

JUDICIAL COMMISSION OF NEW SOUTH WALES

THE JUDICIAL REVIEW

THE ONGOING ASCENT OF THE AUSTRALIAN MAGISTRACY*

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THINGS IN COMMON

By a brilliant constitutional design, the Australian Judicature is integrated and comes together, at its apex, in the High Court. We are but seven Justices. We have special constitutional and legal responsibilities. However, we are also part of a judicial institution, the most numerous members of which (more than 400 in all) comprise the State and Territory magistrates of Australia. In addition, in recent years, the establishment of the Federal Magistrates Court has brought new and increasing numbers of federal judges, called magistrates, serving in a federal court created by the Federal Parliament in accordance with s 71 of the Constitution¹.

* Text of an address to the XVI Biennial Conference of the Association of Australian Magistrates, Sydney, 7 June 2008. See the earlier paper by the author "The Rise and Rise of the Australian Magistracy" (2003) 15(1) *Judicial Officers' Bulletin* 1.

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¹ *Federal Magistrates Act* 1999 (Cth).

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In some ways the work of the Justices of the High Court is similar to the work of magistrates. We share the responsibility of deciding cases placed before us, and doing so justly and in accordance with law. All of us are the guardians of the Constitution and of the rule of law, the unwritten implied principle of Australian constitutionalism². In the performance of our adjudicative functions, we are independent of directions from Parliament or the Executive Government as to how we should render our particular dispositive orders.

In one of the papers I read preparing for these remarks I saw a question asked as to whether the principle established by the High Court in *Kable v Director of Public Prosecutions (NSW)*³, upholding the independence of State courts as constitutionally inherent in their exercise of federal jurisdiction, applied to the magistracy. There is no doubt that *Kable* does so apply. Its foundation is the potential exercise of federal jurisdiction. Magistrates throughout the nation, federal, Territorial and State, *all* exercise federal jurisdiction. As a result, they must *all* enjoy the minimum requirements of judicial independence implicit in the integrated Judicature envisaged by the Constitution. The Constitution is thus not only a guarantee of independence for federal

² *Australian Communist Party v The Commonwealth* (1951) 81 CLR 1 at 193; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103]-[104].

³ (1996) 189 CLR 51.

courts. It also provides protection, to the degree stated, for State courts, including those in which State magistrates participate judicially.

Beyond these generalities, there are functional similarities between the work of the Justices of the High Court and that of magistrates. We all work very hard. We are generalists. We must shift large and ever-increasing workloads. Where necessary, we must all decide cases presented by self-represented litigants. Often, as in special leave cases in the High Court, we have a strictly limited time within which to hear argument and to dispose of important and difficult questions. Some hearing days are stressful for all of us. The magistracy of Australia has been described as "the under-valued work-horse of the court system"⁴. I must confess that I sometimes feel that this description applies equally to my own Court.

When I arrived in the High Court in 1996, the former rule forbidding litigants to appear except by a legal representative, had been replaced so as to permit individual litigants, unrepresented by lawyers, to enjoy the same rights of audience as others. In a few cases (notably unrepresented prisoners in certain States of Australia)⁵ this "right" is

⁴ J Willis, "The Magistracy: The under-valued work-horse of the court system" in C Corns (ed), *Reshaping the Judiciary*, 129.

⁵ *Muir v The Queen* (2004) 78 ALJR 780. The practice, confined to some States of Australia, has been the subject of an adverse report by the United Nations Human Rights Committee under the First Optional Protocol to the *International Covenant on Civil and Political Rights*. See United Nations, Human Rights Committee, Views on

sometimes more theoretical than real. If the State will not bring the prisoner to the Court, the Court was, in practice, normally forced to deal with the matter on the papers.

A huge increase in migration applications, brought by litigants (often unrepresented) who claimed to be "refugees" under the *Refugees Convention and Protocol*, imposed burdens on the special leave and other lists of the High Court that were in many ways akin to those faced every day by magistrates. Eventually something had to give. In 2004, the High Court adopted new rules of court imposing a filter. Now, like all other final national courts, an oral hearing before the High Court (including for an application for special leave) is not guaranteed to every litigant, whether legally represented or not. A panel of two Justices reviews every application. The panel decides whether it would be justified to list the application for oral argument in open court, which is limited to twenty minutes (a facility which itself many magistrates must sometimes yearn for). This change, reflected in the High Court Rules⁶, has shifted some of our burden to dispositions on the papers. Yet also in these cases we publish in open Court short reasons for our decisions rejecting the application for special leave.

Communication No 1347/2005; *Lucy Dudko and Australia*, 29 August 2007, Doc CCPR/C/90/D/1347/2005.

⁶ High Court Rules 2004, Rule 41.10.5. and 41.11.1. See M D Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30 UNSWLJ 731 at 736 – 738.

Mass jurisdiction, whether at the High Court level or before magistrates, is a very large burden. Judicial officers in every court must be specially vigilant that they do not overlook legal points or points of justice in the particular case. I have no doubt that the life of a judicial officer, whether a Justice of the High Court or a magistrate, often feels the same at the end of the day. In my career, I have participated successively in five judicial bodies at different levels of the hierarchy. So I have witnessed the similarities and the differences⁷.

Although I have never served as a magistrate, I recognise the enormous importance of the work of the magistracy and the great changes that have come over the magistracy in my professional lifetime. Lord Diplock once said⁸ that the greatest change that he had seen in his professional lifetime had been the development of a comprehensive administrative law in England. We too, in Australia, have shared in this development. But, greater still, in my opinion, has been the radical change that has come over the magistracy in Australia. From an often dispirited group of lay justices and public servants, lacking complete independence from the executive government⁹, magistrates throughout

⁷ In the Australian Conciliation and Arbitration Commission, Federal Court of Australia, New South Wales Court of Appeal, Court of Appeal of Solomon Islands and, since, 1996, the High Court of Australia.

⁸ *R v IRC; Ex parte Federation of Self-Employed* [1982] AC 617 at 641 (HL).

⁹ cf *Fingleton v Christian Ivanhoff Pty Ltd* (1976) 14 SASR 530 at 546.

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Australia have become true judicial officers and thus full colleagues of the judiciary. They are recognised as such and respected for the high standards of their appointments; the legal protections for their independence; and their participation in the professional bodies in which judges work with them as true equals on issues of common judicial concern¹⁰.

In an address to magistrates in 1990, Justice Jim Thomas of the Supreme Court of Queensland emphasised the changes that had come about in the standing of magistrates throughout Australia¹¹:

"The magistrates' Courts are for most citizens the only place where direct contact is made with a judicial officer. It is inescapable that the point has been reached where the magistrates must be regarded as a group of judicial officers forming the ground level of a three-tier judicial structure. It is no longer valid to view the magistracy as a hybrid creature, part public servant, part judicial officer, disadvantaged by inadequate training and with an imperfect understanding of the judicial role. There were times not long distant when such a view was accurate. The times have changed, and in this instance for the better".

From the vantage point of the High Court of Australia and service as a judicial officer over thirty-three years since January 1975, I have

¹⁰ Such as the Australian Institute of Judicial Administration, the Judicial Conference of Australia, judicial colleges and civil society organisations such as the Australian Section of the International Commission of Jurists, the Commonwealth Association of Judges and magistrates and the Union Internationale des Avocates.

¹¹ J Thomas, "The Ethics of magistrates" (1991) 65 ALJ 387 at 389.

therefore grasped the opportunity offered to me by my old University colleague and friend, Magistrate Daphne Kok of the New South Wales Local Court, President of the Association. Before my own service as a judicial officer concludes in February 2009, I want to bring greetings, and a message of respect and encouragement, to the Australian magistracy and an assurance that the work of magistrates is valued at every level of the hierarchy as an integral part of the national judicature, including by the Justices of the High Court of Australia.

MAGISTRATES I HAVE KNOWN

A love of the concrete : The President asked me to speak on the subject of judicial independence as it affects magistrates in Australia. There is little that is original to be added to the many essays on this subject that have been published in recent years¹². In 2001 Chief Justice Beverley McLachlin of the Supreme Court of Canada observed that on this topic "[e]verything which can be said has been said and

¹² See eg A F Mason, "The Appointment and Removal of Judges" in *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1999); Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (ALRC 92, 2001); K Mack and S R Anlieu, "The Administrative Authority of Chief Judicial Officers in Australia" (2004) 8 *Newcastle L Rev* 1; M Warren, "Independence of the Magistracy: Crossing Over to Judicialism" (2005) 7 *The Judicial Review* 293.

repeated on so many occasions in so many learned articles that any further observations are inevitably redundant"¹³.

To assist me in my task of searching amongst the entrails for something fresh, I was given a few contributions which, in recent years, have addressed the issue of the independence of the judiciary generally and of magistrates in particular. With the dutifulness that comes naturally to judicial officers, I read these articles. They demonstrated that Australian magistrates are devils for punishment. Not content with the avalanche of words they daily receive in court, they seemingly invite upon themselves a similar flood of opinions and experiences on the subject expressed in their conference. Out of kindred sympathy, I feel disinclined to add to the ordeal. In truth, I have accepted the President's invitation in order to enjoy congenial company; to share stories of our common vocation; to join in laments about our shared burdens; and to offer respects from my Court to your courts on the occasion of your conference.

The legal system in which we operate, that of the common law, is strengthened by its devotion to practicality. If it is sometimes short on conceptualisation of problems, it is always long on a concrete and practical approach to problems. The common law generally works

¹³ B McLachlin, "Judicial Independence", remarks on the 300th Anniversary of the Act of Settlement, Vancouver, 11 May 2001, quoting Justice S L Robins.

slowly towards principles. It does so by analogous reasoning applied to actual circumstances. I will therefore make a few points for consideration by reference to my own experiences over the years, including before magistrates whom I remember well.

Early days in court: Many lawyers in Australia cut their teeth appearing in magistrates' courts. To this extent, the magistrate typically carries a special burden. He or she is usually the first judicial officer that the young legal initiate sets eyes on. In the oral tradition of our legal system, it falls to magistrates, all too often, gently to train the novice in the basic arts of advocacy; patiently to listen to their immature endeavours; indulgently to overlook at least some of their mistakes; carefully to correct and steer them in the path that provides assistance to the court and to the client; in a kindly way to settle their nervous apprehensions; and firmly to demonstrate that the rule of law reigns in every court in this much blessed land.

Because magistrates are usually the first judicial officers whom the inexperienced legal practitioner addresses (save perhaps for a moot or two at Law School), they carry a particular responsibility to set a good example in judicial technique and performance.

As it happens, I did not enjoy this typical experience. Because I had no family connections with the legal profession I found it almost impossible, despite brilliant school results, to secure articles of clerkship. Eventually they came my way in a small legal firm. It was one that

specialised in litigation, but on the civil side. Within hours of arriving to commence my articles, I was 'instructing' counsel in the then Workers' Compensation Commission of New South Wales, in a case involving a claim by the client, for workers' compensation benefits. I could not believe my good fortune to have embarked upon an experience in the law that involved me in long hours of every day witnessing the oral tradition of advocacy and trial work. Not for me the whispering galleries of equity or the company list. This was the blood and guts of a statutory jurisdiction and common law trials.

The judge on my first day was a man of considerable legal talent, robust demeanour and great commonsense. In the result, Judge Alf Rainbow rejected my client's claim for compensation. He did so based on the cross-examination of counsel appearing for the two employers: Mr Gordon Samuels and Mr Adrian Cook. Each of them went on to distinguished service in the law. Each became a judicial officer - Gordon Samuels was my colleague in the New South Wales Court of Appeal and later the State Governor. Adrian Cook became a judge of the Family Court of Australia and later appeared before me in the High Court.

When, with the aid of films, they demonstrated the defects in my client's case, I was brought to the rude awakening that not every witness tells the truth; and not every client deserves to win. It was a bracing experience for my first day in court. Had I been sent that day to the

Central Court of Petty Sessions in Liverpool Street, Sydney, I would probably have had a similar experience.

Another judge of the Compensation Court was Judge W J Dignam. He had been Australia's ambassador to Ireland. He had returned to Australia to an appointment to the Workers' Compensation Commission. Although he was always personally kind to me, he had a habit (not shared by the other judges) of dismissing claims without giving reasons. "This claim fails. There will be an award for the respondent". Bundled out of the courtroom, it then fell to me, with my immature experience, to endeavour to explain to the litigant who had lost why the claim had failed. Often, I was not at all sure.

That experience with Judge Dignam left me smarting. It imprinted an indelible impression upon my mind. This was that judicial officers of our tradition are not merely public servants who make correct decisions. Their decision-making is a contribution to the public resolution of a controversy. They are, in a sense, always public teachers of law and justice. Years later, in the New South Wales Court of Appeal, in *Osmond v Public Service Board of New South Wales*¹⁴, I reflected my strong belief that all repositories of public power, derived ultimately from a Parliament and the people, are legally obliged to explain the reasons for their deployment of that power, at least where such deployment has

¹⁴ [1984] 2 NSWLR 477. (See also [1993] 1 NSWLR 691).

seriously adverse consequences for the person affected by their decision.

In the event, the High Court of Australia rejected the conclusion which Justices Priestley and I had expressed in the Court of Appeal on this subject in *Osmond's Case*. The High Court upheld the minority view of Justice Glass to the effect that the common law of Australia had not advanced to a requirement that administrative office-holders must give reasons for their decisions¹⁵. Since my appointment to the High Court, I have waited patiently for a case to arise where I could endeavour to secure reconsideration of the 1986 decision in *Osmond*. Despite my saintly patience, no such case has presented. Meantime, statutory obligations have frequently enlarged the requirement for reasons. Moreover, some developments of the common law have suggested that, in particular circumstances, the repositories of statutory power must provide reasons¹⁶.

One circumstance certainly requiring the provision of reasons is that the decision-maker is a judicial officer. That principle had been established for New South Wales, as an attribute of the judicial process, in an earlier decision of the Court of Appeal in *Pettitt v Dunkley*¹⁷. In its

¹⁵ *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

¹⁶ See eg *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 378-379.

¹⁷ [1971] 1 NSWLR 376.

decision in *Osmond*, the High Court acknowledged that, for the judiciary, a higher standard was required than for administrators and tribunals¹⁸. Of course, for busy judicial officers, it is not always essential to give formal reasons, or extended or reserved reasons. The extent of the obligation depends upon the circumstances. Sometimes the exchanges between the Bench and the parties sufficiently explain the reasons for the decision in the case. But in the Court of Appeal, together with colleagues, I always insisted on the judicial obligation to provide sufficient reasons so that the losing party would know why they lost¹⁹. The unexplained rejection of claims that I witnessed in Judge Dignam's court is now generally a thing of the past.

Dickens and Hogarth: Although my practice, as a clerk and young solicitor, lay on the civil side, it left me somewhat dissatisfied. I thirsted for experience in criminal jurisdiction, the overwhelming bulk of which was performed by magistrates in the then Court of Petty Sessions.

I became a member of university bodies and of the Council for Civil Liberties. These associations brought a flow of work that we would now call *pro bono*. One such case involved Glynn Corbishley. He was a young invalid pensioner accused of assault which was probably the result of a misunderstanding of his physical condition. The case brought

¹⁸ (1986) 159 CLR 656 at 667.

¹⁹ See eg *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247.

him before a short-tempered magistrate at Paddington Court House in Sydney, Mr Locke SM. The transcript showed that the magistrate rejected the accused's indication of a need for legal representation, by simply ignoring it. It was a rude awakening for me as to the realities that could sometimes arise in mass criminal jurisdiction in a suburban court.

Mr Corbishley sought statutory prohibition against Magistrate Locke so as to secure a rehearing of the case. Unfortunately, he also appealed against the decision, granting a suspended sentence on condition of entering a bond, to the Quarter Sessions sitting of the District Court of New South Wales. This was a mistake. Having enlivened the right to a complete rehearing of the case the provision of prohibition, a discretionary writ, would have been exceptional. In the end, it was refused. However, Justice Wallace, the President of the Court of Appeal declared, on the basis of the transcript, that there had been a:

"denial of natural justice in the proceedings before this magistrate and it is discouraging to learn that justice has been administered in this way by a modern New South Wales Court"²⁰.

Justice Holmes agreed in the disposition but he added²¹:

²⁰ *Ex parte Corbishley; Re Locke* [1967] 2 NSW 547 at 547.

²¹ [1967] 2 NSW 547 at 549.

"The picture is one which shows how the poor, sick and friendless are still oppressed by the machinery of justice in ways which need a Fielding or a Dickens to describe in words and a Hogarth to portray pictorially. What happened that day, however to the applicant was only the beginning of the terrors which were to confront him before the proceedings before this Stipendiary magistrate were completed".

Sadly, it is necessary to recall these cases to mind in order to remind ourselves of the room for improvement, and the attainment of improvement, within the judiciary. An important lesson that I learned from *Corbishley's* case was that the highest judiciary of the State (which I would one day join) did not tolerate poor standards. On the contrary, it insisted on, and practised, high standards; and said so. I was later told that the Court of Appeal's remarks hastened the transfer of Mr Locke SM to less stressful work and to his early retirement.

Leading magistrates: By the time I came to serve in my first judicial appointment in 1975, I had taken a higher degree in law in company with a very fine magistrate who later became the Deputy Chief Magistrate of New South Wales, Mr Walter Lewer SM. He and I graduated on the same day at Sydney University as LL.M. We kept in touch subsequently because of our mutual interest in the developing discipline of criminology, which we had studied together in our LL.M. course.

Mr Lewer was an excellent magistrate: sincere, sensitive, intelligent and patient. He was quite formal. He was one of those judicial officers before whom I would appear in my work as *pro bono*

solicitor, and later barrister, for the New South Wales Council for Civil Liberties. In those days of the Vietnam War and Moratorium, and countless demonstrations against that conflict, it fell to me to represent university students and others and to try to save them from criminal conviction that might blight their careers. Then, for the first time, I watched extremely busy magistrates disposing of cases carefully and usually justly as it seemed to me, and in accordance with law.

Many of my clients at that time claimed conscientious objection to compulsory national military service. It was a hard road to win exemption on that ground given the decision of the High Court as to the meaning of "conscientious beliefs"²². My impression at the time was that magistrates probably shared the divided opinions of the community. Some gave the claims short shrift. Others reached their conclusions, apparently, more in sorrow than in anger. In the back of everyone's mind was the knowledge that young national servicemen were being killed in action in Vietnam. The decisions could, in some cases, literally involve a matter of life and death.

When I was appointed as inaugural Chairman of the Australian Law Reform Commission in 1975, I came to work closely with many magistrates in several of the tasks that were assigned to the Commission, concerned with the reform of federal law. Our projects

²² *R v District Court; Ex parte White* (1965) 116 CLR 644 per Windeyer J.

included reform of the procedures of criminal investigation²³ and the sentencing of federal offenders²⁴. Of necessity, in these projects, I came to know senior magistrates throughout Australia, including the Chief Magistrate in New South Wales, Mr Murray Farquhar.

Mr Farquhar's fall from grace was a tremendous blow to the magistracy and the judiciary²⁵. Yet I must say that he was always closely and positively involved in the growing study of criminology. He took an active part in the work of the Institute of Criminology within the University of Sydney. I have no doubt that his participation in these endeavours was genuine and sprang from worthy motives. All of this was to prove to me a lesson that we soon learn in judicial life. Human beings are complex, with strengths as well as faults and foibles. Despite the tabloids, few in the parade of miscreants that we see in the courts are entirely without hope of redemption. Wherever possible, courts must hold out the prospect of that hope. They must do so not just because of the essential moral integrity of human beings but because of the practical interest that society has in self-improvement, the provision of second chances and the normal entitlement to live it down.

²³ Australian Law Reform Commission, *Criminal Investigation* (Interim) (1975) ALRC 2.

²⁴ Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980).

²⁵ *R v Farquhar*, NSW Court of Criminal Appeal, unreported, 29 May 1985.

Removal of magistrates: When in 1984 I began judicial work in the New South Wales Court of Appeal, it did not take long for the court to be concerned in a case of great importance for the magistrates of that time. I refer to the decision in *Macrae v Attorney-General (NSW)*²⁶.

When the decision was adopted to establish the Local Courts of New South Wales²⁷, in place of the superseded Courts of Petty Session, the Chairman of the Local Courts (by this time Mr Clarence Briese SM), notified magistrates in a circular letter how they would accede to the office of magistrate under the new legislation. Following a recommendation of the State Law Reform Commission, an appointments committee was established. This was to process applications for appointment; to interview applicants; and to make recommendations to the Attorney-General. Five magistrates who had previously served in the former court, and who applied for the new appointment, were not recommended for re-appointment. Each of them was subject to private allegations concerning their alleged unfitness to be so appointed. The relevant allegations were brought to the notice of the magistrate at the time of interview.

When declaratory relief to permit the non-appointees to challenge this process was refused at first instance, an appeal was taken to the

²⁶ (1987) 9 NSWLR 268 at 278.

²⁷ Under the *Local Courts Act* 1982 (NSW).

New South Wales Court of Appeal. A majority of that court (again Justice Priestley and myself) concluded that the decision of the Attorney-General not to recommend appointment of the five former magistrates was void for denial of procedural fairness based upon the legitimate expectations that the magistrates had accrued during their former service as magistrates. Justice Mahoney dissented.

Specifically, the majority held that, in considering applications for appointment as magistrates under the new legislation for those who had served as magistrates under the *Justices Act* 1902 (NSW), it was not open to the decision-makers to take into account, or act on, adverse material, without notifying the person concerned, up front, of the existence and content of the allegations and without giving that person a full and fair opportunity to be heard in relation to it. An important foundation for the conclusion that Justice Priestley and I severally reached was the very strong Australian tradition, particularly in federal courts (but not only there) respecting the right of former office-holders in a superseded court to be appointed (virtually automatically) to a replacement court or tribunal²⁸.

In the federal sphere in Australia, even in respect of the former Commonwealth Court of Conciliation and Arbitration, found to be constitutionally invalid and thus void under the *Boilermakers'* decision of

²⁸ (1987) 9 NSWLR 268 at 279.

1956²⁹, the "defunct" court was never formally abolished by legislation until all previously serving "judges" had either died or resigned³⁰. The importance for judicial independence of protecting the former office-holders in the Court of Petty Sessions was emphasised by the majority in the Court of Appeal. The course that had been followed in Canada and New Zealand, upon the changes in the 1970s rendering all of the serving magistrates District Judges, was called in aid. The many precedents in Australia and other Commonwealth countries led Justice Priestley and me to our view that a high constitutional principle had to be observed, protective of the judicial institution and office and insistent upon manifestly just procedures. Otherwise, the adventitious change of court arrangements might be used as an occasion to get rid of office-holders for illicit, inadequate or improper reasons.

In *Attorney-General (NSW) v Quin*³¹, the principle in *Macrae's* case was tested in the High Court. By a narrow majority³², the High Court upheld the prerogative power of the Attorney-General to recommend appointments as were deemed appropriate. The decision was a disappointment to me. In cases of constitutional principle, it is

²⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

³⁰ (1987) 9 NSWLR 268 at 280.

³¹ (1990) 170 CLR 1.

³² Mason CJ, Brennan and Dawson JJ; Deane and Toohey JJ dissenting.

always important to keep the eyes fixed on any large issues at stake and to anticipate possible future developments and sometimes to nip them in the bud.

When, in the federal sphere, the *Conciliation and Arbitration Act* 1904 (Cth) was repealed and the former Australian Conciliation and Arbitration Commission was replaced by the Australian Industrial Relations Commission, one only of the Deputy Presidents was not reappointed to the new body³³. This was Justice Jim Staples. I used the occasion of the Ronald Wilson Lecture in 1994 to criticise the developing practice in Australia of effectively removing judicial officers by abolishing their courts or tribunals and by not reappointing them to the substitute body³⁴. In fact, I gave a number of lectures on the point as the practice appeared to escalate.

Thus, in Victoria and Western Australia, former judges of the workers' compensation tribunals were effectively dismissed from their offices by the expedient of repealing the legislation under which their tribunals had been created. This was a serious moment for judicial independence in Australia. At first, the Bar (and to some extent the Bench) seemed relatively unconcerned about the development.

³³ The *Conciliation and Arbitration Act* 1904 (Cth) was repealed by the *Industrial Relations (Consequential Provisions) Act* 1988 (Cth).

³⁴ M D Kirby, "Abolition of Courts and Non-Reappointment of Judicial Officers" (1995) 12 *Australian Bar Review* 181.

Perhaps they thought it would leave them untouched. But as Pastor Martin Niemöller once said, bad developments, unless stopped in their tracks, tend to escalate and ultimately to consume those who failed to react earlier. In the matter of judicial independence, all citizens, but specially judicial officers, must be vigilant.

The fuss that followed the Macrae, Quin and Staples affairs, and the other cases I have mentioned, probably constituted a reason why, in New South Wales, amendments to the *Constitution Act 1901* (NSW) were enacted to introduce a specific protection against this practice. An amendment provided protection for the magistrates in the State. Thus, s 56 of that Act provides:

"56. Abolition of judicial office

- (1) This Part does not prevent the abolition by legislation of a judicial office.
- (2) The person who held an abolished judicial office is entitled (without loss of remuneration) to be appointed to and to hold another judicial office in the same court or in a court of equivalent or higher status, unless already the holder of such an office.
- (3) That right remains operative for a period during which the person was entitled to hold the abolished office.
- (4) This section applies whether the judicial office was abolished directly or whether it was abolished indirectly by the abolition of a court or part of a court".

It would be my hope that equivalent provisions will be adopted in every jurisdiction of Australia to prevent a repetition of what happened to Australian judicial officers twenty years ago.

Tenure and independence: Stable tenure is essential to effective independence of decision-makers, whether judges or tribunal office-holders. Research undertaken by Professor Mary Crock of the University of Sydney, into the decision-making of members of the Refugee Review Tribunal, suggests that changes occurred in the decision-making patterns of members of that Tribunal following a change of practice in reappointment of members.³⁵ Decision-makers who are subject to the risk of non-reappointment may draw inferences from the patterns emerging from the apparent practice of the government not to reappoint those whose decisions have been perceived as unfavourable to the government's interests.

In several cases in recent years, the High Court of Australia has had to consider particular aspects of the service and work of magistrates in Australia. In *North Australian Aboriginal Legal Aid Service v Bradley*³⁶

³⁵ M Crock, "Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions", (2000) 24 *Melbourne University Law Review* 190 at 214-216, cited in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 128 [123]; [2000] HCA 57 and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 114 [185]; [2001] HCA 22.

³⁶ (2004) 218 CLR 146; K Mack and S R Anlieu, "The Security of Tenure of Australian Magistrates" (2006) 30 *Melbourne Uni L Rev* at 373.

the Court rejected an argument that special remuneration arrangements made for Mr Bradley, as Chief Magistrate of the Northern Territory, impinged unacceptably upon his independence as that office-holder or the independence of his court. The High Court made it clear there is "no single ideal model of judicial independence, personal or institutional"³⁷. It stressed that care needed to be taken in accepting, at face value, remarks made in a Canadian decision to the effect that "less stringent conditions are necessary to satisfy [the] security of tenure of inferior courts"³⁸. Six Justices in *Bradley* endorsed my earlier observation, by reference to the *Kable* decision, that³⁹:

"In Australia, the ultimate foundation for the judicial requirements of independence and impartiality rests on the requirements of, and implications derived from, Ch III of the Constitution".

In *Fingleton v The Queen*⁴⁰, the High Court reversed an injustice occasioned to the former Chief Magistrate of Queensland, Magistrate Di Fingleton. It emphasised the ambit of the activities attracting the principles of judicial independence. They can extend beyond actual

³⁷ (2004) 218 CLR 146 at 152 [3] per Gleeson CJ.

³⁸ (2004) 218 CLR 146 at 172 [65] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ in a reference to *Ell v Alberta* [2003] 1 SCR 857 at 875.

³⁹ (2004) 218 CLR 146 at 163 [27] referring to *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 373 [116].

⁴⁰ *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38].

adjudication to involve allocation and listing arrangements. In that case, Chief Justice Gleeson pointed out:

"It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assured with confidence to exercise authority without fear or favour".

In my own reasons in that case I added remarks to make it clear Ms Fingleton had not succeeded in her appeal on purely "technical" points where she had failed on the "merits" before a jury. I made it clear that, in my opinion, she had substantial arguments on the merits that did not need to be reached because of the legal interpretation adopted by the High Court⁴¹. Happily, Magistrate Fingleton has resumed duties as a magistrate in Queensland and that chapter is closed.

A chapter that is not closed concerns the growing incidence of short-term and part-time appointments to judicial office. I appreciate that this practice is sometimes congenial to retired judicial officers. My own view is that there is less offence to principle in recalling retired judicial officers to judicial duty than in appointing, as short-term or part-time decision-makers, legal practitioners who come straight from the practising profession and return there either at the end of short judicial service or even in the midst of such service. These practices are in my

⁴¹ (2005) 227 CLR 166 at 229 [186].

view highly undesirable. They present a danger for the independence of judicial institutions in Australia. They result in the constitution of part of the judicial branch of government by persons who do not enjoy real security of tenure but are answerable to the Executive Government at short-term intervals, for reappointment. That practice is fundamentally wrong in principle.

At a time when judicial officers and other public officials are subject to unprecedented criticism and pressure from tabloid and other media, it is essential, both for the appearance and actuality of independence, that the decision-makers should not be a cohort of part-time and short period appointments. Most offensive of all is the utilisation of exceptional statutory powers, designed to permit the appointment of occasional *ad hoc* short-term judicial officers to meet exceptional and unexpected circumstances, so that such appointments are turned into a regular and permanent portion of the working judiciary.

I endeavoured to explain my concerns in this regard in my dissenting reasons in the recent decision of the High Court in *Australian Securities and Investments Commission v Forge*⁴² To illustrate my opinion, I had my staff, who enjoyed computer skills far greater than my own, to turn the statistics of the appointment of Acting Judges in New South Wales from tables into graphs. A picture of the changing composition of the New South Wales courts speaks a thousand words.

⁴² (2006) 228 CLR 45.

For those truly concerned about emerging trends affecting the independence of the judiciary in our country, I commend the graphs appearing in my reasons in *Forge*⁴³. Whilst not coming to the same conclusion as I reached in the circumstances of that case, the joint reasons of three Justices⁴⁴ appeared to indicate a similar concern about the trend, were it to continue and expand. Events since *Forge* have confirmed me in my opinion of the correctness of my view. Judges in a national final court have the special responsibility of defending basic institutions and the implications of the Constitution. They must constantly look over the horizon.

Office for the people: This short chronicle of some of the encounters I have had over my life with challenges to the independence of the judiciary (and I have not mentioned them all) will, I trust, convince others of the strong commitment I have to that value. Ultimately, the value of judicial independence does not belong to judicial office-holders themselves. It belongs to the people. They trust us. That trust is won by the daily work of tenured, independent judicial officers. We must be vigilant against often well-meaning, but misguided, attempts by the Executive or Parliament to dilute the tenure of judicial officers in

⁴³ (2006) 228 CLR 45 at 99, 100, 107, 109.

⁴⁴ Per Gummow, Hayne and Crennan JJ (2006) 228 CLR 45 at 76 [63]-[64].

Australia for doing so threatens to damage to one of the core principles upon which rests the security of our freedoms.

FUTURE ISSUES

New and changing issues: The changing character of the magistracy in Australia came about substantially because of the recruitment of magistrates from a new pool, which had long been the source of most judicial appointments in our tradition. I refer to the recruitment, in middle years, of members of the private legal profession. This brilliant idea, copied from England, helps to explain why the judiciary in the English legal tradition has maintained higher standards of independence and won higher levels of public respect than is generally true of a professional judiciary appointed after the civil law tradition - from graduates a separate judges' school and those later promoted within the service.

The reason for the heightened independence of our judges is that persons recruited from the private profession bring with them an independence of mind and self-image. They never regard themselves as public servants, as such. They consider themselves to be independent lawyers who are serving for a time in their careers in the judicial branch of government. That is true of judges. It is also now true of magistrates in Australia.

This said, there remain issues on the agenda in the continuing evolution of the standing and independence of the magistracy in Australia. These issues include the provision to magistrates of appropriate pension arrangements; the assurance of similar long leave and study entitlements as belong to most Australian judges, so-titled; the provision of arrangements (already begun) by which magistrates in one jurisdiction of Australia can serve for a time in another jurisdiction; the enhancement of continuous professional education during the years of judicial service; the provision of institutional independence to permit ultimate judicial control or supervision over the expenditure of funds essential for the operations of a court; and, perhaps, a change of title to replace the title of "magistrate" with that of "Judge". Already, magistrates throughout Australia are now designated in court as "Your Honour" in place of the former honorific "Your Worship"⁴⁵.

No doubt governments are cautious about changing names and titles. It is unlikely that such a change could be achieved in this country without raising, directly and acutely, the Australian passion for relativities in salary and other economic benefits. Nonetheless, it is worth reminding the sceptical that permanent magistrates in Canada, New Zealand and, since 1999, in England, have assumed the title of Provincial or District Judge. The strongest reason, as it seems to me, for Australians to follow this pattern, is that it would probably enhance

⁴⁵ K Mason, "Impartial, Informed and Independent" (2005) 7 *The Judicial Review* 121 at 121-122.

the pool of candidates from whom magistrates are recruited. Moreover, it would tend to strengthen still further the self-image and expectation of full independence, that is the hallmark of the judiciary of our tradition. Ultimately, that independence depends not on piece of constitutional paper, statutes, court decisions, rules or titles. It depends upon the attitude of the office-holders themselves and their resolve, day by busy day, to perform their duties to the highest standard and to exhibit the tripartite qualities of judicial office laid down by international human rights law: due qualifications, independence and impartiality⁴⁶.

Privilege of service: When all of these solemn things are said and done, there is one last feature of the judicial office that we share, whether we sit in the High Court of Australia or as a magistrate. It is the daily realisation of how fortunate we are to have been trusted, in our life's journey, with the precious responsibility of deciding cases affecting fellow human beings at critical moments in their lives.

Not everything that judicial officers have to do is pleasant. Sometimes it is our obligation to enforce laws that we think misguided, inefficient and even unjust. In my own lifetime, I have been aware of such laws. Indeed they have affected me. Personally. They have made me very conscious of the constant need to reform and renew the law.

⁴⁶ The three essential judicial qualities referred to in the *International Covenant on Civil and Political Rights*, Art 14.1.

For all that, our work is special. We know that, objectively, our work is very important for our country and that it represents an example for the wider world. When visitors come to my chambers from overseas, I tell them that the proudest boast I can make, as the longest serving judicial officer in Australia, is that never once in thirty-three years has an attempt been made to interfere with my judicial independence. No 'phone call from a Minister. No pressure from the big end of town. No whispered request at a club. Never. This is a proud boast and we must ensure that it continues to be so.

I conclude as I began with a message of respect, appreciation and support for the magistrates of Australia from the High Court of Australia.

JUDICIAL COMMISSION OF NEW SOUTH WALES

THE JUDICIAL REVIEW

THE ONGOING ASCENT OF THE AUSTRALIAN MAGISTRACY

The Hon Justice Michael Kirby AC CMG