

Working as a High Court judge*

SMH, August 19, 2005

It is a great pleasure to be invited to give this speech in Newcastle on the request of the Women Lawyers' Association and the Newcastle Law Society.

Not only was I born in this city, but apart from living for a few years in North Queensland as a boy and a few months in Sydney, I lived in Newcastle until I was 28 years of age. So it can be fairly said that Newcastle is my natural home.

For better or worse, Newcastle played a major part in my formative years.

Although I spent my first nine months at the bar in Wentworth Chambers reading for John Williams - a Newcastle barrister who went to Sydney - my legal career really began, as the president mentioned, when I started a practice in Newcastle. I was in practice at the bar here from April 1962 until 1964 when I went to the Sydney bar.

Those two years at the Newcastle bar were a very valuable training ground.

The very nature of practice at a regional bar means that a barrister has to acquire a sound knowledge of many areas of law. Certainly in those days, specialisation was not an option at all events if you wanted to make a living as a barrister.

At no moment during those two years at Newcastle, did it ever occur to me that I would spend almost 17 years of my life working as the justice of the High Court, which is the title of this lecture - and to which topic I must now turn.

These days the High Court under Chief Justice Gleeson, despite his icy presence, is a warm and friendly court. At least that is what us justices like to think. Certainly, it is quite untrue that during one hearing senior counsel after a barrage of questions from Chief Justice Gleeson, is heard to mutter: "Come back, come back, Sir Anthony Mason, all is forgiven."

Now, I don't mean to imply that every moment of a High Court hearing is the judicial equivalent of a Woodstock or Nimbin love-in between the bench and the bar. For example, the counsel often find the questions of Justice Gummow quite disconcerting. This is almost always the case when His Honour asks questions like, "Why has no one noticed before now that this case is in federal jurisdiction?" or when he asks: "Is there a matter here for the purpose of chapter three of the Constitution?"

Those sorts questions drain the blood from counsel at the other side of our warm and friendly court. But penetrating as they are, Justice Gummow's questions seem mild compared to the questions of Sir Anthony Mason, which justifiably in my view earned him the title of the heavyweight champion of the federal judiciary.

Sir Anthony was particularly adept at using what the late Mr Justice Huntley called the judicial uppercut - the question that knocks counsel's argument right out of the ring. After one penetrating question from Sir Anthony during an appeal, counsel could only dazedly reply: "Your honour has got me on the ropes" to which Sir Anthony coolly replied, "On the canvas, I would think."

One of the hazards of hearing cases in the High Court is the need to be careful as to what you say, even to the justice sitting next to you. The sound system in the High Court is - or certainly used to be - very sensitive.

Sometimes the justices have been embarrassed by the sensitivity of those microphones. On one video special leave link hearing, those at the receiving end heard the presiding justice say to me: "This is a toss of the coin job. Are you still of the same opinion?" For those of you who are shocked by the idea of a justice tossing a coin to decide a case, I should point out that there is in fact high authority in favour of judges doing so. Lord Wright famously said that a judge whose decisions are reversed more than 50 per cent of the time has a judicial duty to toss a coin.

It is not only the justices who from time to time have been embarrassed by the sensitivity of the microphones. We used to hear many things that were whispered by counsel to their juniors or opponents. For some reason overhearing the whisperings of counsel is now a rare occurrence. Perhaps the quality of the microphone has deteriorated, or counsel has become more wary, or perhaps the justices have got older and deafer.

Some years ago, senior counsel, arguing an appeal, protested to the court, that the Court of Appeal of NSW had failed to apply a previous senior High Court decision in his favour.

One member of the court hastily informed him that we were not bound by our previous decisions, and we would look at that case and examine it upon its merits.

Senior counsel, who had been having a hard time getting the court to accept his arguments then paused for a moment and leaned over and whispered to his junior. He would be embarrassed to know that some of us heard him say, "Mate, I think we are stuffed."

People have often asked me whether I enjoyed being a High Court justice. I tend to think that enjoyed is not an appropriate term. The work of the court is too important, too busy, voluminous, too demanding and too intense to make talk of enjoying the work appropriate.

I think it is more appropriate to ask whether the work is satisfying or continues to interest you. If asked, I would answer each of those questions, yes.

One reason why working as a High Court justice never loses its interest is the infinite variety of legal issues and factual scenarios that come before the court. Yesterday, I had a quick look at the subject matter of the appeals that the court decided in 2004. There were 23 separate subject matters. The appeals concerned professional misconduct, real property, defamation, evidence, criminal law, extradition, contract, negligence, copyright, local government, insurance, income tax, employer and employees, statutory interpretation, immigration, town planning, estoppel, constitutional law, trade practices, patents, private international law, contributions and indemnities between tortfeasors and the tort of inducing breach of contract. No other area of legal practice or endeavour exposes a legally trained person to such a variety of interesting work. And the cases that raise these issues are not confined to any particular state or part of the Commonwealth. They include questions arising under federal law and the laws of each of the states and territories. Given the breadth of

legal and factual issues that come before the court, I am always amused to hear or read statements that the justices of the High Court live in an ivory tower deciding abstract questions of law really divorced from the real world.

There is almost no aspect of human behaviour that does not come before the court either in appeals or special leave applications. The court does not of course seek witnesses, but it reads the evidence they give. And over the range of cases that come before the court, that evidence reveals just about the whole spectrum of human behaviour. You would not have to be on the High Court for very long, before you conclude, that the only limit to human evil, depravity, and dishonesty is physical impossibility. Nor will you have to be there very long before you concluded there is no limit to human gullibility.

If anything, the special leave applications that we hear, give rise to an even wider range of legal problems, in a wider range of factual scenarios. That is because more than 75 per cent of special leave applications deal with issues that are not sufficiently important to warrant the grant of special leave, although they touch on facts and issues that have their own intrinsic interest.

Questions of the construction of contracts, or a statute peculiar to a particular state or territory, generally do not warrant special leave to appeal. But for the court to do its work properly, it can only hear about 60 appeals each year, and of necessity it must preserve the grant of leave for cases that will have precedent value, and lay down principles that will have wide application throughout the Australian community.

Another example of the type of case that does not generally warrant the grant of special leave is a case turning on purely factual issues. Ordinarily the court will not grant leave to determine questions of facts. Wily counsel appealing for respondents in special leave applications, that one of the surest grounds for defeating the application is to persuade the court that it will not be able to determine the important legal issues in the case without first determining complex factual questions. The standard formula for dismissing an application in those circumstances is for the court to say it's not a suitable vehicle for the grant of leave - a statement that once prompted an irate applicant to say to his counsel "next time I'll bring a Cadillac".

However, the Judiciary Act requires the court in determining whether to grant leave to take into consideration whether there has been a miscarriage of justice in the particular case. That can include miscarriages of arising from factual as well as legal error. From time to time, special leave applications come before the court, where the decision appears to have been affected by an indisputable error of fact on the part of the court below. Where that appears to be the case, the court generally grants leave to appeal, despite the factual nature of the case unless for some other reason the appeal is bound to fail.

No discussion of the work of the High Court could be complete without mentioning the volume of special leave applications. In 2004-2005 year, just ended, 876 special leave applications were filed in the court. In the previous year 729 were filed. That meant that in the 2004-05 year there was a 20 per cent increase in the applications filed.

This year, almost one in four sitting days at the court has been devoted to special leave applications. Previously it was about one day in eight. This change has

unfortunately reduced the number of days available for the appeals in other cases. But in addition to the time devoted to reading special leave applications that are subject to the hearing, a considerable amount of time is now spent in reading and determining applications for special leave to appeal that are dealt with solely on the papers.

As a result of changes in the High Court rules, commencing last January, the court is now able to deal with many applications for special leave without a hearing - and indeed without requiring the application to be served on the proposed respondents to the application. If the court thinks the case has no merit, it will determine the case on the papers without putting respondents to the expense of being served and having the dilemma of briefing counsel or taking no action in respect of the service of the application.

However, at least up to the present this procedure has increased the work burden for the justices. Last Friday week for example, Justice Heydon and I delivered reasons dismissing 53 such applications. There were, as you could imagine, many hours of work involved in determining those applications.

Immigration cases are one of the causes for the blow out in the hearing of special leave applications. For the year ended June 30th 2005, 60 per cent of all civil applications, totalling 457 cases, had to do with immigration. 88 per cent of those applications - a total of 402 - were filed by unrepresented applicants.

Indeed, the number of unrepresented litigants filing matters in the high Court now constitutes 64 per cent of all civil applications, compared to only 19 per cent 10 years ago. The almost exponential growth of special leave applications over the last decade has meant that the time between filing applications and the hearing of them has increased each year.

By a major effort, the court has recently been able to reduce those delays.

Many applications by unrepresented applicants - indeed probably the majority of them - are understandably poorly prepared. Under the old rules, the written submissions of the applicants frequently enabled the justices to quickly get to grips with the real issues of the case. But where the case is now dealt with on the papers, the respondent is not served. Without the understanding of the case that used to come from the respondent's submission, additional time of the justices is now taken up seeking to understand the points and issues that unrepresented litigants seek to raise. It can hardly be said, that the time taken to study an application by an unrepresented litigant is almost always greater than the time taken to study an application prepared by a competent legal practitioner.

But no matter how poorly prepared an application may be it is always that lurking behind the disorganised material, is a point worthy of attention by the court. Although the occasions when this occurs are rare - perhaps not more than three or four or five cases in a thousand - the justices do what they can to ensure the unrepresented litigant, and indeed every litigant, does not suffer injustice by reason of lack of legal knowledge or a good point overlooked. Some practitioners are rather cynical about the way the court deals with special leave applications, but to those cynics who believe the court processes those special leave applications rather mechanically, words spoken by Justice Kirby in an interview with Monica Attard, on Sunday profile in November 2003 are worth repeating. His honour said: "When I came to the High

Court one thing really struck me as I hadn't known as an outsider - as a judge who had been subject to the high court. This is how seriously everyone takes the final appeal. We hear special leave applications and I had been the subject of that for 13 years while I was the president of the Court of Appeal. And I didn't know how the High Court did it internally, but it really isn't a secret. The cases are assigned and shared between us, we meet for with very careful discussion before hand, no final decision is made of course, but it's been very thoroughly examined and I was rather pleased, I must admit, to come into the court and see how seriously everybody took the responsibility of considering the cases."

What his honour said regarding special leave applications that are the subject of a hearing, applies equally to special leave applications that are dealt with on the papers. A recent demonstration of how conscientiously the justices of the High Court study special leave applications concerns the case of the former Queensland chief magistrate Ms Dianne Fingleton.

After studying the papers in that application for special leave to appeal against the criminal conviction, the court directed its registrar to write to the parties and inform them that the court wished to hear argument on the applicability of a statutory provision giving immunity to magistrates in respect of certain matters. That statutory provision had not been relied on or raised either at the trial or on appeal at the Queensland Court of Appeal or in the special leave application that was filed in the High Court.

Eventually the court granted special leave to appeal on that point and on appeal the court unanimously quashed Ms Fingleton's conviction because of the immunity provision. If it had not been for the court one can feel almost certain, because that point would have never have been determined in her favour.

By any standard the work load of the High Court justices borders on oppressive. Forty years ago in his retirement speech, Sir Owen Dixon said that the bench was hard and unrewarding work. With the increased complexity of law and the ever increasing volume of work in the court, it has got even harder. The number of justices in the court - seven - is the same as the number of justices that constituted the court during the tenure of Sir Owen Dixon. Every other court, almost without exception throughout the country, has doubled, trebled or quadrupled its membership. The High Court still has the same seven judges. It's probably no coincidence that since the constitution was amended in 1977 to require justices to retire on turning 70, no justice -other than the three chief justices - Chief Justices Gibbs, Mason and Brennan - have stayed on the court for the compulsory retiring age. If everything goes to plan, I will be the first puisne justice since 1977 to reach the retiring age.

Inevitably, the work load requires the justices of the court to work very long hours. I suspect that no justice works less than 60 hours each week and it seems to me one or two work in excess of 80 hours each week.

Moreover, apart from physically dealing with the cases, justices are inevitably thinking about the issues of cases - even when their not sitting in court or in chambers or at home in their studies.

The work load of the court has also had very significant impact on the leave entitlements of justices. In the last 20 years most justices have taken only part of their

leave entitlements. When I retire from the court in November, I will forfeit 18 months of accumulated leave entitlements. Justices Mason, Brennan, Gaudron, Deane, Toohey and Dawson, would have forfeited similar if not greater entitlements to leave.

So how do the justices of the court cope with this very large work load? Obviously the research and arguments of counsel is of great assistance to the court. So is the assistance that the court gets from its law library, which has a fine research section. The High Court library is about the best in the southern hemisphere, spending about \$1 million each year on subscriptions and books.

At the request of a justice the research section will provide a detailed survey of any area of law that is relevant to the case at hand.

In addition, each justice has two associates as well as a personal assistant. Part of an associate's duty is to proof read his or her justice's judgement checking for accuracy every quotation, assertion of fact and citation in the judgement. In addition the court has two highly-skilled proof readers who again check the judgements for accuracy in respect of each of those matters.

The court also arranges its sittings so as to maximise its efficiency having regard to the need to hear cases and have time for research, reflection and the writing of judgements.

The court usually sits in Canberra for the first two weeks of each month except for January and July. It then sets aside the second two weeks of each month for research, reflection and the preparation of reasons for judgement.

In most years, most justices, for most of January or July or both, also work in the court researching and preparing judgements. Four times a year, the court travels interstate to hear cases during one week of that second two weeks of the month. If there is a sufficient volume of work the court goes to Hobart during March, to Brisbane during June, to Adelaide during August and to Perth during October.

The court also travels to Sydney and Melbourne on one or more days during the first two weeks of the month to hear special leave applications.

Its sits in Canberra to hear special leave applications from the Australian Capital Territory by video link from Darwin, Brisbane Adelaide and Hobart and Perth.

Some weeks before the beginning of each month, the Chief Justice circulates a proposed list which identifies the cases and special leave applications to be heard during that month and the justices who are to sit on those cases and applications.

The list is headed proposal, because that is all it is. Each justice is entitled to sit on any case whether or not the justice is named on the proposal. From time to time a justice will ask to sit on a particular case, even though his or her name did not appear on the proposal. In the 1930s, that formidable individual Sir Hayden Starke would even turn up without any notice and sit on a case.

Ordinarily, the proposal lists five justices to sit on appeals and three justices to deal with special leave applications. If an appeal is perceived to be of particular importance, the practice is to list all available judges to sit on the appeal. In

constitutional cases, seven justices sit unless for some reason a justice is unavailable or perceives a conflict of interest.

Ten or 14 days before the commencement of sittings, the appeal books for special leave applications for that sitting are delivered to the chambers of the justices who are to sit on the appeals and applications. Some days before the hearings, the justices receive copies of the written submissions of the parties and the submissions of any interveners.

The manner in which justices prepare for the hearing of appeals, constitutional or other cases, appear to vary from justice to justice. Some justices carry out intense preparation before the hearing of a case. They not only read the appeal or application books from cover to cover, but they carry out research of at least a preliminary nature. These justices often write a draft judgement almost immediately after the hearing but they will of course make changes after reading other judgement and on occasions after they have given more consideration to the case .

When I was a judge of the NSW Court of Appeal I used that approach. However the issues were generally simpler and the volume of work in that court and the demands of efficiency made it imperative that you'd write your judgement and circulate it as quickly as possible.

My working method when sitting as a member of the Full Bench of the High Court is quite different from the method that I used when I was in the Court of Appeal. I still use that method when sitting on my own in the original jurisdiction of the court in applications for stays and similar applications. Indeed, only on about four occasions have I reserved judgement when sitting on my own. If you are not going to reserve you have to be confident that you have not overlooked any point and it is important that you have done a great deal of work on the case before it comes on for hearing.

But when I am a member of the Full Bench of the court, I usually content myself with reading the judgements of the judges who heard the case in the lower courts and the summing up in criminal cases or in civil cases if there are issues concerning the summing up and the written submissions of the parties.

Of necessity, reading submissions of the parties will require me to read parts of the evidence. But until I have listened to the oral arguments and the Socratic dialogue that take place during the hearing, I rarely read the whole of the evidence or all of the case cited before the hearing. Like Sir Owen Dixon, I see the arguments of the parties as the first step in the process of preparing a judgement.

I like to work my way to a conclusion after an in-depth study of the case. That way is seldom smooth. Frequently I change my views about issues as I read and think more and indeed the process of writing itself often causes you to change your views about the case.

On numerous occasions I have been halfway through a judgement and come to a conclusion it just wouldn't write.

After completion of the oral argument of the court, it is the usual practice of the court to have a conference in the chambers of the presiding justice to ascertain the views of the justices concerning the determination of the case. Sometimes, the justices or a majority of them will have a reasonably strong view as to how the case should be

determined. When that is so, and when the reasoning processes of the justices or a majority of them is similar, the presiding justice - which is generally the chief justice but from time to time is myself - will ask one of the justices that holds that view to write a draft judgement.

The draft judgement like all judgements of the court is circulated to the other members of the court who sat on the case. The fact that a justice is asked to prepare a draft judgement for the court or a majority is not decisive of the outcome of a case.

After the justices have studied the case in more detail and done further research a potential majority may disappear. On one occasion that I recall, the draft judgement became a dissent with most of the original majority deciding the case in the opposite way and for different reasons.,

If there is a sharp division of opinion at the conference the presiding justice may also ask a member of the minority to write a first draft and that too is circulated. In difficult cases however, there may be no clear consensus as to how the case should be decided or how the decision should be reasoned. When that occurs it will often be set down for discussion at a special monthly meeting where the justices discuss the progress made in completing the judgements in all outstanding cases.

At times the result of the discussions at the meeting a majority of justices agree on the way the case should be decided and the reasons for so deciding it after that discussions. If that occurs, one of the majority may be asked - or volunteer - to do a first draft.

In cases where no consensus is achieved the unspoken understanding is that each justice will prepare a judgement, although of course justices with similar views may get together and prepare a joint judgement.

Unless the case seems very clear I prefer not to form a view as to the way their case should be decided until I am confident how it should be decided. I prefer to wait until I have read as much material and given the case as much thought as I can. And I get great assistance from my associates.

At the start of each month, my two associates are expected to agree amongst themselves as to which cases to be heard that month each of them wishes to work on. In cases where it has not come to any definite conclusion after the hearing, I will discuss the case with the associate, telling him or her about my tentative views and asking the associate to prepare a memorandum on the case with those views in mind.

I find these memoranda of great assistance. In a single document, they gather together and objectively analyse the arguments of the parties and discuss relevant case law and statutes to which the parties have referred, together with any independent research and ideas the associate has. Quiet frequently, they reflect - at least in a general way - the view I finally take of the case. Often enough however, I do not agree with the analysis or the reasoning processes set out in the memorandum.

But even in those cases, I find the memorandum to be a useful document and it is not surprising they are useful and of a very high standard. All my associates have held first-class honours degrees in law. Over 50 per cent have one or more university medals in law or other subjects and one of the advantages of getting the associate to write a memorandum is that at the time of the associate's thinking or research his or

her knowledge, and review of the case, is sharpened and the associate is in a better position to criticise my drafts.

I've always encouraged my associates to point out any weaknesses or omissions that they see in my draft. I tell them I would rather hear their criticisms than have them point it out some months later in a law review article.

Needless to say, my associates do not hesitate express their views about my draft. If I think the point made by the associate is correct, I change the judgement to give effect to that view. However, on many occasions, the associate and have to agree to disagree. Sometimes I have to tell the associate that it was I who was appointed to the High Court.

I frequently do a preliminary outline to give effect to my own readings and research. After I have read as widely as I can in the relevant area of law and again studied the arguments of the parties and read any judgements of my colleagues that have been circulated, I prepare a draft judgement. When I was at the bar, I always dictated opinions and when I was on the Court of Appeal I dictated the first draft of a judgement. In the High Court, however, I have always used a computer to write my judgements. For many years I have used Word software. In recent years I have used drag-on naturally speaking to dictate parts of the judgement into the computer I find that particular voice recognition system has about 85 per cent accuracy in translating what I have said.

Most of my judgements go through several drafts.

It will appear to members of this audience that there is nothing in the work of a High Court justice that cannot be done by a first-class woman lawyer who had the energy to cope with the workload. Mary Gaudron proved that beyond a doubt and there are many women practising law today who are capable of doing the work of a justice of the High Court in accordance with the standards that the community expects of High Court justices.

Leaving aside those practising or teaching, in my view - by any reckoning - there are at least 10 women judges serving on the Supreme Courts of the states and the Federal Court who would make first-class High Court justices.

For the reasons that I gave in a speech that I made in a speech to the Law Society of Western Australia last year, I think there is an overpowering case for appointing a woman as my successor and to some at least of the other three vacancies that will occur in the next three and a half years on the High Court.

As I said in Perth, the need to maintain confidence in the legitimacy and impartiality of the justice system is to me an unanswerable argument for having a judiciary for having a judiciary in which men and women are equally represented.

No doubt what constitutes equal representation is open to debate. But that's a matter of detail not principle.

In many cases, women lawyers will bring a different approach to legal problems and in the law - as I sought to demonstrate last year in the inaugural Sir Anthony Mason lecture on constitutional law - attitudes and approaches in law are all important.

Law is not an exact science. At the margins of the law, the approach of individuals is frequently decisive.

Look at the dissent rates in the High Court. Justice Kirby dissents in 33 per cent of the cases. Justice Callinan in 18 per cent and I dissent in 14 per cent. So at least three justices have different views about how the law should be interpreted and applied.

Madam President, the Vice-President of the Women Lawyers Association, I thank you and your association for the honour and opportunity to give this lecture. I hope that it has given those attending here tonight some insight into the work of the court or at least the work of this particular justice.

***This is not an official version released by Justice McHugh. He may post such a revised and more detailed version on the High Court's web site at a later date.**