with a distance between the wheels of four feet eight and a half inches. That distance was originally chosen because it was the approximate width of the backside of two horses.

Accordingly, the reason why the space shuttle is, and will remain, of limited capacity, is because its booster rockets cannot be much bigger than the width of two horses' behinds.

The story of the long-term consequences of deeply embedded structures can serve as an introduction to the theme which I wish to address on this occasion. Most of you will come to play a role in the administration of justice. It is not well understood just how deeply embedded in our systems of decision-making are fundamental assumptions of a structural character about the processes of justice.

We Australians like to think of this as a young country. Indeed, the second line of our National Anthem is "for we are young and free". However, when it comes to the basic mechanisms of governance this is not a young country, this is an old country. The Supreme Court of which I am Chief Justice was established in 1824. It has now had a continuous existence as the same institution for 180 years. I can read the early judgments of the Court and understand them completely. They use the same concepts and apply the same basic principles.

Obviously the law has changed in numerous respects since that time. Nevertheless, there is a fundamental core content of a continuous character. We have an even longer inheritance of some 900 years from our origins as a British colony. But in Australia itself we have a history of 180 years of uninterrupted institutional continuity. The institutions of our parliamentary democracy are also old. Three years ago we celebrated the Centenary of Federation. Next year we will celebrate 150 years of representative and responsible government in New South Wales.

These institutions make a fundamental contribution to our social stability and our economic prosperity. That contribution arises in large measure by reason of the longevity of the mechanisms of governance, both of parliamentary democracy and of the rule of law.

By international standards these institutions are extraordinarily old. Let me just give you a quick overview of the position elsewhere in the world at the time that the Supreme Court of New South Wales was established in 1824.

Other than in England, and I think only Sweden, nowhere in Europe can one identify any institution of this longevity. Germany did not exist. It was a bewildering variety of kingdoms, duchies, electorates and independent city states. Nor did Italy exist. It was similarly a variety of republics and monarchies with a large region in which the pope exercised temporal power. These nations would not even emerge for 40 years.

France had the restored Bourbon monarchy, after an unsuccessful experiment with its first republic and its first empire. Ahead of it were four more republics, another empire and a period of Nazi occupation and Vichy regime. Germany, after its unification, would be first an empire, then a republic, then the Nazi regime to be followed by a division into two distinct states, one a democracy another a Communist dictatorship, before reunification.

The position in Asia was no different. China was still an empire as it had been for thousands of years. 1824 was 20 years before the first Opium War began the process of opening up China, eventually leading to a nationalist revolution in 1911, a period of warlord domination, then a Communist regime that commenced in 1949, 125 years after the New South Wales Supreme Court was brought into existence.

Japan was then dominated by the Tokugawa Shogunate. It would be 50 years before the Emperor was restored to authority. A number of governmental systems followed, including a military dominated regime followed by a democratic system after World War II.

One can go on and on. Save in England and North America the institutions of governance in virtually every part of the world went through numerous fundamental transformations. Each of the changes of regime, whether by way of revolution, or invasion, or peaceful decision, was associated with the transformation of the legal system. The dislocation and social instability associated with these transformations is something of which Australia has blessedly been free.

Australians should appreciate the longevity of our fundamental institutions. We should long since have abandoned that national diffidence which made us act as if history was something that happened somewhere else. Our own history is long and remains of fundamental significance to our day to day lives.

As each of you play your roles in the administration of justice in the future, I ask you to remember the fact that you operate in institutions with a long and proud tradition. The modes of decision-making and the principles applicable in our legal system have been developed by trial and error over long periods of time. You will no doubt, from time to time, come across rules and practices which you regard as inhibiting the freedom of your activities. However, those rules and practices have been forged in the heat of experience over the centuries.

There is a great deal of wisdom deeply embedded in institutional processes of such longevity. That wisdom is not always apparent to those who have to accommodate their instincts and wishes to institutional constraints. As you experience such constraints in the future you should always remember their origin and that they represent the accumulated wisdom of many generations. This nation is a stronger and better place by reason of the age of our fundamental institutions of governance.

In conclusion, let me congratulate you on your graduation. The requirement of tertiary study for entry into the police force is comparatively recent. It has played an important role in improving the quality of policing in this State. I wish you well in your future careers.

Blackstone, Burke Bentham and the Human Rights Act 2004 (ACT) - Keynote Address 9th International Criminal Law Congress.

**BLACKSTONE, BURKE, BENTHAM AND
THE HUMAN RIGHTS ACT 2004 (ACT)
KEYNOTE ADDRESS
9TH INTERNATIONAL CRIMINAL LAW CONGRESS
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
CANBERRA, 28 OCTOBER 2004**

The theme of this conference is: Human Rights and the Criminal Law. It has been adopted, as Chief Justice Higgins has noted in his Welcome Message to participants, by reason of the recent passage of the Human Rights Act 2004 (ACT) which introduced a bill of rights modelled, in large measure, on the UK Human Rights Act 1998.

With the exception of this Territory, Australia remains one of the last outposts of resistance to what has been described in contemporary jurisprudence as the "rights revolution".

Common lawyers have traditionally been reluctant to embrace the rhetoric of rights. Australian lawyers, other than quite recent graduates, maintain that reluctance. No doubt that will change, probably quite rapidly. There remain real issues, and real choices to be made, about the proper role of the judiciary in a democratic society. I wish to address a few remarks at the outset this morning to the reasons underlying the traditional attitude of common lawyers to rights talk.

In 1753, Sir William Blackstone delivered the first lectures on English law ever presented at an English university. Until that time Oxford and Cambridge had taught only Roman and canon law. The Inns of Court were the only university for common lawyers. Blackstone was to become the first Vinerian Professor of Law at Oxford.

Blackstone's Commentaries was the first comprehensive statement of the common law. It is noteworthy that he had no diffidence about the language of rights. The first book of the Commentaries is entitled "Of The Rights of Persons". Chapter 1 of that book is entitled "Of The Absolute Rights of Individuals". His primary focus was on political or civil rights and, particularly, on the right of property. I would not wish to put Blackstone forward as any kind of model for a contemporary human rights scholar[1]. However, his choice of language must have reflected the practice of the bar at the time.

Of particular significance for the future was the influence of Blackstone's Commentaries in the United States of America. In the course of his defence of the American colonists against the conduct of the British executive, Edmund Burke noted that the Commentaries had sold as many copies in America as they had in England. Indeed, without any institution such as the Inns of Court, and with a dispersed population, the Commentaries became more a law library than a law book for American legal practice [2]. Almost a century of American lawyers, from the founding fathers and Chief Justice Marshall down to Abraham Lincoln, learnt their law from Blackstone. For that reason the language of rights, particularly, reflected in the Declaration of Rights of Virginia in 1776 and the Bill of Rights adopted in 1791 in the United States Constitution, came naturally to American lawyers.

For the first few decades of the colony of New South Wales, Blackstone's Commentaries were frequently referred to as authority[3]. For example, Blackstone's treatment of the press was used by Chief Justice Forbes when overruling the attempt by Governor Darling to control the unruly local newspapers by a licensing system and a prohibitive stamp duty[4].

Blackstone was an important source for the identification of what was then referred to as the rights of Englishmen, relied upon by those sections of the Australian society which campaigned for trial by jury and the creation of a local legislative council. However, after these early decades reference to Blackstone in large measure disappeared from British and Australian legal discourse. This was in direct contrast with the American experience, where Blackstone's Commentaries retained their influence and, indeed, are sometimes cited today.

There were two basic reasons for the demise of rights talk in English and, therefore, in Australian jurisprudence. The first was political, the second philosophical. The political reason was the calamity of the French Revolution. The philosophical reason was the emergence to dominance of utilitarianism [5].

On 26 August 1789 the French National Assembly adopted the Declaration of the Rights of Man and the Citizen, which preceded the United States' Bill of Rights, although not that of Virginia. The Declaration described itself as "a solemn declaration of the natural, inalienable and sacred rights of man".

This Declaration was a focal point of the critique by Edmund Burke in his *Reflections on the Revolution in France*, published on 1 November 1790 and released to widespread popular acclaim in Britain, selling thousands of copies in the first year and being immediately translated throughout Europe. Burke, who had been a supporter of the American colonists, found the French Revolution too much to bear for a number of reasons, including the assertion of the abstract Rights of Man. The force of his rhetoric, and the immediate acclaim with which it was received, was enough to bring a quick reaction from his former friend, Thomas Paine, perhaps the most skilful propagandist of his era. Paine locked himself up in the Angel Inn in Islington and, somehow oblivious to the rowdiness of the drunks, horses and general press of humanity around the Inn, depicted by William Hogarth, produced his classic *The Rights of Man* by the end of January 1791[6].

As the French Revolution descended into the Terror and as the succeeding regime under Napoleon became a mortal threat to Britain, all things French, and particularly the Declaration of the Rights of Man came to be rejected. Burke's analysis proved to be prophetic. Its influence grew. Thomas Paine was imprisoned in Paris and died in exile in the United States.

Even before the French Revolution Blackstone had been attacked by Jeremy Bentham. Bentham as a young teenager was shocked when he attended Blackstone's lectures and heard him support the complexities of the common law. Bentham rejected the theory of natural law. He was a founder of the command theory of law: that all law was an act of will by a sovereign, rather than conforming to some ideal. The arcane mysteries of the common law offended Bentham's monomaniacal pursuit of the principle of utility - the balance of pleasure and pain - as the sole determinant of all proper law. He was the first economic rationalist.

When the French Declaration of Rights appeared Bentham launched a ferocious attack, declaring:

"Natural rights is simply nonsense: natural and imprescriptible rights - [by which he meant rights which could not be abrogated by a legislature] (was) - rhetorical nonsense - nonsense upon stilts."

His basic proposition, in common with generations of legal positivists to come, was that rights were created by law, rights did not precede government or law. It is not often remembered that the example he used for this proposition in the 'nonsense on stilts' passage was in fact the Australian Aborigines, whom he called "the savages of New South Wales" and who, he said, had no laws and therefore no rights[7].

Bentham's legal positivism, his command theory of law and his utilitarian philosophy was to become the dominant intellectual tradition of English jurisprudence. This commenced with his disciple, John Austin, who was appointed in 1827 to the first chair of jurisprudence at the newly created University College, London. It would continue under Albert Venn Dicey, who in 1883 was appointed to the Vinerian Chair of English Law at Oxford. In Australia the tradition was manifest in many ways, notably by an important influence on Dicey, William Hearn the professor of, *inter alia*, law at Melbourne University[8]. This positivist and utilitarian tradition dominated Australian jurisprudence and, in many ways, still does so.

From the time of his original 1753 lectures at Oxford, which formed the *Introduction to the Commentaries*, Blackstone proclaimed that the commencing point of his analysis was the proposition that the purpose of English governance was to promote political and civil liberty. In contrast, Bentham always treated liberty as subordinate to utilitarian reform[9]. Blackstone used a dialectical mixture of natural law and legal positivism. By the middle of the 19th century, references to natural law had become distinctly embarrassing to British lawyers.

The *Commentaries* were still the basic text but required updating in numerous respects. Unlike the United States, where new editions of the *Commentaries* continued to be produced and actively

deployed in legal discourse, in England an expurgated and updated version was produced. The task was undertaken by Henry John Stephen, whose book *New Commentaries on the Laws of England* (Partly Founded on Blackstone) first appeared in 1841. Its numerous subsequent editions and student summaries remained a basic text for the best part of a century. The alterations are revealing.

In his Introduction Blackstone had referred to natural rights and said: "No human legislature has power to abridge or destroy them". Stephen's *New Commentaries* amended this statement to read: "No human legislature can justifiably abridge or destroy them". Similarly, the heading of Blackstone's Chapter 1 which was: "Of the Absolute Rights of Individuals" had become "Of Personal Rights". Assertions such as "the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature" had disappeared[10].

None of this is to suggest that the idea of rights played no part in the continuing development of the common law. There can however be no doubt that the focus shifted. Rights were no longer regarded as "natural", in the sense that they had to be treated as existing prior to the creation of a polity and of the laws enacted or developed by custom by the polity. The concentration remained, of course, on civil and political rights, although the original emphasis on property rights waned over the course of the 20th century until, perhaps, its very end. There was never a focus on the concern of contemporary rights discourse with economic or social rights or collective rights. Nevertheless, important principles were developed in a manner perfectly consistent with a focus on rights.

In my Gerard Brennan lecture last year I dealt at some length with the principle of a fair trial and sought to show how it was consistent with the recognition of a right to a fair trial in various bills of rights, including in the stream of decisions in the United Kingdom under the Human Rights Act 1998 [11].

There was, however, one matter, which I indicated in that address, may well give rise to significant differences between Australia and the UK with respect to the right to receive a fair trial. As similar issues may arise under the ACT Human Rights Act it is appropriate to discuss the matter on this occasion.

I refer to the way in which the English courts have applied the interpretation section contained in s3 of the Human Rights Act 1998 (UK). That section provides that legislation "must be read and given effect in a way which is compatible with the Convention right" but only "so far as it is possible to do so". That formulation was stronger than the similar provision in the Bill of Rights Act 1990 of New Zealand which provides: "A meaning that is consistent with the rights and freedoms contained in this Bill of Rights" is to be preferred "wherever an enactment can be given" such a meaning.

The ACT Bill of Rights Consultative Committee recommended adoption of the United Kingdom provision, albeit it in slightly different terms as follows:

"A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so."

However, what was enacted in s30 of the ACT Human Rights Act follows the New Zealand model. It provides:

"In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred."

Of particular significance for the construction of this section is that it is expressly made subject to s139 of the Legislation Act, which is the now usual form found in Interpretation Acts of requiring that an interpretation that would best serve the purpose of a law be preferred to any other interpretation. The interaction of these sections will call for careful analysis by the courts of the Territory[12].

The ACT legislation contains a statement of what is meant by the phrase "working out the meaning of a Territory law", adopted from the Legislation Act. That phrase is stated to mean:

(a) resolving an ambiguous or obscure provision of the law; or
 (b) confirming or displacing the apparent meaning of the law; or
 (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

(d) finding the meaning of the law in any other case."

How some of these processes, e.g. "displacing the apparent meaning of the law", conforms with the principle of purposive interpretation, let alone the idea of Parliamentary intention, will pose some challenges for the legal profession and judges of the Territory.

The process of statutory interpretation often provides choices. As the late poet laureate, Ted Hughes, once observed:

"A word is its own little solar system of meaning."

The scope of an interpreter's choice is confirmed in an observation made by a master of statutory interpretation - reflecting, perhaps, his preoccupation with the game of Scrabble - Lord Simon of Glaisdale, who once said:

"Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law)."[13]

In most respects the ACT definition of "working out the meaning of the law" has resonances in the case law on statutory interpretation. Nevertheless, words such as "ambiguity" do not necessarily identify an objective test. The irony with the word "ambiguity" is that it itself may be used in different senses. The word is not necessarily restricted to lexical or verbal ambiguity and syntactic or grammatical ambiguity. It may extend to circumstances in which the intention of the legislature is, for whatever reason, doubtful[14].

A distinction between an "ambiguous" and an "obscure" provision is found in s30(3)(a). It can be traced to a decision of the House of Lords, where the court was unanimous that the particular legislation was entirely unambiguous, it was just that three of their Lordships said the meaning was X and two said the meaning was Y[15].

One of their Lordships put it this way:

"... I do not suggest this Act of 1925 is clear. I do not suggest that section 1 bears its meaning, as I have interpreted it, upon its sleeve. It yields up its secret only to the patient inquirer. Its truth lies at the bottom of the well. It is obscure, it remains oblique, but it is not in the result ambiguous. The truth from the well is found, at the end of the search for it, to have been leaking from the section itself all the time just as the truth, in the words of a learned judge we have all remembrance, may leak out sometimes even from an affidavit."[16]

I am not attracted to the distinction between obscurity and ambiguity.

As in the case of the principle of a fair trial, this special statutory interpretation provision overlaps with the common law. Indeed, to a significant degree, the preservation of fundamental rights and liberties by the common law has been secreted within the law of statutory interpretation. Such protection operates by way of rebuttable presumptions to the effect that Parliament did not intend:

- * to invade common law rights;
- * to restrict access to the courts;
- * to abrogate the protection of legal professional privilege;
- * to exclude the right to resist self-incrimination;
- * to interfere with vested property rights;
- * to alienate property without compensation;
- * to interfere with equality of religion;
- * to deny procedural fairness to persons affected by the exercise of public power;
- * to take away rights of actions for damages.

Statutory intrusions into these rights are subject to a process of strict construction. The concept of strictness has been expressed in a number of different, but equivalent, ways: for example "express words of plain intendment" or "clear and unambiguous words", expressed with "irresistible clearness" and "with a clearness which admits of no doubt"[17]. The general principle has been clearly articulated

by the High Court on a number of occasions, particularly in the cases of Bropho and Coco[18].

This is now reinforced by the principle that statutes are to be interpreted, so as not to be inconsistent with established rules of international law, based on the presumption that Parliament is presumed to intend to legislate in conformity and not in conflict with international law[19]. This, of course, now includes the recognition of rights in international human rights instruments.

These are the sorts of issues on which different judges can take different views. This became clear most recently in the important High Court decision of Al-Kateb. The issue was whether or not the Migration Act 1958 (Cth) authorised the indefinite detention of persons in circumstances where there was no real prospect of their removal from Australia. As this audience will be well aware the High Court, by majority, answered that question in the affirmative.

In his dissent Gleeson CJ said:

"[19] ... Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment...

[20] A statement concerning improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament."

A similar approach to reading down the legislation was adopted by Justices Gummow and Kirby, the other dissentients[20]. The majority, however, found that the words of the statute required the indefinite detention of Mr Al-Kateb. They were "unambiguous" and "too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights"[21] or "the words of the relevant provisions will not yield"[22] or "the statutory language is clear and unambiguous"[23].

It is in contexts such as these that an express provision requiring a law to be interpreted consistently with a statement of human rights may be of particular significance. The conclusion of the majority in Al-Kateb that the statute was unambiguous, may not cover the relevant field, in view of the acknowledgement in s30(3) of the Human Rights Act 2004 (ACT) that a process of construction involves either "displacing the apparent meaning of the law" or "finding the meaning ... when its apparent meaning leads to a result that is ... unreasonable".

Under the formulation of the United Kingdom Human Rights Act it is clear what the result would have been.

As I noted in my Gerard Brennan lecture last year, there are authorities in the House of Lords which apply s3 of the Human Rights Act in a way which the application of the common law principles of statutory interpretation would have led to a similar result. For example, a provision reversing the onus was interpreted, in the absence of specification, to refer to only a shifting of the evidentiary onus rather than the persuasive burden[24]. It is likely a similar result would have been reached in Australia.

However, other judgments took the process well beyond anything that we would call "interpretation"[25]. In a case involving the interpretation of a "rape shield" provision, regulating the admissibility of sexual history evidence, the House of Lords found that the section was subject to a proviso that any questioning required to ensure a fair trial was not excluded[26]. No such interpretation would be acceptable in Australia.

This approach has been dramatically affirmed by two House of Lords judgments since I delivered that lecture[27]. In June this year, in Ghaidan v Godin-Mendoza, the House of Lords affirmed a radical use of s3. Lord Steyn's judgment in that case contains a useful appendix, which sets out in tabular form each of the important judgments applying s3 until that time.

Two weeks ago, the House of Lords had to again consider the issue of whether a burden imposed on the defence was evidential, in the context of anti terrorism legislation. In the legislation under consideration, Parliament had expressly listed provisions which imposed an evidential burden. The section in issue was not on that list. The House of Lords found, expressly, that it was not the intention of Parliament that an evidential burden be imposed. However, it held that s3 of the earlier Human

Rights Act expressed a contrary intention which permitted the Court to so find[28].

The most recent English cases emphasise that the interpretation obligation under s3 is very strong and far-reaching. The House of Lords has expressly held that this obligation may "require the Court to depart from the legislative intention of Parliament"[29]. The Court can modify a provision, even one which is clear and unambiguous[30].

As is well known the Human Rights Act of the United Kingdom, which in this respect has been adopted in the ACT, sought to reconcile the commitment to the implementation of the European Convention on Human Rights with the traditional doctrine of parliamentary supremacy. It did so by expressly denying the courts the ability to overrule a statute. However, a court could make a "declaration of incompatibility" which may create a political imperative leading to change of the offending legislation, which the Human Rights Act envisaged could occur with retrospective effect. The House of Lords has now determined that the remedy of a declaration of incompatibility is very much a last resort and should only be used where what is identified as the "primary remedial measure" of making a compliant interpretation, cannot be used. Although I do not pretend to have read everything that was written on this subject, I did follow the debate about this legislation in its early years reasonably closely. I do not remember anyone envisaging such a result.

Whether or not the ACT legislation is open to a similar interpretation is a matter that will no doubt engage the attention of some members of this audience in the future. The fact that the ACT s13 is made subject to the purposive interpretation provision would suggest that it is not. One Law Lord advanced a deliciously appropriate starting point, applicable to s30(1) of the ACT statute, that the way in is to concentrate on the fact that the word "possible" in the injunction "as far as possible", is ambiguous[31]. In this, as in many other respects, you will have some interesting times ahead.

Generally, it appears likely that ACT practitioners will find greater assistance in the New Zealand case law on s6 of their 1990 Act, than in the English authorities[32]. Lord Steyn has said that the UK Parliament had considered and rejected the model of s6 of the New Zealand Act. His Lordship said that the New Zealand Act imposes a requirement that an interpretation be reasonable and that the United Kingdom Parliament "specifically rejected the legislative model of requiring a reasonable interpretation"[33]. It is not clear to me how his Lordship came to this conclusion. Section 6 of the New Zealand Act makes no reference to reasonableness. There is a reference to "reasonable limits" in s5, but that is a different provision.

The introduction of a Bill of Rights on a State basis was considered and rejected in New South Wales, following a rather tentative suggestion by myself[34]. I do not envisage any change in the political situation in New South Wales in the near future. It is difficult to see a change at the national level. What the position is in other States I am not qualified to say. I note, however, that it has become customary to refer to the ACT's Human Rights Act as Australia's "first Bill of Rights". I do not wish to be seen to be spoiling the party, but it does appear to me to be more accurate to describe it, for the time being, as Australia's "only Bill of Rights".

1 See, e.g. A Miles et al "Blackstone and American Indian Law" (2002) 6 Newcastle L Rev 89.

2 See Daniel J Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries*, University of Chicago Press, Chicago, 1941; Albert W Alschuler "*Rediscovering Blackstone*" (1996) 145 U.P.a.L.Rev. 1; Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone and the Rise of Judicial Activism*, Uni of Chicago Press, Chicago, 2003, esp at pp111-112; A Miles et al "*Blackstone and his American Legacy*" (2001) 5 Aust & NZ J. of Law & Educ 46.

3 See Wilfred Prest, "*Antipodean Blackstone: The Commentaries Down Under*" (2003) Flinders Journal of Law Reform, 151.

4 See Newspaper Acts Opinion 16 April 1827 accessible at www.law.mq.edu.au/scnsw and J J Spigelman "*Foundations of the Freedom of the Press in Australia*" (2003) 23 Aust Bar Rev 89 at 96. On the English background to US rights discourse, see the references collected at fn 22.

5 See generally Jeremy Waldron (ed) '*Nonsense Upon Stilts*': Bentham, Burke & Marx on The Rights of Man, London, 1987.

6 See John Keane, *Tom Paine: A Political Life*, Bloomsbury, London, 1995, esp at pp290-304.

7 See *Waldron supra* at 53.

8 See *Egan v Chadwick* (1999) 46 NSWLR 513 at [41]; J La Nauze "Hearne and 'The Government of England'" (1967) 26 Public Administration 505 at 304; Sir Owen Dixon, *Jesting Pilate*, 1965 38 esp at 41.

9 See *Carrese* supra at Ch 5.

10 See Henry John Stephen *New Commentaries on the Laws of England* (2nd ed), vol 1, London, Butterworths, 1848, at 35, 129, cf Blackstone's *Commentaries on the Laws of England*, Book 1, Ch 1 *124.

11 See J J Spigelman "*The Truth Can Cost Too Much: The Principle of a Fair Trial*" (2004) 78 ALJ 29.

12 See, e.g. Carolyn Evans "*Responsibility for Rights: The ACT Human Rights Act*" (2004) 32 Fed.L.R. 291 at 306.

13 *Stock v Frank Jones (Tipton) Limited* [1978] 1 WLR 231 at 236.

14 See *Bowtell v Goldsborough Mort & Co Limited* (1905) 3 CLR 444 at 456-457; *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; *Repatriation Commission v Vietnam Veterans Association of NSW Branch Inc* (2000) 48 NSWLR 548 at [116]; *R Cross, Statutory Interpretation* (3rd ed) 1995 at 83-84.

15 See *Ellerman Lines Limited v Murray* [1931] AC 126 and R Megarry, *A Second Miscellany - At Law* Stephens & Sons, London, 1973, pp179-180.

16 [1931] AC 126 at 144 per Lord Blanesburgh.

17 See generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, (5th ed), Butterworths, Sydney, 2001, especially Chapter 5; Frances Bennion, *Statutory Interpretation*, (4th ed), Butterworths, London, 2002, XVI; J J Spigelman "*Statutory Interpretation: Identifying the Linguistic Register*" (1999) 4 Newcastle Law Review 1 at 11-17.

18 See, e.g. *Potter v Minahan* (1908) 7 CLR 371 at 304; *Bropho v Western Australia* (1991) 171 CLR 1 at 17-18; *Coco v R* (1994) 179 CLR 427 at 436-438; *Durham Holdings Pty Limited v New South Wales* (1999) 47 NSWLR 340 at 353; *Plaintiff S 157* (2003) 211 CLR 476 at 492; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [11], [106], [134]; *Durham Holdings v NSW* (2001) 205 CLR 399 esp at 415.

19 See, e.g. *Jumbunna Coal Mines v Victoria Coal Mines Association* (1908) 6 CLR 308 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77-80; *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42; *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 at 303-305 per Gummow J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; *Newcrest Mining (WA) Limited v The Commonwealth* (1997) 190 CLR 513 at 657-666; *Chu Kheng Lim v The Minister for Immigration and Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at [97], [166]; *Coleman v Power* (2004) 78 ALJR 1166 at [17]-[19], [240]-[243]; Sir Anthony Mason "*International Law as a Source of Domestic Law*" in B R Opskin and D R Rothwell Editors *International Law and Australian Federalism*, Melbourne University Press, 1997, at pp220-222.

20 See *Al-Kateb*, supra, at [117]-[125] and [145]-[151].

21 See at [33] per McHugh J.

22 See at [232] per Hayne J and [303] per Heydon J.

23 At [298] per Callinan J.

24 See *R v Lambert* [2002] 2 AC 545 at 563, 574-574, 590, 610.

25 Supra n 11 at 78 ALJ at 48 referring particularly to *R v A (No 2)* [2002] 1 AC 45 at 56, 69, 87-88, 97 and 106.

26 *R v A* (No 2) supra.

27 See *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113; *Attorney General's Reference No 4* of 2002; *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43.

28 *Attorney General's Reference No 4* supra at [50], [53].

29 See *Attorney General's Reference No 4* supra at [28].

30 See, e.g. *Ghaidan* supra at [29], [30], [44].

31 *Ghaidan* supra at [27].

32 See particularly *Moonen v Film and Literature Board of Review* [2001] 2 NZLR 9 at [16]-[20]; *R v Poumako* [2000] 2 NZLR 695 at [29], [37], [57], [80]-[84]; *R v Pora* [2001] 2 NZLR 37 at [53]-[56], [116].

33 *R v A* (No 2) supra at [44], [55], [120], [14] and [163]; *Ghaidan* supra at [44].

34 See J J Spigelman, "*Rule of Law - Human Rights Protection*" (1999) 18 Aust Bar Rev 29 at 33; Standing Committee on Law and Justice, Legislative Council of New South Wales, A New South Wales Bill of Rights, Report 17, October 2001.

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Federal Law Review - 40th Anniversary Dinner

**FEDERAL LAW REVIEW: 40th ANNIVERSARY DINNER
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
CANBERRA, 28 OCTOBER 2004**

The role of student edited law reviews and whether or not they have a future has been the subject of controversy for many decades[1].

When Justice Michael Kirby published a defence of law reviews a few years ago, he said:

"To justify a new journal, the publisher must offer something that current journals do not provide. As well, law schools, proliferating in such number, need to differentiate their products."

From 1935 when Melbourne University Law School commenced to publish *Res Judicata*, which became the Melbourne University Law Review in 1957, until today when there are almost thirty university law reviews, the Federal Law Review is the only one that identified a specialist field from the outset. In 1964 it became the seventh university law review following Melbourne, Queensland, Western Australia, Sydney Tasmania and Adelaide. Sir Kenneth Bailey, then Solicitor General of the Commonwealth in a Foreword to the first issue of the review emphasised the distinctive contribution that the focus of attention on federal matters would make to Australian legal literature.

For anyone launching a new and different product it is of crucial significance to have the insight to identify a growth area. Those who chose to emphasise federal jurisdiction as an area of specialisation in 1964, displayed one of the most impressive feats of perspicacity in all of Australian legal academic history. It is only necessary to mention some of the events of the next decade or two which gave rise to so significant an expansion of federal jurisdiction as to constitute the most dramatic change in the administration of justice since the creation of the Commonwealth.

Within a decade or so the High Court would liberate the corporations power and the external affairs power, the Family Court and Federal Court would be established, the Commonwealth Parliament would pass the Trade Practices Act, adopt the administrative law package and implement an invariable practice, not yet enshrined in the Constitution, that the Income Tax Assessment Act must double in size in every two or three years. Within a few more years there would be the first national scheme of corporations and securities law. Furthermore, sometime within two decades or so, one of the great transitions in economic history would occur, one with particular significance for federal jurisdiction. For all of human history there can be little doubt that, if one could ever do the calculation, the most important single item of wealth in the world was real estate. Sometime, probably in the 1980s or 1990s, that changed. The total value of the world's intellectual property came to exceed the total value of the world's real estate. The divergence has been increasing ever since. It is always convenient to follow the money.

It is a personal honour for me, and a tribute to the autochthonous expedient of investing State courts with federal jurisdiction, that you have invited a State Chief Justice to mark this anniversary. Constitutional and federal matters constituted a substantial proportion of my practice at the Bar. My involvement with federal jurisdiction has been less significant since my appointment, six years ago.

The perspicacity of your first editors is manifest in the first article published with the citation (1964) 1 Fed Law Rev 1. This was an article by Sir Garfield Barwick on the subject of the new Federal Superior Court, as the court that became the Federal Court of Australia was then proposed to be known. Sir Garfield had written the article in his capacity as the Commonwealth Minister with responsibility for designing the new court. By the time the article appeared he had been appointed Chief Justice of Australia. Sir Garfield made it clear that in his opinion, save with respect to proceedings under the then Matrimonial Causes Act 1959, the jurisdiction of the Federal Superior Court with respect to most areas of federal jurisdiction should become exclusive. In some respects that proposal has been implemented from time to time in particular areas. Nevertheless there remains a considerable overlap between the jurisdictions of the Federal Court and State Supreme Courts.

At the time of my appointment to the Supreme Court of New South Wales I became a little disconcerted about the way some of my old friends in the Federal Court began to treat me as some kind of trade rival. However, over the years the relationship has stabilised and is now entirely amicable.

The cooperative spirit of interaction between the jurisdictions was considerably enhanced during the years that the cross-vesting scheme was allowed to operate. This led to a great deal of mutual adjustment in a spirit of cooperation. The cross-vesting scheme worked extremely well. It was a scheme of great practical significance. It ensured that the administration of justice could be conducted with a minimum of technical disputation. It operated without, so far as I am aware, even a hint of criticism for a decade. Of course, it should have been obvious that it had to be illegal. So it proved.

There is a long tradition of competition between courts. Some of the most important areas of the law were developed under the competitive thrust of direct personal interest.

For many centuries the four major courts of England, the Court of Common Pleas, the Kings Bench, the Exchequer and the Chancery, actively competed with each other. The Court of Common Pleas was supposed to hear all matters between individual subjects; the Exchequer was concerned with matters of revenue; and the Kings Bench handled all matters involving the King and the King's peace, including all crime and all other matters of peace like trespass. It had a jurisdiction over anybody in prison.

The competitive instinct was not based on institutional pride. The critical motivation was that judges and court officials kept all the court fees. That was how they were paid. When the income of judges from fees was taken away by statute, in 1826, their salary was raised from £2,400 per year to £5,500 per year. Offices in the court, such as that of the Master, were openly bought and sold for substantial capital sums, payable, I should emphasise, to the head of jurisdiction like a Chief Justice. As early as 1639 the officer of Master of the Rolls was sold at auction for £15,000. A Commission of Inquiry in 1810 found a range of particular offices in the courts that were available to be purchased. Many, which were nothing but sinecures, producing up to £12,500 a year, for doing nothing.

Judges and court officers became very wealthy men. They had real financial interests at stake when maximising litigation in their court. This was reinforced by the interests of the specialist bars that grew up around each court.

Significant parts of our procedural and substantive law were created by judges in order to attract work to maximise their status and income. The judges of the Kings Bench, which had a vested interest in getting litigants into one or His or Her Majesty's prisons, created a fiction that a person had committed a trespass, under what was called the Bill of Middlesex. The beauty of this allegation was that the court of Kings Bench simply refused to allow anyone to deny it. Once in prison, the court had jurisdiction over any aspect of that person's affairs.

The Court of Exchequer acted in a similar way. Although it was concerned only with the protection of the revenue, it adopted a doctrine that whenever a person was asked to pay money to another, that person would become less able to pay taxes. Accordingly, the Court of Exchequer could determine the claim. As all of you will clearly understand, this has a clear resonance in the jurisdiction that may be found to be accrued or pendant to the Federal Court's jurisdiction under the Income Tax Assessment Act.

In Adam Smith's *The Wealth of Nations* there is a section in which he refers to causes of action like trespass as an entirely beneficial development arising from competition between courts. He concluded that the spur of competition, driven by the financial interest of judges, meant that judges created law which best served the interests of parties. I assume, without knowing, that somewhere in the vast law and economics literature the views of Adam Smith have been taken up.

The system is not without its attractions, although Adam Smith did say that judges should not be able to collect fees until judgement was delivered. Nothing in the recent history of privatisation of governmental functions should make us sanguine that the deliberate creation of rival forums for dispute resolution is a mere historical curiosity. On that basis, the future of federal jurisdiction is very healthy.

Let me conclude with some observations about the future of the law review. Over recent decades there has been a considerable degree of speculation about the future of the book in the light of

electronic publication. I don't think I'm merely betraying my age when I say that electronic self-publication in the form of web logs and the like is unlikely to supersede journals. Nevertheless a process of adaptation will be required. An advocate of an electronic future has undertaken a systematic review of the historical literature about the resistance to the Guttenberg printing process[2]. Before printing the basic mechanism of scholarly communication was the scribal system which extended to factory-like scriptoria, particularly in monasteries, which were capable of a certain form of mass production. As one Dominican friar said at the time:

"The world has got along perfectly well for 6,000 years without printing and has no need to change now."

He, and others of his opinion, expressed their concern that the benefit of the scribe's editorial expertise and writing skills would be lost and that printing would permit too many spelling mistakes and typographical errors. More significantly, it opened up the possibility of publication by new sections of the community, people who would not be subject to the degree of censorship and other forms of restraint which authorities, particularly religious authorities, were able to impose. That same Dominican friar dismissed printed text as a product of "ignorant oafs" permitting even "uneducated fools to give themselves the airs of learned doctors". He accused all printers of "vulgarising intellectual life".

Just as students are said to receive considerable educational benefits from their participation in student edited law reviews, so this Dominican friar expressed concern about the loss of the educational benefits of copying manuscripts. As the friar put it:

"As he is copying the approved text he is gradually initiated into the divine mysteries and miraculously enlightened."

Finally, he was exasperated by the profusion of information. He was able to report that the city state of Venice had already become "so full of books that it was hardly possible to walk down the street without having armfuls of them thrust at you 'like cats in a bag' for two or three coppers".

Of course we also have yet to find a way to tame the monster of easy electronic availability. One fact will highlight the problem. A search for the words "information overload" on Google produces, as of yesterday, the self-satirical answer of 973,000 hits. I am sure the techniques for selecting from the available profusion of information will continue to develop. The style and content of law reviews and indices of legal periodicals will have to adapt to this new environment. There is little doubt in my mind that having a specific specialisation, as you do, will prove a great advantage in that process of adaptation.

As, for the past 40 years and for the foreseeable future, student involvement in the production of a law review will remain one of the important rights of passage for a legal student. Perhaps I can leave you with some words of warning from Edward Gibbon who described, in his *Decline and Fall*, the greatest law school of the late Roman Empire, located in contemporary Beirut, manifesting even then the close bond between legal education and the judiciary or other forms of government service. Speaking of the period after the foundation of Constantinople, he said:

"All the civil magistrates were drawn from the profession of the law. The celebrated Institutes of Justinian are addressed to the youth of his dominions who have devoted themselves to the study of Roman jurisprudence; and the sovereign condescends to animate their diligence by the assurance that their skill and ability will in time be rewarded by an adequate share in the government of the republic. The rudiments of this lucrative science were taught in all the considerable cities of the East and West; but the most famous school was that of Berytus, on the coast of Phoenicia, which flourished above three centuries from the time of Alexander Severus, the author perhaps of an Institution so advantageous to his native country. After a regular course of education, which lasted five years, the students dispersed themselves through the provinces in search of fortune and honour; nor could they want an inexhaustible supply of business in a great empire already corrupted by the multiplicity of laws, of arts, and of vices. The court of the Praetorian prefect of the East could alone furnish employment for 150 advocates, 64 of whom are distinguished by peculiar privileges, and two were annually chosen with a salary of 60 pounds of gold to defend the causes of the treasury ..."

(I interpolate to note that tax practitioners have always been particularly well remunerated for obvious reasons.)

Gibbon went on to say:

"The honour of a liberal profession has indeed been vindicated by ancient and modern advocates, who have filled the most important stations with pure integrity and consummate wisdom; but in the decline of Roman jurisprudence the ordinary promotion of lawyers was pregnant with mischief and disgrace. The noble art, which had once been preserved as the sacred inheritance of the patricians was fallen into the hands of freed men and plebeians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fermenting differences, of encouraging suits, and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintain the gravity of legal professors, by furnishing a rich client with subtleties to confound the plainest truth, and with arguments to colour the most unjustifiable pretension. The splendid and popular class was composed of the advocates who filled the Forum with the sound of their turgid and loquacious rhetoric. (Take heed the putative barristers among you.) Careless of fame and of justice, they are described for the most part as ignorant and rapacious guides who conducted their clients through a maze of expense, of delay, and of disappointment from whence, after a tedious series of years, they were at length dismissed, when their patience and fortune were almost exhausted."

Plus ça change.

1 . See Fred Roddell, "Goodbye the Law Reviews" (1936) 23 Virginia Law Review 38; republished in (1999) 73 ALJ 593 with commentary by John Gava at 397; Bernard Hibbitts "Last Writes? Reassessing the Law Review in the Age of Cyberspace" (1996) 71 New York Univ Law Review 615; Symposium in (1996) 30 Akron Law Review 1; The Hon Justice Michael Kirby, "Welcome to Law Reviews" (2002) 26 Melbourne Uni Law Review 1; John Gava, "Law Reviews: Good for Judges Bad for Law Schools?" (2002) 26 Melbourne Uni Law Review 29; Marilyn Pittard & Peter Heffey "Ancora Imparo: The Historical Role of the Law Review in University Scholarship" (2003) 23 Monash Uni Law Review 278. See most recently Richard A Posner, "Against the Law Reviews", Legal Affairs, November/December 2004 accessible at www.legalaffairs.org.

2 See Bernard J Hibbitts in Akron Law Review supra.

The New Liability Structure in Australia - Swiss Re Liability Conference

**THE NEW LIABILITY STRUCTURE IN AUSTRALIA
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SWISS RE LIABILITY CONFERENCE
SYDNEY
14 SEPTEMBER 2004**

The District Court of New South Wales has jurisdiction to hear motor accident claims and work injury damages claims irrespective of the amount claimed and all other common law claims where the amount claimed does not exceed about \$750,000. Its civil jurisdiction is, to a substantial degree, a personal injury jurisdiction. Filings in the District Court have fallen from about 20,000 in calendar year 2001, to 13,000 in 2002 and to 8,000 in 2003. The reduced rate of filings is continuing this year. It is reasonably clear that something dramatic has happened to civil litigation in New South Wales. Similar effects are seen in other states.

What these figures reveal is a dramatic change in the practical operation of the law of negligence in Australia over a few years. This is the result of two factors. First, there has been a substantial shift in judicial attitudes at an appellate level, led by the High Court of Australia. Secondly, there have been major changes to the law of negligence implemented by statute.

One lesson we must all learn from history is never to underestimate the ingenuity of the legal profession when faced with such dramatic changes to its customary practices. I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the City could not be sued for a defect in a road or sidewalk unless it had had fifteen days' notice of the specific defect. The plaintiff lawyers, or as, they call themselves, trial lawyers of New York City, established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the City were available for sale to trial lawyers[1].

At any one time the total cost of curing the defects of which the city had been given notice was several billion dollars. Last year the Mayor of New York complained that in calendar year 2002 alone, the city received 5,200 maps from BAPSPC spotters which identified some 700,000 blemishes[2]. Needless to say the city has never successfully defended a case under the fifteen days' notice law. I am confident that Australian lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

The Historical Background

For well over a century judges were universally regarded, in all common law jurisdictions, so far as I am aware, as mean, conservative and much too defendant-oriented. This led parliaments to extend liability, commencing with Lord Campbell's Act, then the abolition of the doctrine of common employment, the abolition of the immunity of the Crown, the creation of workers' compensation and compulsory third party motor vehicle schemes and provision for apportionment in the case of contributory negligence.

In Australia, about twenty to twenty-five years ago, the process of legislative intervention changed its character. It proceeded on the basis that the judiciary had become too plaintiff-oriented. A generational change in the judiciary coincided with a change in the opposite direction in the social philosophy of the broader polity, which came to re-emphasise persons taking personal responsibility for their actions. There may very well be an iron law which dooms judges to always be a decade or two behind the times.

Throughout Australia, in different ways and at different times, new regimes were put in place from about the early 1980s, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. In Australia's second largest state of Victoria, a no fault scheme for traffic accidents was established similar to the more wide-ranging New Zealand scheme. In the largest state

of New South Wales such a scheme was actively considered but not, in the event, adopted. In all states what had come to be regarded as common law rights were significantly modified by legislative intervention. When I say, "come to be regarded", many of the causes of action were only available because of the previous century of legislative change, to which I have referred, which overrode the common law.

The undefined elements of the tort of negligence left much open. What damages are remote? What does "commonsense" suggest as the cause? When is a contribution to the creation of a risk "material"? Should a limitation period be extended? Should the plaintiff's evidence be accepted? How should one choose between two widely divergent experts' opinions, each of which is probably at, or beyond, the boundaries of the range of legitimate opinion? Should the plaintiff be believed about what effect a hypothetical warning would have had upon him or her? There is much flexibility in the outcome of negligence litigation.

Professor Atiyah referred to a long-term historical trend of expanding the scope of the tort of negligence and the damages recoverable for the tort, as "stretching the law"[3]. There was, however, an equivalent, parallel trend, perhaps of even greater practical significance, of 'stretching the facts'.

Contemporary judges generally reached intellectual maturity at the time that the welfare state was a widely accepted conventional wisdom. The "progressive" project for the law of that era was to expand the circumstances in which persons had a right to sue. We are now more conscious of limits - social, economic, ecological and those of human nature. Hobbes has triumphed over Rousseau, but not over Locke. For several decades now the economic limits on the scope of governmental intervention have received greater recognition. The law cannot remain isolated from such broader trends in social attitudes.

In particular there has been a significant change in expectations within Australian society, as elsewhere, about persons accepting responsibility for their own actions. The idea that any personal failing is not your fault, that everyone can be categorised as a victim, has receded. The task is to restore an appropriate balance between personal responsibility for one's own conduct and expectations of proper compensation and care.

This is, of course, an issue which resonates beyond the law. The change is noticeable over the decades. It is not likely that Donald Bradman would ever have taken a banned substance. If he had, however, it is quite inconceivable that he would have blamed his mother. There is a shift back to accepting responsibility, as Adam Gilchrist showed when he walked without the umpire having raised a finger.

The debate in Australia, leading to recent statutory changes, focused on particular cases and a range of circumstances in which persons recovered damages, sometimes substantial damages, when there could be little doubt that they were the author of their own misfortune. One case referred to frequently involved a young man diving from a cliff ledge into a swimming pool without checking the depth of the water. The idea that the authority which owned the land should have put up a warning sign advising against diving is no longer, with the changing times, regarded as a reasonable basis for liability.

There seems no doubt that the past attitude of judges, when finding liability and awarding compensation, was determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages awarded to injured plaintiffs. Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home.

The line between the kinds of mistakes or unfortunate results that are an inevitable concomitant of day to day human interaction, including professional practice, on the one hand, and the sorts of mistakes or results which should not occur at all, on the other hand, may have been drawn in a different way on many occasions in the absence of the ubiquity of insurance. The various choices that the fungibility of the concepts associated with the tort of negligence throws up may very well have been made differently.

Over the course of a number of decades the effect of judicial decision-making was, in substance, to transform the tort of negligence from a duty to take reasonable care into a duty to avoid any risk by reasonably affordable means. That, in my opinion, was the practical effect of a stream of judicial decision-making at appellate level, particularly for that vast body of decisions that never come before

an appellate court and, indeed, the even larger proportion of claims that are settled out of court in the light of a practitioners' understanding of the likely outcome.

The Australian judiciary has now become more sensitive to the broader implications of individual decisions by reason of the cumulative effect of such decisions. The progressive paring back of the tort of negligence by statutory changes over the course of two plus decades has itself had an impact on judges. Furthermore, evidence accumulated about the unintended consequences of the tort system. The practice of defensive medicine is a good example. Both my brothers are doctors. Even in the late 1960s I recall the scorn that they expressed about their American colleagues who refused to stop at the scene of road accidents. Australian doctors have long since joined them.

I have expressed the view both in judgments and extra judicially, that the judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies can be regarded as, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state. For many decades there was a seemingly inexorable increase in that form of taxation by judicial decision[4]. In Australia that increase has stopped as a result of a change in judicial attitudes and is likely, subject, of course, to the vagaries of the insurance market, to be reversed, as a result of legislative intervention throughout Australia.

At least indirectly in the case of judges, and overtly in the case of the parliaments, the shift in attitude has been driven by the escalation of insurance premiums and, in recent years, by the unavailability of insurance in important areas on any reasonable terms or at all.

The year 2002, where insurance premiums escalated rapidly in numerous categories of insurance, was the year in which, for Australia, quite a number of chickens came home to roost. By that time, however, the change in judicial attitudes was well under way.

It is at the boundaries of the tort, where new and different situations are under consideration, that the change in judicial attitude has become most apparent. However, that change must also have an effect on the outcome of cases even in the well-established categories. The various choices available to a judge in terms both of acceptance of evidence and the formulation of the judgments required to determine such cases will be affected by the kind of change of attitude to which I refer.

There has been a steady stream of cases in the appellate courts, particularly in the High Court, in which the outcomes would have been different if the process of stretching the law and of stretching the facts had not been arrested and reversed[5].

People who trip on footpaths no longer always successfully sue local councils. The owner of a shopping mall was not responsible for criminal conduct in the mall's car park. The authors of the rules for rugby were not liable to injured players. Nor was the person who conducted an indoor cricket arena. A cinema was not liable when a client tried to sit down in a darkened cinema but the seat was, as is common, retractable. A hotelier was not liable for injuries suffered after departure by an intoxicated patron. A club with gambling machines was not liable to refund the losses of a compulsive gambler whose cheques it had cashed. The driver of a vehicle was not liable when a child suddenly darted out into the road. A school authority was not liable for intentional criminal conduct, relevantly sexual abuse, of a teacher against a pupil. Governmental regulators were not liable for the health consequences of a failure to regulate self-interested commercial actors whose conduct caused injury. Governmental decision-makers whose intervention, for example, in family relationships, caused psychiatric injury on the basis of allegations that proved incorrect, were not liable for those injuries. Employers which conducted disciplinary or dismissal actions with adverse psychiatric consequences were also found not to be liable. A prison authority was found not liable for psychiatric injury caused to the victim of a crime by an escapee nor for the defects of her prematurely born son - Dorset Yacht was doubted.

It is quite likely that many of these cases would have been decided differently only a few years ago. I do not wish to imply that the development has been all one way. There have been important cases in which liability has been established in circumstances where the issue was debatable. Nevertheless, the drift of judicial decision-making is plain at a senior appellate level. It is unquestionably having an effect on trial judge decision-making of a substantial character.

The most difficult area with which the law is still grappling in this regard is that of liability for psychiatric injury. Difficult issues of a philosophical and factual character remain to be resolved in this field. The application of legal tests, in a context where expert evidence has few, and often no, objectively

verifiable elements, is particularly difficult. This is exacerbated by the fact that the relevant area of expertise is only to a limited extent based on scientific research and has a wide element of discretion. In this area, perhaps more than any other, the Whig approach to science - the assumption that improvement of knowledge occurs in some kind of straight line of progress, rather than being cyclical or, dare one say so, a creature of fashion - is not likely to be correct[6]. It is particularly difficult to determine where to draw the line between refusing to give recovery for the normal stresses of life, including working life, and those extraordinary stresses that people should never have suffered.

In this area Australian law is now unlikely to develop in any principled way by reason of statutory intervention, to which I will presently refer.

The Sense of Crisis

Legislative change over the last year or two has been driven by a perceived crisis in the price and availability of insurance. In Australia this focused on public liability and medical negligence. However, similar pressures had been building up in all areas for a number of years, including the high volume areas of industrial accidents and traffic accidents.

Over 2002-2003 there were virtually daily reports about the social and economic effects of increased premiums: cancellation of charitable and social events such as dances, fetes, surfing carnivals and Christmas carols; the closure of children's playgrounds, horse riding schools, adventure tourist sites and even hospitals; the early retirement of doctors and their refusal to perform certain services, notably obstetrics; local councils were shutting swimming pools and removing lethal instruments such as seesaws and roundabouts from children's playgrounds; our Sydney tabloid proclaimed "The death of fun"; many professionals could not obtain cover for categories of risks, leading to withdrawal of their services; for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; midwives were unable to get cover at any price; many professionals were reported to have disposed of assets so as to be able to operate without adequate cover or even any insurance.

The issue became highly charged politically. The talk was of "crisis". The concern of governments was motivated in part by the liability of government directly as a major employer, property owner and provider of services, particularly in education, health and transport. This was, however, reinforced by the emergence, over recent years of a role for government as a backstop for private insurers, as the reinsurer of last resort. It took many years for the government role of "lender of last resort" to take the institutional form of the contemporary central bank. We are in the early stages of institutional development of the "reinsurer of last resort" function.

In Australia we have had a range of proposals in different areas for the government to underwrite existing insurers, e.g. for the risks associated with terrorism. Of particular significance is the acceptance that it was politically impossible for the government to stand by and let a major insurer default on its obligations. A national scheme was implemented to support the major medical insurer when it appeared to be insolvent. Governments at both levels of our federal system became involved in protecting policyholders when a major general insurer, HIH Limited, went into liquidation. This is exactly what happened long ago in the case of banks.

It is quite clear that governments have a very real financial interest in the operations of the tort system.

Whether by way of increases in insurance premiums or by way of a call on tax payers' funds it became widely accepted at all levels of Australian government and in the general community that the existing tort system had become economically unsustainable. The particular focus was the sudden escalation of premiums. Insurance premiums are the result of a multiplicity of factors, however, the cost of claims sets the basic structural parameters within which other forces operate. Those costs have increased considerably over recent decades.

Although the practical operation of the law of torts must determine to a substantial degree the level of premiums for liability insurance, the suddenness and size of the increases and the expansion of policy exclusions reflected developments in the insurance market, 9/11, HIH, etc. The underlying cause of the problem must, however, be distinguished from the immediate cause of the crisis[7]

Legislative Change

In New South Wales legislative changes had commenced in a number of areas prior to the events of 2002-2003. Those events, however, led to a national response in which many of the New South

Wales proposals were adopted more widely and legislation went even further than had been considered appropriate until that time.

The Commonwealth and the states appointed an inquiry to review the law of negligence. The Panel was chaired by the Honourable David Ipp, a judge of the New South Wales Court of Appeal. By and large, the recommendations of this panel have been implemented, with some variation, in all states and territories, with complementary national legislation almost complete. The principal thrust of the changes is the limitation of circumstances in which damages can be recovered for personal injury and the restriction of the heads and quantum of damage that can be so recovered. The changes are wide ranging and include the following:

- * The not "far fetched or fanciful" test for foreseeability has been replaced by a test that a risk be "not insignificant" which, despite the double negative, is of a higher order of possibility.
- * A requirement has been introduced identifying a range of factors which have to be taken into account when determining breach of duty - referred to as the "negligent calculus". These factors include probability of harm, seriousness of harm, the burden of taking precautions, the social utility of the activity and precautions that may be required by similar risks, not just the particular causal mechanism of the case before the court. This statutory requirement, which in many respects reflects the common law, will focus attention on matters which may not have been given adequate weight, particularly in lower courts.
- * An express acknowledgment of the normative element in determination of issues of causation is adopted by applying a test of whether responsibility for the harm should be imposed on the negligent party.
- * An express provision emphasising that the plaintiff always bears the onus of proving any fact relevant to the issue of causation, thereby implicitly overturning judgments which suggested that in the case of evidentiary gaps - often medical causation issues - proof on the issue of causation could shift from the plaintiff to the defendant.
- * The introduction of a modified version of the Bolland test, which was not the law in Australia, in all cases of professional negligence providing that treatment was not negligent if it occurred in accordance with an opinion widely held amongst respected practitioners, subject to the ability of the court to intervene if the opinion was "irrational". The Bolland test does not, however, apply to a duty to warn or inform. This has led to different approaches. In New South Wales there is no duty to warn of an obvious risk.
- * The enactment of a "person of normal fortitude" test for purposes of foreseeability of mental harm, which the Ipp Panel identified as representing the majority view in the most recent High Court authority on the subject, although the judges who did in fact hold that view have since accepted that the majority regarded normal fortitude as merely a relevant consideration and not as an independent test^[8]. Nevertheless, the statutory test is likely to deny liability in many situations in which the common law would have imposed it.
- * In a number of states, including New South Wales, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to a person who directly witnessed a person being killed or injured or put in peril or who was a close family member of the victim.
- * A number of states have adopted, in different terms, a policy defence available to all public authorities, requiring that the interests of individuals after materialisation of a risk have to be balanced against a wider public interest, including the taking into account of competing demands on the resources of a public authority. In New South Wales the defence is stated as principles for determining whether a duty exists or breach has occurred, expressly acknowledging that performance may be limited by financial and other resources available to the authority, that the general allocation of those resources by an authority is not open to challenge and that the conduct of the authority is to be assessed by reference to its full range of functions. Also, in New South Wales the legislation provides that a public authority is not liable for a failure to exercise a function to prohibit or regulate an activity if the authority could not have been required to exercise that function in mandamus proceedings instituted by the claimant. This provision may well come to test the limits of the availability of mandamus and principles of locus standi.
- * The liability of a volunteer or a good samaritan is limited.

* Changes are made to the law about voluntary assumption of risk and contributory negligence. An intoxicated person is deemed to have contributed twenty-five percent to the injury.

* The liability of persons who act in self-defence to criminal conduct is restricted.

* An injured person is deemed to have been aware of any obvious risk, about which there is no duty to warn save in the case of a request or in the case of a professional service.

* Provision is made that an apology cannot constitute an admission, regarded as of particular significance in the field of medical negligence. Doctors can say sorry for a result, without fear of making an admission of liability.

There are also thresholds, caps and restrictions on recoverable damages, including:

* Establishment of an indexed maximum for the recovery of economic loss, generally three times average weekly earnings. Persons earning more than that have the ability to take out first person loss of earnings insurance.

* Establishment of a threshold of a percentage of permanent impairment before a person may recover general damages at all, generally a sliding scale of fifteen percent up to about thirty percent, after which full recovery is permitted.

* Establishment of an indexed maximum for recovery of general damages.

* Restrictions have been imposed on the recovery of damages for provision of gratuitous services.

* The rate of interest that can be awarded on damages has been fixed and generally reduced.

* The discount rate established by the courts for the determination of the present value of future loss has been fixed and increased.

* Exemplary damages have been abolished in many jurisdictions and, to some degree, aggravated damages have also been abolished. Exemplary damages were rarely awarded and this would make little practical difference to insurance premiums. Aggravated damages represent actual loss. This change does, however, pander to the current imperative of political life in a media saturated age: to be seen to be doing something. In the heat of the debate it appeared that anything less was more. The reasons proffered for this change are singularly unconvincing.

This recitation of the major changes indicates how wide-ranging and fundamental the alterations of the law have been. Many of the changes were contained in a list of possible amendments to the law which I compiled in an address in 2002 - not including caps and thresholds - and which became something of a template for the subsequent debate[9]. In that address I emphasised the importance of proceeding on the basis of a principled alteration, rather than an underwriter driven alteration of the law.

The earlier changes to the law over the course of some two decades had resulted in significant differences amongst the respective schemes for transport accidents, industrial accidents and medical negligence. These arose because different insurers and administrators were involved in each area of liability. They had a great influence on what changes were required to bring down claims and, therefore, premiums, in a context where government had often announced an objective of reducing premiums in a particular area of insurance by a specific amount. These disparate processes created inexplicable and unjustified variations in the rules which applied. Quite different compensation was available depending on whether injury occurred in a car or in a car park or at work or on an operating table or in a public swimming pool or in a supermarket. The sense of fairness which is essential to the effective operation of the system had been attenuated.

The result of the new regime is to avoid the sense of inequality as a ground for unfairness. It has, however, replaced that ground with others and the debate is actively continuing. In particular, the introduction of caps on recovery and thresholds before recovery - an underwriter driven, not a principled change - has led to considerable controversy. The introduction of a requirement that a person be subject to fifteen percent of whole of body impairment - that percentage is lower in some

States - before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.

The evidence suggested that in smaller claims, say up to about \$100,000, about half of total damages awarded was in the form of general damages. The threshold has made these claims virtually uneconomic from the point of view of the legal profession. Perhaps more than any other single change, it is the threshold for general damages that has led to the dramatic fall in filings in the District Court. This has been reinforced by the cap on lawyers' fees.

Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation.

The effective abolition of what insurance companies regard as small claims, albeit the matters are not small from the perspective of the injured person, is expected to have a considerable impact on premiums. Insurers convinced the governments that this was an important aspect of the changes required. My own suspicion is that insurers simply find it easier to compute the effect of such a change than of changes in applicable legal principle. Underwriters do not believe that they are capable of predicting changes in judicial behaviour and who can blame them.

Proportionality

One aspect of the legislative change that is not yet in force, but will be in the near future, is the adoption of a system of proportionate liability with respect to economic loss. Relevant legislation has been passed in a majority of states but requires amendment to bring the transitional provisions into line with the recently proclaimed Commonwealth legislation.

The traditional approach of awarding damages in tort, or for breach of a contractual term of skill and diligence, has been one of what has been called solidary liability, where the liability is joint and several in situations where the same damage is caused by negligence on the part of more than one person. A proposal to introduce a system of proportionality was considered in Australia about a decade ago and rejected. The climate established by the recent debate on tort law reform has been such that the system of proportionate liability has been adopted and is on the verge of being introduced.

A defendant who is only ten percent responsible for the injury will only bear ten percent of the damages. Joint and several liability is preserved in the case of a defendant who intended to cause or who fraudulently caused economic loss or damage to property. Vicarious liability and the several liability of partners is also preserved.

This system creates the possibility that a person who has suffered injury will be unable to fully recover. However, it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer in favour of plaintiffs against the insolvency or impecuniosity of co-defendants who have contributed more substantially to the economic loss suffered by the plaintiff. The traditional attitude of the law, which favours personal injury plaintiffs, puts them in a different category from those who suffer economic loss.

This is a matter likely to be of particular significance in the area of professional liability for auditors and lawyers who are frequently joined in commercial proceedings simply on the basis of the depth of their pockets, or rather of that of their insurers. In many such cases the directors of a particular company, who are primarily liable for the events leading to economic loss, are not sued at all.

It is quite likely that the new system will change the dynamics of a considerable body of commercial litigation. How that will actually impinge on large cases involving auditor's negligence and the like has yet to be seen. However, the courts will have to determine a new set of principles for allocating responsibility to different actors whose cumulative conduct leads to a single loss. The principal impact of the new regime is likely to be in the sphere of professional indemnity insurance.

Conclusion

The change in the law of negligence in Australia has been quite dramatic. The working out of the new statutory regime has commenced and will take some time. There remains a significant debate as to whether or not the reforms have gone too far. Australian lawyers are focussing attention on the considerable increase that has been reported in insurance company profits. Political pressure on premiums is increasing but, in the long term, the level of premiums will be determined by the renewed

ability of Australia to attract insurance company capital, particularly, the capital of reinsurers and by a turn in the insurance market cycle which, sooner or later, is inevitable.

I am conscious that I have used the word "reform", a word that has long since acquired a positive connotation of 'improvement', which puts anyone opposed to the relevant change on the defensive. Not all the changes I have identified would be accepted by Australian lawyers as "reforms" in that sense.

I am reminded of the blistering attack on reformers by Senator Roscoe Conkling, a Republican machine party boss in New York City who said in 1880:

"Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, canting, self-righteousness. ... Their real object is office and plunder. When Dr Johnson defined patriotism as the last refuge of a scoundrel, he was unconscious of the then undeveloped possibilities of the word 'reform'." [10]

I conclude with a note of apprehension, even defeatism, reminiscent of the fate of the New York City 15 days notice regulation. Earlier this year the Commonwealth Government produced a booklet proclaiming the triumph of the tort law reform legislative package throughout Australia. The publication set out in detail the major changes to the law which I have outlined this morning. The introductory chapter of this official publication concluded with a paragraph which struck a discordant note with the self-congratulatory tone of the booklet. It said, under the heading "DISCLAIMER":

"Information contained in this report should not be relied upon without reference to Australian legislation in force from time to time and appropriate legal advice." [11]

Perhaps they were just teasing.

1 The New Yorker April 21 and 28 2003 at p101. See also www.nystla.org.

2 See www.nyc.gov/html/law/pressreleases/pr050602.pdf.

3 Atiyah, *The Damages Lottery* (1997) Hart Publishing, Oxford, Chapters 2 and 3.

4 See *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97]; cf at [116].

5 See, *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321; *Derrick v Cheung* (2001) 181 ALR 301; *Agar v Hyde* (2000) 201 CLR 552; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Rosenberg v Percival* (2001) 205 CLR 434; *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512; *Sullivan v Moody* (2001) 207 CLR 562; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540; *New South Wales v Lepore* (2003) 212 CLR 511; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 207 ALR 52; *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43; *Van Der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204; *Richmond Valley Council v Standing* (2002) Aust Torts Rep 81-679; *University of Wollongong v Mitchell* [2003] Aust Torts Rep 81-708; *New South Wales v Paige* (2003) Aust Torts Rep 81-676; *Newcastle City Council v Shortland Management Services* (2003) 57 NSWLR 173; *New South Wales v Godfrey & Godfrey* (2004) Aust Torts Rep 81-741; *Amaca Pty Ltd v New South Wales* [2004] NSWCA 124; *Wyong Shire Council v Vairy* [2004] NSWCA 247; *Boyd Industries Pty Ltd v Canuto* [2004] NSWCA 256.

6 See, for example, the penetrating analysis of Rickard McNally, *Remembering Trauma*, Harvard Uni Press 2003.

7 I have discussed this in my paper on "Negligence and Insurance Premiums" supra. See also Peter Cane "Reforming Tort Law in Australia: A Personal Perspective" (2003) 27 *Melb.U.L.Rev* at 49.

8 See Commonwealth of Australia Review of the Law of Negligence: Final Report September 2002 (The Ipp Report), www.revofneg.treasury.gov.au at 9.13 and cf *Tame v New South Wales* (2002) 211 CLR 317 esp at [16] [61] [109] [196] [273] and [366] and cf *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205 at [98] and [119].

9 See "Negligence: The Last Outpost of the Welfare State" supra note [1].

10 Truesdale, "Rochester Views the Third Term 1880" (1940) 2(4) Rochester History 1 at 5.

11 Reform of liability Insurance Law in Australia, Commonwealth of Australia, February 2004, p 12.

Integrity and Privative Clauses - The Third Lecture in the 2004 National Lecture Series

INTEGRITY AND PRIVATIVE CLAUSES

THE THIRD LECTURE IN THE 2004 NATIONAL LECTURE SERIES

FOR THE AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

BY THE HONOURABLE JAMES J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

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The sumptuary rules of the Chinese Imperial Civil Service established a rigidly defined set of dress requirements for all public officials: from the black lacquer-treated hats with protruding wings and the black boots trimmed with white lacquer to the ceremonial belts backed with jade, rhinoceros horn, gold or silver. Each distinctive sub-unit or rank of the civil service also had a badge of rank in the form of a cloth chest piece embroidered, in the case of the civil hierarchy, with birds in pairs. The top rank had two stately cranes soaring above clouds. The lowest rank had a pair of earth-bound quails, pecking the grass. The military ranks wore breast patches carrying images of fierce animals such as lions, tigers, bears and panthers.

There was one distinct civil service unit with a unique system of badge identification. Western scholars, by an inaccurate analogy with the Roman administrative system, called this unit the "censorial" or "supervising" branch of government. Its role was to maintain the integrity of the mechanisms of governance. Civil officials in this branch had an embroidered breast patch, which was identical for all members of the branch, regardless of rank. It displayed a legendary animal called a Xiezhi which could detect good from evil and, allegedly, could smell an immoral character from a distance, whereupon the Xiezhi would leap upon the person and tear him or her to pieces[1].

The Chinese censorial system was organised as a separate branch of government to maintain surveillance over all other governmental activities and thereby enforce proper behaviour through processes of impeachment, censure and punishment. It also had the function of initiating recommendations for change of governmental policies, practices or personnel. The success of the Chinese Imperial tradition as a system of administration, manifest in its longevity, has been attributed to the power and vigilance of the censorate[2].

In the 1920s, Sun Yat-sen proposed that the Republic of China adopt a five yuan or branch system of government comprised of three branches from the Western governmental tradition - executive, legislative and judicial - and two from China's past: an examination branch and a control or integrity branch. In the 1930s such a branch was established and called the Control Yuan.

When an American constitutional lawyer recently proposed that modern constitutions should now incorporate a separate institutionalised integrity branch of government[3], another American scholar drew attention to the similarity between that proposal and the Chinese Imperial tradition adopted by Sun Yat-sen[4].

Integrity Institutions

In the first lecture in this series[5] I proposed recognition of an integrity branch of government as a fourth branch, equivalent to the legislative, executive or judicial branches.

I noted that in any stable polity there is a widely accepted concept of how governance should operate in practice. The role of the integrity branch is to ensure that that concept is realised, so that the

performance of governmental functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.

I put forward the idea of integrity as a useful way to conceptualise a universal governmental function, within which the body of law known as administrative law may find a place. The focus is on institutional integrity, rather than personal integrity, although the latter, as a requirement of conduct of occupants of public office, has implications for the former.

Institutional integrity goes beyond a narrow concept of illegality to encompass at least two additional considerations. First, the maintenance of fidelity to the public purposes for the pursuit of which an institution is created. Secondly, the application of the public values, including procedural values, which the institution was expected and/or required to obey.

This focus on fidelity to purpose and on applicable public values does, in my opinion, distinguish the integrity function from other governmental functions, including most executive, legislative and judicial decision-making, which are concerned with the quality of actual outcomes.

I summarise the integrity functions performed by various institutions of governance, set out more fully in the first lecture.

The traditional role of ministerial responsibility in a Westminster system can be understood, in part, as the performance by Parliament of an integrity function. The particular institutional manifestations of this function include the role of the formal Opposition, the significance that has always been attributed to daily question time, debating conventions such as those attendant on no confidence resolutions, and inquiries by Parliamentary committees. Whilst these procedures are often directed to the quality of outcomes, and therefore perform an executive function, or are concerned with legislative reform, and therefore can be seen as part of the legislative process, frequently they are directed to maintaining the integrity of government.

The Parliament also has the ultimate authority to remove judicial officers for proved misbehaviour. In this regard the Parliament performs an integrity function with respect to the judicial branch of government.

In a Westminster system of government, the head of state, the Queen in the United Kingdom and the Governor-General in Australia, is also part of the integrity branch. Walter Bagehot's threefold classification of the powers of the constitutional monarch in *The English Constitution* was: to be consulted, to encourage, and to warn. This, in large measure, is the performance of an integrity function.

Many of the institutions of the integrity branch of government are emanations of the executive. Nevertheless over the years many of these institutions have, by legislation and practice, developed an independence which has become institutionalised.

Perhaps the oldest such institution is the centralised audit office, which we in Australia generally call the Auditor-General. The focus on probity of governmental expenditure in the course of the financial audit is the performance of an integrity function.

Over recent decades new specialist institutions have emerged. In New South Wales the Hong Kong model of an Independent Commission Against Corruption was adopted and a separate Police Integrity Commission was created. There is a statutory Corruption Commission in Western Australia and, in 2002, two Queensland institutions were merged in the Crime and Misconduct Commission.

Public inquiries frequently focus on integrity matters. The operations of parliamentary committees and executive inquiries, notably Royal Commissions, have been of considerable significance in this respect. In Australia over recent decades important integrity issues have been considered by the Western Australian Royal Commission into the Commercial Activities of Government, referred to as the inquiry into "WA Inc", the Fitzgerald Inquiry into Corruption in the Queensland Police Force and the Wood Royal Commission into the New South Wales Police Force. In the United Kingdom the Scott Report on Matrix Churchill, the Phillips Report on mad cow disease and the Hutton inquiry about press reports concerning British participation in the Iraq War, all raised integrity issues.

Various complaint handling mechanisms have been established which often focus on integrity issues. I include in that respect the Ombudsmen, particularly in those states in which an independent

corruption commission does not exist. Of course complaint mechanisms are designed, in part, to improve the quality of decisions and in that regard perform an executive function. Nevertheless, such organisations do perform integrity functions.

Over recent decades a concern with personal integrity of public officials, particularly focussed on the existence of conflicts of interest, has also taken new institutional forms. Formal codes of ethics identifying standards of behaviour have been promulgated in many areas of the public sector. In some places separate institutions have emerged, for example, the Integrity Commissioner in Ontario and the Integrity Commissioner in Queensland.

Integrity and Administrative Law

The role of the courts in supervising administrative action has frequently given rise to controversy with respect to the proper role of a judiciary in a democratic polity. What constitutes transgressing that proper role is a matter on which reasonable minds may differ. In the first lecture I expressed the view that the idea that judicial review is part of an integrity branch of government, expresses the limits upon the permissible scope of judicial review in a manner which may be useful. When the courts review matters which do not give rise to integrity issues, it is likely, I said, that they have gone too far. The issue is one of "judicial legitimacy", to adopt Chief Justice Gleeson's phrase[6].

The distinction between judicial review and merits review is a fundamental principle of Australian administrative law. Judicial review is a manifestation of the integrity branch of government. Merits review is a manifestation of the executive branch.

Australian administrative law continues to adhere to the proposition that there is no error of law in making a wrong finding of fact[7], unless the fact is jurisdictional.

The task of policing the boundaries of the legality/merits dichotomy is a continuing one. Over recent decades, as I indicated in the first lecture, Australian administrative law has diverged from that of England in important respects with respect to the identification of the boundary and the rigour with which it is enforced. This is a function of our strong tradition of the separation of powers, manifest primarily in the force of the High Court's Chapter III jurisprudence[8]. In the second lecture, I discussed the gravitational pull of High Court jurisprudence about the "constitutional writs" upon the common law[9].

Subject to what may emerge from the High Court's further consideration of *Kable*, the difference between the constitutional writs and the common law applicable to State administrative law appears to be well established by *Craig*. The constitutional writs are not necessarily attended by the same incidents as the prerogative writs[10].

For the foreseeable future we will have three distinct, but interrelated, bodies of administrative law: the constitutional writs, the common law and the ADJR Act and its State progeny. Nevertheless, the constitutional jurisprudence will exercise a gravitational pull on both the common law and on the statutory jurisdiction.

In the administrative law literature integrative concepts have emerged which threaten the legality/merits distinction. One is the suggestion that the specific rules of administrative law are part of a broader principle of preventing an "abuse of power" or of curing "serious administrative injustice"[11]. Another posits that these rules are simply "principles of good administration". Such general concepts are beguiling.

It is a short step from stating that all of the particular rules which are in fact recognised in the case law can be so categorised, to saying that the results of a particular dispute should be determined by the judge's opinion as to whether the conduct constitutes an "abuse of power", "serious administrative injustice" or that in some manner, the "principles of good administration" require judicial intervention. Such concepts are more likely to lead to judicial decisions which transgress the proper limits of judicial review in a democratic polity, than the integrative concept which I propound, namely, the performance of an integrity function.

The court system cannot supervise the broad stream of discretionary administrative decision-making, even by the application of a standard of "legality", unless that standard is narrowly confined. Nor in a democratic society should judges attempt any such task where what is criticised, as a matter of substance, is the quality of an outcome of a decision-making process. It is, however, appropriate for the judiciary to ensure the fidelity of decision-makers to their jurisdiction, so that the integrity of the

institutions within which those individual decision-makers operate is maintained.

In the first lecture, I expressed my opinion, that the English cases which appeared to recognise substantive legitimate expectations, such as *Coughlan and Begbie*[12], the effect of which is indistinguishable from merits review, would not be followed in Australia, where legitimate expectations give rise only to procedural rights[13].

Similarly, the emergence in England of a doctrine of proportionality, under the influence of European Community law, particularly by reason of the adoption of the European Convention on Human Rights in the Human Rights Act 1998 (UK), trespasses on the merits side of the legality/merits boundary. A proportionality test requires a court to assess the weight a decision-maker has given to particular considerations and to assess the balance struck between conflicting considerations[14]. Such a process involves an executive rather than an integrity function of government[15].

In the second lecture I noted that earlier this year, the English Court of Appeal took the decisive step and recognised material mistake of fact as a basis for overturning administrative decisions[16]. This new ground of judicial review, or of appeal for error of law, will probably lead to further divergence between Australian and English administrative law. The most Australian law presently permits is an appeal from a perverse finding of fact[17] and in New South Wales not even that[18]. These cases may need to be reviewed in the light of the High Court decision in *Applicant S20/2002*. Judicial review for factual error is constrained by *Wednesbury* unreasonableness, save in the case of jurisdictional facts. The High Court declined an invitation to decide whether "material error of fact" was a ground of review in Australian law[19].

England has moved a long way from maintaining institutional integrity. The focus of attention has moved from the function being performed to the quality of the decisions made. That has not happened in Australia.

The Concept of Jurisdiction

In the second lecture, delivered in Adelaide last month, I focussed on the concept of jurisdiction which bears a close resemblance to the idea of "integrity" which, I acknowledged, is neither capable of precise definition nor of uncomplicated application. At the heart of each concept is a notion of significance. Each represents a recognition that not every error in administrative procedure can be the subject of judicial review. At the top of the spectrum of significance is the concept of "essentiality".

I expressed the view that the distinction between permissible and impermissible conduct, as manifest in the difference between jurisdictional and non-jurisdictional error, is real, indeed fundamental. I considered and rejected the criticisms that have sometimes been advanced about the utility of the concept of jurisdiction.

In the second lecture I explored how the idea of an integrity function assists in the understanding of the distinction between jurisdictional and non-jurisdictional errors of law, in determining when a fact is jurisdictional and in the rejection of a doctrine of deference in Australian administrative law.

A jurisdictional error of law or of fact, I suggested, raises issues of integrity. A non-jurisdictional error of law or of fact raises issues of competence and correctness.

Jurisdictional error of law can take different forms. The power may be misinterpreted by the decision-maker. A jurisdictional fact, sometimes called a "collateral fact", may be absent. A procedural defect may be such as to invalidate the decision, which requirement was once described as "mandatory" rather than "directory"[20]. A consideration that a decision-maker was obliged to take into account may have been ignored[21]. All of these tests serve an integrity function.

The distinction between jurisdictional and non-jurisdictional error of law remains a critical distinction in Australia. If there had ever been a prospect that the distinction would become attenuated, that prospect disappeared with the renewed emphasis given to the constitutional dimension of the relevant principles, as the High Court developed its 75(v) jurisprudence over recent years. During the course of this development, the High Court emphatically confirmed the traditional common law distinction in *Craig*.

In the second lecture I expressed the opinion that it is open for the High Court to determine that, subject to the particular statute, an error of law by an administrative decision-maker is usually jurisdictional. There is nothing inconsistent with performance of an integrity function if this proposition

is understood as a rebuttable presumption of statutory interpretation rather than, as the House of Lords concluded, as effectively abolishing the distinction between jurisdictional and non-jurisdictional errors of law at common law. The idea of institutional integrity can guide the development of the law in respects such as this.

Apprehension is sometimes expressed that judges may too readily find facts to be "jurisdictional" and thereby intrude too far into executive decision-making. The concept of integrity can serve as a guide to ensure that any such tendency is kept in check. The focus of attention must always be fidelity to the purposes of the power and the maintenance of the public values to be served. The focus is not the quality of the outcome.

In the second lecture I emphasised that the determination of when a fact or event is jurisdictional is a principled process. It does not trespass on the merits side of the legality/merits distinction. The appellation "jurisdictional fact" is, in my opinion, a convenient way of expressing a conclusion, which is the result of a process of statutory interpretation. That process leads to the determination that, on the proper construction of the relevant power, a fact referred to must exist in fact, a test of objectivity, and that the Parliament intended that the absence or presence of the fact would invalidate action under the statute, a test of essentiality[22]. The position is similar to that expressed by the High Court with respect to procedural requirements in *Project Blue Sky*.

The language of essentiality, including words like "mandatory" and "jurisdictional", directs attention to matters that are appropriately described as issues of institutional integrity. It directs attention away from the quality of the actual outcome which, save in exceptional circumstances, is not relevant to the inquiry.

A good indication of the rigour with which Australian administrative law is restricted to an integrity function is the decisive rejection in the *City of Enfield* case of any idea of judicial deference[23]. Where intervention by a court is designed to ensure the institutional integrity of the decision-making process, it should be clear that "deference" is entirely inappropriate.

In this third lecture I propose to continue some of the themes developed in the first two lectures. The legality/merits dichotomy remains at the heart of Australian administrative law. That dichotomy has not been attenuated, as appears to have occurred in other common law jurisdictions, by the recognition of a doctrine of substantive legitimate expectations, by the application of a proportionality doctrine or by the recognition of material mistake of fact as a basis for review. The critical concept identifying the scope of review is the concept of "jurisdiction", both in terms of jurisdictional errors of law and jurisdictional facts. In this third lecture I propose to apply this analysis to the particular case of statutory provisions restricting access to the courts which are sometimes called ouster clauses but, in Australia, generally called privative clauses.

Privative Clauses

Privative clauses take different forms, though there are certain commonly occurring formulations. The number of cases in which a privative clause has been found not to protect a particular decision-making process is very large. The cases are not necessarily reconcilable. Nevertheless, certain broad themes emerge.

Perhaps the most important factor is the application of the well-known principle of the law of statutory interpretation that Parliament is presumed not to intend to reduce the jurisdiction of a court save to the extent that the legislation expressly so states or necessarily implies[24]. This is a specific application of a more general principle that Parliament did not intend to abrogate fundamental rights or freedoms, of which a citizen's rights of access to the courts is one. This principle and its application has recently been reaffirmed in the authoritative joint judgment of the High Court in the *Plaintiff S157* case[25]. Privative clauses are, accordingly, construed strictly.

A number of alternative, but equivalent, formulations have been propounded to identify the level of strictness appropriate to the construction of provisions which may have the effect of invading common law rights: "express words of plain intendment"[26], or "clear and unambiguous words"[27], or "unmistakeable or unambiguous"[28] or "irresistible clearness"[29] or "with a clearness which admits of no doubt"[30] or "clearly manifested by unambiguous language"[31]

General words contained in a statute are frequently read down in accordance with longstanding principles of statutory interpretation of which one can find an expression, in surprisingly contemporary reasoning, as long ago as 1560, when the Barons of the Court of the Exchequer said:

"... The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach some persons only, which expositions have always been founded upon the intent of the legislature which they have collected some times by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." [32]

No parliamentary drafter can be in any doubt that this approach will be applied to a privative clause. Subject to constitutional limitations, the drafter can maximise the efficacy of a provision, but only by words of 'irresistible clarity'. In view of the longevity of the principle of strict construction of privative clauses, the Courts are entitled to proceed on the basis that legislation has been drafted on the assumption that that will occur.

A privative clause generally consists of two component parts. The first identifies the decision or event to which the relevant restriction applies, e.g. in a frequently appearing formulation "a decision under this Act". The second is the specification of the restriction upon a court which may otherwise have supervisory jurisdiction, e.g. language of 'finality', "no appeal", no "certiorari or quashing" and no "calling into question", etc.

A strict construction applies to each of these two distinct aspects of a privative clause. Of particular significance for present purposes is the first, i.e. the identification of the decision or event which triggers the application of the restriction found in the second part of the clause. The High Court decision in Plaintiff S157 turned on this factor.

The Court held that s474 of the Migration Act 1958, which purported to protect from review "decisions ... made under this Act", referred only to decisions which were not infected by jurisdictional error. An administrative decision which involved jurisdictional error is "regarded, in law, as no decision at all" [33]. In part this conclusion was determined by the Constitutional context under consideration in Plaintiff S157, specifically the inability of the Parliament of the Commonwealth to pass legislation inconsistent with the conferral by s75(v) upon the High Court of jurisdiction to supervise officers of the Commonwealth by the constitutional writs and also by other express and implied provisions of Chapter III of the Constitution.

Although the Constitutional basis would have been a sufficient basis to read down the word "decision" so as not to apply to a decision affected by jurisdictional error, the High Court regarded the conclusion as flowing equally from the application of the law of statutory interpretation. In this regard the same result would apply to State legislation which, subject to future development of the Kable principle in the High Court, does not have the same constitutional overlay.

The conclusion that words identifying the decision or event which triggers the application of a privative clause does not encompass a decision or event infected by jurisdictional error, is a longstanding principle. Notwithstanding the convolutions that the Commonwealth went through in formulating and explaining s474 of the Migration Act, the result should not have been unexpected. As far back as volume 1 of the Commonwealth Law Reports an attempt to insulate decisions of the then New South Wales Arbitration Court by means of a privative clause protecting any "award, order or proceeding" in that court from any 'challenge, appeal, review, quashing or calling in question ... on any account whatsoever' was rejected on the basis that such provisions "have always been construed as not extending to cases in which a court with limited jurisdiction has exceeded its jurisdiction" [34].

The same approach has been applied consistently in a long line of authority, notably in the arbitration area, so that reference to "decision" was not generally protected from review for jurisdictional error [35].

A comprehensive privative clause will be effective to oust review for non-jurisdictional error of law [36]. Indeed, that is permitted under the Commonwealth Constitution [37]. However, for those matters which are essential, in the sense that they are jurisdictional, clear and express language (in the various formulations to which I have referred) is required before Parliament can be said, even in the case of State legislation not subject to a constitutional restriction, to have intended to restrict judicial review.

In one High Court judgment dealing with New South Wales legislation a contrast was drawn between the formulation "a decision under this Act" and an alternative formulation, not in fact used in the legislation then under consideration: "under or purporting to be under this Act"[38].

No doubt inspired by this implicit suggestion, the New South Wales Parliament did pass legislation protecting the Industrial Commission from any form of review with respect to "a decision or purported decision of the Commission". Subject to a constitutional challenge to the validity of this provision, which it was not necessary to decide[39], this extension has been held to be effective to protect from jurisdictional error[40]. However, there does have to be a "decision" of some character by the Commission, so that a challenge mounted as soon as proceedings are instituted can, the New South Wales Court of Appeal has held, be entertained[41].

Constitutional restrictions would prevent a privative clause in Commonwealth legislation extending to a 'purported decision'.

The Hickman Principle

Lord Diplock once said:

"Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today."[42]

Whatever may be the position in England that statement cannot apply to the observations of Dixon J in *R v Hickman; Ex parte Fox & Clinton*[43]. In *Hickman* Dixon J identified a core content of supervisory jurisdiction in the form of three provisos to the operation of a privative clause. Those three provisos were: the decision must be a bona fide attempt to exercise the power, that it must relate to the subject matter of the legislation and that it is reasonably capable of reference to the power given to the decision-maker.

In the *Darling Casino* case, Gaudron and Gummow JJ contrasted the position under Commonwealth law and State law in the following terms:

"... A privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the Hickman principle."[44]

This passage appears to give the Hickman principle a binding force that does not derive from the Constitution. What is it that gives the matters identified force of this character?

The principle applied to the interpretation of privative clauses to the effect that a Parliament is presumed not to deny citizens access to the courts is a rebuttable presumption. In the context of State legislation it cannot be an irrebuttable presumption.

If I may be permitted the sin of self-quotation, I sought to explain the passage from the judgment of Gaudron and Gummow JJ in the following way:

"The final qualification with reference to the 'Hickman principle' is not, as I understand it, a suggestion that in some manner that 'principle' is immune from legislative overruling rather, once the intention appears from the legislative scheme that the privative clause has in fact extended to jurisdictional error, then a final principle of statutory construction reflected in the Hickman principle must be applied. This is because the strict construction, appropriate for all such clauses, is applied with particular stringency to those core matters. Indeed it may be so difficult to conceive of a form of words capable of satisfying a 'necessary intention' test, that express words are, as a practical matter, required."[45]

To say that a statutory provision must be strictly construed does not invoke a specific body of rules. There are degrees of strictness[46]. To similar effect are the observations of Gleeson CJ in *Plaintiff S157* where his Honour referred to various adjectives which are often used to emphasise the significance of an alleged defect in jurisdiction. Gleeson CJ said:

"Unless adjectives such as 'palpable', 'incontrovertible', 'plain' or 'manifest' are used only for rhetorical effect, then in the context of review of decision-making, whether judicial or administrative, they convey

an idea that there are degrees of strictness of scrutiny to which decisions may be subject."[47]

Notwithstanding the iconic status that has been given to the threefold Hickman principle it is not appropriate to treat it as if it were enshrined in legislation. However, that was what the Commonwealth effectively sought to do in Plaintiff S157. For some reason, which has never been fully explained so far as I am aware, the Commonwealth did not write the Hickman principle into the legislative scheme, but sought to have s474 of the Migration Act construed as if it had on the basis of expressions of intention in the Explanatory Memorandum and the Second Reading Speech.

The unsuccessful Commonwealth submission was to the effect that the privative clause should be understood to expand the jurisdiction of the relevant decision-maker subject only to the three Hickman provisos. This submission was rejected on the basis that the Hickman principle was simply a rule of construction and that, accordingly, "there can be no general rule as to the meaning or effect of privative clauses"[48].

There were a number of statements in previous High Court decisions suggesting that, subject to the Hickman provisos, the effect of a privative clause was to extend jurisdiction. However, those statements were often, but not always, expressed in the form that that was the "effect" of the application of the privative clause[49]. The Commonwealth's submission in Plaintiff S157 confused practical effect with legal effect. The earlier statements must now be understood as subject to the views expressed in the joint judgment in Plaintiff S157:

"... It is inaccurate to describe the outcome in a situation where the provisos are satisfied as an 'expansion' or 'extension' of the powers of the decision-makers in question."[50]

The joint judgment went on to state:

"To understand the three Hickman provisos as qualifying the powers of those who make privative clause decisions, rather than qualifying the protection which the privative clause affords, either assumes the Act on its true construction provides no other jurisdictional limitation on the relevant decision making or other power or it assumes that the repository of the power can decide the limits of its own jurisdiction ... [T]he first assumption is wrong. The alternative assumption would contravene Chapter III."[51]

Save to the extent that Chapter III impinges on State courts, the extent of which we will probably know when decisions are handed down in cases presently before the High Court, the second "assumption" does not apply to State legislation. The position with regard to State decisions, particularly statutory courts, may be different. Nevertheless, a process of statutory interpretation of a significant level of strictness is still required with respect at least, to the three Hickman provisos, to inviolable limitations and manifest defects.

Beyond the Hickman provisos

Notwithstanding the terms in which Dixon J stated and subsequently restated the Hickman principle [52], it appears now to be clear that it was not a comprehensive statement. It has been proposed that a fourth proviso is discernible in the authorities[53]. The fourth principle is that a decision must not "display a jurisdictional error on its face". However, that is the way in which a number of High Court authorities, including Plaintiff S157 itself, explains the third Hickman proviso, i.e. whether or not a decision is reasonably capable of reference to the power[54].

Of greater significance is the strong line of authority, affirmed in S157, that the process of statutory interpretation, required when a privative provision is included in legislation, may lead to the conclusion that certain kinds of limitations or requirements in the legislative scheme are, as variously expressed in the authorities, "essential", "indispensable", "imperative" or "inviolable". This was once advanced as a fourth proviso[55]. However, it has a different quality. It is not in fact a "proviso" at all.

The approach to interpretation first identified by Dixon J in Hickman is now authoritatively established in Australia. The task is one of reconciliation of conflicting provisions, namely the provision imposing some form of limitation on jurisdiction and the provision preventing judicial review[56]. This is the starting point of analysis. It is a very revealing starting point. There is an unexpressed major premise that there is no such thing as unlimited executive authority.

Contrary to our monarchical tradition, the executive arm of government cannot act merely on the basis of its power. This is a rule of law assumption and in Plaintiff S157 Gleeson CJ expressly invoked the

rule of law as one of the factors required to be taken into account in the process of statutory construction[57]. I can see no reason why rule of law assumptions would not lead to the same result for a State Parliament. A parliament cannot confer unlimited power on the executive branch.

The joint judgment in Plaintiff S157 rejected the Commonwealth submission that the Parliament could confer an entirely open ended discretion[58]. However difficult it may be to identify the limits, there is a point where a parliament is delegating legislative power itself and that is not a proper exercise of legislative power[59]. This important constitutional principle is the starting point for a Hickman analysis.

The interpretation of a privative clause cannot proceed on the basis that it stands alone. It is not permissible to focus only on the fact that it states there will be no judicial review and to conclude, therefore that there can be no judicial review. A privative provision must be construed in its total context. As the joint judgment in Plaintiff S157 said:

"The process of construction for which (the Commonwealth) contends is not a process of construing the legislation as a whole. It is a process which places a construction on one provision, the privative clause, and asserts that all other provisions may be disregarded."[60]

Their Honours went on to refer to the formulation of Dixon J in *Murray*; ex parte *Proctor* that certain limitations may be "essential" and that a privative clause could not, therefore, apply to them. The same process is described in many other ways, perhaps most frequently in terms of an "inviolable limitation"[61]. It is convenient to use that term.

The characterisation of a limitation as "inviolable" represents the culmination of a process of statutory interpretation by means of the reconciliation between the privative provision and the relevant restriction or restraint. This process is an alternative to the three-fold proviso of the Hickman principle. It is not a proviso at all. Dixon J referred to the three-fold proviso as a "first step" and the "inviolable restriction" as a "second step"[62].

Terminology such as "imperative duties" and "inviolable limitations or restraints" clearly points to jurisdictional error[63]. It may be, however, that the conception of an "inviolable" limitation does not exhaust the field of jurisdictional error, particularly as that somewhat elusive concept has expanded over recent decades. Plainly not all limitations or restrictions in a statutory scheme can be described as "inviolable", nor all duties as "imperative".

Everything will turn on the specific legislative scheme under consideration in any case. Nevertheless, what appears to be involved is a heightened level of strictness of scrutiny with respect to matters which a consideration of the legislative scheme as a whole - namely the total context in which the privative provision which has to be construed appears - requires or imposes. There is an idea of essentiality underlying this process.

The position is the same as that which the High Court determined to be the case when discussing the terminology often applied to breach of procedural conditions in the *Project Blue Sky* case[64]:

"The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning ... A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provisions should be invalid."

However, as the joint judgment went on to immediately note "a finding of purpose or no purpose in this context often reflects a contestable judgment"[65]. The same is true when determining when a "limitation" is "inviolable" or a duty "imperative".

I think we are all now used to the idea that the appellation "mandatory" and "directory" is a statement of a conclusion. So long as we recognise that fact, I find the terminology useful and would tentatively encourage its reintroduction into the administrative law lexicon, as does Professor Aronson and his co-authors[66]. It seems to me to be a useful shorthand.

It is not finally settled whether strict scrutiny of a privative clause leads to the conclusion that the clause does not protect every form of error that may be classified as jurisdictional for other purposes of administrative law. The process of reconciliation may involve a different form of analysis from that which is appropriate for determining categories of jurisdictional error.

Plaintiff S157 was concerned with an alleged breach of the requirement of procedural fairness. Such a breach had generally been assimilated with jurisdictional error in its original narrow sense[67].

Over recent years, at least in the case of administrative decision-makers, the concept of jurisdictional error has expanded. In *Craig* the idea of jurisdictional error was found to encompass virtually all of the matters listed in the Administrative Decisions Judicial Review Act, as picked up in the Queensland Judicial Review Act, except the catch all of "abuse of power"[68]. Furthermore in *Yusuf* the High Court indicated that even this list was not exhaustive[69].

Prior to S157, the majority in a five judge bench of the Full Federal Court had concluded that s474 of the Migration Act was effective with respect to the *Craig* type list of jurisdictional errors[70]. In the immediate wake of S157 the view was expressed that S157 was concerned only with the principle of natural justice and that the privative clause may still be effective for some other matters constituting jurisdictional error[71]. This was doubted and eventually overruled by subsequent Full Federal Court decisions[72]. The High Court has yet to determine this issue.

It may be of significance that in S157 the joint judgment did not simply use the terminology of "jurisdictional error", which would have been a clear reference back to the broad concept of jurisdictional error as it has developed with respect to administrative decision-makers over recent years. The formulation adopted at [76] was that the privative clause "must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act". The only examples of relevant jurisdictional error given in that paragraph of the joint judgment were "imperative duties" and "inviolable limitations".

It is not clear that a particular defect capable of constituting jurisdictional error, e.g. a failure to take into account a particular relevant consideration, necessarily constitutes a "failure to exercise jurisdiction". The test suggests a broader inquiry than simply asking and answering the question has there been a failure to take into account a relevant consideration? There is a suggestion that an additional level of significance has entered the equation.

The particular formulation found in the critical passage in Plaintiff S157 appears in a number of other places including on at least one occasion in a passage where a distinction is drawn between that formulation and the full *Craig* type list of factors capable of constituting jurisdictional error. In *Darling Casino*, the joint judgment of Gaudron and Gummow JJ said at 633-634:

"... A clause which provides only that a decision may not be called into question in a court of law is construed so as not excluding review on the ground that the decision involved jurisdictional error, at least in the sense that it involved the refusal to exercise jurisdiction or that it exceeded the jurisdiction of the decision-maker." [Emphasis added]

The footnote attached to this sentence was:

"Note the wider use of the expression 'jurisdiction' referred to in *Anisminic Limited v Foreign Compensation Commission* (1969) 2 AC 147 at 171 per Lord Reid; see also at 195, per Lord Pearce."

The two references to *Anisminic*, which their Honours described as a "wider use of the expression 'jurisdiction'", suggested a *Craig* type list of factors.

To similar effect is the reasoning of Gaudron J in her dissenting judgment in *Abebe v The Commonwealth*[73] where her Honour stated at [107] that "jurisdictional error is not confined to situations which a tribunal either lacks jurisdiction or exceed its jurisdiction" and added at [108]: "Not every failure to have regard to relevant matters or to disregard relevant matters constitute jurisdictional error". Similarly in Plaintiff S157, Callinan J left open the question whether the remedies in s75(v) required a "grave or serious breach" in the case of procedural fairness[74].

In *Vanmeld I* raised the possibility that the extension of the concept of jurisdictional error may require a review of the proposition that privative clauses do not protect against jurisdictional error[75]. The significance of this review is even clearer in view of the High Court judgment in *Applicant S20/2002* which appears to recognise irrational or illogical decisions as constituting jurisdictional error[76].

The reference in Plaintiff S157 to the process of construction leading to a conclusion that a particular limitation is "inviolable" or a particular defect is "manifest" or that a particular duty is "imperative"[77],

does suggest that it is not sufficient to simply categorise an error under one of the Craig type factors. Rather, the overall process of interpretation must be conducted to determine the element of essentiality in the circumstances of the case. The process of statutory construction must lead to the conclusion that the relevant error has resulted in 'a failure to exercise jurisdiction or an excess of jurisdiction'.

The approach of the joint judgment in Plaintiff S157 was affirmed in a subsequent High Court decision [78]. There will of course be clear cases in which a detailed investigation of the legislative scheme is not required. However, it appears that in some cases categorisation of the nature of the error will be insufficient.

A process of reconciliation may still be required even if the privative provision extends to a "decision or purported decision"[79]. What is involved in such a case is two similarly forceful expressions of parliamentary intention which make the process of reconciliation more acute, but do not resolve it. In such a context it is likely that some, but not necessarily all, examples of jurisdictional error are protected. Some restrictions may still be "inviolable".

The Integrity Function

Strict scrutiny of legislation is appropriate in a range of situations, frequently with the effect that general words are read down[80]. The strict construction applied to privative clauses has the effect of ensuring that decisions are made for the purposes for which they were intended to be made and in accordance with the public values which the decision-making process was expected to obey. The idea of essentiality at the heart of the jurisdictional/non-jurisdictional distinction coincides to a substantial degree with what I have described as institutional integrity. As applied to privative clauses, this principle of statutory interpretation is a clear manifestation of the integrity function of administrative law.

This perspective is reinforced by the heightened strictness of scrutiny in the case of "inviolable limitations" or "imperative duties". The concept of institutional integrity may be of assistance in the task of statutory interpretation directed to identifying which restrictions and/or duties are of sufficient essentiality to answer the description of an "inviolable limitation" so that the privative provision is read down. There is an idea of 'essentiality' underlying this process. When matters involving institutional integrity arise with respect to a particular decision-making process, a conclusion that the fact or event is "essential" will more readily be drawn.

I have referred to the unstated major premise of the Hickman analysis that there is no such thing as unlimited executive authority. Powers are conferred for a purpose. The purpose, if nothing else does so, identifies limits. Once one attaches a purposive dimension to a power, then the assumption that the limits of that power are to be determined by a process of judicial review manifests a concern with institutional integrity.

The constitutionalisation of administrative law at a Commonwealth level proceeds apace. The joint judgment in Plaintiff S157 emphasises the integrity function of the High Court's role. Their Honours said at [104]:

"The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them."

The jurisdiction of other courts at common law serves precisely the same purpose of maintaining institutional integrity.

As Kirby and Callinan JJ put in a joint judgment, referring to all Australian Parliaments:

"[69] ... where a discretion is conferred by statute, it must be exercised in accordance with the language by which it is conferred and to achieve the purposes for which the power has been granted. To talk of 'absolute' judicial discretions; at least where such discretions are conferred by an Australian statute, involves a contradiction in terms. Absolute discretions are a form of tyranny.

[70] All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No Parliament of Australia could confer

absolute powers on anyone ... [t]here are legal controls which it is the duty of the courts to uphold when their jurisdiction is invoked for that purpose."^[81]

I conclude with an observation of Brennan J which reflects the concern with institutional integrity of administrative law:

"Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."^[82]

1 See Ray Huang, 1587, *A Year of No Significance: The Ming Dynasty in Decline*, Yale Uni P, Newhaven (1981) pp53-54.

2 See Charles O Hucker, *The Censorial System of Ming China*, Stanford Uni P, Stanford, California (1966) p3.

3 See Bruce Ackerman, "The New Separation of Powers" (2000) 113 *Harvard Law Review* 633 at 694-696.

4 See William P Alford, "Book Review" (2000) 113 *Harvard Law Review* 1677 at n 96.

5 The Integrity Branch of Government, accessible at www.courts.nsw.gov.au/speeches.

6 Murray Gleeson "Judicial Legitimacy" (2000) 20 *Aust Bar Rev* 4.

7 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77; *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at [44].

8 See, e.g. *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699 at [76]-[77]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [59].

9 Jurisdiction and Integrity accessible at www.courts.nsw.gov.au/speeches.

10 *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officer's Association* (1986) 60 ALJR 588 at 594; *Abebe supra* at [21]; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [21]-[23], [162], [164]-[166].

11 *Ex parte Applicant S20/2002 supra* at [170] and [161] per Kirby J.

12 *R v North & East Devon Health Authority; Ex parte Coughlan* [2001] QB 213; *R v Secretary of State for Education & Employment; Ex parte Begbie* [2001] 1 WLR 1115.

13 See *Ex parte Lam supra* 699 at [81]-[83], [111], [143], [148]. See also *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA Trans 64, granting special leave from the decision in *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 127 FCR 259.

14 See e.g. *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547E-G.

15 On the response to proportionality in Australia see Aronson, Groves and Dyer *Judicial Review of Administrative Action* (3rd ed) Sydney 2004 at 343-348; Allars "Proportionality, Tradition and Constitutional Framework: Borrowing Foreign Legal Notions in Australian Public Law" in Doeker-Mach and Ziegert (eds) *Law, Legal Culture and Politics in the Twenty First Century* Franz Steiner Verlag, Stuttgart 2004.

16 *E v Secretary of State for the Home Department* [2004] 1 WLR 1179 at [66], see also at [63]. This case involved an appeal limited to a question of law, but the reasoning extends to judicial review.

17 *Puhlhofer Hillingdon London Borough Council* [1986] AC 486 at 518; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [41].

18 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156. See also *Bruce v Cole* (1998) 45 NSWLR 163 at 189.

19 *In Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S134/2002* (2003) 211 CLR 461 at [35]-[42].

20 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

21 See *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24; see also *Craig v South Australia* (1995) 184 CLR 163 at 177-179.

22 See *Timbarra supra* at [37]-[39]. See also *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43 at [27].

23 *Enfield supra* at [39]-[48].

24 See, e.g. *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121 at 134; *Johnson v Director General of Social Welfare (Vic)* (1936) 135 CLR 92 at 97.

25 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [72].

26 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396; *R v Lieschke* (1987) 162 CLR 4447 at 463; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576.

27 *Bropho v Western Australia* (1991) 171 CLR 1 at 17.

28 *Coco v R* (1994) 179 CLR 427 at 436-438; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381; *Plaintiff S157 supra* at [30].

29 *Potter v Minahan* (1908) 7 CLR 277 at 304.

30 *McGrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121 at 128.

31 *Al Kateb v Godwin* [2004] HCA 37 at [19].

32 *Straddling v Morgan* (1560) 75 ER 305 at 315. See also *Bowtell v Goldsbrough Mort & Co Limited* (1906) 3 CLR 444 at 456-457.

33 *Plaintiff S157* at [76] quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [5], [63] and [152].

34 *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181 at 197.

35 See, e.g. *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 esp at 131; *Brown v Rezitis* (1971) 27 CLR 157 esp at 172.

36 See e.g. *Hockey v Yelland* (1984) 157 CLR 124; *Houssein v Under Secretary Department of Industrial Relations & Technology* (1982) 148 CLR 88. See references in *Aronson et al* (3rd ed) at 837-838.

37 See *S157* at [81].

38 See *Darling Casino Limited v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 635. See also *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, 195.

39 *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212 at [120]-[133].

40 See *Mitchforce supra*.

41 See *Solution 6 Holdings Limited v Industrial Relations Commission of NSW* [2004] NSWCA 200 applying *Ex parte the Caterers & Restaurant Keepers Association* (1903) 3 SR NSW 19; *R v Australian Stevedoring Industry Board*; *Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 118-119; *Belmore Property Pty Ltd v Allen* (1958) CLR 191 at 196.

42 See *R v Inland Revenue Commissioners*; *Ex parte National Federation of Self Employed and Small Businesses Limited* [1982] AC 617 at 640.

43 (1945) 70 CLR 598.

44 *Darling Casino supra* at 634.

45 See *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at [137]; see also *Mitchforce supra* at [72].

46 See *Vanmeld supra* at [151].

47 Plaintiff S157 *supra* at [13].

48 Plaintiff S157 at [60]. See also at [35] per Gleeson CJ.

49 See, e.g. *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 275; *Darling Casino Limited supra* at 631. See S157 at [133] per Callinan J.

50 Plaintiff S157 *supra* at [64].

51 S157 at [99]. Note that the reference to "the three Hickman provisos" reflects a submission put in those terms.

52 See also *R v Murray*; *Ex Parte Proctor* (1949) 77 CLR 387 at 398; *Coal Miners Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Limited* (1960) 104 CLR 437 at 442-443.

53 See *Aronson Dyer & Groves Judicial Review of Administrative Action* (3rd ed) Sydney 2004 at p853 and cf *Mitchforce supra* at [77].

54 See *R v Commonwealth Conciliation and Arbitration Commission*; *Ex parte Amalgamated Engineering (Australian Section)* (1967) 118 CLR 219 at 252-253; *R v Coldham*; *Ex parte Australian Workers Union* (1983) 153 CLR 405 at 414; and *O'Toole v Charles David supra* at 285, 287; *Mitchforce supra* at [77]-[79], [210]-[213]; S157 *supra* at [57].

55 See, e.g. *O'Toole v Charles David supra* at 273.

56 See, e.g. S157 at [10], [17], [19], [58], [59] and [60].

57 See S157 at [31].

58 See at [101]-[102].

59 See Meyerson "Rethinking the constitutionality of delegated legislation" (2003) 11 *Aust J of Admin Law* 45.

60 See S157 *supra* at [65]. See also at [33] per Gleeson CJ.

61 See, for example, the various authorities and statements to this effect in S157 itself at [20], [21], [26], [65], [66], [70], [76], [157], [159], [160]. See also *Charles David supra* at 274; *R v Metal Trade Employees Association*; *Ex parte Amalgamated Engineering Union Australian Section* (1951) 82 CLR 208 at 248 referred to with approval in *Coldham supra* at 419, *Darling Casino* at 632. See also "final or definitive limitation": *R v Central Reference Board*; *Ex parte Theiss (Repairs) Pty Ltd* (1948) 77 CLR 123 and also the formulation "definitely ... not exercisable in other cases" *R v Commonwealth Rent Controller*; *Ex parte National Mutual Life Association of Australia* (1947) 75 CLR 361 at 369.

62 See *Mitchforce* supra at [86]-[87] referring to *R v Murray*; *Ex parte Proctor* at 399-400 and Plaintiff S157 at [20].

63 See Plaintiff S157 supra at [76].

64 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93].

65 *Project Blue Sky* supra at [91].

66 *Aronson Dyer & Groves* supra at 325, 854.

67 See the authorities collected in *Vanmeld* supra at par [160].

68 See *Craig v South Australia* (1995) 184 CLR 163 at 179.

69 See *Minister for Immigration and Multicultural Affairs v Yusuf* (2004) 206 CLR 323 at 351.

70 See *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 esp [636].

71 See *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 144 per Giles J.

72 See *WADK v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 48 at [26]; *Applicant NALU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 31 at [13]; *Minister for Immigration and Multicultural and Indigenous Affairs v WAAG* [2003] FCAFC 60 at [5]; *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 259 at [4]; *SBBG v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 281 at [20]; *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 423 at [27], [30], [33], [34].

73 (1999) 197 CLR 520.

74 S157 at [159].

75 See *Vanmeld* supra at [134]; See also *Aronson et al* (3rd ed) at 867.

76 *Applicant S20/2002* supra at [34], [37], [52] and [173] cf [9]. Note the qualification by Callinan J at [173] with respect to the 'sufficiency' of the error to justify relief. This conclusion may also require reconsideration in *Azzopardi* supra.

77 See S157 at [13], [18], [20], [21], [26], [56], [57], [65], [66], [70], [76], [157], [159], [160].

78 See *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 esp at [49]-[51].

79 See *Mitchforce* supra at [90]-[92].

80 See, e.g. *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105 at 116, *Australian National Airlines v Newman* (1987) 162 CLR 466 at 471, 476 and *Puntoriero v Water Administration Ministerial Corp* (1999) 199 CLR 575 at [33]-[37], [59]-[68], [113] (exception of liability provisions); *Potter v Minahan* supra at 304; *Bropho* supra at 17; *Coco* supra at 437; *Al Kateb* supra at [19]-[20]; S157 supra at 494; *Daniels Corporation International Pty Ltd v ACCC* (202) 213 CLR 543 at [11], [106]-[107] and [134]; *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 at 415; *Hot Holdings Pty Ltd v Creasy* (1995) 185 CLR 149 at 171 (invasion of common law rights). On reading down general words see cases collected in *R v Young* (1999) 46 NSWLR 681 at [22]-[32].

81 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [69]-[70].

82 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70, quoted with approval in S157 at

[31] by Gleeson CJ.

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Formal Opening Ceremony Court of Criminal Appeal, Lismore

**IN THE COURT OF
CRIMINAL APPEAL**

**SPIGELMAN CJ
WOOD CJ at CL
HOWIE J
BLACK DCJ
MAGISTRATE
LINDEN
COUNCILLOR
KING, MAYOR OF
LISMORE**

**Tuesday 24 August
2004**

FORMAL OPENING CEREMONY

COURT OF CRIMINAL APPEAL, LISMORE

Mr G Radburn, on behalf of the Bar Association of New South Wales.
Mr R Benjamin, immediate past President of the New South Wales Law Society.
Mr J Maxwell, on behalf of the Far North Coast Law Society.

1. **SPIGELMAN CJ:** Welcome to this ceremonial sitting of the Court of Criminal Appeal at Lismore this morning. I first welcome the Lord Mayor, Councillor Mervyn King, who joins us on the Bench at this first sitting of the Court of Criminal Appeal in Lismore. I invite him to address the Court.

2. **COUNCILLOR MERV KING, MAYOR, LISMORE CITY COUNCIL:** May it please this honourable Court. It is with great honour that I, on behalf of the Lismore City Council and the people of Lismore, extend a warm welcome to your Honours and the Court of Criminal Appeal to Lismore.

3. I understand that the Court has lately taken the opportunity to sit in regional areas of the State. As the Mayor of a regional city, I can say that it is a very positive development that will help our community appreciate, to a greater extent, the workings of the court system.

4. With a population of 43,000, Lismore is a growing city - a regional city. Estimates I have seen calculate that around 150,000 people regularly visit Lismore in order to shop or to use Government, legal or business services. Our region is the fastest growing area of the State. Our traditional farming population is changing with the times. As a community, we now welcome many new arrivals from metropolitan areas. A sizeable "alternative lifestyle" community is firmly established here and many new professional families and retirees are moving to the area seeking a sea change.

5. Lismore is outward looking and confident and we have always been so since our city was founded over 120 years ago. Despite technological change it still seems often that we are a long way from Sydney. This, of course, brings with it certain challenges to the community and also is reflected, I am sure, in the cases and issues that appear before the Bench.

6. Lismore does not take for granted its status as the legal centre of the Northern Rivers. It is something of which the people of Lismore are very proud and something my Council is very keen to encourage in every way possible.

7. As Mayor of Lismore I am often asked what Council can do to decrease crime. The short answer is that Lismore Council cannot control crime but we can support communities to become more cohesive.

As a community we recognise the extraordinary difficulty that members of the judiciary face and, therefore, we are conscious and extremely grateful for the great service that the Court provides for our community.

8. On behalf of the Lismore community, let me say once again, how very honoured we are to have the Supreme Court sitting in its Appellate jurisdiction and welcome, once again, the three members of the Bench. I extend to you the very best wishes of the Lismore community.

9. MR G RADBURN ON BEHALF OF THE NEW SOUTH WALES BAR ASSOCIATION: If the Court pleases. On behalf of the members of the NSW Bar and particularly on behalf of the Barristers of the North Coast, I extend a welcome to your Honours and the Court of Criminal Appeal to the city of Lismore.

10. Today marks the first occasion that the Court of Criminal Appeal has sat in Lismore in the history of the Court. The Court sits in Sydney but since 1999 has commenced to sit in country centres, as required, and since that time has travelled to Newcastle, Wagga Wagga and Dubbo.

11. The Courts under our legal system have a long history of bringing justice to the people. The courts of England from the early days of the Saxons travelled to the country and became known as Circuit Courts. The first of such circuits was in approximately 1176. In those times the courts would administer justice in a manner somewhat different to that of today. Up until 1217 trial by ordeal was conducted. The judges dealt with both criminal and civil matters in a variety of ways over the centuries but the circuits continued to develop and to dispense justice to the people.

12. The Supreme Court of this State was established in 1824 and has administered justice in this State since that time with virtually no change. The Court in its original jurisdiction has been for a long time visiting country centres on circuit to hear cases and at the present time, the Court still visits country centres to hear cases as and when required in both its civil and criminal jurisdictions. His Honour, Wood CJ at CL, who is a member of this Court today, has presided in Lismore on prior occasions.

13. The decision of your Honour, Spigelman CJ, to bring the Court of Criminal Appeal to the country centres of this State is most welcome. It is a recognition by the superior court that justice should be accessible to all whether you live in the city or the country. It also allows the Court to maintain contact and understand first hand the demands of the regional communities.

14. This Court is open for anybody to attend and to see first hand how criminal justice at its highest level is administered in this State and I would hope members of the public of this city and this area take advantage of such an opportunity.

15. It is anticipated that this Court will sit for two days to deal with a number of matters. Your Honours will bring justice to all the parties in accordance with the law. During your stay your Honours will receive all the courtesies from the Bar which you are entitled to expect. May it please the Court.

16. MR R BENJAMIN, IMMEDIATE PAST PRESIDENT OF THE LAW SOCIETY OF NEW SOUTH WALES: May it please the Court. I speak on behalf of the solicitors of New South Wales and in particular on behalf of Mr Gordon Salier, the President of the Law Society of New South Wales, who offers his apologies for not being here today. On his behalf I welcome the Court in its sitting in Lismore for these next two days.

17. I am joined today, as you know, your Honour Spigelman CJ, by the Chief Executive Officer of the Law Society of Lismore, Don Maxwell, who is in court. This is a special sitting of the Court of Criminal Appeal which is consistent with the standing policy of the Supreme Court in its various forms, to provide regular regional sittings both by way of gazetted circuits and special sittings such as this.

18. The Supreme Court some years ago celebrated its 175th birthday and its 175 years of service to the community of New South Wales. As I understand it, it is now 180 years that it has been providing law to the whole of the community of New South Wales and not just the major cities but throughout the regions.

19. The Court is supported by a strong and independent legal profession who are well represented here today. The strength of that profession can be seen by the move in the last 12 months, from compulsory membership of the Law Society of New South Wales to voluntary membership, where some 93 per cent of practising solicitors joined the Law Society and that is much higher in the regional areas. That shows the dedication and professionalism of the profession in New South Wales and its support for courts such as yours and the broader system of law in New South Wales.

20. On behalf of the Law Society, we welcome the Court to Lismore and strongly support the Court's continued presence in regional New South Wales. As the Court pleases.

21. **MR J MAXWELL ON BEHALF OF THE FAR NORTH COAST LAW SOCIETY:** May it please the Court. The reason that I have been chosen to speak on behalf of the Far North Coast Law Society today is because your Honour, Spigelman CJ, and I commenced our legal career together in February 1963 when we both enrolled in the combined Arts/Law course at Sydney University. I must say that I finished first. I must also say that the reason I finished first was because his Honour spent the extra two years in the Arts faculty where he took a double First Class Honours degree and a University Medal. He then came down to Law school and took another First Class Honours degree and another University Medal. So you can see why he is sitting up there and I am down here.

22. In 1971 when his Honour graduated I came to Lismore as a solicitor. 33 years later I am still here as a solicitor. That is in sharp contrast to his Honour's career. In 1972, you will recall there was a change of Government in Canberra. His Honour went down there and was playing bass in Prime Minister Whitlam's band. Subsequently, he did a number of gigs in superior positions in the Commonwealth Public Service. He then returned to the New South Wales Bar and had a very distinguished career as both junior and senior counsel. Subsequently, of course, he now plays lead guitar and vocal in the Supreme Court.

23. The other Justices who are sitting with his Honour are His Honour, Wood CJ at CL, who in another life, cast a great deal of light into some very dark places in the New South Wales Police Force and to whom all law-abiding citizens in this State owe a great deal of gratitude.

24. His Honour Howie J, who in a long career in criminal law, as a public solicitor, a public defender, a Director of the Criminal Law Division of the Attorney General's Department, a Deputy Director of Public Prosecutions, Crown Advocate and then an author of a criminal law practice, a District Court judge and now a Supreme Court judge and he, obviously, brings a great deal of erudition and experience to his deliberations in his work in the Supreme Court.

25. I welcome your Honours to Lismore on behalf of the solicitors of this region. It will be a short stay but I trust it will be an enjoyable one.

26. **SPIGELMAN CJ:** Thank you Mr Mayor, Mr Radburn, Mr Benjamin and Mr Maxwell for your words of welcome.

27. The Supreme Court first sat in Lismore almost exactly 100 years ago in 1905. Since that time the Court has come here in matters of crime and in civil trials but never before today in an appellate body. This is the Court of Criminal Appeal which, as I am sure everybody knows, is the final court of appeal for most criminal matters in this State. It disposes of in excess of 500 cases a year. The number of appeals that go on to the High Court are probably about half a dozen each year. So for the overwhelming proportion of criminal matters, this is the final court of appeal.

28. The longevity of our traditions in the administration of justice play a fundamental role in the economic stability and social welfare of this community. We Australians like to think of this as a young country. The second line of our national anthem is, "For we are young and free". However, when it comes to the fundamental mechanisms of government, whether of Parliamentary democracy or the rule of law, this is not a young country, this is an old country.

29. From a century ago, when this Court first sat in Lismore, the transformation in virtually every other nation in the world was much greater than anything that happened in Australia. In that century the Supreme Court has come here and has sat throughout New South Wales making the same kind of decisions in much the same way and still, as far as this Court is concerned, in the same kind of dress. This is not true everywhere but it is true of this Court. When one thinks of what the position has been

over the course of that time, one can see the stability of which we have been the beneficiaries in this country.

30. A century ago China was still an empire. It had a revolution or two ahead of it, a nationalist Government, a period of invasion from Japan and then a communist regime. Russia was run by the Czars and also had a couple of revolutions to go, culminating in the communist regime. It was then broken up into a number of different States. Germany was also an empire – then recently unified under the Prussian King. Throughout South East Asia the only independent nation was Thailand. India, Pakistan, Indonesia, Malaysia did not have governments of their own for over half a century. One can go on through Africa and other parts of the globe. In all of that time each of those regime changes have been accompanied by fundamental changes to the nature of the administration of justice.

31. Throughout that time in Australia we have continued in much the same way. That sort of stability and that kind of longevity of our institutions is something that we do not often acknowledge. As soon as one takes an international perspective on these matters one has to draw the conclusion that this is not a new country in some ways, but one with old, established institutions.

32. Part of the contribution the legal system makes to the economic prosperity and social stability of the nation is the continuing replenishment the law gets from contact with the community at large. It happens in various ways, the most notable of which is the jury system, where ordinary members of the community decide the most important issues affecting their fellow citizens. That is why visits such as this, by maintaining the contact with the community and serving the community, remain of great significance.

33. These days the Supreme Court does not sit in regional areas in its civil jurisdiction as often as it used. The flow of cases to the Supreme Court has significantly diminished with the expanded jurisdiction of the District Court. As a result, the kind of circuits that have happened in the past will not happen in the future. Nevertheless, when cases warrant a hearing the Court will, of course, come and conduct that hearing. The circuits of the past are no longer possible because of the reduced caseload.

34. In the first instance criminal jurisdiction, however, the Court will continue to return, as it always has, to try the more important cases, in the local region where the crimes occurred. That is now possible to a certain degree in the appellate context and we are doing that today.

35. It is of great significance, I believe, that the people of New South Wales appreciate the importance of the criminal appellate process. There are thousands and thousands of sentences issued at different levels of the court structure of this State in every year. Of those thousands and thousands of cases in the Local Court and the District Court, and a smaller number in the Supreme Court, perhaps 20 or 30 receive much publicity in the metropolitan press each year. A larger number receive publicity in the regional communities, because the interest in the crimes is much more clear-cut in a local context.

36. Nevertheless, it is not possible for the media as a whole to report in a comprehensive way on the full picture of the administration of criminal justice. As a result what tends to happen is that the people of the State get a distorted perspective of what is actually decided by the criminal justice system, particularly with regard to sentencing decisions which attract so much attention.

37. I think it is of great significance for the courts to get across an understanding that there is an appellate process, that inadequate sentences are fixed up on appeal and excessive sentences are also fixed up on appeal. This process works on a day to day basis and is not confined to those sensational cases which attract the attention of the media.

38. I receive a daily clipping service that includes all the media. I have no doubt that the regional media report more fully and comprehensively than the citizens of Sydney get, where the reporting tends to be very highly concentrated on exceptional, controversial cases. Nevertheless, it is significant for the Court of Criminal Appeal, by these sorts of visits to regional areas, to establish the proposition that the system of criminal justice in this State works on a fair, open and transparent basis and that much of the matter that gets the greatest degree of publicity is not representative in any way whatsoever of the broad stream of decision-making in criminal justice in this State.

39. I thank you very much for your welcome today and look forward to returning to Lismore in the

future.

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Victory in the Pacific Commemoration Service

VICTORY IN THE PACIFIC
COMMEMORATION SERVICE AND WREATH LAYING CEREMONY
THE GENOTAPH, SYDNEY
SUNDAY, 15 AUGUST 2004

We are gathered this morning at this solemn monument to commemorate the end of war in the Pacific 59 years ago. Of all the anniversaries we commemorate each year, including those marking the conclusion of past conflicts, this occasion has particular significance. The Pacific war was the first and only time in our history when the territorial integrity of Australia was subject to direct immediate threat and when acts of war were carried out on Australian soil.

This day, 59 years ago, marked the end of the Second World War, a conflict without precedent in recorded history. During that war, from an Australian population of seven million people, almost one million men and women enlisted for service. A great many more supported the war effort directly in a civilian capacity. Almost forty thousand Australians gave their lives and countless thousands suffered physical or emotional wounds, during that terrible conflict. We mark this anniversary, first and foremost to remember and to honour those who served and those who suffered, both in Australia and overseas. Above all, we gather here to pay tribute to , and to express our continuing gratitude to, those who died. By this remembrance, repeated annually, we reinforce our awareness as a community that our democratic and free way of life is a precious inheritance, an inheritance, which has been hard won through the commitment and sacrifice of those who served.

As we reflect on the rigours and the horror of war and its impact on individuals and on families - of lives cut off, of hopes and aspirations destroyed - we engage in a process which must be undertaken so that our nation will do what it can to ensure that such an occurrence will never happen again. As it was once put: "*Those who cannot remember the past are condemned to repeat it*". We must never allow it to be said that those who defended our fundamental freedoms in the Second World War died in vain. What we commemorate today is the performance by millions of Australians of duties they owed to Australia as a nation and a society. I do not speak only of military duties, I speak of duties owed as citizens. The duty to defend the nation is the most fundamental of civic obligations. The example of those who served emphasises for all of us that the rights we enjoy must be earned. I belong to a fortunate generation which has not had to earn our rights in the same way or to the same degree as those whose service and sacrifice we commemorate today had to do. But it is their example which should make each and every one of us ponder: Are we doing what we should in the performance of our civic obligations, so as to be able to say that we have earned the rights we enjoy? We have a duty to the dead whom we honour today, and who performed their obligations beyond measure, to be able to answer that question "Yes".

Jurisdiction and Integrity - The Second Lecture in the 2004 National Lecture Series

JURISDICTION AND INTEGRITY

THE SECOND LECTURE IN THE 2004 NATIONAL LECTURE SERIES

FOR THE AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

BY THE HONOURABLE JAMES J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES

ADELAIDE, 5 AUGUST 2004

In the first lecture in this series^[1] I proposed recognition of an integrity branch of government as a fourth branch, equivalent to the legislative, executive or judicial branches.

I noted that in any stable polity there is a widely accepted concept of how governance should operate in practice. The role of the integrity branch is to ensure that that concept is realised, so that the performance of governmental functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.

I put forward the idea of integrity as a useful way to conceptualise a universal governmental function, within which the body of law known as administrative law may find a place. The focus is on institutional integrity, rather than personal integrity, although the latter, as a requirement of conduct of occupants of public office, has implications for the former.

Institutional integrity goes beyond a narrow concept of illegality to encompass at least two additional considerations. First, the maintenance of fidelity to the public purposes for the pursuit of which an institution is created. Secondly, the application of the public values, including procedural values, which the institution was expected and/or required to obey.

This focus on fidelity to purpose and on applicable public values does, in my opinion, distinguish the integrity function from other governmental functions, including most executive, legislative and judicial decision-making, which are concerned with the quality of actual outcomes.

I summarise the integrity functions performed by various institutions of governance, set out more fully in the first lecture.

The traditional role of ministerial responsibility in a Westminster system can be understood, in part, as the performance by Parliament of an integrity function. The particular institutional manifestations of this function include the role of the formal Opposition, the significance that has always been attributed to daily question time, debating conventions such as those attendant on no confidence resolutions, and inquiries by Parliamentary committees. Whilst these procedures are often directed to the quality of outcomes, and therefore perform an executive function, or are concerned with legislative reform, and therefore can be seen as part of the legislative process, frequently they are directed to maintaining the integrity of government in the way I have identified, that is to ensuring that powers are exercised for the purposes for which they were conferred, in the manner in which they were expected and/or required to be performed.

The Parliament also has the ultimate authority to remove judicial officers for proved misbehaviour. In this regard, also, the Parliament performs an integrity function with respect to the judicial branch of government.

In a Westminster system of government, the head of state, the Queen in the United Kingdom and the

Governor-General in Australia, is also part of the integrity branch. This is not the case in those nations which combine the positions of head of state and head of government, such as in the United States. In our system, however, Walter Bagehot's threefold classification of the powers of the constitutional monarch in The English Constitution was: to be consulted, to encourage, and to warn. This, in large measure, is the performance of an integrity function.

Many of the institutions of the integrity branch of government are emanations of the executive. Nevertheless over the years many of these institutions have, by legislation and practice, developed an independence which has become institutionalised.

Perhaps the oldest such institution is the centralised audit office, which we in Australia generally call the Auditor-General. The focus on probity of governmental expenditure in the course of the financial audit is the performance of an integrity function.

Over recent decades new specialist institutions have emerged. In New South Wales the Hong Kong model of an Independent Commission Against Corruption was adopted. Similarly there is a statutory Corruption Commission in Western Australia and, in 2002, two Queensland institutions were merged in the Crime and Misconduct Commission. In New South Wales a separate Police Integrity Commission was created, on the recommendation of the Wood Royal Commission, to investigate allegations of corruption in the police force and to supervise the management of allegations of misconduct by members of the police force.

Public inquiries frequently focus on integrity matters. The operations of parliamentary committees and executive inquiries, notably Royal Commissions, have been of considerable significance in this respect. In Australia over recent decades important integrity issues have been considered by the Western Australian Royal Commission into the Commercial Activities of Government, referred to as the inquiry into "WA Inc", the Fitzgerald Inquiry into Corruption in the Queensland Police Force and the Wood Royal Commission into the New South Wales Police Force. In the United Kingdom the Scott Report on Matrix Churchill, the Phillips Report on mad cow disease and the Hutton inquiry about press reports concerning British participation in the Iraq War, all raised integrity issues.

Various complaint handling mechanisms have been established which often focus on integrity issues. I include in that respect the Ombudsmen, particularly in those states in which an independent corruption commission does not exist. Of course complaint mechanisms are designed, in part, to improve the quality of decisions and in that regard perform an executive function. Nevertheless, such organisations do perform integrity functions.

Over recent decades a concern with personal integrity of public officials, particularly focussed on the existence of conflicts of interest, has also taken new institutional forms. Formal codes of ethics identifying standards of behaviour have been promulgated in many areas of the public sector. In some places separate institutions have emerged, for example, the Integrity Commissioner in Ontario and the Integrity Commissioner in Queensland.

I have recently become aware of a novel integrity institution established in the United Kingdom known as The Statistics Commission. This is an independent non-statutory body which monitors officially published statistics to determine whether appropriate data is collected and whether publication of statistics is adequate and impartial. It has criticised the way official figures have been handled. The Commission has recommended that the existing voluntary Code of Practice and its monitoring role should be given a statutory basis in order to enhance public trust in official statistics[2].

The Judiciary's Role

By enforcing legality in governance the judiciary plays a critical role in maintaining institutional integrity. Constitutional law is the performance of an integrity function with respect to the legislature. This form of judicial review is a well-known feature of the Australian legal system. In the first lecture in this series I advanced the proposition that administrative law should also be seen as the performance of an integrity function. That was the main focus of the lecture and I develop the idea further in this second lecture.

The role of the courts in supervising administrative action has frequently given rise to controversy with respect to the proper role of a judiciary in a democratic polity. What constitutes transgressing that proper role is a matter on which reasonable minds may differ. In the first lecture I expressed the view that the idea that judicial review is part of an integrity branch of government, expresses the limits upon the permissible scope of judicial review in a manner which may be useful. When the courts review

matters which do not give rise to integrity issues, it is likely, I said, that they have gone too far. The issue is one of "judicial legitimacy", to adopt Chief Justice Gleeson's phrase[3].

The distinction between judicial review and merits review is a fundamental principle of Australian administrative law. Judicial review is a manifestation of the integrity branch of government. Merits review is a manifestation of the executive branch.

Australian administrative law continues to adhere to the proposition that there is no error of law in making a wrong finding of fact[4], unless the fact is jurisdictional.

However, as Chief Justice Gleeson said about the distinction between legality and merits in his discussion of judicial legitimacy:

"The difference is not always clear cut; but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day and *Wednesbury* unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action." [5]

In the first lecture I emphasised the significance of the legality/merits distinction in Australian administrative law. I referred to its most frequently cited formulation, that of Brennan J in *Attorney General v Quinn*[6]:

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's powers. If, in so doing, the court avoids administrative injustice or error, so be it, but the court has no jurisdiction simply to cure an administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

The task of policing the boundaries of the legality/merits dichotomy is a continuing one. Over recent decades, as I indicated in the first lecture, Australian administrative law has diverged from that of England in important respects with respect to the identification of the boundary and the rigour with which it is enforced. This is a function of our strong tradition of the separation of powers, manifest primarily in the force of the High Court's Chapter III jurisprudence[7].

Not only does our Constitution contain a more strict separation of powers than that of other common law countries, but there is an understandable influence of judicial review on the basis of constitutional validity, upon judicial review on the basis of statutory validity.

McHugh and Gummow JJ have observed:

"In Australia, the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems ... Considerations of the nature and scope of judicial review, whether by this Court under s75 of the Constitution or otherwise, inevitably involves attention to the text and structure of the document in which s75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration. This demarcation is manifested in the distinction between jurisdictional and non-jurisdictional error which informs s75(v)." [8]

A judiciary which is accustomed to declaring invalid the legislation of a Parliament is not likely to be diffident when it comes to the assessment of the validity of administrative acts performed pursuant to parliamentary authority. Furthermore, the kinds of matters that may arise in constitutional law have close analogies with those which arise in administrative law.

There are matters of constitutional fact of a character which are required to exist and which are essential for the validity of legislation. This is the equivalent of a jurisdictional fact for the assessment of delegated legislation or the application of a statutory regime to particular situations. A clear example is the requirement that an interstate industrial dispute exist before the arbitration power of the Commonwealth applies.

Similarly, an error of law with respect to the application of a constitutional restriction or power has a quality of 'essentiality' which is quite distinct from other errors of law. It is a natural step to conclude that a similar quality of essentiality may attach to errors of law in statutory decision-making.

The understanding of the Australian judiciary that invalidating legislation has real limits in a democratic society has influenced the formulation of principle, but not always conduct, with respect to invalidating administrative acts.

Section 75(v) of the Constitution - which gives the Court original jurisdiction in matters where mandamus, prohibition or an injunction is sought against an officer of the Commonwealth - has led the High Court to constitutionalise federal administrative law. Where we once spoke of "prerogative writs" we now speak of "constitutional writs". This new focus emerged from legislative attempts to prevent or limit review by the Federal Court[9].

Justice Selway has directed attention to the fact that Australian common law is uniform and must conform to the Constitution. On this basis he has put forward the intriguing idea that constitutional limitations on the role of the judiciary will set the parameters within which the Australian common law of judicial review will develop[10].

Subject to what may emerge from the High Court's further consideration of Kable, the difference between the constitutional writs and the common law applicable to State administrative law appears to be well established by Craig. The constitutional writs are not necessarily attended by the same incidents as the prerogative writs[11].

Unless this case law is overturned, the body of constitutional law with respect to officers of the Commonwealth will not necessarily determine the common law of judicial review or the principles applicable to appeals limited to error of law. It is, however, likely to operate as a constraint on change in the common law, at least to the degree of change that has occurred in England. For the foreseeable future we will have three distinct, but interrelated, bodies of administrative law: the constitutional writs, the common law and the ADJR Act and its State progeny. Nevertheless, the constitutional jurisprudence will exercise a gravitational pull on both the common law and on the statutory jurisdiction.

Review of Errors of Fact

In the first lecture, I expressed my opinion, the English cases which appeared to recognise substantive legitimate expectations, such as Coughlan and Begbie[12], the effect of which is indistinguishable from merits review, would not be followed in Australia, where legitimate expectations give rise only to procedural rights[13].

Similarly, the emergence in England of a doctrine of proportionality, under the influence of European Community law, particularly by reason of the adoption of the European Convention on Human Rights in the Human Rights Act 1998 (UK), trespasses on the merits side of the legality/merits boundary. A proportionality test requires a court to assess the weight a decision-maker has given to particular considerations and to assess the balance struck between conflicting considerations[14]. Such a process involves an executive rather than an integrity function of government[15].

Earlier this year, the English Court of Appeal took the decisive step and recognised mistake of fact as a basis for overturning administrative decisions. The Court invoked observations by Lord Slynn of Hadley, obiter but with only one of his colleagues demurring, that a "material error of fact" was a ground for judicial intervention[16]. Lord Slynn had also referred to a jurisdiction to quash for "misunderstanding or ignorance of an established relevant fact"[17].

The Court of Appeal concluded[18]:

"[66] In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding are ... First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or her advisers) must have not been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

Leave to appeal to the House of Lords has been refused. This new ground of judicial review, or of

appeal for error of law, will probably lead to further divergence between Australian and English administrative law. The most Australian law presently permits is an appeal from a perverse finding of fact[19] and in New South Wales not even that[20]. Judicial review is constrained by Wednesbury unreasonableness, save in the case of jurisdictional facts. The High Court declined an invitation to decide whether "material error of fact" was a ground of review in Australian law[21].

England, but not Australia, has moved a long way from maintaining institutional integrity. The focus of attention has moved from the function being performed to the quality of the decisions made.

In the administrative law literature integrative concepts have emerged which threaten the legality/merits distinction. One is the suggestion that the specific rules of administrative law are part of a broader principle of preventing an "abuse of power" or of curing "serious administrative injustice"[22]. Another posits that these rules are simply "principles of good administration". Such general concepts are beguiling.

It is a short step from stating that all of the particular rules which are in fact recognised in the case law can be so categorised, to saying that the results of a particular dispute should be determined by the judge's opinion as to whether the conduct constitutes an "abuse of power", "serious administrative injustice" or that in some manner, the "principles of good administration" require judicial intervention. Such concepts are more likely to lead to judicial decisions which transgress the proper limits of judicial review in a democratic polity, than the integrated concept which I propound, namely, the performance of an integrity function.

The observations of Gleeson CJ in a constitutional context are applicable to the common law. His Honour referred to a Privy Council decision which invoked "good administration" when determining the fairness of administrative procedure and said:

"If that were intended as a separate and independent ground for quashing the removal order, as distinct from a reason in legal policy for binding the authorities to the requirement of fairness, it would not relate easily to the exercise by this Court of its jurisdiction under s75(v) of the Constitution. The constitutional jurisdiction does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration." [23]

Nor, I add, does the common law jurisdiction.

Parliament may, of course, confer on courts a jurisdiction to review on the basis of a general standard such as "abuse of power". This has occurred in the ADJR Act and the States which have adopted it [24]. It is not likely that a power to intervene on the basis of a "principle of good administration" will be conferred.

The court system cannot supervise the broad stream of discretionary administrative decision-making, even by the application of a standard of "legality", unless that standard is narrowly confined. Nor in a democratic society should judges attempt any such task where what is criticised, as a matter of substance, is the quality of an outcome of a decision-making process. It is, however, appropriate for the judiciary to ensure the fidelity of decision-makers to their jurisdiction, so that the integrity of the institutions within which those individual decision-makers operate is maintained.

The Concept of Jurisdiction

The word "jurisdictional" is frequently deployed in administrative law, not always with acclaim. The core concept bears a close resemblance to the idea of "integrity" which, I acknowledge, is neither capable of precise definition nor of uncomplicated application. At the heart of each concept is a notion of significance. Each represents a recognition that not every error in administrative procedure can be the subject of judicial review. It is inherent in the very process of assessing significance, that reasonable minds may differ.

As Justice Hayne put it in *ex parte Aala*:

"The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on her or him, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction... The former kind of error

concerns departures from limits upon the exercise of power the latter does not." [25]

The primary meaning of jurisdiction in a legal context is "authority to decide" [26].

Justice Felix Frankfurter who once described the idea of a jurisdiction as "a verbal coat of too many colours" [27], also referred to the "morass" in which one can be led by "loose talk about jurisdiction" and concluded that "'jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls" [28].

The most sustained attack on the distinction between jurisdictional and non-jurisdictional error came from the pen of D M Gordon with respect to jurisdictional facts [29]. Lord Cooke of Thorndon extended the attack to the distinction between jurisdictional and non-jurisdictional errors of law, commencing with his 1954 unpublished PhD thesis at Cambridge University [30] and sustained by him in the New Zealand Court of Appeal and the House of Lords. Recently it has become a frequently reiterated theme of Justice Kirby's [31].

I am of the view that the distinction between permissible and impermissible conduct, as manifest in the difference between jurisdictional and non-jurisdictional error is real, indeed fundamental. The criticism has often been advanced that there is no single test or theory or logical process by which the distinction can be determined [32]. In my opinion, that does not detract from the validity of the distinction. The life of the law, as Oliver Wendell Holmes Jr famously said, has not been logic, but experience.

The idea of institutional integrity, in the broader context which I advance, may help us to understand the nature of the distinction. Furthermore, the process of determining what matters are "jurisdictional" is a principled process. It is the application of these principles, particularly, the law of statutory interpretation, which fills the gap that arises from the absence of a single *ex ante* test or theory.

To say that different judges may come to different conclusions as to the significance of a particular error, and accordingly as to whether or not it is "jurisdictional", is not to identify an infirmity from which every other approach advanced in substitution for the terminology of "jurisdiction" does not also suffer.

When the English Court of Appeal extended judicial review to a material error of established fact leading to unfairness, it gave rise to a range of issues - what is a "material" error? when is it "objectively verifiable"? and what did "fairness" require? - which replicate the difficulties of determining when is a fact "jurisdictional". Similarly, the New Zealand Court of Appeal has adopted a test of "material" error of law, in the sense that the error "affects a matter of substance" [33]. This test is likely to give rise to at least as many difficulties as the idea of jurisdictional error. There is no *ex ante* theory or test of 'materiality'.

There is a spectrum of words indicating significance. A word such as "materiality" refers to matters reasonably high in the spectrum of significance. At the top of the spectrum is "essentiality". It is the idea of essentiality which is at the core of the concept of jurisdictional error, including jurisdictional fact [34]. It is "essentiality" which leads to a conclusion of invalidity. When matters directly involving institutional integrity arise with respect to a particular decision making process, a conclusion that the fact or event is 'essential' will more readily be drawn.

There are grounds of judicial review which are not based on jurisdictional findings and may step beyond the integrity function. The most obvious case is that of error of law on the face of the record. Nevertheless, there is sufficient commonality amongst the grounds of review that the idea of essentiality, performing an integrity function, is of utility to understand the current state of the law and, therefore, for its principled development and application.

In the remainder of this lecture I propose to explore how the concept of an integrity function assists in understanding the distinction between jurisdictional and non-jurisdictional errors of law, in discerning jurisdictional facts and in the rejection of a doctrine of deference in Australian administrative law.

Jurisdictional Error of Law

A jurisdictional error of law raises issues of integrity. A non-jurisdictional error of law or of fact raises issues of competence and correctness. Jurisdictional error of law can take different forms. The power may be misinterpreted by the decision-maker. A jurisdictional fact, sometimes called a "collateral fact", may be absent. A procedural defect may be such as to invalidate the decision, which requirement was

once described as "mandatory" rather than "directory"[35]. A consideration that a decision-maker was obliged to take into account may have been ignored[36]. All of these tests serve an integrity function.

The distinction between jurisdictional and non-jurisdictional error of law remains a critical distinction in Australia. If there had ever been a prospect that the distinction would become attenuated, that prospect disappeared with the renewed emphasis given to the constitutional dimension of the relevant principles, as the High Court developed its 75(v) jurisprudence over recent years. The gravitational pull of the Constitution on Australian common law is too strong.

During the course of this development, the High Court emphatically confirmed the traditional common law distinction in *Craig v South Australia*. In that case the Court was concerned with the availability of certiorari to an inferior court. However, the reasoning of the joint judgment provided, by way of contrast, a clear statement of the scope of the remedy with regard to administrative tribunals. The joint judgment said:

"If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it." [37]

This list is not exhaustive and the errors may overlap[38].

In *Craig*, the High Court refused to adopt the reasoning in *Anisminic*[39], which had been widely interpreted as effectively abolishing the distinction between jurisdictional error and error within jurisdiction[40]. It is not clear why the joint judgment did not refer to the House of Lords affirmation of *Anisminic* in *Page*[41], which has come to be regarded as the leading English authority declaring obsolete the distinction between error of law on the face of the record and other errors of law.

The joint judgment in *Craig* emphasised the distinction between jurisdictional and non-jurisdictional error. Their Honours went on to narrowly define the concept of record. (Subsequently broadened by statute in New South Wales to extend to reasons for judgment.) In its reasons for rejecting a broader concept, the joint judgment indicated that to do so would "go a long way towards transforming certiorari into a discretionary general appeal for error of law"[42]. These express references were to the case of an inferior court. Review for non-jurisdictional error of law in such a case was to remain unavailable.

As quoted above, the test of jurisdictional error for an administrative tribunal covers a wider field and was not expressly confined by a narrow concept of the record, although the authorities relied upon in this respect in *Craig* include review of decisions of administrative tribunals. Whether errors of law by administrative decision-makers are, as a matter of substance, likely to be found to be jurisdictional in most cases remains a matter of contention[43].

In my opinion, it is open for the High Court to determine that, subject to a particular statute, an error of law by an administrative decision-maker is usually jurisdictional. It is open to the High Court to adopt the formulation of Lord Browne-Wilkinson in *Page*[44]:

"Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis."

There is nothing inconsistent with performance of an integrity function if this proposition is understood as a rebuttable presumption of statutory interpretation rather than, as the House of Lords concluded, as effectively abolishing the distinction between jurisdictional and non-jurisdictional errors of law at common law.

Lord Griffiths' formulation in *Page*[45] is even more clearly confined to the performance of an integrity function:

"... the purpose of judicial review ... is to ensure that those bodies that are susceptible to judicial review have carried out their public duties in the way it was intended they should. In the case of bodies other than courts, insofar as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial

review is available to correct their error of law" [Emphasis added.]

Whether or not such a rule of statutory interpretation can or should apply to proceedings under s75(v) raises difficult issues. However, when applied to statutory decision-makers a presumption that all errors of law are, in effect, jurisdictional appears to be a reasonably open development. This is consistent with the performance of an integrity function. The idea of institutional integrity can guide the development of the law in respects such as this.

The position of inferior courts is different, primarily because of the special quality of the judicial power under the Australian Constitution. On the basis of the reasoning in *Craig*, no such principle of statutory interpretation will apply to courts. Subject, of course, to statutory indications to the contrary, such a rule could operate in the case of administrative decision-makers without imperilling any established principle.

Jurisdictional Facts

The idea of jurisdictional fact was at the heart of the development of judicial review from the seventeenth century onwards[46]. As defined by the majority judgment in the *City of Enfield* case[47]:

"The term 'jurisdictional facts' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion."

This should settle many years of terminological confusion.

Mark Aronson has identified what he calls a "resurgence of jurisdictional facts"[48]. Two examples of this resurgence are the High Court's decision in the *City of Enfield* case and my earlier judgment in *Timbarra Protection Coalition*[49]. It has been suggested that there is some difference between my reasoning in *Timbarra* and that of the majority in *Enfield*[50]. I am unable myself to detect any difference. At least two judges of the Federal Court have proceeded on the basis that my own approach is consistent with the subsequent judgment in *Enfield*[51].

Apprehension is sometimes expressed that judges may too readily find facts to be "jurisdictional" and thereby intrude too far into executive decision-making. The concept of integrity can serve as a guide to ensure that any such tendency is kept in check. The focus of attention must always be fidelity to the purposes of the power and the maintenance of the public values to be served. The focus is not the quality of the outcome.

The determination of when a fact or event is jurisdictional is, I repeat, a principled process. It does not trespass on the merits side of the legality/merits distinction.

In *Timbarra* I made some observations about the nature of the process involved in determining whether a fact is jurisdictional. I was critical of some commentary which talked of the "jurisdictional fact doctrine".

The appellation "jurisdictional fact" is, in my opinion, a convenient way of expressing a conclusion, which is the result of a process of statutory interpretation. That process leads to the determination that, on the proper construction of the relevant power, a fact referred to must exist in fact, a test of objectivity, and that the Parliament intended that the absence or presence of the fact would invalidate action under the statute, a test of essentiality[52].

The definition from *City of Enfield* is of this character. In *Craig*, the joint judgment, similarly referred to an "event or requirement" constituting "an essential condition of the existence of jurisdiction"[53].

The position is the same as the High Court determined to be the case in the context of discussing the terminology often applied to breach of procedural conditions in the *Project Blue Sky* case[54]. The joint judgment adopted the analysis of the New South Wales Court of Appeal in *Tasker v Fullwood*[55] and said:

"The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. ... A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."

The language of essentiality, including words like "mandatory" and "jurisdictional", directs attention to

matters that are appropriately described as issues of institutional integrity. It directs attention away from the quality of the actual outcome which, save in exceptional circumstances, is not relevant to the inquiry.

There are significant difficulties involved in the process of determining whether or not the jurisdictional quality, the element of essentiality, has been made out in the particular circumstances before a court. However, as Gummow J said in the course of the special leave application in *Timbarra*, which occurred after argument in the *City of Enfield* case but before the Court handed down judgment in that case:

"The principles as to how one determines whether something is a jurisdictional fact are settled but necessarily imprecise. That must be so." [56]

These are matters on which reasonable minds may differ. The recognition that the concern is institutional integrity may assist in restricting such divergence.

As the joint judgment put it in *Project Blue Sky*, with respect to the question of whether it was "a purpose of the legislation that an act done in breach of the provision should be invalid":

"Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstance. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue." [57]

A significant range of indicators must be considered. The Court must start with the scope, subject matter and text of the legislative scheme and its purpose. The full context must be considered at the commencement of the process [58].

The process of determining whether a fact or event, or combination of such, has the requisite quality of essentially always requires a multiplicity of factors must be considered. The process is a principled process and that is so even if different judges may reach divergent conclusions. Such divergence is a result of the process of interpretation required to determine the will of Parliament when that is not readily apparent.

There is a considerable body of case law which can assist a parliamentary drafter to restrict or permit judicial review. A number of factors frequently arise, such as:

- * Expressing a power in terms of the state of mind of the decision-maker.
- * Indicating the scope of policy considerations involved.
- * Identifying whether a factor is preliminary to the matter that must be determined.
- * Determining the inconvenience of invalidity.

One indicator that a fact is not to be regarded as jurisdictional is if the formulation includes terminology relating to the mental state of a decision-maker such as "opinion", "belief" or "satisfaction". However, the existence of that state of mind may itself be a particular kind of jurisdictional fact, albeit subject to judicial review only on the limited grounds authoritatively stated by Gibbs J in *Buck v Bavone* [59].

If the fact or event involves matters of judgment, involving the weighing of multiple considerations - a polycentric decision as it is sometimes called - that will generally indicate that the relevant fact or event is not jurisdictional. Whether or not a property was eligible for listing on the national estate raised issues of judgment. In observations endorsed in the High Court, Chief Justice Black said that this task:

"... may be a difficult and complicated one, involving careful assessment of complex facts and the formation of opinions and value judgments on a potentially very wide range of matters. Questions of science, history and aesthetics may well need to be considered. Many branches of science ... may be involved. A wide range of historical and cultural issues may need to be considered." [60]

However, it is not always the case that matters of judgment are not jurisdictional. For example, whether or not a report about an employee was "substantially favourable" was found to be an objective one [61]. In *Timbarra*, whether development was "likely to significantly affect threatened species" was jurisdictional. Similarly, in *City of Enfield*, whether an industry was "likely ... to produce

conditions which are, or may become, offensive or repugnant to the occupiers or user of land" was jurisdictional. In each case, the overall statutory context was determinative.

The case law is replete with conflicting conclusions with respect to such matters. For example, in *R v Gray Ex parte Marsh* the High Court split evenly on the significance of a requirement that the Federal Court "inquire into and determine" an "irregularity". Half the Court held that whether any irregularity had occurred was a jurisdictional fact. The other half rejected this conclusion[62].

A particularly significant indicator is if the factual reference is found in the formulation of the power to be exercised or arises inevitably in the course of the consideration by the decision-maker of the exercise of the discretionary power. Such a matter is unlikely to be a jurisdictional fact. A judgment of the Privy Council, which is the origin of this line of authority, distinguished, inter alia, between a fact that is an "essential preliminary to the decision-making process" and a "fact ... to be adjudicated upon in the course of the inquiry"[63].

Factual references expressed to be preliminary or ancillary to the exercise of a power, or which may relate to the instigation of the decision-making process itself, for example by reason of the identification of requirements of an "application", are more likely to be jurisdictional by reason of their extrinsic nature[64]. Where a factual reference is appropriately characterised as preliminary or ancillary or, in some other manner, extrinsic to the facts and matters necessary to be considered in the exercise of the substantive decision-making process itself, then the conclusion that Parliament intended this matter to exist objectively will often follow. Issues of essentiality, as distinct from objectivity, require a closer inquiry, even where such preliminary or ancillary or extrinsic reference is found.

That a finding of invalidity, in the context of litigation in courts, has adverse effects, has been said to be the basis for a presumption that a fact is not jurisdictional. I refer to the well-known passage of Sir Owen Dixon in *Parisienne Basket Shoes*[65]. The presumption of inconvenience is not always justified. Whether or not persons have organised their affairs on the assumption of validity, including particularly third parties who are not involved in the litigation, and the significance of any such reliance, will clearly vary from case to case over a wide spectrum of possible detriment.

Sir Owen Dixon's observations about inconvenience associated with invalidity of decisions by a court must now be understood in the light of the clear differentiation between the position of a court and an administrative tribunal, let alone an administrator, to be found in the joint judgment of the High Court in *Craig*[66]. Although, the issues before the court in *Parisienne Basket Shoes*, included review of an administrative tribunal[67], the better view is that there is no presumption in the case of administrative decision-making. Nevertheless issues of inconvenience, both to the parties and others, may still arise and are entitled to weight[68].

The case law indicates that other indicators arise quite often. The process of assessing them requires the application of the normal principles of statutory interpretation, including the presumptions. Of particular significance in many disputes that arise, is the presumption that Parliament does not intend to interfere with common law rights[69]. This principle will also temper the application of the presumption discussed above that a statute must be construed on the basis that Parliament did not intend to cause inconvenience[70]. The Parliament can create results that some would regard as inconvenient, and often does[71].

The assessment of multifactorial elements for purposes of determining whether a fact or event is essential, in the sense that the integrity of governmental action is involved, is necessarily a complex task. The idea that the absence of a definitive test or theory is a ground for criticism is meretricious.

The process of statutory interpretation to determine whether a fact is jurisdictional in the relevant sense is a principled process. Contrary to the criticisms sometimes made, it is not a blank cheque to the judiciary to intervene whenever a judge believes the outcome to be undesirable. Any one of the indicators to which I have referred will not be determinative, nor is the list exhaustive. The progressive development of case law, in the variety of contexts in which the issue arises, applying the normal techniques of common law development, has established, and will continue to establish, clear guidance for parliamentary draftsmen. In my opinion, the idea of integrity can play a useful role in this process of common law development.

Deference

A good indication of the rigour with which Australian administrative law is restricted to an integrity

function is the decisive rejection in the City of Enfield case of any idea of judicial deference[72]. It was suggested that the courts should defer to administrative fact finding and, following a US doctrine, to defer to administrative interpretation of ambiguous legislation. In Enfield, the Court made it quite clear that there was no room for judicial deference with respect to jurisdictional issues.

Talk of deference is an almost infallible sign that the basic rule, the effect of which is to be modified by deference, has gone too far.

In the jurisprudence of the European Court of Justice a doctrine of deference has arisen. It is called the "margin of appreciation". With respect to compliance with the European Convention on Human Rights, States may discharge their responsibilities in different ways. The "margin of appreciation" is, in large measure, a necessary concomitant of the concept of proportionality by which the European Court determines compliance. It represents a recognition that proportionality, if untrammelled, will intrude into legislative power or the merits of executive decision to an impermissible extent. It is by means of European law, particularly in the implementation of the Convention in the Human Rights Act 1998 (UK), that proportionality and deference have entered English administrative law[73].

Recently, Lord Hoffman rejected the language of deference, in a passage which is consistent with the High Court's reasoning in City of Enfield:

"My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

...

The principles upon which decision-making powers are allocated are principles of law. ... [W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law."[74]

Whilst the language of "deference" is rejected, the substance of "margin of appreciation" and the test of "proportionality" remain. Lord Walker is probably correct to conclude that the "scope and reach of the Human Rights Act is so extensive", that the English Courts have no alternative but to delve into matters of fact finding beyond the Wednesbury test[75]. Except in the ACT, we do not have to follow. Nevertheless, as Chief Justice Doyle showed in a paper on common law rights a few years ago[76], there are common law principles which are equally fundamental and which will influence the determination of what is a jurisdictional matter.

Where intervention by a court is designed to ensure the institutional integrity of the decision-making process, it should be clear that "deference" is entirely inappropriate. That does not mean that a court will not give considerable weight to the conclusions on fact and usage, including jurisdictional facts, of primary decision-makers. This will, however, depend on the statutory scheme under consideration[77]. To do more would be to abdicate the judicial function. To do less would be to blur the legality/merits distinction which, whatever the difficulties of its application, remains a rigorously policed boundary in Australian administrative law.

1 The Integrity Branch of Government, accessible at www.courts.nsw.gov.au/speeches.

2 See Statistics Commission Annual Report 2003-2004 Cm.6250, July 20-04 esp pp1-3; 20 and www.statscom.org.uk.

3 Murray Gleeson "Judicial Legitimacy" (2000) 20 Aust Bar Rev 4.

4 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77; *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at [44].

5 Gleeson "Judicial Legitimacy" at p11.

6 (1990) 170 CLR 1 at 35-36.

7 See, e.g. *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699 at [76]-[77]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77

ALJR 1165 at [59].

8 Ex parte Lam supra at [76]. See also Ex parte S20/2002 supra at [59].

9 *Commencing with Abebe v The Commonwealth* (1999) 197 CLR 510.

10 Selway "The Principle Behind the Common Law Judicial Review of Administrative Action - The Search Continues" (2002) 30 Fed L Rev 217. Professor Peter Cane refers to "the new common law of constitutional judicial review". See Cane "The Making of Australian Administrative Law" (2003) 24 Aust Bar Rev 1 at 18.

11 *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officer's Association* (1986) 60 ALJR 588 at 594; *Abebe supra* at [21]; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [21]-[23], [162], [164]-[166].

12 *R v North & East Devon Health Authority; Ex parte Coughlan* [2001] QB 213; *R v Secretary of State for Education & Employment; Ex parte Begbie* [2001] 1 WLR 1115.

13 See Ex parte Lam supra 699 at [81]-[83], [111], [143], [148]. See also *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA Trans 64, granting special leave from the decision in *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 127 FCR 259.

14 See e.g. *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547E-G.

15 On the response to proportionality in Australia see Aronson, Groves and Dyer (3rd ed) *infra* at 343-348; Allars "Proportionality, Tradition and Constitutional Framework: Borrowing Foreign Legal Notions in Australian Public Law" in Doeker-Mach and Ziegert (eds) *Law, Legal Culture and Politics in the Twenty First Century* Franz Steiner Verlag, Stuttgart 2004.

16 *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330 at 344G-345D, cf at 348E.

17 *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2003] AC 295 at [53], see also at [61]-[62] and [169].

18 *E v Secretary of State for the Home Department* [2004] 1 WLR 1179 at [66], see also at [63]. This case involved an appeal limited to a question of law, but the reasoning extends to judicial review.

19 *Puhlhofer Hillingdon London Borough Council* (1986) AC 486 at 518; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [41].

20 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156. See also *Bruce v Cole* (1998) 45 NSWLR 163 at 189.

21 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S134/2002* (2003) 204 CLR 461 at [35]-[42].

22 Ex parte Applicant S20/2002 supra at [170] and [161] per Kirby J.

23 Ex parte Lam supra at [32]; cf *Minister for Immigration and Multicultural Affairs; Ex parte Bhardwaj* (2002) 209 CLR 597 at [8] and [150].

24 See Administrative Decisions Judicial Review Act 1977 (Cth) s5(2)(i) and s6(2)(i) and Qld and WA Acts.

25 Ex parte Aala supra at [163].

26 *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 at [6].

27 *United States v L A Tucker Truck Lines* 344 US 33, 39 (1952).

28 *City of Yonkers v United States* 320 US 685, 695 (1944).

29 Commencing in (1929) 45 LQR 458 and (1931) 47 LQR 386, see the list in P Craig *Administrative Law* (5th ed) p479n and M Aronson "The Resurgence of Jurisdictional Facts" (2001) 12 *Public Law Rev* 17 at 19n.

30 Aronson "Resurgence" at 19n.

31 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 123; *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504 at [22]; *Re McBain: Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 439; *Ex Parte Applicant S20/2002 supra* at [120].

32 See, e.g. P Craig *Administrative Law* (5th ed) London, 2003 at Ch 15.

33 *Peters v Davison* [1999] 2 NZLR 165 at 189.

34 See *Timbarra Protection Coalition Inc v Ross Mining ML* (1999) 46 NSWLR 55 esp at [37]-[38].

35 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

36 See *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24; see also *Craig v South Australia* (1995) 184 CLR 163 at 177-179.

37 *Craig v South Australia supra* at 179. The position of inferior courts is much more restricted; see esp at 179-180.

38 *Minister for Immigration and Multicultural Affairs v Yusuf* (2004) 206 CLR 323 at 351.

39 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 esp at 171.

40 See *Craig v South Australia* at 178-179.

41 *R v Hull University Visitor; Ex parte Page* [1993] AC 682.

42 *Craig v South Australia supra* at 181.

43 See Aronson, Dyer and Groves *Judicial Review of Administrative Action* (3rd ed) Sydney 2004 esp at pp214-218.

44 Page *supra* at 701F-G.

45 Page *supra* at 693B.

46 See Jaffe "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70 *Harv L Rev* 953 at 953-958.

47 *Corporation of City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 138. See also Eshetu *supra* at [130].

48 See Aronson "The Resurgence of Jurisdictional Facts" (2001) 12 *Public Law Rev* 17. See the further consideration in Aronson, Dyer and Groves *Judicial Review of Administrative Action* (3rd ed) Sydney 2004 esp at 227-239 and Allars "Chevron in Australia: A Duplicitous Rejection?" (2002) 54 *Admin L Rev* 569.

49 See, e.g. *Cabal v Attorney General* (Cth) (2001) 113 FCR 154 at 172.

50 See *Plumb v Penrith City Council* [2002] NSWLEC 223 at [17].

51 See *Cabal supra* per Weinberg J at 172 and *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 123 FCR 298 at 425 per French J.

52 See *Timbarra* supra at [37]-[39]. See also *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43 at [27].

53 *Craig v South Australia* supra at 177-178.

54 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93].

55 (1978) 1 NSWLR 20 at 23-24.

56 *Ross Mining NL v Timbarra Protection Coalition Inc* (S26/1999, 14 May 1999).

57 See *Project Blue Sky* supra at [91]. See also *Jaffe* supra at 961-2. See also *Ex parte Redgrave; Re Bennett* (1945) 46 SR(NSW) 122 at 125 per Jordan CJ.

58 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

59 See (1976) 135 CLR 110 at 118-119. See *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276; *Australian Heritage Commission v Mount Isa Mines Limited* (1997) 187 CLR 297 at 303; *Minister for Immigration & Ethnic Affairs v Eshetu* (1999) 196 CLR 611 at [128]-[145], note esp [130].

60 See *Australian Heritage Commission v Mount Isa Mines* (1995) 60 FCR 456 at 465-6; *Australian Heritage Commission v Mount Isa Mines* (1997) 187 CLR 297 at 303-304. See also *Canberra Tradesmen's Union Club Inc v Commissioner for Land and Planning* (1999) 86 FCR 266 at 272.

61 See *Sutherland Shire Council v Finch* (1969) 123 CLR 657 at 663 and 666 and see below *Sutherland Shire Council v Finch* supra at 315 at 325-325 per Mason JA, as his Honour then was.

62 See *R v Gray; Ex parte Marsh* (1985) 157 CLR 351.

63 See *Colonial Bank of Australia v Willen* (1874) LR 5 PC 417 at 442-443.

64 See *Colonial Bank of Australia v Willen* supra at 443; *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 158; *Ex parte Mullen*; *Re Hood* (1935) 35 SR(NSW) 289 at 300; *Ex parte Hulin*; *Re Gillespie* (1965) 65 SR(NSW) 31 at 33; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516 at 539; *Timbarra Protection Coalition* supra at [44] and [50]-[60]. See also Aronson "The Resurgence of Jurisdictional Facts" supra at 34.

65 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391.

66 *Craig v South Australia* (1995) 184 CLR 163 at 179.

67 Aronson "Resurgence" supra at 32-3.

68 *Sutherland Shire Council v Finch* (1970) 71 SR(NSW) 315 at 325-6 per Mason JA; *Timbarra* supra at [58]; *Queensland v Wyvill* (1989) 25 FCR 512 at 519.

69 See, e.g. *Bropho v State of Western Australia* (1990) 171 CLR 7 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 436; *Cabal* supra at 173; *Minister for Immigration & Ethnic Affairs v Naumovska* (1983) FLR 589 at 601; *R v YZ* (1999) 162 ALR 265 esp at 269-70; at [32]; *R v Chen* (2002) 130 A Crim R 300 at [32]; Spigelman "Statutory Interpretation: Identifying the Linguistic Register" (1999) 4 Newcastle L Rev 1 at 11-17; Doyle "Common Law Rights and Democratic Rights" in P D Finn (ed) *Essays on Law & Government* vol 1 Law Book Co, Sydney, 1995 esp at pp147-151, 157-160.

70 See *Plenty v Dillon* (1991) 171 CLR 635-654 and *Coco v The Queen* supra at 436.

71 See *Timbarra* supra at 72; *Cabal* supra at 173; *Australian Heritage Commission* supra at 306; *Pharmacy Guild of Australia v Australian Community Pharmacy Authority* (1996) 70 FCR 462 at 476.

72 *Enfield* supra at [39]-[48].

73 See, e.g. *R (Farrakhan) v Home Secretary* [2002] QB 1391 at [64], [67]; *DPP ex parte Kebeline* [2002] 2 AC 316 at 381.

74 *R (Prolife Alliance) v British Broadcasting Corp* [2003] EMLR 23 at [75].

75 *Prolife* supra at [144]. See also *Craig Administrative Law* supra at 584-585.

76 J J Doyle "Common Law Rights and Democratic Rights" supra Ch 6.

77 See *Enfield* supra at [45]-[49], adopting the formulation of Gummow J in *Eshetu* supra at [140]. See also *Allars* supra at 585-590.

Tort Law Reform In Australia - Address To The London Market At Lloyd's

TORT LAW REFORM IN AUSTRALIA
 ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
 CHIEF JUSTICE OF NEW SOUTH WALES
 TO THE ANGLO-AUSTRALIAN LAWYERS SOCIETY &
 THE BRITISH INSURANCE LAW ASSOCIATION
 LINCOLN'S INN, LONDON
 16 JUNE 2004
 AND
 PRESENTATION TO THE LONDON MARKET AT LLOYD'S
 6 JULY 2004

The District Court of New South Wales has jurisdiction to hear motor accident claims and work injury damages claims irrespective of the amount claimed and all other common law claims where the amount claimed does not exceed about £350,000. Its civil jurisdiction is, to a substantial degree, a personal injury jurisdiction. Filings in the District Court have fallen from about 20,000 in calendar year 2001, to 13,000 in 2002 and to 8,000 in 2003. The reduced rate of filings is continuing this year. It is reasonably clear that something dramatic has happened to civil litigation in New South Wales. Similar effects are seen in other states.

What these figures reveal is a dramatic change in the practical operation of the law of negligence in Australia over a few years. This is the result of two factors. First, there has been a substantial shift in judicial attitudes at an appellate level, led by the High Court of Australia. Secondly, there have been major changes to the law of negligence implemented by statute. My purpose this evening is to outline in general terms the nature of the changes to the law that have had such dramatic effects in so short a period of time. It is first, however, necessary to provide a broader context[1].

One lesson we must all learn from history is never to underestimate the ingenuity of the legal profession when faced with such dramatic changes to its customary practices. I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the City could not be sued for a defect in a road or sidewalk unless it had had fifteen days' notice of the specific defect. The plaintiff lawyers, or as, they call themselves, trial lawyers of New York City, established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the City were available for sale to trial lawyers[2].

At any one time the total cost of curing the defects of which the city had been given notice was several billion dollars. Last year the Mayor of New York complained that in calendar year 2002 alone, the city received 5,200 maps from BAPSPC spotters which identified some 700,000 blemishes[3]. Needless to say the city has never successfully defended a case under the fifteen days' notice law. I am confident that Australian lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

The Historical Background

For well over a century judges were universally regarded, in all common law jurisdictions, so far as I am aware, as mean, conservative and much too defendant-oriented. This led parliaments to extend liability, commencing with Lord Campbell's Act, then the abolition of the doctrine of common employment, the abolition of the immunity of the Crown, the creation of workers' compensation and compulsory third party motor vehicle schemes and provision for apportionment in the case of contributory negligence.

In Australia, about twenty to twenty-five years ago, the process of legislative intervention changed its character. It proceeded on the basis that the judiciary had become too plaintiff-oriented. A generational change in the judiciary coincided with a change in the opposite direction in the social philosophy of the broader polity, which came to re-emphasise persons taking personal responsibility for their actions. There may very well be an iron law which dooms judges to always be a decade or two behind the

times.

Throughout Australia, in different ways and at different times, new regimes were put in place from about the early 1980s, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. In Australia's second largest state of Victoria, a no fault scheme for traffic accidents was established similar to the more wide-ranging New Zealand scheme. In the largest state of New South Wales such a scheme was actively considered but not, in the event, adopted. In all states what had come to be regarded as common law rights were significantly modified by legislative intervention. When I say, "come to be regarded", many of the causes of action were only available because of the previous century of legislative change, to which I have referred, which overrode the common law.

There was, as I have mentioned, a philosophical clash between the expansion of the tort of negligence and the change in political philosophy, associated in this country most closely with the name of Margaret Thatcher. An element of welfare state paternalism, or, depending on one's point of view, a sense of compassion, that in some quarters came to be regarded as old-fashioned, was not absent from day to day judicial decision-making about when a person ought to receive compensation, even in a fault based system. It was recognition of this phenomenon that led me to describe the tort of negligence as "the last outpost of the welfare State", although in truth a universal no fault scheme would be more accurately so described.

The undefined elements of the tort left much open. What damages are remote? What does "commonsense" suggest as the cause? When is a contribution to the creation of a risk "material"? Should a limitation period be extended? Should the plaintiff's evidence be accepted? How should one choose between two widely divergent experts' opinions, each of which is probably at, or beyond, the boundaries of the range of legitimate opinion? Should the plaintiff be believed about what effect a hypothetical warning would have had upon him or her? There is much flexibility in the outcome of negligence litigation.

Professor Atiyah referred to a long-term historical trend of expanding the scope of the tort of negligence and the damages recoverable for the tort, as "stretching the law"[4]. There was, however, an equivalent, parallel trend, perhaps of even greater practical significance, of 'stretching the facts'.

Contemporary judges generally reached intellectual maturity at the time that the welfare state was a widely accepted conventional wisdom. The "progressive" project for the law of that era was to expand the circumstances in which persons had a right to sue. We are now more conscious of limits - social, economic, ecological and those of human nature. Hobbes has triumphed over Rousseau. For several decades now the economic limits on the scope of governmental intervention have received greater recognition. The law cannot remain isolated from such broader trends in social attitudes.

In particular there has been a significant change in expectations within Australian society, as elsewhere, about persons accepting responsibility for their own actions. The idea that any personal failing is not your fault, that everyone can be categorised as a victim, has receded. The task is to restore an appropriate balance between personal responsibility for one's own conduct and expectations of proper compensation and care.

This is, of course, an issue which resonates beyond the law. The change is noticeable over the decades. It is not likely that Donald Bradman would ever have taken a banned substance. If he had, however, it is quite inconceivable that he would have blamed his mother. There is a shift back to accepting responsibility, as Adam Gilchrist showed when he walked without the umpire having raised a finger.

The debate in Australia, leading to the statutory changes, focused on particular cases and a range of circumstances in which persons recovered damages, sometimes substantial damages, when there could be little doubt that they were the author of their own misfortune. One case referred to frequently involved a young man diving from a cliff ledge into a swimming pool without checking the depth of the water. The idea that the authority which owned the land should have put up a warning sign advising against diving is no longer, with the changing times, regarded as a reasonable basis for liability.

There seems no doubt that the past attitude of judges, when finding liability and awarding compensation, was determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages awarded to injured plaintiffs. Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant

and deprive him or her of the family home.

The line between the kinds of mistakes or unfortunate results that are an inevitable concomitant of day to day human interaction, including professional practice, on the one hand, and the sorts of mistakes or results which should not occur at all, on the other hand, may have been drawn in a different way on many occasions in the absence of the ubiquity of insurance. The various choices that the fungibility of the concepts associated with the tort of negligence throws up may very well have been made differently.

Foreseeability

If one had to pick a single point of departure for the imperial march of the tort of negligence, the beginning of the process of what Atiyah calls "stretching the law", it was probably the judgment of Lord Reid for the Privy Council in *Wagon Mound (No 2)*[5]. The judgment of the Privy Council was delivered at a time when the practice of the Board was to deliver a single inscrutable judgment which acquires some of the power of a legislative enactment precisely because it is bereft of that divergence of reasoning amongst different judges in a final court of appeal that is more appropriate for the principled development of the law.

Lord Reid's judgment is quite simplistic. That is sometimes the product of the compromises that are required for a joint judgment.

The case was an appeal directly from a single judge of the Supreme Court of New South Wales, Mr Justice Walsh, later to serve on the High Court. Sir Cyril Walsh, placed particular weight on his assessment that the likelihood of an oil spillage catching fire was "rare" and "very exceptional". The Privy Council rejected this as the appropriate test. It asked whether or not something was "a real risk" in the sense that it would not be brushed aside as "far fetched". The subsequent application of this test by the High Court in Australia has led to the formulation that a risk of injury is foreseeable unless it can be described as "far fetched or fanciful"[6].

Lawyers, even after *Wagon Mound (No 2)*, continued to refer to the test for identifying a duty as one of "reasonable foreseeability". I cannot see that "reasonableness" has anything to do with a test that only excludes that which is "far fetched or fanciful". The test appears to be one of "conceivable foreseeability", rather than of "reasonable foreseeability".

As George Orwell said in his great 1946 essay *Politics in the English Language*:

"the English Language ... becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts."

and

"... if thought corrupts language, language can also corrupt thought. A bad usage can spread by tradition and imitation even among people who should and do know better."

So it appears to be with a continued use of the terminology of "reasonable foreseeability".

If we had kept a firm hand on the idea of "reasonableness" as a limiting factor we would never have needed the flirtation with "proximity" nor the two stage *Anns* test[7], nor the three stage *Caparo* test[8], nor the multifactorial analysis now applied by the High Court in Australia. The search for a unifying principle in the law of negligence has proven to be as futile as the search for a unifying principle in the laws of physics.

Over the course of a number of decades the effect of judicial decision-making was, in substance, to transform the tort of negligence from a duty to take reasonable care into a duty to avoid any risk by reasonably affordable means. That, in my opinion, was the practical effect of a stream of judicial decision-making at appellate level, particularly for that vast body of decisions that never come before an appellate court and, indeed, the even larger proportion of claims that are settled out of court in the light of a practitioners' understanding of the likely outcome.

The Australian judiciary has now become more sensitive to the broader implications of individual decisions by reason of the cumulative effect of such decisions. The progressive paring back of the tort of negligence by statutory changes over the course of two plus decades has itself had an impact on judges. This legislative intervention has, as I will shortly show, accelerated and become much more dramatic over the last two years. Furthermore, evidence accumulated about the unintended consequences of the tort system. The practice of defensive medicine is a good example. Both my

brothers are doctors. Even in the late 1960s I recall the scorn that they expressed about their American colleagues who refused to stop at the scene of road accidents. Australian doctors have long since joined them.

I have expressed the view both in judgments and extra judicially, that the judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies can be regarded as, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state. For many decades there was a seemingly inexorable increase in that form of taxation by judicial decision[9]. In Australia that increase has stopped as a result of a change in judicial attitudes and is likely, subject, of course, to the vagaries of the insurance market, to be reversed, as a result of legislative intervention throughout Australia.

At least indirectly in the case of judges, and overtly in the case of the parliaments, the shift in attitude has been driven by the escalation of insurance premiums and, in recent years, by the unavailability of insurance in important areas on any reasonable terms at all.

The year 2002, where insurance premiums escalated rapidly in numerous categories of insurance, was the year in which, for Australia, quite a number of chickens came home to roost. By that time, however, the change in judicial attitudes was well under way.

Although the Wagon Mound (No 2) continues to represent the law in Australia, there are distinct signs that the "far fetched and fanciful" test is likely to be reviewed by the High Court[10]. There are a range of well-established categories of negligence in areas such as traffic and industrial accidents where the application of basic principles is well established. Change in such areas has occurred by legislative intervention. It is, however, at the boundaries of the tort, where new and different situations are under consideration, that the change in judicial attitude has become most apparent. However, that change must also have an affect on the outcome of cases even in the well-established categories. The various choices available to a judge in terms both of acceptance of evidence and the formulation of the judgments required to determine such cases will be affected by the kind of change of attitude to which I refer.

There have been a steady stream of cases in the appellate courts, particularly in the High Court, in which the outcomes would have been different if the process of stretching the law and of stretching the facts had not been arrested and reversed.

People who trip on footpaths no longer always successfully sue local councils. The owner of a shopping mall was not responsible for criminal conduct in the mall's car park. The authors of the rules for rugby were not liable to injured players. Nor was the person who conducted an indoor cricket arena. A cinema was not liable when a client tried to sit down in a darkened cinema but the seat was, as is common, retractable. A hotelier was not liable for injuries suffered after departure by an intoxicated patron. A club with gambling machines was not liable to refund the losses of a compulsive gambler whose cheques it had cashed. The driver of a vehicle was not liable when a child suddenly darted out into the road. A school authority was not liable for intentional criminal conduct, relevantly sexual abuse, of a teacher against a pupil. Governmental regulators were not liable for the health consequences of a failure to regulate self-interested commercial actors whose conduct caused injury. Governmental decision-makers

whose intervention, for example, in family relationships, caused psychiatric injury on the basis of allegations that proved incorrect, were not liable for those injuries. Employers which conducted disciplinary or dismissal actions with adverse psychiatric consequences were also found not to be liable. A prison authority was found not liable for psychiatric injury caused to the victim of a crime by an escapee not for the defects of her prematurely born son - *Dorset Yacht* was doubted[11].

It is quite likely that many of these cases would have been decided differently only a few years ago. I do not wish to imply that the development has been all one way. There have been important cases in which liability has been established in circumstances where the issue was debatable. Nevertheless, the drift of judicial decision-making is plain at a senior appellate level. It is unquestionably having an effect on trial judge decision-making of a substantial character.

The imperial march of negligence has also been restricted by a newly emerged emphasis on the importance of coherence in the law. The tort of negligence should not be permitted to cut across other areas of the law which have developed a distinctive approach to balancing conflicting interests. Negligent words causing mental harm may lead to incongruence between actions in defamation and negligence. Negligent conduct creating a nuisance should not create liability in negligence where an action in nuisance would be denied. Questions of coherence arise most frequently in cases which

allege the negligent exercise of a statutory duty. In many quite disparate fields, the principle of coherence has restricted liability for negligent conduct in circumstances in which liability would probably have been found only a few years ago[12].

The most difficult area with which the law is still grappling in this regard is that of liability for psychiatric injury. Difficult issues of a philosophical and factual character remain to be resolved in this field. The application of legal tests, in a context where expert evidence has few, and often no, objectively verifiable elements, is particularly difficult. This is exacerbated by the fact that the relevant area of expertise is only, to a limited extent, based on scientific research and has a wide element of discretion. In this area, perhaps more than any other, the Whig approach to science - the assumption that improvement of knowledge occurs in some kind of straight line of progress, rather than being cyclical or, dare one say so, a creature of fashion - is not likely to be correct[13]. It is particularly difficult to determine where to draw the line between refusing to give recovery for the normal stresses of life, including working life, and those extraordinary stresses that people should never have suffered.

In this area Australian law is now unlikely to develop in any principled way by reason of statutory intervention, to which I will presently refer.

The Sense of Crisis

Legislative change over the last year or two has been driven by a perceived crisis in the price and availability of insurance. In Australia this was focused in particular on public liability and medical negligence. However, similar pressures had been building up in all areas for a number of years, including the high volume areas of industrial accidents and traffic accidents.

Over 2002-2003 there were virtually daily reports about the social and economic effects of increased premiums: cancellation of charitable and social events such as dances, fetes, surfing carnivals and Christmas carols; the closure of children's playgrounds, horse riding schools, adventure tourist sites and even hospitals; the early retirement of doctors and their refusal to perform certain services, notably obstetrics; local councils were shutting swimming pools and removing lethal instruments such as seesaws and roundabouts from children's playgrounds; our Sydney tabloid proclaimed "The death of fun"; many professionals could not obtain cover for categories of risks, leading to withdrawal of their services; for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; midwives were unable to get cover at any price; many professionals were reported to have disposed of assets so as to be able to operate without adequate cover or even any insurance.

The issue became highly charged politically. The talk was of "crisis". The concern of governments was reinforced by the liability of government directly as a major employer, property owner and provider of services, particularly in education, health and transport. This was, however, reinforced by the emergence, over recent years of a role for government as a backstop for private insurers, as the reinsurer of last resort. It took many years for the government role of "lender of last resort" to take the institutional form of the contemporary central bank. We are in the early stages of institutional development of the "reinsurer of last resort" function.

In Australia we have had a range of proposals in different areas for the government to underwrite existing insurers, e.g. for the risks associated with terrorism. Of particular significance is the acceptance that it was politically impossible for the government to stand by and let a major insurer default on its obligations. That is exactly what happened long ago in the case of banks. A national scheme was implemented to support the major medical insurer when it appeared to be insolvent. Governments at both levels of our federal system became involved in protecting policyholders when a major general insurer, HIH Limited, went into liquidation.

It is quite clear that governments have a very real financial interest in the operations of the tort system.

Whether by way of increases in insurance premiums or by way of a call on tax payers' funds it became widely accepted at all levels of Australian government and in the general community that the existing tort system had become economically unsustainable. The particular focus was the sudden escalation of premiums. Insurance premiums are the result of a multiplicity of factors, however, the cost of claims sets the basic structural parameters within which other forces operate. Those costs have increased considerably over recent decades.

There is no doubt, in my mind, that the underlying cause of the "crisis" that was proclaimed to exist, was the practical application of the fault based tort system in the context of adversary litigation, even though the attitude of the judiciary was changing at the very time that this campaign in the media was occurring. The rate of change proved too slow for the political process. What brought the issue to a head were developments in the market for insurance.

By 2002 what had for many years been a buyer's market in insurance had become a seller's market. At an international level there had been a series of natural disasters, which had drawn down the capital of insurance companies, particularly that of reinsurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom which further reduced the capital available to insurance companies. Quite quickly, demand came to exceed supply in the global reinsurance market.

In Australia this development was accentuated by problems of own making. In particular, the collapse of HIH, which had been particularly active in the professional negligence and public liability market, transformed the pricing of insurance in the Australian market. It appears, with the benefit of hindsight, that one of the principal reasons for the collapse was that HIH had been aggressively underpricing in a number of areas of insurance in order to increase its market share. Indeed, one of our more successful insurance companies, QBE Limited, had found the Australian market so unattractive that only about fifteen percent of its capital was invested at home. In a sense, the increased insurance premiums, which should have emerged gradually over the course of a decade or so, came all at once, when this particular insurer was removed from the market. As a result of the changes to which I will refer QBE has substantially expanded its exposure in the Australian market place.

Although the practical operation of the law of torts must determine to a substantial degree the level of premiums for liability insurance, the suddenness and size of the increases and the expansion of policy exclusions reflected such developments in the insurance market. The underlying cause of the problem must be distinguished from the immediate cause of the crisis^[14]

Legislative Change

In New South Wales, the largest and most litigious state in Australia, legislative changes had commenced in a number of areas prior to the events of 2002-2003. Those events, however, led to a national response in which many of the New South Wales proposals were adopted more widely and legislation went even further than had been considered appropriate until that time.

The Commonwealth and the states appointed an inquiry to review the law of negligence. The Panel was chaired by the Honourable David Ipp, a judge of the New South Wales Court of Appeal. By and large, the recommendations of this panel have been implemented, with some variation, in all states and territories, with complementary national legislation almost complete. The principal thrust of the changes is the limitation of circumstances in which damages can be recovered for personal injury and the restriction of the heads and quantum of damage that can be so recovered. The changes are wide ranging and include the following:

* The not "far fetched or fanciful" test for foreseeability has been replaced by a test that a risk be "not insignificant" which, despite the double negative, is of a higher order of possibility.

* A requirement has been introduced identifying a range of factors which have to be taken into account when determining breach of duty - referred to as the "negligent calculus". These factors include probability of harm, seriousness of harm, the burden of taking precautions, the social utility of the activity and precautions that may be required by similar risks, not just the particular causal mechanism of the case before the court. This statutory requirement which in many respects reflects the common law will focus attention on matters which, following *Wagon Mound (No 2)*, may not have been given adequate weight, particularly in lower courts.

* An express acknowledgment of the normative element in determination of issues of causation is adopted by applying a test of whether responsibility for the harm should be imposed on the negligent party.

* An express provision emphasising that the plaintiff always bears the onus of proving any fact relevant to the issue of causation, thereby implicitly overturning judgments which suggested that in the case of evidentiary gaps - often medical causation issues - proof on the issue of causation could shift from the plaintiff to the defendant.

* The introduction of a modified version of the *Bollam* test, which was not the law in Australia, in all

cases of professional negligence providing that treatment was not negligent if it occurred in accordance with an opinion widely held amongst respected practitioners, subject to the ability of the court to intervene if the opinion was "irrational". The Bollam test does not, however, apply to a duty to warn or inform. This has led to different approaches. In New South Wales there is no duty to warn of an obvious risk.

* The enactment of a "person of normal fortitude" test for purposes of foreseeability of mental harm, which the Ipp Panel identified as representing the majority view in the most recent High Court authority on the subject, although the judges who did in fact hold that view have since accepted that the majority regarded normal fortitude as merely a relevant consideration and not as an independent test[15].

* In a number of states, including New South Wales, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to persons who directly witnessed a person being killed or injured or put in peril or were a close family member of the victim.

* A number of states have adopted, in different terms, a policy defence available to all public authorities, requiring that the interests of individuals after materialisation of a risk have to be balanced against a wider public interest, including the taking into account of competing demands on the resources of a public authority. In New South Wales the defence is stated as principles for determining whether a duty exists or breach has occurred, expressly acknowledging that performance may be limited by financial and other resources available to the authority, that the general allocation of those resources by an authority is not open to challenge and that the conduct of the authority is to be assessed by reference to its full range of functions. Also, in New South Wales the legislation provides that a public authority is not liable for a failure to exercise a function to prohibit or regulate an activity if the authority could not have been required to exercise that function in mandamus proceedings instituted by the claimant. This provision may well come to test the limits of the availability of mandamus and principles of locus standi.

* The liability of a volunteer or a good samaritan is limited.

* Changes are made to the law about voluntary assumption of risk and contributory negligence. An intoxicated person is deemed to have contributed twenty-five percent to the injury.

* The liability of persons who act in self-defence to criminal conduct is restricted.

* An injured person is deemed to have been aware of any obvious risk, about which there is no duty to warn save in the case of a request or in the case of a professional service.

* Provision is made that an apology cannot constitute an admission, regarded as of particular significance in the field of medical negligence. Doctors can say sorry for a result, without fear of making an admission of liability.

There are also thresholds, caps and restrictions on recoverable damages, including:

* Establishment of an indexed maximum for the recovery of economic loss, generally three times average weekly earnings. Persons earning more than that have the ability to take out first person loss of earnings insurance.

* Establishment of a threshold of a percentage of permanent impairment before a person may recover general damages at all, generally a sliding scale of fifteen percent up to about thirty percent, after which full recovery is permitted.

* Establishment of an indexed maximum for recovery of general damages, at a little above £100,000.

* Restrictions have been imposed on the recovery of damages for provision of gratuitous services.

* The rate of interest that can be awarded on damages has been fixed and generally reduced.

* The discount rate established by the courts for the determination of the present value of future loss has been fixed and increased.

* Exemplary damages have been abolished in many jurisdictions and, to some degree, aggravated

damages have also been abolished. Exemplary damages were rarely awarded and this would make little practical difference to insurance premiums. Aggravated damages represent actual loss. This change does, however, pander to the current imperative of political life in a media saturated age: to be seen to be doing something. In the heat of the debate it appeared that anything less was more. The reasons proffered for this change are singularly unconvincing.

This recitation of the major changes indicates how wide-ranging and fundamental the alterations of the law have been. Many of the changes were contained in a list of possible amendments to the law which I compiled in an address in 2002 - not including caps and thresholds - and which became something of a template for the subsequent debate[16]. In that address I emphasised the importance of proceeding on the basis of a principled alteration, rather than an underwriter driven alteration of the law.

All the earlier changes to the law over the course of some two decades have resulted in significant differences amongst the respective schemes for transport accidents, industrial accidents and medical negligence. These arose because different insurers and administrators were involved in each area of liability. They had a great influence on what changes were required to bring down claims and, therefore, premiums, in a context where government had often announced an objective of reducing premiums in a particular area of insurance by a specific amount. These disparate processes created inexplicable and unjustified variations in the rules which applied. Quite different compensation was available depending on whether injury occurred in a car or in a car park or at work or on an operating table or in a public swimming pool or in a supermarket. The sense of fairness which is essential to the effective operation of the system had been attenuated.

The result of the new regime is to avoid the sense of inequality as a ground for unfairness. It has, however, replaced that ground with others and the debate is actively continuing. In particular, the introduction of caps on recovery and thresholds before recovery is feasible, has led to considerable controversy. The introduction of a requirement that a person be subject to fifteen percent of whole of body impairment - that percentage is lower in some States - before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all.

The evidence suggested that in smaller claims, say up to about £35,000, about half of total damages awarded were in the form of general damages. The threshold has made these claims virtually uneconomic from the point of view of the legal profession. Perhaps more than any other single change, it is the threshold for general damages that has led to the dramatic fall in filings in the District Court. This has been reinforced by the cap on lawyers' fees for cases below about £35,000 of the higher of £3,500 or twenty percent of the amount. This is a maximum fee in the absence of a cost agreement.

The effective abolition of what insurance companies regard as small claims, albeit the matters are not small from the perspective of the injured person, is expected to have a considerable impact on premiums. The insurers convinced the governments that this was an important aspect of the changes required. My own suspicion is that they simply find it easier to compute the effect of such a change than of changes in applicable legal principle. Underwriters do not believe that they are capable of predicting changes in judicial behaviour and who can blame them.

Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation.

Proportionality

One aspect of the legislative change that is not yet in force, but will be in the near future, I am sure, is the adoption of a system of proportionate liability with respect to economic loss. Relevant legislation has been passed in a majority of states but its proclamation is delayed pending the passage by the Commonwealth Parliament of complementary legislation, which has been introduced.

The traditional approach of awarding damages in tort, or for breach of a contractual term of skill and diligence, has been one of what has been called solidary liability, where the liability is joint and several in situations where the same damage is caused by negligence on the part of more than one person. A proposal to introduce a system of proportionality was considered in Australia about a decade ago and rejected. The climate established by the recent debate on tort law reform has been such that the system of proportionate liability has been adopted and is on the verge of being introduced.

A defendant who is only ten percent responsible for the injury would only bear ten percent of the damages. The system will not apply to claims for personal injury but is limited to claim for damages

with respect to economic loss or damage to property. Joint and several liability is preserved in the case of a defendant who intended to cause or who fraudulently caused economic loss or damage to property. Vicarious liability and the several liability of partners is also preserved.

This system creates the possibility that a person who has suffered injury will be unable to fully recover. However, it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer in favour of plaintiffs against the insolvency or impecuniosity of co-defendants who have contributed more substantially to the economic loss suffered by the plaintiff. The traditional attitude of the law, which favours personal injury plaintiffs, puts them in a different category from those who suffer economic loss.

This is a matter likely to be of particular significance in the area of professional liability for auditors and lawyers who are frequently joined in commercial proceedings simply on the basis of the depth of their pockets or rather of that of their insurers. In many such cases the directors of a particular company, who are primarily liable for the events leading to economic loss, are not sued at all.

It is quite likely that the new system will change the dynamics of a considerable body of commercial litigation. How that will actually impinge on large cases involving auditor's negligence and the like has yet to be seen. However, the courts will have to determine a new set of principles for allocating responsibility to different actors whose cumulative conduct leads to a single loss.

The mechanism for making claims between concurrent wrong-doers will be abolished. However, a plaintiff may claim against concurrent wrong-doers in subsequent actions and the court may join concurrent wrong-doers in proceedings. A defendant is under an obligation to notify a plaintiff of concurrent wrong-doers of whom the defendant is aware so that the claim, of what might be called "diminished economic responsibility", does not ambush a plaintiff.

There are important considerations of principle underlying the choice that has now been made. That is most clearly reflected in the decision to limit the proportionate liability system to claims for economic loss and property damage and the retentions of the old rules for intentional or fraudulent causation of economic loss. The principal impact of the new regime is likely to be in the sphere of professional indemnity insurance.

Professional Indemnity Insurance

Another proposal is of particular significance for professional indemnity insurance. The High Court has adopted a literalist interpretation of s54 of the Insurance Contracts Act which permits a court to excuse late notification of claims and of circumstances. This has rendered the restrictions inherent in a claims made or claims made and notified policy virtually irrelevant[17]. Such policies are common form in the case of professional indemnity. Insurance companies found it difficult to price professional indemnity cover or to quantify provisions for such claims. An inquiry has reported on how this provision should be changed, with respect to claims made, but not occurrence based, policies[18]. An early draft of the provision attracted criticism, but that is well on the way to being resolved. I have no doubt that this will be implemented.

Another matter of considerable significance for professional indemnity is the model established a decade ago in New South Wales, soon to be nation wide, of Professional Standards legislation. In essence, this is a trade off between the adoption of regulated risk management procedures by a profession in exchange for a statutory cap on liability. Not everyone who could do so has taken advantage of the scheme, not least because clients have resisted the idea of a cap, even though the statutory caps are higher than almost all historical claims.

The system works on the basis of a representative association of a professional group submitting a scheme for approval by the regulator. The scheme must include a range of obligations, particularly for risk management, in exchange for a cap.

The professional standards regime has received the unanimous policy support of all governments. The caps will vary from one scheme to another e.g. a cap of \$1 million for a sole practitioner per claim is proposed by the scheme of the New South Wales Bar Association compared with various limits in the case of solicitors with a level of \$1.5 million. These limits will generally exclude only larger commercial claims. The objective is to temper the considerable escalation of premiums and the expansion of policy exclusions, of recent years.

The ten year old New South Wales Act had only limited impact. The cap did not apply to statutory causes of action under Commonwealth legislation. It will now. A nationally consistent scheme appears

to be imminent.

Conclusion

As can be seen the change in the law of negligence in Australia has been quite dramatic. The working out of the new statutory regime has commenced and will take some time. There remains a significant debate as to whether or not the reforms have gone too far. Australian lawyers are focussing attention on the considerable increase that has been reported in insurance company profits. Political pressure on premiums is increasing but, in the long term, the level of premiums will be determined by the renewed ability of Australia to attract insurance company capital, particularly, the capital of reinsurers and by a turn in the insurance market cycle which, sooner or later, is inevitable.

I am conscious that I have used the word "reform", a word that has long since acquired a positive connotation of 'improvement', which puts anyone opposed to the relevant change on the defensive. Not all the changes I have identified would be accepted by Australian lawyers as "reforms" in that sense.

I am reminded of the blistering attack on reformers by Senator Roscoe Conkling, a Republican machine party boss in New York City who said in 1880:

"Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, canting, self-righteousness. ... Their real object is office and plunder. When Dr Johnson defined patriotism as the last refuge of a scoundrel, he was unconscious of the then undeveloped possibilities of the word 'reform'." [19]

May I say in conclusion that there has been no serious discussion in Australia of us adopting on an universal basis the no fault type insurance scheme that exists in New Zealand. It does, as I have said, exist for motor vehicle accidents in Victoria and has been advocated more widely. Nevertheless, if the changes both in judicial attitudes and the legislative regime now in place do not result in a system of compensation for accidents which is widely accepted to be economically sustainable, a no fault scheme may appear to be the only alternative.

May I leave you with a judgment from a United States Court in Michigan, where damage to a tree was found not to be covered by the Michigan system of no fault liability. The claim was for damages for the cost of protecting and reinvigorating what the owner described as a "beautiful oak tree", into which an errant motorist had crashed his Chevrolet. This led the Michigan Court of Appeals to be moved to verse. The Court's judgment as reported is as follows:

"We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is pressed
Upon a mangled tree's behest.
A tree whose battered trunk was pressed
Against a Chevy's crumpled crest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care;
Flora lovers though we three,
We must uphold the Court's decree
Affirmed."

This I emphasise is the whole judgment. The headnote I should add was also in verse. For the doubters amongst you the reported case reference is Fisher v Lowe (1983) 333 NW 2nd 67.

I conclude with a note of apprehension, even defeatism, reminiscent of the fate of the New York City 15 days notice regulation. Earlier this year the Commonwealth Government produced a booklet proclaiming the triumph of the tort law reform legislative package throughout Australia. The publication set out in detail the major changes to the law which I have outlined this evening. The introductory chapter of this official publication concluded with a paragraph which struck a discordant note with the self-congratulatory tone of the booklet. It said, under the heading "DISCLAIMER":

"Information contained in this report should not be relied upon without reference to Australian legislation in force from time to time and appropriate legal advice." [20]

Perhaps the authors were just teasing.

1 I have dealt with these matters at some length in two earlier papers. See Spigelman "Negligence: *The Last Outpost of the Welfare State*" (2002) 76 ALJ 432; Spigelman "Negligence and Insurance Premiums: Recent Changes in Australian Law" (2003) 11 Torts LJ 291.

2 *The New Yorker* April 21 and 28 2003 at p101. See also www.nystla.org.

3 See www.nyc.gov/html/law/pressreleases/pr050602.pdf.

4 Atiyah, *The Damages Lottery* (1997) Hart Publishing, Oxford, Chapters 2 and 3.

5 *Overseas Tank Ship (UK) Limited v Miller Steam Ship Co Pty Ltd* (1967) 1 AC 617.

6 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

7 *Anns v Merton London Borough Council* (1978) AC 728.

8 See *Caparo Industries v Dickman* [1990] 2 AC 605.

9 See *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97]; cf at [116].

10 See, for example, the observations of McHugh J in *Tame v New South Wales* (2002) 211 CLR 317 at [98].

11 See, *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; *Richmond Valley Council v Standing* (2002) NSWCA 359; (2002) Aust Tort Reps 81-679; *University of Wollongong v Mitchell* [2003] Aust Torts Rep 81-708; *Agar v Hyde* (2000) 201 CLR 552; *Woods v Multi Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Rosenberg v Percival* (2001) 205 CLR 434; *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321; *Sullivan v Moody* (2001) 207 CLR 562; *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; *Derek v Cheung* (2001) 181 ALR 310; *New South Wales v Lepore* (2003) 212 CLR 511; *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540; *Sullivan v Moody* (2000) 207 CLR 562; *New South Wales v Paige* (2003) Aust Torts Rep 81-676; *Amaca Pty Ltd v State of New South Wales* (2004) NSWCA 124; *State of New South Wales v Godfrey & Godfrey* (2004) NSWCA 113.

12 See *Sullivan v Moody* supra esp at [5], [54], [55]-[62]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 198 CLR 1 at [3], [18], [93 at 6], [114], [203]-[213]; *Perre v Apand* (1999) 198 CLR 638 at [197]; *Tame v New South Wales* supra at [28], [58], [123], [323]; *NSW v Paige* supra at [84]-[177]; *Newcastle City Council v Shortland Management* (2003) 57 NSWLR 173 at [86]-[93]; *NSW v Godfrey* supra at [71]-[80].

13 See, for example, the penetrating analysis of Rickard McNally, *Remembering Trauma*, Harvard Uni Press 2003.

14 I have discussed this in my paper on "Negligence and Insurance Premiums" supra. See also Peter Cane "Reforming Tort Law in Australia: A Personal Perspective" (2003) 27 Melb.U.L.Rev at 49.

15 See Commonwealth of Australia Review of the Law of Negligence: Final Report September 2002 (*The Ipp Report*), www.revofneg.treasury.gov.au at 9.13 and cf *Tame v New South Wales* (2002) 211 CLR 317 esp at [16] [61] [109] [196] [273] and [366] and cf *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205 at [98] and [119].

16 See "Negligence: The Last Outpost of the Welfare State" supra note [1].

17 See *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652; *FAI General Insurance Co Limited v Australia Hospital Care Pty Ltd* (2001) 204 CLR 641; *Eastend Real Estate Pty Ltd v C E Heath Casualty & General Insurance Limited* (1991) 25 NSWLR 400.

18 Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act 1984* (Cth) Report into the Operation of s54, Commonwealth of Australia, October 2003.

19 Truesdale, "Rochester Views the Third Term 1880" (1940) 2(4) Rochester History 1 at 5.

20 Reform of Liability Insurance Law in Australia, Commonwealth of Australia, February 20-04, p12.

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Tort Law Reform in Australia

**Address by the Honourable J J Spigelman AC
Chief Justice Of New South Wales
To the Anglo-Australian Lawyers Society &
the British Insurance Law Association
Lincoln's Inn, London
16 June 2004
and
Presentation To The London Market At Lloyd's
6 July 2004**

The District Court of New South Wales has jurisdiction to hear motor accident claims and work injury damages claims irrespective of the amount claimed and all other common law claims where the amount claimed does not exceed about £350,000. Its civil jurisdiction is, to a substantial degree, a personal injury jurisdiction. Filings in the District Court have fallen from about 20,000 in calendar year 2001, to 13,000 in 2002 and to 8,000 in 2003. The reduced rate of filings is continuing this year. It is reasonably clear that something dramatic has happened to civil litigation in New South Wales. Similar effects are seen in other states.

What these figures reveal is a dramatic change in the practical operation of the law of negligence in Australia over a few years. This is the result of two factors. First, there has been a substantial shift in judicial attitudes at an appellate level, led by the High Court of Australia. Secondly, there have been major changes to the law of negligence implemented by statute. My purpose this evening is to outline in general terms the nature of the changes to the law that have had such dramatic effects in so short a period of time. It is first, however, necessary to provide a broader context[1].

One lesson we must all learn from history is never to underestimate the ingenuity of the legal profession when faced with such dramatic changes to its customary practices. I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the City could not be sued for a defect in a road or sidewalk unless it had had fifteen days' notice of the specific defect. The plaintiff lawyers, or as, they call themselves, trial lawyers of New York City, established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the City were available for sale to trial lawyers[2].

At any one time the total cost of curing the defects of which the city had been given notice was several billion dollars. Last year the Mayor of New York complained that in calendar year 2002 alone, the city received 5,200 maps from BAPSPC spotters which identified some 700,000 blemishes[3]. Needless to say the city has never successfully defended a case under the fifteen days' notice law. I am confident that Australian lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

The Historical Background

For well over a century judges were universally regarded, in all common law jurisdictions, so far as I am aware, as mean, conservative and much too defendant-oriented. This led parliaments to extend liability, commencing with Lord Campbell's Act, then the abolition of the doctrine of common employment, the abolition of the immunity of the Crown, the creation of workers' compensation and compulsory third party motor vehicle schemes and provision for apportionment in the case of contributory negligence.

In Australia, about twenty to twenty-five years ago, the process of legislative intervention changed its character. It proceeded on the basis that the judiciary had become too plaintiff-oriented. A generational change in the judiciary coincided with a change in the opposite direction in the social philosophy of the broader polity, which came to re-emphasise persons taking personal responsibility for their actions. There may very well be an iron law which dooms judges to always be a decade or two behind the times.

Throughout Australia, in different ways and at different times, new regimes were put in place from about the early 1980s, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. In Australia's second largest state of Victoria, a no fault scheme for traffic accidents was established similar to the more wide-ranging New Zealand scheme. In the largest state of New South Wales such a scheme was actively considered but not, in the event, adopted. In all states what had come to be regarded as common law rights were significantly modified by legislative intervention. When I say, "come to be regarded", many of the causes of action were only available because of the previous century of legislative change, to which I have referred, which overrode the common law.

There was, as I have mentioned, a philosophical clash between the expansion of the tort of negligence and the change in political philosophy, associated in this country most closely with the name of Margaret Thatcher. An element of welfare state paternalism, or, depending on one's point of view, a sense of compassion, that in some quarters came to be regarded as old-fashioned, was not absent from day to day judicial decision-making about when a person ought to receive compensation, even in a fault based system. It was recognition of this phenomenon that led me to describe the tort of negligence as "the last outpost of the welfare State", although in truth a universal no fault scheme would be more accurately so described.

The undefined elements of the tort left much open. What damages are remote? What does "commonsense" suggest as the cause? When is a contribution to the creation of a risk "material"? Should a limitation period be extended? Should the plaintiff's evidence be accepted? How should one choose between two widely divergent experts' opinions, each of which is probably at, or beyond, the boundaries of the range of legitimate opinion? Should the plaintiff be believed about what effect a hypothetical warning would have had upon him or her? There is much flexibility in the outcome of negligence litigation.

Professor Atiyah referred to a long-term historical trend of expanding the scope of the tort of negligence and the damages recoverable for the tort, as "stretching the law"[4]. There was, however, an equivalent, parallel trend, perhaps of even greater practical significance, of 'stretching the facts'.

Contemporary judges generally reached intellectual maturity at the time that the welfare state was a widely accepted conventional wisdom. The "progressive" project for the law of that era was to expand the circumstances in which persons had a right to sue. We are now more conscious of limits - social, economic, ecological and those of human nature. Hobbes has triumphed over Rousseau. For several decades now the economic limits on the scope of governmental intervention have received greater recognition. The law cannot remain isolated from such broader trends in social attitudes.

In particular there has been a significant change in expectations within Australian society, as elsewhere, about persons accepting responsibility for their own actions. The idea that any personal failing is not your fault, that everyone can be categorised as a victim, has receded. The task is to restore an appropriate balance between personal responsibility for one's own conduct and expectations of proper compensation and care.

This is, of course, an issue which resonates beyond the law. The change is noticeable over the decades. It is not likely that Donald Bradman would ever have taken a banned substance. If he had, however, it is quite inconceivable that he would have blamed his mother. There is a shift back to accepting responsibility, as Adam Gilchrist showed when he walked without the umpire having raised a finger.

The debate in Australia, leading to the statutory changes, focused on particular cases and a range of circumstances in which persons recovered damages, sometimes substantial damages, when there could be little doubt that they were the author of their own misfortune. One case referred to frequently involved a young man diving from a cliff ledge into a swimming pool without checking the depth of the water. The idea that the authority which owned the land should have put up a warning sign advising against diving is no longer, with the changing times, regarded as a reasonable basis for liability.

There seems no doubt that the past attitude of judges, when finding liability and awarding compensation, was determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages awarded to injured plaintiffs. Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant

and deprive him or her of the family home.

The line between the kinds of mistakes or unfortunate results that are an inevitable concomitant of day to day human interaction, including professional practice, on the one hand, and the sorts of mistakes or results which should not occur at all, on the other hand, may have been drawn in a different way on many occasions in the absence of the ubiquity of insurance. The various choices that the fungibility of the concepts associated with the tort of negligence throws up may very well have been made differently.

Foreseeability

If one had to pick a single point of departure for the imperial march of the tort of negligence, the beginning of the process of what Atiyah calls "stretching the law", it was probably the judgment of Lord Reid for the Privy Council in *Wagon Mound (No 2)*[5]. The judgment of the Privy Council was delivered at a time when the practice of the Board was to deliver a single inscrutable judgment which acquires some of the power of a legislative enactment precisely because it is bereft of that divergence of reasoning amongst different judges in a final court of appeal that is more appropriate for the principled development of the law.

Lord Reid's judgment is quite simplistic. That is sometimes the product of the compromises that are required for a joint judgment.

The case was an appeal directly from a single judge of the Supreme Court of New South Wales, Mr Justice Walsh, later to serve on the High Court. Sir Cyril Walsh, placed particular weight on his assessment that the likelihood of an oil spillage catching fire was "rare" and "very exceptional". The Privy Council rejected this as the appropriate test. It asked whether or not something was "a real risk" in the sense that it would not be brushed aside as "far fetched". The subsequent application of this test by the High Court in Australia has led to the formulation that a risk of injury is foreseeable unless it can be described as "far fetched or fanciful"[6].

Lawyers, even after *Wagon Mound (No 2)*, continued to refer to the test for identifying a duty as one of "reasonable foreseeability". I cannot see that "reasonableness" has anything to do with a test that only excludes that which is "far fetched or fanciful". The test appears to be one of "conceivable foreseeability", rather than of "reasonable foreseeability".

As George Orwell said in his great 1946 essay *Politics in the English Language*:

"the English Language ... becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts."

and

"... if thought corrupts language, language can also corrupt thought. A bad usage can spread by tradition and imitation even among people who should and do know better."

So it appears to be with a continued use of the terminology of "reasonable foreseeability".

If we had kept a firm hand on the idea of "reasonableness" as a limiting factor we would never have needed the flirtation with "proximity" nor the two stage *Anns* test[7], nor the three stage *Caparo* test[8], nor the multifactorial analysis now applied by the High Court in Australia. The search for a unifying principle in the law of negligence has proven to be as futile as the search for a unifying principle in the laws of physics.

Over the course of a number of decades the effect of judicial decision-making was, in substance, to transform the tort of negligence from a duty to take reasonable care into a duty to avoid any risk by reasonably affordable means. That, in my opinion, was the practical effect of a stream of judicial decision-making at appellate level, particularly for that vast body of decisions that never come before an appellate court and, indeed, the even larger proportion of claims that are settled out of court in the light of a practitioners' understanding of the likely outcome.

The Australian judiciary has now become more sensitive to the broader implications of individual decisions by reason of the cumulative effect of such decisions. The progressive paring back of the tort of negligence by statutory changes over the course of two plus decades has itself had an impact on judges. This legislative intervention has, as I will shortly show, accelerated and become much more dramatic over the last two years. Furthermore, evidence accumulated about the unintended

consequences of the tort system. The practice of defensive medicine is a good example. Both my brothers are doctors. Even in the late 1960s I recall the scorn that they expressed about their American colleagues who refused to stop at the scene of road accidents. Australian doctors have long since joined them.

I have expressed the view both in judgments and extra judicially, that the judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies can be regarded as, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state. For many decades there was a seemingly inexorable increase in that form of taxation by judicial decision[9]. In Australia that increase has stopped as a result of a change in judicial attitudes and is likely, subject, of course, to the vagaries of the insurance market, to be reversed, as a result of legislative intervention throughout Australia.

At least indirectly in the case of judges, and overtly in the case of the parliaments, the shift in attitude has been driven by the escalation of insurance premiums and, in recent years, by the unavailability of insurance in important areas on any reasonable terms at all.

The year 2002, where insurance premiums escalated rapidly in numerous categories of insurance, was the year in which, for Australia, quite a number of chickens came home to roost. By that time, however, the change in judicial attitudes was well under way.

Although the Wagon Mound (No 2) continues to represent the law in Australia, there are distinct signs that the "far fetched and fanciful" test is likely to be reviewed by the High Court[10]. There are a range of well-established categories of negligence in areas such as traffic and industrial accidents where the application of basic principles is well established. Change in such areas has occurred by legislative intervention. It is, however, at the boundaries of the tort, where new and different situations are under consideration, that the change in judicial attitude has become most apparent. However, that change must also have an affect on the outcome of cases even in the well-established categories. The various choices available to a judge in terms both of acceptance of evidence and the formulation of the judgments required to determine such cases will be affected by the kind of change of attitude to which I refer.

There have been a steady stream of cases in the appellate courts, particularly in the High Court, in which the outcomes would have been different if the process of stretching the law and of stretching the facts had not been arrested and reversed.

People who trip on footpaths no longer always successfully sue local councils. The owner of a shopping mall was not responsible for criminal conduct in the mall's car park. The authors of the rules for rugby were not liable to injured players. Nor was the person who conducted an indoor cricket arena. A cinema was not liable when a client tried to sit down in a darkened cinema but the seat was, as is common, retractable. A hotelier was not liable for injuries suffered after departure by an intoxicated patron. A club with gambling machines was not liable to refund the losses of a compulsive gambler whose cheques it had cashed. The driver of a vehicle was not liable when a child suddenly darted out into the road. A school authority was not liable for intentional criminal conduct, relevantly sexual abuse, of a teacher against a pupil. Governmental regulators were not liable for the health consequences of a failure to regulate self-interested commercial actors whose conduct caused injury. Governmental decision-makers whose intervention, for example, in family relationships, caused psychiatric injury on the basis of allegations that proved incorrect, were not liable for those injuries. Employers which conducted disciplinary or dismissal actions with adverse psychiatric consequences were also found not to be liable. A prison authority was found not liable for psychiatric injury caused to the victim of a crime by an escapee not for the defects of her prematurely born son - Dorset Yacht was doubted[11].

It is quite likely that many of these cases would have been decided differently only a few years ago. I do not wish to imply that the development has been all one way. There have been important cases in which liability has been established in circumstances where the issue was debatable. Nevertheless, the drift of judicial decision-making is plain at a senior appellate level. It is unquestionably having an effect on trial judge decision-making of a substantial character.

The imperial march of negligence has also been restricted by a newly emerged emphasis on the importance of coherence in the law. The tort of negligence should not be permitted to cut across other areas of the law which have developed a distinctive approach to balancing conflicting interests. Negligent words causing mental harm may lead to incongruence between actions in defamation and negligence. Negligent conduct creating a nuisance should not create liability in negligence where an

action in nuisance would be denied. Questions of coherence arise most frequently in cases which allege the negligent exercise of a statutory duty. In many quite disparate fields, the principle of coherence has restricted liability for negligent conduct in circumstances in which liability would probably have been found only a few years ago[12].

The most difficult area with which the law is still grappling in this regard is that of liability for psychiatric injury. Difficult issues of a philosophical and factual character remain to be resolved in this field. The application of legal tests, in a context where expert evidence has few, and often no, objectively verifiable elements, is particularly difficult. This is exacerbated by the fact that the relevant area of expertise is only, to a limited extent, based on scientific research and has a wide element of discretion. In this area, perhaps more than any other, the Whig approach to science - the assumption that improvement of knowledge occurs in some kind of straight line of progress, rather than being cyclical or, dare one say so, a creature of fashion - is not likely to be correct[13]. It is particularly difficult to determine where to draw the line between refusing to give recovery for the normal stresses of life, including working life, and those extraordinary stresses that people should never have suffered.

In this area Australian law is now unlikely to develop in any principled way by reason of statutory intervention, to which I will presently refer.

The Sense of Crisis

Legislative change over the last year or two has been driven by a perceived crisis in the price and availability of insurance. In Australia this was focused in particular on public liability and medical negligence. However, similar pressures had been building up in all areas for a number of years, including the high volume areas of industrial accidents and traffic accidents.

Over 2002-2003 there were virtually daily reports about the social and economic effects of increased premiums: cancellation of charitable and social events such as dances, fetes, surfing carnivals and Christmas carols; the closure of children's playgrounds, horse riding schools, adventure tourist sites and even hospitals; the early retirement of doctors and their refusal to perform certain services, notably obstetrics; local councils were shutting swimming pools and removing lethal instruments such as seesaws and roundabouts from children's playgrounds; our Sydney tabloid proclaimed "The death of fun"; many professionals could not obtain cover for categories of risks, leading to withdrawal of their services; for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; midwives were unable to get cover at any price; many professionals were reported to have disposed of assets so as to be able to operate without adequate cover or even any insurance.

The issue became highly charged politically. The talk was of "crisis". The concern of governments was reinforced by the liability of government directly as a major employer, property owner and provider of services, particularly in education, health and transport. This was, however, reinforced by the emergence, over recent years of a role for government as a backstop for private insurers, as the reinsurer of last resort. It took many years for the government role of "lender of last resort" to take the institutional form of the contemporary central bank. We are in the early stages of institutional development of the "reinsurer of last resort" function.

In Australia we have had a range of proposals in different areas for the government to underwrite existing insurers, e.g. for the risks associated with terrorism. Of particular significance is the acceptance that it was politically impossible for the government to stand by and let a major insurer default on its obligations. That is exactly what happened long ago in the case of banks. A national scheme was implemented to support the major medical insurer when it appeared to be insolvent. Governments at both levels of our federal system became involved in protecting policyholders when a major general insurer, HIH Limited, went into liquidation.

It is quite clear that governments have a very real financial interest in the operations of the tort system.

Whether by way of increases in insurance premiums or by way of a call on tax payers' funds it became widely accepted at all levels of Australian government and in the general community that the existing tort system had become economically unsustainable. The particular focus was the sudden escalation of premiums. Insurance premiums are the result of a multiplicity of factors, however, the cost of claims sets the basic structural parameters within which other forces operate. Those costs have increased considerably over recent decades.

There is no doubt, in my mind, that the underlying cause of the "crisis" that was proclaimed to exist, was the practical application of the fault based tort system in the context of adversary litigation, even though the attitude of the judiciary was changing at the very time that this campaign in the media was occurring. The rate of change proved too slow for the political process. What brought the issue to a head were developments in the market for insurance.

By 2002 what had for many years been a buyer's market in insurance had become a seller's market. At an international level there had been a series of natural disasters, which had drawn down the capital of insurance companies, particularly that of reinsurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom which further reduced the capital available to insurance companies. Quite quickly, demand came to exceed supply in the global reinsurance market.

In Australia this development was accentuated by problems of own making. In particular, the collapse of HIH, which had been particularly active in the professional negligence and public liability market, transformed the pricing of insurance in the Australian market. It appears, with the benefit of hindsight, that one of the principal reasons for the collapse was that HIH had been aggressively underpricing in a number of areas of insurance in order to increase its market share. Indeed, one of our more successful insurance companies, QBE Limited, had found the Australian market so unattractive that only about fifteen percent of its capital was invested at home. In a sense, the increased insurance premiums, which should have emerged gradually over the course of a decade or so, came all at once, when this particular insurer was removed from the market. As a result of the changes to which I will refer QBE has substantially expanded its exposure in the Australian market place.

Although the practical operation of the law of torts must determine to a substantial degree the level of premiums for liability insurance, the suddenness and size of the increases and the expansion of policy exclusions reflected such developments in the insurance market. The underlying cause of the problem must be distinguished from the immediate cause of the crisis[14]

Legislative Change

In New South Wales, the largest and most litigious state in Australia, legislative changes had commenced in a number of areas prior to the events of 2002-2003. Those events, however, led to a national response in which many of the New South Wales proposals were adopted more widely and legislation went even further than had been considered appropriate until that time.

The Commonwealth and the states appointed an inquiry to review the law of negligence. The Panel was chaired by the Honourable David Ipp, a judge of the New South Wales Court of Appeal. By and large, the recommendations of this panel have been implemented, with some variation, in all states and territories, with complementary national legislation almost complete. The principal thrust of the changes is the limitation of circumstances in which damages can be recovered for personal injury and the restriction of the heads and quantum of damage that can be so recovered. The changes are wide ranging and include the following:

* The not "far fetched or fanciful" test for foreseeability has been replaced by a test that a risk be "not insignificant" which, despite the double negative, is of a higher order of possibility.

* A requirement has been introduced identifying a range of factors which have to be taken into account when determining breach of duty - referred to as the "negligent calculus". These factors include probability of harm, seriousness of harm, the burden of taking precautions, the social utility of the activity and precautions that may be required by similar risks, not just the particular causal mechanism of the case before the court. This statutory requirement which in many respects reflects the common law will focus attention on matters which, following *Wagon Mound (No 2)*, may not have been given adequate weight, particularly in lower courts.

* An express acknowledgment of the normative element in determination of issues of causation is adopted by applying a test of whether responsibility for the harm should be imposed on the negligent party.

* An express provision emphasising that the plaintiff always bears the onus of proving any fact relevant to the issue of causation, thereby implicitly overturning judgments which suggested that in the case of evidentiary gaps - often medical causation issues - proof on the issue of causation could shift from the plaintiff to the defendant.

* The introduction of a modified version of the Bollaam test, which was not the law in Australia, in all cases of professional negligence providing that treatment was not negligent if it occurred in accordance with an opinion widely held amongst respected practitioners, subject to the ability of the court to intervene if the opinion was "irrational". The Bollaam test does not, however, apply to a duty to warn or inform. This has led to different approaches. In New South Wales there is no duty to warn of an obvious risk.

* The enactment of a "person of normal fortitude" test for purposes of foreseeability of mental harm, which the Ipp Panel identified as representing the majority view in the most recent High Court authority on the subject, although the judges who did in fact hold that view have since accepted that the majority regarded normal fortitude as merely a relevant consideration and not as an independent test^[15].

* In a number of states, including New South Wales, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to persons who directly witnessed a person being killed or injured or put in peril or were a close family member of the victim.

* A number of states have adopted, in different terms, a policy defence available to all public authorities, requiring that the interests of individuals after materialisation of a risk have to be balanced against a wider public interest, including the taking into account of competing demands on the resources of a public authority. In New South Wales the defence is stated as principles for determining whether a duty exists or breach has occurred, expressly acknowledging that performance may be limited by financial and other resources available to the authority, that the general allocation of those resources by an authority is not open to challenge and that the conduct of the authority is to be assessed by reference to its full range of functions. Also, in New South Wales the legislation provides that a public authority is not liable for a failure to exercise a function to prohibit or regulate an activity if the authority could not have been required to exercise that function in mandamus proceedings instituted by the claimant. This provision may well come to test the limits of the availability of mandamus and principles of locus standi.

* The liability of a volunteer or a good samaritan is limited.

* Changes are made to the law about voluntary assumption of risk and contributory negligence. An intoxicated person is deemed to have contributed twenty-five percent to the injury.

* The liability of persons who act in self-defence to criminal conduct is restricted.

* An injured person is deemed to have been aware of any obvious risk, about which there is no duty to warn save in the case of a request or in the case of a professional service.

* Provision is made that an apology cannot constitute an admission, regarded as of particular significance in the field of medical negligence. Doctors can say sorry for a result, without fear of making an admission of liability.

There are also thresholds, caps and restrictions on recoverable damages, including:

* Establishment of an indexed maximum for the recovery of economic loss, generally three times average weekly earnings. Persons earning more than that have the ability to take out first person loss of earnings insurance.

* Establishment of a threshold of a percentage of permanent impairment before a person may recover general damages at all, generally a sliding scale of fifteen percent up to about thirty percent, after which full recovery is permitted.

* Establishment of an indexed maximum for recovery of general damages, at a little above £100,000.

* Restrictions have been imposed on the recovery of damages for provision of gratuitous services.

* The rate of interest that can be awarded on damages has been fixed and generally reduced.

* The discount rate established by the courts for the determination of the present value of future loss has been fixed and increased.

* Exemplary damages have been abolished in many jurisdictions and, to some degree, aggravated damages have also been abolished. Exemplary damages were rarely awarded and this would make little practical difference to insurance premiums. Aggravated damages represent actual loss. This change does, however, pander to the current imperative of political life in a media saturated age: to be seen to be doing something. In the heat of the debate it appeared that anything less was more. The reasons proffered for this change are singularly unconvincing.

This recitation of the major changes indicates how wide-ranging and fundamental the alterations of the law have been. Many of the changes were contained in a list of possible amendments to the law which I compiled in an address in 2002 - not including caps and thresholds - and which became something of a template for the subsequent debate[16]. In that address I emphasised the importance of proceeding on the basis of a principled alteration, rather than an underwriter driven alteration of the law.

All the earlier changes to the law over the course of some two decades have resulted in significant differences amongst the respective schemes for transport accidents, industrial accidents and medical negligence. These arose because different insurers and administrators were involved in each area of liability. They had a great influence on what changes were required to bring down claims and, therefore, premiums, in a context where government had often announced an objective of reducing premiums in a particular area of insurance by a specific amount. These disparate processes created inexplicable and unjustified variations in the rules which applied. Quite different compensation was available depending on whether injury occurred in a car or in a car park or at work or on an operating table or in a public swimming pool or in a supermarket. The sense of fairness which is essential to the effective operation of the system had been attenuated.

The result of the new regime is to avoid the sense of inequality as a ground for unfairness. It has, however, replaced that ground with others and the debate is actively continuing. In particular, the introduction of caps on recovery and thresholds before recovery is feasible, has led to considerable controversy. The introduction of a requirement that a person be subject to fifteen percent of whole of body impairment - that percentage is lower in some States - before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all.

The evidence suggested that in smaller claims, say up to about £35,000, about half of total damages awarded were in the form of general damages. The threshold has made these claims virtually uneconomic from the point of view of the legal profession. Perhaps more than any other single change, it is the threshold for general damages that has led to the dramatic fall in filings in the District Court. This has been reinforced by the cap on lawyers' fees for cases below about £35,000 of the higher of £3,500 or twenty percent of the amount. This is a maximum fee in the absence of a cost agreement.

The effective abolition of what insurance companies regard as small claims, albeit the matters are not small from the perspective of the injured person, is expected to have a considerable impact on premiums. The insurers convinced the governments that this was an important aspect of the changes required. My own suspicion is that they simply find it easier to compute the effect of such a change than of changes in applicable legal principle. Underwriters do not believe that they are capable of predicting changes in judicial behaviour and who can blame them.

Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation.

Proportionality

One aspect of the legislative change that is not yet in force, but will be in the near future, I am sure, is the adoption of a system of proportionate liability with respect to economic loss. Relevant legislation has been passed in a majority of states but its proclamation is delayed pending the passage by the Commonwealth Parliament of complementary legislation, which has been introduced.

The traditional approach of awarding damages in tort, or for breach of a contractual term of skill and diligence, has been one of what has been called solidary liability, where the liability is joint and several in situations where the same damage is caused by negligence on the part of more than one person. A proposal to introduce a system of proportionality was considered in Australia about a decade ago and

rejected. The climate established by the recent debate on tort law reform has been such that the system of proportionate liability has been adopted and is on the verge of being introduced.

A defendant who is only ten percent responsible for the injury would only bear ten percent of the damages. The system will not apply to claims for personal injury but is limited to claim for damages with respect to economic loss or damage to property. Joint and several liability is preserved in the case of a defendant who intended to cause or who fraudulently caused economic loss or damage to property. Vicarious liability and the several liability of partners is also preserved.

This system creates the possibility that a person who has suffered injury will be unable to fully recover. However, it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer in favour of plaintiffs against the insolvency or impecuniosity of co-defendants who have contributed more substantially to the economic loss suffered by the plaintiff. The traditional attitude of the law, which favours personal injury plaintiffs, puts them in a different category from those who suffer economic loss.

This is a matter likely to be of particular significance in the area of professional liability for auditors and lawyers who are frequently joined in commercial proceedings simply on the basis of the depth of their pockets or rather of that of their insurers. In many such cases the directors of a particular company, who are primarily liable for the events leading to economic loss, are not sued at all.

It is quite likely that the new system will change the dynamics of a considerable body of commercial litigation. How that will actually impinge on large cases involving auditor's negligence and the like has yet to be seen. However, the courts will have to determine a new set of principles for allocating responsibility to different actors whose cumulative conduct leads to a single loss.

The mechanism for making claims between concurrent wrong-doers will be abolished. However, a plaintiff may claim against concurrent wrong-doers in subsequent actions and the court may join concurrent wrong-doers in proceedings. A defendant is under an obligation to notify a plaintiff of concurrent wrong-doers of whom the defendant is aware so that the claim, of what might be called "diminished economic responsibility", does not ambush a plaintiff.

There are important considerations of principle underlying the choice that has now been made. That is most clearly reflected in the decision to limit the proportionate liability system to claims for economic loss and property damage and the retentions of the old rules for intentional or fraudulent causation of economic loss. The principal impact of the new regime is likely to be in the sphere of professional indemnity insurance.

Professional Indemnity Insurance

Another proposal is of particular significance for professional indemnity insurance. The High Court has adopted a literalist interpretation of s54 of the Insurance Contracts Act which permits a court to excuse late notification of claims and of circumstances. This has rendered the restrictions inherent in a claims made or claims made and notified policy virtually irrelevant[17]. Such policies are common form in the case of professional indemnity. Insurance companies found it difficult to price professional indemnity cover or to quantify provisions for such claims. An inquiry has reported on how this provision should be changed, with respect to claims made, but not occurrence based, policies[18]. An early draft of the provision attracted criticism, but that is well on the way to being resolved. I have no doubt that this will be implemented.

Another matter of considerable significance for professional indemnity is the model established a decade ago in New South Wales, soon to be nation wide, of Professional Standards legislation. In essence, this is a trade off between the adoption of regulated risk management procedures by a profession in exchange for a statutory cap on liability. Not everyone who could do so has taken advantage of the scheme, not least because clients have resisted the idea of a cap, even though the statutory caps are higher than almost all historical claims.

The system works on the basis of a representative association of a professional group submitting a scheme for approval by the regulator. The scheme must include a range of obligations, particularly for risk management, in exchange for a cap.

The professional standards regime has received the unanimous policy support of all governments. The caps will vary from one scheme to another e.g. a cap of \$1 million for a sole practitioner per claim is proposed by the scheme of the New South Wales Bar Association compared with various limits in

the case of solicitors with a level of \$1.5 million. These limits will generally exclude only larger commercial claims. The objective is to temper the considerable escalation of premiums and the expansion of policy exclusions, of recent years.

The ten year old New South Wales Act had only limited impact. The cap did not apply to statutory causes of action under Commonwealth legislation. It will now. A nationally consistent scheme appears to be imminent.

Conclusion

As can be seen the change in the law of negligence in Australia has been quite dramatic. The working out of the new statutory regime has commenced and will take some time. There remains a significant debate as to whether or not the reforms have gone too far. Australian lawyers are focussing attention on the considerable increase that has been reported in insurance company profits. Political pressure on premiums is increasing but, in the long term, the level of premiums will be determined by the renewed ability of Australia to attract insurance company capital, particularly, the capital of reinsurers and by a turn in the insurance market cycle which, sooner or later, is inevitable.

I am conscious that I have used the word "reform", a word that has long since acquired a positive connotation of 'improvement', which puts anyone opposed to the relevant change on the defensive. Not all the changes I have identified would be accepted by Australian lawyers as "reforms" in that sense.

I am reminded of the blistering attack on reformers by Senator Roscoe Conkling, a Republican machine party boss in New York City who said in 1880:

"Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, canting, self-righteousness. ... Their real object is office and plunder. When Dr Johnson defined patriotism as the last refuge of a scoundrel, he was unconscious of the then undeveloped possibilities of the word 'reform'." [19]

May I say in conclusion that there has been no serious discussion in Australia of us adopting on an universal basis the no fault type insurance scheme that exists in New Zealand. It does, as I have said, exist for motor vehicle accidents in Victoria and has been advocated more widely. Nevertheless, if the changes both in judicial attitudes and the legislative regime now in place do not result in a system of compensation for accidents which is widely accepted to be economically sustainable, a no fault scheme may appear to be the only alternative.

May I leave you with a judgment from a United States Court in Michigan, where damage to a tree was found not to be covered by the Michigan system of no fault liability. The claim was for damages for the cost of protecting and reinvigorating what the owner described as a "beautiful oak tree", into which an errant motorist had crashed his Chevrolet. This led the Michigan Court of Appeals to be moved to verse. The Court's judgment as reported is as follows:

"We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is pressed
Upon a mangled tree's behest.
A tree whose battered trunk was pressed
Against a Chevy's crumpled crest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care;
Flora lovers though we three,
We must uphold the Court's decree
Affirmed."

This I emphasise is the whole judgment. The headnote I should add was also in verse. For the doubters amongst you the reported case reference is Fisher v Lowe (1983) 333 NW 2nd 67.

I conclude with a note of apprehension, even defeatism, reminiscent of the fate of the New York City 15 days notice regulation. Earlier this year the Commonwealth Government produced a booklet proclaiming the triumph of the tort law reform legislative package throughout Australia. The publication

set out in detail the major changes to the law which I have outlined this evening. The introductory chapter of this official publication concluded with a paragraph which struck a discordant note with the self-congratulatory tone of the booklet. It said, under the heading "DISCLAIMER":

"Information contained in this report should not be relied upon without reference to Australian legislation in force from time to time and appropriate legal advice." [20]

Perhaps the authors were just teasing.

1 I have dealt with these matters at some length in two earlier papers. See Spigelman "Negligence: The Last Outpost of the Welfare State" (2002) 76 ALJ 432; Spigelman "Negligence and Insurance Premiums: Recent Changes in Australian Law" (2003) 11 Torts LJ 291.

2 The New Yorker April 21 and 28 2003 at p101. See also www.nystla.org.

3 See www.nyc.gov/html/law/pressreleases/pr050602.pdf.

4 Atiyah, *The Damages Lottery* (1997) Hart Publishing, Oxford, Chapters 2 and 3.

5 *Overseas Tank Ship (UK) Limited v Miller Steam Ship Co Pty Ltd* (1967) 1 AC 617.

6 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

7 *Anns v Merton London Borough Council* (1978) AC 728.

8 See *Caparo Industries v Dickman* [1990] 2 AC 605.

9 See *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97]; cf at [116].

10 See, for example, the observations of McHugh J in *Tame v New South Wales* (2002) 211 CLR 317 at [98].

11 See, *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; *Richmond Valley Council v Standing* (2002) NSWCA 359; (2002) Aust Tort Reps 81-679; *University of Wollongong v Mitchell* [2003] Aust Torts Rep 81-708; *Agar v Hyde* (2000) 201 CLR 552; *Woods v Multi Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Rosenberg v Percival* (2001) 205 CLR 434; *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321; *Sullivan v Moody* (2001) 207 CLR 562; *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; *Derek v Cheung* (2001) 181 ALR 310; *New South Wales v Lepore* (2003) 212 CLR 511; *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540; *Sullivan v Moody* (2000) 207 CLR 562; *New South Wales v Paige* (2003) Aust Torts Rep 81-676; *Amaca Pty Ltd v State of New South Wales* (2004) NSWCA 124; *State of New South Wales v Godfrey & Godfrey* (2004) NSWCA 113.

12 See *Sullivan v Moody* supra esp at [5], [54], [55]-[62]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 198 CLR 1 at [3], [18], [93 at 6], [114], [203]-[213]; *Perre v Apand* (1999) 198 CLR 638 at [197]; *Tame v New South Wales* supra at [28], [58], [123], [323]; *NSW v Paige* supra at [84]-[177]; *Newcastle City Council v Shortland Management* (2003) 57 NSWLR 173 at [86]-[93]; *NSW v Godfrey* supra at [71]-[80].

13 See, for example, the penetrating analysis of Rickard McNally, *Remembering Trauma*, Harvard Uni Press 2003.

14 I have discussed this in my paper on "Negligence and Insurance Premiums" supra. See also Peter Cane "Reforming Tort Law in Australia: A Personal Perspective" (2003) 27 *Melb.U.L.Rev* at 49.

15 See Commonwealth of Australia Review of the Law of Negligence: Final Report September 2002 (The Ipp Report), www.revofneg.treasury.gov.au at 9.13 and cf *Tame v New South Wales* (2002) 211 CLR 317 esp at [16] [61] [109] [196] [273] and [366] and cf *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205 at [98] and [119].

16 See "Negligence: The Last Outpost of the Welfare State" supra note [1].

17 See *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652; *FAI General Insurance Co Limited v Australia Hospital Care Pty Ltd* (2001) 204 CLR 641; *Eastend Real Estate Pty Ltd v C E Heath Casualty & General Insurance Limited* (1991) 25 NSWLR 400.

18 Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act 1984 (Cth) Report into the Operation of s54*, Commonwealth of Australia, October 2003.

19 Truesdale, "Rochester Views the Third Term 1880" (1940) 2(4) *Rochester History* 1 at 5.

20 *Reform of Liability Insurance Law in Australia*, Commonwealth of Australia, February 20-04, p12.

Occasional Address - Law Graduation Ceremony - University of Sydney

**OCCASIONAL ADDRESS
LAW GRADUATION CEREMONY
UNIVERSITY OF SYDNEY
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
28 MAY 2004**

I grew up in a country in which the Prime Minister, Sir Robert Menzies, was able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching cricket and then return, taking another six weeks to do so. Things have speeded up since then.

Another feature of the era was the dial on radio sets, still then called by many people a wireless, even though it then wasn't. Such sets were universally manufactured not with the radio frequency spectrum but with the call signs printed on the dial, e.g. 2GB, 2UE etc. The idea that additional radio stations may be permitted to exist had not crossed anyone's mind and was not do so for decades.

I hold the belief, which many of you probably regard as illusory, that all of this was not that long ago. The technological changes over this period have been extraordinary and are continuing. For many years, all aspects of Australian life was dominated by what was aptly described as the *tyranny of distance*. There was no aspect of life more significantly burdened by that tyranny than intellectual life. For those of us who had the privilege of attending and graduating from this great University, the transformation wrought by technology in the accessibility of information and the ability to travel and receive visitors has transformed the university experience, as so much else.

In some respects we have substituted the tyranny of distance with the tyranny of immediacy. This tyranny, at least, we share with everyone else.

All aspects of life have speeded up. Olympic sports like luge, cycling and canoeing are now measured in milliseconds. Other sports have changed their rules or reinvented themselves to provide a "fast-food" alternative. One thinks of the introduction of tie breakers in tennis. Sir Robert Menzies would never have approved of one-day cricket.

Anyone using contemporary telecommunications or computer technology has experienced a curious phenomenon: a sense that a particular delay in some processing functions was quite intolerable, even though that length of delay was perfectly acceptable, indeed regarded as miraculous, only a year before.

Where we once spoke of words per minute, we now speak of characters per second. One can buy telephone answering machines with a quick replay button – in a digital format, so that the replay is accelerated without the high pitch of a Disneyfied chipmunk. In Tokyo there is a restaurant which charges by time. You clock in, you clock out and your bill is computed at a certain number of yen per minute. Indeed it is necessary for us to create the illusion that we are saving time, even when we cannot do so. On most elevators, the "door close" button is in fact a placebo. It has no function other than to placate those who measure their life in seconds.

Sometimes our technology proves constraining. The original typewriters were mechanical. A fast typist would cause the metal typefaces to lock together. Accordingly, a keyboard was invented to slow down the pace of typing in the English language, by positioning the letters in a deliberately inconvenient manner. This is called the QWERTY keyboard, after the top left hand line of letters. It remains the standard upon which everyone has learned to type, even though it is deliberately inefficient.

I give another example concerning the booster rockets on the side of the United States space shuttle, which must be shipped by train from the factory to the launch site. Those booster rockets cannot be made any bigger because they have to fit through a single track railway tunnel in the Rocky Mountains.

The United States railway gauge, which is four feet eight and a half inches, or 1.435 metres, was

adopted because that was the gauge in the pioneer industrial economy, England. The first railway lines in England had been built by the same engineers who built the pre-railway tramways and that was the gauge that they had used. The reason they adopted that gauge was because they used the same jigs, tools and equipment that had long been used to build wagons and carriages, drawn by horses. The wagons and carriages were built with four feet eight and a half inches between the wheels because that was the space between the ruts in the road for many of the long distance roads in England. By continued use over the centuries, those ruts had become fixed by the passage of countless wagons and carriages and the most efficient way to traverse the road was to stay in the ruts.

Many of the long distance roads in England had been laid down by the Romans and the ruts had commenced to be formed during the period of Roman occupation of England by the wheels of Roman chariots. All chariots throughout the Roman empire were built, in the interests of standardisation, with a distance between the wheels of four feet eight and a half inches. That distance was originally chosen because it was the approximate width of the backside of two horses.

Accordingly, the reason why the space shuttle is, and will remain, of limited capacity, is because its booster rockets cannot be much bigger than the width of two horses' behinds.

The success stories of contemporary technology are, of course, more widespread than these little difficulties would suggest. Every academic discipline and profession, not least the practice of law, has been transformed over recent decades by information and communication technology. Electronic communication and the accessibility of legal information on-line is the most dramatic technical improvement in my legal lifetime. It has transformed the way legal work is conducted.

There was a time, only twenty years ago, when I tried to keep up-to-date with overseas developments by subscribing to a sea mail edition of the *Sunday New York Times*. It has been estimated that the amount of information contained in one issue of the *Sunday New York Times* would approximately equate to the total amount of information that a citizen of the nineteenth century would acquire in a lifetime. The papers would stack up metres high at home waiting for me to get around to reading them. That this, and much more, is instantly available, with a few clicks of a mouse, is simultaneously amazing and daunting.

What one can now gather, almost instantly, through the power of search engines and the omnipresence of mass media in profusion, requires a self-consciously determined process of selection, otherwise mere chance will determine what we learn and what we do. How can one cope with the flow and stay in control of one's own intellectual development?

The scale of the problem can be represented by one figure. If you search the words "information overload" on Google, as I did yesterday, you get 768,000 hits. That has a certain self-satirical quality. It does, however, reflect the broader problem, which has been called "data asphyxiation".

On this occasion, I thought I might tell you how I have come to deal with the burden of information overload. It is not a coping mechanism that will suit everyone, but some of you may find it useful. A maxim I have found compelling is: Live as if you will die tomorrow, but read as if you will live forever. An insight that I have found useful in my own journey is that if you try to learn too much, you may end up learning nothing.

I decided long ago that if I kept reading as widely as I had been and in an unsystematic fashion, I would acquire a lot of information in the short-term, but the depth of my understanding of anything would not improve. For those of you who will become barristers, you will learn that it is essential to the craft that you cram your mind with an enormous amount of information about the subject matter of the proceedings and instantly download the whole of that database as soon as you come out of court. Unfortunately, this process becomes so ingrained, that you find that you instinctively download a lot of things you would have preferred to retain.

My technique for adapting to the pressures of information overload was to choose one area of intellectual inquiry about which I could read in-depth, preferably an area not directly connected to my daily activities.

I first chose the history of western Shanghai. This was the early eighties when China was still a totalitarian State and the possibility of the extraordinary change in the People's Republic and the re-emergence of Shanghai as a major international city was not within the realms of contemplation. After

several years that project ceased, when I realised that I really couldn't do it properly unless I taught myself how to read Chinese. That, at the time, seemed a daunting project albeit, in retrospect, I wish I had had the courage to proceed.

The substitute was far removed in time and place. I read in depth into medieval history, concentrating on the life of Thomas Becket. This was a subject on which I was tolerably confident that there were no new documents to be discovered. My schoolboy Latin was probably enough. Becket had attracted a large, but finite and apparently manageable body of historical writing.

This became my intellectual hobby. It was a disciplined way of organising my ignorance. It had a point, a purpose and a finite end. Instead of acquiring a glib understanding on a wide variety of subjects I could come to understand a particular subject in-depth and eventually, perhaps, write about it. My overseas travel acquired a purpose. There were places to be visited, such as Canterbury itself. In those pre-Amazon days books had to be discovered, often by chance, in second hand bookshops. I recall well the thrill of finding a definitive biography in a Paris bookshop of the contemporary french king, Louis VII. I did not experience anything like the same sensation when, in order to check whether this was still the definitive biography in french, I conducted a thirty second check on Amazon France, to find that it was.

Most enjoyable was the time I spent in libraries throughout the world, particularly in London, Sydney and Washington. Most significant of all was the magnificent resource which, as a graduate, I had access to in the Fisher Library of this University. The greatest number of entries in my bibliography were found here.

Eventually I was able to organise this research in the form of a draft during a sabbatical I gave myself from the Sydney bar in 1992. Nothing more was done until 1999, when I was asked by John McCarthy QC, a Fellow of the Senate, to address the St Thomas More Society, of which he is President.

Over the course of the last five years this little obsession has transformed itself into a series of lectures to the Society on the life and death of Thomas Becket and his relationship with Henry II. It has been a wonderful journey but, in the last lecture late last year, I finally killed Becket. The lectures will be published next week by the Society as a book and this journey is over.

I am now actively looking for another hobby.

My ability to continue to grow intellectually was determined by the eight wonderful years that I spent as an undergraduate in this University. I remember those years with the greatest fondness. It is for that reason that the particular honour bestowed upon me by the University today in the form of an Honorary Doctorate of Laws is received with heartfelt gratitude.

My career as an undergraduate included four full years of an Arts Degree, all of them on campus, before leaving for the law school in Phillip Street. I have always regretted that the law school was not part of the campus. I applaud the decision that has finally been made to move it here. It will enrich the lives of future law students, as it will enrich the intellectual life of the University as a whole. Some things will be lost. Special measures will be required to retain the close connection between the courts and the profession with the Law Faculty. I have no doubt, however, the move will be a positive one.

May I also applaud the choice of design. The Law Faculty last year had an inaugural alumni dinner at which models of the various tenders were displayed. The one chosen was clearly outstanding. Inevitably there must be sacrifices. The library will now be in the basement, instead of the students, but it is a magnificent building.

All of you will now be alumni, at a time when the University, and in particular the Law Faculty, is seeking to create a stronger relationship with its graduates than in the past. As is well known this is a tradition that the American universities have long since established, to their inestimable advantage, particularly financial, but not only such. It is no accident that the overwhelming proportion of the greatest universities in the world are now American. It is a reflection of the wealth of that nation. It is also a reflection of the way they organise their universities and their finances. Their relationship with alumni plays a critical role. We Australians will have to move in the same direction. The time when government finances were regarded as some kind of magic pudding – in which you could cut off a slice and it would just grow back – has long since gone.

All of you in the future will be called upon to support the Law Faculty through an alumni link. This has

sometimes been portrayed as some kind of invitation to charity or at most an expression of gratitude. It should not only be so regarded. This is a matter of enlightened self-interest.

American law alumni form a distinct network. There is a bond between people who have shared the experience of attending the same institution, often being taught by the same people. From the point of view of new graduates this network can be of assistance in their development in the profession. However, even after you are well established in the profession, the stimulation of interaction with younger people who have graduated more recently has considerable advantages.

The degree you receive today has a reputation. That reputation is determined by the quality of the students, staff and course content of this Faculty over decades past. That reputation, and therefore the recognition that your degree will receive in the future, will be adversely affected if the quality of the degree is not sustained. It is in your own long term interests to do what you can to ensure that this Law Faculty continues to have the highest reputation.

I realise that many of you will not in fact practice law. Nevertheless, the significance of your legal training will manifest itself in numerous ways in your future careers. I wish you well in your journey.

In conclusion, I thank the Fellows of the Senate for the honour bestowed upon me by the award of this honorary degree.

The Integrity Branch of Government - The First Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law.

**THE INTEGRITY BRANCH OF GOVERNMENT
THE FIRST LECTURE IN THE 2004 NATIONAL LECTURE SERIES
FOR THE AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW
BY THE HONOURABLE JAMES J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 29 APRIL 2004**

The sumptuary rules of the Chinese Imperial Civil Service established a rigidly defined set of dress requirements for all public officials: from the black lacquer-treated hats with protruding wings and the black boots trimmed with white lacquer to the ceremonial belts backed with jade, rhinoceros horn, gold or silver. Each distinctive sub-unit or rank of the civil service also had a badge of rank in the form of a cloth chess piece embroidered, in the case of the civil hierarchy, with birds in pairs. The top rank had two stately cranes soaring above clouds. The lowest rank had a pair of earth-bound quails, pecking the grass. The military ranks wore breast patches carrying images of fierce animals such as lions, tigers, bears and panthers.

There was one distinct civil service unit with a unique system of badge identification. Western scholars, by an inaccurate analogy with the Roman administrative system, called this unit the "censorial" or "supervising" branch of government. Its role was to maintain the integrity of the mechanisms of governance. Civil officials in this branch had an embroidered breast patch, which was identical for all members of the branch, regardless of rank. It displayed a legendary animal called an Hsieh-chih which could detect good from evil and, allegedly, could smell an immoral character from a distance, whereupon the Hsieh-chih would leap upon the person and tear him or her to pieces [1].

The Chinese censorial system was organised as a separate branch of government to maintain surveillance over all other governmental activities and thereby enforce proper behaviour through processes of impeachment, censure and punishment. It also had the function of initiating recommendations for change of governmental policies, practices or personnel. The success of the Chinese Imperial tradition, a system of administration, manifest in its longevity, has been attributed to the power and vigilance of the censorate [2].

The Thirteenth Century Mongol Emperor, Kublai Khan, once said of his governmental structure:

"The Secretariat is my left hand, the Bureau of Military Affairs is my right hand, and the Censorate is the means for my keeping both hands healthy." [3]

Insofar as the Chinese system had a separation of powers, which given the overriding authority of the Emperor could not be rigid, it was the censorate rather than the judicial arm of government that could be characterised as sufficiently independent to constitute such a separation. One of the means by which this independence was enforced was that censors had a right to directly address the throne by means of written memorials, without any intervening official commentary. If not independence in our sense, there was a substantial degree of institutional autonomy.

Of course, like any other branch of government the censorate was liable to develop institutional interests of its own. There is a natural tendency in any surveillance mechanism to come to believe that the administration of government exists for the purposes of being investigated. There would naturally be times when these processes were taken too far. One Imperial Grand Secretary complained about the continued intervention of Censors in matters of administration. He said they were like the "squawkings of birds and beasts" [4].

In the 1920s, Sun Yat-sen proposed that the Republic of China adopt a five yuan or branch system of government comprised of three branches from the Western governmental tradition - executive, legislative and judicial - and two from China's past: an examination branch and a control or integrity branch. When an American constitutional lawyer recently proposed that modern constitutions should now incorporate a separate institutionalised integrity branch of government [5], another American scholar drew attention to the similarity between that proposal and the Chinese Imperial tradition

adopted by Sun Yat-sen [6].

I recognise that there have been a number of candidates for a "fourth branch" designation over the years. The number does not matter. The idea does. The primary basis for the recognition of an integrity branch as a distinct functional specialisation, required in all governmental structures, is the fundamental necessity to ensure that corruption, in a broad sense of that term, is eliminated from government. However, once recognised as a distinct function, for which distinct institutions are appropriate, at a level of significance which acknowledges its role as a fourth branch of government, then the idea has implications for our understanding of constitutional and legal issues of broader significance.

I will presently outline some of the many ways in which this function is performed. However, recognising "integrity" as a fundamental mechanism of governance, to the degree that it can be called a fourth branch of government, equivalent in significance to the legislative, executive or judicial branches, allows us to analyse the individual components in a different way. I put the idea of integrity forward as a useful way to conceptualise a universal governmental function, within which the body of law known as administrative law may find a place.

The Idea of Integrity

Considered as a branch of government, the concept focuses on institutional integrity rather than personal integrity, although the latter, as a characteristic required of occupants of public office, has implications for the former. I use the word in its connotation of an unimpaired or uncorrupted state of affairs. This involves an idea of purity which, in the context of mechanisms of governance, will often give rise to contestable propositions. Nevertheless, in any stable polity there is a widely accepted concept of how governance should operate in practice. The role of the integrity branch is to ensure that that concept is realised, so that the performance of governmental functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.

So understood, institutional integrity goes beyond matters of legality. However, it is not so wide as to encompass any misuse of power. Beyond issues of legality, the integrity of a governmental institution is determined by two additional considerations. First, the maintenance of fidelity to the public purposes for the pursuit of which the institution is created. Secondly, the application of the public values, including procedural values, which the institution was expected to obey.

I realise that these are general, perhaps vague, statements. In that respect they do not suffer from any infirmity that is unusual in this kind of discourse. A focus on fidelity to purpose and to applicable public values does, in my opinion, distinguish the integrity function from a focus on the quality of actual outcomes. The latter is the focus of executive decision-making and of much legislative and judicial decision-making.

A short definition is that the integrity branch or function of government is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose. This definition resonates with words frequently deployed in administrative law discourse. I intend them to have effect at a higher level of generality. It should be regarded as a first cut.

Overlap of Functions

Many of the existing institutions of the three recognised branches of government including the Parliament, the head of state, various executive agencies and the superior courts, collectively constitute the integrity branch of government.

The idea of a "separation of powers", where each power or function is performed by a separate institution, has always been an over-simplification. Notwithstanding the strictures of Article III jurisprudence in the United States and the even stricter Chapter III jurisprudence in Australia, it has always been more accurate to describe the system, as one American scholar once did, as one of "separated institutions sharing powers"[7].

There are numerous examples of a particular institution, said to be one of the three branches of the traditional division, exercising the functions of one of the other branches. I give only a few examples.

The extent to which the executive performs a legislative function, even by amending actual legislation

under a Henry VIII clause, has been obvious for a long time. Of course, the degree of control in a Westminster system that the executive has over the Parliament would lead any observer concerned with matters of substance rather than of form to locate the source of almost all legislation in the executive branch. On the other hand, the different system in the United States involves Congressional specification of so much fine detail in a legislative text as to bear the characteristic of the performance of an executive rather than a legislative function.

The recognition that judges make law, particularly in the context of the traditional common law, similarly bears a legislative character. Such a role performed by the courts, is substantially expanded in any jurisdiction which has a Bill of Rights or equivalent provision. At times, notably in the United States, in contexts such as the determination of acceptable arrangements for electoral districts or the racial integration of education systems, judicial decision often bears an executive character.

These examples are intended only to establish the proposition, at a general level, that functions appropriately classified in one of the traditional three-fold classification of the separation of powers are frequently performed by an institution which has as its primary role one of the other characterisations. So it proves with the integrity branch of government.

Integrity Institutions

I begin with the Parliament as an institution. Clearly, its primary function of Parliament is legislation. However, Parliament does much more than pass statutes. The traditional role of ministerial responsibility in a Westminster system - or in contemporary argot, "accountability" - can be understood, in part, as the performance of an integrity function. The institutional manifestations of such responsibility: the existence of a formal Opposition, the significance of daily question time and inquiries by parliamentary committees, perform the integrity function of government.

In a system such as that of the United States, where the executive is not formally responsible to the legislature, the various provisions for checks and balances, most notably the detailed supervisory functions of Congressional committees, can similarly be seen as performing an integrity function. So too with the process of impeachment.

It has been suggested that the supervisory functions of Parliament - whether through question time or through parliamentary inquiries - should be regarded as in some manner part of the legislative function. No doubt legislation may be required to remedy defects that are identified by an inquisitorial process. However, once an integrity function is identified as a separate and distinct role, there is no need for such a characterisation to be the only function seen to be performed. The Parliament as an institution does more than legislate. It performs an important role in ensuring that powers conferred upon the executive and on judges, given the authority of Parliaments to remove judicial officers, are properly performed. This integrity function of Parliament lies at the heart of the legitimacy of our governmental process.

In a Westminster system of Government, the head of state, the Queen in the United Kingdom and the Governor-General in Australia, is also part of the integrity branch. This is not the case in those nations which combine the positions of head of state and head of government, such as the United States.

When comparing the British system and the United States system, it is important to get the terminology correct. It is traditional to refer to the English system as a monarchy and to the United States as a republic. When one considers the actual powers of the head of state, the substance of the matter is the opposite[8]. The United Kingdom is in fact, a republic with a hereditary president. The United States is in fact a monarchy with an elected king. Once we have the terminology right we can properly appreciate the differences between the systems. End of digression.

Where the head of state is separate from the head of government, the former is able to act as a check and ensure the proper functioning of the system. Walter Bagehot's three-fold classification of the powers of a constitutional monarch in the English Constitution was: to be consulted, to encourage, and to warn. The functions of the head of state as a symbol of national unity go beyond an integrity function. However, an integrity function is performed, or is able to be performed, by the Queen in England, and by the Governor-General and Governors in the Australian federal system.

In our system a head of state must, of course, act on the advice of an appointed Minister. In its origins, this was a constitutional requirement intended to protect Parliament from the arbitrariness of royal authority. This historical relationship is manifest in the terminology of the traditional designation. The very word "minister" indicates a position of inferiority on the part of one to "minister" to another, i.e. the

royal personage or representative. It indicates that one was a servant of another. The terminology of giving "advice" was, in its feudal origins, accurate. The monarch could accept or reject "advice". We continue to use the word "advice", when we mean, albeit politely, something like a direction.

A reserve power of undefined but limited scope may exist in exceptional circumstances enabling the head of state to act other than strictly on the basis of advice. This, of course, is a controversial issue, the controversy in Australia stemming from the dismissal of the Whitlam Government in 1975. In order to recognise that there is an integrity function, it is not necessary to seek to resolve that controversy.

I do, however, wish to note what appears to me to be an extension of previous claims on the part of a Governor-General. In his address to open the Centenary Conference of the High Court, the present Governor-General said:

"... the Prime Minister can have his commission withdrawn by the Governor General if he loses the confidence of the Parliament or is in material breach of the Constitution." [9] [Emphasis added]

It is not apparent that a "material breach" would have to be determined in legal proceedings, nor who would judge its 'materiality'. So far as I am aware, no predecessor of the Governor-General had ever formulated a reserve power in terms of a "material breach of the Constitution".

Sir Paul Hasluck outlined the integrity role of the Governor-General, not in gender neutral language, but as follows:

"(The Governor-General) has a responsibility to see that the system works as required by the law and conventions of the Constitution, but he does not try to do the work of the Ministers ... He can himself question the conclusion, seek to know the reasons for it, draw attention to relevant considerations to ensure they are taken into account, and satisfy himself that the proposal does express the single mind of his advisers, but he himself, while influencing the outcome of discussion in this way, needs to be careful not to be an advocate of any partisan cause. In doing this, he has two dominant interests - one is the stability of government (no matter from which political party he is drawn) and regard for the total and non-partisan overall interests of the people and the nation." [10]

There have been different views expressed by Governors-General as to their role in checking the legality of government conduct [11]. Where the lawfulness of a particular proposal is arguable, the Governor-General or Governor cannot and should not get involved in the issue of lawfulness beyond, at most, seeking advice from the Attorney-General or Solicitor-General and acting on it. An issue may arise where a matter is not justiciable. The view has been expressed by a former Governor that in such a case a Governor-General or Governor would be entitled to decline to act on advice "if there were clearly a lack of legal power to do the act or if it were clearly contrary to the law" [12]. However, matters of clarity are, ironically, often contestable.

Many of the institutions of the integrity branch appear to be emanations of the executive. However, over the years a number of such institutions have, by legislation and practice, developed an independence which has become institutionalised and often entrenched. Such institutions perform supervisory roles with respect to each of the other three branches - legislative, executive or judicial - although most are concerned with the executive.

Perhaps the oldest such institution is the centralised audit office which we in Australia call the Auditor-General. In England the office dates back to the 1860s. This is an institution replicated in all governmental systems. The flow of funds associated with government has always been a critical point for the possibility of corruption. Ensuring that government expenditure is properly made by means of financial audit is clearly an integrity function. Its focus is probity.

Audit offices have, particularly over recent decades, expanded the scope of their activities into performance auditing, designed to achieve the "three E's": economy, efficiency and effectiveness of governmental programmes. A performance audit bears more of a characteristic of an executive function and is designed to ensure the quality of actual decisions. It is concerned with merits rather than with probity. Again we have a single institution performing divergent functions. However, historically, audit offices have their origins in the integrity function.

The clearest example of the distinctiveness of an integrity function over recent decades is the salience that has come to be given to the prevention of corruption. Obviously this is not a new problem. However, its control has taken new institutional form. In New South Wales the Hong Kong model of an

Independent Commission Against Corruption was adopted. Similar functions are performed by such bodies in other Australian States, in some cases by the Ombudsman. There is a statutory Corruption Commission in Western Australia. In 2002 two Queensland institutions were merged in the Crime and Misconduct Commission. In New South Wales a separate organisation called the Police Integrity Commission has been created, on the recommendation of the Wood Royal Commission, to investigate corruption in the police force and to provide oversight of the management of allegations of misconduct by the police service. A feature of this scheme is the creation of an internal mechanism - called the Inspector - to audit the operations of the Police Integrity Commission and to deal with complaints that it has abused its power[13]. Such internal checks by inspectors have also been adopted in security agencies.

The definition of what constitutes "corruption" for relevant purposes may vary, but the integrity function is clear. The jurisdiction of such bodies extends beyond the members of the executive branch. In New South Wales and in some other States it can encompass conduct on the part of parliamentarians and judicial officers.

Complaints concerned with the efficiency or courtesy of particular persons are dealt with by Ombudsmen and other mechanisms of complaint handling. In the case of judicial officers in New South Wales such complaints are dealt with by the Judicial Commission. In the latter case, where complaints raise issues of integrity they are likely to be classified as serious and dealt with in a different manner to the general run of complaints[14]. Complaint mechanisms are designed to improve the quality of decision-making and are more in the nature of the performance of an executive function, than an integrity function. Nevertheless, many complaint handling bodies, including Ombudsmen, do perform integrity functions, in the course of, or sometimes in addition to, dealing with individual complaints.

Over recent decades, concern with the personal integrity of public officials has also taken an institutional form. Formal codes of ethics or other documents identifying standards of behaviour have been promulgated. A focus of concern has been the resolution of conflict of interest issues that arise in the course of a decision-making process. In the United Kingdom, these matters have developed in the context of the 1994 Nolan Committee report on Standards in Public Life. Throughout the world centralised agencies responsible for the public service have developed standards of conduct and mechanism for their enforcement.

In some places separate institutions have emerged. In Ontario a statutory Integrity Commissioner advises parliamentarians and public servants on ethical conduct. In Queensland an Integrity Commissioner is appointed under the Public Sector Ethic Act 1994 (Qld) to advise public officials on conflict of interest issues.

Integrity issues are often the focus of attention of public inquiries. These are conducted by Parliamentary Committees and by executive inquiries, notably Royal Commissions. Such ad hoc inquiries have been of considerable significance in many jurisdictions.

In Australia, over the course of the last decade or two, there have been a number of inquiries that exposed corrupt or otherwise improper conduct in government. They have included the Western Australian Royal Commission into the Commercial Activities of Government, referred to as the Inquiry into "WA Inc", the Fitzgerald Inquiry into Corruption in the Queensland Police Force and the Wood Royal Commission into the New South Wales Police Force.

In the United Kingdom, the Scott Report on Matrix Churchill, the Phillips Report on bovine spongiform encephalopathy (BSE), colloquially and conveniently referred to as mad cow disease, and the Hutton inquiry into the British Government's participation in the Iraq War, all raised integrity issues.

The integrity function of government has been the basis for the creation of new statutory rights designed, in part, to enable the function to be better performed, including by involvement of individual members of the public, non-governmental organisations and the media. Freedom of Information legislation is of that character[15]. So is whistleblower legislation[16].

The Judiciary's Role

I turn to judicial institutions and the performance of integrity functions by courts. Constitutional law is a clear case of an integrity function directed towards the legislature. This form of judicial review has always been a feature of the Australian legal system. For over a century it has been at the forefront of the jurisprudence of the High Court.

This role is expressed in a recent majority joint judgment of the High Court in *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at [66].

"... the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements".

Issues of constitutional law are not the focus of this address.

The distinction between judicial review and merits review is a fundamental principle of Australian administrative law. Although, as has sometimes been said, the legality/merits distinction is not as clear as is often assumed[17], nevertheless the distinction is valid.

Judicial review is a manifestation of the integrity branch of government. Merits review is a manifestation of the executive branch. The former seeks to ensure that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised. Merits review, in the common Australian formulation, is concerned to ensure that the "correct and preferable" decision is made in a particular case and that the fairness, consistency and quality of decision-making is maintained. Such a function is part of the executive branch.

At a federal level, Australian administrative law has a constitutional dimension by reason of s75(v) of the Constitution, which expressly confers jurisdiction on the High Court with respect to what has come to be called, in recent years, the constitutional writs of prohibition and mandamus. This constitutional dimension is, if anything, even more clearly a manifestation of an integrity function.

The distinction between legality and merits is, as has often been emphasised, fundamental to the proper delimitation of the judicial role in a democratic polity. However, in the oft quoted words of Chief Justice Marshall in *Marbury v Madison*[18]:

"It is, emphatically, the province and duty of the judicial department to say what the law is."

This insight, originally expressed in a constitutional law context, has been applied by the High Court of Australia in administrative law as identifying the essential characteristic, indeed duty, of the judiciary in that context.

The formulation of the scope of administrative law in Australia that has most frequently been cited in recent judgments of the High Court, is that of Brennan J in *Attorney General v Quin*[19]:

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's powers. If, in so doing, the court avoids administrative injustice or error, so be it, but the court has no jurisdiction simply to cure an administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

The formulation that judicial review is directed to "enforcing the law which determines the limits and governs the exercise" of the power under consideration, is now a widely accepted statement of the legality/merits dichotomy. It states the 'legality' side of the legality/merits dichotomy in terms which identify the role as part of the integrity function to which I have referred.

Subsequent references to Brennan J's formulation have not adopted his Honour's emphasis on statute as the source of administrative law principles. His Honour's reference to the "law", as to what was being 'declared' and 'enforced', may extend to encompass principles of the common law which "determine the limits and governs the exercise" of the relevant powers, as well as a statute that has such an effect.

As Sir Anthony Mason noted when he delivered the first National Lecture Series on Administrative Law, there is a longstanding debate as to the foundations of judicial review between those who find its origins in the common law and those who find its origins in statutory interpretation[20]. This debate has engaged many academics in England[21]. In Australia the debate has occasioned commentary

which has included, at the level of federal administrative law, a constitutional dimension arising from the express conferral on the High Court of the powers in 75(V) of the Constitution[22]. In Australia the issue has attracted judicial attention[23].

Sir Anthony Mason in *Kioa v West*[24] supported a common law basis for the duty to act in accordance with procedural fairness[25]. This was in contrast with the view advanced by Sir Gerard Brennan that procedural fairness was an issue of proper statutory interpretation - the *ultra vires* theory of the English debate[26]. The views of Sir Anthony Mason were adopted in a subsequent judgment by a majority of the High Court[27]. Nevertheless, in more recent judgments of the High Court the matter has been treated as open, although the majority appear to support the common law duty approach[28].

The issue which has animated the English debate is the relationship between judicial review and Parliamentary supremacy. Australia has never had a Parliament which was or is "supreme" or "sovereign" in the British sense. The restraints of the Commonwealth Constitution now have over a century of jurisprudence. Going back to the colonial predecessor legislatures, their actions were originally subject to review for consistency with the law of England and thereafter could be overridden by legislation of the Imperial Parliament. Australian experience was with what used to be referred to as a "subordinate" or "non-sovereign" legislature[29]. Perhaps for that reason, we have been more willing to emphasise that the doctrine of Parliamentary supremacy is itself a principle of the common law[30].

I have earlier expressed my preference for the common law basis[31]. The alternative seems to me to suffer from three defects.

First, it cannot explain the application of administrative law principles to the exercise of the royal prerogative. Although as Sir Anthony Mason has pointed out[32], it is still open to the High Court not to follow the *GCHQ* case[33], I can see nothing in Australian jurisprudence which would suggest that the High Court would not do so.

Secondly, the approach cannot explain the application of administrative law principles to non-statutory private bodies exercising public powers. The English case law after *Datafin*[34] is well established. It has been suggested that, until certain observations were made in *NEAT Domestic Trading Pty Ltd v AWB*[35], Australian case law was limited and indecisive[36]. However, I regard the High Court decision in *Forbes* as equivalent to *Datafin* in relevant respects. The *New South Wales Trotting Club*, as Gibbs J noted:

"... had no statutory power or recognition, but according to the evidence it controlled trotting in New South Wales by the consent of the government and all of the trotting clubs of that State. Under the Rules of Trotting it had extensive power." [37]

This limited liability company was found to be obliged to accord natural justice to a non-member punter before "warning off" under the Rules of Trotting.

Thirdly, I find the denial of a common law basis strained insofar as it invokes principles of statutory construction that are fictions. I refer, for example, to presumptions such as that Parliament intends that a statutory body will obey the laws of natural justice or that a statutory power will be exercised reasonably or logically[38]. Such matters will usually turn on the construction of the statute[39]. The law of statutory interpretation is a branch of the common law. A presumption of this character is a common law principle. To say that judicial review derived from a presumption in the common law of statutory interpretation is, nevertheless, based on the statute and not on the common law, is not a compelling distinction.

Policing the Boundary

The legality/merits dichotomy does not involve a bright line test. The boundary is porous and ill defined. Policing the boundary is a continual task, particularly of appellate courts.

Over recent decades Australian administrative law has diverged from that of England in important respects with respect to both the identification of the boundary and, perhaps of greater practical significance, the rigour with which the borderland is policed. The reason for the difference is to be found in the High Court's Chapter III jurisprudence. The separation of powers under the Commonwealth Constitution is of a different quality to anything that has been accepted in the United Kingdom. Indeed, it is enforced with greater rigour than in the United States. The consequent focus on

the proper boundary of judicial power in a constitutional context has affected the way in which the propriety of judicial review of administrative action is approached.

The English dalliance with substantive legitimate expectations, not yet approved by the House of Lords[40], will not be accepted in Australia. The determination in a line of cases from Coughlan and Begbie[41], of a "legitimate expectation" that a benefit will in fact be provided is not distinguishable in its consequences from merit review. That it has been justified on the basis of an overriding principle of preventing an "abuse of power"[42] is an interpretative concept which could obliterate the legality/merits distinction.

The further development of administrative law may lead to the recognition of new categories on the "legality" side of the legality/merits dichotomy. Any such category will be capable of description as an "abuse of power". (As envisaged by s5(2)(j) and s6(2)(j) of the ADJR Act which refer to "abuse of power".) That is quite a different process from adopting "abuse of power" as a general test.

As McHugh and Gummow JJ said in Lam[43]:

"In Australia, the observance by decision makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution."

Decision-making by State officers does not have the same constitutional overlay, but the result will not differ. As McHugh and Gummow JJ went on to say at [73], English common law, subject to the House of Lords, appears to apply minimum standards to administrative decision-making. "These standards fix upon the quality of the decision making and thus the merits of the outcome". Whilst their Honours emphasised the significance of the separation of powers under the Constitution[44], the same kind of restriction informs Australian common law applicable to State decision-making.

The scope of the Kable[45] doctrine appears likely to be resolved by the High Court in the near future. The doctrine of separation of powers has a similar degree of rigour under State Constitutions, no doubt in part by reason of linkage with the Commonwealth Constitution, including under s106-108. The separation of judicial power requires restraint on the part of the courts when approaching the border of executive, let alone legislative, power. For this reason the distinction between jurisdictional and non-jurisdictional error remains a critical demarcation in Australian administrative law.

Selway J has suggested[46] that Constitutional limitations on the role of the judiciary set the parameters for the development of the common law principles of judicial review. Whilst his Honour's proposition that Australian common law is uniform and must conform to the Constitution is based on authority, there do remain significant differences between judicial review of federal decisions under s75(v) of the Constitution and judicial review at common law of State decisions. Craig's case suggests that this remains the case[47]. Indeed as the reference in s75(v) to the common law remedies of mandamus and prohibition suggests, this is an area in which, to use Sir Owen Dixon's phrase, the common law is the ultimate constitutional foundation[48].

Australian common law retains the restrictions on judicial review which have long been part of our common law inheritance. It appears that, under the influence of European jurisprudence, the common law of England and Wales is changing. The Australian Constitution, with its more rigorous separation of powers, prevents our common law changing in the same direction.

In Australia, legitimate expectations give rise only to procedural rights.[49]

A similar approach appears from the refusal of Australian courts to accept another concept which has blurred the legality/merits distinction: the test of proportionality.

Professor Craig maintains that proportionality has not yet been recognised as a separate head of review in English law[50]. Nevertheless, the terminology appears with increasing frequency as a standard to be applied in determining the validity of decisions. It has a clear application in any matter which has a European Community law element. As that now includes the European Convention on Human Rights, by reason of the Human Rights Act 1998, the number of cases in which the test is not raised are likely to be few. Proceedings which would once have needed to invoke the strict standard of Wednesbury unreasonableness are now likely to invoke European law. The European Court of

Human Rights has decided that Wednesbury unreasonableness was an inadequate standard under Article 6 of the Convention and a proportionality test was required[51].

When applied to decisions which affect fundamental human rights protected by the Human Rights Act, the idea of proportionality acquires a dimension that can be called constitutional. Similarly, there are areas of Australian constitutional law, particularly with respect to purposive powers and review of subordinate legislation, where the concept of proportionality has been useful[52]. It appears that proportionality has a broader application in English law[53].

A proportionality test requires a court to assess the weight a decision-maker has given to particular considerations and to assess the balance struck between conflicting considerations[54]. Such a process can only be regarded as on the merits side of a legality/merits boundary.

Australian law is not required to accommodate European law. The proportionality test has not been accepted as a ground for judicial review[55].

Whatever its fate may prove to be in England and Wales, the strict Wednesbury test for unreasonableness is not likely to be subsumed in Australian law by a general principle of proportionality. As Gleeson CJ and McHugh J said in *Eshetu*:

"In *Wednesbury* itself ... Lord Greene MR said that what a court may consider unreasonable is a very different thing from 'something overwhelming' such that it means that a decision was one that no reasonable body could have come to."[56]

However, as Gummow J noted in *Eshetu* at [125], "'Wednesbury unreasonableness' may overlap with other more clearly defined grounds for judicial review". Much of what, in the future, is likely to be expressed in English administrative law in terms of proportionality, will fall to be analysed in Australia under those other grounds. The Human Rights Act will, in this regard, lead to a divergence of our common law traditions[57].

In the usual case, the starting point will be the statute conferring powers. The relevant restrictions on the exercise of a discretionary power will often be found by the construction of the statute. This is so even in those cases where the statute does not identify the grounds on which a direction is to be exercised.

As Dixon CJ said of such a case, in a passage recently cited with approval by McHugh and Gummow JJ[58]:

"If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case."[59]

There is, in this approach, no focus on the reasonableness or quality of the ultimate decision. The content of the decision will, of course, be a material part of the process of identifying an actuating purpose. The comparison to be made, however, is with the purpose permitted by the legislation, not with a standard of what a reasonable decision-maker may have done. The language of actuating purpose is the language of integrity. It does not cross to the merits side of the boundary.

There is a home grown formulation that trembles on the verge of merits review. It has been said that a decision-maker must give "proper, genuine and realistic consideration to the merits of the case". This formulation emerged from the particular context of the Administrative Decisions (Judicial Review) Act 1977 (Cth) where a specific ground of review is provided in s5(2)(f) for the exercise of a discretionary power "without regard to the merits of the case". Similar references occur in cases at common law[60].

As Professor Macmillan pointed out, this formulation may depart, at least in its practical operation, from the distinction made by Dixon CJ in *Klein v Domus Pty Ltd* quoted above[61]. He cites examples of how the standard has been applied to invalidate numerous decisions. After referring to a number of formulations of the legality/merits principle, Professor Macmillan said:

"Those principles enjoy a great measure of judicial respect, but are likely to be overshadowed if the administrative law standards that define how a discretion must be exercised are not, in truth,

standards at all. The rules for administrative decision making then become inherently vague, governed to an unhealthy extent by the sense of restraint or forbearance of the individual judge".[62]

A Full Court of the Federal Court has subsequently rejected the "proper, genuine and realistic" test, which it described as "invoking language of indefinite and subjective application, in which the procedural and substantive merits of any Tribunal decision can be scrutinised"[63]. The Court did, however, accept that where the decision can be characterised as a constructive failure to exercise jurisdiction, the decision is reviewable[64]. That is the language of integrity.

Perhaps the most difficult issue in this area of the law for a judge to discuss is the possibility that judges have, in particular cases, stretched factual findings with the effect that the case falls within a recognised ground of judicial review. This is a covert form of merit review which cannot always be corrected on appeal. There have been judicial observations on this problem. The High Court has warned of "overzealous judicial review"[65]. Academic commentary is of particular importance in this regard[66].

Some decisions seem to find, too readily, unreasonableness of that exceptional degree as the *Wednesbury* test calls for; expectations are said to have arisen and given the self-fulfilling appellation of "legitimate" too easily; administrative correspondence and memoranda are parsed and analysed in a search for signs of relevant and irrelevant considerations with excessive grammatical punctiliousness; minor and obviously irrelevant blemishes in a decision-making process are found to have offended the principles of fairness. Perhaps overriding all of this is the slippage of the terminology from matters capable of being identified as raising issues of the integrity of the process into merely matters of "good administration"[67]. Slippery concepts such as rationality and fairness can too readily be deployed in a manner which masks the true basis of decision.

As Gleeson CJ and McHugh J observed in *Eshetu*:

"Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as 'illogical' or 'unreasonable', or even 'so unreasonable that no reasonable person could adopt it. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence".

The observation by Dixon CJ in *Klein v Domus* quoted above, that the repository of the power is entitled to act on her or his own opinion of the justice of the case is a perspective which may be lost in judicial proceedings. Such proceedings lack balance in that the process focuses on identifying the content of the legality side of the legality/merits dichotomy[68].

What may be considered relevant considerations, proper purposes, a rule of policy, uncertainty, etc, let alone more vague tests such as proportionality or abuse of power, will naturally expand if a court does not have a clear conception of what kinds of facts, matters and considerations should be seen as relating exclusively or primarily to the merits. The experience and intuition of executive decision-makers, their understanding of the broader implications of a particular case and their insight into the public policy objectives of the statutory scheme, are rarely, if ever, the focus of attention in judicial proceedings. Matters that fall on the merits side of the legality/merits dichotomy, are often given inadequate, if any, attention. There is an inherent imbalance in the process.

If judges bear in mind that judicial review is directed to ensuring the integrity of governance, rather than ensuring that justice is done in the individual case, then the distortions that have sometimes been detected will be less likely to occur.

Judicial Legitimacy

Administrative law has long since emerged from Dicey's denial that it existed at all, to be recognised as a distinct body of law. It is understandable that those who specialise in the field will seek to identify general principles that serve to integrate, and thereby distinguish, their chosen specialisation. When concepts of the breadth of those sometimes referred to, such as 'principles of good administration' or prevention of 'abuse of power', are invoked, the discipline makes claims that the case law does not support.

I put forward the idea of an integrity branch of government as an alternative statement, at a high level of generality, that can provide a broader context within which the case law on judicial review can develop, without transgressing the proper role of a judiciary in a democratic polity.

The administrative law literature refers to a variety of purposes served by this body of law. These have included: the control of government power, the protection of individual rights, the improvement in the quality of administration, the fostering of participation in decision-making: Multiple perspectives are appropriate, indeed, they are inevitable. The integrity function emphasises some of the traditional themes, but links them in a different way.

The scope and content of judicial review involves, at its core, an issue of what Chief Justice Gleeson has felicitously called "judicial legitimacy"[69]. His Honour identifies fidelity to the exercise of powers for the purpose for which they were conferred on the judiciary as the essential quality sustaining judicial legitimacy. In the context of judicial review of administrative action this limitation requires attention to and emphasis on the distinction between legality and merits. His Honour added:

"The difference is not always clear cut; but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day and *Wednesbury* unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action."[70]

The idea that judicial review forms part of an integrity branch of government expresses the limits upon the permissible scope of judicial review in a manner which may be useful. The determination of when twilight has merged into night, to use Chief Justice Gleeson's metaphor, is never an easy task. There has, from time to time, been accurate criticism of particular judicial decisions as having, to mix my metaphors slightly, crossed to the dark side.

I do not mean to suggest that judicial review is co-extensive with the protection of integrity. The grounds for judicial review may be defined more narrowly than that. However, when the courts review matters which do not give rise to integrity issues, it is likely that they have gone too far.

Conclusion

There is, I believe, utility in identifying the common function performed by the institutions to which I have referred: Parliament when not acting as a legislature, the head of state, the courts by judicial review, auditors general, corruption commissions, royal commissions etc. Whilst also performing other functions, from legislation in the case of a Parliament to resolving individual disputes in the case of the judiciary, it is possible to identify a distinctive function which can be categorised as maintaining the integrity of government in the manner I have identified: i.e. ensuring that powers are exercised for the purposes and in the manner envisaged.

That there is a unifying theme, is suggested by the uniform reaction of those whose conduct is assessed in the performance of an integrity function. At the outset I mentioned the Imperial Grand Secretary who complained that the Chinese censor's conduct was like the "squawkings of birds and beasts". From Parliamentary question time to judicial review, from Auditor-General reports to Corruption Commission investigations, from Parliamentary Committee hearings to Royal Commission reports, those whose conduct is in question are apt to use terminology similar to "squawkings" in their own defence. That does suggest something similar is going on in all these processes.

Remember the Hsieh-chih, the mythical animal that could smell an immoral character from a distance and thereupon would tear him or her apart. Thus is the integrity function performed. The checks and balances establish a creative tension.

End Notes

1 See Ray Huang, 1587, *A Year of No Significance: The Ming Dynasty in Decline*, Yale Uni P, Newhaven (1981) pp53-54.

2 See Charles O Hucker, *The Censorial System of Ming China*, Stanford Uni P, Stanford, California (1966) p3.

3 *Ibid*, p6.

4 *Ibid*, p297.

5 See Bruce Ackerman, "The New Separation of Powers" (2000) 113 *Harvard Law Review* 633 at 694-696.

6 See William P Alford, "Book Review" (2000) 113 Harvard Law Review 1677 at n 96.

7 Richard E Neustadt, *Presidential Power*, Signet, New York (1964) p42.

8 I think this was pointed out by Lord Acton, but I cannot remember where.

9 Address by His Excellency Major General Michael Jeffery AC CVO MC on the Occasion of the Official Opening of the High Court of Australia Centenary Conference, Canberra, 9October 2003.

10 Paul Hasluck, *The Office of Governor-General*, Melbourne Uni P, 1979 p20

11 See George Winterton, "The Evolving Role of the Governor General", *Quadrant*, March 2004, pp42-46.

12 Richard E McGarvie, *Democracy: Choosing Australia's Republic*, Melb Uni P., Melbourne, 1991, pp71-72.

13 See Police Integrity Commission Act 1997 (NSW), Royal Commission into the New South Wales Police Service Interim Report, February 1996, Chapter 5: Final Report, May 1997, Chapter 9.

14 See Judicial Officers Act 1986 (NSW) Div 3.

15 Freedom of Information Acts have been passed in 1982 (Cth), 1989 (NSW), 1982 (Vic), 1992 (Qld), 1992 (NT), 1992 (SA), 1991 (Tas), 1989 (ACT).

16 See Public Interest Disclosure Act 1998 (UK); the Protective Disclosure Act 1994 (NSW) and the Whistleblower Protection Acts passed in 1993 (SA); 1994 (Qld); 2001 (Vic). See generally the papers in (2002) 33 AIAL Forum; Goode "Policy Consideration in the Formulation of Whistleblower Protection Legislation" (2000) 22 Adelaide Law Rev 22; and Note (2001) 29 Aust Bus.L.Rev 424.

17 See Peter Cane, "Merits Review and Judicial Review - The AAT as Trojan Horse", (2000) 28 Federal Law Review 213 and cf comments by Sir Anthony Mason, "Judicial Review: A View from Constitutional and Other Perspectives" (2000) 28 Federal Law Review 331 at 333-339.

18 (1803) 1 Chanch 137 at 177; 5 US 87 at 111.

19 See *Attorney-General v Quin* (1990) 170 CLR 1 at 35-36; subsequent references include *Minister for Immigration v Wu Shen Liang* (1996) 185 CLR 259 at 272; *Abebe v The Commonwealth* (1999) 197 CLR 510 at [195]; *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at [43].

20 "The Foundations and the Limitations of Judicial Review", (2001) 31 AIAL Forum 1 at pp5-12.

21 See the compilation of previously published articles in Christopher Forsyth (ed) *Judicial Review*, Oxford, 2000 and subsequently see the review of this book by Andrew Halpin, "The Theoretical Controversy Concerning Judicial Review" (2001) *Modern Law Review* 500; Geoffrey Jowell, "Vires & Vacuums: The Constitutional Context of Judicial Review" (1999) *Public Law*, 448; P Craig and Bamforth, "Constitutional Analysis Constitutional Principle and Judicial Review" (2001) *Public Law* 763; T R S Allan, "The Constitutional Foundations of Judicial Review: Constitutional Conundrum or Interpretative Inquiry" (2002) *Cambridge LJ*, 87; T Craig, "Constitutional Foundations, The Rule of Law and Supremacy" (2003) *Public Law*, 92; P P Craig, *Administrative Law* (5th ed) Sweet & Maxwell London (2003) esp at pp12-20.

22 Aronson and Dyer *Judicial Review of Administrative Action* (2nd ed) Law Book Co, Sydney, 2000, Chapter 3; Gaegler, "The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution" (2000) 28 *Fed Law Rev* 303; Bayne, "The Common Law Basis of Judicial Review" (1993) 67 *ALJ* 781; Mason "Foundations", supra, n 20 at pp5-16

23 I have considered this issue both extra-judicially, see Spigelman, "Foundations of Administrative Law" (1999) 4 *The Judicial Review* 69, 72-79 and 58 *Aust J of Public Admin* 3, and judicially, see *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 *NSWLR* 78 at 91-92; *Minister for Local*

Government v South Sydney City Council (2002) 55 NSWLR 381 at [6]-[13].

24 (1985) 159 CLR 550 at 584.

25 Ibid at 504.

26 Ibid at 609-616; FAI Insurance Limited v Winneke (1982) 151 CLR 342 at 407-413; Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 at 584-585.

27 See Annetts v McCann (1992) 170 CLR 596 at 598.

28 Cases include Abebe v Commonwealth of Australia supra at 553 [112]-[113]; Re Refugee Review Tribunal Ex parte Aala (2000) 204 CLR 82, 99, 38-40 at 142 [168] 155 [213]; Re Minister for Immigration and Multicultural Affairs Ex parte Epeabaka (2001) 206 CLR 128 at 147 [55]; Re Minister for Immigration and Multicultural Affairs Ex parte Miah (2001) 206 CLR 57 at 68 [29]-[31] 74 [52]-[53] 83 [89]-[90] and 109 [171]-[172]; Newland v Refugee Review Tribunal (2002) 76 ALJR 966 at 1018 [308]. I have discussed these authorities in Minister for Local Government v South Sydney City Council supra at [11]-[13].

29 See, e.g. Street, A Treatise on the Doctrine of Ultra Vires, Sweet & Maxwell, London, 1930, esp 27 and Part VII.

30 See Dixon, *Jesting Pilate*, Law Book Co, Sydney, 1965, at 206.

31 See Spigelman, "Foundations", supra n23.

32 Mason, "Foundations", supra n20 at p8.

33 Council of Civil Service Unions v Minister for the Civil Service (1985) AC 374..

34 R v Panel on Takeovers and Mergers ex parte Datafin Plc (1987) QB 815.

35 (2003) 77 ALJR 1263 esp at [27], [51], [120]-[123], [96], [99]-[115].

36 Aronson and Dyer, supra, (2nd ed) 97-103. Mark Aronson has made available to me a draft of the third edition which draws attention to NEAT v AWB.

37 Forbes v New South Wales Trotting Club Ltd (1979) 143 CLR 242 at 262.

38 See, e.g. Kruger v The Commonwealth (1997) 190 CLR 1 at 36; Hill v Green (1999) 48 NSWLR 161 at [72].

39 See, e.g. Hill v Green, supra at [74]; Bruce v Cole (1998) 45 NSWLR 163 at 189F-G.

40 See R v Home Secretary ex parte Hindley (2001) 1 AC 410 at 419, 4321.

41 R v North and East Devon Health Authority ex parte Coughlan (2001) QB 213; R v Secretary of State for Education and Employment ex parte Begbie (2001) 1 WLR 1115; R (Bibi) v Newnham London Borough Council (2002) 1 WLR 237; Rowland v The Environment Agency [2003] GWCA Civ 1885.

42 See e.g. Coughlan at 243-246 [57], [61], [66]; Begbie at 1129-1130, 1131, 1133-1134. See also Sir Stephen Sedley in Forsyth (ed) supra pp 302-303.

43 Re Minister for Immigration and Multicultural Affairs ex parte Lam (2003) 77 ALJR 699 at [72].

44 At [76]-[77]. See also at [28] per Gleeson CJ, [118]-[119] per Hayne J and [148] per Callinan J.

45 Kable v Director of Public Prosecutions (1995) 189 CLR 51.

46 Selway "The Principle Behind Common Law Judicial Review of Administrative Action - The Search

Continues" (2002) 30 Fed L Rev 217.

47 Craig v South Australia (1995) 184 CLR 103.

48 See Dixon, *Jesting Pilate*, supra n30, pp203ff.

49 See Lam, supra at [81]-[83], [111], [143], [148]. A further opportunity to determine the place of legitimate expectations will arise when the High Court considers the appeal from NAAF of 2002 v Minister for Immigration and Multicultural Affairs (2003) 127 FCR 259.

50 Craig, *Administrative Law*, supra n21 at 617-632.

51 Lustig-Prean VUK (No 1) (2000) 29 EHHR 548.

52 See e.g. *Nationwide News v Wills* (1992) 177 CLR 1 at 27-33; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 296, 376-377; *Leask v The Commonwealth* (1996) 187 CLR 579 at 593-595, 600, 612-615, 624; *South Australia v Tame* (1989) 166 CLR 101 at 165, 178; Bayne, "Reasonableness, Proportionality and Delegated Legislation" (1993) 67 ALJ 448.

53 See e.g. *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment* (2001) 2 WLR 1389 at 1407 per Lord Slynn.

54 See *R (Daly) v Secretary of State for the Home Department* (2001) 2 AC 532 at 547E-G.

55 See e.g. the cases collected in *Bruce v Cole* (1998) 45 NSWLR 163 at 185; *McCormack v Commissioner of Taxation* (2001) 114 FCR 574 at 592; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 670; Sir Anthony Mason "The Tension between Legislative Currency and Judicial Review" (2003) 77 ALJR 803 at 809; See also Aronson and Dyer, supra n22 289-292.

56 Eshetu supra at [44].

57 As I apprehended. See Spigelman "Rule of Law - Human Rights Protection" (1999) Aust Bar Rev 29 at 322-333; Spigelman "Access to Justice and Human Rights Treaties" (2000) 22 Syd LK R 141 at 150. The position is otherwise with respect to the incidents of a fair trial. See Spigelman "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 ALJ 29 at 47-48.

58 *Re Minister for Immigration and Multicultural Affairs ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [69].

59 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473.

60 See the authorities discussed in *Bruce v Cole*, supra at 185-186.

61 Macmillan, "Judicial Restraint and Activism in Administrative Law" (2002) 30 Fed L R 336 at 361.

62 Ibid, p357.

63 *Minister for Immigration and Multicultural Affairs v Athony Pillai* (2001) 166 FCR 426 at 442. See also *Weal v Bathurst City Council* (2000) 111 LGERA 181; *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at [62].

64 Ibid, pp443-444.

65 *Wu Shan Liang*, supra at 272. See also *Minister for Ethnic Affairs v Guo* (1997) 191 CLR 559 at 577; *Eshetu*, supra at 629, 646, 657; *Xu v Minister for Immigration and Multicultural Affairs* (1999) 95 FCR 425 at [55].

66 See Macmillan, "Judicial Restraint", supra n57.

67 See, e.g. Forsyth (ed), supra at p3, 95, 349.

68 See Macmillan "The Role of Judicial Review in Australian Administrative Law" (2001) 30 AIAL Forum 51 at 53.

69 See Murray Gleeson "Judicial Legitimacy" (2000) 20 Aust Bar Rev 4.

70 Ibid, p11.

Address on the Occasion of the Retirement of the Honourable Justice R P Meagher

**ADDRESS ON THE OCCASION OF THE RETIREMENT OF
THE HONOURABLE JUSTICE R P MEAGHER
AS A JUDGE AND A JUDGE OF APPEAL OF THE
SUPREME COURT OF NEW SOUTH WALES
15 MARCH 2004**

We gather here today to mark the departure from full-time involvement in the administration of justice of one of the intellectual giants of our legal history. The Honourable Roderick Pitt Meagher, known universally as Roddy, is the most widely loved judge of his time. There are some exceptions to that proposition but they need not detain us.

The source of the esteem in which your Honour is held is your combination of immense personal charm with an extraordinary intellect, reinforced by the wickedness of your tongue, the sparkle of your wit and the relentlessness of your intellectual honesty, not least with yourself. Throughout your career in the law, as lecturer, author, barrister and judge, you have followed the law where it led, whatever the consequences may be. On no occasion did anyone suspect that you fudged either the law or the facts to achieve a convenient, let alone a popular decision.

Often the confidence you exude, together with your extraordinary command both of the law and of the language to explain it, leaves the rest of us surprised, even anxious. That, however, is not your problem but ours.

As everyone in this courtroom knows your major contribution is found in that magnificent text *Equity: Doctrines and Remedies*, a joint work which is the product of a massive scholarly endeavour.

Justice Heydon said of this publication:

"It has extremely strong claims to be placed on, indeed at the top of, a short list of the greatest legal works written in the English language in the 20th century."^[1]

It is a different kind of text to any that had come before. It spoke without the diffidence characteristic of legal texts; it exuded, and sometimes luxuriated in, its own confidence and mastery of the subject; its style was irreverent, witty and disrespectful, including strongly expressed opinions about the inadequacies of judgments by judges of high repute. It heralded a new and distinctive voice in Australian legal discourse, a voice which would enrich the intellectual endeavour of a generation of lawyers in numerous further publications, speeches, judgments and, for those of us privileged to have experienced them, in conversations with you. I am confident you will, one day, find your Boswell. In the Court of Appeal and in the Court of Criminal Appeal, your Honour dealt with matters across the full range of this Court's jurisdiction, travelling well beyond equity jurisprudence. Chief Justice Gleeson, who is overseas and has asked me to apologise for his absence today, informs me that he was careful to ensure that you sat with him on your first appearance as a judge in the Court of Criminal Appeal. Immediately after the bench sat you turned to the Chief Justice and said:

"You only have to look at him to know that he is guilty."

Chief Justice Gleeson felt obliged to point out:

"The Appellant hasn't been brought up from the cells yet. You're looking at the court officer."

Throughout your years on the bench of this Court you have conducted yourself with unfailing courtesy to counsel and litigants. In hearings you have manifested an ability to direct attention to the real issues upon which the outcome of the case would depend, distilling the facts into their simplest form, before applying the precise principles of law required to determine the case. Your judgments are written concisely, accurately and with humour, encapsulating within a few pages what others take dozens to express. This is not the style fashionable amongst your judicial contemporaries, including myself.

There are many of us who yearned for more. We are, however, most grateful for what we received.

All of us cherish the memory of your many witticisms, your mischievous inventions, your flaunting of unfashionable opinions - some of which you probably hold - and your eloquent turns of phrase. Even those who have been the object of your most pointed barbs, many of which must have been hurtful, seem to accept that they were devoid of malice. I am sure they were. For no-one was exempt from a rapier like thrust at the heart of their reputation.

Sir Frederick Jordan was one for whom you have the highest intellectual respect. Nevertheless, with respect to a particular footnote in his Chapters in Equity in New South Wales you once observed, in a judgment:

"Great as is the homage we all owe to Sir Frederick Jordan, one must state that the footnote is nonsense. It has, of course, been approved by the High Court on about four occasions ... but that does not convert it into sense."^[2]

This was 1998, when your Honour had served on the Court for about a decade. In 1983, when your Honour wrote the Foreword to the republication of Sir Frederick Jordan's Papers^[3], the High Court judgments, to which you would later refer with such scorn, were mentioned in that Foreword. Far from being critical of those judgments, your Honour referred to them as an indication of the "current utility" of Sir Frederick's great work. Perhaps you were teasing. Your Honour was of course then counsel. This may have been an uncharacteristic display of tact, or at least discretion. You would rise above tact on the bench.

As you move into the entirely tact free zone of post judicial life, we look forward to continuing enrichment from your wit and your intellect. The fact that it will no longer be available to me on a virtually daily basis is a loss which I will feel deeply. So will many other members of this Court. I and we will miss you.

1 Heydon "The Role of the Equity Bar in a Judicature Era" in G Lindsay (ed) No Mere Mouthpeice: Servants of All, Yet of None Sydney (2002).

2 See Chief Commissioner of Stamp Duties v ISVT Pty Limited (1998) 45 NSWLR 639 at [64]; "Sir Frederick Jordan's footnote" (1999) 15 Journal of Contract Law 1.

3 Sir Frederick Jordan Select Legal Papers Sydney 1983 Foreword p2

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Our Common Law Heritage - Address to the 2004 Joint Study Institute of Law Librarians

OUR COMMON LAW HERITAGE ADDRESS BY THE HONOURABLE J J SPIGELMAN AC CHIEF JUSTICE OF NEW SOUTH WALES THE 2004 JOINT STUDY INSTITUTE OF LAW LIBRARIANS SYDNEY, 21 FEBRUARY 2004

I have been asked by the organisers of this event to provide an introduction to the common law heritage of the Australian legal system particularly for the international participants. Much of which I will say will be well known to the Australian participants and I apologise in advance for that.

Last year we celebrated the centenary of the High Court of Australia. That Court is now well known throughout the common law world as a final court of appeal for the quality of its judgments, which are frequently cited in a variety of jurisdictions. The centenary provided an occasion for recognising the longevity of our institutions, for acknowledging the origins of Australian jurisprudence in the common law of England and for recognising the emergence of a distinct Australian common law over recent decades. Nevertheless, the development of our common law continues to be influenced and informed by the jurisprudence of other common law countries and, at least at the level of the High Court, increasingly by international jurisprudence.

The unity of the Australian common law is determined by a particular feature of our Federal Constitution which differs in this respect from that of the United States. The High Court unlike the Supreme Court of the United States is the ultimate court of appeal on all matters not just constitutional matters or matters arising under federal laws. All aspects of the common law including the law of torts and of contracts, can be determined by the High Court, absent a federal element. Such cases do not reach the Supreme Court of the United States. In Australia the common law in all its respects is developed by the High Court of Australia in a single, unitary common law system.

There is another distinctive aspect of our federal system which promotes unity in our jurisprudence. The Constitution provides for the conferral of federal jurisdiction on State courts. With some specific exceptions of matters required to be conducted in Federal courts, matters arising under national statutes and the Constitution are regularly heard in State courts. For example, all national criminal laws are administered by State courts. Certain specific areas such as national taxation laws, national administrative laws, competition law, and, by reason of a collaborative arrangement between State and Commonwealth Parliaments, family law are the exclusive province of the Federal Court or the Family Court. The fundamental area of the common law is primarily a matter for State courts although, where the disputes also involve a federal statute provision, they are able to be conducted in the Federal Court.

As I am sure is true in all your jurisdictions, the judicial hierarchy of Australia is organised in layers, like Dante's Hell and for much the same reason. All States have a Supreme Court and a Local Court. The larger States also have District Courts. There are the larger States also certain specialist courts. At a national level the Family Court deals with all aspects of family law. The Federal Court has a substantial jurisdiction based on federal statutes some of which, as I have mentioned, constitute an exclusive jurisdiction. There is also a recently established Federal Magistrates Court which deals with smaller matters that hitherto were either in the Family Court or the Federal Court. Of course the High Court of Australia is the ultimate appellate court from all Federal and State courts, as I have mentioned.

It is against this institutional background that I wish on this occasion to make some observations about the common law heritage which is shared by the various jurisdictions represented at this conference.

The first and most distinctive aspect of common law procedure is its fundamentally pragmatic quality. We proceed by deciding the facts of particular cases. This process may take a very long time before a principle emerges by a process of induction. The common law method has never been more perceptibly described than it was on a number of occasions by Oliver Wendell Holmes. In one essay

he wrote:

"It is the merit of the common law that it decides the case first and determines the principle afterwards ... It is only after a series of determinations on the same subject matter, that it becomes necessary to 'reconcile the cases', as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step." [1]

What is involved in this process is the development of legal principles on the basis of actual practical decision-making and dispute resolution over long periods of time in the course of dealing with real problems that arise in real factual situations. This is, of course, a different process than that involved when applying a rule expressed in terms of a formulation of words contained in an overriding code that is to be applied to particular factual situations. That approach is the usual model of decision-making in civil law systems, whose jurisprudence is derived from Roman law and Canon law.

Contemporary comparative lawyers speak of a process of convergence between common law and civil law systems. One aspect of that convergence is the growing importance of statute law in many areas that have originally grown by means of the common law development to which I have referred. This has included significant alteration to contract and tort law and many other areas of the law, some reflected in statutes which have the force of a code.

The difference in approach between common law and civil law systems is well expressed in a metaphor derived from a cognate area of discourse in philosophy, namely epistemology, the theory of knowledge. One of the great controversies of the history of philosophy was between empiricists and rationalists. The former sought to relate knowledge, ideas, truth and meaning to experience, whereas the latter related these matters to pure reason, so that thought about such matters transcended mere experience. It was no accident that most empiricists were British - Bacon, Hobbes, Locke, Berkeley, Hume, whose intellectual tradition included the common law method. On the other hand the rationalists - Descartes, Spinoza and Leibniz, were continental, whose intellectual heritage was Roman law and Canon law.

Francis Bacon expressed the contrast between the two schools of philosophy in the following way:

"Empiricists are like ants, they collect and put to use; but rationalists are like spiders, they spin threads out of themselves." [2]

The common law method is the way of the ant: collecting particular fact situations which give rise to decisions relating only to those fact situations and putting them to use by a process of analogy or adaptation in other factual situations.

It is an important aspect of that process of decision-making, to use Oliver Wendell Holmes' insight, that the process involves the work of many minds, not simply a limited number of drafters of a particular code or statute, and which in the adversary system has been tested by persons who are trained to resist the application of whatever principles are suggested in one case to the detriment of their clients in a subsequent case. The furnace of the adversary system provides the heat in which the purity of the metal to be forged can be assured.

The adversary system is one of the two great mechanisms for establishing truth. The other is, of course, the investigatory system of civil law countries. As part of the process of convergence to which I have referred, common law processes of judicial decision-making and administration of justice are adopting features of the investigatory system, at the same time as certain adversarial ideas have been incorporated in civil law procedures.

One criticism that is often directed to the mechanisms of the common law, from those of a rationalist bent, is that the truth of a matter cannot be determined unless that is expressly the task embarked upon. I disagree. The common law adversary process is a manifestation of the power of Socratic dialogue, a respectable means of determining the truth.

It is through the processes of the ant that many of the most fundamental principles and procedures of the common law have been developed over the course of the centuries. That process is a continuing one. It is now being informed by parallel, but not identical, developments in the common law of a

number of jurisdictions. Increasingly, judges, especially appellate judges, are looking to international precedent. This is simply one manifestation of the multi-faceted process often called globalisation.

The common law is the product of the simultaneous operation of continuity and change. Fundamental principles have developed over centuries, in the manner I have described, and these principles continue to inform and energise the practical application of the law and direct its continued adaptation to new challenges and changes in technology, economy and society.

The fundamental principle referred to as the rule of law encompasses an idea of legality and of legitimacy in the administration of justice. Laws provide a predetermined rule or standard by which behaviour is to be assessed, particularly the behaviour of those exercising power and authority. Perhaps the most essential characteristic of the rule of law is that the law must operate to constrain the arbitrary exercise of power, both private and public. Persons and institutions who have power must exercise that power within, and subject to, a comprehensive framework of binding rules. The rule of law is not inconsistent with the exercise of authority. It is, however, inconsistent with the exercise of authority in an arbitrary manner.

There is no universally accepted idea of the rule of law or of the content of the concept. The label, I believe, becomes progressively less useful as its scope extends. However, its core content includes the idea of legality, to which I refer, and which is a fundamental part of our common law inheritance.

The importance of this approach to the rule of law has never been more forcefully or appropriately stated than that it was by the playwright, Robert Bolt in his play *A Man For All Seasons* about Thomas Moore, the Lord Chancellor of England who defied Henry VIII and was beheaded. In the play Thomas Moore delivers a passionate defence of the rule of law to his future son-in-law, Roper. Moore asserts that he knew what was legal, but not necessarily what was right, and would not interfere with the devil himself, until he broke the law. The following exchange then occurred:

"ROPER: So now you give the Devil benefit of law!

MOORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MOORE: Oh? And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast - man's laws, not God's - and if you cut them down ... do you really think you could stand upright in the winds that would blow then? Yes I'd give the Devil benefit of law for my own safety's sake."

This imagery of the law as a protection from the forces of evil is an entirely appropriate one. The interaction between positive law and morality is a matter that has been the subject of debate amongst philosophers for many centuries. But the pragmatic heritage of the common law is plainly manifest in Thomas Moore's riposte.

One of the fundamental principles of the administration of justice in a common law system is the principle of open justice. This is sometimes referred to in terms of the saying: "Justice should not only be done but should manifestly be seen to be done". For about a century it has now been firmly established in both England and Australia that there is no inherent power in a court to exclude the public. Various statutory provisions have been adopted which permit court closure or restriction of publication. But the fundamental rule is that judicial proceedings must be conducted in open court, to which the public and the press have access. Exceptions are strictly confined. As the Privy Council once put it, "Publicity is the authentic hallmark of judicial as distinct from administrative procedure"[3].

The principle manifests itself in a wide range of rules of procedure and of substantive law. It lies at the foundation of the obligation of a court to publish its reasons. The court is not only under an obligation to provide reasons to the parties in a case. Publication of reasons is to the public. Cases frequently arise as to the adequacy of reasons indicating the vigour of the principle of open justice in this respect.

Judges can no longer rely on the advice which Lord Mansfield gave to a general who, as Governor of an island in the West Indies, would also be obliged to sit as a judge:

"Lord Mansfield said to him 'Be of good cheer - take my advice - and you will be reckoned a great judge as well as a great commander in chief. Nothing is more easy; only hear both sides patiently - and consider what you think justice requires, and decide accordingly. But never give your reasons - for your judgment will probably be right, but your reasons will certainly be wrong.'"[4]

One of the reasons for requiring judicial impartiality, in terms of disqualification for bias, is the appearance of justice. It is determined by a test of what fair-minded people - not just the parties, but the public - might reasonably apprehend or suspect. Actual bias is not the test. A reasonable apprehension is enough because, as it is said "Justice must be seen to be done".

The issue also arises in Australian constitutional law with respect to the question of separation of powers. The principle of open justice is sometimes referred to when determining whether a function conferred on a judicial officer is incompatible with the office and accordingly, cannot be conferred on a judge.

The rule of natural justice that a judicial decision-maker must accord procedural fairness by way of a hearing is also often justified on the basis of the importance of the appearance that justice be done.

I note in passing two examples of the particular strength of character of British juries and advocates, at least in the past. The English Court of Appeal once held that a trial did not miscarry despite the fact that during the accused's Counsel's address to the jury the Chairman of Quarter Sessions kept sighing and groaning and was heard to say "O God" a number of times[5].

On another occasion the Court of Appeal rejected an allegation that a murder trial miscarried when the judge appeared to be asleep for fifteen minutes. The court was satisfied by a perusal of his summing-up that he must have been awake and that the mere appearance of being asleep was not enough. The court referred to the principle that "Justice must be seen to be done" as a "hallowed phrase" and described the appearance of the judge as inattentive or asleep as a "facile" application of the principle. Their Lordships concluded:

"It was not wholly without relevance that none of the experienced Counsel present found it necessary to take steps to awaken the judge or to acquaint him with the fact that his appearance seemed to be less alert than it should have been."[6]

It appears that English counsel are, or at least were, made of the same stern stuff as English juries. I doubt whether these authorities will survive the English adoption of the Human Rights Act.

Open justice also serves the important function that victims of crime, and the community generally, may understand the reasons for criminal sentences. The significance of this function was well expressed by Warren Berger, when Chief Justice of United States:

"Civilised societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental natural yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner or in any covert manner'. It is not enough to say that results alone will satiate the natural community desire for 'satisfaction'. A result considered untoward may undermine public confidence, and when a trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively it is important that society's criminal process 'satisfy the appearance of justice' and the appearance of justice can best be provided by allowing people to observe it.

...

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case."[7]

The operation of various rules designed to ensure the fairness of a trial is also based on appearances, for example, the prohibition of undue interference by a judge and of improper conduct by a court officer.

The principle of open justice is the basic mechanism for ensuring judicial accountability in a common law system. The cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perception of bias and to ensure the fairness of a trial, that is the way the judiciary is held accountable to the public.

The "public" which, in a democracy, the judiciary serves, must not be understood in any immediate

popular sense. The judiciary serves the "public" understood as a historical continuum: acknowledging debts to previous generations and obligations to future generations.

The relationship between the principle of open justice and judicial accountability has been emphasised by Chief Justice Gleeson, the Chief Justice of Australia, at a time when he occupied my post, he wrote:

"The corollary of the obligation of judges to conduct their business in public, and to give reasons for their decisions, is that they are exposed and are regularly subjected to public comment and criticism. The practical importance of this should not be underestimated, especially in an age when attitudes towards authority are no longer deferential, and are frequently the opposite. Being a judge is not a suitable occupation for the thin skinned." [8]

His Honour said with respect to the obligation to give reasons:

"This form of accountability is not to be taken lightly. The requirement of giving a full reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from judges, how many other decision-makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Those decisions, other than those made by judges, are made by people who may choose whether or not to give their reasons." [9]

The principle of open justice did not emerge in our legal history by a process of deduction from an abstract ideal or general formulation of words. Like all other important aspects of our legal system, the principle was derived from observation of the actual practice of dispute resolution over long periods of time which, once recognised as a principle, influenced further development of the practice.

The word "court" in the sense of the judicial institution, shares a common origin with a royal or aristocratic "court" which, by its nature, involved a broader range of persons than the immediate disputants. The early use of juries as representatives of the community, also implied public access. Such are the pragmatic origins of fundamental principle in the common law [10].

The same can be said of another fundamental principle of the administration of justice, the principle of a fair trial. That principle is another manifestation of the slow development over a long period of time, in the course of the practical determination of real issues of principles of great, indeed overriding, importance.

I use the word principle deliberately. In Australia we do not have, in the form of a Bill of Rights or any equivalent document, a formal recognition of a right to a fair trial. A principle may be more flexibly applied than a freestanding right. However, the vigour of the principle of a fair trial in our system leads me to doubt whether, at least in this respect, the adoption of a Bill of Rights' type provision containing such an express undertaking would lead to any substantial difference in the actual operation of our legal system.

The principle of a fair trial operates as a qualification on the ability of the legal system to identify the truth. The reason for the development of the principle is not that we do not value truth in the common law tradition. It is just that there are other values with which the pursuit of truth may sometimes conflict. This proposition was stated with great eloquence by Vice Chancellor Knight Bruce in 1846, when he said:

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, the obtaining of these objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly, or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things may be loved unwisely - may be pursued too keenly - may cost too much." [11]

The restraints on the processes for determining the truth in our common law system are multi-faceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. The principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. It took many years of pragmatic development before a single overriding principle was recognised. Once so recognised it informed and energised further developments in the law.

In Australian jurisprudence, the principle of a fair trial is based on the inherent power of a court to control its own processes, particularly, on its power to prevent abuse of its processes. This is quite different in its origins to foundation of such a principle in a Bill of Rights or other such overriding code provision.

The court's power to prevent its processes being seen to tolerate illegal or improper conduct has been exercised in numerous ways over the years. For example, the Judges' Rules adopted as a guide for proper police conduct in 1912, and for many years implemented by courts in Australia until, in large measure, being superseded by statutory provision, were based on this power. The detailed controls on confessional evidence which developed over a period of time were also, in large measure, based on such considerations. So was the emergence of a discretion to exclude evidence obtained by illegal or improper means. These matters go beyond the principle of a fair trial to a general principle of fairness.

It is not possible to attempt to list exhaustively the attributes of a fair trial. The issue has arisen in a seemingly infinite variety of actual situations in the course of determining whether something that was done or said either before or at the trial, deprived the trial of the quality of fairness to a degree where a miscarriage of justice had occurred. However, over the course of centuries certain identifiable issues have arisen on many occasions and led to similar judgments being made as to their effect on fairness of proceeding.

There is probably no aspect of the preparation for a trial or of actual trial procedure which is not touched, and often determined, by fair trial considerations. As Lord Devlin once put it:

"Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise by the judges of their power to see that what was fair and just was done between prosecutors and accuseds."^[12]

The kinds of issues that have arisen are so multifarious that only a partial list can be proffered. Nevertheless, the list indicates the vigour of the principle in our common law tradition:

- * The issue often arises of whether a trial should proceed at a particular time or in that geographical location or before a particular judge. Adjournments and changes of venue occur frequently, for example, to allow the effects of adverse publicity to dissipate. There may be extreme cases in which even a permanent stay is appropriate.
- * The imposition of an onus of proof and the differentiation of the standard of proof between civil and criminal proceedings, reflects an understanding of what fairness requires in the particular circumstances, relevantly, if the special stigma of a criminal conviction is to be attached to a citizen.
- * The detail of the obligation to obey the rules of natural justice applies with particular force and encompasses all of the requirements of a fair hearing, including reasonable notice of the case a person has to meet and the provision of a reasonable opportunity of presenting his or her case.
- * All of the detailed rules and practices with respect to when notice or disclosure is required, when an adjournment is appropriate and the order of proceedings, particularly the right of cross-examination, have, as their source, centuries of consideration by generations of judges of the interaction, sometimes synergistic, sometimes in conflict, between the search for truth and the requirements of a fair hearing.
- * Identification of the principle that the unavailability of legal representation for an accused charged with a serious offence, should lead to a stay of the proceedings, is obviously based on this principle.
- * The requirements of clarity in a criminal indictment is reinforced in that context by the need to avoid duplicity or latent ambiguity and by judicial control of the size and content of an indictment. These rules are substantially based on fairness considerations.
- * The right of an accused to fair and timely disclosure of the Crown case and of the materials held by the Crown applies the principle.
- * The prosecution obligation in a criminal trial to put its case fully and fairly and not to split its case, so that the accused knows in full the case against him or her before deciding to adduce evidence.

* The requirement that an interpreter be available for an accused so that the accused can follow the proceedings.

* The determination of circumstances in which fairness of a trial has been affected by incompetence of counsel does on occasions require appellate intervention.

* The obligations on a trial judge in the case of unrepresented litigant to ensure that the litigant receives such assistance as to enable a fair trial to occur.

I interpolate at this point to acknowledge that all of our jurisdictions are plagued by the increasing number of unrepresented litigants and the difficulties they pose for the effective operation of our processes. It may be that we have been too accommodating in this regard in the past. In appropriate cases, we need to treat some litigants in person in the same way as Sir Thomas Beecham recommended a conductor should treat an orchestra: "Never smile encouragingly at the brass section".

The common law of evidence developed over many centuries and has, comparatively recently been codified in Australia at the national level and in this State. That body of law contains numerous exclusionary rules which apply to exclude evidence that is otherwise relevant. If the search for truth were the over-riding consideration of a trial, there would be no such exclusionary rule. Relevance would be the only criterion. The multiplicity of exclusionary rules in our law of evidence is a manifestation of the way in which the principle of a fair trial pervades our trial procedures.

We have rules requiring a judge to weigh probative value against prejudicial effect and, if the latter outweighs the former, then the evidence should be excluded. There is an overriding unfairness discretion capable of being exercised. Over many years of experience, the common law has developed a keen appreciation of circumstances in which evidence may be unreliable, in a way not necessarily apparent to juries. Sometimes these considerations lead to the exclusion of evidence. On other occasions they lead to warnings being given to a jury.

The complex body of doctrine associated with the hearsay rule is also derived from such an understanding of unreliability. Similar considerations underlie the exclusion of evidence of general bad character, of similar fact and tendency evidence.

In many situations, the requirement of a fair trial may not demand the rejection of evidence. The prejudice may be alleviated to a sufficient degree by the trial judge providing directions and warnings to the jury. The nature and content of these directions and warnings has been determined in many different situations and in some, for example, in cases involving allegations of sexual assault have become standardised and an integral part of the process of conducting such a trial.

Similar practices have arisen from the experience of the law with respect to identification evidence. Juries give such evidence more weight than the reliability of a person's recollection warrants. Witnesses tend to give evidence of identification with a degree of assurance that the plasticity of human memory does not justify. The use of photographs for purposes of identification may distort the process in a number of ways such as the "rogues gallery effect", where the possession of a photograph used by the police may suggest that the person has previously committed crimes and the "displacement effect", by which the photograph of the accused displaces the original memory of the offender in the mind of witnesses and the subsequent confirmation of identification, usually in forceful terms, is actually a memory of the photograph, not of the person.

Such distortion can affect the fairness of the trial. In accordance with well-recognised principles, determined over centuries of practical experience, lead to the exclusion of evidence or to directions and warnings to the jury as to the use of the evidence.

All of these numerous rules, practices, procedures and requirements are able to be viewed today as particular manifestations of an over-riding principle of a fair trial. However, as I have indicated above, in accordance with the common law method, the principle did not come first. The rules did not emerge by a process of deduction from an abstract idea. What came first were numerous specific manifestations of difficulties emerging over the course of centuries of determining real cases, originally in England, and in recent centuries, in other common law nations. It was the actual practice of legal decision-making and dispute resolution, in the course of dealing with these real problems which gave rise to the specific rules and practices in respect to evidence and procedure which are now capable of being expressed in a legal principle of general application.

The requirements of a fair trial are one manifestation of the diverse values served by our common law tradition. The values of justice, truth and fairness lie at the heart of our legal system. They are the foundation of the maintenance of public confidence in the administration of justice which Justice Gummow of our High Court has described to be "In present times the meaning of the ancient phrase 'the majesty of the law'"[13].

Over recent decades, common law courts have had to deal with the emergence of a new dominant ideology in public discourse. The standards of commercialism and managerialism have swept aside many other values. They dominate public debate to an unprecedented degree throughout the Western world. It is noticeable, for example, that although once our cities were dominated by public buildings - a parliament, court, town hall, cathedral - now all are dwarfed by commercial office blocks and public buildings are often constructed in an indistinguishable form. There are dangers in such uniformity. Diversity in the values served by social institutions is as significant for the health of our society as biodiversity is for our ecology.

At times the focus on the universal applicability of market forces borders on monomania. The common law has seen off a number of monomanias. In the past they have tended to come in the form of religion. It once came in the form of the divine right of kings. It now comes in the form of the divine right of markets. However, no claim to universal applicability of commercial or economic values is compatible with the simultaneous pursuit of truth, justice and fairness.

The courts are an arm of government. They have not been and cannot be insulated from changes in attitude about the proper role of government and the appropriate ways to conduct governmental activities. Nevertheless, there are limits to which such pressures can be accommodated in the law without compromising the fundamental task of delivering justice - by which I mean fair outcomes arrived at by fair procedures - in accordance with law.

The courts must be concerned with matters such as excessive delays, which of themselves often deny justice. Nevertheless, there are limits to the ability of an adjudicative process to resolve matters fairly in a short period of time. Speed is a particular obsession of contemporary discourse. However, speed is like light: if you have too much, it will obscure not illuminate.

I grew up in a country in which the Prime Minister was able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching cricket and then return by boat, taking another six weeks to do so. This is inconceivable today.

The Prime Minister at the time, Sir Robert Menzies, would never have approved of one day cricket: a game with special rules designed to speed things up, including penalising a team for a slow over rate. Most other changes in sports have been in the same direction. Tie breakers in tennis. Olympic sports like luge, cycling and canoeing are now measured in milliseconds.

The process of acceleration is unremitting. In the United States it took 46 years for 25 percent of the population to be connected to electricity. It took 35 years for that proportion to get the telephone, 16 years for that proportion to take up personal computers, and seven years for that proportion to be connected to the internet.

Where we once spoke of words per minute, we now speak of characters per second. One can buy telephone answering machines with a quick replay button - in digital format, so that the replay is accelerated without the high pitch of a Disneyfied chipmunk. In Tokyo one restaurant charges by time: at a rate of yen per minute. You clock in, you eat as much as you can, you clock out and your bill is computed on the time difference. Indeed, it is even necessary for us to create the illusion that we are saving time even when we cannot do so. On many elevators, the "door close" button is in fact a placebo. It has no function, other than to placate those who measure their life in seconds.

Yesterday I typed the words "information overload" into the Google search engine and received about 239,000 hits. Information overload indeed. It is sometimes believed that there are only two things that have not speeded up in recent times. These are traffic and litigation.

Throughout the common law world over recent decades considerable effort has been directed to developing case management systems which are designed to reduce delay. There is an honourable tradition of the common law in this regard. For many centuries, indeed it was only abolished in the 18th century, the common law had a mechanism known as *peine fort et dure*, a form of torture inflicted

upon a prisoner indicted for felony who refused to plead and submit to the jurisdiction of the court. Heavy weights were applied to his body until he consented to be tried by either pleading "guilty" or "not guilty" or until he died. This was an early form of case management. It remains a model for some contemporary practitioners.

In some circles there seems to be a belief that it is always possible, without exception, to achieve more with fewer resources. I have in mind the response of an ardent micro economic reformer who noticed that a string quartet performs a work by Mozart in exactly the same time in 2004 as it had been performed in 1804. For 200 years there has been no increase in productivity whatsoever. This reformer, sure that he has discovered a great scandal in the form of a collusive arrangement amongst professional musicians, insists that the competition authorities investigate.

Some things take time. Justice is one of them. In some spheres of conduct productivity improvements are not possible without diminution of quality.

I reject the tendency to identify courts as merely some kind of publicly funded dispute resolution service. This is much too narrow a focus and, indeed, is potentially subversive of the rule of law. Courts perform functions that go well beyond resolving disputes. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the resolution of private disputes.

The judgments of the courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a broadly similar character to one of the functions performed by legislatures. It occurs in the course of determining private disputes.

The courts do not deliver a "service". The courts administer justice in accordance with law. They no more deliver a "service" in the form of judgments and decisions than a parliament "delivers a service" in the form of debates and statutes. I do not doubt that courts serve the people. But they do not provide services to the people. This distinction is not merely semantic, it is fundamental.

Litigants are not consumers. Litigants have rights. They come to assert their rights in a court, not to exercise some form of consumer choice. In any event, human life cannot be characterised simply as a series of consumer choices. This is clearest, perhaps, in the criminal justice system where, in substance, the community asserts rights by way of protecting itself. In all cases litigants are and should be treated in the courts as citizens, not consumers.

Librarians are, no doubt, as conscious as any other section of the community, about the greater salience being given these days to issues of economy, efficiency and effectiveness. This salience occurs in competition with and, frequently, in preference to, other values of governmental activity such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. As the dominant perspective of the age, this shift in priority of values is something to which courts and, I am sure librarians, are subject to and have to adapt to. Nevertheless, there are limits to which this shift can go without fundamentally undermining the role of the law.

One characteristic of the administration of justice is its inefficiency when compared with some other systems of decision-making. This is not an accident. It reflects the deliberate institutional development of the common law over the course of some 900 years.

There is no doubt that a much greater volume of cases could be handled by a specific number of judges if they could sit in camera, dispense with the presumption of innocence, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, act on the basis that no-one has any rights and not have to publish reasons for their decisions. Even greater "efficiency" would be apparent if judges had made up their minds before a case began. There are places where such a mode of decision-making has been, and indeed is being, followed. We do not regard them as role models. The entire heritage of our common law tradition is to the contrary.

Our system of justice is not the most efficient mode of dispute resolution. There is no need to make any apology for that fact. After all, democracy is not the most efficient mode of government. We have deliberately chosen inefficient ways of decision-making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of government decision-making in order to

ensure that governments act with the consent of the governed.

The values that are served by our system of justice, and by our parliamentary institutions, cannot be regarded as subordinate to, let alone some kind of manifestation of, the allegedly superior values of a market system.

I agree with the observations of Rabbi Jonathon Sacks the Chief Rabbi of the British Commonwealth, who argued that the kind of society that gives rise to and is able to sustain a market economy tends to be a society with a strong respect for certain kinds of tradition. He was concerned with religion, but his analysis applies to our mechanisms of governance. Rabbi Sacks expressed concern that traditions were being undermined by the power of the market. Indeed, he identified the recent global triumph of the market as, perhaps, the market economy's own worst enemy. He said:

"When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our worth is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.

That, not the return of socialism, is the danger that advanced economies now face. And in these times, when markets seem to hold out the promise of uninterrupted growth in our satisfaction of desires, the voice of our great religious traditions needs to be heard, warning us of the gods that devour their own children, and of the temples that stand today as relics of civilisations which once seemed invincible ...

The market, in my view, has already gone too far: not indeed as an economic system, but as a cast of thought governing relationships and the image we have of ourselves ... The idea that human happiness can be exhaustively accounted for in terms of things we can buy, exchange and replace is one of the great corrosive acids that eat away the foundations on which society rests; and by the time we have discovered this, it is already too late.

The market does not survive by market forces alone. It depends on respect for institutions, which are themselves expressions of our reverence for the human individual as the image and likeness of God."^[14]

The courts have preserved - more successfully than many other areas of government - a distinctive public service ethos. This has been possible, in significant measure, by reason of the constitutionally guaranteed independence of the judiciary. That independence has enabled the courts, notwithstanding pressures to the contrary, to continue to apply the fundamental procedures and principles of the common law, including the principle of open justice and the principle of a fair trial, to which I have referred. I am happy to say that at least in Australia, this distinctive ethos of public service is not likely to change in the case of the courts.

There is a great deal of wisdom deeply embedded in institutions which have grown and adapted to changing circumstances over long periods of time. Like so many other things, Australians tend to take the benefit of these traditions for granted. However, anyone with the remotest interest in what has been happening and is happening in numerous other nations without these traditions, must recognise the extraordinary advantages we have, both in terms of social stability and economic welfare, from the strength of these institutions.

The institutions are, however, changing and will continue to change. There have been, for example, significant modifications of the adversary system. This is an instance of convergence between common law and civil law systems. Common law judges no longer sit back and allow cases to be conducted before them by the parties, without any form of guidance or intervention on the part of the court. In response to the changed attitudes to governance, to which I have referred, the courts have assumed a greater degree of responsibility for the speed and efficiency with which their caseload is administered. This has required a degree of intervention in the conduct of proceedings that was not part of the common law tradition.

The traditional image of justice is of a woman with a pair of scales wearing a blindfold. The position was otherwise in Lilliput, as Gulliver found. In Lilliput not only does the image of justice not wear a blindfold, she has eyes in the back of her head. That is an appropriate image for the era of judicial case management.

Nevertheless, there remain differences between the concern with case and caseload management and the degree of control of proceedings exercised by judges in civil law jurisdictions. There have been changes and modifications to the adversary system, but it still remains, in its essence, based on the common law tradition.

One major difference between common law and civil law judges is in the publication of reasons for decision, to which I have referred as an essential aspect of the principle of open justice. Although this varies from one civil law jurisdiction to another, the basic approach of a judge writing a decision in a civil law jurisdiction is to portray the process as one of obedience by the judge to a higher requirement. In France, perhaps more than Germany, all traces of discretion, doubt and individuality tend to be removed from the published judgment. In most civil law countries it is almost inconceivable to have the judge formulate and consider a range of alternatives, give reasons for choosing between them and express doubts and qualifications in the process. Even in the area of statutory construction, a common law judge is perfectly prepared to consider a range of alternatives. He or she does not pretend that the words chosen by the parliament can only have one meaning. This difference becomes clearest in the course of appeals, where dissents are frequent and often expressed in strong language.

I believe it is intellectually more honest to be open about the process of judicial decision-making. It must be the case that civil law judges encounter similar problems, even in the construction of codes. In this way the difficulties and the process of a continual adaptation of the common law are revealed. As Lord Diplock once put it:

"The beauty of the common law [is] it is a maze and not a motorway." [15]

Although there are various forms of judicial style in judgment writing, a high level of candour and a high level of individuality, is a feature of the common law tradition. Perhaps I can leave you with two such examples.

The first is from Lord Denning who commenced a judgment in the following way:

"It happened on April 19, 1964. It was bluebell time in Kent. Mr. And Mrs. Hinz had been married some ten years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child. On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island ... etc." [16]

The second is the opening paragraph of the then Justice Megarry's judgment in the matter of *Re Flynn* [17] and I leave you with this piece of Australian nostalgia:

"Errol Flynn was a film actor whose performance gave pleasure to many millions. On June 20, 1901, he was born in Hobart, Tasmania; and on October 14, 1959, he died in Vancouver, British Columbia. When he was 17 he was expelled from school in Sydney; and in the next thirty-three years he lived a life that was full, lusty, restless and colourful. In his career, in his three marriages, in his friendships, in his quarrels, and in bed with the many women he took there, he lived with zest and irregularity. The lives of film stars are not cast in the ordinary mould; and in some respects Errol Flynn's was more stellar than most. When he died, he posed the only question that I have to decide: Where was he domiciled at the date of his death?"

1 O Wendell Holmes, "Codes and the Arrangement of the Law" (1870) reprinted in Nobik, Ed, *The Collected Works of Justice Holmes* (1995) vol 1, pp212-213 (reference omitted).

2 From *Cogitata & Psia* (1607) quoted in Cottingham J *The Rationalist*, Oxford UP (1988), pp1-2.

3 See *McPherson v McPherson* (1936) AC 177.

4 Quoted in Jackson, *Natural Justice*, 2nd Ed (1979) p97.

5 *R v Hircock* (1971) QB 67.

6 *R v Langham* (1972) Crim LR 459.

7 Richmond Newspapers Inc v Virginia (1980) 448 US 555 at 571-572.

8 Gleeson "Judicial Accountability" (1985) 2 The Judicial Review, 117 at 123-124.

9 Ibid at 122.

10 See Netime "The Principle of Open Justice" (1984) 8 U Tas LR 25, 26-27; Raybos Australia v Jones (1985) 2 NSWLR 47-51; Richmond Newspapers Inc v Virginia supra at 565-566.

11 See Pearse v Pearse (1846) 1 DeG & Sn 12 at 28-29; 63 ER 950 at 957.

12 Connelly v DPP (1964) AC 1254 at 1347.

13 Man v O'Neill 1996-97

14 Jonathan Sacks "Markets and Morals" (2000) 105 First Things 23.

15 Morris v C W Mountain & Sons (1966) 1 QB 716 and 730.

16 Hinz v Berry (1972) 2 QB 40 at 42.

17 (1968) 1 All ER 49 at 50.

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Opening of Law Term Dinner, 2004

OPENING OF LAW TERM DINNER, 2004
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
THE LAW SOCIETY OF NEW SOUTH WALES
SYDNEY, 2 FEBRUARY 2004

The booster rockets on the side of the United States space shuttle must be shipped by train from the factory to the launch site. Those booster rockets cannot be made any bigger because they have to fit through a single track railway tunnel in the Rocky Mountains.

The United States railway gauge, which is 4 feet 8 ½ inches, or 1.435 metres, was adopted because that was the gauge in the pioneer industrial economy, namely England. The first railway lines in England had been built by the same engineers who had built the pre-railway tramways and that was the gauge they had used. The reason they adopted that gauge was because they used the same jigs, tools and equipment that had long been used to build wagons and carriages, drawn by horses. The wagons and carriages were built with 4 feet 8 ½ inches between the wheels because that was the space between the ruts in the road on many of the long distance roads in England. By continuing use over the centuries, those ruts had become fixed by the passage of countless wagons and carriages. Many of the long distance roads in England had been laid down by the Romans and the ruts commenced to be formed during the period of Roman occupation of England, by the wheels of Roman chariots. In the interests of standardisation all chariots throughout the Roman Empire were built with a distance between the wheels of 4 feet 8 ½ inches. That distance was originally chosen because it was the approximate width of the backside of two horses.

Accordingly, the reason why the space shuttle is, and will remain, of limited capacity is because its booster rockets cannot be much bigger than the width of two horses behinds.

In Australia, we had an even worse technological fix in our early history. As is well known, the colonies, in their rivalry over trade, deliberately built railway lines of different gauges in order to impede the possibility of product in the outlying areas of one colony being shipped to the nearest port, when that port, happened to be in another colony. It took the best part of a century to overcome the economic dislocation of those decisions.

This anecdote is relevant to two matters which I wish to discuss this evening. The first is the high probability that further steps will be taken in the course of the next year or so towards the emergence of a national legal profession in Australia. State jealousies, which have impeded the national practice of law, which jealousies, I hasten to add, have not for some considerable period of time been of any significance in this State, have attenuated considerably over recent years throughout Australia.

Under the impetus of the Standing Committee of Attorneys General, a uniform model bill for regulation of the legal profession is well advanced. Professional associations such as the Law Society of New South Wales directly, and indirectly, through participation in these processes by the Law Council of Australia, have done much to create the situation that a nationally consistent regulatory regime for the legal profession is a very real prospect. The next year will prove crucial in terms of ensuring that that regulatory regime is not only nationally consistent, but also optimal.

In inter-governmental relations of this character, of which we have had much experience over many years of our federal system, this is the point at which the worst compromises are made. This is the point when the least progressive unit of a federation can threaten to destroy the principle of uniformity, unless its most regressive practices are adopted as the national standard.

I recall from many years ago, in the context of the debate about the adoption of uniform censorship laws in Australia, a cartoon of the then Victorian Attorney General, Sir Arthur Rylah – who had famously proclaimed that he was seeking to protect his teenage daughters, of which he then had none. He was depicted sitting in a chair encased in a straightjacket. The caption read: "Of course we

agree with uniform censorship, as long as we can supply the uniform”.

Whilst it remains the case that the overwhelming majority of legal practitioners operate within the confines of a State, or indeed of a local community, a substantial proportion of legal services, particularly, when assessed in terms of monetary value, are performed at, or contestable at, a national level. Somehow or other these two imperatives have to be brought into alignment. A State based, but nationally consistent, regulatory framework can satisfy both sets of demands.

Lawyers in the city of Sydney should be, and I believe are, particularly enthusiastic about the emergence of opportunities for a truly national practice. That does not mean that legal practitioners who operate at a more local level will be subject to different standards. However, a regulatory framework that is, to use the jargon of this area of discourse, “seamless”, is well advanced and appears likely to emerge in the not too distant future.

The work is being done under the auspices of the Standing Committee of Attorneys General with, as far as I can see, the enthusiastic support of the legal profession throughout Australia and, particularly, from this State. Nevertheless, I reiterate, this is the moment at which inappropriate compromises can be forced by the most recalcitrant sections of the profession. It is a time to ensure not only that the standard gauge is standard but that the standard is the appropriate one. It may prove necessary to threaten to go ahead without the recalcitrant.

The second matter to which the anecdote I commenced with is pertinent concerns the introduction of the CourtLink system in New South Wales courts. This new IT system, which has been piloted in the Supreme Court’s Adoption List and for Costs Assessments, will be progressively rolled out across the NSW justice system. This will commence with crime in the Supreme and District Courts in April this year and in civil cases, on the latest estimate available to me, by October of this year. At that stage, access will be made available to the profession. Thereafter, the system will be rolled out to the Local, Children’s and Coroner’s Courts, and to Sheriffs offices.

The technological inertia of non-standard gauges has been avoided by relying on the now universally accepted web-based internet technology and the adoption of Legal XML as the language.

Perhaps the most distinctive feature of CourtLink is that it will provide a single system for all of the courts in New South Wales. Interaction between courts, for example by way of appeal from one court to another, and interaction between courts and other agencies of the justice system, will be facilitated to an extent that has never been possible in the past.

CourtLink has also brought to a head the need to streamline processes within each court, as well as between courts. A working party with judicial and registry representatives of the three main courts and of the profession, is well advanced.

I am aware that for many years the Law Society has made representations about the number of different forms and processes which have required practitioners to spend time and effort in determining which particular form is required, for which piece of legislation, in which court. It appears, for example, that something like 695 different forms are used in the criminal jurisdictions of the Local, District and Supreme Courts. I understand that the rationalisation process will result, in the criminal area, in one type of warrant, one type of bond, one type of affidavit, one type of subpoena and that notices performing identical functions in the different courts will be in a standard form.

We are well advanced along the way to ensuring that there is a single set of rules and forms. This will, I understand, eventuate in a Civil Procedure Bill.

Nevertheless, it will remain appropriate that the rules accommodate the need for different levels of complexity in the different components of the hierarchy of courts in this State. It must remain possible to conduct matters of greater complexity and significance in a different manner from other matters. Accordingly, the requirements and procedures of the Local Court should remain simpler and more expeditious than those of the District Court, which in turn should remain simpler and more expeditious than those of the Supreme Court. These gradations can be incorporated in a common framework.

What we have in prospect is a considerable simplification of the processes with which practitioners have had to become familiar in the past.

In Courtlink, the use of standardised, web-based internet technology will permit easier access to the

court systems, at reduced cost and from a larger range of locations. Members of the public will be able to make many inquiries via the internet rather than by attending at a court in person. Legal practitioners will be able to conduct a number of their business processes, relating to cases, online. This will include access to filed documents, requests for hearing dates, participation in online forums (including e-hearings) and making a range of inquiries with respect to matters in which they are involved. This access will be available 24 hours, seven days a week. It will also be available to suburban and rural practitioners with exactly the same facility as practitioners whose offices are close to the court.

The integration of the systems of the various courts will mean that, in those cases in which physical access to a court is required, that can be done anywhere. For example, the Wagga Wagga Local Court will be able to receive a document from a practitioner in Wagga Wagga with respect to a matter in the Supreme Court, including one that may be heard somewhere other than Wagga Wagga.

Of particular significance, however, will be the ability to interact with the court electronically. Documents will be able to be lodged online. Service of documents will be able to be done online. Electronic forums will replace many directions hearings and other mentions, where a considerable amount of time is wasted getting to and from court or waiting in court, for a process which may only take a few moments.

Those developing the CourtLink system asked the Law Society to include a technology question in the annual Practising Certificate Survey. The results of that survey are encouraging. Approximately half of persons surveyed – ranging from about 45% to 55% for different questions – indicated that they would expect a significant degree of benefit from CourtLink in the following respects:

- To look up such matters as court orders, lists of documents, list dates and dates available for listing.
- To receive e-mails from the court notifying case events.
- To make online applications to a court, such as for a new list date or an interlocutory application.
- To save time in filing a document by lodging it electronically.
- To be able to file a document 24 hours a day seven days a week.
- To use a single internet website to file a document electronically for any New South Wales court.

Experience in other courts suggests that e-filing may not be used to its full potential. The potential saving in costs to the court, and most particularly to clients, is, however, substantial. It may not be necessary to go as far as the courts of Singapore have gone. There it is simply not possible to file a physical document. Persons without access to the internet, such as self-represented litigants, can have access to the court's electronic systems by kiosks situated at the courts. It may, however, prove necessary to consider a regime in which physical filing and personal attendance is more expensive in terms of court fees than electronic filing. Nothing like that is in contemplation, but it may need to be considered if the new accessibility does not lead to reduced costs, by way of e-filing and, particularly, by way of reducing the number of actual attendances.

Over recent years the courts of New South Wales have substantially reduced the delays which have in the past been of such concern. That process is not yet complete, but the problem has been substantially alleviated and, so long as the same level of resources are made available to the courts, one can expect further progress.

This is not a cause for complacency. In the administration of justice, as in all areas of government, the search for improved ways of doing things is ongoing. In the years ahead the focus of our attention must be on reducing costs. I do not mean the reduction of costs to consolidated revenue – although that is important - I mean reducing costs to the parties. Delay has, of course, been a major cause of waste and increased costs. However, other sources of avoidable costs require our attention.

CourtLink will create numerous opportunities to reduce costs. The profession should prepare itself for a substantial expansion in the use of online mentions and e-filing.

In many areas of litigation, the costs incurred in the process bear no rational relationship, let alone a proportionate relationship, to what is at stake in the proceedings. The principal focus of improvement, now that delays are well on the way to being acceptable, must be the creation of a proportionate relationship between costs and what is at stake.

Shortly after my appointment as Chief Justice, I instigated a process of consultation with the profession in two broad streams. The first was concerned with issues of delay and led to a number of rule changes and changes in ethical rules for advocates. The second process, which had a separate

advisory committee, was concerned to review practices of the court which affect the costs of proceedings to litigants. The first of the two processes led to substantial change. I have to say I was disappointed that, in the second process, very few ideas were forthcoming as to how practices and procedures could be altered with a view to minimising costs.

This is an objective which must receive higher salience, if only in the enlightened self-interest of the profession itself. There have been numerous legislative changes over the last two decades, perhaps particularly over the last two years. Those changes have transformed the manner in which litigation is conducted first, in traffic accidents, then industrial accidents, then professional negligence and public liability proceedings and, now, more generally across the range of tort proceedings. These changes have had a number of driving forces. Let there be no doubt that one of the most important of those driving forces has been the belief that the legal process eats up much too high a proportion of what is at stake. In particular this has led, in some areas, to the replacement of an adversarial system by some form of administrative process. Unless the profession concentrates on this problem, there is no reason to believe that this kind of change will stop with the areas in which it has now been implemented.

I include in this prognosis commercial litigation which has not hitherto been affected. Over the last two decades the cost structure of most Australian commercial enterprises has been transformed beyond recognition. One of the few areas of business expenditure which has not notably diminished is the cost of dispute resolution. The business community will expect a more cost effective service. For example, we need to consider the adoption of a stopwatch system by which the parties agree, in advance, to the total time that a case can take. How they allocate their time – to opening, examination in chief, cross-examination and addresses – is a matter for each party. The total time, however, does not change.

If the legal profession and the courts cannot deliver a more cost efficient service, then we will be bypassed in commercial dispute resolution as, to some degree, we have been bypassed in other areas of dispute resolution.

This process requires a collaborative approach by the courts and the profession. I have no doubt that that will occur. Matters of this character must now be given a higher priority.

I recognise that some of the case management practices that the courts have adopted, in order to reduce delays, may have resulted in increased costs. In particular, they have resulted in the front loading of costs by bringing forward expenditure that may not occur if a case settles, as most do. Some aspects of court practices may show insufficient regard for the costs that are imposed on others.

Those responsible for the administration of courts are no less prone than other administrators to see things from their own perspective and to organise matters in accordance with the demands of their own budget and, perhaps on occasions, their own convenience. The clearest example of this is over listing. If a significant proportion of cases are not reached, or reached in a perfunctory brief manner at the end of the day, this will add significantly to costs. I urge members of the profession who experience cost effects from case management practices, particularly those involving an excessive number of attendances at court, to let the courts know.

The courts are continuing to fine-tune case management practices and of course this process will continue. For example, a few months ago the Supreme Court reduced from one year to five months, the period within which inactivity may result in proceedings being dismissed.

The Chief Judge of the Common Law Division, Justice Wood, announced last year that adjournments in that Division will be more difficult to obtain in future and, in certain lists, the number of mentions will be reduced. I remain concerned that there are a substantial number of cases in the court which are so old that it is very difficult to understand why the legal practitioners cannot get them ready for hearing. These also tend to be the cases which have an inordinate number of mentions. At the moment our resources are directed to serving those practitioners who can get their act together. Our ability to target the older cases will, however, be increased as the backlog diminishes, which, in common law civil cases, it is still doing.

New arrangements have been introduced this year for the management of civil cases in the Common Law Division. I hope that the daily scheduling of hearings, status conferences and applications will improve both case management outcomes and consistency in the application of case management

principles.

Last year a number of changes were implemented in the Equity Division. The Chief Judge of the Division, Justice Young, expressed his concern about the costs of Family Provision Act applications. In many cases, those costs are out of all proportion to the amount involved in the estate. As the Chief Judge indicated, unless the experience in these respects alters, the court will need to decide whether or not to assess what costs ought to have been incurred if the solicitor acted in accordance with reasonable competence and efficiency. It may be necessary to consider introducing a cap on recoverable costs in the case of small estates. There may also be a need to consider the South Australian practice in which small estates are handled on the papers by a Master in chambers without representation, but with a right of review to a judge.

Such an approach may need to be looked at in other areas as well.

As costs come to receive a greater salience, I trust that the profession will take the lead. In this respect there may be a need for a systematic review of the operation of the Cost Assessment Scheme which has now been in operation for ten years. That is an appropriate period to review the system's actual impact on cost practices.

One thing that has occurred over that period of ten years is that time based charging has become almost universal. I do not believe that this is sustainable. I note that last year, your past President, Robert Benjamin, published in the Law Society Journal a thoughtful piece on the tyranny of the billable hour. As I and my predecessor, Chief Justice Gleeson, have often said over the years, it is difficult to justify a system in which inefficiency is rewarded with higher remuneration.

The difficulty of course is that the person providing the service, namely the legal practitioner, does not have a financial incentive to do the service as quickly as possible. The control is of course, the practitioner's sense of professional responsibility. For most members of the profession this restraint is a real one. Only a handful of members of the profession exploit their position by providing services that either do not need to be provided at all, or provide them in a more luxurious manner than is appropriate.

The enlightened self-interest of the majority requires some form of professional control of the handful who may abuse the system. Such conduct, even by a minority, affects the reputation of the profession as a whole and may determine the nature of external regulation. I trust that if it becomes necessary for judges to perform the function of regulating such conduct, in the course of deciding who should bear costs and at what level costs should be awarded in particular proceedings, that they will receive the support of the profession when they do so.

After legal costs, the most important single cost item is expert evidence. I gave an address last year on the increased use of single experts in England. That address was published in the Law Society Journal. Single joint experts particularly in areas involving elements of quantification, can help us to minimise costs. I am not here referring to court appointed experts. Much can be done by agreement between the parties.

In the High Court in England the overwhelming majority of personal injury cases, including medical negligence cases, now have single joint experts for some matters. Generally this is confined to quantification issues, rather than matters of liability and causation. Nevertheless, this new practice is of significance in terms of minimising costs. The parties agree in advance on a joint expert whom both trust. On such matters, the expert becomes the effective decision maker, rather than the judge. In substance this is a form of alternative dispute resolution on specific questions.

There appears to be no reason why we cannot move in this direction to a substantial extent. A number of consultations are occurring between judges in charge of various lists in the Supreme Court and members of the profession about the use of joint single experts in those lists. The Chief Judge of the Land and Environment Court has also announced such changes in that jurisdiction. This is a matter upon which early collaboration between practitioners will directly benefit all their clients. I ask the profession to pursue this collaborative endeavour.

There are many other areas of cost minimisation to which attention will need to be given in the years ahead. I have no doubt that I can look forward to a co-operative relationship between the courts and the Law Society in these respects.

